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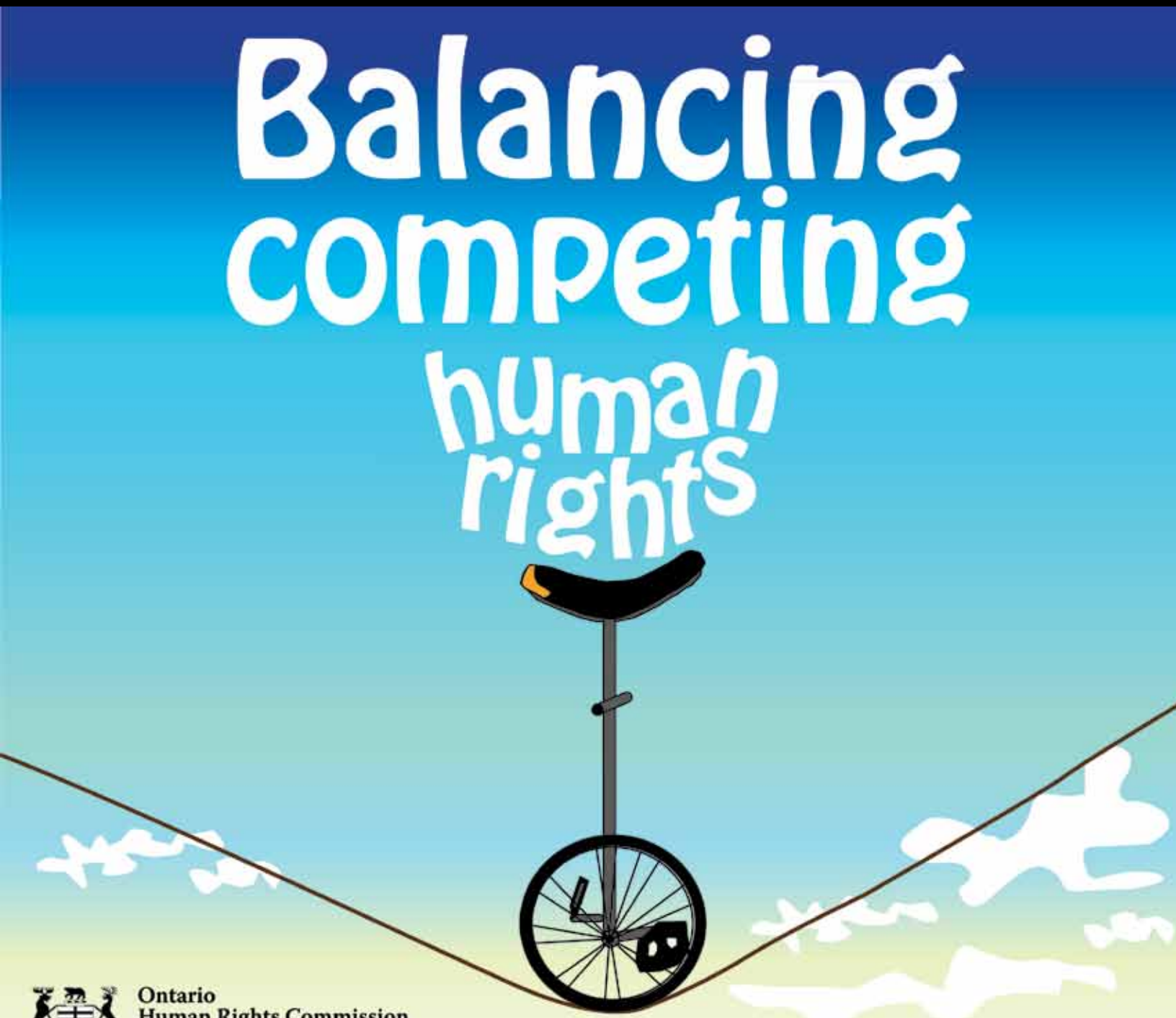
Balancing competing human rights



The new mandate of the Ontario Human Rights Commission

Ontario Human Rights Commission
Commission ontarienne des droits de la personne

On June 30, 2008, the *Human Rights Code Amendment Act*, 2006 came into effect, changing the human rights system in Ontario. As part of this, the mandate of the Ontario Human Rights Commission (OHRC) has changed.

The Ontario Human Rights Commission (the OHRC) no longer accepts complaints of discrimination. All new applications complaining about discrimination are now filed directly with the Human Rights Tribunal of Ontario (the HRTO).

A new body, the Human Rights Legal Support Centre, will offer independent human rights-related legal and support services to individuals, ranging from advice and support to legal representation.

Under the new Act, the role of the Ontario Human Rights Commission (OHRC) in preventing discrimination and promoting and advancing human rights in Ontario is strengthened. The OHRC has been given the power to:

- Expand its work in promoting a culture of human rights in the province
- Conduct public inquiries
- Initiate our own applications (formerly called “complaints”)
- Intervene in proceedings at the Human Rights Tribunal of Ontario (HRTO)
- Focus on engaging in proactive measures to prevent discrimination using public education, policy development, research and analysis

The OHRC has also been given broad inquiry powers. The HRTO may refer matters in the public interest to the OHRC and may ask the Commission to conduct an inquiry. We will have the power to monitor the state of human rights and report directly to the people of Ontario. The OHRC may also apply to the HRTO to state a case to the Divisional Court where it feels the HRTO decision is not consistent with OHRC policies.

We will continue to be guided by the Human Rights Code in all our work. The overall spirit of the new law is that the OHRC is one part of a system for human rights alongside the HRTO and Human Rights Legal Support Centre.

In some ways, the new law enhances the OHRC’s independence. We will file our annual report directly to the Speaker of the Legislative Assembly, instead of through the Attorney General, as we have in the past. We will have the power to monitor and report on anything related to the state of human rights in the Province of Ontario.

Our power to review legislation and policies, for example, is very broad. The new law refers to our ability to consider whether legislation is inconsistent with the intent of *the Code*. We will have a role in dealing with “tension and conflict” and bringing people and communities together to help resolve differences. Our current role as a developer of public policy on human rights is made explicit in the new legislation, as is the way those policies can be used in issues that are before the Tribunal.

Our vision

An Ontario in which everyone is valued, treated with dignity and respect, and where human rights are nurtured by us all.

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LETTERS

Comments on this edition of Canadian Diversity?
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Your letters may be edited for length and clarity.

MESSAGE FROM BARBARA HALL, CHIEF COMMISSIONER, ONTARIO HUMAN RIGHTS COMMISSION

CONTINUING THE DIALOGUE ON BALANCING COMPETING RIGHTS

A person who is blind and uses a service dog wants to take a taxi, but the taxi driver's religious beliefs lead him to not allow dogs in his car. A marriage commissioner refuses to perform a marriage ceremony for a same-sex couple, because it would be contrary to her religious beliefs.

What do we do in cases like these, when rights related to one *Code* ground seem to conflict with those of another ground? The OHRC is working to find answers.

In March 2010, we held a Policy Dialogue on Competing Human Rights Claims in partnership with the York University Centre for Public Policy and the Law. This was the first step in our work to develop an OHRC policy on balancing competing rights.

Community and advocacy groups joined academics, lawyers and policy makers to discuss what competing human rights claims look like and how they may be handled to maximize the human rights of all involved. The Dialogue papers included in this issue reflect the discussion we enjoyed with these diverse partners.

Our task over the two days of the Dialogue was to start to build a structure and a process that we could all use to deal with competing human rights claims. We talked about balancing and compromise, about analytical frameworks and approaches, about individual rights and group rights and even relational rights.

As we work to develop a process, we must make sure we always think about the people affected. We need to be thinking about people like Gurbaj Singh Multani, the young man whose faith required him to wear his kirpan – even though his school said the kirpan might be dangerous for other students. In his case, the Supreme Court said:

> By disregarding the right to freedom of religion, and by invoking the safety of the school community **without considering the possibility of a solution** that posed little or no risk, the school board made an unreasonable decision.

As we work to find a workable balance between competing rights, we must always "consider the possibility of a solution." That is the first big step to resolving our differences and building a society that recognizes the human rights of all.

Solutions will not always come easily. Consider the case of N.S., still before the courts. In this case, a woman was ordered to remove her niqab when testifying at a preliminary hearing in a sexual assault case. Does her right to wear the niqab outweigh the defendants' right to full answer and defence of the charges against them?

We have seen or been involved in a number of recent cases where religious rights clashed with sexual orientation rights, and we expect to see this again.

For people with disabilities, encountering barriers is too often a daily experience. Sometimes a way to get over a barrier – like a service dog – turns into another conflict. How do we balance one child's allergies with another child's service animal?

In Ontario, with 15 grounds under the *Code*, in five service areas, conflict is inevitable. Our challenge is to make fair resolution inevitable, too.

Beverley McLachlin, the Chief Justice of the Supreme Court has long experience with human rights – and her approach is clear. She says:

> We **need** human rights. Whether we like it or not, religious, ethnic and cultural diversity is part of our modern world – and increasingly, part of our national and community reality. Human rights and the respect for every individual upon which they rest, offer the best hope for reconciling the conflicts this diversity is bound to generate. If we are to live together in peace and harmony – within our nations and as nations in the wider world – we must find ways to accommodate each other.

We started that task with the Policy Dialogue last March. We will continue to work on this until we find the best ways to help real people find real solutions.

EDITORS' INTRODUCTION

Shaheen Azmi, Lorne Foster and **Lesley Jacobs**

Over the last decade, the practice of human rights has taken on increasing complexity in Canada and elsewhere around the world, in large part because of the way human rights claims are understood. There are times when the claim to a right of one individual or group directly affects the claim to the human rights of another group. Such competing human rights claims can be played out in many places, from the classroom to workplaces, to the international stage, wherever individuals or groups actively claim the recognition of rights that may interfere with the access to rights of others. How do individuals, groups, organizations, governments, human rights commissions, non-governmental organizations (NGOs) and academics approach this multi-faceted issue?

In March 2010, The *Ontario Human Rights Commission* (OHRC) in partnership with the *York Centre for Public Policy and Law* at York University in Toronto hosted a policy dialogue, *Towards a Policy Framework to Address Competing Human Rights Claims*, which sought both to inform and shift how differently situated people from across society – ordinary citizens, journalists, human rights lawyers and advocates, academics – think about competing human rights claims. The vision for the policy dialogue was to bring leading stakeholders from a wide range of affected groups – faith communities, persons with disabilities, LGBT groups, other minority groups, all sorts of NGOs and civil society organizations – together with academics who work on rights conflicts from a wide range of perspectives, human rights practitioners and lawyers and people from human rights commissions across Canada to talk about when human rights claims collide, confront or compete with one another. The policy dialogue was designed as a major step towards the formulation of a new policy for the OHRC in the area of competing human rights claims. It included sessions on a range of topics related to competing rights claims including philosophical perspectives, legal frameworks, particular contexts such as those involving disability, religion, sexual orientation, and gender, the limitations on court adjudication, social policy perspectives, the media's portrayal of and role in competing rights claims, and examples of civil society approaches.

The essays in this special issue of Canadian Diversity are the product of *Towards a Policy Framework to Address Competing Human Rights Claims*. The contributors were all participants in the policy dialogue and offered substantial insights into the nature of competing human rights claims and how to move the discussion forward in the framing of a policy in Ontario and elsewhere in Canada for addressing competing human rights claims.

We would like to acknowledge here the tremendous contributions of Robin Smith at the York Centre for Public Policy and Law and Dora Nipp at the Ontario Human Rights Commission. We also like to thank The Law Foundation of Ontario, Noël Badiou and Selwyn McSween of the Centre for Human Rights at York University for their support. Aaron Jacobs provided valuable editorial assistance on the papers.

SHARING THE SIDEWALK

Shauna Van Praagh is an Associate Professor and Associate Dean of Graduate Studies at the Faculty of Law at McGill University, and a member of the McGill Centre for Human Rights and Legal Pluralism. She teaches "Social Diversity and Law", and has given workshops to primary school students on "Our Hasidic Neighbours".

ABSTRACT

This paper imagines different users of the sidewalk, with an emphasis on religious women, to explore the ways in which individuals and communities shape discourse in contemporary Canada. While approaches to "competing rights" often take the form of Charter modification, legislation, or litigation, the fragile intersection of faith and gender can be described through simple "sidewalk stories" of acknowledgement and interaction.

I. THE SIDEWALK MOMENT

Imagine a sidewalk in a major cosmopolitan Canadian city. As you walk along, with your list of errands in hand, you see someone heading towards you. You don't know the person, where she comes from or where she is going, and she doesn't know you. You step to the right, as does she, and you pass each other – having avoided eye contact and collision. You have shared the sidewalk, you have acknowledged each other, you have followed well-known norms of conduct, and nothing about your purpose, direction, or trajectory has been affected by the encounter. This is co-existence in the absence of conflict, controversy or even conversation.

And yet, many sidewalk moments go beyond silent co-existence. Risks of collision and competition for the space are present; so are potential promises of conversation and concern. The range of possible sidewalk encounters – shaped by the identities of the sidewalk users, the nature and norms of the neighbourhood, and the character of the sidewalk itself – gives rise to various ways to govern the co-existence of sidewalk users. We might focus on the possibility of conflict, and create general principles or specific rules of resolution. We might imagine ways to communicate norms of conduct such that controversy is avoided. Or we might collect stories of encounters in order to construct a narrative of sidewalk moments.

Models of governance embodied by these responses are reflected in any discussion of "competing rights". Charters or Codes are obvious structures for grounding the principles relevant to resolving competition. Specific legislation or educational policies may be even more effective at targeting particular kinds of conflict. This paper will suggest that a collection of stories and behaviours is an equally significant approach. Rather than imagining rules that govern the "sidewalk moment" of rights that challenge each other to a duel, this approach is committed to a careful observation of the interactions – of rights, interests, identities, narratives, and real people – in the limited space that a sidewalk provides. Social policy may be constructed "on the ground", both figuratively and literally. The sidewalk moment helps us engage in that construction project.

