
DIVISIONAL COURT DECISION PROVIDES MIXED RESULTS IN CHRISTIAN HORIZONS APPEAL

*By Jennifer M. Leddy and Terrance S. Carter**

A. INTRODUCTION

On May 14, 2010, the Divisional Court of Ontario issued a significant decision in the Appeal brought by Christian Horizons from a ruling by the Human Rights Tribunal¹ of Ontario on April 15, 2008.

The case addresses the broad issue of religious organizations maintaining their religious identity while serving the public and the particular issue of when religious organizations can require employees to comply with a “Statement of Personal Lifestyle and Morality Standards Expected of Staff” (“Lifestyle Statement”) when such statements contain discriminatory qualifications on their face.

The decision also affirms an important principle that religious organizations, whether they provide services directly to their own members or to the public, are eligible for the statutory exemption in section 24 (1) (a) of the *Ontario Human Rights Code* that allows them to hire co-religionists. The findings on the definition of religion, particularly that social service is an expression of faith, will be helpful in other contexts.

However, the decision that it is not a *bona fide occupational qualification* for Christian Horizons to require support workers to sign a Lifestyle Statement that includes a provision to abstain from same-sex

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¹ For an analysis of the Tribunal’s decision see Terrance S. Carter and Derek B. Mix-Ross, “The Christian Horizons Decision: A Case Comment,” *Church Law Bulletin* No. 22, May 28, 2008.

relationships is problematic, given the clear findings of fact that Christian Horizons seeks to “establish a Christian home environment” for its residents and that many of its employees see their work as “Christian ministry.”

As well, the holding that Christian Horizons created a “poisoned work environment”, independently of whether it came within the statutory exemption, is also concerning because little guidance about what constitutes a “poisoned work environment” is provided and as such may open the door to allegations that could otherwise be defended on the basis of the statutory exemption.

B. FACTS

Christian Horizons was founded in 1965 as an Evangelical Christian organization to minister to individuals with developmental disabilities. Today, it operates more than 180 residential homes as well as camping and day programs, employing over 2,500 staff and caring for more than 1,400 people. It is the largest single community living service provider in the province of Ontario and receives approximately \$75 million annually of public funding.

Christian Horizons required all employees to subscribe to a doctrinal statement of Christian beliefs and a Lifestyle Statement. Examples given in the Lifestyle Statement of conduct “incompatible with effective Christian counselling ideals, standards and values” included: extra-marital relationships, theft, fraud, homosexual relationships and lying and deceit. While it has always only hired Evangelical Christians to staff its programs, it serves people of all faiths.

Connie Heintz began working as a support worker at a community living residence operated by Christian Horizons in 1995. Her duties included providing care and support for individuals who have developmental disabilities. She trained in Christian ministry and counselling, participated in religious activities at Christian Horizons and signed contracts that included the Lifestyle Statement. In 1999 she entered a same sex relationship which was contrary to the Lifestyle Statement. When the relationship became known to Ms. Heintz’s supervisor, she was offered counselling.

In June 2000, a co-worker complained of harassment by Ms. Heintz. Following an inquiry she received a disciplinary letter. On August 28, 2000 Ms. Heintz went on medical leave and on September 22 resigned. A few months later, she filed a Human Rights complaint with the Ontario Human Rights Commission alleging

that she had been discriminated against on the basis of her sexual orientation and been exposed to a poisoned work environment. Christian Horizons admitted that they would have fired Ms. Heintz had she not resigned.

C. RELEVANT LEGISLATION

The relevant provisions of the *Ontario Human Rights Code*² (“the Code”) that are germane to the decision are as follows:

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

Special employment

24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

D. THE DECISION OF THE TRIBUNAL

1. Statutory Exemption under Section 24 (1) (a) of the Code

Since Christian Horizons admitted discriminating against Ms. Heintz contrary to section 5 of the Code, the main issue before the Tribunal was whether Christian Horizons came within the statutory exemption in section 24 (1)(a).

In order to come within the statutory exemption, Christian Horizons had to establish that it met the three elements included in the statutory exemption, namely, that:

- 1) It is a religious organization;
- 2) It is primarily engaged in serving the interests of persons identified by their creed and employs only people similarly identified; and

² Ontario Human Rights Code, R.S.O. 1990, C. H. 19

- 3) The restriction in employment to persons similarly identified by creed is a reasonable and *bona fide* qualification because of the nature of the employment (the “BFOQ requirement”).

The Tribunal found that Christian Horizons only met the requirements in element one, as indicated by the brief summary of its reasons.

