

Human Rights Code & Rental Housing

Disclaimer: This article is written for informational purposes only and should not be relied upon as legal advice. In each case, specific advice should be obtained which will be responsive to the circumstances of the individual requiring it.

My suspicion is that most landlords or those thinking of getting into the business don't consider themselves social workers. You might be surprised to know that the Courts to some extent, the Landlord and Tenant Board (the 'Board') to a greater extent, and the Human Rights Commission (the 'Commission') to an extent yet unknown, consider you as such, and are placing burdens on your company that are unreasonable and arduous.

The *Human Rights Code* (the 'Code') is the supreme law of Ontario, so much so that it is considered by the Courts to be quasi-constitutional in nature. For the purposes of rental accommodation, the Code protects persons who fall into one of 15 identifiable categories (race, ethnicity, religion, physical and mental disability, receipt of public assistance, family composition etc.) from discrimination at the hands of their landlord. I think it's safe to assume that most landlords know that they can't discriminate against persons because of one of those factors when deciding whether or not to grant a lease. In fact, the Code in one of its regulations sets out that only credit-worthiness and tenant-worthiness are factors that can lawfully be considered. Ever since the 1998 decision of *Kearney v. Bramalea Ltd.*, you can't even consider income information on its own (ratios of income to rent) without also considering credit-worthiness, unless the tenant, after being asked, only provides income information.

These criteria are all up for grabs at the moment, as the Commission, after extensive public consultation (with poverty activist groups) is planning on issuing new guidelines and a position paper on Human Rights in rental housing. I can tell you that there are those on the tenant advocacy side, most funded by the Ontario government that would like to see income information removed as a factor, and prohibit landlords from charging a last month's rent deposit, claiming it is discriminatory against the poor. In fact, Chief Commissioner Barbara Hall is consulting with the remarkably irrelevant and ineffective United Nations which takes the position that access to housing should be a legal right available to all people.

While most of us are aware that discrimination prior to the outset of a tenancy is not permitted or acceptable in Canadian society, it is not primarily in this area of housing where *advances* are being made which threaten the viability of our industry. A large coalition of poverty, housing, human rights and mental health activists are attempting to have the Commission set out new policy guidelines clarifying tenant's rights and landlord's obligations for *in situ* tenants. These policy guidelines on rental housing would become the basis for the adjudicative decisions made by the Human Rights Tribunal and other Courts, including those made by the Landlord and Tenant Board.

It's happening already at the Board, as the Code clearly sets out that constructive discrimination against *in situ* tenants cannot be tolerated. Boiled down to its simplest form, constructive discrimination occurs if the landlord imposes a rule or requirement on a tenant that would at first glance, appear to be a neutral requirement, but that by virtue of the tenant's status under one of the Code's 15 protected categories, is difficult or impossible for the tenant to achieve. The final element making up constructive

discrimination is that the landlord has not taken into account the tenant's status by modifying the rule or requirement. Modification of a requirement is also known as *accommodation*.

Examples would include requirements like good behaviour, paying rent on time, not selling crack from their unit, not damaging the unit and not interfering with, threatening or harassing other tenants or the landlord. The Code goes on to say that where a person, by virtue of this trait or disability is not capable of performing the task or requirement that would normally be expected of an individual, then the landlord has a duty to accommodate this disability. How far does this duty extend?

The Code says it extends to the point of *undue hardship*. Read those words carefully! They imply that there will be hardship that is *due and appropriate* for the landlord to have to face, and only when the hardship becomes *undue*, does the landlord no longer have the duty to accommodate further. Theoretically at that point the tenant's actions would no longer be saved by the Code. And what is *undue*? The Commission back in 1989 set a high standard for what undue hardship is, and the Courts have generally held, at least in an employment context, that something just short of insolvency is the sweet spot. When arguing that the accommodation is undue, there are only three factors to be considered in the test; costs, outside sources of funding, and health and safety. The onus of proof is on the person making the claim of undue hardship (the landlord), and there must be objective, direct, and (where possible) quantifiable evidence to support the claim.

The Landlord and Tenant Board has the jurisdiction to consider the Code and the landlord's duty to accommodate, and too often, it does it badly. By badly, I mean that many Members grossly over-apply the code, and use cases and guidelines drafted by the Commission in an employment context when considering accommodation in a housing context. They also tend to do a poor job in fact-finding insofar as determining:

- The existence of a disability
- The seriousness of the disability
- What affect that disability had on the tenant's alleged behaviour

It's frightening, but I've repeatedly seen some Board adjudicators apparently fishing for disabilities just to be able to deny an eviction, with claims that the landlord didn't accommodate those disabilities. It seems to be enough for the tenant to simply say "*I'm depressed all the time*", or "*I need to use this cane to get around*" to trigger relief from eviction on a rent or conduct application, where the disability has no potential to affect the tenant's ability to pay rent or keep the music down after 11 pm. Topping it off is the practice by some Members of applying the same criteria against a new immigrant renting out his or her basement for \$450 per month, as they would against a non-profit housing provider. In fact, I'm of the opinion that this over-application of the Code and making these findings of fact without any evidentiary basis is bringing the Board into disrepute.

By the time you read this, the new guideline may already be in force. If you are concerned that mental health or other Code grounds may become an issue at the hearing, I would strongly advise you to contact a professional to represent you in the matter. And if you do get decisions that smack of unfairness, file a review, write the Minister, the Ombudsman or even the papers. This perversion of fairness through over-application of the Code at the Board has to stop.