II. SIDEWALK VARIATIONS

1. REDEFINING THE SIDEWALK

The metaphor of the sidewalk moment reminds us that some basic rules or minimal ordering are required to govern the interaction of pedestrians going in opposite directions. The norm that might tell us to move to the right in order to avoid collision gives us only a skeletal picture of human relations and interaction. The sidewalk itself in this image is neutral background against which two similar users balance each other. But this is an analysis of competing rights untouched by the richness of sidewalks in real neighbourhoods. Sidewalks are places to play hopscotch, to sleep, to put out a hat for money, to train a dog, to operate a snow removal truck, or to learn how to ride a bicycle. They are collective sites of many intersecting interactions.

In Outremont, in Montreal, on Saturday mornings, the sidewalk is both a public path for some people and an

extension of their homes for others. Religious fiction allows the Hasidic Jewish residents of Outremont to treat all space demarcated by wires or strings as domestic or private (Van Praagh, 1996; Chateauvert, et al., 2004; Anctil, et al., 1999). From a practical viewpoint, this means that baby carriages can be pushed down the sidewalk on the Sabbath, their owners reassured by the overhead wires that the ground is deemed domestic for religious reasons. Thus, the shared sidewalk is not only a potential site for the encounter of a deeply religious pedestrian and her non-religious neighbour. It is also literally a fusion of definitions: a religious community definition of the sidewalk as private, and a secular state definition of the sidewalk as public. One definition is visibly inscribed, through wires high above pedestrians' heads. The other is necessarily invisible, marked by the mix of users and uses of the space.

Ten years ago, objection to the "eruv" being juxtaposed on Outremont neighbourhoods resulted in the dismantling of the wires by the municipal government. But, after a 2001 Quebec Superior Court case (Rosenberg v. Outremont, 2001), the Hasidic communities succeeded in reinstating the eruv. Thus, the literal line placed by the Hasidim around their communities to facilitate religious observance, co-exists with the figurative line drawn by the municipality around the entire neighbourhood, filling it in with public space (Cooper, 1996; Gagnon, 2002).

The eruv story is effective for three principal reasons. First, it teaches us that stories of encounter – or of competing rights – have to be placed in context in order to be meaningful. It is futile to imagine telling two sidewalk users how to behave vis-à-vis each other if we don't know where they are and who they are at the moment of encounter. Second, it reminds us that the well-worn dichotomy of public and private requires particular sensitivity and attention. Not only can it be turned on its head, such that private interactions depend on public structures, and public norms can sometimes be best seen through a private lens, but it denies important overlap. Thus, approaches to "competing rights" are drawn from both public law and private law.

Third, the eruv brings together two seemingly disparate actors and institutional sites of governance. The role and responsibility of the municipal authorities illustrate state authority. At the same time, the extension of the domestic sphere invites us through the front door of a Hasidic Jewish home writ large. We expect to turn to the municipality as the site of jurisdiction over a sidewalk; after all, there must be rules on snow clearance, spring-cleaning, and general maintenance. But the possibility of a Hasidic mother carrying her baby on that sidewalk on a Saturday comes from the normative authority situated in her home, the authority that allows her to do what would otherwise be deemed prohibited work. The governance of the sidewalk is simultaneously top-down, in the form of state law, and bottom-up, in the form of religion-derived family custom.

2. GOVERNING THE SIDEWALK

Examples of state desire to define space and modes of behaviour are not hard to find. The Canadian Charter of Rights and Freedoms is one, as are all provincial human rights codes or charters. When individuals bring claims of discrimination or the infringement of their fundamental rights, against either state or non-state actors, they rely on an explicitly articulated commitment to individual freedoms. The individual whose freedom has been violated can walk down the sidewalk, head held high, once those in his path have been told to step aside in the name of human rights protection. As one state authority orders one sidewalk user to yield to the other, however, another state authority may try to impose the opposite rule. Different state actors compete in their attempts to define and govern space and behaviour. When the Bouchard-Taylor Commission was created by the Quebec government in 2007, part of the preamble of its mandate explicitly named as a concern the appropriate balance between the rights of the majority and the rights of minorities (Commission de consultation sur les pratiques d'accommodement relieés aux difference culturelles, 2007). At the same time, the municipality of the small village of Hérouxville pointed specifically at the Quebec and Canadian charters of human rights as the source of unreasonable accommodation of certain immigrant cultures. Both these instances are examples of scepticism towards interpretation by courts and tribunals of state instruments of human rights protection. Both react to state governance of "competing rights" by questioning its language, structures, and application.

The "Code de vie" proposed in Hérouxville literally addressed questions of who could walk where, how, why, and with whom (Municipalité de Hérouxville, 2007). Significantly, the *Code* specified that individuals covering their heads and faces were not welcome in the village, an intended reference to Muslim women. The visit of a busload of Muslim women from Montreal, arms full of baked treats, gave Hérouxville residents a much-needed reality check. But the clumsy attempts to articulate a broad answer to the question of "Qui sommes-nous?" through a specific exclusion of particular religious people from the sidewalks are worth closer attention. In reaction to accommodation perceived as overly generous to religious minorities, we find the explicit exclusion of religious women whose mode of dress identifies them as such. That is, the easiest target is the most visible, and the prime example seems to be the Muslim woman who covers her head, her face, or her body.

The call – both metaphorical and literal – for a clearing of the sidewalks of religious women, is often supported in the name of gender equality. Indeed, the Quebec Council on the Status of Women has argued for a modification of the Quebec Charter such that freedom of religion would be explicitly subordinated to the right to gender equality (Le Conseil du Statut de la Femme, 2007). This approach focuses on a human rights framework as both problem and solution. The issues are characterized as challenges of competing rights, and the remedy is the imposition of a clear hierarchy. As religious individual meets woman on the sidewalk, the religious individual should always give way and walk in the street.

3. CONFRONTATION ON THE SIDEWALK

Such an encounter characterizes the patch of Montreal sidewalk that links two now-famous neighbours: the YMCA and the Satmar Hasidic synagogue (Gruda, 2007). Satmar Hasidic Jews pray at the synagogue and use it as a community centre and yeshiva. Next door, YMCA members swim, exercise, work out with weights, and participate in children's programs. When representatives from the synagogue offered to pay to frost the Y's windows in order to stop Hasidic boys from spending time looking across the alley at women in the exercise room, the Y accepted their proposal. In doing so, it failed to consider the views of its own community and clients. After much heated discussion in 2007, the frosted windows disappeared, the Hasidic boys – one presumes – were placed under stricter surveillance, and neighbourly equilibrium was restored.

The sidewalk site for this back-and-forth can be interpreted as a battle between gender equality and religious ideology. The women of the Y might signify equality, freedom and the future; the men of the synagogue religious authority, isolation, and the past. But the story and the sidewalk need not be presented in this way. No explicit conflict on the sidewalk ever took place; each neighbour, and its members, displayed respect for the other. The initial negotiation of co-existence was simply reworked, as more voices were heard and perspectives added. Rather than a clear-cut victory of one neighbour or right over another, this is a story of shared space marked by dynamic diversity or fluid hybridity (Simon, 1999).

This alternative perspective on the story – one in which the contours of co-existence are shifting rather than sharp – holds out more potential for recognizing the missing people in the picture. Whether in the Status of Women's recommendation for a trumping right of gender equality, or in a simplistic characterization of Y and synagogue as a conflict between gender and religion, religious women are absent. That is, all individuals of faith appear to be men, and all women appear to be faith-free. The notion that a choice need be made between equality and religious freedom in human rights law doesn't seem to make real space for women as members of religious communities. Going for an actual walk through the neighbourhood, and observing the mélange of activities that fill the buildings and sidewalk, holds out much potential for interacting with women of faith.

III. REIMAGINING SIDEWALK SPACE

The paradigmatic image of the problematic outsider in much of the discourse on social diversity and citizenship has become the religious woman, cloaked (literally or figuratively) in the vestments of her faith. She is seen as a victim of religious norms governing gender dynamics and roles, someone caught in traditions that need to change. Often it sounds like it is the responsibility of the state to somehow save her, to help her take off the cloak and find herself. However, denying a religious woman the right to wear the vestments of her faith in public risks pushing her right off the sidewalk, either into oncoming traffic with no protection or back into her "private" home with the blinds closed and curtains drawn.

Instead, we could look for ways to walk with her, to make room on the sidewalk. Above, we saw how the eruv turns the sidewalk into both public space and an extension of the home. Perhaps encouraging that extension, such that the private is opened up rather than kept closed, means that the religious woman's footprints can be traced in the fresh snow along with those of her neighbours. Instead of telling her she can't come outside as she is, we develop our side-by-side existence until we both feel "at home" inside and out.

In a collection of essays written in Yiddish and now published in French and English, a Hasidic woman in Outremont writes of her daily life, the challenges of bringing up twelve children, and the tiny moments that constitute her relationships and responsibilities (Zipora 2006, 2007). As she says, she lives with her curtains closed to the outside world. But she is prepared, through her writing, to extend an invitation into her home. By sharing her own space, usually closed off as private or domestic, she offers an opportunity to all to recognize the complex ways in which religious women organize and experience their overlapping membership in communities of faith and in the broader community at large.

An invitation into a religious woman's home is much harder to come by than is a confident handle on how to approach "competing rights". But I would suggest that such an invitation has the potential to be turned into a much more meaningful story, one that sheds light on how claims of rights violations can be understood and

effectively addressed. A real mix of narratives and experiences serves as the multi-textured sidewalk space in which individuals and communities observe, acknowledge, and talk with each other. Sometimes, conflicts occur and require resolution. Yet it is futile to search for a constitutional, legislated or policy template that simply provides the answer and sidesteps complicated conversation. Each conflict, like each story of encounter on the sidewalk, will carry its own context, characters, and consequences.

Codes, charters, and constitutions are structures that frame our institutions and guide our collective character and well-being. But they co-exist with daily dialogue and interaction in which we engage as neighbours and citizens. That is, while state instruments and institutions embody a "desire" to define and govern shared space, the "capacity" to actually oversee and govern the sidewalks belongs to the users. Attempting to address the competition among rights in an abstract way assumes that charters set out basic background rules that resolve any imagined or real conflict. Instead, if we recognize the multiple meanings of the shared sidewalk, we realize how many sites of encounter exist, whether formal or informal, easy to see, or quietly hidden.

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SHARED CITIZENSHIP AS THE CONTEXT FOR COMPETING HUMAN RIGHTS CLAIMS: TOWARDS A SOCIAL POLICY FRAMEWORK

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ABSTRACT

This paper argues that shared citizenship provides the context and the means for differently situated persons to advance competing human rights claims and that this shared citizenship can be a resource for Human Rights Commissions in Canada to develop social policy that frames competing human rights claims.

I. INTRODUCTION

Competing human rights claims pose a multitude of difficult and pressing challenges. Some challenges are philosophical in nature: should all human rights claims be given equal weight? Other challenges are juridical in nature: how should judges decide cases where competing human rights are at issue? Still other challenges revolve around social policy: can we be proactive and reduce the likelihood of competing human rights claims arising in the first place? How can persons with competing human rights claims reconcile with each other? Can civil society or state institutions be designed that facilitate processes and provide remedies when human rights conflict?

This paper attempts to meet some of the challenges in developing social policy for addressing competing human rights claims. It assumes a *social constructionist* engagement with human rights. Social constructionism is a sociological theory of knowledge that considers how social phenomena develop in social contexts; and seeks to explore rigourously the nuances, contingencies, contestations and meanings that are part and parcel of the social construction of reality. Within constructionist thought, rights are considered as a construct or 'artifact' that is dependent on contingent variables of our social selves. There is now a substantive body of literature examining various aspects of the social practice of human rights. Here, rights are not simply given as divine will, or as transhistorical being, or as universal ontology – but are considered products of human social interaction with all its imbalances and imperfections. From this perspective, human rights are invariably the product of the balance of power between

normatively-oriented social actors in a social-historical context. The argument advanced here is that shared citizenship provides the context for competing human rights claims in Ontario and that this context can provide the Ontario Human Rights Commission (OHRC or Commission) with direction for the development of a social policy framework that addresses competing human rights claims.

II. SOCIAL CONSTRUCTIONIST INSIGHTS FOR HUMAN RIGHTS SOCIAL POLICY DEVELOPMENT

The idea of the 'universality' of rights, argued Malcolm Waters (1996:593), "is itself a human construct." This insight has major implications for human rights social policy development. The social constructionist approach examines what actors actually do with human rights in everyday life, in institutional-settings, and in other specific fields of political contestation. In developing a framework for understanding the social construction of rights, research has begun a move toward foreclosing on the age-old philosophical and ontological status-debates, and focusing on the investigation of their meaning, use and mobilization. Moreover, by declaring an interest in the 'indeterminacy' of rights, social constructionist research is well-placed place to investigate the shifting dynamics of rights disputes, or *competing human rights claims;* which are becoming increasingly prevalent in our transnational and multicultural world. By investigating the social relationships, practices and struggles that mobilize right claims and rights talk, and animate rights disputes, the social constructionist approach can 'bracket' the prevailing dominant discourses and provide a more dynamic and textured understanding of rights.

From a social constructionist perspective, human rights claims should be seen as the product of a particular place and time, and in this respect, historically and socially contingent. This observation is significant in a number of ways. First, rights are not simply inalienable or natural; they are not necessarily beneficial for the rights holder to exercise. Second, human rights were invented in the modern age both as a product of the exercise of a particular type of political power and as a response to a particular form of power (Hunt 2007). Contrary to Lockean political philosophy, 'rights' and 'freedom' were not in existence before 'power', but rather are the distinctive products of the 'new mode of life' that is modern global capitalism (Woodiwiss, 2005: 32). They have a paradoxical nature in that they allow us to challenge inequalities whilst contributing to the production of social divisions. Third, although human rights typically find expression in law, they have a life in society outside the law and do not rely solely on the juridical sphere to dictate their meaning. For this reason, the doctrine of human rights can go beyond law and form a fundamental moral basis for regulating contemporary social order.