Element one - Is Christian Horizons a Religious Organization?

The Tribunal readily came to the conclusion that Christian Horizons is a religious organization on the basis of the following indicia:

- ♦ Throughout its history the members of Christian Horizons have been Christians who wished to join a Christian organization.
- ♦ The doctrinal statement of Christian Horizons has been a core document since its inception. Its members and employees are required to sign it and it is incorporated into its Constitution and By-laws.
- ♦ Religious observances and practices “permeate all formal activities of the organization”, including Directors’ and Members’ meetings and dedication services for new programs.

In response to the Human Rights Commission’s argument that Christian Horizons was a social service agency that received 100 per cent of its funding from the Ministry, the Tribunal found that:

“In my view, there is no reason why an organization cannot be a religious organization within the meaning of section 24 (1) (a) simply because it provides a social service. There is a long and honoured tradition of churches, religious orders and religious organizations providing social services in the community...the mere fact that such an organization does receive public funding, even all its funding, does not preclude finding it to be a religious organization, provided other indicia of that status are established on the evidence.” (Tribunal Reasons, para. 115-116)

Element two - Is Christian Horizons Primarily Engaged in Serving the Interests of Persons Identified by their Creed and does it Employ Only Persons Similarly Identified?

The fact that Christian Horizons provides opportunities for Evangelical Christians to come together “to live out a deeply felt religious calling, either as members, volunteers or employees” did not convince the Tribunal that Christian Horizons was primarily engaged in serving the interests of evangelical Christians. On the contrary, it found, on the evidence and “plain reading” of section 24 (1) (a) that it

was primarily engaged in serving persons with disabilities irrespective of their faith. As a result, it could not come within the statutory exemption. The Tribunal's understanding of the legislative balance created in the section was stated in terms of a public/private distinction as follows:

“[The Legislature] has determined that where the organization is primarily engaged in serving the interests of its members or its community of co-religionists, it will be granted freedom to restrict hiring to members of its faith, subject to the qualification being reasonable and *bona fide*. Where, however, it branches out into the public realm, where the nature and primary purpose of its activity creates a relationship with the broader public, its rights are then limited, and, as pertaining to the social activity of employment, it cannot infringe on the fundamental rights of others.”
(Tribunal reasons para.160)

Element three - Is the qualification a reasonable and *bona fide* qualification because of the nature of the employment?

Even if it had found Christian Horizons to be primarily serving persons identified by their creed, the Tribunal would have found that it did not meet the third requirement because “no real effort was made to examine whether the requirement (agreeing to and signing the Lifestyle Statement) was in fact reasonably necessary or whether the employment could be performed without the discriminatory restrictions.” (Tribunal reasons para. 161). Although employees were required to sign both the Doctrinal Statement and Lifestyle Statement, the Tribunal's confined its analysis to the Lifestyle Statement and did not make any finding with respect to the Doctrinal Statement.

2. Poisoned Work Environment

In addition to finding that Christian Horizons did not come within the statutory exemption, the Tribunal held that it infringed Ms. Heintz's rights under the Code by the work environment and how she was treated once her same-sex relationship became known. In particular, Christian Horizons violated the Code by suggesting Christian counselling, permitting a poisoned work environment of rumours and innuendos, and acting on discriminatory view on matters of human resources. This finding was made independently of whether Christian Horizons met the requirements of section 24 (1)(a) and Tribunal found that this violation of the Code was not subject to the statutory exemption.

3. Remedies

The Tribunal awarded general damages of \$8000.00 for imposition of the Lifestyle Statement, \$10,000 for the poisoned work environment, and \$5000 for mental anguish. It also ordered special damages for the wages and benefits Ms. Heintz would have received between September 23, 2000 and July 12, 2002.

The Tribunal also made the following “public interest” remedies:

- (a) Christian Horizons was ordered to adopt an anti-discrimination and anti-harassment policy as well as a human rights training program for all employees and managers.
- (b) Christian Horizons was ordered to cease and desist from imposing the Lifestyle Statement as a condition of employment. The effect of this order was stayed for 8 months.
- (c) Christian Horizons was ordered to commence, within 30 days of the decision, a review of its employment policies, in consultation with the Commission, to ensure that such policies comply with the Code.
- (d) Christian Horizons was ordered to submit, no later than six months from the date of the decision, a report to the Tribunal outlining the steps it proposed to take to ensure that its employment policies are in compliance with the Code. This report was to be provided to Ms. Heintz and the Commission 30 days prior to submitting it to the Tribunal and both of them would be entitled to make submissions to the Tribunal on the proposal of Christian Horizons.

