
**FAITH AND FREEDOM ALLIANCE
CHRISTIAN LEGAL INTERVENTION ACADEMY**

Toronto – June 5, 2010

Human Rights: An Overview

By Mervyn F. White, B.A., LL.B., Trade-mark Agent

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PART I

- The *Human Rights Code* (Ontario)
- Legislation which reflects “public policy”
- Preamble (in part):

“and whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and being as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well being of the community and the province”

“The Ontario *Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which cannot be waived or varied by private contract...” *Ontario v. Etobicoke*, [1982] 1 S.C.R. 202 (S.C.C.)

“The preamble to the Code proclaims public policy in Ontario that the Code should, to a reasonable extent not inconsistent with the rights of others in the community, be given an interpretation which allows remediation of discrimination...” *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375 (Div. Ct.)

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- Important to note that it has been tempered by Charter arguments
- See *Brockie*
“The conflict of dignities presented by this appeal required a balancing of individual religious rights and individual rights to protection from discrimination in the marketplace based on an analysis of the Code and of the Charter.”

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“The objectives under the anti-discrimination provisions of the Code must be balanced against Mr. Brockie’s right to freedom of religion and conscience.”

- Note that the court held in *Brockie* that the further the activity is from the “core elements” of the religions belief, the more likely it is that the activity will impact on others and the activity is therefore less deserving of constitutional protection

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- See *Smith v. Knights of Columbus*, [2005] B.C.H.R.T.D. No. 544

“The panel accepts that a person, with a sincerely held religious belief, cannot be compelled to act in a manner that conflicts with that belief, even if that act is in the public domain... The panel also find that, although the Knights were not being asked to participate in the solemnization of the marriage, reserving the hall for the celebration of the marriage would have required them to indirectly condone the celebration of a same-sex marriage, an act that is contrary to their core religious beliefs.”

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- *The Human Rights Code (Ontario)*
 - Part 1 of the *Human Rights Code* enumerates areas in which individuals have the right to be treated “equally” and without discrimination
 - Some examples include:

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- Section 1 which states as follows regarding the provision of services:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability. e.g. *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375

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– Or *Gilliard v. Pictou* [2005] N.S.H.R.J.D. No. 2

“I find that religion was a factor in the decision not to grant Reverend Gilliard the use of the Marina Stage. Reverend Gilliard was denied the use of the Marina Stage because his performance contained a “message”. The message was a religious message... While the Town of Pictou has the discretion to offer a service to some or all members of the public, that discretion cannot be exercised in a discriminatory way... I find that the Town of Pictou discriminated against Reverend Gilliard and his group on the basis of religion...”

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– Section 2 which states the following regarding accommodation:

2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of orientation, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.

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– Section 5 which states the following regarding 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, same-sex partnership status, family status or disability.

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- Other areas of harassment or discrimination covered by the OHRC include:
 - harassment in accommodation and employment;
 - contracts;
 - vocational associations;
 - sexual harassment in accommodation and workplaces;
 - sexual solicitation by a person in power;
 - reprisals.

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- Section 9 provides that:
 No person shall infringe or do, directly or indirectly, anything that infringes a right under this part.
- Cannot contract out of this legislation. See *Ontario v. Etobicoke*, [1982] 1 S.C.R. 202

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Part II - DEFINITIONS

- Important definitions include:
 - S.10:
 - “equal” means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination.
 - “harassment” means engaging in a course of vexatious comment or conduct that is known or ought to reasonably be known to be unwelcome.

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- S.11:

“Constructive discrimination” means a right of person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination or a prohibited ground that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- a) The requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- b) It is declared in this Act, other than in section 17, that to discriminate because of such grounds is not an infringement of a right”

S.11(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship or the person responsible for accommodating those needs, considering the cost, outside sources of funding if any, or health and safety requirements, if any.

