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

Toronto – June 5, 2010

**Human Rights Concerns: What Churches and
Religious Organizations Can Do In Response**

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A. OVERVIEW OF TOPICS

- Why be Concerned about Human Rights Issues?
- Human Rights Issues and Same-sex Marriage
- Human Rights Issues and Use of Facilities
- Human Rights Issues and Lifestyle Statements
- Possible Use of Multiple Corporate Structures

B. INTRODUCTORY COMMENTS

- The purpose of this presentation is to provide comments on how churches and religious organizations can respond to legal developments with respect to same-sex marriage, facility use policies, as well as lifestyle statements
- See Church Law Bulletins #1, #7, #8, #12, #16, #22 and #29 at www.churchlaw.ca for more details
- Due to the constantly evolving state of the law in these areas, the comments that follow are by necessity fluid in nature and subject to change

C. WHY BE CONCERNED ABOUT HUMAN RIGHTS ISSUES?

- **Directors of registered charities, and consequently, churches and religious organizations, have a fiduciary duty to protect their charitable assets in the event of such claims**
 - **Case law has affirmed that charities and non-profits are not immune from liability solely because of their non-profit or charitable status: see Supreme Court of Canada decisions of *Bazley v. Currey* and *John Doe v. Bennett***

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- **The Ontario Court of Appeal in the *Christian Brothers* decision held that all assets of a charity, whether beneficially owned or held as a special purpose charitable trust, are available to satisfy the claims of tort victims upon the winding-up of a charity**
- **Therefore, the leadership of a church or religious organization must be proactive in identifying the risks with respect to potential human rights claims**

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D. HUMAN RIGHTS ISSUES AND SAME-SEX MARRIAGE

- **Background**
 - **In the summer of 2003, the federal government confirmed it would not appeal the decisions of the B.C., Ontario and Quebec courts on same sex marriage**
 - **Proposed *Civil Marriage Act* was prepared by the federal government and referred to the Supreme Court**

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- In the Marriage Reference, SCC found that
 - Section 1 of the proposed *Civil Marriage Act* extending civil marriage to same-sex couples was constitutional and its very purpose flows from the *Charter of Rights and Freedoms*
 - The *Charter of Rights and Freedoms* also protects religious officials from being compelled to perform marriages between two persons of the same sex if it is contrary to their religious beliefs

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- New Federal Legislation (Bill C-38) *Civil Marriage Act*
 - Bill C-38 received Royal Assent on July 19, 2005
 - Very similar to proposed *Civil Marriage Act* that was referred to SCC with some exceptions:
 - Very extensive preamble explaining purpose of legislation

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- Last minute amendments to *Civil Marriage Act* offers some exemptions:

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, ... solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion ...or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

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– Section 149.1 of the *Income Tax Act* is amended by adding the following:

- ...a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty... solely because it ... exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*.

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- Ontario’s *Spousal Relationship Amendment Act, 2005* added the following exemption to the Ontario Human Rights Code (“the Code”):
 18.1 (1) 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* (Ontario) 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, allow 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

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- Also added new exemptions to *Marriage Act* (Ontario):
 20 (6) A person registered under this section is not required 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 do so 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.
- Definition
 20 (7) In subsection (6), “sacred place” includes a place of worship and any ancillary or accessory facilities.

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- A “person registered under the *Marriage Act*” is defined as follows:
 20 (3) No person shall be registered unless it appears to the Minister,
 - (a) that the person has been ordained or appointed according to the rites and usages of the religious body to which he or she belongs, or is, by the rules of that religious body, deemed ordained or appointed;
 - (b) that the person is duly recognized by the religious body... as entitled to solemnize marriage;
 - (c) that the religious body ... is permanently established both as to the continuity of its existence and as to its rites and ceremonies; and
 - (d) that the person is resident in Ontario or has his or her parish or pastoral charge in whole or in part in Ontario;

E. HOW CAN CHURCHES AND RELIGIOUS ORGANIZATIONS PREVENT COMPLAINTS RELATED TO SAME-SEX MARRIAGE?

1. The Importance of Constitutional Documents

a) **The legal nature of churches and religious organizations**

- Churches and other religious organizations are a voluntary association of persons who come together for a collective purpose as reflected in their respective governing agreement, namely their constitution
- A church or religious organization's constitution is a civil law document that can only reflect church law if it is made a part of the church constitution

b) **The need for churches and religious organizations to clearly articulate their identity and beliefs through a constitution**

- Since a church or religious organization is nothing more than what the individuals forming it decide it to be, it is essential to clearly state what they believe and, where possible, relate those beliefs to Scripture
- If the church or religious organization fails to articulate what it is and what it believes, it will be left up to the courts to determine
- The church or religious organization may then be left more vulnerable to challenge under the provincial human rights legislation