Finally, and most importantly, in our society, human rights are a constitutive component of full citizenship and rights claims are an expression of that shared citizenship. In a social constructionist ideal world, social actors go through human rights discourses to get to citizenship. In this ideal world, the mutual recognition of others as human rights bearers is a function of shared citizenship, which shifts the terms of debate from the problems of balancing or reconciling competing human rights claims to their democratic citizenship potential. Here, competitive practice and conflicting rights claims at the individual and collective levels are conceived as disciplinary threads in weaving the social fabric of a fulsome and expanded "social citizenship" (Marshall 1964). This ideal state is an emergent reality that extends the meaning of citizenship rights beyond conventional notions of legal and political equality to encompass social equity rights, including the right to a minimum level of economic security and social welfare assured by the state. These emergent social citizenship rights refer to guarantees of equal opportunity for socially disadvantaged groups, such as women, Aboriginal peoples and other people of colour, to participate fully in the public as well as economic life and to expect a reasonable level of respect and recognition from others. In this ideal social constructivist world, the task of state and institutional social actors, the courts and human rights commissions, is to move democracy forward by increasing the access-avenues to justice. Shared citizenship provides, in other words, the context for these actors to advance competing human rights claims against each other and the state.

III. THE NEW MANDATE OF THE ONTARIO HUMAN RIGHTS COMMISSION

The social constructionist ideal world of competing human rights claims can be shown to fit well with the new mandate of the OHRC given by the *Human Rights Code Amendment Act*, 2006. The new mandate requires the Commission to bridge the gap between public policy and justice administration. Thereby, the Commission is now responsible for developing public policy, as well as, addressing tension and conflict in the province, in order to bring people and communities together to help resolve differences. This new mandate bestows the unique capacity to address multi-faceted social issues with a broad range of processes – those both rule and policy-based, and those left to discretionary decision makers.

Under the mandate of the new *Act*, the Commission has the role of monitoring the state of human rights and to report directly to the people of Ontario. It has been given the power to:

- Expand its work in promoting a culture of human rights in the province
- Conduct public inquiries
- Initiate its own applications (formerly called 'complaints')
- Intervene in proceedings at the Human Rights Tribunal of Ontario (HRTO)
- Focus on engaging in proactive measures to prevent discrimination using public education, policy development, research and analysis

The interpretive principles governing the *Human Rights Code* have been left to the courts. But the new mandate shifts the institutional focus of the Commission from a more legalistic to a more social policy approach. In the words of the Attorney General of Ontario (2008), "[T]he Ontario Human Rights Commission works to promote, protect and advance human rights. Its main focus is to address the root causes of discrimination. Activities include research and monitoring, policy development, and education and training. The Commission also conducts human rights inquiries and may initiate human rights applications or intervene in important cases before the Tribunal. Through outreach, cooperation and partnership the Commission aims to advance Ontario's human rights culture."

In the old human rights structure, the issues of Commission gate-keeping and delay certainly reveal the limitations of the system. The challenge for the new Commission is effecting social policy by bringing people and communities together to help resolve differences, while being at risk of becoming an object of the tension and conflict they seek to resolve. Yet it must be said that, as sophisticated articulations of constitutionally-protected rights emanate from the courts and laypersons perceive a broad spectrum of wrong treatment as, at least potentially actionable discrimination or harassment, the commission system cannot be expected to bear the full weight of responsibility for achieving anti-discrimination social goals. Rosanna Langer (2006) has argued that government-sponsored anti-discrimination enforcement must be situated within a broader set of common practices such as municipal accessibility plans, e.g. those stipulated under the *Ontarians with Disabilities Act,* progressive employment legislation, in-house corporate and employer anti-discrimination and anti-harassment 'best practices," and community-based educational initiatives. A healthy network of anti-discrimination practices is the best insurance of a vital normative fabric of human rights protections.

Meanwhile, the pragmatism of seeking social policy solutions, as opposed to judicial ones, fits comfortably within the new mandate of the Ontario Human Rights Commission. Its new flexibility can also mean increasing the range and repertoire of remedies for fulfilling social justice goals. This includes, and also opens up, the possibility of incorporating Alternative Dispute Resolution (ADR) and 'win-win approaches', rights-based mediation, and the collaborative problem-solving techniques that integrate practical experience with theoretical knowledge.

ADR, for example, has experienced increasing acceptance and utilization primarily because of a perception of greater flexibility, costs below those of traditional litigation, and speedy resolution of disputes. In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster appropriate and effective dispute resolution. Some cases and some complaints are viewed to be appropriate for formal grievance or to go to court or to the police or to a tribunal, and the like. Other conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need third party mediation or arbitration. Thus, ADR usually means a method that is not the courts, and involves processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. Dispute resolution considers all the possible responsible options for conflict resolution that are relevant for a given issue.

Ultimately, the social justice mandate of the OHRC is configured by the assurance of neutral (non-advocate, non-adversarial) communicative interactions, which open up the possibility for contextual problem-solving for the mutual empowerment of human rights bearers. In this world, access to justice ought not to require formal processes for its assurance. The ideal OHRC would be responsible for engaging the public interest goals in anti-discrimination beyond a formulaic rigidity of law, by broadening the constellation of remedies, and preventing the premature legalization of individual and social harms.

IV. IMPLICATIONS FOR A SOCIAL POLICY FRAMEWORK

It has been suggested above that one of the most fundamental insights of a social constructivist approach to human rights is an appreciation of the context in which competing human rights claims are made. In particular, in Ontario shared citizenship in an advanced capitalist global society provides the context and the means for differently situated persons to advance competing human rights claims. These competing human rights claims do

not reflect natural inequalities nor innate differences and conflicts between persons. They reflect instead power dynamics and socially constructed differences among people. But the fact that this conflict and competition is embedded in human rights discourse expresses the social fact that these individuals also share a common citizenship and this shared citizenship can be a resource for developing social policy that frames competing human rights claims.

This approach helps us to identify three important elements that should be considered in the development of a policy framework for the OHRC. The first element revolves around the centrality of the access to justice agenda in its new mandate. Social constructivism highlights the political and economic differences and ideological supports that have created the social cleavages which rouse human right movements in the first place. The OHRC, as an institution committed to human rights in Ontario, must in any balancing rights policy recognize the full continuum of social life, from competition to conflict, and the dimensions of power including their intrusion into the political and economic and ideological structures of society. Human rights discourse in the absence of a clear focus and understanding of differential access to power and resources loses sight of the principle of equality of citizenship. In other words, the policy framework must have integrated within it a component of access to justice.

The second element provides direction for the educational component of the policy framework. It is important that the educational component be organized around the significance of shared citizenship as a resource for mitigating against conflict and being proactive in ensuring that conflict does not escalate. Seeing different claimants as fellow citizens and viewing those citizens in a way that is empathetic holds much greater promise than an adversarial process where there are only winners and losers.

The third element requires accommodating for the social contingency of particular competitions between human rights claims. The challenge of a modern human rights system is to craft social policy in a way that recognizes the overriding importance of human rights protections, and that is flexible enough and fluid enough to allow for changing power dynamics within our society as well as evolving knowledge and new insights about human rights and discrimination.

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THE RIGHT TO TOLERATION

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ABSTRACT

This essay examines John Locke's argument for a right to religious toleration, which is the historical forerunner of modern liberal conceptions of a broader tolerance. Locke's approach to toleration is shown to give rise to rival and conflicting claims of right which can only be resolved through an appeal to the duty of civility.

I. INTRODUCTION

This essay examines John Locke's defence of the right to toleration. But why drag a seventeenth-century philosopher into a discussion of conflicting rights in the twenty-first century? Well, for one thing, Locke's seminal contribution to the liberal political tradition is a justification of the state in terms of its role as guarantor of individual rights. Locke is also famous for his defence of religious toleration, which he treats in terms of the right to liberty of conscience. While Locke does not concern himself with the difficulties arising from a possible conflict of rights, his theory compels us to think about the accommodation of religious diversity in the face of competing claims of conscience. And since, on the terms of his own argument, claims of conscience are put forward as a matter of right, the way Locke deals with these competing claims might well have something to tell us about how to handle rights in conflict. It is also relevant that Locke's philosophical construction of the state, rights, and toleration still inform our contemporary practices.

II. LOCKE'S RIGHT TO TOLERATION

According to Locke, religious opinions and divine worship *"have an absolute and universal right to toleration,"* and "Liberty of Conscience is every man's natural Right."

Lockean toleration is a negative right largely consistent with how we today think about religious freedom, as enshrined in the Canadian Charter of Rights and the First Amendment to the United States Constitution. For us, as for Locke, the right to liberty of conscience means that religious believers may entertain whatever conception of the divine seems true to them and engage in whatever manner of public worship they think appropriate without encountering coercive interference from the state or their fellow citizens.

Although several of Locke's arguments for toleration explicitly draw on his understanding of what is required of Christians in their conduct toward one another, the regime of toleration he proposes extends to Jews, Muslims, and "Pagans". To this extent, then, the Lockean right to toleration is deliberately inclusive. It acknowledges the social identity of minority religious groups and creates a space for them within a religiously pluralistic civil society. The antagonisms born of religious differences are muted by assigning politics and religion to separate spheres. Within the political sphere all persons share a common civic identity and a common set of "civil interests," which Locke enumerates as "Life, Liberty, Health, and Indolency of Body; and the Possession of outward things, such as Money, Lands, Houses, Furniture, and the like." Religion, on the other hand, is assigned to a non-public sphere where like-minded individuals are free to come together in voluntary associations – churches – for the purpose of worshipping God "in such a manner as they judge acceptable to him, and effectual to the Salvation of their Souls."

The Lockean right to toleration assures that the particularity of the individual's religious identity can be

preserved alongside her non-denominational civic identity. At the same time, it rules out the pursuit of religious ends by political means, thus neutralizing the threat posed by sectarianism. T.M. Scanlon captures Locke's meaning when he says of tolerance, "What tolerance expresses is a recognition of common membership that is deeper than [group] conflicts, a recognition of others as just as entitled as we are to contribute to the definition of our society."

III. CIVIL AUTHORITY AND CLAIMS OF CONSCIENCE

A parallel might be drawn here with John Rawls' idea of public reason. Locke's magistrate is required to confine his actions to measures that will protect and promote the civil interests common to all citizens. Accordingly, he must be able to describe his actions in light of that purpose in order to avoid having their legitimacy called into question. Inevitably, difficult cases will arise. Locke gives the example of a law forbidding the slaughter of calves imposed to replenish the nation's livestock after the supply of cattle had been greatly diminished due to some "extraordinary Murrain." He thinks this objective well within the bounds of the magistrate's just authority, but observes that it will have a differential impact on believers whose religion requires the weekly sacrifice of a calf as part of their worship service. Need these believers be accommodated by making an exception to the general law temporarily forbidding the slaughter of calves? Locke thinks not. He explains that "in this case the Law is not made about a Religious, but a Political matter: nor is the Sacrifice, but the Slaughter of Calves thereby prohibited." What matters to Locke in this example is not only the magistrate's language of justification but his intentions. By acting for a valid public reason, the magistrate shows respect for the believers whose weekly sacrifice is blocked by the law. It is, of course, possible to doubt the sincerity of the magistrate, and Locke is well aware of the temptation to make duplicitous use of political language. Accordingly, he cautions the magistrate "always to be very careful that he do not misuse his Authority, to the oppression of any Church, under pretense of the publick Good."

Might Locke have opted for accommodation in this example? There is no apparent reason why not. If the magistrate were to decide on reasonable evidence that a religious exemption from the ban would not injure the public, it is arguable that in light of the Lockean right to toleration he is in fact obliged to grant the exemption. To do otherwise would only encourage the suspicion that he had acted out of prejudice "under pretense of the publick good," which would justify conscientious disobedience on the part of the affected worshipers.

Whether or not in any particular case the public good truly requires the magistrate's action is always contestable, and since there is "no judge on earth between the Supreme Magistrate and the People" the impasse can only be broken by a resort to arms, the consequences of which are usually so horrific as to give both the magistrate and the people reason to pause.

IV. TOLERATION AND IDENTITY

Modern critics of Locke sometimes complain that the terms on which he allows religious and cultural minorities into the political sphere deny them the public recognition necessary for full inclusion. The critics claim, in effect, that religious and cultural minorities are allowed a universal civic identity by Locke (and later liberals) only if they hide their particular religious and cultural identities. This might prove less galling if the political sphere were truly a neutral zone devoid of religious or cultural referents, but the critics contend that invariably it carries the imprint of the majority. This imprint may be invisible to members of the dominant religious and cultural groups, but it rarely escapes the notice of minority group members and only serves to remind them of their outsider status.

This critique is not without merit, but arguably it misconstrues the purpose of Locke's carefully crafted separation of politics and religion. Assigning religion to the non-public sphere is not intended to hide it away in private, but rather to create a social space for the (unthreatening) public display of religious identity. The conditions for society's recognition of particular religious identities on equal terms with one another are made possible by the state's regard for liberty of conscience and the right to toleration, which make it impossible to exclude the members of minority religious groups from public schools or public office, for example, simply on account of their religion. Ultimately, it is to be hoped that general recognition of the right to toleration (and its enforcement by the state) will encourage the development of mutual trust, eventually leading to the dissipation of prejudice and full social acceptance of the minority by the majority.

V. LOCKEAN TOLERATION AND LIBERAL MULTICULTURALISM

Is the Lockean right to toleration a hollow promise for those who take *works*, the outward acts that characterize a life lived in accordance with one's religious beliefs, to be as or more important for attaining salvation than an inward *faith*? To put the question more concretely, are the rights of, say, a conscientious Catholic for whom there is

religious imperative to oppose abortion given short shrift by a modern Lockean polity that treats abortion as a matter of personal choice and requires her to tolerate the practice? It is likely that anyone who thinks of religion not as an easily compartmentalized set of personal beliefs (inward faith) but as a complete way of life for an entire community (outward works) will answer this question in the affirmative.

Locke might respond, as modern liberals do, by saying that everyone is free to conceive of their religion in any manner they please and to live their lives accordingly, so long as they do not intrude on the rights of others. Thus, the Catholic Church may forbid its own members from having abortions on pain of excommunication, but the church may not issue commands to non-Catholics. Catholics are at liberty, of course, to attempt to persuade non-Catholics that abortion is a sin. For Locke, this is how toleration operates. Respect for the religious point of view is institutionalized through a multi-faith dialogue where the object is to win hearts and minds by means of reasoned argument. But Locke conceives of this religious dialogue as being about speculative theological opinions, whereas the hard questions that give rise to so much religious strife in the present day concern practical moral opinions bearing on the conduct of life.

