Ontario
Human Rights Commission
Commission ontarienne des
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The shadow of the law:
Surveying the case law dealing with competing rights claims

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Introduction

We live in an increasingly diverse and complex society in which all citizens enjoy a variety of rights, freedoms and corresponding obligations. It is inevitable that legal rights may sometimes encroach on one another.

While cases dealing with competing human rights or equality rights claims are relatively rare, there are legal decisions which provide some guidance on the key legal principles people can use when resolving competing rights claims. There is no set formula for dealing with these tensions, but courts, in particular the Supreme Court of Canada, and tribunals have developed and refined legal tools to reconcile competing rights situations. Such situations include tensions between freedom of expression or religion and the right to a fair trial; the right to privacy and the right to disclosure of all relevant information in both criminal and civil proceedings; religious freedoms and the right to be free from discrimination based on sexual orientation or gender, to name just a few.

The Ontario Human Rights Commission is developing a policy framework to address competing rights claims. The goal is to provide guidance to organizations, policy makers, litigants, adjudicators and others on how to assess, handle and potentially resolve competing rights claims.

This document explains the legal backdrop for the Commission's Policy Framework. It is divided into two main sections. The first provides an overview and summary of key legal principles from some significant legal decisions. This section aims to help readers understand the relevant legal background when seeking to conciliate or otherwise reconcile competing rights claims. The second part of the document surveys the leading cases that deal with competing rights. It also provides examples of situations where the leading cases, and the key principles from them, have been applied by courts and tribunals. It is divided by the types of rights conflicts that most commonly arise. The cases are discussed in some detail as the specific factual context of each case is so important to the rights reconciliation process.

Key principles

The case law is clear that, where rights appear to be in conflict, *Charter* principles require a "reconciliation" that fully respects the importance of both sets of rights. As noted by Justice Iacobucci, in an article entitled "'Reconciling Rights' The Supreme Court of Canada's Approach to Competing *Charter* Rights,"[1] and as cited with approval by the Ontario Court of Appeal:[2]

> …it is proper for courts to give the fullest possible expression to all relevant *Charter* rights, having regard to the broader factual context and to the other constitutional values at stake.

[1] (2002), 20 S.C.L.R. (2d) 137 at 140.
[2] *R. v. N.S.*, 2010 ONCA 670 at para 47 [hereinafter "Niqab decision"].

However, the cases don't tell us exactly how to achieve a 'reconciliation' of rights. There are no set formulas or "bright-line rules"[3] for dealing with competing rights claims. Rather legal decisions have identified a number of fundamental principles that provide guidance in how to approach, as well as what to avoid, in dealing with a competing rights claim.[4] Many of the principles are abstract, allowing for some flexibility in approaching claims on a case-by-case basis. It is also clear that the law in this area continues to evolve, with new legal developments, such as the recent decision of the Ontario Court of Appeal in the so-called "Niqab decision" continuing to increase our understanding of how to address competing rights claims.[5]

A consistent principle in the case law is that no legal right is absolute but is inherently limited by the rights and freedoms of others.[6] For example, in the context of freedom of belief or religion, the courts have found that the "freedom to hold beliefs is broader than the freedom to act upon them" where to do so would interfere with the rights of others. Other examples include limiting the right to freedom of expression guaranteed by s. 2(b) of the Canadian *Charter of Rights and Freedoms* (the *Charter*) where the expression could have the effect of compromising a fair trial guaranteed by s. 11(d) and s. 7 of the *Charter,*[7] inciting hatred as defined in the *Criminal Code of Canada* and some human rights legislation,[8] or resulting in discrimination against a minority group in our society.[9]

Related to this is the recognition that there is no hierarchy of *Charter* rights;[10] all rights are equally deserving and an approach that would place some rights over others must be avoided.[11] Instead legal principles require a balance to be achieved that fully respects the importance of both sets of rights.[12]

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[3] *Ibid.* at para. 97.

[4] Examples of "what not to do" in a competing rights scenario include: (1) treating any right as absolute; (2) regarding any rights as inherently superior to another; (3) accepting a hierarchy of rights; and (4) approaching rights in the abstract or in a factual vacuum.

[5] The Supreme Court of Canada has recently granted leave to appeal a Saskatchewan Court of Appeal decision dealing with the tension between freedom of expression and religion and a provision in the *Saskatchewan Human Rights Code* prohibiting a publication that exposes or tends to expose persons to hatred, ridicule, belittles or otherwise affronts dignity on the basis of a prohibited ground of discrimination. It therefore appears likely that there will be further developments in this area after the Supreme Court hears this appeal and renders its decision. See *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26 (CanLII), leave to appeal to SCC granted October 28, 2010. It has also granted leave to appeal the Ontario's Court of Appeal's Niqab decision.

[6] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 29, *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141 at p. 182, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 226.

[7] *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835.

[8] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

[9] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

[10] Note that there may be a hierarchy of *Charter* vs. non-*Charter* rights and *Code* vs. non-*Code* rights. The *Charter* has primacy over all laws in Canada. As well, quasi-constitutional rights contained in human rights laws generally have primacy over non-constitutional legal rights (see for example s. 47(2) of the Ontario *Human Rights Code*).

[11] *Dagenais, supra* note 7; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 61.

[12] *Trinity Western, supra* note 6 at para. 31; *Dagenais, supra* note 7 at p. 877.

With these overarching principles in mind, the courts have outlined some steps to be used when competing rights situations arise. First, the courts have suggested that for a competing rights scenario to arise at all, a legal right must first be found to exist.[13] Not every rights claim, when the facts and law are set out clearly, in context, will be found to be legally valid. This validation process may be seen as having two components: (1) does the claim engage a legal right or is it being mischaracterized as such; and (2) when the evidence is examined, can the individual with the claim bring himself or herself within the asserted right.[14]

With regard to the first element of this process, namely determining whether a claim engages a legal right or is being mischaracterized as such, human rights tribunals have considered and rejected several justifications for discriminatory conduct which could be characterized as competing rights. For example, "customer preference" or "business or economic rights" have not been accepted as a valid competing right in cases involving discrimination contrary to human rights legislation.[15] Similarly, in an Ontario Board of Inquiry decision concerning someone's refusal to sell his property to a racialized person, the notion that individuals have the liberty, guaranteed by s. 7 of the *Charter*, to determine who they wish to sell their private property was not adopted. The Board found in the circumstances of the case that liberty rights did not extend to the liberty to discriminate on the basis of a prohibited ground in the public sale of private property.[16]

If the claim does engage a legal right, it is then necessary to consider whether on the facts of the case, the individual can bring him or herself within that right. Evidence may need to be called to prove that the claim falls within the parameters of the right unless the engagement of the right is clear from the circumstances.[17]

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[13] Niqab decision, *supra* note 2 at paras. 49 and 65.

[14] For example, a claim that there is an interference with freedom of religion may not be found to be legitimate if, on the facts of the case and in the relevant context, the asserted religious belief is not found to be sincerely held. In *Bothwell v. Ontario (Minister of Transportation),* 2005 CanLII 1066 (ON S.C.D.C.) the Court considered all the evidence in relation to the claimant's objection to a digital driver's licence photograph for religious reasons and found that the claimant did not meet his burden of establishing a sincerely held religious belief as set out in the Supreme Court decision in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 S.C.R. 551. The Court was influenced, in part, by the fact that the claimant had raised a number of privacy, rather than religious, concerns and that his actions were inconsistent with his asserted religious beliefs. Another example of failing to bring oneself the right would be if asserting the right to free expression concerning activity that (a) does not convey or attempt to convey a meaning, and thus has no expressive content, or (b) which conveys a meaning but through a violent form of expression; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

[15] See for example: *Giguere v. Popeye Restaurant*, 2008 HRTO 2 (CanLII) citing a number of other human rights decisions. In *Giguere* the Tribunal stated: "Economic interests and rights do not trump human rights, unless there is a specific exemption in the legislation." (at para. 77).

[16] *Grant v. Willcock* (1990), 13 C.H.R.R. D/22 (Ont. Bd.Inq.).

[17] In the Niqab decision, the court noted that unlike an accused's right to make full answer and defence in a fair trial, a witness' right to freedom of religion is not inherently triggered by participation in the criminal justice process. A witness who seeks to exercise a religious practice while testifying must establish that the practice falls within the scope of the right to freedom of religion. That inquiry must almost inevitably involve testimony from the witness explaining the connection between the practice and his or her religious beliefs, although in most cases the inquiry would be relatively straightforward; Niqab decision, *supra* note 2 at paras. 65-66. In a BC Human Rights Tribunal decision, the applicant was found not to have alleged facts "from which a nexus could be inferred" between the alleged adverse treatment she received and her

An example of a claim that may be seen as one falling outside the asserted right is the Supreme Court of Canada decision in *R. v. Kapp*.[18] In that case, mainly non-Aboriginal commercial fishers asserted a breach of their equality rights under s. 15 of the *Charter* as a result of a program granting members of three Aboriginal bands communal fishing licences during a 24 hour period. The Court concluded that while there was a distinction imposed on the basis of race, the program did not constitute discrimination under s. 15 of the *Charter* as it was an "ameliorative" government program aimed at achieving substantive equality by helping a disadvantaged group, within the meaning of s. 15(2) of the *Charter*. The Court noted the communal right of Aboriginal persons to fish for food, social and ceremonial purposes.[19]

While this Aboriginal right has not been recognized by the courts as extending to commercial fishing, the Court considered Aboriginal fishing rights claims as part of the government's ameliorative purpose for the program. The Court did not agree on the significance of the applicability of s. 25 of the *Charter*, a section which states that the guarantee of certain rights and freedoms in the *Charter* shall not be applied in a way that takes away from certain Aboriginal rights including treaty rights and "other rights and freedoms" derived from the Royal Proclamation or from land claims agreements. The majority of the court preferred to view s. 25 as "an interpretive provision informing the construction of potentially conflicting *Charter* rights". However, Justice Bastarache would have dismissed the s. 15 argument on the basis of s. 25 of the *Charter*, in essence giving this provision primacy over other *Charter* rights.

Once the competing constitutional issues are identified and described, the rights must be defined in relation to one another by looking at the underlying context in which the apparent conflict arises.[20] This contextual approach is critical, as the courts have repeatedly held that *Charter* rights and human rights do not exist in a vacuum and must be examined in a contextual manner in order to settle conflicts between them. When reconciling a conflict between competing rights, all the facts and the constitutional values at stake must be appreciated and understood.[21] This "scoping of rights" allows some rights conflicts to be avoided altogether and assists in resolving others.

Several considerations come into play in scoping the rights. It is necessary to determine whether there is an actual intrusion of one right into the other. There is no conflict unless there is an actual burden on other rights.[22] The mere recognition of rights of one group

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religious beliefs. Therefore, there was insufficient evidence to establish that a religious right was engaged; *Chiang v. Vancouver Board of Education*, 2009 B.C.H.R.T. 319 at para 115.

[18] [2008] 2 S.C.R. 483.

[19] As recognized in decisions such as *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[20] *Mills*, *supra* note 11; *Trinity Western*, *supra* note 6.

[21] *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (S.C.C.), [1990] 2 S.C.R. 1086 at 1099-1101; *MacKay v. Manitoba*, 1989 CanLII 26 (S.C.C.), [1989] 2 S.C.R. 357 at 362-363, 366; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (S.C.C.), [1992] 1 S.C.R. 236 at 253-255.

[22] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 46. Providing rainbow stickers to a teacher (which show support for gay, lesbian, bisexual and transgendered persons), with the choice of

(e.g. the legalization of same-sex marriage) cannot, in itself, violate the rights of another (e.g. religious groups who do not recognize the right of persons of the same sex to marry) unless there is an actual impact on the rights of another (e.g. religious officials being asked to perform same-sex marriages). Similarly, speculation that a rights violation may occur will not suffice. There must be evidence, and not just an unsupported assumption, that the enjoyment of one right will have a detrimental effect on another. For example, requiring teaching students to adhere to certain "community standards" prohibiting "homosexual activity" does not mean that graduates of the teaching program will discriminate against or show intolerance towards their students based on sexual orientation.[23]

The exercise of properly scoping rights by examining all the facts and constitutional values at stake may result in finding that some rights are not in actual conflict and can be reconciled. For example, in a complex decision dealing with the religious objection of Jehovah's Witness parents to a potentially life sustaining blood transfusion for their newborn child, a minority of the Supreme Court found that there was ultimately no conflict between the parent's freedom of religion and the right to life, liberty and security of the person of the child because the parent's right to freedom of religion did not extend to making faith-based medical choices that could harm their child.[24] By defining freedom of religion in this way, a conflict between rights was avoided. However, the majority of the Court did find that freedom of religion extended to the right of parents to rear their children according to their religious beliefs and left the balancing between the parents' freedom of religion and the child's right to life, liberty and security of the person to s. 1 of the *Charter*. Ultimately, the restrictions on parental rights were found to be justified under s. 1 of the *Charter* because of the best interests of the child and the importance of protecting children at risk.

