
**THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar**

Ottawa – February 16, 2011

Freedom of Religion – Reconciling Rights

By Jennifer M. Leddy, B.A., LL.B.

1-866-388-9596


jleddy@carters.ca

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Ottawa · Toronto
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Toll Free: 1-877-942-0001



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OVERVIEW

- Introduction
- Christian Horizons Case
- R. v. N.S. Case
- Marriage Reference Case
- Conclusion

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A. INTRODUCTION

- This presentation is a broad overview of three complex cases about reconciling/ balancing competing Charter rights/values
 - The *Christian Horizons* case involves balancing the right to equal treatment in employment under the Ontario *Human Rights Code* and the *Charter* value freedom of religion
 - The *R. v N.S* case involves reconciling the *Charter* value of freedom of religion and the right to a fair trial

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- The *Marriage Reference* case involves balancing the equality rights and freedom of religion under the *Charter*
- It is beyond the scope of this presentation to get into a detailed discussion of the difference between Charter values as an interpretative principle and a full Charter analysis of Charter rights
- For a fuller analysis of the cases please see Church Law Bulletins No.29 (Christian Horizons) No.31 (R.v.N.S.) and No. 32 (Marriage Reference)

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B. THE CHRISTIAN HORIZONS CASE

- This case concerns balancing the right to equal treatment in employment under the Ontario *Human Rights Code* and the Charter value of freedom of religion
- The Ontario Divisional Court affirmed in May 2010 that religious organizations, whether they provide services to their adherents or the public, are eligible for the exemption in the *Human Rights Code* that allows them to hire co-religionists

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- The Court also affirmed that the hiring of co-religionists must be a reasonable and *bona fide* occupational qualification because of the nature of the employment
- The Court found that on the facts of this case Christian Horizons had not established that adhering to a lifestyle statement was an occupational qualification for a support care worker in its group homes

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- Facts
 - Christian Horizons is a Christian organization that ministers to individuals with developmental disabilities, irrespective of their faith
 - It required all staff to adhere to a Lifestyle Statement that prohibited certain behavior, including same-sex relationships
 - A support care worker, who was involved in a same-sex relationship, resigned alleging discrimination

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- Under the Ontario *Human Rights Code* a religious organization can discriminate in matters of employment by preferring its co-religionists if
 - it is primarily engaged in serving the interests of persons identified by their creed, and
 - the religious qualification is a reasonable and *bona fide* qualification because of the nature of the employment(Sections 5 and 24 (1) of the *Code*)

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- Religious organization
 - The Court found that Christian Horizons is a religious organization because
 - its doctrinal statement is part of its Constitution and By-laws
 - religious observances and practices permeate all formal activities of the organization
 - Public funding and social service did not affect the finding that Christian Horizons is a religious organization

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- Serving Co-religionists
 - The Court rejected a narrow interpretation of S. 24 (1) of the *Code* because it would have restricted the freedom of religion of members of Christian Horizons
 - The Court held that a religious organization serves the interests of its members, not only when it serves its own faith group, but when it pursues activities that further the religious purpose of the organization such as caring for people with disabilities without discrimination

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- Reconciling Rights
 - The Court reconciled the competing Charter value of freedom of religion and the right to equal treatment in employment under the *Code* by applying the *bona fide occupational qualification* test in section 24 (1) of the *Code*
 - The qualification to be valid must not just flow from the religious ethos of the organization but must be tied directly and clearly to the performance of the job

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- Christian Horizons did not meet the test because there was not a direct connection between the duties of the support care worker and the qualification of abiding by the Lifestyle Statement
- The Court was not persuaded by the argument that the support workers were the “face of the organization”, that religious commitment is essential to the task or that it is difficult to separate out the religious components from specific tasks

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- Implications
 - *Bona fide* occupational qualifications are fact specific
 - Religious organizations that wish to exercise preferential hiring rights must be careful in the future to tie the qualifications to their doctrinal statement, have good job descriptions and connect the qualifications to performance of the job