Locke seems to think that a broad societal consensus can be expected on moral questions. With the undeniable breakdown of that consensus, liberalism after Locke inclined toward greater acceptance of moral pluralism, which it sought to accommodate by enlarging the number of speculative and moral opinions assigned to the non-public sphere protected from outside interference. J.S. Mill, for example, expands the boundaries of personal liberty far beyond the range Locke would have found tolerable, and modern liberals go further still. As the state retreats from policing morals, persons and groups who, for religious reasons, take a strong interest in the moral quality of public life are likely to feel increasing aggrieved. This is the paradox inherent in Locke's construction of the right to toleration: in the name of conscience individuals and groups are expected to tolerate conduct they find grossly immoral, which is itself an affront to conscience.

VI. CONCLUSION: THE DUTY OF CIVILITY

Does Locke's doctrine have anything to offer us in the face of this dilemma? Locke recognizes that to the sincere believer nothing is more important than her religious obligation, a perspective he apparently shares. "The principal and chief care of every one ought to be his own Soul first," he writes, "and in the next place the publick Peace." But he immediately adds that "there are very few will think 'tis Peace there, where they see all laid waste." Locke's words are a caution to believers, who in his time were all too familiar with the devastation caused by wars of religion.

Chastened believers have ample incentive to embrace what Locke calls the duty of civility. He, in one place, describes civility as a duty consisting in "outward expressing of goodwill and esteem or at least of no contempt and hatred," and he ranks it second only to justice among the virtues which relate to society. The duty of civility receives support from Locke's insistence that beliefs grounded in religious faith are not subject to demonstration and hence cannot be shown to be true in a manner convincing to all. The lesson he would have us draw from this seems similar to what Rawls intends by "the burdens of judgment." Since, according to Locke, the beliefs people do hold are a result of their experience and associations, which vary from one person and one group of people to the next, it is only reasonable to expect a diversity of religious opinions. Thus, although "every one is Orthodox to himself," as Locke puts it, no one has a reasonable basis for declaring others to be heretical. Recognition of the Lockean burdens of judgment makes mutual toleration the default position for competing orthodoxies.

Accepting the duty to be civil will not prevent clashes between conscientious believers or the collision of competing rights claims, but it should help keep a lid on things and make it less likely that hard feelings will poison relations between the contesting parties. It should also promote a general willingness on the part of individuals and groups to accommodate one another insofar as this is possible without compromising a fundamental interest.

But like all of Locke's arguments on behalf of toleration, the appeal for civility is addressed to persons who already recognize the religious "other" as a fellow citizen possessing the same rights and deserving the same consideration as themselves. What is to be done, then, about the genuinely intolerant, those who, out of sincerely held religious beliefs, would deny religious freedom to others? Locke writes, "those that will not own *and teach* the Duty of tolerating All men in matters of mere Religion... have no right to be tolerated by the Magistrate."

RE-UNDERSTANDING THE PUBLIC SPHERE AND THE FAIR TREATMENT OF BELIEFS IN CANADA

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ABSTRACT

How we understand the public sphere is key to whether we treat different groups fairly in relation to it. This article suggests that many of the central terms currently in use hide the anti-religious aspect of a so-called "neutral" state that only bleaches out religious beliefs and projects while leaving untouched and unexamined those framed by atheistic and agnostic presuppositions.

From its earliest decisions touching upon the freedom of conscience and religion in Section 2(a) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada has recognized that religion has a public as well as a private dimension. In the famous decision striking down the *Lord's Day Act* in *R.v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336, then Chief Justice Dickson wrote of the essence of the right to the freedom of religion as being not just the right to hold a belief privately but the right to the public aspects involved in relation to "teaching" "disseminating" and "manifesting" those beliefs. The question then is how these public dimensions of religious belief fit both with the right of citizens to be free *from* religion and the right of other citizens to have their religion expressed and lived in a public way.

The more recent decision of *Chamberlain v. Surrey Sch. Dist.* No. 36, [2002] 4 S.C.R. 710, ("Chamberlain") had to wrestle further with the nature of the public sphere and the meaning of the term "strictly secular" in the British Columbia *Schools Act*, given this public dimension of religious belief. The unanimous Supreme Court of Canada upheld a unanimous British Columbia Court of Appeal on the point that "secular" must include religious believers and their perspectives not exclude them. This decision is often overlooked but it remains a very important indication that fair treatment requires a public sphere that is inclusive not exclusive of religious believers and their groups (the right to freedom of religion not being simply an individual right).

The idea of a public sphere that includes religious beliefs and believers is not how most of us are used to considering the public sphere (a sphere containing, amongst other things, law, politics, medical ethics and public education). In fact, many of our key terms – such as "secular" – seem to be taken as meaning that the sphere is free from religion. Yet the conclusions of the Supreme Court of Canada decision in *Chamberlain* leads us to consider that "secular" in Canada should now be understood to be religiously *inclusive* rather than religiously *exclusive*. Another way of putting this is that a concept of a State that does not have an established religion (such

as Canada) does not mean that religious beliefs, believers and communities have no relevance for the public realm or are, in some particular way, outside it more than other citizens and their groups. Atheism and agnosticism are not established belief systems in Canada in the same way that no particular religion is established.

Many of the key terms and concepts in the discussion about the fair treatment of beliefs in relation to religion and public policy are so confused that they inhibit rather than assist clarity of analysis. Thus, terms such as "pluralism", "believer", "faith", "secular" and "secularism" must all be reconsidered in order to move to the fresh and more just consideration of the religiously inclusive public sphere (called for in *Chamberlain*) and principles of justice and fairness more generally.

The relationship best characterizing an appropriate way forward for Canada is "the co-operation of church and state." Co-operation, rather than separation, suggests *both* a necessary jurisdictional *distinction* (the "church" and state have different roles and Canada is not a theocracy) and a *functional relationship* rather than strict separation. Separation fails to recognize the public dimension of religion and beliefs as well as the cultural benefits that accrue from involving religious communities and believers in the work of the state – and one need only think of charities, health care and education to see areas in which Canadian society is able to co-operate with denominational organizations, including extending public funding or tax benefits to them.

There are strong arguments that the fair treatment of denominational rights involves extending that recognition beyond simply those denominations recognized historically (in such things as denominational education) rather than limiting extension or removing recognition all together in the name of "efficiency" or a mis-understanding of "fairness." Because denominations and all belief communities, religious or non-religious, operate within the nation state, there is also a corresponding need to develop a core curriculum of civics, including civil virtues that further a meaningful understanding of tolerance, pluralism and so on. This, however, could and should be done within expanded denominational and state-funded schooling.

Obviously, how the relationship between church and state is to be developed will build on what has already taken place in Canadian history, yet will be responsive to the identification of a new basis for co-operation.

In addition to a re-understanding of what we mean by the public sphere, the Supreme Court has made it clear in the case of *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, that when the protected rights of two individuals (or, by extension, groups) come into conflict, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights. This is so because there is, in theory, no "rank-ordering" of rights in Canada with some taking a higher place than others. Here, the implication is that no particular claim, for example, one notion of equality or the rights of any one group in relation to, say, religion or sexual orientation, should take precedence over any other. Again, this calls for a more nuanced approach to potential rights conflicts and "sphere-sharing" than some sorts of claims allow when they seek to force everyone to support one side (their own) of contested beliefs.

What this means for public policy formulation and the fair treatment of beliefs in Canada is the need to be attentive to religious inclusion in each area to ensure that citizens who have religious concerns or who might be influenced by particular policies (in areas such as charitable status, immigration, social security, child care policy, multiculturalism, health care, education, to name but a few) are considered and consulted in the course of policy formulation and involved on an ongoing basis with respect to the monitoring of such policies. Canada must become as "inclusive", "tolerant", and "diverse", in practice, as it purports to be in principle.

One definition of a "liberal" after all is a person who values liberty not only for himself or herself, nor only for his or her group, but for everyone. The key is living together with difference and disagreement, and not bleaching these out for some sort of forced consensus that involves an abandonment of what it is legal to believe, such as very different and irreconcilable notions of what legitimate "marriage" entails.

Only a richer conception of how citizens with differing belief systems can co-exist will solve the dilemma posed by erroneous uses of key terms in aid of universal consensus. What is clear is that claims for "neutrality" based upon the prior exclusion of religious beliefs rather the inclusion of other beliefs, under misuse of terms such as "believer/unbeliever", "secular" or "faith", fail to support a proper approach to accommodation of differing beliefs. Approaches to "pluralism", "equality" or "tolerance" that implicitly or expressly suggest a move towards eventual agreement on all matters, need to be rejected as inconsistent with both human freedom and a proper understanding of diversity and accommodation.

If we want to affirm that Canada does not have a sectarian government, then we should say so; this is different than using the concept of "separation of Church and State" which, in one reading of its American formulation, would preclude the "co-operation of "Church" and State", which is the better Canadian model for the relationship.

The State, through its primary public policy drivers of law and politics, should always keep in mind the need

to find ways in which people who do not believe the same things can, nonetheless, share the public realm and even work together in their joint task and privilege of citizenship.

All human beings are believers, the question is not one of belief or non-belief but of what is believed in. Yet how often we hear those who do not have religious belief described as "unbelievers." All citizens, as a matter of fact, as set out above, make their decisions in life based upon their beliefs. On one level, therefore, we are all "believers." The question is: "what do we believe in?" and "for what reasons?". Furthermore, we may ask 'does the origin of our beliefs mean that some people or some beliefs have less importance in a society that says it will respect the ability of citizens to have the fundamental right and freedom to "belief" and "expression" in addition to "conscience and religion?"

As with "belief", so it is with "faith." It has been observed that everyone who acts must take matters on faith of some sort, as we do not and cannot prove all of our assumptions empirically; for example, we trust the directions of a stranger. Everyone has "faith" of some sort, therefore, and not all faiths are religious. This, too, has implications for how we think about citizenship and public policy. Why then do we speak of "communities of faith" or "people of faith" when we mean only those who have religion or are religious, thereby implicitly suggesting that all the others do not have faith?

The separation of the world, therefore, into two sharp divisions – one side the religious, thought of as based on non-rational "belief" and "faith" and the other side, the non-religious, based upon facts and empirical reason, is erroneous. The implicit suggestion of the contemporary period is that those who are not in "communities of faith" are people of facts and/or that they do not operate out of "faith" but – and here is another false division – "reason" alone. This is not so and when "faith" and "belief" are understood to be aspects of all human existence, and public policy as based upon beliefs and faith, of some sort, we begin to see that the watertight compartments currently being used to insulate, divide and confuse our analysis need to be replaced by better conceptions.

It is somewhat surprising that it is often those who have much to gain in terms of public sphere access who often further this very erroneous language.

Similarly, there is, on all sides, a tendency to view "the State" as something that stands free and apart from the citizens and communities that make it up. I believe this is a misleading characterization. The State, as primarily composed of "law" and "politics" as the formal means of controlling the public realm, should be understood holistically. It skews analysis of the inter-relationship to view the State as entirely separate from those who constitute it. For the State or public realm to be "religiously inclusive" means that all aspects of it should be open to the influence of beliefs and conceptions of religious and non-religious citizens. It is this holistic understanding that has been lost through the uses of "secular" and similar terms over the last few centuries.

The reference point of this short paper, therefore, is holistic of State, Individual and Community but suggests that a plurality of viewpoints on such matters as the nature of equality, the relations between women and men, the dignity of the person, what sorts of moral views are tolerable etc., is both unavoidable and necessary in a free and democratic society. Such a society recognizes that diverse forms of life are part and parcel of contemporary existence and liberal constitutional government properly understood.

Any foundational terms used to describe the nature of the public sphere can serve to bracket out religious adherents from other citizens. I have referred, above, to "secular", "believer/unbeliever" and only religious understandings of "faith", and elsewhere in my writing, to misunderstanding or not defining "secularism" as key impediments in this regard. To move towards fair treatment of faiths in the public sphere requires overcoming these impediments. As the context usually shows, however, such anti-religious uses are, with the exception of "secularism", most often implicit and unintentional. I hope I have illustrated the need to overcome the general failure in understanding key terms so that the State, through the political and legal dimensions of public policy, can begin to better extend fair and inclusive treatment to all citizens whether religious or not.

CONTEXTUAL EQUILIBRIUM V. CONFLICTING RIGHTS

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ABSTRACT

This article examines what is at the core of situations where it is alleged that rights are in conflict. The article examines critically the thesis of eminent jurist, Justice Frank Iacobucci, who claims that rather than focusing on how to address conflict of rights, courts and tribunals should focus on how to reconcile rights and that this task is different from that of balancing rights under Section 1 of the Canadian Charter of Rights and Freedoms. The article attempts to demonstrate that in reality both what is termed reconciling rights and balancing rights is part of what the author terms ascertaining the "contextual equilibrium" of rights.

1. CONTEXTUAL EQUILIBRIUM V. CONFLICTING RIGHTS UNDER THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

One of the most overlooked quotes from the Supreme Court of Canada is the landmark ruling of Justice Dickson on the overarching values to be kept in mind in interpreting the *Canadian Charter of Rights and Freedoms* including Section 1 in the *R v. Oakes* (1986] 1 S.C.R. 103). He stated that the key values of the Charter can be found in the phrase "free and democratic society" and should also be used as the "ultimate standard" for interpretation of section 1. Chief Justice Dickson put this ultimate standard in the following terms:

> Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The 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.

While these values will inevitably conflict in theory, what the Court in *Oakes* and in subsequent decision have strived to do is to "hunch" out a jurisprudential framework of what I call "contextual equilibrium" in concrete cases where these values may conflict. In some of the leading decisions on the *Charter*, the conflict has been between two sets of rights but in other cases between rights and the other values not exhaustively listed by Chief Justice Dickson in his statement on what are the

foundational societal values of a free and democratic society. In both cases, but especially in the latter case, the focus will immediately turn to the proportionality analysis in Section 1 of the *Charter.* This analysis will focus primarily on the situation where the values underlying two sets of rights may appear to be in conflict.