However, it appears that in other contexts, where the scoping exercise does not permit full reconciliation, it may be necessary to determine the extent of the interference with the rights in question. If an interference is minor or trivial, the right is not likely to receive protection.[25]

If there is a substantial interference with the rights in question, it is necessary to engage in some sort of balancing or weighing of the rights and to have one right give way to the other or have both rights compromised. It appears from the law that one set of rights are more likely to be circumscribed in situations where the impingement relates to activity that would be contrary to the "core", or a fundamental aspect, of another individual's rights. For example, the courts have drawn a distinction between requiring religious

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whether to display the stickers being entirely voluntary, was found not to create any burden on disadvantage on religious rights; *Chiang, supra* note 17 at para 36.

[23] *Trinity Western, supra* note 6.

[24] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, *supra* note 6.

[25] In *Amselem*, *supra* note 14, the Supreme Court refused to engage in a balancing under section 1 of the *Charter* between freedom of religion as it impacted on the right to peaceful enjoyment and free disposition of property as the effect on the former was substantial while the effect on the latter was considered "at best, minimal" and could not be considered as validly limiting religious freedom (at paras 57 and 60).

officials to perform same-sex marriages contrary to their religious beliefs[26], which involves a fundamental aspect of religious practice, and an individual operating a business that refuses to offer its printing services to a same-sex organization. In the later case, the court noted that commercial enterprise is at the "periphery" of freedom of religion and accordingly in the circumstances of that case, the religious rights had to give way to the right to be free from discrimination based on sexual orientation.[27]

In addition, while the courts have consistently acknowledged that individuals are free to hold religious beliefs or express their opinions on matters, they have also made clear that there are limits to how these beliefs and opinions may be acted upon where they may deny equal recognition and respect to members of a minority group in society. For example, the rights to freedom of expression and religion have been limited where the inherent dignity and equality of individuals protected under human rights legislation is significantly engaged, such as where the writings of a teacher were found to have poisoned the educational environment for his Jewish students.[28]

In another case, the religious beliefs of parents were found to be an inappropriate basis for excluding discussions of same-sex parented families in the school curriculum. The majority of the Supreme Court of Canada noted that while parents need not abandon their views with respect to same-sex relationships, the school system could not exclude certain lawful family models because of these parental beliefs and that parental beliefs must be accommodated in a way that respects diversity and promotes tolerance in the school community. The Supreme Court appeared to be suggesting that this was a reasonable resolution of the tension between both sets of rights stating: "This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others."[29]

Similarly, when a conflict arises that truly impacts on a person accused of a crime's right to make full answer and defence, that right will prevail and the countervailing right will be required to yield as our justice system has always held that the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice.[30]

Potential compromises to both sets of rights, recently described as "constructive compromises" by the Ontario Court of Appeal, are also part of the reconciliation process. These compromises "may minimize apparent conflicts … and produce a

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[26] *Reference re Same-Sex Marriage*, *supra* note 22.
[27] In *Brockie v. Brillinger (No. 2)*, (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.), the Divisional Court noted that Mr. Brockie's exercise of his right to freedom of religion in the commercial marketplace is, at best, at the fringes of the right. Therefore limits on his right to freedom of religion were found to be justified where it would cause harm to others, namely by infringing their *Code* right to be free from discrimination based on sexual orientation. The court left open the possibility that a different conclusion could be reached if the material being printed contained material that "might reasonably be held to be in direct conflict with the core elements of Mr. Brockie's religious beliefs." (at para. 56)
[28] *Ross*, *supra* note 9.
[29] *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at paras. 19-21 and 33.
[30] Niqab decision,*supra* note 2 at paras. 88-89; *Mills, supra* note 11 at para. 89.

process in which both values can be adequately protected and respected."[31] Searching for compromises involves exploring measures that may lessen any potential harm to each set of rights. For example, in the Niqab decision, the court suggested a number of measures a judge could explore that might allow for reasonable adjustments to both the witness' freedom of religion and the accused's right to make full answer and defence. This process of looking for options to reconcile rights resembles the process that must be followed as part of the duty to accommodate in the human rights context. Similarly, in cases such as *Dagenais* the Supreme Court directed courts considering a request for a publication ban to search for a "reasonably available and effective alternative measure" which would achieve the important objectives at stake. In *O'Connor,*[32] a case involving a victim's right to privacy in medical records and an accused's right to make full answer and defence, a balance was achieved by first providing the disputed records to the court to review.

Statutory defences must also be considered in a competing rights analysis. The Supreme Court of Canada and other decision-makers have noted that provisions in human rights legislation that provide defences to what would otherwise amount to discrimination may reflect the Legislature's attempt to reconcile competing rights situations. In *Caldwell v. Stewart,*[33] the Supreme Court of Canada concluded that the protection for Catholic schools contained in the British Columbia *Human Rights Code*, protected the right of a religious group to operate its denominational school according to its religious beliefs and practices. Therefore, although the decision not to renew a contract of a Catholic teacher who had married a divorced man in a civil ceremony, contrary to the church's rules regarding marriage, would have otherwise been discriminatory, the Court accepted that the respondent school had the "right" to preserve the religious basis of the school by employing teachers who accept and practice the teachings of the church.

The Court stated that as the Legislature had specifically enacted a defence to extend rights to denominational schools and similar institutions, the defence should not be narrowly interpreted: "This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights."[34] A similar conclusion was reached in respect of a similar provision in the Quebec *Charter of Human Rights and Freedoms*. The Supreme Court noted that a defence which allowed certain organizations of a charitable, political or religious nature to make some distinctions in respect of persons employed had a dual purpose. It both conferred rights on some persons, namely the right to freely associate for the purpose of expressing particular views or engaging in particular activities, and limited the rights of others to be free from discrimination in employment.[35]

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[31] Niqab decision, *supra* note 2 at para. 84.
[32] [1995] 4 S.C.R. 411.
[33] [1984] 2 S.C.R. 603.
[34] *Ibid. at* p. 626.
[35] *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279. The specific provision at issue read (at that time): "A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

As a result, where a human rights defence appears to recognize a competing right to the right to be free from discrimination, an appropriate approach to statutory interpretation becomes particularly important. Such an approach involves a careful consideration of the wording of the section (including a consideration of both the English and French versions), the scheme of the whole statute and the intention of the Legislature (which could include a consideration of the legislative history of the provision). Ultimately, in interpreting such a provision, one must ask its purpose. If it is found to have a dual purpose: namely to both recognize the rights of some persons and limit the rights of others, the provision should not be construed narrowly.[36] Nevertheless, any individual or organization wanting to rely on such an exemption provision will still be required to show that their situation falls squarely within the criteria of the relevant section.[37]

Legal decisions dealing with competing rights

What follows is an in-depth survey of case law reconciling a variety of rights and interests that have come into conflict. Where it is important to fully appreciate the outcome of the case, details regarding the full factual context are provided. While this section is divided according to the most common types of rights conflicts, as noted in the *Legal Principles* section many of the key principles established apply regardless of the particular combination of rights at play.

Freedom of expression, fair trial and the administration of justice

While freedom of expression, a fair criminal trial and concerns for the administration of justice may not appear to directly relate to human rights as protected in human rights laws, one of the leading competing rights decisions arose out of a situation that engaged these rights.

In *Dagenais v. Canadian Broadcasting Corp*.[38], the Supreme Court of Canada set out a framework for balancing freedom of expression and the right to a fair trial. The Court established several key principles which have since been found to apply to a variety of competing rights claims.

The Court was asked to consider a publication ban ordered by a lower court which would have prevented the Canadian Broadcasting Corporation from airing a mini-series showing a fictional account of sexual and physical abuse at a Catholic boy's school in Newfoundland during the trial of several members of a Catholic religious order. They were charged with physical and sexual abuse of young boys at schools in Ontario. The request for the publication ban required the court to balance the key constitutional rights of free expression (s. 2(b) of the *Charter*) and the right to a fair trial (s. 11(d)).

[36] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII).
[37] *Martinie v. Italian Society of Port Arthur* (1995), 24 C.H.R.R. D/169 (Ont. Bd. of Inquiry).
[38] *Supra* note 7.

The Supreme Court confirmed that all rights have equal status and no right is more important than the others[39]:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

In re-formulating the approach to publication bans in the criminal trial context, the Court incorporated a contextual approach that requires considering the facts of the case as well as balancing of the rights to free expression and fair trial rights. The Court also noted the importance of considering whether alternative measures are available that could achieve the objective of the publication ban.

The Court concluded that in this case the publication ban that had been ordered by the lower court could not be upheld. While the ban was clearly directed toward preventing a real and substantial risk to the fairness of the trial, it was too broad. It prohibited broadcast throughout Canada and even banned reporting on the ban itself. In addition, reasonable alternative measures were available to achieve the objective without limiting the expression rights to this degree.

In a later decision, *R. v. Mentuck*,[40] the Supreme Court modified the test to better suit a different context. In *Mentuck* concerns for the administration of justice, rather than fair trial rights of the accused, were engaged. The Crown asked for a publication ban to protect the identity of police officers and the effectiveness of undercover police operations. Both the media and the accused opposed the ban. The trial judge granted a one-year ban as to the identity of the police officers but refused to grant a ban with respect to the methods used by the police to conduct their undercover operations.

The Supreme Court noted that the facts of the case "invoke a different purpose and different interest from those raised by the facts of *Dagenais*. Thus, a literal application of the test as set out in *Dagenais* will not properly account for the interests to be balanced."[41] Therefore, the Court reformulated the *Dagenais* test to better recognize that publication bans may trigger more interests and rights than just the rights to trial fairness and freedom of expression. The Court again emphasized the importance of considering the particular factual context when balancing the rights and interests at issue[42]:

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[39] *Ibid*. at p. 877.
[40] [2001] 3 S.C.R. 442.
[41] *Ibid.* at para. 28.
[42] *Ibid*. at para. 37.

> It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner.

The Court agreed with the trial judge that the ban on the identity of the officers was necessary to prevent a serious risk to the proper administration of justice, but that a ban on disclosing details of the undercover operation was not.

The Supreme Court once again considered the *Dagenais* analysis in the context of confidentiality orders in court proceedings. In *Sierra Club of Canada v. Canada (Minister of Finance)*[43], the Court dealt with an application by Atomic Energy of Canada Ltd. for a confidentiality order for documents containing highly sensitive commercial information. The lower courts had all declined to grant the confidentiality order. The Supreme Court once again applied the considerations in *Dagenais* to the particular context of freedom of expression and open and accessible court proceedings. This time, the Supreme Court found that the confidentiality order should be granted. Disclosing the confidential documents would impose a serious risk to an important commercial interest of AECL and there was no reasonable alternative measure to granting the order.

The Human Rights Tribunal of Ontario (the "HRTO") has applied *Dagenais* and other decisions dealing with requests for confidentiality orders and publication bans in human rights proceedings. These orders are typically requested in the human rights context to protect the privacy interests of parties or participants in the proceedings, to ensure a fair hearing and the integrity of the Tribunal's processes, and to promote accessibility to the human rights system.[44] Like the courts, the HRTO has required a sufficient factual basis for a publication ban, through actual evidence supporting the request[45]. In addition, the HRTO has considered each request in light of the particular factual context, has balanced freedom of expression against other interests engaged by the request for the publication ban and has tried to limit any impact on rights as much as possible:

> Mindful of the criteria in *Dagenais, supra,* it appears to me that a publication ban which restricts only the public identification of the applicant and does not otherwise compromise the openness of the hearing or the media's ability to report on the case strikes an appropriate balance between the applicant's obvious privacy and dignity interests and the public's right to know about the case. Other than granting the applicant's request, I cannot at this stage see a "reasonably available and effective alternative measure" which would achieve the important objectives which have been identified. It seems to me that the proposed partial publication ban is as limited as

[43] [2002] 2 S.C.R. 522.
[44] *August v. Richland Marketing Inc*., 2003 HRTO 25 (CanLII); *Nourhaghighi v. Toronto Catholic District School Board*, 2009 HRTO 1519 (CanLII); *Steele v. Ontario (Minister of Community Safety and Correctional Services)*, 2010 HRTO 1019 (CanLII); *XY v. Ontario (Government and Consumer Services)*, 2010 HRTO 1906 (CanLII).
[45] See for example, *Marakkaparambil v. Ontario (Health and Long-Term Care)*, 2007 HRTO 24 (CanLII).

possible, while still achieving the desired objectives; and there is proportionality between the salutary and deleterious effects of the ban.[46]

Privacy, full answer and defence and equality

A number of decisions dealing with the production of medical or other sensitive records in the context of court or tribunal proceedings have considered the relationship between privacy and equality rights and the right to make full answer and defence. Similarly, decision-makers have grappled with reconciling privacy interests and human rights when deciding how to deal with requests for production of personal records which might be relevant to determining whether an incident of discrimination or harassment, contrary to a human rights law, has occurred.