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C. THE R. v. N.S. CASE

- This case concerns reconciling the *Charter value* of freedom of religion with the right to a fair trial
- In October 2010 the Ontario Court of Appeal reiterated that there is no hierarchy of rights under the *Charter*, that no right is absolute
- The court affirmed that that when rights collide the court must attempt to reconcile them having regard to the context and possible "constructive compromises"

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- Facts
 - The case concerned a Muslim woman who invoked freedom of religion to wear a niqab while testifying as the complainant during a preliminary hearing on charges of sexual assault
 - The defendant asserted that his right to a fair trial, to make full answer and defense, required the complainant to uncover her face when testifying

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- Steps in reconciling rights
 - The first step is to identify the content of the constitutional values that are engaged
 - Freedom of religion
 - Right to a fair trial
 - If the rights are more than minimally interfered with there must be an attempt to give effect to both having regard to the specific context

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- Right to a fair trial
 - The right to cross examine without significant restraint is a fundamental component of the right to a fair trial
 - However, limits on the right to cross examination do not necessarily impede a fair trial
 - There is no right to a face to face cross-examination

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- An accused who does not see the face of the complainant “loses something of potential value” to the defence
- Whether the accused loses the right to a fair trial depends on an inquiry that examines the effect of veiled testimony in the circumstances of the case and having regard to other legitimate interests

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- Freedom of religion
 - The court followed the Supreme Court of Canada’s expansive approach to freedom of religion which protects both religious beliefs and conduct whether obligatory or voluntary expressions of faith (*Amselem, Big M Drug Mart*)
 - For the *Charter* value of freedom of religion to be engaged the claimant must show that she has a belief or practice having a nexus with religion, that she is sincere in her belief and that the measure in question interferes with freedom of religion in more than a trivial or insubstantial way

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- The Court will not enter into theological debates and is more interested in how the complainant interprets Islam with respect to wearing the niqab than with official religious practice
- Sincerity of religious belief is not dependent on consistent practice in the past but the complainant’s own exceptions to wearing the niqab in public are relevant in determining if removing it while testifying would fall within those exceptions

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- Contextual analysis
 - If the constitutional values are sufficiently engaged there must be an attempt to give effect to both
 - Contextual factors to be taken into account in balancing the rights are as follows:
 - Other ways to assess demeanour (e.g. body language, voice)
 - Nature of proceeding (preliminary/trial)
 - Forum of trial (jury or judge alone)

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- Nature of evidence (e.g peripheral/central)
- Nature of defence (e.g. credibility/identity)
- Other constitutional values and societal interests (e.g. access to justice by minority, transparency)
- Constructive compromises
 - Possible constructive compromises must be considered as part of reconciliation process
 - Using only women for court staff, judge and counsel

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- Closing court to all men except accused and counsel
- Wearing more transparent niqab
- If the judge concludes after considering all the circumstances that wearing the niqab would impede a fair trial then the witness will be ordered to remove the niqab
- Implications
 - When rights appear to collide the first task is not to obliterate one but to attempt to give effect to both

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- Sends message that “participation in court system will not come at cost of religious beliefs”
- Provides clear framework for reconciling competing *Charter* rights and values
- The process itself affirms the claims even if they are not completely recognized

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D. MARRIAGE REFERENCE CASE

- The Reference concerns reconciling the right to freedom of religion and the equality rights under the *Charter*
- A Reference is the legal term for questions referred to the Court by the government for consideration
- A Reference decision is advisory only but influential in framing future legislation

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- In January 2011 the Sask. Court of Appeal unanimously ruled that proposed legislation which would exempt marriage commissioners from performing marriages contrary to their religious beliefs violated the equality provisions of the *Charter*
- Two sets of reasons were given by the Court of Appeal , this presentation deals only with the reasons which were concurred in by three of the five judges