- In Ontario, a church or religious organization can articulate what it believes and practices and can avail itself of subsection 18.1(1) of the Code
- For unincorporated churches, a constitution is usually a single document
- For incorporated churches and religious organizations, the constitution consists of:
 - Letters patent
 - General operating by-law
 - Policy statements
- In order to protect the charitable status of the church or religious organization under the *Income Tax Act*, it is essential to ensure that the charitable purpose of the church or religious organization includes “advancement of religion”

2. Possible Options Regarding Specific Constitutional Documents

- In light of changes in the law, churches and religious organizations can take the following steps to avoid human rights complaints
 - a) Statement of Faith
 - A statement of faith should always be part of the constitution of a church or religious organization
 - Scripture is open to differing interpretations. A more literal and/or orthodox interpretation would likely be more consistent with a position not in support of same-sex marriage

- If applicable, the church or religious organization’s statement of faith should reflect it’s theological belief in a literal and/or orthodox interpretation of Scripture
- General Scriptural passages such as those contained in the Apostle’s Creed can be inserted in the statement of faith
- However, Scriptural passages that may be construed as promoting hatred against an identifiable group may leave the church or religious organization open to civil and even criminal liability

b) Charitable Objects

- The church or religious organization's charitable objects are set out in its letters patent and should clearly indicate a religious purpose with references, where possible, to Scripture, i.e. "propagating the Gospel of Jesus Christ"
- The charitable objects should also make reference to upholding the church or religious organizations statement of faith, where applicable

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c) General Operating By-law

- The general operating by-law should define membership
- Conditions for membership could include:
 - Adherence to the church or religious organization's constitution and its statement of faith
 - Members would be subject to the authority of the church or religious organization
 - A requirement to sign a membership statement by a member indicating they agree to comply with the church constitution and its statement of faith

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- Individuals involved in or leading ministries or programs, as well as key employees, could collectively be required to be members
- The by-law should also have a provision authorizing the directors to implement operating policies for the church or religious organization, together with an effective discipline procedure

d) Policy Statements

- Policy statements can be of assistance in articulating a practical manifestation of the church or religious organizations beliefs

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– Churches and religious organizations should ensure their policy statements make reference to being applied in accordance with their statement of faith, where applicable

– Examples of the types of policy statements a church or religious organization might adopt with regard to same-sex marriage are a policy on marriage including the following, where applicable:

- If the church or religious organization does not support same-sex marriage in accordance with a literal and/or orthodox interpretation of Scriptures, the policy should contain a statement recognizing marriage as a holy sacrament and defining marriage as being between one man and one woman in accordance with its statement of faith
- Clergy should be required to subscribe to the church or religious organization’s constitution, including its statement of faith
- Marriage can only be solemnized by clergy of the local church or other clergy approved by the church who have subscribed to the statement of faith and constitution of the church or religious organization

3. Education of clergy concerning their legal rights

- It would be prudent for local churches and religious organizations and/or denominations to educate the clergy of their legal rights in relation to the fulfillment of their ministerial duties and the operations of the church or religious organization as a whole
- The *Civil Marriage Act* (Canada) recognizes the right to freedom of conscience and freedom of religion but cannot provide specific exemptions for clergy from having to perform same-sex marriages contrary to their beliefs as this is the purview of the provinces
- It is therefore important for local churches and/or denominations to provide education to both clergy and church or religious organization

F. HUMAN RIGHTS ISSUES AND USE OF FACILITIES

- Churches and religious organizations often receive requests to use their facilities from a wide variety of groups, including other charitable and non-profit organizations, businesses and individuals
 - Examples include sports clubs, self-help groups (substance abuse), day care centers, theatre groups, music schools, concert promoters, wedding parties, etc
 - This may often make a great deal of financial sense where the property is underutilized

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- Hosting events that will attract individuals to their premises may also help raise awareness of the church or religious organization's presence within the community
- However, permitting third parties to use the facilities of a church or religious organization may expose the organization to substantial risk of liability from a human rights complaint
- A facility use policy or agreement should be one component of a proactive risk management strategy for a church or religious organization

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- Churches and religious organizations face potential liability under human rights legislation where a claim may be filed against the church or religious organization with the Human Rights Tribunal of Ontario
 - See for example the British Columbia Human Rights Tribunal decision of *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544

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- In Ontario, section 18 of the Code enables church and religious organizations to restrict the use of their facilities to their membership
- The Knights of Columbus were unable to rely on the concordant exemption in British Columbia legislation because they rented their facility to individuals outside of their membership, i.e. to the general public