Because these values, even though they may conflict in theory, are the fundamental values of the *Charter*, they are supposed to guide not only the development of the common law, but also the interpretation of statutory law in Canada, including quasi-constitutional human rights legislation, such as the *Ontario Human Rights Code (Code).*

Justice Frank Iacobucci, one of the most influential justices on the Supreme Court that has shaped the evolution of the *Charter,* has proposed that rather than addressing conflict of rights, there should be a focus on *reconciling* rights, (Supreme Court Law Review (2003) 20). This is crucial because the Supreme Court has insisted that there is no hierarchy of rights to be inferred from the jurisprudence of the Charter and that no one right should be privileged at the expense of another. This critical ruling by the Supreme Court was firmly stated by Chief Justice Lamer in *Dagenais v. Canadian Broadcasting Corporation (Dagenais [1994] 3 S.C.R. 858 at 877):*

> 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.

The way in which Justice Iaccobucci and most *Charter* decisions have attempted to avoid the emergence of hierarchy of rights is through the fundamental appreciation of rights in context. Before this can be illustrated, Justice Iaccobucci points out that the reconciliation of rights must be distinguished from balancing rights under Section 1.

While Section 1 analysis deals with putting the onus on the government to justify the violation of a Charter right, Justice Iaccobucci argues that the reconciliation of rights focuses on the values of different *Charter* rights in dealing with the problem before the Court. This requires an examination of the underlying interests at stake in the context in which the *Charter* rights are being asserted.

While Justice Iaccobucci may wish to call this reconciliation of rights, it is suggested that what is really occuring is attempting to put rights that seem to conflict into an equilibrium depending on what particular interests are at stake in any particular fact situation. This is also a key objective of the balancing test under Section 1 of the *Oakes Test*. For that reason, I do not agree with the learned Justice that there is much difference between the framework involved in the balancing of rights and that of reconciling rights. They both involve what I call searching for the "contextual equilibrium" of rights that may at first seem to be in conflict.

Justice Iaccobucci insists that the difference between rights balancing and rights reconciliation is that the former connotes assigning primacy to one right over another right or interest under the Section 1 analysis. In contrast, the learned judge argues that reconciliation of rights is the exercise that courts engage in when they define the content and scope of rights in relation to one another.

What is surprising is that Justice Iacobucci also points to what I consider perhaps the paradigm of reconciling rights or what I term contextual equilibrium as the application of the traditional balancing test, namely the decision on *R. v. Keegstra ([1990] 3 S.C.R. 697*). I suggest the key part of the attempt to find a contexual equilibrium of the rights and interests involved in the Keegstra fact situation was articulated in this crucial statement by Chief Justice Dickson for the majority:

> As I have said already, 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)" (Royal College, supra, at p. 247).

The strong dissent in *Keegstra* by Madam Justice McLachlin (as she then was) focused on how, in primarily principled argumentation, the general prohibition against hate propaganda in Section 319(2) of the *Criminal Code* was overbroad, too vague and subjective and therefore failed under each part of the *Oakes Test.* In contrast, the main thrust of the majority's decision as articulated by Chief Justice Dickson seemed focused on seeking a

contextual equilibrium in concrete situations where the individual right of free expression in the particular context of the facts in *Keegstra* conflict with the group rights of the targeted minorities to equality. In order to find that equilibrium, Chief Justice Dickson sought to locate the core of the rights being asserted and then ascertain based on the facts of the particular context in *Keegstra*, whether those core values of the rights asserted are indeed at play or are really peripheral in the actual factual context. Then the rights whose core values are not at play will have to be placed in a just equilibrium with rights whose core values are at play.

This approach can be termed balancing rights, reconciling rights or my preferred term of contextual equilibrium of rights in concrete factual situations. In *Trinity Western University v. College of Teachers (British Columbia, ([2001] 1 S.C.R. 772)* the Court faced one of the most controversial of so-called conflict of rights contexts. As is well known, here the Court had to reconcile, balance or find a contextual equilibrium between the religious freedoms of individuals choosing to attend an evangelical institution and the equality concerns of potential discrimination against students in the B.C. school system. The Court ruled that the Charter did not apply but went on to make the point that there was not really a *conflict of rights on the particular facts involved*. Instead, the majority judgment ruled that any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved. On the particular facts of the case, a delineation of the rights involved did not indicate a conflict of rights. There was no concrete evidence that training teachers at Trinity Western fosters discrimination in the public schools of British Columbia. The Court ruled that the freedom of individuals to adhere to certain religious beliefs while at the institution had to be respected. However, the Court warned that if there was evidence of acting on those beliefs, the context would shift dramatically.

I have argued elsewhere (Mendes,(1992) *N.J.C.L.* 283) that many, if not most of the rights under the Charter can be regarded as collective rights in the sense that they can be experienced in the context of group activities such as freedom of religion, association, assembly, expression and the rights to liberty and security of the person. In some contexts one could regard the claiming of individual rights as a way of advancing the rights of a collectivity.

What are termed collective rights is part of humanity's desire to "self-collect" to belong in community. This is such an essential part of existence, that without the ability to fulfill it, we can not be fully human. The fact of human existence requires that we experience the world as much through community as through individual personhood. Rights are part of the world we experience both as individuals and in community and that is what makes them inalienable and deserving of protection. Contextual equilibrium requires societies that claim to be free and democratic to do justice to both sets of rights in concrete situations.

In this sense, contextual equilibrium moves away from the implication in the term "conflicting rights" that when such conflict occurs one right must trump over another. Contextual equilibrium instead can be analogized to a radar screen where in any factual context, the centre of the screen is the core values underlying each of the contested rights. It is suggested that in the vast majority of cases where there is a conflict of rights, one set of rights is closer to the core values underlying that right than the other one. In the case of the prohibition of the vilest forms of hate propaganda, for example, the equality and security of the person rights of the targeted groups are closer to the core values of those rights, than the freedom of expression rights of the hate monger. The core values of freedom of expression, as enunciated by Chief Justice Dickson in the *Keegstra* decision, are quite distant from the actual contextual free expression of a hate monger.

2. CONTEXTUAL EQUILIBRIUM V. CONFLICTING RIGHTS UNDER THE ONTARIO *HUMAN RIGHTS CODE*

In a paper prepared for the Ontario Human Rights Commission in August 2005 titled "Balancing Conflicting Rights: Towards an Analytical Framework", the unnamed author proposes an intriguing and creative framework for balancing conflicting rights. The paper first highlights what is termed two main paradigms for balancing conflicting rights. The two are termed pragmatic and principled balancing. The two are regarded not as binary opposites but necessarily intertwined in the analysis of any conflicting rights case. I will suggest below, both paradigms are an integral part of what I call the contextual equilibrium of rights that may seem in conflict.

The principled balancing paradigm is stated to focus on the values underlying the *Ontario Human Rights Code* and the *Charter* and delineates the rights in such a way as to avoid conflict. The pragmatic approach looks to provisions in the *Code* such as the exception sections of the *Code* and the duty to accommodate to allow two conflicting rights to be managed within a particular context. The paper first suggests that it is imperative that only actual conflicts of rights are approached as balancing tasks under either or both paradigms. I suggest that the determination of whether there is an actual conflict or not

is part of the first step of ascertaining the contextual equilibrium of rights that may only seem to be in conflict. Indeed, the *Trinity Western* decision of the Supreme Court described above is a classic example of this first step of the search for contextual equilibrium. The pragmatic approach then provides a template for discerning how, in a particular factual context, one determines how close or far any particular right is from the centre of the contextual equilibrium rights radar.

The Ontario Human Rights Tribunal's decision in *Berry v. Manor Inn ((1980) 1 C.H.R.R. D/152)* regarding a woman's right to breastfeed in public is an example of this contextual equilibrium approach. This and other often cited examples of two different claims for reasonable accommodation illustrated by the author of the *Ontario Human Rights Commission* paper is usually not a rights conflict but an inquiry into whether the specific needs of each rights claimer can be met within the parameters set by the *Code*.

2.1 THE PRINCIPLED BALANCING APPROACH: THE PREAMBLE TO THE *CODE* AND INTERPRETATIVE PRINCIPLES

It is suggested in the Ontario Human Rights Commission paper that the values in the preamble to the *Code* and how the courts have interpreted them bring into focus the need to balance individual and group rights along with community development and well-being in any claims brought under the *Code*. As discussed above, Chief Justice Brian Dickson's elaboration of the values of a free and democratic society under the *Charter* reinforces the principled position that individual and group rights are inextricably linked in the realm of human existence. For that reason, I would contest the claim that where the legislated exceptions in the *Code* are protective of certain collective rights, they should always be interpreted in a manner which predetermines the outcome in favour of any asserted individual right against discrimination, no matter how marginal. Where these exceptions are intended to protect fundamental collective rights, the provisions in the exceptions may well be an attempt to lay out a principled framework for contextual equilibrium between the individual rights to be free of discrimination and the collective rights encapsulated in the enumerated exceptions. Indeed, the fundamental purpose of the *Code* is the removal of discrimination, but this can also include unprincipled discrimination against the collective exercise of individual rights protected not only by the *Code,* but also by the *Charter,* which is now the supreme law of the land. Given the adamant rulings of the Supreme Court that there is no hierarchy of rights in the *Charter,* it should be assumed that there is also no principle in the *Code* that would give an automatic priority to any individual right to be free from discrimination against a fundamental collective right encapsulated in one of the exceptions in an actual factual context.

The principled approach outlined in the Commission paper is, I suggest, another way of describing the core values of the rights in the *Code* that identifies the centre of the contextual equilibrium radar screen.

3.1 THE EXCEPTION SECTIONS

The Ontario Human Rights Commission paper suggests there are several exception sections that operate as defenses and that respondents must meet the criteria to prove that they are entitled to the exception. The most critical ones are found in sections 18, 20(3) and 24 of the *Code*. Tribunals and Courts have rightly stated that these exceptions should be narrowly construed while the enumerated rights to non-discrimination must be broadly construed. The paper acknowledges that these exceptions attempt to balance freedom of association (often in the religious context) with the broader right to be free from discrimination protected under the *Code* and indeed under the section 15 equality guarantee of the Charter. The Supreme Court of Canada in *Caldwell v. Saint Thomas Aquinas High School ([1984] 2 S.C.R. 279)* also confirmed that such exception sections confers and protects rights, in particular the right to associate. In a crucial part of the ruling Justice McIntyre made the following ruling:

> There can be no serious question that Roman Catholic schools, having their special nature, have functioned and continue to function lawfully in the Province. On the other hand, the law of the land has conferred rights regarding employment which have come into conflict with the rights of the respondent in the operation of its denominational school…
>
> It is therefore my opinion that the courts should not in construing s. 22 consider it merely as a limiting section deserving of a narrow construction. This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights. I agree with Seaton J.A. in the Court of Appeal where he expressed this thought in these words:
>
> This is the only section in the Act that specifically preserves the right to

> associate. Without it the denominational schools that have always been accepted as a right of each denomination in a free society, would be eliminated. In a negative sense s. 22 is a limitation on the rights referred to in other parts of the *Code*. But in another sense it is a protection of the right to associate. Other sections ban religious discrimination; this section permits the promotion of the religion.

I suggest that what courts and tribunals have done in rulings on the narrow interpretation of the exception sections is to give advance warning that contextual equilibrium requires that such collective assertions of freedom of association, religion or other forms of collective rights *do not overreach* in attempting to "self-collect" in community with others similarly identified. Such examination of whether there is overreaching will include the test of "bona fide", what are the true core or primary interests of the collectivity and after the Supreme Court's ruling in the *Meiorin Grievance, ([1999] 3 S.C.R. 3),* the impossibility of accommodation without the imposing of undue hardship. Without commenting on the correctness of the Tribunal's decisions in the context of the most controversial of the exceptions, namely the special employment exception in section 24(1) of the *Code*, the allegations of overreaching of the collective right to freedom of association and religion was at the heart of the dispute that lead to the decisions in *Brillinger v. Brockie ([2002] O.J. No. 2375 Ont. Sup.Ct.), Parks v. Christian Horizons (16 CHRR D/40)* and in the more recent *Heinz v. Christian Horizons. (63 C.H.R.R. 12).*

2.1.4 CONCLUSION

This analysis has attempted to demonstrate that if we are to take seriously the repeated rulings of the Supreme Court that there is no hierarchy of rights under the *Canadian Charter of Rights and Freedoms* or under the provincial human rights legislation in Canada, there has to be both a principled and pragmatic way of achieving what I am calling a contextual equilibrium of seemingly conflicting rights in an actual factual context. What is often in dispute in situations that are termed conflicting rights is the assertion by one side in a factual context that a group has overreached in promoting its claim to a collective right to freedom of association, religion, expression etc., while the group that is asserting that right is concerned that their cherished beliefs, practices, rites or, in the case of linguistic minorities, their language rights, will be ultimately threatened by the peripheral intrusion against their claimed right.

The task then of the judge or human rights tribunal member is to ascertain where is the contextual equilibrium between the two sets of rights that can do justice to both but not constitute such an intrusion on either right that the fundamental values and principles underlying both the *Charter of Rights and Freedoms* and the *Code* are seriously impaired. In most cases, identifying what are the core values of each right that is situated at the centre of the contextual equilibrium rights radar will assist in the process of adjudicating what are termed conflict of rights. Sometimes it may require the wisdom of Solomon to do justice in these circumstances, but justice demands it.

LEGAL FRAMEWORKS: THE RECONCILIATION MODEL

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ABSTRACT

The author proposes a method of reconciling "rights in tension" (a phrase the author prefers to "competing rights"), recognizing that sometimes rights claims will be too antithetical to the rights of others or to societal values to permit reconciliation. She discusses three examples of religious and equality rights in tension.

I. INTRODUCTION

The international emergence of "rights" was reinforced in Canada by the *Canadian Bill of Rights*, human rights legislation and the *Canadian Charter of Rights and Freedoms*. Individual (or group) rights dominate the discourse, encouraging the "pitting" of rights against each other or against broader societal concerns.

