DISCRIMINATION ON THE BASIS OF "CREED" UNDER THE *ONTARIO HUMAN RIGHTS CODE*

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ABSTRACT

The Ontario Human Rights Code clearly protects religious adherents' observance of holy days and dress requirements. While the Supreme Court of Canada has established a framework under s. 1 of the Charter for resolving conflicting rights, there are unresolved issues including the status of religious organizations that serve the vulnerable.

INTRODUCTION

Religion has long been a "hot button issue" in Canadian society with issues of religious conflict garnering media attention and raising controversy. The human rights system provides one mechanism for the peaceful resolution of such conflict. Complaints of discrimination on the basis of creed have tended to fall into one of several categories: holy days, religious dress and conscientious objection to certain types of work. Where there are conflicting rights a framework for resolution exists under s.1 of the *Charter*. Religious adherents have lately been critical of the human rights system, largely because of high profile cases concerning expression, this despite the protection for religion under human rights codes.

APPLICATION OF THE *CHARTER*

Interpretation of the *Code* must be in accordance with the *Charter*. Section 2(a) guarantees "freedom of conscience and religion" as a fundamental freedom and s. 15 protects individuals from discrimination on the basis of religion. Justice Dickson set out two guiding principles for religious freedom in *Big M Drug Mart*, [1985] 1 S.C.R. 295:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. (para. 94)
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> Freedom can primarily be characterized by the absence of coercion or constraint. (para. 95)

The Supreme Court defined "religion" in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual

> fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith. (para. 39)

In the most recent case from the Supreme Court of Canada concerning religious accommodation, *Alberta v. Wilson Colony of Hutterian Brethren*, 2009 SCC 37, the majority criticized the Alberta Court of Appeal's approach; it applied "reasonable accommodation" when considering the minimal impairment branch of the *Oakes* test. However, in two previous cases, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256, the Supreme Court clearly used a convergent approach. Charron, J., writing for the majority in *Multani*, says:

> Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. (para. 53)
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> While it is now not clear whether the *Charter* and human rights codes should be applied similarly, it is clear that *Charter* jurisprudence should be considered.

DISCRIMINATION ON THE BASIS OF "CREED"

Infringements of the right to be free from discrimination on the basis of creed can be direct, a bus company that refuses religious advertising, or adverse effect discrimination, a general dress code that impacts those with religious requirements.

Re Ontario Human Rights Commission and Simpsons-Sears (sub. nom O'Malley v. Simpsons-Sears) [1985] 2 S.C.R. 536, established the principle that an employer must accommodate an employee's religious observances to the point of undue hardship. The employer's requirement that all full-time staff work occasional Friday evenings and Saturdays violated Mrs. O'Malley's observance of her Sabbath, as a Seventh-day Adventist.

The Supreme Court of Canada established a new standard for adverse effect discrimination in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3 *[Meiorin]*. It ruled that the accommodationist approach left discriminatory "neutral rules" in place, while singling out those on whom they had a discriminatory impact. The neutral rule itself should allow accommodation.

OBSERVANCE OF HOLY DAYS

It is settled law that employers must accommodate their employees' holy days and days of observance (Sabbath). In *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970, the court required both an employer and a union to accommodate a Seventh-day Adventist's Sabbath observance. In the 1994 case *Commission scolaire régionale de Chambly v. Bergevin,* [1994] 2 S.C.R. 525, the Supreme Court held that a school calendar requiring Jewish teachers to work on Yom Kippur was discriminatory and ordered that the teachers be granted that day off with pay.

The Ontario Court of Appeal applied the *Meiorin* principles in *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U. (Tratnyek)* (2000), 50 O.R. (3d) 560. Tratnyek observed 11 holy days annually but his employer provided two paid days for observances. The employer allowed him to make use of a compressed work week for the additional nine days and adjusted its usual practice by allowing him to take the days off when he required them.

DRESS REQUIREMENTS

Adverse effect discrimination has been found where employers have neutral dress requirements that conflict with religious requirements.

K.S. Bhinder, a Sikh, challenged a CNR safety helmet requirement as discriminatory on the basis of religion under the *Canadian Human Rights Act*. The Supreme Court of Canada applied a two-fold test to determine if it was a *bona fide* occupational requirement and found that the hard hat was imposed honestly and in good faith, meeting the subjective part of the test. The objective part of the test was also met as hardhats promoted safety. The Supreme Court of Canada reversed *Re Bhinder and Canadian National Railway*, [1985] 2 S.C.R. 561, in 1990 in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489.

While a Sikh complainant successfully challenged the mandatory motorcycle helmet law in British Columbia in *Dhillon v. B.C. (Min. of Transportation and Highways, Motor Vehicle Branch)* (1999), 35 C.H.R.R. D/293 (B.C.H.R.T.), the Ontario equivalent survived a *Charter* challenge *R. v. Badesha* (2008), 168 C.R.R. (2d) 164 (Ont. C.J.). Justice Blacklock found that the requirement infringed Sikhs' religious freedom but it was saved under s. 1 as helmets protect safety.

A job requirement of a clean-shaven face is also discriminatory towards Sikh men. When the issue is purely aesthetic the company was required to consider the complainant's application for employment. Where the job could necessitate wearing self-contained breathing apparatus in the event of a gas leak in a pulp mill, as in P*annu v. Skeena Cellulose Inc.,* [2000] B.C.H.R.T.D. No.