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- The *Marriage Act* (Ontario) extends the exemption for religious officials noted earlier to “any event related to the solemnization of a marriage,” which presumably would include a wedding reception
- Courts and tribunals will be left to interpret what part of the lands and buildings of a church or religious organization will be included as “ancillary and accessory facilities”, as well as what events will be considered to be “related to the solemnization of marriage.”
- The *Marriage Act* (Ontario) only provides protection to churches and religious organizations where their “sacred places” are being rented out to or provided for purposes associated with the solemnization of marriage
- Does not include other uses, such as a choir competition or music recitals

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- Permitting use of facilities to external third party users i.e. outside of membership may expose the church or religious organization to human rights complaints
- In renting their facilities, churches and religious organizations need to decide if there are any activities they will not permit which are subject to human rights considerations
- In renting to third party individuals outside of membership, the church or religious organization may not be able to distinguish on the basis of individual characteristics i.e. under the human rights legislation
 - i.e., race, religion, sex, sexual orientation, etc.

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G. WHAT CAN CHURCHES OR RELIGIOUS ORGANIZATIONS DO IN RESPONSE?

1. Facility Use Policies

- The facilities of a church or religious organization are there to help it achieve its charitable purposes
- These purposes can be included in a policy, to inform potential users about why the facilities exist
 - Facility use policy statements can be of assistance in articulating a practical manifestation of a church or religious organization’s beliefs

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- Facility use policy statements must be prepared in a manner that is consistent with applicable human rights legislation
- The facility use policy should prohibit any activities that represent an unreasonable risk or harm
- For church and religious organizations, a facility use policy may provide for the following:
 - Restricting use of facilities to programs and/or members and for charitable purposes which are consistent with the statement of faith and constitution
 - This will strengthen ability to refuse requests for undesirable uses of the property

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- Churches and religious organizations should ensure that their facility use policy is enforced in a consistent manner, otherwise the following may occur:
 - The church or religious organization may waive its ability to enforce
 - The church or religious organization may be vulnerable to allegations of discrimination for inconsistency in enforcement

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- The policy may outline the refusal to rent facilities or cancellation of use based on a number of reasons, including:
 - Unsatisfactory prior use
 - Non-payment of fees
 - Proposed activity does not further charitable objects of the church or religious organization
 - Terms of facility use agreement not met or complied with

- What should go into the facility use policy?
 - A statement outlining the prioritization of uses of facilities
 - Facility use could be prioritized as follows: ministry related activities, followed by wedding receptions, with external use activities being last in priority, where applicable
 - Any restrictions on activities need to be clearly stated in the policy
 - The activities identified by the charitable activities should have priority over any rentals to third parties

2. Facility Use Agreement

- A facility use agreement is a contract that establishes terms of usage for activities or events by third party individuals, organizations or businesses using a church or religious organization’s facilities
- The agreement can serve as evidence of due diligence by the church or religious organization to protect and ensure proper usage of a church’s or religious organization’s property and resources in accordance with its charitable purposes

H. HUMAN RIGHTS ISSUES AND LIFESTYLE STATEMENTS

- The recent *Christian Horizons* (2010 ONSC 2105) decision by the Ontario Divisional Court provides churches and religious organizations with insight into how to carefully plan, document and implement employee lifestyle statements where such statements are on their face be contrary to the Code

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- The relevant provisions of the Code with respect to employment are:
 - s. 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
- The Ontario Human Rights Commission takes the position that the phrase “equal treatment with respect to employment” can be interpreted to protect anyone in a work-like context, therefore this provision can also apply to volunteers

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- The *Christian Horizons* decision affirmed that in order for a church or religious organization to claim the benefit of the s.24(1)(a) exemption with regard to a lifestyle statement that is contrary to the Code, the church or religious organization must prove that:
 1. It is a religious organization
 2. It is primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified
 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 (“BFOQ requirement”)
- The Court found that in any event there was evidence of a “poisoned work environment”

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I. HOW CAN A CHURCH OR RELIGIOUS ORGANIZATION MEET THE TESTS ARTICULATED IN CHRISTIAN HORIZONS?