E. DECISION OF THE DIVISIONAL COURT

The Divisional Court overruled the Tribunal on its interpretation of the second element of the statutory exemption in section 24 (1) (a). It found that Christian Horizons primarily serves the interests of persons identified by their creed because it is a means by which Evangelical Christians can live out their faith by helping those in need. However, the Court found that it failed to meet the third element of the statutory exemption that the requirement of subscribing to the Lifestyle Statement was a *bona fide* occupational qualification because of the nature of the employment. The decision of the Tribunal with respect to the

poisoned work environment was upheld, as were the remedies for damages but most of the “public interest” remedies were struck out as overbroad. The following is a brief summary of the Court’s reasons for decision.

1. Statutory Exemption under Section 24 (1) (a) of the Code

Element one - Is Christian Horizons a religious organization?

The Divisional Court easily upheld the Tribunal’s conclusion that Christian Horizons is a religious organization.

Element two - Is Christian Horizons Primarily Engaged in Serving the Interests of Persons Identified by their Creed and does it Employ Only Persons Similarly Identified?

a) The Wording of the Provision

The Divisional Court criticised the Tribunal’s overreliance on one aspect of statutory interpretation, namely the “plain meaning” of the words of section 24 (1) (a), without taking sufficient account of the legislative history, context and purpose of the Section. The Court also clearly stated that the words of the section “make no reference to a public/private distinction, and it is inappropriate to read one in.”

b) Proper Perspective

The Court examined both the English and French versions³ of section 24 (1) (a) to determine the proper perspective from which to determine whether a religious institution is primarily engaged in serving the interests of persons identified by creed. The English version emphasizes the perspective of the interests being served (in this case people with disabilities) and the French version focuses on the principal objective of the religious organization. The Court determined that the French version provides the proper approach and that the question to be asked of a religious group providing charitable services is “whether the principal objective is to serve a religious calling or mission in carrying out this work.”

³ The Court found that the English and French versions of Acts are equally authoritative.

c) Purpose of the Statutory Exemption

The Court relied on two Supreme Court of Canada decisions⁴ in finding that special (preferential) employment provisions in human rights legislation across the country have, if not the same wording, the same purpose to “protect the fundamental freedom of association of individuals to join in a group or organization for specified purposes”. Both of these Supreme Court of Canada decisions rejected arguments that such provisions should be narrowly interpreted as rights limiting provisions. On the contrary, they have a “dual purpose: they both confer rights on some persons and limit the rights of others in situations where the section applies. They are meant to protect the right to associate and to promote certain types of association, including religion.” Mr. Justice Beetz, in para. 100 of the *Brossard* case, summarized the purpose of these special provisions as follows:

“In my view, this branch of s.20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances.”

The Court faulted the Tribunal’s interpretation of section 24 (1) (a) because it ignored the purpose of the provision, the purpose of the organization, and the historic contribution of faith groups to the disadvantaged regardless of their faith. The Court completely accepted the arguments of Christian Horizons and the Christian intervenors on this crucial point which the Court summarized as follows;

“The appellant and the Christian intervenors in this appeal all argued that the Tribunal’s interpretation will lead to an absurd result that could not have been intended by the Legislature, given the inclusion of the special employment provision in the Code. If the Tribunal is correct, religious organizations like Christian Horizons or a religious group offering to feed the hungry will be unable to rely on s. 24 (1) (a) if they minister to individuals regardless of their religious beliefs. Such an organization could not require even its senior officers, who constitute the organization’s directing mind, to be adherents to its religious beliefs. They submit that the Legislature could not have intended to put out of business religious organizations that minister to the disadvantaged as an expression of their religious beliefs. (Reasons for decision, para. 65)

⁴ *Caldwell v. Stuart*, [1984] 2 S.C.R. 603, and *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279.

d) Charter Values

Given the ambiguity caused by the French and English versions of the statutory exemption, the Court also interpreted section 24 (1) (a) in light of *Charter Values*, finding that the Tribunal's narrow interpretation of the section failed to consider the impact of its interpretation on the freedom of religion of members of religious organizations and failed to consider this impact from their perspective. Noting that the charitable work of the members of Christian Horizons is an "expression of their religious beliefs and values", the Court found that the Tribunal's interpretation would restrict their freedom of religion because it "would require them to confine their charitable work to members of their faith group, when they see their religious mandate as to serve all of the needy without discrimination."

e) The Correct Interpretation

The Court found that the correct approach to the second element of section 24 (1) (a) is to determine if the organization sees the activity as a religious activity and whether the activity furthers the religious purposes of the organization and its members, "thus serving the interests of the members of the religious organization". This does not mean that once it is determined that there is a religious organization that the second element is met. "There is still the need to consider the nature of the organization and the activity it undertakes, as well as the purpose for which it undertakes the activity."