In *R. v. O'Connor*[47], the Supreme Court of Canada established a procedure for determining when a victim's medical and therapeutic records, in the possession of third parties such as physicians, must be released to the accused in order for meaningful full answer and defence.[48] The majority of the Court set out a two-step process in which the accused (or person seeking production) first has the burden of establishing that the information sought is likely to be relevant. If likely relevance is shown, the records are produced to the judge or decision-maker to examine the records and to determine whether they should be given to the person asking for them. In balancing the competing rights in question, decision-makers are to examine the scope of the rights in a contextual manner; for example by considering, among other things, the degree to which the record is necessary for the accused to make full answer and defence, the nature and extent of the reasonable expectation of privacy in the record, whether production of the record would be based on any discriminatory belief or bias and whether potential prejudice to the person's dignity, privacy or security of the person would be result from production of his or her medical record.

After the decision in *O'Connor*, the federal Parliament amended the *Criminal Code* to create a statutory process for the production of records in sexual assault trials that was different from the *O'Connor* approach. Then, in *R. v. Mills* the Supreme Court of Canada considered a *Charter* challenge to these provisions. The Court engaged in an extensive contextual scoping of the rights and principles at issue, namely full answer and defence, privacy and equality.

The Court noted that no right may be defined in a way as to negate the other and "[n]o single principle is absolute and capable of trumping the others; all must be defined in light of competing claims."[49] This notion that no right automatically trumps the other is another important principle in addressing competing rights claims.

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[46] *XY*, supra note 44 at para. 12.
[47] *Supra* note 32.
[48] The *O'Connor* procedure is now recognized as a general mechanism at common law for ordering production of any record beyond the possession or control of the prosecuting Crown, but is not limited to cases where third party records attract a reasonable expectation of privacy; *R. v. McNeil*, [2009] 1 S.C.R. 66.
[49] *Mills, supra* note 11 at para. 61.

The Court returned to its framework as set out in *Dagenais*, namely to seek a balance that fully respects the importance of both sets of rights. The court also again emphasized the contextual approach to rights reconciliation:

> This illustrates the importance of interpreting rights in a contextual manner – not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.[50]

The Court reviewed the relevant principles and rights in detail, with an "acute sensitivity to context" and concluded that the scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses. The court emphasized that the weight to be granted to the interests protected must be determined on a case-by-case basis. Ultimately where a lack of disclosure of third party records would result in an accused being unable to make full answer and defence, the accused's right must prevail as the threat of convicting an innocent person strikes at the very heart of the principles of fundamental justice.[51]

In *R. v. McNeil*[52], the Supreme Court of Canada once again confirmed the role of the *O'Connor* procedure for ordering production of records held by third parties. The Court noted that the first step in the *O'Connor* process is to assess whether the document is "likely relevant" to the proceeding. The second stage involves balancing the competing interests at stake in the particular circumstances of the case. The Court noted that with few exceptions, an accused person's right to make full answer and defence to criminal charges will outweigh any competing privacy interest. However, it is still important to take steps to minimize the impact on privacy, for example by ensuring only relevant information is produced and restricting who may have access to the information.

Similar considerations have informed decisions dealing with production of records, privacy and equality rights in the civil and human rights context. In *M. (A.) v. Ryan*, the Supreme Court of Canada considered whether in a civil action for damages, the defendant's right to relevant material in order to answer the case against him should outweigh privacy and equality interests of the plaintiff. Once again considering the relevant context, the Court noted that while in a criminal trial the defendant may lose his or her liberty, in a civil suit what is at stake for the defendant is money and reputation. These interests, when balanced against privacy interests of the complainant, may result in a different outcome in the rights reconciliation process: "As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may

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[50] *Ibid*.
[51] It may be observed that in concluding that if after scoping the relevant rights having regard to the full factual context, if an accused's right to make full answer and defence is compromised, it must prevail over privacy rights, the Court does recognize a hierarchy of rights where one right trumps another; see also Niqab decision.
[52] *Supra* note 48.

not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production."[53]

The Human Rights Tribunal of Ontario has balanced the competing interests of privacy, on the one hand, versus the ability either to establish a claim of discrimination or to make full answer and defence to one, on the other. Where a party has requested the production of sensitive information such as medical records or employment records, the Tribunal has been faced with the same "conflicting considerations" as the courts in the cases discussed above. To date, the Tribunal has not set out a single procedure to be followed in all cases where this issue has arisen; however, in many decisions, particularly where the privacy interests in the records are significant, it has adopted the approach in *O'Connor* and as the best means to balance privacy interests against a record's importance in determining whether or not a violation of the *Human Rights Code* has occurred.[54]

Freedom of religion and full answer and defence

A unique set of circumstances in the criminal context has led to an opportunity for the Supreme Court of Canada to consider an apparent conflict between the constitutional right to freedom of religion of a witness in a criminal proceeding and the constitutional right of the accused to make full answer and defence. The appeal in *R. v. N.S.* (the Niqab decision) is set to be heard by the Supreme Court of Canada in December 2011.

The witness, N.S.[55] is an alleged victim of historical sexual assaults. She is also a Muslim woman who sincerely believes that for religious reasons she must wear a veil (also known as a Niqab) covering her face, except her eyes, while testifying in court. The two accused, an uncle and a cousin, argue that allowing N.S. to testify against them with her face covered would compromise their fair trial rights. In its decision, the Ontario Court of Appeal set out a process for a decision maker, in this case a preliminary inquiry judge, to use to determine how to balance the complex rights at play.

Before beginning any constitutional analysis, the court noted that "it is important to remind one's self of what is at stake in human terms."[56] The court outlined the very real impact that each person's *Charter* rights could have on the other. Faced with this apparent "collision" of rights, the court highlighted several key principles from earlier decisions, namely: (1) the court must attempt to reconcile the rights so that each is given full force and effect within the relevant context; (2) no *Charter* right should be treated as absolute; (3) no right should be regarded as inherently superior to the other; and (4) rights cannot be considered in the abstract – the specific factual context must be considered. In emphasizing the importance of context, the Court observed:

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[53] [1997] 1 S.C.R. 157 at para. 36.
[54] See *McEwan v. Commercial Bakeries Corporation*, 2004 HRTO 13 (CanLII); *Washington v. Toronto Police Services Board*, 2009 HRTO 217 (CanLII); and *King v. Toronto Police Services Board*, 2009 HRTO 64 (CanLII).
[55] A publication ban has been ordered in the case and only the initials of the alleged victim and accused are to be used.
[56] *Supra* note 2 at para 45.

"Reconciling competing *Charter* values is necessarily fact-specific. Context is vital and context is variable. Bright line rules do not work."[57]

The Court first described the fair trial rights engaged by N.S.'s request to testify with her face covered. It noted that trial fairness is not measured only from the perspective of the accused but also takes into account society's broader interest in ensuring a process that leads to accurate verdicts and respects the dignity of all those involved. Cross-examining a witness with a covered face could compromise trial fairness by affecting the judge's ability to assess the witness' demeanour, which is relevant to the witness' credibility and the reliability of her evidence. As well, it could compromise the ability of the person conducting the cross examination to effectively question the witness by removing the ability to respond to non-verbal communication, such as facial expressions. Ultimately, whether an accused who is denied the right to see the full face of a witness loses his constitutional right to make full answer and defence will depend on a fact-specific inquiry based on the circumstances of the particular case and other legitimate interests.

Next, the Court considered the religious rights of the witness under s. 2(a) of the *Charter.* It noted that freedom of religion is a broad right. It is triggered when a person demonstrates a sincere belief in a practice that is linked to his or her religious beliefs which is interfered with in a way that is more than trivial or insubstantial. The Court also noted that the protection given to religious beliefs is greater than that given to actions motivated by those beliefs. A witness who asks to exercise a religious practice while testifying will have to show that the religious practice falls within the scope of the right, usually through testimony explaining the connection between the practice and his or her sincerely held religious beliefs.

Having laid the foundation, the Court of Appeal went on to set out the approach to be taken to reconciling the rights in issue. A court faced with a competing rights claim of this nature should begin by determining whether the constitutional values underlying both claims are in fact engaged in the specific circumstances. This assessment must be fact-specific. If the judge is satisfied that the witness has advanced a valid religious rights claim and the religious practice, in this case wearing the Niqab, would interfere with the accused's ability to cross-examine in a way that is more than minimal or insignificant, the judge must then attempt to reconcile the two rights by giving effect to both. At this stage, context becomes particularly important. The relevant contextual considerations include the degree of interference with the assessment of the witness' demeanour, the ability of the judge to overcome this by appropriately instructing the jury in a criminal trial, the nature of the proceeding, the nature of the evidence to be given by the witness and the nature of the defence. As well, the contextual analysis requires the court to take into account other constitutional values and societal interests including equality rights of women, negative stereotyping of Muslims, access to justice and public confidence in the justice system.

[57] *Ibid.* at para. 97.

The Court also suggested that there is an important procedural component to the reconciliation exercise. The process a court goes through and the judge's reasons for whatever decision he or she makes has an important role to play and even becomes part of the reconciliation:

> If a person has a full opportunity to present his or her position and is given a reasoned explanation for the ultimate course of conduct to be followed, the recognition afforded that person's rights by the process itself tends to validate that person's claim, even if the ultimate decision does not give that person everything he or she wanted.[58]

"Constructive compromises" must also be considered as part of the reconciliation process. This involves searching for measures to reduce potential impacts on one or both sets of rights. However, the court acknowledged that efforts to reconcile the rights of the witness and the accused may ultimately be unsuccessful. If the judge concludes that wearing the Niqab in all of the circumstances would infringe the accused's right to make full answer and defence, that right is to prevail over the witness' religious rights and the witness must be ordered to remove the Niqab.[59] This is because our justice system has always held that the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice.

The court therefore acknowledged that while all rights are to be treated as equal in the at the outset, if there is no way to reconcile them, even through constructive compromises, one right may be forced to give way to another. In such cases, it is necessary to choose which right is more fundamentally important in our society, based on the facts presented.

The Supreme Court of Canada has granted leave to appeal the decision of the Ontario Court of Appeal. It will, therefore soon have the opportunity to comment on or revise the approach to the competing rights at issue.

Freedom of expression and human rights/equality rights

An area that continues to be highly controversial is the evolving tension between freedom of expression (which in some cases may arguably be linked to freedom of religion) and equality rights. Freedom of expression, which is also sometimes called free speech, is a right that is based on individual civil liberties and has been described as one of the pillars of a modern democracy[60]. The Supreme Court of Canada has

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[58] *Ibid.* at para. 83.

[59] Note that in certain circumstances, relevant evidence can come before the court through transcripts and some witnesses (e.g. children) may be permitted to testify behind screens in certain circumstances; see the *Criminal Code*, sections 709 to 713 and and *R. v. Levogiannis*, [1993] 4 S.C.R. 475.

[60] See *Bou Malhab v. Diffusion Métromédia CMR Inc.*, 2011 SCC 9 at para 17. This case dealt with a claim of defamation by a group of Montreal taxi drivers as a result of racist comments by a provocative radio host about drivers whose mother tongue is Arabic or Creole. The Court dismissed the class action lawsuit. The majority of the Court found that an individual is not entitled to damages simply because he is a member of a group which is the target of offensive comments. The majority found that since defamation is a tool for protecting personal reputations, in order to obtain compensation a member of the group must prove that an ordinary person would have believed that he/she *personally* suffered damage to their

repeatedly recognized its fundamental importance in individual self-fulfillment, in allowing people to put forward and be exposed to diverse ideas and opinions, and for fostering participation in social and political life. As such, in recent years, there has been a trend towards greater concern for the protection of freedom of expression. At the same time however, freedom of expression is not absolute and can be limited by other rights in a democratic society[61], including the right to be free from discrimination. Over the past 20 years, there have been a series of decisions dealing with where these limits should be drawn, culminating in an appeal to the Supreme Court of Canada, to be heard in October 2011, which will once again revisit this delicate issue.

In the 1990 decision in *Canada (Human Rights Commission) v. Taylor*[62], the Supreme Court of Canada heard a constitutional challenge to a provision of the *Canadian Human Rights Act* which prohibits the communication of telephone messages that are likely to expose persons identifiable on the basis of a prohibited ground of discrimination, in that case Jewish persons, to hatred or contempt. At issue was whether the provision violated "freedom of expression" as guaranteed by s. 2(*b*) of the *Charter.* The majority of the Court found that the provision was a reasonable limit on the right to freedom of expression. The Court reasoned that so long as only hatred expressing "unusually strong and deep-felt emotions of detestation, calumny and vilification", i.e. speech in its most extreme form, is caught, the limit on free speech is appropriate. However, a dissenting judgement written by McLachlin JJ. (as she then was) found that the section was not a reasonable limit as it was overly broad and could catch more expressive conduct than could be justified by its objectives, for example by prohibiting expression which may be relevant to social and political issues.