In addressing "competing" rights claims, it is preferable to consider how to reconcile or balance claims. Balancing may have the connotation of "trumping", but "reconciling" sees rights as having softer contours because different rights find their meaning in the same overall understanding of the relevant legal document or in the overriding values of society (Iacobucci, 2003; cf. *Kapp* (2008)).

Since "competing" rights connotes an adversarial process, I use the term "rights in tension". Nevertheless, recognition of both rights, even modified, may not be possible because one right is antithetical to the other or to societal values. Then the label "competing" might ultimately be appropriate. I use "interests" (with a moral or other status), as well as "rights" (which have legal recognition).

Rights recognize the complexity of human interaction, reflecting the need for "freedom" and "belonging" Tully (2002). Reconciling "rights in tension" requires defining the nature of society, one which acknowledges that we be mindful of the impact of our individual exercise of individual rights on others. Reconciliation reflects a pluralist view of Canadian society: characterized by recognition of the complexity of interests, by a system of values transcending the individual rights and by a means of accessing these rights.

The process of reconciling rights in tension requires two major inquiries:

- To what extent does one right interfere with the enjoyment of the other right? The more one right infringes the other, the less likely that a rights claim can be recognized in its existing form.
- To what extent are the rights or interests consistent with or apparently antithetical to broad societal values or interests? The greater the dissonance, the less likely a right claim will be recognized, *especially when it denies the rights of others.*

To be clear, not conforming to significant societal values or interests is not by itself a reason to deny a rights claim. In a pluralist society diverse viewpoints are part of the fabric of the society.

Guidance for a reconciliation approach may be found in section 9.1 of the Quebec *Charter of Human Rights and Freedoms*: "[i]n exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec." Section 1 of the *Canadian Charter* places the onus on the state to justify the limitations on rights; individuals are to accept limitations

imposed on them, rather than explore themselves how the exercise of their rights affects others in the community. The idea of "reconciliation" suggests the idea of "rights as relationship" (Nedelsky, 1996), rather than rights as individual "property".

II. ILLUSTRATIONS

Freedom of religion and equality (including religious equality) illustrate how rights may be said to "compete".

A secular and pluralist country faces two interrelated challenges in its treatment of religion: how to protect the private exercise of religious beliefs and how much it will allow or facilitate their public exercise; and the legitimacy of state condonation of religious practices contrary to other widespread values such as equality. The difficult challenge arises when groups with views opposing mainstream values seek positive endorsement by the state of their internal practices or when they want to influence the mainstream society's approach to certain issues.

Below I discuss three illustrations.

1. RELIGIOUS CLAIMS AND EQUALITY OF THE LGBT COMMUNITY: PRIVATE OR PUBLIC?

Trinity Western University sought approval of its teaching program. It required teachers, students and others to sign a code setting out community standards, including refraining from "homosexual" conduct which it described as a "sin". In considering whether TWU discriminated, the Supreme Court of Canada held that the equality concerns of students, described as shared by society, were not infringed because the code did not translate into discrimination in the classroom, in word or deed. The Court limited its analysis to the university/school context and thus to the extent homosexuals were harmed, it is that they would not feel welcome at TWU.

This analysis does not consider that state tolerance of discriminatory codes itself might harm those whose conduct is said to be "sinful". However tolerated in a private context, once the state approves the organization's public participation, the state's commitment to certain values comes into play, including the equality interest of "homosexuals" in being presented as full members of Canadian society. The Code now becomes, albeit inferentially, a state sanctioned document that needs to be assessed against the right to be portrayed as equal members of society.

The religious-based claim at issue in *TWU* could have been better framed as whether the right, on the basis of religious belief, to harm members of a group by assumptions and words about their moral worth could be reconciled with the equality right not to be the subject of words that might cause "damage … of grave psychological and social consequence" (*Keegstra*, 1990, para.60).

In *Reference re Same-Sex Marriage* (2004), the Court concluded, at para. 46, that "[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster." It is important to determine whether a claim not to be required to perform same sex marriage is *based on* denying some people the right of a state sanctioned practice in the hands of a state sanctioned official, a case in which beliefs are translated into action. While it is unlikely that a same-sex couple would choose to be married by someone with these views, it is the case that their desire to be married is not premised on denying marriage to others nor on not allowing others to hold certain religious views, while the refusal of someone to marry them on the basis of religious views is *premised* on the denial of the couple's equality rights. This is a nuanced distinction, but it is not an irrelevant one in thinking about how to reconcile apparently opposing rights in cases where reconciliation is difficult to achieve. (The right to refuse to marry same sex couples is the subject of a reference to the Saskatchewan Court of Appeal: (CBCnews, May 2010)).

2. RELIGIOUS CLAIMS AND GENDER EQUALITY: PROVOCATION

In *R. v. Humaid* (2006), Humaid admitted that he had killed his wife, but argued provocation. He believed that she had been unfaithful to him. He relied on expert testimony that in Islam infidelity, particularly by women, is "a very serious violation of the family's honour and worthy of harsh punishment by the male members of the family" (*Humaid*, para.67). Doherty J.A. commented on "the nub of the problem" raised by the argument that Humaid's "religious and cultural beliefs should have been factored into the 'ordinary person' test" relevant to the provocation defence. While these beliefs will be considered when the insult at issue is targeted at the accused's beliefs, in this case, the insult was not *targeted* at Humaid's beliefs; rather the argument is that it be given increased gravity *because of* his beliefs. Doherty J.A. sets the issue squarely at paragraph 93, commenting that Humaid's beliefs are premised on women's inferiority and acceptance or even encouragement of violence against women. He said, "These beliefs are antithetical to fundamental Canadian values, including gender equality. It is arguable that as a matter of criminal law policy, the 'ordinary person' cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values."

3. THE INTERSECTION OF RELIGION AND EQUALITY: THE BURQA

Challenges to wearing the burqa, niqab or chador have been at the forefront in different countries. In the U.K., judges have discretion to decide whether lawyers and legal advisors and others are able to wear the niqab (full face covering) in court (JSB Equal Treatment Bench Book, 2007). In France, there have been proposals to ban the wearing of the burqa in public places. (CBCnews, January 2010). In Canada, the issue has arisen with respect to voting, being a witness and receiving or providing public services, as well as other contexts. The rights or interests are those of religion (although the burqa's religious status is debatable), of equality (of the women who wear it, apparently whether they say they choose to do so or not) and of societal interests such as security, the integrity of the election process or assumptions about appropriate court procedures. These interests are complicated since, for example, the women wearing burqas are claimed to have both religious and gender equality interests, depending on perspective.

What is it, then, that troubles us about the burqa? The wearer is unknown and unknowable. In western society, the covered face, apart from being covered as protection from physical danger such as cold weather, represents the desire to be secretive, in fun or in earnest. In a world where we are more and more open to public scrutiny, whether we wish to be or not, the woman wearing a burqa is able to maintain her privacy, even while she sees everything others see. It cannot be ignored, too, that the burqa carries a connotation of other beliefs that might be contrary or threatening to mainstream Canadian norms.

Are the tensions really about this subtext? Or about *real* interests that justify the limitation on women's religious freedom (if this is why they wear the burqa)? How do "we" decide whether prohibiting the wearing of the burqa limits or advances women's equality? Does gender equality work for or against women's "choice"? Are there practical solutions that might resolve legitimate concerns?

III. CONCLUSIONS

Rights do not exist in isolation, nor, in most cases, do those who make rights claims. They live in a society in which the rights of others and the broader interests of society as a whole may be affected by their claims. Conceptualizing different rights claims as "competing rights" sets the stage for an interpretation that results in the triumph of one right over another. Thinking about them as "rights in tension" permits a more nuanced assessment of how rights interrelate with each other and with broader societal interests. This does not mean that there may not be situations in which rights cannot be reconciled, in which "compromise" is asking too much of the claimants or constitutes too much of a challenge to societal interests. "Rights in tension" or "reconciling rights" does mean, however, that rights analysis is more reflective of societal dynamics – or of what those dynamics ought to be in a secular pluralist society.

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THE REGULATION OF HATE SPEECH UNDER THE *CANADIAN HUMAN RIGHTS ACT*

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ABSTRACT

This paper summarizes the recommendations made in the report I prepared for the Canadian Human Rights Commission concerning s.13 of the CHRA. In the report I recommended the repeal of the section so that the CHRC and the Canadian Human Rights Tribunal would no longer deal with hate speech, and in particular hate speech on the Internet. I took the position that state censorship of hate speech should be confined to a narrow category of extreme expression – that which explicitly or implicitly threatens, advocates or justifies violence against the members of an identifiable group, even if the violence advocated is not imminent – and that the restriction of this narrow category of expression should be dealt with under the Criminal Code rather than the CHRA.

I. INTRODUCTION

In June of 2008 I was asked by the Canadian Human Rights Commission [CHRC] to write a report about the regulation of hate speech on the Internet, focusing specifically on section 13 of the *Canadian Human Rights Act [CHRA].* Section 13 prohibits the repeated communication on the phone system or the Internet of any matter "that is likely to expose a person or persons to hatred or contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination" – such as race, gender and religion.

I was asked to do this at a time when the CHRC was coming under significant scrutiny. There are, I think, two reasons for this increased scrutiny of the CHRC. First, the CHRC (and other Human Rights Commissions [HRCs]) have in recent years received and investigated complaints about speech that is not so far removed in content and tone from widely-held views -- notably, speech that links Muslims to violence, and anti-gay speech that rests on established religious views. Until recently, virtually all of the complaints received by the CHRC concerned postings on neo-Nazi or white-supremacist websites. Second, the CHRC, as well as several of the provincial Human Rights Commissions (HRCs), have received complaints against mainstream publications (or at least their Internet versions), including *Maclean's* magazine and smaller publications such as the *Western Standard* and *Catholic Insight*.

I submitted my report to the CHRC in late October 2008. (Moon, 2008) In the report, I recommended the repeal of s.13 of the *CHRA* so that the CHRC and the Canadian Human Rights Tribunal (CHRT) would no longer deal with hate speech, and in particular hate speech on the Internet. I argued that hate speech should continue to be prohibited under the *Criminal Code*. I took the position that state censorship of hate speech should be confined to a narrow category of extreme expression – that which threatens, advocates or justifies violence against the members of an identifiable group, even if the violence advocated is not imminent – and that the

restriction of this narrow category of expression should be dealt with under the *Criminal Code* rather than the *CHRA*. My recommendation rested on three claims.

II. THE RESTRICTION OF EXTREME EXPRESSION

The first claim is that the failure to ban the extreme or radical edge of prejudiced speech carries too many risks, particularly when it circulates within the racist subculture that subsists on the Internet. The familiar freedom of expression position is that ideas cannot be censored simply because we fear that members of the community may find them persuasive or that an individual's self-understanding or self-esteem may be negatively affected. It is often said that we should respond to racist claims not with censorship, but instead by offering competing views that make the case for equal respect or by creating more avenues for marginalized groups to express themselves. Faith in human reason underlies most accounts of freedom of expression and cannot simply be cut out and discarded from the analysis. Yet, we know that in some times and places reason does not always operate. Hate speech on the Internet is often directed at the members of a relatively insular racist subculture. When directed at such an audience, extreme speech may reinforce and extend bigoted views without being exposed to public criticism. Individuals, already weighed down by prejudice or susceptible to manipulation or already part of an extremist subculture, will see in these claims a plausible account of their social and economic marginalization and a justification for radical action. Because the Internet audience is highly fragmented, it is easy for a particular website to operate at the margins and avoid critical public scrutiny. While most Internet websites are public in the sense that they are generally accessible, the audience for a particular site is often self-selecting and sometimes quite small. Smaller hate sites (or those that are less easily accessed such as chat rooms) that link like-minded individuals are able to encourage a sense of intimacy and identity and to operate below the radar. Thus these sites can be an effective means for individuals and groups, who hold hateful views, to encourage others to adopt more extreme views or to take violent action. It may be then that the failure to ban the extreme or radical edge of prejudiced speech – that which threatens, justifies or advocates violence – carries too many risks, particularly when it is directed at the members of a racist subculture or occurs in a context in which there is little opportunity for response. The advocacy of violence may be a concern because, in the words of the Cohen Committee, "in times of stress such 'hate' could mushroom into a real and monstrous threat to our way of life" (Cohen Commission, 1966 p. 24) or more likely because it may encourage "isolated" acts of violence against members of an identifiable group, acts such as 'gay-bashing'. Hate crimes are committed most often not by organized groups but by individuals who have immersed themselves in the extremist subculture that operates principally on the Internet.

III. LESS EXTREME SPEECH

The second claim is that less extreme forms of discriminatory expression, although harmful, cannot simply be censored out of public discourse. Any attempt to exclude from public discourse, speech that stereotypes or defames the members of an identifiable group would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression. Because these less extreme forms of discriminatory expression are so commonplace, it is impossible to establish clear and effective rules for their identification and exclusion. Because they are so pervasive, it is vital that they be addressed or confronted rather than censored. We must develop ways other than censorship to respond to expression that stereotypes and defames the members of an identifiable group and to hold institutions such as the media accountable when they engage in these forms of discriminatory expression.

IV. THE HUMAN RIGHTS PROCESS

The third claim is that a narrowly drawn ban on hate speech that focuses on expression that is tied to violence does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor, and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the "dispute" between them.