Accepting the findings of facts made by the Tribunal, the Court had no difficulty in holding that "...it is clear that Christian Horizons operates its group homes for religious reasons – in order to carry out a Christian mission, imitating the work of Jesus Christ by serving those in need. ...As the Tribunal noted, [Christian Horizons] sees the organization as a vehicle through which individuals who identify as Evangelical Christians can live out their faith."

The Court, therefore, held that Christian Horizons satisfied the second element of the statutory element in that it was primarily engaged in serving the interests of persons identified by their creed, with benefits to people with disabilities who are cared for by them.

Element three - Is the qualification a reasonable and bona fide qualification because of the nature of the employment?

In addressing this third element of the statutory exemption, the Court narrowed the qualification to the provision prohibiting same-sex relationships, which was in issue in this case. By contrast, the Tribunal had considered the entire Lifestyle Statement as the qualification.

The Court followed the two part test laid out in the Supreme Court of Canada case of *Ontario (Human Rights Commission) v. Etobicoke (Borough)*⁵ As can be seen from the following quote from the Supreme Court, the test has both subjective and objective elements.

“To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his employees and the general public.

The Tribunal found that Christian Horizons met the first part of the test in that from a subjective perspective it honestly and sincerely believed that the qualification was necessary for the performance of the support worker job and the Court did not interfere with the finding. It was clear that from the organization’s perspective, religious commitment was essential to performance of the task.

With respect to the second objective part of the test, the Court found that it was necessary to closely examine the employee’s duties, functions and activities. “The qualification to be valid must not just flow automatically from the religious ethos of Christian Horizons. It has to be tied directly and clearly to the execution of and performance of the task or job in question.” The Court was of the view that to focus only on the religious mission of Christian Horizons would render the BFOQ element irrelevant or meaningless.

⁵ 1 S.C.R. 202 at p.208.

The Court considered and distinguished the leading Supreme Court of Canada *Caldwell*⁶ case about the conduct of a Catholic school teacher which was contrary to Catholic beliefs. In the *Caldwell* case, the Court found that conformity to Catholic doctrine was a *bona fide* occupational requirement because the teacher was engaged in teaching students about the Catholic faith. In the opinion of the Court, Ms. Heintz was not engaged in “religious education or indoctrination” or in “promoting an Evangelical way of life”, even though support workers participated in prayer, hymn singing and Bible reading with the residents. Nor was the Court persuaded by the argument of Christian Horizons, that the support workers are the “face of the organization”, that the religious ethos permeates the organization, that religious commitment is essential to the work, and that it is difficult to separate out the religious component from specific tasks performed by the worker. Christian Horizons also put forth, without success, its argument that religious conformance by support workers was necessary to provide Christian ministry in what were Christian homes. Moreover, the Court appeared to disregard the finding of fact that “the evidence shows that this deep religious commitment is displayed in excellent service and loving care provided to the residents, as well as support to their families.” (Reasons for decision, para. 93)

In the court’s view, there was nothing about the performance of tasks such as cleaning, laundry, helping residents to eat, or to taking them to appointments that would require a support worker refraining from same-sex relationships. The court came to this conclusion, notwithstanding the objective finding of fact that the religious commitment resulted in excellent care of the residents and families.

Apparently drawing on the analysis in the *Caldwell* case, the Court found that religious conformity by the support workers was not necessary because “...the support workers’ employment and the tasks they perform are not intended to infuse the residents of the homes that Christian Horizons serves with the lifestyle morals that Christian Horizons demands of its adherents.”

The Court was also greatly influenced by the process Christian Horizons used to prepare the Lifestyle Statement. Staff were simply asked to come up with a list of lifestyle and morality qualifications for the organization without examining the nature and duties of support workers and why adherence to the

⁶ *Supra*, note 4.

Statement would be necessary for performance of their duties. The issue was further complicated by the fact that, with the exception of the supervisors, all employees in all the homes are called support workers with the same job description, title and function.

2. Poisoned Work Environment

The Court affirmed the Tribunal's ruling that infringement of the Code in this way is not subject to the 24(1) (a) exemption. The role of the Court on this issue was not to retry the matter but simply to decide whether the Tribunal's decision based on the evidence was reasonable. The Court held that there was evidence to support the finding.