While not a case that arose out of an allegation of an infringement of a human rights statute, at the same time as it released *Taylor*, the Supreme Court issued its decision in *R. v. Keegstra*[63] in which it commented extensively on the values of freedom of expression on the one hand and the protection of minorities and marginalized groups from discrimination on the other. Mr. Keegstra was charged under the hate propaganda provisions of the *Criminal Code*. The Court rejected the idea that the scope of s. 2(b) *Charter* rights should be narrowed by reference to equality rights. Rather, it was in determining whether the infringement of Mr. Keegstra's s. 2(b) rights could be justified under s. 1 of the *Charter* that various contextual factors such as the harm caused by hate propaganda, international agreements signed by Canada prohibiting racist statements and other *Charter* rights such as equality rights in s. 15 should be considered. In conducting this analysis, the nature of hate propaganda as a form of expression made it easier to justify restrictions on it:

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reputation. The majority concluded that this was not the case here. In this case, the group of taxi drivers was both large (1,100 persons) and diverse and the remarks at issue were an "extreme, irrational and sensationalist generalization." As a result, the Court found that the radio host's remarks did not damage the reputation of each Arab or Haitian taxi driver and the appeal was dismissed.

[61] *Ibid.*

[62] [1990] 3 S.C.R. 892.

[63] *Supra* note 8.

> I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(*b*), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(*b*).

Ultimately, the Court, by a narrow majority, upheld the law.[64]

Several years later, in *Ross v. New Brunswick School District No. 15*,[65] the Supreme Court of Canada considered a conflict between Malcolm Ross' freedom to express himself and his religious beliefs through anti-Semitic comments and publications and Jewish and other minority students' right to be free from discrimination in education. The Supreme Court unanimously upheld a human rights Board of Inquiry finding that Ross' off duty anti-Semitic comments undermined his ability to fulfill his functions as a teacher and concluded that the Board of Inquiry was correct in concluding that Ross' continued employment as a teacher constituted discrimination in public education. The Court went on to find that the Board of Inquiry's order to remedy the discrimination, which included removing Ross from the classroom, did infringe his right to freedom of expression. However, with the exception of the part of the remedial order that required the school board to terminate his non-teaching employment at any time in the future should Ross pronounce, write, sell or publish anti-Semitic statements, the remedy was justified under s. 1. [66]

In reaching the conclusion that the remedy violated expressive rights, the Court confirmed the breadth and importance of the guarantee of freedom of free expression, no matter how unpopular or repugnant the expressed views might be.

The Court also considered the argument that as Ross' religious views were exhibited through his writings, statements and publications, Ross' freedom of religion had also been infringed. The Court noted that while freedom of religion ensures that every individual must be free to hold and to manifest beliefs without State interference, the right:

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[64] In contrast, in *R. v. Zundel*, [1992] 2 S.C.R. 731 the *Criminal Code* offence of spreading false news was struck down as unconstitutional.

[65] *Supra* note 9.

[66] Specifically, the Board of Inquiry ordered the school board to a) remove Ross from the classroom for a period of 18 months; b) place Ross in a non-teaching position, should one become available within that 18 month period; c) terminate his employment if, by the end of the 18 month period, he had not been placed in a non-teaching position; and d) terminate his non-teaching employment at any time in the future should he pronounce, write, sell or publish anti-Semitic statements. The Supreme Court of Canada found that the remedy violated Ross' s. 2(a) and 2(b) *Charter* rights. However, parts a), b) and c) of the order were justified under s. 1 of the *Charter.* Part d) was not as it impaired Ross' rights more than what was necessary to prevent a poisoned educational environment (given that Ross would no longer be in a teaching role).

> is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.[67]

Nevertheless, the court noted that rather than formulating internal limits to the freedom of religion guarantee, a broader interpretation of the right is to be preferred with any reconciliation of conflicts left to the s. 1 analysis as set out in *R. v. Oakes*.[68]

In applying the Oakes analysis to determine whether the infringement of Ross' s. 2(a) and 2(b) rights could be justified, the Court once again emphasized the importance of a contextual analysis that involves a weighing of essential values and principles. These include the accommodation of a wide variety of beliefs on the one hand, and respect for cultural and group identity, and faith in social institutions that enhance the participation of individuals and the respect for human dignity, on the other.

In a similar situation, the off duty conduct of a BC teacher resulted in disciplinary proceedings against him by the British Columbia College of Teachers (BCCT). As a result of articles and letters to the editor expressing his views on "homosexuality" which were published in a local newspaper, Mr. Kempling was found guilty of conduct unbecoming a member of the BCCT (*Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 (Canlii)). Among other disciplinary measures, his teaching certificate was suspended for one month. On appeal to the Supreme Court of British Columbia and then to the Court of Appeal he argued that his *Charter* rights including freedom of religion, freedom of expression and equality were infringed. The appeal courts disagreed. Looking at the entire context, in particular what he had written, they agreed that not only were the writings discriminatory, they were linked to his position as a teacher and demonstrated that he was committed to fulfilling his public and professional responsibilities in an intolerant and discriminatory manner. His statements undermined the core value of non-discrimination in the public education system.

With respect to Mr. Kempling's *Charter* rights, the Court of Appeal found that there was no evidentiary foundation to support his freedom of religion claim. There was no information concerning Mr. Kempling's religion or its tenets and no evidence that established that his ability to practice his religion would in any way be compromised by being restricted from making discriminatory public statements. His equality rights were not impacted as he was not being treated differently than other teachers. Finally, with respect to s. 2(b), the Court accepted that Mr. Kempling's right to freedom of expression was infringed but found that the infringement was justifiable under s. 1 of the *Charter*.

The Court noted that it is through the s. 1 analysis that the balancing of the competing rights at issue must occur. This s.1 analysis requires an assessment of four contextual

[67] *Ibid.* at para. 72
[68] [1986] 1 S.C.R. 103.

factors related to the s. 2(b) infringement: 1) the nature of the harm; 2) the vulnerability of the group; 3) the subjective fears and apprehension of harm; and 4) the nature of the expression at issue.

The Court focused on the first and fourth factors. On the first contextual factor, the nature of the harm was the denial of access to a discrimination-free educational environment for LGBT students and damage to the integrity of the school system as a whole. Evidence that particular students were impacted was not required to establish that harm had been caused. With regard to the fourth factor, while some of Mr. Kempling's writing was part of a rational debate on political and social issues, much of it crossed the line into discriminatory rhetoric that was far from the core values of freedom of expression. Taken as a whole, the expression was not deserving of a high level of constitutional protection. Since the expression caused harm and was outside the core values underlying s. 2(b), it was easy for the court to conclude that the BCCT's actions were justified under s. 1 of the *Charter*. The Court noted that since in *Ross*, an 18 month suspension and a lifetime ban from working in the school board was upheld, the one-month suspension imposed on Mr. Kempling must pass "constitutional muster".

A number of human rights decisions have considered and applied *Ross*, *Taylor* and *Keegstra*. In a few cases, the expression has been found so offensive that a breach of the relevant human rights statute has been found. These tend to be situations in which the expression contains an element of inciting people to act in a way that would otherwise be discriminatory[69]. In many others, the matter does not proceed for jurisdictional or other reasons[70], and if a hearing is held, the right to free speech is preserved.[71]

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[69] *Saskatchewan (Human Rights Commission) v. Bell (c.o.b. Chop Shop Motorcycle Parts)*, 1994 CanLII 4699, 21 C.H.R.R. D/147 (SK CA). The respondent distributed stickers that showed caricatures of certain racialized groups with a red circle and a slash symbol through them meaning "forbidden", "no" or "not allowed". This was a breach of the relevant provision of the Saskatchewan Code as the stickers (1) were displayed and sold in a store open to the public; (2) tended to expose particular groups to hatred and ridicule because of their race and religion and (3) encouraged others to engage in discriminatory practices against these groups. In a case that dealt with discrimination on the basis of sex and sexual orientation in services (as opposed to a human rights provision dealing directly with expression), a Tribunal found that a comedian's right to free expression did not extend so far as to provide a justification for his verbal and physical assault on a lesbian patron who was at the restaurant. His actions were not "jokes" and were not reasonably related to any effort to deal with a disruption to the show; Pardy v. Earle and others (No. 4), 2011 BCHRT 101 (CanLII).

[70] For example, members of the Muslim community filed complaints with the Alberta Human Rights Commission alleging that cartoons published in Western Standard magazine were "anti-Islamic, racist and reproduced for the purpose of inciting hatred against the Prophet and Islam". The Alberta Commission dismissed the complaints saying that given the full context of the reproduction of the cartoons, the strong language concerning what constitutes hatred and contempt in the case law and the need to balance freedom of expression against human rights, there was no reasonable basis for the complaints to proceed to a hearing. In 2008, the Ontario Commission concluded it did not have jurisdiction under the Ontario *Code* to proceed with complaints about an article in Macleans magazine.

[71] For example, in *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 (CanLII) the Saskatchewan Court of Appeal concluded that newspaper ads reflecting Mr. Owen's views on "homosexuality" did not breach the Saskatchewan Code. See also, *Elmasry v. Rogers Publishing Ltd.* (No. 4) (2008), 64 C.H.R.R. D/509, 2008 BCHRT 378 which dismissed complaints filed on behalf of Muslim residents of British Columbia concerning an article published in Maclean's magazine. The

In Ontario, the HRTO considered s. 13 of the Ontario *Code* which applies to a "notice, sign, symbol or other similar representation" that indicates an intention to infringe a right or incites others to infringe rights under Part I of the *Code*. In *Whiteley v. Osprey Media Publishing*[72] the HRTO agreed with the Ontario Human Rights Commission's submissions that a newspaper editorial expressing opinions on a subject is not a "similar representation" and is therefore not covered by this provision in the *Code*. As publication of opinion in the media is a matter at the core of freedom of expression and freedom of the press in a democratic society, any ambiguity in s. 13 should be resolved in favour of the exclusion of such matters from the *Code*. The content of an editorial was also found not to be a service under the *Code*.

Recently, in *Whatcott*[73] the Saskatchewan Court of Appeal decided an appeal from a decision of the Saskatchewan Human Rights Tribunal finding a breach of the provision in the Saskatchewan *Human Rights Code* that prohibits "hate propaganda". The Supreme Court of Canada has agreed to hear the case in October 2011 and will consider the constitutionality of the section of the Saskatchewan *Code* in light of the impact that it has or may have on freedom of expression and freedom of religion.

William Whatcott distributed four flyers under the name Christian Truth Activists to homes in the Saskatoon and Regina area in 2001 and 2002. Four people who received the flyers filed complaints with the Saskatchewan Human Rights Commission alleging that the flyers promoted hatred based on sexual orientation or otherwise contravened the Saskatchewan *Human Rights Code*. The relevant section is s. 14(1)(b) which prohibits the publication of any representation that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground. Section 14(2) states that nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

The flyers contained a number of statements concerning "homosexuality", "homosexuals" and "Sodomites" urging that steps be taken to keep "homosexual propaganda" out of the school system. Many of the statements in the flyers were described by the Saskatchewan Court of Appeal as "crude, offensive and pejorative." Whatcott argued that he was exercising his rights to freedom of religion and freedom of expression. He further argued that, even if found to incite hatred, the comments were in relation to sexual activities or behaviours and that sexual activity is distinct from sexual orientation.

The Saskatchewan Human Rights Tribunal concluded that the flyers contained a number of statements which taken together could be objectively considered to expose to hatred, ridicule, belittle, or otherwise affront dignity based on sexual orientation. On appeal, the Saskatchewan Court of Queen's Bench clarified that for the section of the *Code* to have been infringed the communication must involve "extreme feelings and

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complainants were not able to establish that the article was likely to expose them to hatred or contempt on the basis of their religion.

[72] 2010 HRTO 2152.

[73] *Supra* note 4.

strong emotions of detestation, calumny and vilification." Having regard to this high threshold, the Court found that the Tribunal was correct in finding the section was breached. The Court was particularly troubled by the statements in the flyers that made reference to "homosexuals" as pedophiles, abusers and molesters of children. The Queen's Bench also considered whether the relevant section of the *Code* is a reasonable limit on free speech and, following an earlier Saskatchewan Court of Appeal decision, found that it was.

In two separate judgments, the Saskatchewan Court of Appeal overturned the Tribunal and Queen's Bench decisions concluding that, on a proper interpretation of s. 14(1)(b), the flyers did not tend to expose to hatred, ridicule, belittle or otherwise affront the dignity of any person or class of persons on the basis of a prohibited ground.