- 1. Is it a religious organization?**
- Both the Tribunal and Divisional Court readily concluded that Christian Horizons was a religious organization on the basis of the following indicia:
 - 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 and its members and employees are required to sign it and it is incorporated into its constitution and by-laws

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- Religious observances and practices “permeate all formal activities of the organization,” including directors’ and members’ meetings and dedication services for new programs
- Most churches or religious organizations should be able to easily meet this element if they have carefully drafted their constitutional documents to reflect their faith and practice as discussed above
- Churches and religious organizations should ensure that they have clear religious purposes stated in their objects, as well as consider incorporating their statement of faith into their governing documents, where applicable

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- 2. Is the organization primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified?**
- In Christian Horizons, the Court determined 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”

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- The decision affirms an important principal 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 Code that allows them to hire co-religionist
- The decision recognizes that churches and religious organizations serve the interests of their members whenever they undertake activities that further their religious purposes
- Churches and religious organizations can therefore rely on the decision to continue to perform social services and still be considered religious organizations

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3. Are the restrictions in employment to persons similarly identified by creed a reasonable and *bona fide* qualification because of the nature of the employment (“BFOQ requirement”)?
- Churches and religious organizations must be careful not to assume that because they are religious in nature that a requirement to adhere to a doctrinal statement for employees will qualify as a BFOQ requirement
 - The onus will be on the church or religious organization as employer to establish the BFOQ requirement

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- As the Court noted, “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.”
- In *Christian Horizons*, there was no evidence that the leadership of the organization did a close examination of the nature and essential duties of its support worker, or why adherence to a lifestyle statement was necessary in relation to those duties

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- A BFOQ contrary to the Code, "...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"
- Therefore, churches and religious organizations that wish to utilize lifestyle statements that contain discriminatory qualifications must review them and tie them directly and clearly to their doctrinal statement and to the execution and performance of an employee's position

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- The Court stated that the evidence about process is relevant to the BFOQ inquiry
 - In this regard, the leadership of the church or religious organization must evidence that it carefully considered the "nature and essential duties" of its employees
 - All employees in the over 180 homes run by Christian Horizons had the exact same job title, description and function
 - Therefore, it is important to consider what job titles and descriptions are given to employees in order to determine which positions can be directly connected to certain prohibitions under the Code

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- Evidence of this analysis should be found in minutes of meetings held by the church or religious organization board, as well as possibly membership meetings, to confirm that the church or religious organization has discharged its burden to show that the BFOQ requirement is reasonable and bona fide because of the nature of the employment
- For example, the job description for the church secretary must detail his or her role in contributing to the ministry of the church and being the "hands" of the pastor or minister in fulfilling the mission of the church

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4. Is there a “Poisoned Work Environment?”

- The *Christian Horizons* decision provides little guidance as to what constitutes a “poisoned work environment” and whether the test is objective, subjective or has elements of both
- Therefore, churches and religious organizations should keep in mind that satisfying all the elements of the statutory exemption under s. 24(1)(a) will not necessarily protect them if they are found to have created a “poisoned work environment.”

- Churches and religious organizations must therefore be careful to ensure that they do not create or permit an environment in which rumours and discriminatory attitudes are allowed to pervade the workplace
- Specifically, churches and religious organizations need to be proactive to ensure that the sorts of elements that result in creating a negative work environment do not exist, and that all employees are treated with respect and dignity, even in their dismissal
- Damages as a result of a “poisoned work environment” can easily be avoided if employers treat all employees with candor and respect

J. POSSIBLE USE OF MULTIPLE CORPORATE STRUCTURES

- In CSP-026, *Guidelines for the Registration of Umbrella Organizations and Title Holding Organizations*, CRA defines “a charitable umbrella organization” to be “one that works to achieve a charitable goal by supporting, improving and enhancing the work of groups involved in the delivery of charitable programs”
- The Guidelines recognize “promoting the efficiency and effectiveness of other registered charities” is a valid charitable purpose

- CRA takes the position that “providing a service or assistance that directly improves the charitable programs of other registered charities, that improves the efficient administration of other charities, or that enables charities to realize economies of scale that they could not achieve on their own, is charitable”
- In this regard, a church or religious organization could establish a parallel operating charity which would provide assistance to the church or religious organization by acting as an employment management corporation to supply employees to the church or religious organization in order to improve its efficiency of administration

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- Parallel operating charities are often used when an incorporated charity has one or more operating divisions with a greater degree of liability exposure (e.g. a school or an AIDS-HIV clinic)
- In this case, the potential liability associated with human rights issues involving employees would be moved to a separately incorporated entity to contain potential human rights liability in order to protect the assets of the church or religious organization

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- The parallel operating charity, however, must still evidence the same due diligence with respect to establishing adherence to a lifestyle or doctrinal statement as being a BFOQ
- The parallel operating charity must operate at arms length from the church or religious organization in order to avoid cross-over liability
- For more information on this subject, see Terrance S. Carter, “Strategies for Protecting Charitable Assets through Multiple Corporation Structures” given at the Canadian Institute’s 8th National Summit, online at: <http://www.carters.ca/pub/article/charity/2008/tsc0331.pdf>

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