New Human Rights Code Guideline Beginning to Impact Landlords

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.

Perhaps I am over-reacting and the sky isn't really falling. And yes, if all the workman has is a hammer, it's true that everything looks like a nail. My connection with the housing industry is narrowly defined and peripheral, doing legal work, so yes, perhaps I see the problem of *Human Rights Code* related issues as potentially more harmful then the facts might otherwise suggest. You decide.

As I write this, it's just over 5 months since the Ontario Human Rights Commission released its Policy Guideline on the Code and rental housing in Ontario. Already I'm seeing a huge uptake in the number of tenant claims at the Landlord and Tenant Board where tenants use the Code as a shield to eviction even in serious conduct applications. I've checked with a number of my colleagues who also see a trend.

I've carefully read the 110 page Policy Guideline issued October 5th, 2009 by the Commission. The *Human Rights Code* itself is nothing more than a framework, a skeleton which simply directs certain sectors of society not to discriminate or harass when providing goods, services, facilities, employment or accommodation. It further sets out 14 protected groups of persons who may seek shelter under the Code as it relates to rental housing. The protected groups or "*protected grounds*" as some refer to them include sexual orientation, age, sex, ethnic origin, marital status, family status, receipt of public assistance etc., but the ones that arise in legal proceedings around housing are generally the protected ground of disability.

By its nature, any policy guideline (such as the LTB's 17 Interpretation Guidelines) is helpful in the sense that it provides clarity with respect to the application of the law that may not be apparent when reading the legislation. But more than providing clarity, this one is a frightening, left wing political document that could bankrupt even the most prudent landlord and serve as a hidden tax applied to a select few.

Part of my role as a provider of legal services is to provide opinions and advice about how a party may thrive or at best survive within a regulatory framework. But for this recently published document, I would suggest that very few of those reading this article could adapt and survive under the fully implemented and applied policy guideline. Now that's not to say there were no Code requirements prior to October 5th, 2009. The modern Code came into force in 1962, but the Code dealt primarily with employment issues in its early years, and hence the case law is generally in the context of employment, easily distinguished from a tenancy context by a capable representative. But with the publishing of the policy guideline for rental housing, one can no longer argue that certain principles of accommodation under the Code should not apply.

To be clear, I'm not speaking of pre-tenancy Code issues. FRPO has fought hard to preserve the right of landlords to do pre-tenancy screening, and nobody can argue that a person should be denied a tenancy due to their inclusion in any of the 14 protected groups and I would walk away from anyone who suggested otherwise. My concerns are within the realm of accommodation under the Code for *in--situ* tenants, those who already occupy your buildings, and whose conduct would otherwise warrant eviction. But just serving a conduct notice, an N5, N6 or N7 without first investigating the needs of the tenant for accommodation, could be seen to be discriminatory. Reading from page 80 of the Policy Guideline, the Commission informs us that *"Several decisions stand for the principle that decision makers must consider a tenant's Code-related circumstances and needs and whether that person could be accommodated, before considering or ordering an eviction."*

First, a brief primer on accommodation. If a tenant falls into one of the 14 protected grounds (let's say he or she is schizophrenic) and the tenant's inclusion in that group is preventing the tenant from adhering to what would normally be an apparently neutral behavioural requirement, and the landlord becomes aware (or ought to be aware) of the tenant's inclusion in the Code protected group, then the landlord is required to lift up the person to assist them in meeting the requirement. That "*lifting up*" is called "*accommodation*". Not too onerous so far, but how many of your staff has the time or training to act in the place of a social worker or even recognize mental health issues. But recognize and react you must, and the Code doesn't tolerate willful blindness to what may be nearly-invisible issues.

But the kicker is the lengths you as the landlord are required to go to in order to accommodate. The guideline says that you need to lift up the tenant to eliminate the effects of the behaviour and your responsibility extends to what the Code calls the "*point of undue hardship*". The Courts says that the point of undue hardship is the point just short of insolvency, or put another way, that to further accommodate the need would substantially and permanently affect the very viability of the enterprise. And the landlord is responsible for all the costs of accommodation.

But it gets worse. Before you can claim you've done all you can to accommodate (to the point of undue hardship), you must provide a Court or Board real, direct, quantifiable, empirical, scientific and objective evidence of your claim. Again quoting, *"A mere statement, without supporting evidence, that the cost or risk is too high based on impressionistic views or stereotypes will not be sufficient."* Will you be bringing your organization's president and accounting department to the next LTB hearing, producing financial statements of your privately-held company? That's what the Code requires if challenged by the other side.

Worse still, the new guideline mandates that landlords, large and small, may not claim undue financial hardship unless you have investigated outside sources of funding, or phase in the solution over a number of years, or seek bank financing to accomplish the needed accommodation. Adding another layer of unfairness, the landlord will be expected to fund the required accommodation from other divisions or sources of funds within its enterprises, not just housing. That would suggest to me that a landlord should hold nothing inside a housing corporation other than housing.

The policy guideline also says you can't use the cost required to accommodate a single tenant, by postulating the universalization of the expense. So for instance, arguing "*Your honour, I could afford to soundproof that one unit without the risk of insolvency, but what about the next tenant who needs the same?*" is not a permitted defence. And finally, it is a principle of accommodation, reiterated in the Policy Guideline that a landlord is required to pay *"all the costs associated with the accommodation"*.

I've seen the floodgates open already. In social housing, tenants are claiming they need larger units because they were locked in a closet as a child and suffer from post-traumatic stress disorder. Just this week, I had a lawyer on a legal aid certificate acting for a former tenant who had been evicted 7 months earlier by the Sheriff, file a review of an eviction order that was based on smoking in the unit contrary to a written lease, and impaired safety related to the smoking. The claim in the review factum was that the tenant is schizophrenic and that there is a body of scientific evidence suggesting smoking may be therapeutic for schizophrenics, and mental illness is a protected ground.

Also this week, I had a legal clinic in downtown Toronto contest both eviction and a claim for $6,000 in damage done by a tenant in "for-profit" housing. The basis of their claim is that the tenant has a disability (never disclosed) that we ought to have been aware of, and therefore we ought to have assisted the tenant to take measures (we did) and that whatever the cost of these measures, it must be borne by the landlord, not the tenant. That same clinic in a case last year argued that the voiding provisions of a Board N5 notice for damage, are likely contrary to the Code and therefore they should have no effect if a tenant is on a fixed income in receipt of public assistance. This because almost by definition, that person could not void an N5 notice for $6,000 worth of damage within the 7 days set out in the statute. While I argued otherwise, I suspect he's probably right.

If unchecked and unchallenged, this will put some landlords out of business, and cause other landlords to get out of the business. Evictions will become almost impossible to achieve, and frivolous claims by the tenant against landlords will become common-place. And I'm not blaming the Landlord and Tenant Board or the tenant bar. It's the law, the Code itself, which is supreme to all other laws and which the Supreme Court has said is "*quasi-constitutional in nature*". The Code and the policy guideline are the problems.

Without a ballot vote, without input by the legislature, and without serious and open consultation, you have all been made un-funded replacements for the mental health institutions systematically closed by successive governments since the 1970's. If you want to preserve the stability of this industry, it is imperative that you speak to your MPP's, write letters to the Premier, withhold donations to the current government, demand a policy position and commitment now from the opposition Conservatives, and do anything else you can to stop this offensive and unjust application of human rights legislation. If the Liberal government wants to put it to a vote and campaign on making landlords the unpaid social workers, facilitators, support workers and guardians of anyone requiring accommodation under the Code, then they should have the guts to come out and say so rather than hide behind an ideological commission that appears to me to be completely out of control.