

## Protection of Conscience Project



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# The New Inquisitors

by Sean Murphy

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## Introduction

The College of Physicians and Surgeons of Ontario is the regulatory and licensing authority for physicians and surgeons practising in Ontario. In February, 2008, the Ontario Human Rights Commission (OHRC) responded to a draft policy of the College with a submission recommending that the exercise of freedom of conscience by physicians be restricted.<sup>1</sup>

The College, in response, released a draft policy "Physicians and the Ontario Human Rights Code", indicating that Ontario physicians will be expected to sacrifice their freedom of conscience to meet the demands of their patients and avoid prosecution by Ontario's human rights apparatus.<sup>2</sup>

According to the College, the Ontario Human Rights Tribunal may take action against a physician who refuses to provide or refer for procedures that he finds morally objectionable. In addition to the possibility of prosecution by the Tribunal, the College states that it will consider the Human Rights Code in adjudicating complaints of professional misconduct. The College's draft policy also suggests that the College plans to force objecting physicians to actively assist patients to obtain morally controversial services.

The Ontario Human Rights Commission has since commented further on the College's proposals,<sup>3</sup> and the tenor of its submission makes clear that the OHRC and related agencies pose a significant threat to the exercise of freedom of conscience by health care professionals. This article provides basic information about the structure and powers of these agencies in Ontario, which exist in one form or another in every Canadian province.

## The Ontario Human Rights Commission

The Ontario Human Rights Commission is a branch of a tripartite inquisitorial system established in the province ostensibly to "help promote and advance human rights."<sup>4</sup>

The legal authority and powers of the Commission are set out in Part III of the Ontario Human Rights Code (hereinafter "the Code").<sup>5</sup> The Commission is authorized, in addition to other regulatory functions, to develop public education programmes, research discriminatory practices, review statutes and regulations to ensure compliance with the Code, and assist individuals and groups to develop anti-discrimination programmes.<sup>6</sup> It can also issue policies "to provide guidance" in applying the Code,<sup>7</sup> a power that allows it to direct the personal and professional conduct of individuals and institutions, backed by an implied threat of prosecution for failure to adhere to the Commission's

‘guidance.’

Further, the Commission can initiate "inquiries" (investigations), not of wrongdoing or unlawful conduct, but of “incidents of tension or conflict” or “conditions” that may lead to such incidents.<sup>8</sup> Presumably, the “incidents” or “conditions” must be related to alleged or potential contraventions of the Code, but the Commission’s investigative mandate is, in law, limited only by its resources and the imagination and ambitions of its members.

OHRC agents have broad powers to enter private property without warrant, and can, without warrant, search premises, examine, measure, photograph the area and and seize they think relevant to the investigation.<sup>9</sup> Moreover, the Code imposes a duty on everyone - accused persons included - to comply with their demands to produce any document or thing, and to assist them in using computers or other data storage systems for this purpose.<sup>10</sup> In the event of non-compliance, interference or obstruction, a warrant to search or do anything specified in the warrant can be obtained for any place, including a dwelling house,<sup>11</sup> and police can be called upon to assist, using force if need be.<sup>12</sup>

All of this for the purpose of investigating, not unlawful conduct, but mere “tension or conflict,” or conditions that might lead to either. In contrast, Canadian police have far less power to investigate criminal offences - including murder.

In chasing down sources of potential tension or conflict, OHRC agents can interrogate any person, and may exclude anyone from the interrogation they deem "adverse" to their investigation, though they may not exclude legal counsel.<sup>13</sup>

For the purpose of resolving tension or conflict or conditions conducive to either, the Commission is authorized to make recommendations and encourage remedial or preventive measures.<sup>14</sup> It is not authorized to enforce its policies or recommendations, but it can apply to the Ontario Human Rights Tribunal to issue an order if it believes that “a right to equal treatment with respect to services, goods and facilities” has been “infringed.”<sup>15</sup> In addition, with the permission of a party who has made an application, it may intervene in a case before the Tribunal.<sup>16</sup>

### **The Ontario Human Rights Tribunal**

The Tribunal can be considered the inquisition proper, since, as will be seen presently, it exercises both investigative and judicial powers. It is an entity established by Part IV of the Code. Members of the Tribunal need not be learned in law or ethics. All that is required is that they have "experience, knowledge or training with respect to human rights law and issues," have ‘aptitudes’ for impartiality and “alternative adjudicative practices and procedures,” and be selected through some form of competitive process.<sup>17</sup>

While the Tribunal is distinct from the Commission, it would be incorrect - even naive - to see in this distinction a separation of powers designed to protect civil liberties. The powers of the Commission and the Tribunal are not separate in the way that the powers of the legislature and judiciary are separate. They are not like different weights, opposed and in balance, on the left and right trays of the

scale of justice. The Commission and Tribunal are separate as the left and right arms of a wrestler are separate, or the left and right flanks of an army.

Thus, though the Commission must apply to the Tribunal to obtain an order to enforce its recommendations, it can force the Tribunal to consider Commission policies that explain how the Code is to be applied when deciding whether or not to issue an order.<sup>18</sup> Nothing prevents the Commission from writing a policy tailor-made for a case it plans to bring to the Tribunal to ensure that the Tribunal will reach the ‘correct’ conclusion.