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- Facts
 - Marriage commissioners are appointed by but not employees of the Government
 - Couples are not assigned a marriage commissioner but contact the commissioner directly
 - While the proposed legislation was broad enough to cover any situation where solemnizing a marriage would be contrary to religious belief, the Court focused on same-sex couples because that issue led to the Reference

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- Framework of *Charter* analysis
 - Determine whether freedom of religion and equality rights infringed under the *Charter*
 - Balance the competing rights under s.1 of the *Charter* which permits reasonable limits on rights and freedoms that can be demonstrably justified in a free and democratic society

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- Equality rights under s. 15 of the *Charter*
 - The Court followed recent Supreme Court of Canada cases (*Kapp; Ermineskin Band*) which provide that the elements of an equality rights claim are
 - Differential treatment on one of s.15 grounds or an analogous ground such as sexual orientation
 - Discrimination involving factors such as prejudice stereotyping or disadvantage

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- The purpose of the proposed legislation did not infringe equality rights because the purpose was not to deny rights to same-sex couples but to accommodate the commissioners' freedom of religion
- However, the effects of the proposed legislation created a discriminatory distinction that would perpetuate disadvantage and stereotypes about same-sex unions
- The argument that another commissioner could do the ceremony was not persuasive because of the effect on the couples who are refused by other commissioners

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- Freedom of Religion
 - The Court followed the Supreme Court of Canada cases in finding that the freedom of religion of the marriage commissioners would be infringed if compelled to perform marriages contrary to their religious beliefs
 - In determining whether infringement is trivial the question is not whether the beliefs are core or peripheral but the consequences of exercising freedom of religion
 - The choice for the marriage commissioners is to perform the marriages or give up their appointment

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- Balancing competing rights under s.1 of the Charter
 - The analysis under section 1 requires an assessment as to whether
 - The objective of the legislation is sufficiently important to justify overriding a Charter right or freedom
 - The chosen means are proportional
 - Rationally connected to objective
 - Minimal impairment of right
 - Effects and objective

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- The Court found that the objective of the proposed legislation was sufficiently important and the means chosen were rationally connected to the objective
- The proposed legislation did not pass the minimal impairment test
- The Court itself raised the possibility of a “single entry system” similar to the Ontario system where marriage commissioners are assigned and religious beliefs accommodated “behind the scenes”

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- The proposed legislation also failed the third element of the proportionality test which requires that the objective of the law outweigh its negative impact on equality rights
- The Court found in weighing the rights that the religious beliefs involved do not "lie at the heart" of freedom of religion under the *Charter* because the commissioners can still hold their beliefs

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- The deleterious effects of the proposed legislation outweighed the objective by:
 - Continuing discrimination against same-sex couples
 - Harmful personal impact on couples refused services
 - Undermining the basic principle that government services must be provided on an impartial basis

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- Implications
 - The Court appears to have placed limits on the scope of freedom of religion that are not in the SCC cases
 - In the Court's view "interests at the heart of" the *Charter* right to freedom of religion are limited to worship and holding beliefs, in effect making a distinction between private and public belief
 - By contrast, the Chief Justice in the *Big M Drug Mart* case goes beyond the freedom to hold beliefs to the right "to manifest beliefs" and not to be forced to act contrary to one's conscience

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- The Court's jurisdiction to judge which beliefs "lie at the heart" of freedom of religion is unclear given the SCC decision in *Amselem* which held that it was not for the Court to determine if a belief is in accordance with religious dogma
- The implications of the decision in the Reference could be far reaching if the religious beliefs and consciences of those who work for public institutions cannot be accommodated
- The Court gave insufficient weight to the consequences faced by the marriage commissioners – they must choose between losing their position and acting contrary to their religious beliefs

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E. CONCLUSION

- In the future there are likely to be more cases with different factual contexts where competing *Charter* rights/values are in issue
- It is hoped that in attempting to reconcile these rights the Courts will seek "constructive compromises" and respect to the extent possible all *Charter* rights that are in play

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