Association of Ontario Midwives
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July 30, 2020

Concerns regarding Applicant status in AOM vs MOH at the HRTO

Dear members,

The AOM is sending this memo to provide an update related to the concerns regarding Applicant status. We are also providing an overview of the HRTO complaint process to give context for the issues that are of concern. The AOM continues its committed review of these concerns and will provide a further update once the process is complete.

The historical context to becoming an Applicant in AOM vs MOH at the HRTO

The application by the AOM against the MOH was launched at the HRTO in November 2013. Typically, when a human rights complaint is launched, all Applicants are known and named at that time. The complaint is brought by individual names. It is very rare to add Applicants mid-proceedings and practically unheard of to add Applicants once a final decision on liability has been issued. Major efforts were made by the AOM in 2013, prior to the launching the application, to ensure midwives who wanted to be part of the complaint were given a reasonable opportunity.

As per Tribunal rules, to be an Applicant in a human rights complaint, an individual *must take positive steps*, including, in this case, signing a consent form allowing the AOM to represent them in the complaint. Without a signed consent form, the AOM has no legal standing to be able to represent a midwife in the human rights complaint. This process is different from a class action, where there is a small representative class of individuals who represent the interests of the class as a whole, and members of the class do not need to opt in. The HRTO unfortunately does not allow a class action model. The HRTO requires that an individual expressly *opt in*—i.e., put their name forward as an Applicant—in this case, by signing a consent. This process is a significant endeavour, and it is much easier to manage a class proceeding. The AOM was pleased to have over 1,000 midwives take the positive steps of signing consents to be added as Applicants.

The AOM's intent was to proceed with the group of midwives who signed consents in 2013 as Applicants in the proceedings, acknowledging that all other midwives would benefit from

closing the gender pay gap going forward. There were, however, significant events and delays that the AOM did not anticipate.

The first event was shortly after the consents were submitted in 2013. The Tribunal decided to make an administrative change to the consent forms and insisted that the AOM seek revised consent forms from all Applicants. The AOM went to great lengths to contact all midwives who filed the original consents to obtain revised consent forms. In 2015, the AOM also individually called midwives who had still not submitted a revised consent, reminding them to do so. Almost all original Applicants filed revised consents. There were a handful of midwives, approximately eight, who did not respond to the AOM's communications and did not submit a revised consent.

The second significant event was that the AOM did not anticipate this case would take over six years to reach a final result. Because of this extended period of legal proceeding, the AOM had the issue of New Registrants in 2014, 2015 and 2016 to consider. The AOM advocated to add New Registrants each year and, alongside these requests, also added midwives who had not yet become Applicants in 2013 for various reasons. In these cases, the AOM advocated on their behalf to add them despite concerns that the Ministry would object. Indeed, there was always a risk in adding new Applicants that the Ministry would start objecting and question the addition of all Applicants who were added after the commencement of the proceeding in 2013. The Ministry, in its right, could have objected because typically, Applicants are decided at the beginning of a proceeding.

The third event is that, as of 2017, the AOM was at the point of making final submissions to the Tribunal. As the evidentiary record before the Tribunal was closed and could not be re-opened, it was decided that it would be inappropriate to seek to add 2017 New Registrants at that time. Moreover, the 2017 New Registrants would benefit from the decision on a going-forward basis. The AOM did not anticipate the Tribunal would take until the end of September 2018 to issue its decision. The AOM also did not anticipate the Tribunal would decline to address the appropriate remedy in its decision, and instead send the question of remedial relief back to the parties. The parties were unable to reach an agreement and were back before the Tribunal to make legal submissions on remedies in May 2019.

At this point, neither 2017 nor 2018 New Registrants had been invited to be Applicants. At the time the AOM position, based on legal advice, was that this was appropriate because the evidence was completed, and the Tribunal had issued a final decision on liability. Then something surprising happened at the remedial hearing in May 2019. The Tribunal, on its

own motion, during the hearing, asked whether there were any further Applicants to be added. This was a complete surprise to both parties. Under pressure from the Tribunal, the Ministry reluctantly agreed to provide a further opportunity to add Applicants, but made it very clear that there had to be finality to the question of who was an Applicant and that it had to be completed *before* the remedial decision was issued. At the remedial hearing, the Tribunal anticipated it would release its decision on remedy at the end of August 2019. The Ministry set a firm, final deadline of early August 2019 for the consents to be submitted, and that was the agreement between the AOM and the Ministry.

In June, July and August 2019, the AOM took steps to communicate to all midwives *who were not yet an Applicant* that they had one final opportunity to become an Applicant. The AOM sent individual emails to non-Applicants, expressly warning them that they were *not* an Applicant and making it very clear that in order to become an Applicant, an individual had to act by signing a consent form and submitting it to the AOM by early August 2019. This June 2019 email was sent to every AOM member who was not an Applicant. The AOM also issued 3 Midwifery Memos during that summer, which set out the process of how to become an Applicant, and the need to file a consent. These communications emphasized that the final deadline was early August 2019.

A very small handful of midwives did not receive the June 2019 email, because they had stopped practicing at that point and were no longer AOM members. A few others did not receive it because they were not at that point registered as midwives, and only became registered in July or August 2019. However, these midwives did receive the Midwifery Memos informing them about how to become an Applicant during this time.