S.13(1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or displaying before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

- S.13(2) subsection (1) shall not interfere with freedom of expression or opinion.
- See *Owens v. Saskatchewan (Human Rights Commission)*, [2006] S.J. No. 221

“The Constitution protects all dimensions of freedom or religion. However, it also accommodates the need to safeguard citizens from harm and to ensure that each of them has non-discriminatory access to education, employment, accommodation and services. In situations where religiously motivated speech involves injury or harm to others, it is necessary to subject it to reasonable limitations.”

“I do not mean by this to suggest in some blanket way that a foundational religious text itself would never be hateful or otherwise offend s. 14 (1)(b) of the Code or that it could never be used in a way that offended the Code...However, at the same time, it is apparent that a human rights tribunal or court should exercise care in dealing with arguments to the effect that foundational writings violate the Code...”

“None of this is to say, of course, that the Bible passages referred to by Mr. Owens, or any other sacred text, can serve as a license for acting unlawfully against gays and lesbians.”

Section 18 of the *Human Rights Code*:

The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

S.18.1(1) is a recent addition which addresses concerns regarding solemnization of marriage by religious officials:

The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the *Marriage Act* refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allows the sacred place to be used or otherwise assist would be contrary to:

- a) The person's religious beliefs; or
 - b) The doctrines, rites, usages or customs of the religious body to which the person belongs.
- S.18(3) "Sacred place" includes a place of worship and any ancillary or accessory facilities.

- See *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698

"The right to freedom of religion enshrined in S.2(a) of the *Charter* encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice...The performance of religious rites is a fundamental aspect of religious practice...It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under S.2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under S.1 of the *Charter*."

– Section 24 of the *Human Rights Code* permits discrimination to occur in the context of “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 saving the interests of person identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital 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;

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• Provisions such as this are given a restrictive interpretation, “since they take away rights which otherwise benefit from a liberal interpretation.” *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279

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• The nature of the employment must require the discrimination

• There must be a *bona fide* occupational requirement to justify this discrimination:

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- e.g., *Kearley v Pentecostal Assemblies Board of Education*, [1993] N.H.R.B.I.D. No. 1

“Undeniably, then, these documents reveal that there is a ubiquitous religious framework, as was the case with the school in *Caldwell*, that determines the true nature and character of the Respondent. Furthermore, emphasis is placed on the role of the teacher in achieving the arms of the Pentecostal school system. It is clear that much significance is attached to the behaviour of teachers and the example they set for students, just as was the case with the Roman Catholic School Board in *Caldwell* ...”

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“Because the Complainant conceded the Respondent’s good faith, the only question was whether or not the Respondent passed the objective branch of the test. I have concluded that in the circumstances of this matter, conformance with the religious beliefs and resulting rules of the Pentecostal Church is reasonably necessary to assure that the Respondent’s objectives are achieved. To use the language of *Brossard*, the qualification of religious conformance is rationally connected to the work of being a teacher for the Respondent.” Par. 59

- e.g., *Caldwell v Stuart et al*, [1984] 2 S.C.R.603

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- Two part test for BFOQ:

“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.”
Ontario v Etobicoke, [1982] 1 S.C.R. 202

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“It became clear from examining the jurisprudence discussed above and relating them to the facts of the two complaints before me that this Board is faced with one of the most complex legislative tasks in the human rights context. The task involves finding the balance of justice between two competing sets of individuals and group rights...In the *Caldwell* case, the court characterized the conflict as being between the right of the individual to be free from discrimination in employment and the right of a religious group to carry on its activities in the operation of its denomination school according to its religious beliefs and practices.” *Parks v Christian Horizons*, 92 CLLC II 17,008.

“The requirement of “a reasonable and *bona fide* qualification” or (BFOQ) is, in short, a statutory imposed tie-breaker.” *Garrod v Rhema Christian School*, 92 CCC II 17,003.