The decision of Hunter J.A. (Sherstobitoff J.A concurring) focused on the balance between the prohibition on "hate propaganda" and the right to freedom of expression as provided for in both the *Charter* and the Saskatchewan *Human Rights Code* (s. 5 and subsection 14(2)). Hunter J.A. stated that in resolving the conflict between freedom of expression and the right not to be subjected to flyers that expose or tend to expose persons to hatred based on their sexual orientation, context, in particular the circumstances in which the publication was made and distributed, is critical. Hunter J.A. then went on to characterize the context in this case as involving issues of morality and described the flyers as representing disapproval of same-sex sexual practices. On this basis, she was willing to give wide latitude to the expression as:

> It is acceptable, in a democracy, for individuals to comment on the morality of another's behaviour. For this reason there will be a relatively high degree of tolerance for the language used in debates about moral issues, subject, of course, to limitations. Anything that limits debate on the morality of behaviour is an intrusion on the right to freedom of expression.

The decision concluded that the Human Rights Tribunal and Queen's Bench had failed to properly examine the flyers objectively, having regard to the context and the circumstances and without due care to balance the rights in issue. Hunter J.A. examined the flyers in light of this framework and concluded that: while some of the words and phrases in the flyers are demeaning, this is not sufficient to meet the test for hatred as set out in *Taylor*. The flyers must be considered in the context of a legitimate debate about including "homosexual" education in the school curriculum. Using an offensive or derogatory term for a group does not amount to hatred and a single inappropriate phrase does not taint an entire publication or tip the balance in favour of limiting free expression.

In a separate concurring judgment, Smith J.A. (Sherstobitoff J.A. also concurring) provided a contextual analysis that considered not just the importance of freedom of expression, but also the historical disadvantage and vulnerability of the targeted group and the harm caused by the publications. Smith J.A. also acknowledged that critiques of same-sex conduct may be equated with an attack on persons of same-sex

orientation. However, like the other judgment, Smith J.A. found that as it was the activity, rather than the orientation, of same-sex persons that was the primary focus of the flyers, the flyers primarily concerned issues of sexual morality which lie "near the heart of speech worthy of protection from the chilling effects of legislative prohibition."

Similarly, Smith J.A. determined that the offensive and pejorative nature of the language used did not change the fact that the messages contained in the flyers were a legitimate and important matter of public concern. Smith J.A. focused on the purpose of the publication and found that as the purpose of the communication was not to promote hatred, the relevant section of the *Code* should not be interpreted to prohibit it. She also made comments with regard to whether it is appropriate to revisit the SCC's decision in *Taylor* and suggested that different constitutional values are at play when speech targets people based on race and religion, as in *Taylor*, as compared to other *Code* grounds, such as sexual orientation.

Not surprisingly, the Supreme Court of Canada appeal has attracted much interest from a variety of organizations ranging from civil liberties groups, religious organizations, organizations that promote the rights of particular disadvantaged groups and human rights bodies who will intervene to present their views on how to balance the rights at issue. The Supreme Court's decision will no doubt represent a new chapter in the reconciliation of free expression and equality rights in Canada.

Freedom of religion and human rights/equality rights

Although competing rights arise in a variety of ways, it is often those situations that involve freedom of religion on the one hand, and the right to be free from discrimination, in particular based on sexual orientation, that attract the most attention. A number of legal decisions concerning these situations also provide guidance on factors to be considered in the reconciliation process.

In *Trinity Western*[74], the Supreme Court of Canada considered whether graduates of a private Christian university, which required its students to abide by certain "community standards" which among other things prohibited "homosexual activity", should be licensed by the British Columbia College of Teachers to teach in the public school system. The College of Teachers argued that teaching programs must be offered in an environment that reflects human rights values and that an institution that wants to train teachers for entry into the public school system must demonstrate that it will provide a setting that properly prepares future teachers for the diversity of students found in a public school setting. In other words, the College argued that it was justifiably concerned about a risk that as teachers, graduates of Trinity Western's program would discriminate on the basis of sexual orientation.

The Supreme Court found that this was a case that could be resolved through "the proper delineation of the rights and values involved." Properly defining the scope of the rights avoided a conflict. The Court found that the proper place to draw a line in this

[74] *Supra* note 6.

case was between the freedom to hold beliefs versus conduct based on those beliefs. There was no concrete evidence that holding beliefs about "homosexuality" would result in actions by graduates of Trinity Western that would be discriminatory.

The Supreme Court once again considered the relationship between religious rights and equality rights of gays and lesbians in *Reference re Same-Sex Marriage*[75]. The Court was asked to consider the constitutionality of a proposed Act that would extend the ability to get married to two persons of the same sex. It was argued that equal access to marriage for same-sex couples would have the effect of violating the equality or religious rights of those who hold religious beliefs opposed to same-sex marriage. The Court rejected this as being a conflict of rights saying that the recognition of the rights of gays and lesbians to marry could not, in itself, violate the rights of others.

With respect to concerns about potential conflicts of rights situations that could arise from legalizing same-sex marriage, the Court refused to make decisions about hypothetical scenarios. The Court confirmed that the presentation of actual facts is needed to properly apply the contextual approach that must be used in reconciling rights. The Court noted that past decisions demonstrate that many, if not all, conflicts can be resolved within the *Charter*, by the proper delineation of rights and internal balancing.

The Saskatchewan Court of Appeal recently considered whether civil marriage commissioners should have the right to refuse to perform same-sex marriage ceremonies based on their religious beliefs; *Marriage Commissioners Appointed Under the Marriage Act (Re).*[76] In two separate decisions, all five judges of the Court found that proposed amendments to Saskatchewan's *The Marriage Act, 1995*, which would have allowed individual marriage commissioners to refuse to conduct a marriage ceremony if doing so would be contrary to their religious beliefs, violated the equality rights provision (s. 15) of the *Charter*. Consistent with the general approach to reconciling competing rights under the *Charter*, both decisions then balanced the right to be free from discrimination on the basis of sexual orientation against the religious rights of the marriage commissioners under s. 1 of the *Charter* and concluded, for slightly different reasons, that the equality rights infringement could not be justified despite the goal of addressing the religious objections of the marriage commissioners.

The Court described the historical marginalization and mistreatment of gays and lesbians and noted the "very significant and genuinely offensive" impact of contacting a marriage commissioner and being refused services based on sexual orientation. The majority decision also considered contextual factors that would affect access to marriage services if marriage commissioners could refuse to perform certain ceremonies. In particular, it was noted that there was nothing planned to ensure a minimum number of commissioners would always be available to perform ceremonies or to take into account geography so that persons in northern, rural areas or smaller centres would not have to travel some distance to find a commissioner willing to marry them.

[75] *Supra* note 22.
[76] 2011 SKCA 3 (CanLII).

Both decisions accepted that to some degree, the religious rights of marriage commissioners would be infringed by being required to perform a marriage ceremony contrary to their religious beliefs. However, there is a significant difference between religious marriages performed by clergy in accordance with the "beliefs, rites and sacraments of their religious faith" and civil marriages which are intended to have no religious implications. When a religious official performs a religious marriage he/she is engaging in a religious rite or practice at the core of the right to religious freedom. In contrast, civil marriage commissioners are not acting as private citizens when they engage in their official duties but are performing a non-religious service on behalf of government. Allowing civil marriage commissioners to refuse to perform certain marriage ceremonies would undercut the basic principle that government services must be provided equally to everyone on an impartial and non-discriminatory basis.

Once again, comparing the conclusion in this decision to discussion in the *Same-Sex Marriage Reference* illustrates the importance of context in balancing potentially conflicting rights. Although both decisions deal with the right to refuse to perform same-sex marriage ceremonies, the outcome is much different when the "core" of the religious right is engaged versus where religious rights are engaged in a much more "secondary" way.

A similar approach can be seen in a decision under the Ontario *Code* in *Brockie v. Brillinger.*[77] Mr. Brillinger, a gay man, went to Mr. Brockie's company to have letterhead and business cards printed on behalf of The Gay and Lesbian Archives. Mr. Brockie refused to provide the services on the basis that serving the Gay and Lesbian Archives would conflict with his religious beliefs. The Ontario Board of Inquiry (the precursor to the Human Rights Tribunal of Ontario) found that Mr. Brockie had discriminated against Mr. Brillinger and the Archives on the basis of sexual orientation. The Board ordered Mr. Brockie to provide printing services to gays and lesbians and gay and lesbian organizations and to pay $5000 in damages.

Mr. Brockie appealed to the Divisional Court. He asked the Court to set aside the decision on the basis of his constitutional right to freedom of religion. The parties to the appeal accepted that the Board's order did indeed infringe Mr. Brockie's freedom of religion as it forced him to act in a way that was contrary to his religious beliefs.

The Court then considered whether the Board's order unduly limited the rights or whether it could be justified as a reasonable limit under s. 1 of the *Charter*. The Court described some of the elements of freedom of religion and some of the limits on it as set out by the Supreme Court of Canada.[78] It noted that the further an activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of protection. The commercial printing services provided by Mr. Brockie were found to be at the periphery of activities protected by freedom of

[77] *Supra* note 27.
[78] In particular in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, *Ross*, *supra note 9* and Trinity Western, *supra,* note 6.

religion. Limits on the exercise of his right were therefore justified to prevent harm to others, i.e. discrimination on the basis of sexual orientation. However, the court did leave open the possibility of a different result in a different context, for example where the content of the materials being printed might more directly conflict with the core elements of Mr. Brockie's beliefs.[79]

In *Smith v. Knights of Columbus*[80], a British Columbia Human Rights Tribunal dealt with a claim of discrimination arising from a Catholic men's organization's refusal to permit a lesbian couple to hold their wedding reception in their hall. The hall was owned by the Catholic Church and operated by the Knights of Columbus. The hall was rented out to the public for a variety of events such as birthdays, anniversaries, AA meetings and a mother and tot program.

The Knights argued that they had a reasonable and *bona fide* justification for cancelling the contract and, in the alternative, that they are entitled to the protection of the statutory defence in s. 41 of the British Columbia *Human Rights Code*.

The Tribunal rejected the application of the s. 41 defence (see the section on **Statutory Defences** for a discussion of this aspect of the decision). In considering whether the Knights had a reasonable and *bona fide* justification for cancelling the rental contract, and whether the Knights could have accommodated the complainants to the point of undue hardship, the Tribunal once again noted the importance of context. The Tribunal looked at a number of factors including the relationship between the Knights and the Catholic Church; the religious beliefs of the Catholic Church in relation to same-sex marriage, both with regard to the marriage ceremony and the celebratory reception following it; and how the hall had been rented out and used in the past, including whether only Catholics had been permitted to rent it.

The Tribunal found that the hall was available to the general public, regardless of religion but that it was also a hall that could not be used for an event that was contrary to core Catholic beliefs. The Tribunal applied an accommodation analysis to determine whether the Knights could have accommodated the complainants, given their core religious beliefs about same-sex marriages, without incurring undue hardship. The Tribunal described this as a "spectrum analysis" meaning it had to decide where on a spectrum to balance the religious rights of the Knights and the equality rights of the lesbian couple. The Tribunal confirmed that the further an act is from the core religious beliefs of the person denying the service, the less likely the act will be found to be justified.

The Panel determined that on the facts of this case, the Knights could not be compelled to act in a manner that is contrary to the core of their religious beliefs. Although they

[79] The Court modified the Board's order to reflect this by adding the following to the Board's order that Mr. Brockie must provide printing services to gays and lesbians, and their organizations: "Provided that this order shall not require Mr. Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed."
[80] (2005), 55 C.H.R.R. D/10, 2005 BCHRT 544.

were not being asked to participate in the solemnization of a same-sex marriage, renting the hall for the celebration of the marriage would have required them to "indirectly condone" an act that is contrary to their core religious beliefs.

However, the Tribunal's analysis did not end there. It found that in the face of the steps that had already been taken to rent the hall to the complainants, the duty to accommodate the rights of the complainants was triggered. The Tribunal suggested that the Knights should have searched for a workable solution that would have lessened the negative effect on the complainants' rights. In particular, before contacting the complainants to cancel the contract, they should have taken additional steps that would have recognized the inherent dignity of the complainants such as meeting with the complainants to explain the situation, formally apologizing, immediately offering to reimburse the complainants for any expenses as a result of the cancellation of the contract and perhaps offering assistance in finding another solution. In essence, the Tribunal was searching for a compromise position whereby the Knights' religious rights were preserved but the impact on the dignity of the complainants of suddenly being told they could not rent the hall, after already having signed the contract and sent out the wedding invitations, was acknowledged.

In Ontario, s. 18.1 of the *Code* provides an exemption for a religious official who refuses to solemnize a marriage that is contrary to his or her religious beliefs or to the "doctrines, rites, usages or customs of the religious body to which the person belongs" . It also allows religious officials to refuse to allow sacred places, defined as places of worship and "any ancillary or accessory facilities", to be used for a marriage ceremony or a related event that is contrary to their religion. To date, there have not been any decisions considering the application of this provision.