56, or to lead correctional facility inmates to safety as in *Re Singh and the Crown in Right of Ontario (Ministry of Correctional Services)*(1980), 27 L.A.C. (2d) 295, the requirement has been upheld because failure to do so endangers the lives of others.

The Sikh requirement to wear a ceremonial dagger, the kirpan, has been more problematic. Kirpans are not permitted on Canadian airplane flights. Judges can exclude kirpans from the courtroom. In 2006, however, the Supreme Court of Canada upheld the right of a Sikh boy to wear the kirpan at school, requiring an exemption from a "no weapons" policy in *Multani* (noted above)

Dress requirements for Muslim women have also been at issue. UPS settled a case in 2005 after firing several Muslim women alleging that their long skirts were hazardous when climbing ladders to retrieve packages. In Ontario, a human rights tribunal found that a Muslim woman had been discriminated as her employer commented regularly that her hijab and loose, modest clothing were "unprofessional" (*Saadi v. Audmax Inc.*, [2009] O.H.R.D.T. No. 994). Finally, a Quebec lifeguard filed a complaint against the YMCA after she was fired for wearing a "burqini," a full-body swimsuit. The YMCA alleged that it was a matter of safety as panicked swimmers might grab the loose fabric.

Religious dress requirements must be accommodated under the *Code* except when they present proven safety risks.

CONSCIENTIOUS OBJECTION

A third area where complaints have been made is that of conscientious objection to certain activities in relation to employment. A Newfoundland hospital was required to reinstate a clerk who was suspended because she refused to sell tickets to a social event at which liquor would be served because it violated her Pentecostal prohibition on alcohol (*Warford v. Carbonear General Hospital* (1988), 9 C.H.R.R. D/947). A Shoppers Drug Mart was required to compensate a Jehovah's Witness who they required to arrange a display of poinsettias during the Christmas season, violating his religious beliefs regarding the observance of Christmas (*Jones v. C.H.E. Pharmacy Inc. et al.*, 2001 B.C.H.R.T. 1). An Ontario Labour Arbitrator ruled that the requirement that employees use a biometric scanner as part of a security system violated their religious beliefs (*407 ETR Concession Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada, Local 414 (Black Grievance)* (2007), 158 L.A.C. (4th) 289).

A current issue before the courts involves whether and to what extent objections to same-sex marriage must be accommodated. In Ontario, s. 18.1 was added to the *Code* to make it clear that religious officials may refuse to solemnize, or otherwise be associated with, same-sex marriages if it violates their religious beliefs. However, this does not address whether civil officials who solemnize marriages or issue marriage licences should be similarly accommodated.

CONFLICTING RIGHTS

The Supreme Court of Canada addressed competing rights under a provincial human rights code in *Ross v. New Brunswick School District* No. 15, [1996] 1 S.C.R. 825. A board of inquiry found that a school board discriminated against Jews by failing to discipline a teacher, Malcolm Ross, who published anti-Semitic materials, and ordered that he be removed from the classroom and that his employment be terminated if he published further anti-Semitic literature. Ross applied for judicial review. The Supreme Court of Canada found that the school board must ensure a welcoming environment for all and that Ross should have been disciplined. However, the requirement that Ross not publish further anti-Semitic literature did not meet the minimal impairment test.

The Ontario Division Court followed the same approach in *Brillinger v. Brockie* (2002), 161 O.A.C. 324 (Div. Ct.). The director of The Gay and Lesbian Archives made a complaint of discrimination on the basis of sexual orientation after Scott Brockie refused to provide printing services on the basis of his religious beliefs. The Ontario Divisional Court acknowledged that the board's order infringed Brockie's s. 2(a) rights to freedom of religion. In the s. 1 analysis, it determined that the board's order was too broad and amended the order such that Brockie was not required to print material that offended his religious beliefs, but required him to print non-offensive material such as stationery.

A more complex issue is raised in *Heintz v. Christian Horizons* (2008), 63 C.H.R.R. 12 (Ont. H.R.T.). Heintz brought a complaint against Christian Horizons, a provider of residential services to mentally handicapped adults in Ontario, after feeling forced out of her job when she began a lesbian relationship. This violated Christian Horizons' lifestyle policy. A human rights tribunal found that Christian Horizons does not fit within the exemption for religious organizations found in s. 24(1) of the *Code* because it provides services to mentally handicapped adults regardless of their religious affiliation. This decision could impact numerous religious organizations, including food banks, homeless shelters and international development agencies, that serve vulnerable populations.

CONCLUSIONS

Court and tribunal decisions give strong protection against discrimination on the basis of "creed". Every effort should be made to ensure religious adherents can observe religious holy days, Sabbaths and dress requirements. Limitations are accepted when there are health and safety requirements or undue hardship to employers.

While an employee's conscientious objection must be respected, it is not clear how this applies to objections to involvement with same-sex marriage, as it is also a protected right. The status of religious organizations that serve the broader community is also in question; even if they do not fall within the exemption to the *Code* in s. 24(1), do they have some protection from the guarantee of religious freedom under the Charter?