

WILLS, ESTATES, CHARITIES & TRUSTS

Rights code trumps religious group's non-gay requirement

The Ontario Human Rights Tribunal recently concluded that a religious organization's code of conduct conflicted with the Ontario *Human Rights Code*.

Heintz v. Christian Horizons (2008), O.H.R.T.D. No. 21 arose from a complaint brought by a former employee of Christian Horizons, a faith-based non-profit organization that provides care and support to individuals in Ontario with developmental disabilities.

As a condition of employment, the complainant signed a lifestyle and morality statement which prohibited, among other things, homosexual relationships. The complainant subsequently entered into a same-sex relationship and ultimately resigned as a result.

The adjudicator for the Ontario Human Rights Tribunal held that "[i]n order to avoid a finding that Christian Horizons violated the *Human Rights Code* by insisting all employees sign and comply with the Lifestyle and Morality Statement," Christian Horizons had to show that it fell within the special employment provisions of s. 24(1)(a).

The adjudicator found that Christian Horizons did not meet the criteria for the exemption because it offered its services to the general public and did not restrict its services to "co-religionists." As well, compliance with the lifestyle and morality statement was not a reasonable or bona fide qualification for employment.

The adjudicator held that Christian Horizons also "infringed [the complainant's] rights under the *Code* as a result



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of the work environment and how she was treated once her sexual orientation came to light." Christian Horizons is appealing the decision.

Pending its review, Ontario organizations that use lifestyle codes of conduct need to examine whether they can qualify for the s. 24(1)(a) exemption.

In this regard, organizations seeking to rely on the exemption as "religious" organizations should first establish that they are in fact "religious" and ensure that they have clear religious purposes stated in their objects and governing documents. An organization will also need to show that "the nature and purpose of its activity is to serve the private interests of its community."

Organizations that serve "the broader public sector" may fall outside of the exemption, although the adjudicator acknowledged that an organization with the primary purpose of serving the interests of a proscribed group of persons could still provide its services to a greater number of persons who

are not members of the proscribed group, without falling outside the exemption. Nevertheless, organizations may want to consider, where appropriate, expanding their membership base in order to include individuals who have been served by the organization in some way.

Where does this leave religious organizations not primarily engaged in providing services to co-religionists, but instead provide assistance to all persons, regardless of creed (such as missionary organizations, soup kitchens, etc.)? The adjudicator interpreted s. 24(1)(a) as requiring organizations to provide services to persons who

could be made that such a religious organization should be able to qualify for the exemption, in that they would be primarily providing services to persons outside of their religious community, but do so on behalf of their members, as a manifestation of their religious beliefs.

Although the adjudicator did not specifically employ this reasoning in the decision, it is consistent, in its result, with his comments that suggested that organizations engaged in proselytizing or "carry[ing] out a mission of salvation" may qualify for the s. 24(1)(a) exemption.

Organizations wishing to employ only persons who adhere to a specific code of conduct will also need to carefully examine whether such requirement is reasonable and bona fide. To meet this test, the requirement must be rationally connected to the nature of employment in a general sense and also objectively "appropriate" and "reasonably necessary" to the performance of the job.

The adjudicator commented on the "poisoned work environment" that the complainant was subjected to, citing discriminatory attitudes that pervaded the workplace, and an offer made by Christian Horizons to provide the complainant with counselling to effect her "restoration." The adjudicator held that the poisoned work environment constituted a violation of the Code, which was "not subject to a s. 24(1)(a) exemption even

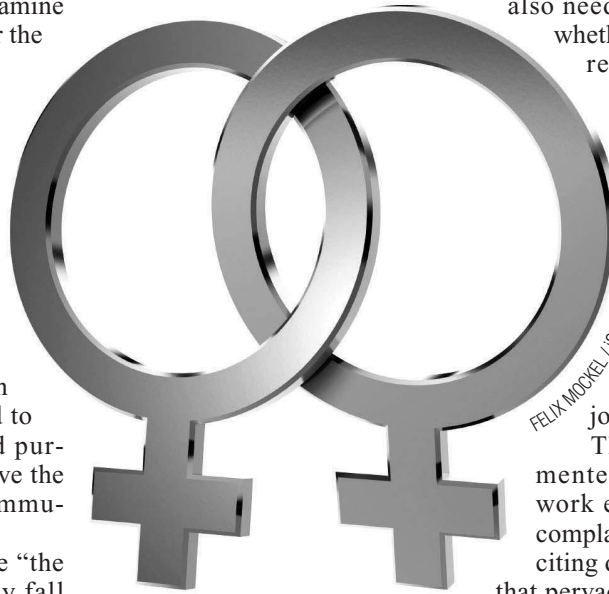
had the exemption been found to otherwise apply." He did not, however, reference any legal authority in support of this conclusion.

The adjudicator further suggested that the morality and lifestyle statement and Christian Horizons' theology of sexuality were themselves causes of the poisoned work environment. As a result of these comments, it is uncertain under what circumstances a code of conduct can make value-based statements in reference to sexual orientation, or if all such codes of conduct, no matter how respectfully worded, will automatically be deemed as "engender[ing] fear, ignorance, hatred and suspicion" and creating a poisoned work environment.

While the adjudicator's comments could be interpreted as suggesting the latter approach, it is more likely that organizations exempt under s. 24(1)(a) can still implement codes of conduct. To conclude otherwise would render s. 24(1)(a) essentially meaningless.

It is hoped that this issue will be addressed and clarified on appeal. In the meantime, organizations should, at the very least, ensure that their codes of conduct contain respectful and appropriate language and that they are not implemented in a way that creates a poisoned work environment. ■

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adhere to its faith beliefs. However, s. 24(1)(a) requires only that organizations be "primarily engaged in serving the interests of persons similarly identified..." [emphasis added].

As such, a strong argument

Unmet expectations cause most disputes

Costs

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- the case is such that court needs to investigate it;
- "moral" grounds to challenge the will;
- the challenger could have determined the strength of the case without litigation;
- "live issue" concerns about capacity.

Courts can be persuaded by additional factors, which can affect the cost award for unsuccessful challengers even where reasonable grounds for the challenge existed at the outset. Courts will "carefully scrutinize the litigation" when awarding costs. They will consider whether:

- the challenger rebuffed reasonable settlement offers;
- the challengers were the

deceased's next of kin;

- the propounder prevented the challenger from assessing the case;
- the challenger should have abandoned the case sooner or ended the litigation after it became evident that the challenge was groundless;
- the challenger alleged, but did not prove, undue influence.

There is good reason for the "modern approach" to costs in unsuccessful will challenges. It recognises the need to restrict unwarranted litigation and to protect estates from being depleted by litigation.

However, courts should recognize the reasonable expectations of children to be treated fairly in their parents' wills. Take the child who is treated less favourably than his or her sibling in a parent's will.

If such treatment is unexpected, it is not surprising that the child is going to question whether the testator's true intentions are reflected in the will. The parent, by not being courageous enough to curb expectations while alive, contributes substantially to a will challenge that arises in those circumstances.

Unmet expectations are the primary cause of most estate disputes. Fault for creating those unmet expectations, with the resulting costs, lies directly with the testator.

In such circumstances, the reasonable costs for the challenger to complete a full investigation ought to be paid by the estate without hesitation. ■

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