The tension between religious rights and the right to be free from discrimination has come up in a variety of ways relation to education and schools. And, it is likely that this area will continue to present many challenges with respect to competing rights.

In 2002, the Supreme Court of Canada and the Ontario Supreme Court were asked to decide cases involving curriculum and the right to attend a school prom with a same-sex partner, respectively.

In *Chamberlain v. Surrey School District No. 36*[81] the Supreme Court considered a challenge to a school board's decision not to approve three books showing same-sex parented families as supplementary resources for use in teaching the family life curriculum. The Board's decision was based on some parents' religious objections. The majority decision of the Court noted that British Columbia's *School Act* required secularism and non-discrimination and found that the Board's decision was unreasonable in the circumstances. The decision noted while religious concerns of some parents could be considered, they could not be used to deny equal recognition and respect to other members of the community. The majority decision emphasized the right to hold religious views, including the view that the practices of others are undesirable.

[81] *Supra* note 29.

However, if a school is to function in an atmosphere of tolerance and respect, these views could not become the basis of school policy. It noted that the Board gave no consideration to the needs of children of same-sex parented families or the relevance of the material to the curriculum's objectives.

The majority decision dealt with the argument that the materials could send confusing messages to children whose parents disapprove of same-sex relationships. The judges noted that as members of a diverse student body in the public school system, children are exposed to the reality that not all of their values or beliefs are shared by others. Exposure to difference allows children to be taught what tolerance involves. As well, tolerance allows persons to maintain their beliefs while still respecting the rights of others (at para.66):

> When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.

Two judges of the Supreme Court would have found the decision of the Board reasonable. In a dissenting decision, the judges emphasized the right of parents to raise their children in accordance with their religious or other beliefs.

While *Chamberlain* dealt with school curriculum, *Hall (Litigation Guardian of) v. Powers*,[82] considered a much different aspect of school life. Mr. Hall, a 17-year-old Catholic gay high school student wanted to bring his same-sex partner to the school prom. The Principal of his Catholic high school denied him permission to do so on the basis that this would condone conduct which is contrary to Catholic Church teachings. The Catholic school board confirmed the decision. Mr. Hall applied to a Court for an interlocutory injunction to restrain the school from preventing him from attending the prom with his boyfriend. The day the prom was to take place, the Ontario Supreme Court granted the injunction.

Because of the special protections given to Catholic schools under the Canadian constitution, the Court had to balance Mr. Hall's equality rights against religious rights and denominational school rights set out in s. 93(1) of the *Constitution Act, 1867.* The court had to reconcile these rights within the test for granting an interlocutory injunction.[83]

[82] 2002 CanLII 49475 (ON SC).

[83] The three-stage test to apply is: (1) Is there a serious issue to be tried, i.e. is it a case with enough legal merit to justify the extraordinary intervention of the court in making the order sought before the trial?; (2) will the applicant suffer irreparable harm if the interlocutory injunction is not granted?; and (3) does the

In assessing the equality rights of Mr. Hall, the Court noted that recreational activities experienced within the school setting are important to a student's development such that "[e]xclusion of a student from a significant occasion of school life, like the school prom, constitutes a restriction in access to a fundamental social institution (at para. 15)." The Court also reviewed the social history evidence in relation to stigmatization and stereotyping of gays and lesbians.

With regard to the context relevant to Catholic school rights, the Court conducted a review of the Church's Catechism and the practical application of the Church's teachings on "homosexuality" in the Catholic community. The Court emphasized that there is a substantial diversity of opinion on the appropriate response to "homosexuality" and on what constitutes a "homosexual act".

As part of its contextual analysis, the Court described the prom as having two aspects; courtship and romance on the one hand and a social and celebratory event on the other. It stated that it cannot be assumed that those who attend with dates have had, or are planning to have, sex with them. The Court questioned whether same-sex dancing at a prom is sinful or is sexual conduct that would be prohibited by the Catholic Church. Perhaps most importantly, the Court emphasized that the prom is not part of a religious service; is not part of the religious education component of the Board's activity, is not held on school property and is not educational in nature.

With regard to whether s. 93 of the *Constitution Act*[84] could be relied on to justify violations of Mr. Hall's equality rights, the Court noted that s. 93 does not mean that the *Charter* does not apply to separate schools. The courts must strike a balance on a case-by-case basis between conduct essential to the proper functioning of a Catholic school and conduct which contravenes *Charter* rights such as equality under s. 15. In this case, the question is whether allowing a gay student to attend his prom with his boyfriend prejudicially affects rights with respect to denominational school under s. 93 of the *Constitution Act*?[85]

The Court's answer to this question was "no". Firstly, the evidence demonstrated a diversity of opinion within the Catholic community, such that it was not clear what course of action would be needed to ensure that denominational school rights would not be prejudicially affected. Second, the right in question (to control who could attend school dances), was not in effect in 1867 and finally, because, viewed objectively, it could not be said that the conduct in question goes to the essential denominational nature of the school.

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balance of convenience favour granting the relief, i.e. which party will suffer more harm from the court granting or refusing to grant to remedy before a trial? See *Hall, ibid.* at para. 11.

[84] Section 93 was intended to preserve and protect denominational schools and was a fundamental part of the "Confederation compromise."

[85] See the section on **Conflicts Related to Different Religious Rights** for a further discussion of s. 93 rights.

Ultimately, the Court concluded that Mr. Hall's equality rights would be more severely impaired if he lost out on the opportunity to attend his prom. On the other hand, and injunction would not compel or restrain teachings within the school or affect Catholic beliefs. As an injunction would restrain conduct and not beliefs it would not impair the defendants' freedom of religion.

The British Columbia Human Rights Tribunal considered an employment case arising out of a school setting. In *Chiang v. Vancouver Board of Education*,[86] a woman who was a teacher-librarian and the sponsor teacher for the school's Christian Fellowship Club, filed a claim of discrimination in employment based on her religion. The claim arose out of incidents between Ms Chiang and another teacher, Ms Fergusson, who was the sponsor teacher for the school's Pride Club (also known as a Gay/Straight Alliance), and the principal's response to the incidents.

Ms Chiang had concerns about Ms Fergusson distributing rainbow stickers showing support for Gay, Lesbian, Bisexual and Transgendered (GLBT) students to staff to voluntarily display on the doors to their classrooms. She felt that her choice not to display the stickers would lead staff and students to consider her intolerant or even homophobic and to conclude that her decision was based on her religious beliefs. However, Ms Chiang did not specify what those religious beliefs were.

Another dispute arose around a video clip about a small, radical Baptist Church in the United States which was very militant in condemning "homosexuals". Ms Fergusson had distributed the video to all staff saying "Here is a reminder of how some young people are being taught to hate." Ms Chiang argued that this singled out Christians and created a hostile work environment for her.

As well, Ms Chiang was given a letter by her principal which stated that the principal expected staff to "support and respect all students regardless of any personal views on homosexuality". Ms Chiang received this letter because of delays in processing GLBT-based books for the library, a process that Ms Chiang was solely responsible for. There had also been issues with Ms Chiang over, among other things, displays and materials regarding gay and lesbian youth.

The BC Tribunal began its analysis by situating the issues raised within the legal context governing human rights within the public school system. The Tribunal noted the secular nature of the school system and the duty of the board to provide a learning environment free from discrimination in relation to either religion or sexual orientation. With regard to religious rights, the Tribunal emphasized the decision of the Supreme Court of Canada in *Trinity Western* which held that the protection for religious beliefs does not necessarily extend to conduct motivated by the beliefs.

The Tribunal looked at the evidence to determine whether Ms Chiang had made allegations falling within the parameters of the right to be free from discrimination on the basis of religion and concluded that she had not. First, the Tribunal found that Ms

[86] *Supra* note 17.

Chiang had never revealed what her religious beliefs were and had not shown she experienced any burden or disadvantage as a result of them. For example, the decision about whether to display the rainbow stickers was completely voluntary. Next, the Tribunal noted that most, if not all of, Ms Chiang's allegations were speculative in nature. Her allegation that by distributing the video clip, Ms Fergusson was singling out all Christians or Ms Chiang as intolerant bigots was an unsupported assumption.

Finally, the Tribunal concluded that public schools are to be conducted on strictly secular principles. Non-discrimination is a core value of the public school system which is required to provide a tolerant and non-discriminatory environment for all students. Therefore, while teachers are free to hold religious beliefs, if their conduct based on those beliefs is not consistent with non-discrimination and tolerance, it is not a violation of the teacher's rights if the school board or principal takes steps to address the behaviour. Therefore, attempts to deal with Ms Chiang's actions in relation to GLBT matters were appropriate.

The complaint was dismissed. However, the Tribunal did note that had Ms Chiang ever informed the respondents that her conduct was based on her religious beliefs and sought accommodation, different issues may have arisen, including whether the Board was required to accommodate her religious beliefs. It is unclear, how this would have worked in practice and whether it would have resulted in a different outcome. Nevertheless, it is possible that a future case may require a decision-maker to decide what to do where a teacher seeks an accommodation, such as an exemption from teaching certain curriculum, based on religious beliefs.

The conflict between religious rights and the right to be free from discrimination based on sexual orientation was recently dealt with in a Northwest Territories housing case. A landlord refused to rent an apartment to a gay couple because of their sexual orientation. At the hearing, he stated that he believed that if he allowed the complainants to live in his property God would punish him in life and that he would face "God's judgment at death". He argued that this would amount to "undue hardship" and that he was therefore justified in discriminating on the basis of sexual orientation. Relying on language from the Supreme Court of Canada's decision in *Big M Drug Mart*, the adjudicator found that while the respondent could hold his religious beliefs and act according to them, his freedom of religion could not be used as an "excuse" to violate someone else's right to equality. He found that the respondent had not provided a "*bona fide* and reasonable justification" for his discriminatory actions as required by the Northwest Territories *Human Rights Act*. In assessing the damages that should be awarded for the discrimination, the adjudicator also did not accept that the award should be lessened because the respondent was "following God's word". There was no evidence that God's word included ignoring legal obligations to treat other people with respect.

Religious rights and gender equality

The relationship between freedom of religion and equality rights has not often been dealt with by civil courts. However in *Bruker v. Marcovitz*, the Supreme Court of Canada

dealt with this to some degree in relation to a domestic dispute that engaged religious and gender equality rights.

The dispute arose out of a husband's refusal to give his wife a religious divorce. The couple had signed an agreement to resolve their matrimonial disputes which included a term that the husband would give his wife a "*get*". A *get* is a Jewish divorce which would release the wife from marriage and allow her to remarry within the faith. Only a husband can give a *get* and there is no other process within the Jewish faith by which a wife can be released from the marriage. However, for over 15 years the husband refused to comply with his commitment and argued that a civil court could not enforce the agreement he signed without violating his religious rights.

The majority of the judges of the Supreme Court of Canada disagreed. They found that the contract was a valid and binding obligation under Quebec law and that the husband was not protected from liability for breaching the agreement on the basis of freedom of religion. In doing so, they suggested that not only were the wife's rights a factor, but so too were fundamental values in Canadian society.

The majority of the Court noted that while courts would be reluctant to interfere in "strictly spiritual or doctrinal" religious matters, they will intervene when property or civil rights are engaged. They went on to question the husband's religious rights claim stating they were having "difficulty discerning" how requiring him to comply with his agreement to give a *get* could conflict with a sincerely held religious belief and have non-trivial consequences for him. However, even if he could establish this, his claim of a religious right had to be balanced against competing values or harm that would result.

In this weighing exercise, the judges noted that the husband had "little to put on the scales" both because he had freely entered into an agreement which he later claimed violated his rights and because to allow him to back out of it would offend public policy:

> The public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests and values that outweigh Mr. Marcovitz's claim that enforcing Paragraph 12 of the Consent would interfere with his religious freedom.

Another interesting element of this case is the extent to which the majority decision reviewed the international approach to this competing rights issue in determining whether the public policy values engaged are dealt with in the same way in other democracies. Two judges of the Supreme Court did not agree with the decision, essentially finding that it wasn't the wife's civil but rather her religious rights that were in issue so the dispute should be dealt with by religious authorities.

The HRTO recently heard a case filed by a woman who objected to an inscription on a monument donated by a Catholic men's organization and located on property owned by

the Catholic Church[87]. According to the applicant, the reference to life "from conception until natural death" is a statement against abortion which is offensive and discriminatory because it denounces, victimizes, and excludes women. The applicant also claimed that the inscription violated her right to be free from religious coercion, including religious messages. The inscription could not be read from the public sidewalk and could only be read by a person on church property.

In a summary hearing process, the HRTO dismissed the claim saying it has no jurisdiction to examine the content of religious teaching and beliefs, particularly where these are conveyed on the premises of a religious organization.