There were a handful of midwives who came forward immediately following the August 2019 deadline, who had compelling reasons for missing the deadline, including a small number who had mistakenly sent their consents to the Tribunal instead of the AOM. The AOM was able to advocate on their behalf. However, the Ministry communicated very clearly, "this has got to stop," and, in exchange for adding these handful of midwives who had missed the deadline, asked for an undertaking from the AOM that there were no further midwives to be added. The AOM undertook that it would not seek to add further midwives as Applicants, but noted that it could not predict whether there could be other midwives who would come forward at a later date, and that these midwives might file their own human rights complaints.

The Tribunal issued its remedial decision many months late, on February 19, 2020. The Tribunal ordered that eligible midwives (midwives who signed the consent by the deadline, and who were working during the relevant timeline) were eligible to receive an injury to dignity award, as well as any retroactive pay owing back to 2011. The Tribunal made it clear that all other midwives who were not eligible (those who did not sign consent or work during the relevant timeline) would benefit from the decision moving forward, and indeed at the very least would receive the 20% adjustment to pay from the date of the decision onward.

Throughout February, March and April 2020, the parties prepared and argued the Ministry's judicial review on an expedited basis before the Divisional Court of Ontario. The Divisional Court upheld the HRTO decision on June 26, 2020. Throughout May and June, the parties attempted to agree to the list of eligible midwives, as per the Tribunal's definition. This list was finalized in early July 2020.

After the list was finalized, approximately 75 midwives have come forward to say they wanted to be Applicants but that they were not on the list.

This was very distressing to the AOM. As the professional association representing all midwives, the AOM wanted as many midwives who wished to become Applicants to do so, and made significant efforts to provide an opportunity to its members. To find out after the fact that there were midwives who missed the opportunity was deeply concerning.

The AOM's efforts to provide fair opportunity to midwives to become Applicants

The AOM wanted as many midwives who were interested in being an Applicant to have the opportunity to do so, with the important caution to not undermine the legal strategy and interests of the current Applicants. It was necessary to consider factors such as the stage of proceedings and, later in the proceedings, the AOM's undertakings to the Ministry to finalize the number of Applicants. It is important to emphasize that technically the AOM could have launched this complaint with just one Applicant. Strictly speaking, the legal process placed no obligation on the AOM to go out and search for Applicants or insist Applicants come forward.

The AOM also did not want to pressure midwives to become Applicants. A number of midwives made it clear they did not support the human rights complaint. The AOM had to

respect the decision of these midwives not to become Applicants and could not be seen to be pressuring its membership.

In light of all of the above factors, the AOM still made its best efforts to communicate clearly about the process and to provide midwives who were interested in becoming Applicants with a reasonable opportunity to do so. It was then left to the midwife to decide whether they wanted to be an Applicant. Midwives had a duty to take steps to inform themselves of the process, including to read emails and Midwifery Memos, to ensure the AOM had their current contact information, to ensure emails were not going to junk mail, to contact the AOM with questions and, if interested in being an Applicant, to sign the consent form, send it to the AOM and confirm with the AOM that they were on the list.

While the AOM has recently learned important ways in which to improve its communications and processes—including tracking midwives who expressly stated they did not want to be part of the proceedings; requiring as opposed to recommending that midwives confirm they were Applicants; and including in email subject lines "Action Required" to indicate a response from the midwife was necessary—it ultimately believes that the process followed provided many reasonable and fair opportunities to midwives to become Applicants in all of the challenging circumstances. The AOM's process resulted in more than 1000 midwives submitting consents and becoming Applicants.

Midwives who have come forward with concerns about their consent form or Applicant status

Since finalizing the list of eligible Applicants in early July 2020, the AOM has received queries from approximately 75 midwives who wished to be Applicants but were not listed. Approximately half of these midwives acknowledge that they missed the August 2019 deadline. The other half have indicated that they either sent consents by the deadline or at least believe they sent a consent but are not certain. Over the past several weeks, the AOM has made considerable efforts to assist, including by holding an information session for these midwives, assisting them in filing human rights complaints and meticulously reviewing the AOM's records of communications, telephone, email and fax records over the course of multiple years.

The AOM is still in the process of obtaining information from these midwives and reviewing its records. In the interim, the AOM is advocating with the Ministry that midwives who fall into the following two categories be added as Applicants:

(1) Midwives who have some evidence, including documentary and affidavit evidence, of signing and transmitting a consent by the August 2019 deadline; and
(2) Midwives who have a compelling justification for missing the August 2019 deadline.

The AOM is further advocating that *all* midwives, regardless of whether they are Applicants, ought to be compensated fairly for their work. The AOM is further advocating that *all* midwives, regardless of whether they are Applicants, be paid any retroactive adjustments to compensation that are made to Applicant midwives, as a matter of fairness.

The AOM will make best efforts to vigorously advocate on behalf of the above midwives with the Ministry. However, it will ultimately be for the Ministry to decide whether to consent to adding Applicants at this late stage and whether to compensate all midwives retroactively. The AOM is hopeful that the fact that some midwives have filed individual human rights complaints will assist in putting pressure on the Ministry.

The AOM will provide further updates on the status of these negotiations, as well as a comprehensive summary, once our investigations into midwives' concerns are complete.

If you have additional concerns or queries about HRTO Applicant issues, contact Christine Allen, Manager, Policy and Communications, at christine.allen@aom.on.ca.

Sincerely,

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President

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Interim Executive Director