3. Remedies

Having held that Christian Horizons was not entitled to the statutory exemption because the requirement to refrain from same-sex relationships was not a *bona fide* occupational requirement for a support worker, the Court upheld the awards of general and special damages. The Court found, however, that the Tribunal overreached with respect to the "public interest remedies". All of them were struck out with the exception of two which were revised to fit the claim made in this case. The requirement that Christian Horizons cease imposing the Lifestyle Statement was amended to cease including a prohibition that support workers not engage in same sex relationships. The requirement that Christian Horizons develop an anti-discrimination and anti-harassment policy and training program was amended to require a policy and training program that targets discrimination on the basis of sexual orientation.

F. COMMENTARY

1. The Divisional Court decision affirms an important principle that religious organizations, whether they provide services directly to their own members or to the public, are eligible for the statutory exemption in section 24 (1) (a) of the *Ontario Human Rights Code* that allows them to hire co-religionists. The fact that the exemption is not limited to religious organizations that directly serve their own members respects the historic involvement of religious organizations in social ministry with people of all faiths, particularly with those who are disadvantaged. It rejects the dichotomy of a public/private distinction between beneficiaries of activities that further the religious purpose of the organization. A ruling to the

contrary could have spilled over into other areas of the law and limited recognized religious activities to places of worship only.

2. The Court's confirmation that the statutory exemption in section 24 (1) (a) is not to be read restrictively as limiting rights but as creating and protecting the rights of groups to associate and share like minded views and activities protects and promotes freedom of religion.
3. The decision recognizes that religious organizations serve the interests of their members whenever they undertake activities that further their religious purposes, whether these activities directly serve the members of the organization or members of the public. It recognizes that religious organizations can perform social services and receive public funding and still be considered religious organizations, something that has not always been understood in other areas of the law.
4. The Divisional Court identifies indicia for discerning whether an organization that appears to be doing social service is a religious organization engaged in Christian ministry.
5. The rulings of the Court, however, on the *bona fide* occupational requirement and the poisoned work environment are problematic and may be of concern to religious organizations that utilize a lifestyle statement for its employees that on its face violates the Code.
6. While *bona fide* occupational requirements are by nature fact specific, the Court has provided helpful guidance of the factors that must be taken into account in drafting and imposing Lifestyle Statements that contain discriminatory qualifications on their face. In this regard, the Court noted at para. 103 that "A discriminatory qualification cannot be justified in the absence of a direct and substantial relationship between the qualification and the abilities, qualities or attributes needed to satisfactorily perform the job." As the Court noted at para. 90, the BFOQ, "must not just flow automatically from the religious ethos," of the organization. It must be justified by a direct and substantial relationship between the qualification and the job. It would, therefore, be prudent for religious organizations that wish to utilize lifestyle statements that contain discriminatory qualifications to review them and tie them directly and clearly to their doctrinal statement and to the execution and performance of an employee's position. As evidenced by the Court's decision, it is also important what job titles and descriptions are given to employees, which should be assessed in order to determine which positions can be directly connected to

certain prohibitions. In this regard, a religious organization will then be able to evidence that the leadership has appropriately turned its mind to conducting an appropriate examination of the nature and essential duties of the position of its employees when imposing restrictions with regard to employment.

7. The Court also found that Christian Horizons created a “poisoned work environment” independently of whether it satisfied the elements of the statutory exemption under s.24(1)(a). The Court, though, provides little guidance as to what constitutes a “poisoned work environment” and whether the test is objective, subjective or has elements of both. Given the many unanswered questions with respect to what constitutes a “poisoned work environment”, religious organizations should keep in mind that satisfying all the elements of the statutory exemption under s. 24(1)(a) will not necessarily shield them if they are found to have created a “poisoned work environment.” Drafting lifestyle statements in positive language to the extent possible and responding to employees who contravene the statements with sensitivity and respect will go a long way in avoiding findings of creating a “poisoned work environment.”

G. CONCLUSION

The results of this decision are mixed. On the positive side, the decision clearly recognizes that religious organizations can maintain their religious identity while serving the public. On the other hand, there are aspects of the decision that may be problematic, such as the way the *bona fide* occupation qualification test was applied in this case, and the vagueness of what constitutes a “poisoned work environment.” However, with careful planning, documentation and implementation, religious organizations should still be able to establish and implement lifestyle statements that require staff to adhere to the religious organization’s lifestyle statement, although such statement may on its face be contrary to the Code.