The HRTO described both the positive component (the right to express and disseminate beliefs) and the negative dimension (the right to be free from coercion to accept or adopt any beliefs, practices or forms of worship) of the competing rights at issue. In doing so, it noted that the applicant was asserting a *Code* right that engages issues that are at the core of others' *Charter* rights, namely the respondent's right to display a message consistent with its religious beliefs on the grounds of a religious institution. The HRTO stated that in interpreting the applicant's rights under the *Code*, it must be careful not to strip the respondent's positive religious rights of any meaning. The Tribunal concluded that it is not an appropriate use of human rights protections set out in the *Code* to challenge the Catholic Church's belief system and teachings.

In another summary proceeding, the HRTO dismissed the claim of a gay man who alleged that when he asked a priest for assistance in dealing with his parents' views toward "homosexuality", the priest made statements expressing his own views on "homosexuality" that violate the *Code*. In the decision, *Tesseris v. Greek Orthodox Church of Canada*[88], the HRTO considered the competing rights of the priest in determining whether it had jurisdiction to hear the Application. In concluding that a member of the clergy performing purely religious functions is not covered by the social area of "services" in the *Code*, the HRTO noted that in the circumstances, the scope of "services" should be interpreted in a way that protects the *Charter* rights of the priest. The HRTO emphasized that the teaching and dissemination of religious beliefs was at the core of the priest's religious rights. In making statements regarding "homosexuality" in accordance with his faith, the priest was exercising rights at the core of freedom of religion which were purely connected with his religious role. Therefore, the alleged interaction between the applicant and the priest was not subject to the *Code* and the application was dismissed.

The HRTO has made it clear through its use of a summary hearing process and its dismissal of the *Tesseris* and *Daillaire* applications that it is not the appropriate forum for challenges to a religion's belief system or teachings. It has done this by interpreting the area of "services" to exclude religious services and facilities. This is consistent with its approach in *Whiteley*, discussed in the section on **Freedom of Expression and Human Rights**. Therefore, it appears that the HRTO may be dealing with some of the

[87] *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII).
[88] 2011 HRTO 775 (CanLII).

more straightforward competing rights claims that come before it by finding it does not have jurisdiction over such applications.

Conflicts related to different religious rights

Religious rights of one group or individual have also bumped up against the religious rights of others. In some cases, the conflict involves the right to practice religion on the one hand, and the right to be free from the imposition of religion, on the other. In other cases, the arguments relate to preferential treatment for a majority or particular religious group.

The imposition of a number of laws and practices based on Christian religious observances have been successfully challenged. One of the leading cases dealing with religious rights in this country, *R. v. Big M. Drug Mart*[89] was a *Charter* challenge to the federal *Lord's Day Act* which made it illegal for stores to remain open on Sundays, with some exceptions. The Supreme Court found that the purpose of the law was to compel the observance of the Christian sabbath and that this purpose infringed freedom of religion for non-Christians. The Court noted that imposing the requirements of the Christian faith creates a hostile climate for, and gives the appearance of discrimination against, non-Christian Canadians. Compelling a day of rest preferred by one religion was also found to be inconsistent with the preservation and enhancement of the multicultural heritage of Canadians. The violation of s. 2(b) was not found justified under s. 1 of the *Charter*.

Shortly after *Big M Drug Mart* was decided, the Court considered Ontario's *Retail Business Holidays Act*. The law also prevented businesses from opening on Sundays but the legislative history of the *Act* showed that its purpose was not religious but rather to provide a common day of pause for retail workers. Nevertheless, in *R. v. Edwards Books and Art*[90] the Supreme Court found the law infringed freedom of religion because while its purpose was secular, its effect was to impose an economic burden on retailers that observed sabbath on a day other than Sunday. However, unlike the *Lord's Day Act* which could not be justified under s. 1, in *Edward's Books*, the law was saved under s. 1 of the Charter as the secular goal of ensuring a common pause day was sufficiently important to justify a limit on freedom of religion. Interestingly, another potential competing rights issue, namely the importance of allowing parents to have a regular day off from work in common with their children's day off from school, was noted. [91]

The recitation of the Lord's Prayer in schools and at public meetings is another situation where the religious practices of one group have been found to impact on the religious

[89] *Supra* note 78.
[90] [1986] 2 S.C.R. 713.
[91] Madame Justice Wilson dissented in part. The *Act* provided an exemption for retailers who closed their stores on Saturdays, but a size restriction meant the exemption was only available to small stores. Wilson J. would have struck down the size limits to the exemption to allow it to apply to all retailers who observed a Saturday Sabbath, regardless of size. The Ontario Legislature later amended the *Act* by removing the size limits.

freedoms of another. In the education context, the Ontario Court of Appeal[92] considered a regulation requiring public schools to open or close each day with religious exercises consisting of reading of the Scriptures or repeating the Lord's Prayer or other suitable prayers. The regulation allowed students not to participate. Even though it allowed for students to be exempted and was wide enough to allow for non-Christian prayers, the regulation was unconstitutional. Once again, the concern was with the coercive element and the pressure on students to conform to the majority's religious practices.

In *Freitag v. Penetanguishene* the Ontario Court of Appeal held that the purpose of opening municipal meetings with the Lord's Prayer was to impose "a Christian moral tone on the deliberations of Council" and violated the rights of non-Christians. Subsequently, the use of a non-sectarian prayer by the Renfrew County Council was challenged by a resident of the County who identified himself as a "Secular Humanist" and who did not believe in God or in participation in prayers. In *Allen v. Renfrew (Corp. of the County)*[93], an Ontario Superior Court found that a broadly inclusive and non denominational prayer, even one that refers to God, while not consistent with the beliefs of some "minority groups" was not an infringement of religious rights. The Court rejected the argument that mentioning God in a prayer at a government meeting could be seen as a coercive attempt to compel religious observance. It also suggested that any interference with Mr. Allen's beliefs were a "minor affront" that did not rise to the level of a violation of freedom of religion:

> The prayer in its present form is not in substance a religious observance, coercive or otherwise and it does not impose any burden on the applicant or any restriction on his exercise of his own beliefs. The recital of this prayer does not compel the applicant, in contrast to *Freitag*, to participate in a Christian or other denominational form of worship. The mere mention of God in the prayer in question is not in this Court's opinion, sufficient in its effect on the applicant to interfere in any material way with his religious beliefs.

A group of parents whose children attended private religious schools challenged the Ontario government's funding for Roman Catholic Schools but not other religious schools. In *Adler v. Ontario*[94] the Supreme Court of Canada rejected the claim that this preferential funding infringed their religious rights and equality rights under sections 2(a) and 15 of the *Charter*. The Court confirmed that because of section 93 of the *Constitution Act, 1867*, Ontario is required to fund Roman Catholic separate schools. This special status is the product of a historical compromise crucial to Confederation.

Several human rights tribunal decisions across Canada have dealt with complaints about religious discussions or proselytizing in the workplace. This may be seen as a competing rights issue as the person filing the human rights complaint is asserting that his or her right to be free from discrimination or harassment based on religion is violated by someone else's assertion of his or her religious beliefs. In *Dufour v. J. Rogers*

[92] *Zylberberg v. Sudbury Board of Education*, 1988 CanLII 189 (ON C.A.).
[93] 2004 CanLII 13978 (ON S.C.).
[94] [1996], 3 S.C.R. 609.

Deschamp Comptable Agréé,[95] employees in a small accounting firm were subjected to religious pressure by the employer. One employee was told during the interview that the atmosphere of the firm was a Christian atmosphere. The employer recommended and held a group prayer session to cure another employee's migraines. An employee was given a Bible and there were many discussions of religion including daily prayer sessions in the boardroom.

The Ontario Board of Inquiry noted that a person's religious outlook goes to the heart of his or her being and that the *Code* protects persons from unwelcome religious pressure. The Board acknowledged that the *Code* would not prevent all overtures or conversations about religion; however, no matter how convinced anyone is of how important his or her religious message is, the *Code* prohibits him or her from "pressing" that message in the workplace. An employer or even a co-worker must avoid taking advantage of the employment relationship or workplace environment to put unwelcome pressure on any employee.

More recently, in *Streeter v. HR Technologies*[96] the Tribunal found that the employer had asked Mr. Streeter questions about religion during his interview and during his 12 year employment, discussions about religion, prayers at business meetings and weekly Bible study groups taken together had the effect of imposing a religious atmosphere that Mr. Streeter felt he had to participate in as part of his employment. The Tribunal found that the religious discussions and actions went beyond what might be considered 'normal' in an office and were an attempt to persuade Mr. Streeter to engage with respect to an issue that had nothing to do with the company's business or his work as an employee.

In an apparent effort to acknowledge the countervailing rights, the Tribunal was careful to note that not every workplace discussion about religion or someone's religious beliefs are contrary to the *Code*. People should be able to express their genuinely held religious beliefs in the workplace, within the confines of the *Code*. However, where the person is also an employer, he or she has a duty to respect and protect an employee's right to be free from discrimination because of creed.

The HRTO found that while the religious atmosphere resulted in discomfort, it did not otherwise adversely affect Mr. Streeter's employment. Accordingly, he was awarded $3500 for the violation of his right to be free from discrimination in the workplace.

Since then, the HRTO has dealt with another case claiming religious coercion in the workplace. The HRTO distinguished the facts in *Lapcevic v. Pablo Neruda Non-Profit Housing Corporation*[97] from *Streeter* finding that while the supervisor had given Ms Lapcevic a Bible and had initiated discussions about religion, in the circumstances there was no unwelcome religious pressure on her such that religion became a term or condition of her employment.

[95] (1989), 10 C.H.R.R. D/6153 (Ont. Bd.Inq.).
[96] 2009 HRTO 841 (CanLII).
[97] 2010 HRTO 927 (CanLII)

In a British Columbia Human Rights Tribunal case[98], two young female employees who identified as atheist claimed religious discrimination because of the impact of being exposed to their employer's beliefs. The claim failed because their employer's practice of Reiki, his belief in the effects of positive thoughts and words and his interest in a book called *The Secret* were not found to constitute a religion. Even if the employer's beliefs were religious in nature, there was no discrimination because the complainants were not compelled to engage in any religious practices or required to read *The Secret* and there was no evidence he denigrated their absence of religious beliefs. While listening to the employer may have been annoying, there was insufficient evidence that it interfered with their atheistic beliefs to the point of being discriminatory.

In *Friesen v. Fisher Bay Seafood Ltd.*[99] the British Columbia Human Rights Tribunal considered a claim of discrimination by a man whose employment was terminated because of his refusal to stop proselytizing in the workplace. Mr. Friesen was a good and reliable employee who worked the night shift at a fish processing plant, a shift that was difficult to keep staffed. However, Mr. Friesen's sincerely held belief was that his religious practice required him to "preach, teach, baptise and make disciples". As such, he insisted on preaching to and trying to convert his co-workers during work hours. This resulted in complaints from the other employees who then had to be moved to the day shift. After Mr. Friesen became a supervisor, in light of his position of authority, his religious activities at work were even more concerning. Mr. Friesen was repeatedly cautioned to respect the beliefs of his co-workers and to stop preaching to and trying to convert them during his work hours. After he refused to do so, his employment was terminated.

It was clear that the only reason Mr. Friesen lost his job was because of his religious practice. Therefore, a *prima facie* case of discrimination was found. The employer therefore had the onus to show that their requirement that he not preach during work hours was a *bona fide* occupational requirement. The BC Tribunal had little trouble finding that it was a *BFOR* based on the competing rights of the other employees.

The employer had to maintain an environment where every employee of any religious background feels comfortable and respected at work. The employer correctly understood that other employees had the right to believe as strongly in their religion or in atheism as Mr. Friesen did in his religion and had the right not to be subjected to the religious beliefs of their supervisor. The employer's response was not heavy handed and it did everything it could to the point of undue hardship. The complaint was dismissed.

Other rights and interests

The tension between equality rights and "property rights" has come up in relation to selling property and with regard to how "co-owned" properties may be used. In an Ontario case, a Human Rights Board of Inquiry did not accept that a cottage owner had

[98] *Young and Young on behalf of Young v. Petres*, 2011 BCHRT 38 (CanLII). The case also dealt with the employer's unwelcome touching which was found to be sexual harassment.
[99] (2008), 65 C.H.R.R. D/400, 2009 BCHRT 1.

a “right” to choose who to sell his property to when that decision was based on the race, ancestry and colour of the interested buyer. In the Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem*,[100] the Court considered the religious rights of Jewish residents to set up “Succahs” on their balconies to fulfill a religious requirement during a nine-day religious festival each year. The association of co-owners of the building argued that these temporary structures on some balconies would lessen the economic and aesthetic value of their property and unduly interfere with their property rights under the Quebec *Charter of Human Rights and Freedoms*. The Court found that the alleged negative effects on the co-owners rights or interests were unsupported by the evidence and, at best, minimal. In the circumstances, the Court said, the religious rights and freedoms of the Jewish residents, which would be significantly impaired by a ban on the Succahs, would “clearly outweigh” the unsubstantiated concerns of the other property owners about the decrease in their property value.