The language of s.13 is potentially quite broad in its scope. The section prohibits "the repeated" communication on the phone system or the Internet of any matter "that is likely to expose a person or persons to hatred or contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination". However, the courts and the tribunal have interpreted the provision narrowly. According to Chief Justice Dickson, writing for the majority of the Supreme Court of Canada in *Canada v. Taylor*, (Taylor, 1990) the words "hatred or contempt" in the context of s. 13(1) refer only to "unusually strong and deep-felt emotions of detestation, calumny and vilification" that are "ardent and extreme" in nature:

> In sum, the language employed in s. 13(1) of the *Canadian Human Rights Act* extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt," *there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.* [emphasis added]

In the report, I argued that the absence of an intention requirement is a problem, because it leaves the door open to a broader or more discretionary application of s.13. In the *Taylor* case the Supreme Court of Canada did not consider the absence in s.13 of an intention requirement (that the respondent intended to spread hatred or knew that his speech was likely to do so) to be fatal to the provision's constitutionality. Dickson C.J. held that the absence of an intention requirement did not undermine the constitutionality of section 13 because the purpose of human rights legislation is to "compensate and protect" the victim rather than "stigmatize or punish" the person who has discriminated. According to Dickson C.J., even though "the section may impose a slightly broader limit upon freedom of expression than does section 319(2) [the hate speech provision] of the *Criminal Code*... the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision." Yet, despite the familiar claim that human rights codes are about harmful effects rather than wrongful intentions, the CHRC and the CHRT have not attempted to measure the effects of hate speech. It is, in fact, difficult to prove the impact of expression on the attitudes and actions of audience members, who may understand and react to the communication in many different ways. A wide range of discriminatory representations may contribute to hateful attitudes and discriminatory actions in the community. Indeed, less extreme, more commonplace, instances of discriminatory speech may provide the groundwork necessary for the spread of hateful attitudes and so might be caught by section 13 on an ordinary reading of its terms. In determining whether the communication at issue breaches section 13, the CHRT looks not at its actual impact, but instead at the extreme content and hateful tone of the communication. It is difficult to describe the wrong to which section 13 is a response without referring to the meaning or intention of the communicator. Not surprisingly, the language of intention frequently appears in the section 13 decisions of the CHRT.

Even though the scope of the prohibition has been narrowly defined by the CHRC and the CHRT, there are at least two significant problems with the current process. (It is worth noting that the small number of section 13 cases that have been sent by the CHRC to the Tribunal, and in which the Tribunal has found a breach of the section, have all (or almost all) involved expression that is so extreme and hateful that it may be seen as advocating violence against the members of an identifiable group.) The first problem is that free speech interests are affected every time an investigation occurs – particularly since the investigation engages the parties and takes 8 to 10 months to conclude. This is a problem because the CHRC is required to investigate a complaint unless it is trivial, vexatious, frivolous or made in bad faith. The CHRC therefore is bound to investigate some complaints that are unlikely to proceed to adjudication. Human rights commissions may be reluctant to exclude a complaint prior to investigation on the grounds that it is trivial, because such a finding may be seen as downplaying the genuine feelings of hurt or injury experienced by minority group members and will preclude the possibility of a facilitated resolution of the 'dispute'. Because s.13 is located in a law that seeks to advance the goal of social equality through education and conciliation, the CHRC may be inclined to err on the side of inclusion when deciding whether a complaint should be rejected prior to investigation on the grounds that it is trivial.

The second problem is the burden that the process puts on private complainants. Hate speech is most often directed at a receptive, or at least interested, audience and is only known to the complainant because she or he has looked for it or stumbled across it. Hate speech necessarily targets a group rather than an individual. The complainant makes the section 13 complaint on behalf of the group or society in general. She/he may not even be a member of the group targeted by the speech but has simply taken the initiative to bring a complaint. It is not accidental, then, that particular individuals have played a leading role in the initiation of complaints. Without the initiative of these individuals, section 13 might have no operation at all. The complainant carries responsibility for the complaint throughout the process, at both the investigation and adjudication stages. (While the CHRC has the legislative authority to initiate complaints under section 13, it has generally not acted on this. The CHRC is not required to appear at the CHRT adjudication, but may do so as representative of the public interest.) In addition to the burden of time

and money that a complainant must bear, particularly if the complaint proceeds to adjudication before the CHRT, a complainant may be subjected to threats of violence. We should not expect complainants to bear such a burden. Moreover, searching neo-Nazi websites for hate speech, and engaging with individuals on those sites to determine their identity, involves ethical challenges that should not be dealt with by private citizens. Hate speech harms the group and the community. It is a public wrong. The state, not private citizens, should be responsible for the enforcement of the law.

V. CHANGES TO S.13

In the report I also suggested changes that should be made to section 13 of the *CHRA*, if it is not repealed. These changes would reshape section 13 so that it more closely resembles a criminal restriction on hate speech. They include: (i) changes to the language of section 13(1) to make clear that the section prohibits only the most extreme instances of discriminatory expression, and more particularly, expression that explicitly or implicitly threatens, advocates or justifies violence against the members of an identifiable group; (ii) the amendment of section 13(1) to include an intention requirement; and (iii) the amendment of the *CHRA* to establish a distinct process for the investigation of section 13 complaints by the CHRC. Under the amended process, the CHRC would receive inquiries and information from individuals or community groups but would have the exclusive right to initiate an investigation in section 13 cases. A third set of recommendations addressed the role of non-state actors, most notably the print media, in the prevention of expression that is hateful or discriminatory in character.

The CHRC, in a report to Parliament in June 2009 (CHRC, 2009), responded to the recommendations in my report. The CHRC called for a continuation of the "dual approach" to the regulation of hate speech "with both the *CHRA* and the *Criminal Code* being applied as appropriate". According to the CHRC, human rights laws are the appropriate mechanism "to deal with situations where the intent of the person posting the messages may not be as clear, but where the extreme nature of the hate messages and their impact" justify their removal even when there is no "moral blameworthiness" on the part of the person posting them. The main difficulty I have with the CHRC's argument (that human rights code regulation is necessary to deal with hate speech that is not improperly motivated) is that it seems to assume that less extreme instances of "hate speech" will be caught by s.13. Yet the CHRC also argues that s.13 does not unduly restrict freedom of expression because it catches only the most extreme and hateful forms of discriminatory expression.

VI. PRESS COUNCILS

Because hate speech laws focus on extreme speech, they leave untouched expression that employs stereotypes, or makes misleading or unfair claims, about the members of an identifiable group. Yet, a "laissez-faire" approach to discriminatory speech fails the groups that are victimized and implicates the larger society in that victimization, because communicative power is inequitably distributed. This speech may be insulting and offensive to minority communities and may affect their position or treatment within the larger community. It may also provide the foundation for more extreme "hate speech", particularly when it appears in the mainstream media. The familiar refrain of those who oppose the censorship of hate speech or group defamation is that the answer to bad speech should be "more speech" – hate speech should be answered, not censored. But if we are serious about the "more speech" answer, then we must think about the real opportunities individuals and groups have to participate in public discourse and respond to speech that is unfair and discriminatory. Groups within the community should have a meaningful opportunity to respond to expression that is not so extreme that it violates criminal or human rights laws but may nevertheless affect their position within the larger community.

To advance this end, I argued that all major print publications should belong to a provincial or regional press council that has the authority to receive a complaint that the publication has depicted an identifiable group in an unfair or discriminatory manner and, if it decides that the complaint is well-founded, to order the publication to print its decision. A decision by the council that its code of conduct has been breached results not in censorship but in "more speech" – the publication of a statement that the newspaper breached the code and, more particularly in this context, that it published material that unfairly represented the members of an identifiable group. I also suggested that if the major publications in the country are not all willing to join a press council, then the establishment of a national press council with statutory authority and compulsory membership should once again be given serious consideration. A newspaper is not simply a private participant in public discourse; it is an important part of the public sphere where discussion about the affairs of the community takes place. As such, it carries a responsibility not to defame or stereotype identifiable groups within the Canadian community.

VII. BALANCING RIGHTS

Hate speech regulation is often said to involve the balancing of competing values or rights – the right to

freedom of expression versus the right to equality. The assumption is that an increase or gain in one of these values involves a decrease or loss in the other. The issue then is how much weight should be given to each value. Yet it is not clear that equality and free expression trade off in this simple way. It is true that when discriminatory views are expressed more widely in the community, the members of the target group may feel less secure, and others in the community may feel more comfortable engaging in acts of discrimination. However, an egalitarian society will not be achieved simply because the state has successfully banned the public expression of prejudice (an impossible task, in any event). Prejudiced views, although impeded, will survive in private life and so must be addressed. But more importantly, a social commitment to equality that will stand against the winds of change must rest on a judgment that all persons are deserving of basic respect and on a conscious rejection of prejudiced views. As I have already argued, it may sometimes be necessary to censor speech. When speech is extreme and occurs in a context in which it is unlikely to be examined critically, we should not take the risk that it may effectively encourage its audience to take extreme action. This is not the same, however, as attempting to expunge all instances of prejudiced expression from public discourse in order to advance a broad-based commitment to equality.

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CONSTRUING RIGHTS: MAJORITARIANISM AND THE SCOPE OF RIGHTS PROTECTION

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ABSTRACT

This paper argues that human rights claims are delimited by majoritarian values and interests and that this provides insight into how competing claims will be balanced.

The determination of a right and its scope of protection are not simply posited or given. Rather, they are constructed in order to maximize the scope of individual freedom in a way that works to the benefit of the state. In other words, to protect individual rights is very much connected to the welfare of the state. Consequently, while rights may operate as checks against state machinery, rights are nonetheless defined by officers of the state (i.e. judges) to support and further the interests of the social polity at large. In this sense, a distinction is made between the government of a particular state and its citizen-polity. Rights may limit government action, but they do so in the interests of the citizen-polity as a whole. As such, we cannot afford to ignore how a right is thereby defined by reference to the aims of the citizen-polity, and the extent to which the content of a right is delimited by majoritarian values and interests. In other words, while a right is designed to protect the individual from the state, the content of the right may be defined pursuant to majoritarian values. Consequently, where rights are in conflict with one another, on balance we can expect that the conflict will be resolved against minority groups making claims in light of values that are viewed as counter to the majoritarian values, which provide content to the rights at issue.

The contribution of majoritarian values to defining the content of a given right become problematic when the majority undervalues the aims and aspirations of those not in the majority. This difficult dynamic is evident in cases involving claims by religious minorities who engage in practices that the majority finds distasteful at best, offensive at worst.

For instance, in a 2007 French Conseil d'Etat decision, a covered Muslim woman was denied citizenship on the ground that she did not fully assimilate into French society, namely that she did not embrace French core values such as gender equality. The court did not articulate what gender equality means, nor did it identify any other "core value" that animated its decision. Rather, it defined French core values in negative fashion, by saying what they are not – they are not the values a covered Muslim woman embraces. To make its case, the government relied upon various pieces of evidence, such as:

- "attended the prefecture several times for interviews, and each time she appeared wearing clothing in the style of women in the Arab Peninsula: a long dark or khaki one-piece dress down to her feet, a veil covering her hair, forehead and chin and, in combination with the veil, another piece of fabric covering the entire face except for her eyes which showed through a slit, which in this area is called the Niqab."

- "did not wear the veil when she lived in Morocco and indicated clearly that she only adopted this garment after her arrival in France at the request of her husband. She says that she wears it more out of habit than conviction."
- "leads a life that is almost reclusive and removed from French society. She does not have any visitors at her apartment; in the morning she does her housework and goes for a walk with her baby or children, and in the afternoon she goes to visit her father or father-in-law… [S]he is able to go shopping on her own, but admits that usually she goes to the supermarket with her husband."

From these facts, the government commissioner concluded that the claimant had not adopted or otherwise acquiesced to the core values of the French Republic, in particular gender equality. Of particular interest is the way in which the commissioner uses the claimant's veiling habit to characterize the quality and content of her values: "She lives in complete submission to the men of her family, which is demonstrated by the clothing that she wears, the organization of her daily life and the statements that she made…showing that she finds this normal."

After reviewing the submissions and evidence, as well as taking into account the European Convention of Human Rights and Fundamental Freedoms, the Conseil d'Etat upheld the government's decision to reject the claimant's application for citizenship. The Conseil held that she adopted "radical religious practices" *(une practique radicale de sa religion)*, which counter the "essential values of French society" *(valeurs essentielles de la communauté française)*, with special reference to gender equality.[1] It agreed with the government that her religious values were contrary to the core values of the society and therefore were an obstacle to her application for citizenship.

A critical analysis of this opinion reveals certain peculiarities about the evidence garnered against the claimant, and its interpretation by the government commissioner. For instance, the commissioner noted that while the claimant can go shopping on her own, she would rather go with her husband. This particular evidence can be understood in different ways. It may be that she would rather shop with her husband because she enjoys her husband's company and might otherwise find shopping alone less enjoyable. Maybe he helps carry any merchandise or groceries that she purchases. The government commissioner, on the other hand, understood this piece of evidence to suggest that the claimant is not an emancipated woman; has not embraced her independence; and therefore has not fully incorporated gender equality as a core value in her life. But even if we stereotypically presume that the claimant's husband is a domineering spouse, we cannot escape the conclusion that the government imposes on her a further cost of not standing up to him.

In this case, the claimant seeks a grant of citizenship. She is not, therefore, making a rights claim. Ironically, though, the core values of French society, such as gender equality, which are the basis for rights claims are the very values used to deny her citizenship. In this case, the values underpinning rights claims are utilized against the petitioner. They can only be used in this fashion, though, by operating on unstated assumptions of what freedom, independence, and gender equality *look like*. In this case, the claimant's appearance, demeanor, and comportment do not conform to those assumptions.

Perhaps the silent operation of such assumptions is inescapable in a heterogeneous society. For, as long as we aspire to govern with regard to majoritarian values, minorities will always suffer, especially in times of national crisis. We cannot ignore that the covered Muslim woman is scrutinized in an increasingly security-conscious world. With the threat of terrorism and the seeming futility of capturing terrorists such as Bin Laden, the covered Muslim woman offers an easy target for pacifying our anxieties about the unseen, undetected, and unexpected terror threat. Whether the language is "security", or in this case "equality", both are postulated as core values without which the particular society will not survive. Consequently, in any conflict of interests or rights, particularly where a minority claimant makes claims upon or against a government body, we can expect that such conflicts will be resolved against minority parties who are viewed as adhering to values that run counter to the majoritarian values that, although often unstated and unnamed, nonetheless inform the assumptions and claims judges can and do make about the common good.

NOTE

[1] For a statement of the case, the relevant legislation, and the conclusions of the government commissioner, see the decision of the Council of State, Case #286798 at: http://www.conseil-etat.fr/ce/jurispd/index_ac_1d0820.shtml (accessed on September 23, 2008).