Like the Commission, the Tribunal can conduct an inquiry (investigation), but it can only begin an inquiry if asked to do so if there is an allegation by the Commission or an individual that a right has been infringed.<sup>19</sup> Though concept of “infringement” is infinitely more plastic than violation, the Tribunal cannot investigate mere “incidents of tension and conflict.” It can, however, ask the Commission to do so.<sup>20</sup> Tribunal agents have the same powers of search, seizure and interrogation as Commission investigators. Ultimately, they submit their reports to the Tribunal.<sup>21</sup>

Whether or not there is a preliminary investigation, the Tribunal must determine whether or not to make the order sought by an applicant, and, for this purpose, it is authorized to determine all questions of fact or law.<sup>22</sup> While it cannot rule on an application without affording the parties an opportunity to make oral submissions, and it must provide written reasons for its decision,<sup>23</sup> the Tribunal is otherwise free to make up its own rules and procedures.<sup>24</sup>

It can - but need not - adhere to the Statutory Powers Procedure Act,<sup>25</sup> which regulates the operation of other quasi-judicial tribunals like the disciplinary committees of the Law Society or College of Physicians and Surgeons.<sup>26</sup> It can conduct hearings in the adversarial style customary in common law jurisdictions, but may also use “alternatives to traditional adjudicative or adversarial procedures,”<sup>27</sup> and there is no requirement that the alternatives be acceptable to the accused. Most remarkable, having made up its own rules, the Tribunal is not necessarily required to follow them.<sup>28</sup>

Acting as an inquisition, Tribunal panels can hold hearings for the combined purpose of investigation and adjudication. The Tribunal is empowered to demand the production of witnesses or evidence from any party to the proceeding, including the accused,<sup>29</sup> and can examine and cross-examine witnesses.<sup>30</sup>

### **Tribunal orders**

If the Tribunal finds that a right has been “infringed,” it can order the payment of compensation and/or restitution for “injury to dignity, feelings and self-respect,”<sup>31</sup> and can order the accused to do anything that the Tribunal believes will “promote compliance” with the Code. There is no limit to the amount of monetary compensation or restitution that may be ordered, or upon what the Tribunal might order done.<sup>32</sup>

Equally important, compensation payments can be ordered even if an accused establishes that his actions were legally justified. This is because human rights tribunals typically follow a two-stage process, first determining whether or not discrimination has occurred, and then (if it has) whether or not the discrimination can be reasonably justified. A finding that the discrimination was justified does not negate the finding that discrimination occurred, so even an accused who succeeds in establishing that he acted reasonably can be forced to pay unlimited sums in compensation, or made to do anything ordered by the Tribunal.<sup>33</sup>

### **Appeals**

In the event that the Tribunal does not correctly apply a Commission policy, the Commission can ask the Tribunal to have the case reviewed by the divisional court, but only with respect to points of law, not findings of fact.<sup>34</sup> It appears that the court cannot set aside the order by the Tribunal even if it made an error in law, though parties to the proceeding can plead with the Tribunal to reconsider its decision in light of the court ruling.<sup>35</sup> It is by no means clear that the Tribunal is bound to conform to the decision of the court.

Finally, though the Tribunal can be asked to reconsider a decision,<sup>36</sup> its decisions cannot be appealed "unless the decision is patently unreasonable."<sup>37</sup>

What might be considered "patently unreasonable" is difficult to predict. For example: under the previous human rights regime, a Christian printer, for reasons of conscience, refused to print materials for an organization that promotes homosexual lifestyles and posts pro-paedophilia literature on the internet. An Ontario human rights panel fined him \$5,000.00 and ordered him to provide services for "lesbians and gays and to organizations in existence for their benefit." On appeal, the Ontario Superior Court of Justice ruled that he could decline to print materials in direct conflict with "core elements" of his beliefs. But the court upheld the conviction and the \$5,000.00 fine.<sup>38</sup> Finally, the Ontario Court of Appeal saddled him with \$40,000.00 in court costs. Quite apart from court costs, his legal fees amounted to almost \$100,000.00.<sup>39</sup>

So, in the eyes of Ontario judges, it is not patently unreasonable to fine a Christian printer who does not want to support the celebration of homosexual lifestyles, and to burden him with \$140,000.00 debt for daring to assert and defend his freedom of conscience and religion.