In several difficult cases, the Supreme Court has been asked to determine the relationship between society’s interest in protecting children from harm, religious rights in s. 2(a) of the *Charter* and s. 7 rights to life, liberty and security of the person. Although the best interests of the child may not be clearly set out as a “right” protected under human rights legislation or the Canadian *Charter of Rights and Freedoms*, the Court has noted that the objective of protecting children from harm is consistent with *Charter* values.

In *Young v. Young*[101], the Supreme Court dealt with a marital breakdown that had religious implications. After a difficult separation, the mother was awarded custody of the couple’s three children and the father was granted access. However, as a result of concerns about the effects of his religious activities on the children, a judge ordered the father not to discuss the Jehovah's Witness religion with the children, take them to any religious services or meetings, or expose them to religious discussions with third parties without the mother’s consent. The Supreme Court was asked to decide whether sections of the *Divorce Act* that required judges to take into account “the best interests of the child” when deciding on custody and access violated the father’s freedom of expression, freedom of religion and equality rights. While the restriction was struck down by the Court, primarily on the basis that in this case it was not shown to be in the best interests of the children, the majority of the Court found that the right to freedom of religion did not guarantee religious activities that would not be in the best interests of the children. In effect, if religious practices were harmful to a child, the parent’s right had to give way to the best interests of the child.

In contrast, the majority of the Supreme Court found in *B. (R.) v. Children’s Aid Society*[102] that the parents’ decision to refuse a potentially life-saving blood transfusion for their baby was protected by freedom of religion. Using a process under the *Child Welfare Act*, the child had been made a temporary ward of the Children’s Aid Society which had

[100] *Supra* note 14.
[101] [1993], 4 S.C.R. 3. In a case decided at the same time, the Court upheld a prohibition on the access parent “continually” indoctrinating the child with the Jehovah’s Witness religion as a majority of the judges accepted the trial judge’s view that this was necessary in the best interests of the child.
[102] [1995] 1 S.C.R. 315.

consented to the blood transfusion. However, despite the serious contravention of the parent's s. 2(a) rights, the infringement was justified under s. 1 of the *Charter.* The state interest in protecting children at risk was balanced against the parents' rights and found, in this case, to outweigh them.

A number of other competing interests may be weighed against rights protected in the *Charter* and statutory human rights instruments. For example, decisions that have dealt with prohibitions on pornography and child pornography have had to balance freedom of expression against public morality and harm to women and children. National security interests has been argued as a basis to limit s. 7 *Charter* rights. A discussion of these other considerations is beyond the scope of this document.

Statutory defences

Human rights laws and the *Charter* contain exceptions that allow discrimination in certain circumstances. In many cases, these defences are an attempt to statutorily recognize a competing right and may reflect law-makers' efforts to reconcile a conflict between different rights. They typically deal with matters such as religious education, the ability of certain types of organizations that are serving the interests of a particular group of person to restrict their membership to persons who belong to that group, the ability to restrict access to certain facilities and shared housing accommodation by sex, and the rights of religious officials to refuse to conduct marriage ceremonies contrary to their religious beliefs.

On occasion, the courts have been called upon to interpret and apply these statutory exemptions. In doing so, they have emphasized the fact that these while these defences impose limits on some rights, they also confer and protect other rights. Therefore, they should not be interpreted overly restrictively. Nevertheless, the elements of the defence must still apply to the circumstances of the case.

In *Caldwell v. Stewart*[103] the Supreme Court upheld the right of a Catholic school to refuse to employ a Catholic teacher who had disregarded the Church's rules. The teacher had married a divorced man in a civil ceremony, contrary to Church dogma. The Court noted the special role of Catholic teachers in showing the "highest model of Christian behaviour" and the fundamental importance of religious and moral training to the school curriculum. As such, teachers could be required to comply with the religious requirements and to set an example by their own behaviour so that as part of receiving a "Catholic education" students could see the application of the Church's requirements in practice. Because of the special nature of the school, accepting and observing the Church's requirements was found to be a *bona fide* qualification for employment.

As well, the Court considered the application of s. 22 of the British Columbia *Human Rights Code* which allowed non-profit charitable, philanthropic, educational, fraternal, religious or social organizations which had as a primary purpose the promotion of the interests of an identifiable group of persons based on race, religion, age, sex etc. to

[103] *Supra* note 33.

grant a preference to members of the group. The Court stated that the section, in addition to limiting the rights of some, protected the rights of others, in particular the right to association and to promote religion. The defence reflected the intent of the Legislature to protect the rights of denominational schools and similar institutions and, as such, should not be narrowly interpreted. The defence was found to apply and Mrs. Caldwell's dismissal was found not to be a violation of the *Code*. The Supreme Court concluded that the conflict between the two legal rights in this case had to be resolved in favour of the school.

Later on, the Supreme Court reached a similar conclusion in a case under the Quebec *Charter of Human Rights and Freedoms* called *Brossard (Town) v. Quebec (Commission des droits de la personne)*.[104] A town's hiring policy that prevented family members of full-time employees and town councillors from being hired was challenged as discriminatory. The defence at issue read (at the time): "A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory." With regard to the exemption for non-profit charitable, philanthropic, religious, political and educational institutions, the Court noted that it had a dual purpose. While limiting the rights of some individuals to be free from discrimination in employment, the section also granted rights to others, namely the right to freely associate for the purpose of expressing particular views or engaging in particular activities, without violating the *Charter*: "Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances."[105]

The British Columbia Court of Appeal applied the decision in *Caldwell* in *Vancouver Rape Relief Society v. Nixon*,[106] a case that involved the competing rights of a transgendered woman and a feminist organization that provided services to women who were victims of male violence. Vancouver Rape Relief Society decided that Kimberly Nixon, described as a post-operative male-to-female transsexual woman, could not train to become a volunteer peer counsellor because she had not always been a female and had lived as a man. The Court described the case as a dispute between, on the one hand, a non-profit society formed to assist persons seen by its members as marginalized and disadvantaged by men, and on the other a person who is a member of a group that has been marginalized.

The Court concluded that while the actions of the Society met the test for discrimination, the exemption in s. 41 of the BC *Human Rights Code* provided to non-profit organizations applied to protect the Society from liability. The Court emphasized that the defence in the *Code* was designed to deal with competing rights concerns: "If, as I conclude here, the Legislature has said that certain behaviour is prohibited and has established the available defences, it seems to me the Legislature, as law-maker, has set the balance of competing rights in a way that we may not ignore and which is presumptively fair."

[104] [1988] 2 S.C.R. 279.
[105] *Ibid.* at para. 100.
[106] 2005 BCCA 601; 55 C.H.R.R. D/67.

The Court rejected an overly strict application of the defence which would have required the Society to show that its primary purpose was to promote the interests of women who have lived their entire lives as females to get the protection of s. 41. Rather, the Society was entitled to have an "internal preference" in the group it served and to select only women who had lived their entire lives as females for the volunteer peer counsellor program.

A significant and recent Ontario case, *Ontario Human Rights Commission v. Christian Horizons*,[107] dealt with the ability of a religious organization that operates residential homes and camps for persons with developmental disabilities to rely on the special employment defence in section 24(1)(a)[108] of the Ontario *Human Rights Code* in defence of a claim of discrimination on the basis of sexual orientation. Connie Heintz, a support worker in a community living residence operated by Christian Horizons, had signed a Lifestyle and Morality Statement required by Christian Horizons. The statement identified, among other things, "homosexual relationships" as inappropriate behaviour rejected by Christian Horizons.

Several years after beginning her employment, Ms Heintz came to an understanding of her sexual orientation and entered into a same-sex relationship. When this became known to the employer, she was offered counselling to assist her to comply with the Lifestyle and Morality Statement prohibiting "homosexuality". Ms Heintz alleged that after that, she was unfairly disciplined concerning her attitude and performance and exposed to a poisoned work environment.

Christian Horizons conceded that it was discriminating against Ms Heintz unless it came within the s. 24(1)(a) defence. In order to Christian Horizons to rely on this defence it had to show: (1) that it is a "religious organization"; (2) it is "primarily engaged in serving the interests of persons identified by" their creed and employs only people who are similarly identified; and (3) religious adherence is a reasonable and *bona fide* qualification because of the nature of the employment.

The first requirement was easily satisfied. With regard to the second, the HRTO found that Christian Horizons was not primarily serving persons identified by their creed because its main mission was to provide care and support for persons with developmental disabilities, regardless of their creed. However, the Divisional Court overturned that finding. It followed the Supreme Court of Canada decisions in *Caldwell* and *Brossard* saying that s. 24(1)(a) should not be interpreted narrowly because while it limits some rights, it also confers a right to associate on certain groups so they can join together to express their views and carry out their joint activities. In interpreting the section, which the Court noted seeks to balance the rights of certain groups against

[107] 2010 ONSC 2105 (CanLII).

[108] Section 24(1)(a) reads: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 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.

equality rights, the HRTO should have considered the guarantee of freedom of religion for members of religious organizations: "An approach to s. 24(1)(a) that takes into account, in the determination of the primary activity of a religious organization, the perspective and purpose of the organization is consistent with the guarantee of freedom of religion."[109]

Applying the correct interpretation, the Divisional Court found that the charitable work of Christian Horizons was a religious activity through which its members lived out their Christian faith and carried out their Christian ministry. Therefore, it was primarily engaged serving the interests of its members. Its clients with developmental disabilities experienced the related benefits.

However, on the third requirement of s. 24(1)(a), the reasonable and *bona fide* occupational requirement defence, the Divisional Court agreed with the HRTO's finding that Christian Horizons had not shown that complying with the Lifestyle and Morality Statement, including the ban on same-sex relationships, was necessary to perform the essential duties of a support worker. Support workers were not actively engaged in promoting an Evangelical Christian way of life. In fact, residents were not required to be Evangelical Christians. As well, the prohibition on same-sex relationships was not required to effectively perform the job tasks of a support worker which included responsibilities such as cooking, cleaning and helping residents to eat. Therefore, unlike *Caldwell*, where the role of the teacher was to instil Catholic beliefs in the students through teaching and example, here there was nothing in the nature of the employment which would make it a necessary qualification of the job that support workers refrain from engaging in same-sex relationships. Therefore, Christian Horizons failed to establish the third element of the s. 24(1)(a) defence and discrimination was found.

Similarly, in the *Knights of Columbus* case discussed in detail in the section on **Freedom of Religion and Equality Rights/Human Rights**, the BC Human Rights Tribunal rejected the Knight's argument that s. 41 of the BC *Code*, the same section that provided a defence to the Catholic school in *Caldwell* and the women's organization in *Nixon*, allowed them to prefer members of their own religious group when renting their hall. The Tribunal found, based on the evidence, that the hall was available to the public and not just members of the Catholic community. There was no preference granted to Catholics. The complainants were denied access to hall because it was to be used for a same-sex marriage celebration, not because the Knights were granting a preference to another group that shared the same religious beliefs.

In reviewing the decisions considering defences to discrimination in human rights statutes several things are clear. First, unlike human rights defences that limit an individual's right based on other interests (such as monetary interests), defences that also recognize and promote the competing rights of other groups in society are not to be interpreted overly narrowly. Second, despite this approach to interpretation, the defence has to be found to actually apply in the case at issue. Finally, this last point

[109] *Christian Horizons, supra* note 107 at para. 71.

requires a full consideration of context based on the evidence in the circumstances of the case. In particular, the organization seeking to rely on the defence must be able to demonstrate, through objective evidence, the link between the actions that have a discriminatory impact on others and its enjoyment of its group right.

Conclusion

This document has analyzed the most significant legal decisions dealing with competing rights and has highlighted general themes and trends in the legal approach to rights in tension. It has also described a number of situations where decision-makers have been called upon to resolve such disputes. It is hoped that it will assist those who are faced with the difficult task of determining how to resolve a competing rights scenario.

It is clear that although not all decisions deal with discrimination issues directly, many of the values underlying human rights protections, such as respect for human dignity, commitment to social justice and equality, accommodation of a wide variety of beliefs and circumstances, protection of vulnerable persons and minority groups, are a consistent theme when determining how to reconcile or appropriately limit rights. As the Supreme Court of Canada has stated in a number of decisions, including the seminal decision in *R. v. Oakes* which set out the test for determining whether an infringement of *Charter* rights can be justified in a free and democratic society:

> [t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[110]

It is significant that these words very closely echo those that describe the values and principles underlying human rights as found in the preamble to the Ontario *Human Rights Code* and human rights statutes across the country.

[110] *Supra* note 66 at para. 64.