• To determine whether the second part of the two part test (i.e., objective requirement) is met, must answer two questions:

- (i) Is the aptitude or qualification rationally connected to the employment concerned? This allows the court to determine whether the employer’s purpose is establishing the requirement is appropriate on an objective sense to the job in question; and
(ii) Is the role properly designed to ensure that the aptitude is met without placing an undue burden on those to whom the rule applies? This allows the court to inquire as to the reasonableness of the means the employer chooses to test the presence of the requirement for the employee in question.
Brossard v Quebec ,[1988] S.C.R. 279

• e.g., Application of two part BROQ test:

- (i) *Schroen v Steinbach Bible College*
“I find that the action of SBC was, in fact, *bona fide*. I could find nothing in the evidence presented before me that would indicate that their actions or intentions were anything but *bona fide* in coming to the conclusion that they could not have Ms. Schroen, a person of the Mormon faith, and belonging to the Church of Jesus Christ of the Latter Day Saints, employed at their institution as an accounting clerk. The first part of the test is subjective..”

“However, the answer to the second part depends upon a consideration of the evidence and of the nature of the employment concerned. The nature of the employment concerned in this case has to be considered not only with the specific job duties, but also consideration must be given to allow a religious group to achieve its religious objectives...How the job or employment relates to the overall functioning in the institution where the job is performed must be considered...is it’s goals and objectives of such a paramount consideration that discrimination is necessary to fulfill these goals and objectives? As well, is the discrimination a *bona fide* and reasonable requirement for the employment or occupation?...”

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“...Although not specifically listed in any job description, it was generally understood and a basic premise at SBC that all employees, be they teachers, staff, support staff, or executives would involve themselves and regularly attend Chapel prayer meetings, attend the school retreat held each year, have students at their homes for group Bible study sessions, attend the school retreat held each year, have students at their homes for group Bible study sessions, attend the school cafeteria to have meals with students and be available at anytime to discuss faith matters with students. In short, everyone employed at SBC was expected to share in the faithful way with students espousing the Christian faith, as that was what SBC was all about.”

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“I find that the mechanical, technical and simplistically described job function duties of the accounting clerk at SBC could not be separated from the religious environment and the atmosphere of the Christian understanding and rationale and feeling that lies at the very heart and root of all the functions, activities and programs at SBC.”

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(ii) *Ontario Human Rights Commission v Christian Horizons*, 2010 ONSC 2105

“At the heart of this appeal is whether Christian Horizons is “primarily engaged” in serving the interests of persons identified by their creed. If so, is religious adherence that involves refraining from same sex relationships a reasonable and *bona fide* qualification for support workers in the Christian Horizons’ homes for people with developmental disabilities?”

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“The language and purpose of the provision [S.24(1)(a) of the Act] require an analysis of the nature of the particular activity engaged in by a religious organization to determine whether it is seen by the group as fundamentally a religious activity. This must be followed by an assessment of whether that activity furthers the religious purposes of the organization and its members, thus serving the interests of the members of the religious organization. If the organization falls within the exemption, a BFOQ assessment must follow.”

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“The onus is on the employer to establish the BFOQ defence.”

“In considering whether the objective test has been satisfied, a close examination of the nature of employment (i.e. the employees’ actual duties, functions, activities and the abilities of the employee to perform the job) is critical.”

“Accordingly, scrutiny of the actual employment in question is where the “rubber meets the road”...The employer must clearly demonstrate that the qualification in issue “is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public””.

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“A qualification of religious conformance is one that intuitively would generally not meet the objective criterion...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 and performance of the task or job in question...”

“The evidence about process is relevant to the BFOQ inquiry, as it demonstrates that Christian Horizons never did turn its mind to the reasonable necessity of the qualification in question in relation to the performance of the actual tasks of a support worker.”

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“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 particular job.”

“There is nothing about the performance of the tasks (cooking, cleaning, doing laundry, helping residents to eat, wash and use the bathroom, and taking them on outings and to appointments) that requires an adherence by the support workers to a lifestyle that precludes same sex relationships.”

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“However, from an objective perspective, the support workers are not actively involved in converting the residents to, or instilling in them, a belief in Evangelical Christianity. There is nothing in the nature of the employment itself which would make it a necessary qualification of the job that support workers be prohibited from engaging in a same sex relationship.”

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