### **Enforcement**

In the end, neither the Ontario Human Rights Commission nor the Tribunal can directly enforce Tribunal orders. Instead, like the inquisitions of the Catholic Church in mediaeval times, which turned relapsed heretics over to the secular arm for the punishment prescribed by law, defaulters are referred to the Attorney General, who must authorize their prosecution in a regular provincial court. If they are found there to have failed to comply with an order of the Tribunal, they can be fined up to \$25,000.00.<sup>40</sup>

### **The Ontario Human Rights Legal Support Centre**

The Ontario legal and political establishment is not unaware of the costs involved in human rights proceedings. Thus, Part IV.I of the Code authorizes the creation of the Human Rights Legal Support Centre, the third arm of Ontario's tripartite human rights inquisition. It is to provide legal services at public expense for those who make complaints to the Ontario Human Rights Tribunal. This ensures that, win or lose, aggrieved parties can seek orders, compensation and restitution without having to pay any of the costs involved. In addition, the Commission may intervene in a case to support a complainant, thus bringing its considerable legal and financial resources to bear against an accused.<sup>41</sup>

Accused persons - like the hapless Christian printer - are not similarly supported. In addition to indirect costs like the loss of income or wages associated with the need to consult counsel and attend legal proceedings, they must pay for their own lawyers, so that, even if they win the case, they may be saddled with significant legal bills.

### **Notes**

1. *Submission of the Ontario Human Rights Commission to the College of Physicians and Surgeons of Ontario regarding the draft policies relating to establishing and ending physician-patient relationships*. 14 February, 2008.  
(<http://www.ohrc.on.ca/en/resources/submissions/surgeons>) Accessed 2008-08-31
2. College of Physicians and Surgeons of Ontario, *Physicians and the Ontario Human Rights Code* ([http://www.cpso.on.ca/Policies/consultation/HumanRightsDRAFT\\_08.pdf](http://www.cpso.on.ca/Policies/consultation/HumanRightsDRAFT_08.pdf)) Accessed 2008-08-14.
3. *Submission of the Ontario Human Rights Commission to the College of Physicians and Surgeons of Ontario Regarding the draft policy, "Physicians and the Ontario Human Rights Code."* 15 August, 2008 (<http://www.ohrc.on.ca/en/resources/submissions/physur>) Accessed 2008-08-31.
4. Ontario Ministry of the Attorney General, *Human Rights in Ontario* (<http://www.attorneygeneral.jus.gov.on.ca/english/oCode/Default.asp>) Accessed 2008-08-27.
5. *Human Rights Code*, RSO 1990, Chap, H19 (hereinafter "Code") ([http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90h19\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm)) Accessed 2008-08-27.
6. Code, Section 29(b), (c), (d), (f)
7. Code, Section 30
8. Code, Sections 29(e), 31(1)

9. Code, Section 31(4) to (6)
10. Code, Section 31(11)
11. Code, Section 31.1(1)
12. Code, Section 31.1(7)
13. Code, Section 31(7)c
14. Code, Section 29(e)
15. Code, Sections 29(i), 35
16. 16. Code, Section 37. An applicant is hardly likely to refuse permission for a supportive intervention from an ally who governs the application of the Code.
17. Code, Section 32(3)
18. The Tribunal may consider Commission policies at any time [Code Section 45.5(1)], but it must to do so when a party to an application - including the Commission - so requests. [Code Section 45.5 (2)].
19. Code, Sections 34, 35
20. Code, Section 44
21. Code, Section 44(14)
22. Code, Section 39
23. Code, Section 43(2)
24. Code, Sections 40, 43
25. *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22  
(<http://www.search.e-laws.gov.on.ca/en/isysquery/02239e74-6b2c-40ee-8c73-72e06f1fe49c/24/frame/>) Accessed 2008-08-29.
26. Code, Section 42
27. Code, Section 43(3)

28. Code, Section 43(8)
29. Code, Section 43(3)f
30. Code, Section 43(3)c
31. Code, Section 45.2(1)
32. Code, Section 45.2(2)
33. This is exemplified by the decision of the BC Human Rights Tribunal that ordered the Knights of Columbus, a Catholic men's organization, to pay damages to a lesbian couple for refusing to rent its hall for their 'wedding' reception. The BC Tribunal applied a comparable section of the BC Human Rights Code [Section 37(2)(d) iii] to impose the damages. Accessed 2008-08-29. *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544. ([http://www.bchrt.bc.ca/decisions/2005/pdf/Smith\\_and\\_Chymyshyn\\_v\\_Knights\\_of\\_Columbus\\_and\\_others\\_2005\\_BCHRT\\_544.pdf](http://www.bchrt.bc.ca/decisions/2005/pdf/Smith_and_Chymyshyn_v_Knights_of_Columbus_and_others_2005_BCHRT_544.pdf)) Accessed 2008-08-30. CTV News, B.C. tribunal awards lesbian couple damages (30 Nov. 2005) ([http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20051129/tribunal\\_lesbiancouple\\_051129/20051129](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20051129/tribunal_lesbiancouple_051129/20051129)). Accessed 30 August, 2008
34. Code, Section 45.6(1), (2)
35. Code, Section 45.6(7)
36. Code, Section 45.7
37. Code, Section 45.8.
38. Murphy, Sean, *Of Printers and Press Gangs*. Catholic Civil Rights League (<http://www.ccrl.ca/index.php>) Accessed 2008-08-30.
39. Gosgnach, Tony, "Scott Brockie saddled with debt." *The Interim*, June, 2004 (<http://www.theinterim.com/2004/june/02scottbrockie.html>) Accessed 2008-08-30.
40. Code, Section 46.2
41. Code, Section 37