COMPETING RIGHTS IN CLAIMS INVOLVING THE RIGHTS OF PERSONS WITH DISABILITIES

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ABSTRACT

This paper briefly describes some aspects of competing rights claims and responses in the context of disability rights. Such a specific examination may help ground more general approaches to a framework for addressing competing rights claims, as well as reveal how tensions between rights claims may manifest differently in particular contexts

I. INTRODUCTION

The principle that human rights are indivisible and non-hierarchical is widely accepted; nevertheless, it is not uncommon to find situations where rights claims are, or are perceived to be, in tension with each other. Where tensions are most acute, it may appear that one rights claim can only be fulfilled by abridging or denying another. In this sense, rights claims may be seen to compete with each other. This raises extremely complex issues.

It is helpful to consider competing rights claims in the specific context of particular types of rights, such as disability rights, for two reasons. The first is that such a specific analysis may help to ground any approach to developing a framework to address competing rights claims. The second is that the challenges of competing rights may manifest differently in particular contexts, and that these varying manifestations may be an element in designing such a framework.

The approach of this paper is descriptive rather than prescriptive. It is not intended to evaluate any particular approach to addressing competing rights claims, but to highlight some aspects of disability rights that may differentiate competing rights claims in this area from those in other areas, to identify the types of competing rights claims that may manifest in the context of disability rights, and to briefly identify some responses that have been made to such competing claims in this context.

II. SOME PRELIMINARY CONSIDERATIONS REGARDING DISABILITY RIGHTS

As a preliminary step, it is useful to clarify what is meant by the term "disability rights". The breadth or narrowness of one's approach to the concepts of "disability" and "rights" may determine whether a particular situation is considered to raise an issue of competing rights at all. That is, there is not necessarily agreement on which situations may be considered as raising competing rights claims: as some of the examples below demonstrate, in some cases, a particular issue may be seen as one of competing rights by some and not by others.

Defining what is included in the scope of "disability rights" raises a host of complex issues beyond the scope of this brief analysis. There is by no means general agreement on what is meant by the term "disability", and depending on whether one adopts a bio-medical, functional, social or human rights approach in a specific context, particular impairments or barriers will or will

not be considered to fall within the scope of the term "disability".

Similarly, in considering "human rights" claims, it is important to note that the scope of "human rights" covered by domestic human rights instruments such as the Ontario *Human Rights Code* is considerably narrower than the scope of "human rights" embraced in international human rights instruments such as the United Nations *Declaration of Human Rights* and the new *Convention on the Rights of Persons with Disabilities.* While certain apparent competing rights claims may be resolved by restricting the scope of "human rights" to those that are protected in domestic human rights instruments, there are risks and limitations to this approach.

As a further preliminary step in considering competing rights claims in the context of disability-related rights, it is helpful to consider the specific nature of disability rights. Central to disability rights is the challenge of according rights and respect to *difference*. As the Supreme Court of Canada pointed out in *Eaton v. Brant County Board of Education,* while most equality rights law and jurisprudence focuses on elimination of discrimination resulting from the attribution of untrue characteristics based on stereotypical attitudes, a key element of the approach to disability rights is to take into account and accommodate the true characteristics of persons with disabilities. One emerging response to the concept of disability is the "universalism model", which aims to "establish a view of ourselves as individuals who exist at an infinite number of points on an infinite number of continua of ability levels" (Surtees: "What Elder Law Can Learn from Disability Law", *Theories of Law and Aging*, 2009), so that, rather than using difference to reinforce separation, we recognize that we are united in our variation. That is, the "difference" that is associated with disability does not separate persons with disabilities from others, but rather is simply part of the universal human experience. In this model, persons with disabilities cease to be viewed as a minority group, and become part of a broader imperative for inclusiveness and flexibility in the design of social norms, institutions and structures.

III. IDENTIFYING TYPES OF COMPETING RIGHTS CLAIMS IN THE CONTEXT OF DISABILITY RIGHTS

In the context of the rights of persons with disabilities, tensions or competition between rights claims arise in a variety of ways. Three commonly identified sources of competing rights are accommodation of disability-related needs, competing accommodation needs, and competition between different types of rights. These different types of tensions tend to evoke different responses.

1. ACCOMMODATION OF DISABILITY-RELATED NEEDS AS A SOURCE OF COMPETING RIGHTS

One commonly expressed tension in the area of disability rights is the notion that accommodations for persons with disabilities infringe on the rights of other persons. For example, in the context of rental housing, a person with environmental sensitivities may need other tenants in the same building to refrain from using certain materials or chemicals in the renovation or upkeep of their premises, thereby affecting the ability of those tenants to use their own spaces as they see fit.

Whether these tensions are considered as issues of competing rights depends, as noted at the outset of this paper, on what we characterize as "rights". These effects are not infrequently perceived as impinging on "rights" by the persons affected, or by the general public. However, these types of tensions have not been generally characterized as involving competing rights, as the persons affected are not claiming legally enforceable human rights under domestic human rights instruments. The legal mechanism available for addressing these tensions is the limitation placed on the extent of accommodations in the form of the "undue hardship standard" incorporated into Canada's domestic human rights instruments.

More general, non-legal responses to expressed concerns about the impact of disability-related accommodations on others are based on the fundamental tenets of disability rights. A disability rights approach seeks to undermine the assumptions about the contributions of persons with disabilities in the workplace or in any other context, and to shift the norm to a more inclusive and respectful approach to persons with disabilities. The universalist model seeks to reframe the emphasis from accommodation of individual difference, to the design of environments that minimize the effects of human variation.

2. COMPETITION BETWEEN THE ACCOMMODATION NEEDS OF TWO PERSONS WITH DISABILITIES

More difficult issues of competing rights arise where two persons with disabilities have different and conflicting accommodation needs. For example, one student in a classroom may have a sensory disability and use a service animal, while another student may have severe allergies that make it impossible to be present in the room with the service animal. These types of conflicts are perhaps unique to disability rights, given the infinitely variable nature of disability-related needs and

accommodations. The peculiar difficulty of such scenarios is that the rights are of the same nature and legal status, and are based on the same principles.

The most obvious response to such scenarios is a procedural one, requiring the accommodation provider to explore all possible options for at least minimally respecting the rights of both persons with disabilities. For example, could one of the students be transferred to another class without unduly affecting his or her education? Are there alternative ways of supporting the person with a sensory disability in the classroom without the service animal, such as by the provision of a dedicated human assistant during class hours?

This type of procedural response places significant responsibilities on the accommodation provider, who is required to respond with creativity and flexibility to balance the competing needs of the parties. It may also require compromise and flexibility from the accommodation seekers themselves. However, this notion of dialogue and flexibility is inherent in the notion of accommodation itself. As the Supreme Court stated in *Central Okanagan School District No. 23 v. Renaud*, "The search for accommodation is a multi-party inquiry" and all parties involved must work together to identify and implement appropriate accommodation.

3. COMPETITION BETWEEN DIFFERENT TYPES OF RIGHTS

The third type of tension involves competition between different types of rights, and may not involve accommodation of disability-related needs at all.

A recent example involved labour action to resolve long-standing wage issues in the developmental services sector. In several instances, picket lines were set up in front of group homes of persons with developmental disabilities, in some cases resulting in considerable disruption, and in fear, disorientation and humiliation for many residents. Arguably, the residents of the group home had their "right to quiet possession" of their own homes disrupted by the exercise of labour rights by the workers.

Such conflicts do not fall neatly within a human rights framework. Assuming that one could bring the situation of the residents of the group home within the ambit of the provisions of the *Code*, one might employ the primacy provisions in section 47(2) of the *Code* to assert the primacy of the rights of persons with disabilities over the labour rights of the workers. Such an approach may resolve the conflict within the relatively narrow confines of the *Code*, but does not address the broader social context in which there is a perceived competition between these kinds of rights. It also has implications for broader notions of the indivisibility of rights and of the status of socio-economic rights.

In balancing such competing rights claims, one must consider, not only the nature of the particular rights at stake for either party, but the historical marginalization and oppression of persons with disabilities. Given the history of subordinating the needs of persons with disabilities to those of others, one must be particularly careful, where the rights of persons with disabilities compete with those of others, to ensure that the rights of persons with disabilities have been given at least equal consideration with those of others, and that the broader context of discrimination and exclusion of persons with disabilities has been taken into account. That is, there is a principle of fairness and equality at stake in considering these competing rights claims.

IV. CONCLUSION

It is clear from this brief description that the ways in which a particular set of competing claims will be dealt with in the disability rights context will depend very much on the nature of the particular claims at issue. There has been no single approach to balancing competing rights in the context of disability. It is also clear that, in attempting to balance or reconcile such claims, one must recognize the particular nature of disability rights, including the history and context of marginalization and exclusion of persons with disabilities.

SEXUAL ORIENTATION AND RELIGION: SORTING OUT POLICY CONFLICTS[1]

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ABSTRACT

Conflicts between religious rights and other Charter-based equality rights involve deep-seated matters of dearly-held and highly personal individual beliefs. This paper provides a survey of the cases in this area over the last decade across Canada, concentrating in particular on the Surrey book banning and the Saskatchewan marriage commissioner case. Rather than taking a philosophical, jurisprudential, or partisan political approach to Charter questions, this paper argues that the methods of democratic deliberation may provide an effective means of processing conflicts between religious rights and lesbian and gay rights. The paper concludes by considering some of the conditions that must be met for successful deliberation.

I. INTRODUCTION

Conflicts between religious rights and other *Charter*-based equality rights involve deep-seated matters of dearly-held and highly personal belief. Scholars in political and legal philosophy have long puzzled over how to reconcile seemingly irreconcilable rights conflicts and judges have been called upon to rule in disputes in which each side claims fundamental *Charter* values. In this paper, I present a brief overview of some of the key recent cases in this area. I argue that methods of democratic deliberation may complement litigation as a means for policy-makers to process conflicts between religious rights on the one hand, and lesbian and gay rights on the other hand.

II. RECENT CASES

Over the last fifteen years, there has been a stream of litigation pitting advocates of specific religious values claiming freedom of religion against advocates of lesbian and gay rights claiming equality rights under the Charter. Some of these issues have included the introduction of reading material depicting children with same-sex parents in elementary schools (the Surrey book banning in BC); teacher training for public schools (Trinity Western University case); the debate over the recognition of same-sex relationships and same-sex marriage (1995-2005); the Owens and Boissoin cases on speech; cases on employment discrimination (Heintz) and discrimination in the provision of services (Brockie) in Ontario; and the ongoing case of a Saskatchewan marriage commissioner who has refused to perform same-sex marriages (Nichols).

In each of these cases, Christian evangelicals claim that their freedom of religion is infringed by the assertion of same-sex equality rights. Two of the cases concerned the moral status of homosexuality itself, especially in relation to the education system. Other cases concerned the status of same-sex relationships and the legal recognition of such relationships in provincial and federal jurisdictions. The Boissoin and Owens cases concern the

publication of statements condemning homosexuality, the Heintz case concerns employment discrimination on the basis of sexual orientation, and the Brockie case concerns the refusal of service to a lesbian and gay organization.

This debate has more than two sides, however. In both the "religious" and 'lesbian and gay rights' camps, there are multiple voices with different stances across a range of current policy issues including education, free speech, and the administration of same-sex marriage. In Canada, religious opinion on same-sex marriage is divided, while, in the queer community, there are those who oppose the campaign for same-sex marriage as normalizing same-sex relationships and undermining distinctive urban queer cultures, while other same-sex couples favour state recognition of same-sex relationships and define the issue as one of fundamental human rights (Smith 2008). In the next two sections, I provide a brief overview of two important cases from different parts of Canada as exemplars of the types of rights conflicts that may arise.

A. SURREY BOOK BANNING, 2000

In the mid-1990s, gay teachers in the public schools of the Vancouver suburbs of Surrey and Port Coquitlam challenged their school board's decision to ban gay and lesbian-positive reading material in the elementary school classroom. Activist teachers put forth a counter discourse that challenged *heteronormativity,* or the assumption that heterosexuality is the norm from which lesbian, gay, and bisexual people "deviate." Heteronormative practices imply heterosexism, i.e. that is, they imply that heterosexual families and relationships are natural, normal and better than homosexual and lesbian relationships. Heteronormative practices oppress through silence and exclusion, while heterosexism refers to an overt valorization of heterosexuality over homosexuality (Peel 2001). The activism of gay teachers and the British Columbia Teachers' Federation (BCTF) on this issue was strongly opposed by the evangelical right wing in B.C. By the mid-nineties, evangelicals had organized to obtain seats in local government and had succeeded in dominating elections to the school board in the Vancouver suburb of Surrey. The Surrey School Board was at loggerheads with the BCTF, objecting to presentations on anti-racism in the schools and banning Gay-Straight Alliances, the only school board to do so in BC (BCTF 2000).

The arguments of the case went beyond the simple demand for inclusion by raising the issue of heteronormativity and pointing to the costs for lesbians and gays themselves of the "enforced visibility" of exclusion and silencing. Chamberlain and his allies argued that treating lesbian and gay behaviour as if it is something that can only be tolerated in the private realm is oppressive because it erases lesbian and gay people from the school and from the family. This erasure is deeply stigmatizing for children with same-sex parents and creates another generation who view lesbian and gay life as deviant from the heterosexual norm. This issue was directly joined in the legal debate as the Christian right claimed the protection of religious freedom, arguing that including the books in the classroom or as approved learning resources would send the message that homosexuality was condoned by or encouraged in the school system. Of course, this is the precise message that activist teachers wanted to send. By arguing that lesbian and gay-positive reading material should be introduced at the elementary level, activist teachers were seeking to challenge the socialization of the next generation and to normalize lesbian and gay life (Fisher 2002; GALE 2000).

B. *NICHOLS V M.J.*, 2009

In 2005, following the legalization of same-sex civil marriage in Canada, Orville Nichols, a marriage commissioner in Saskatchewan, launched a human rights complaint arguing that his freedom of religion would be violated if he were asked to marry a same-sex couple. This complaint was dismissed by the Saskatchewan Human Rights Commission in 2006. At around the same time, a gay man ("M.J.") applied to get married in Saskatchewan and Nichols refused to perform the marriage, stating that it was against his religious beliefs. M. J. filed a human rights complaint against Nichols, which was adjudicated in M.J.'s favour by a Saskatchewan human rights tribunal in 2007. Nichols was ordered to pay $2,500 and to perform marriages of same-sex couples when called upon to do so under his duties as marriage commissioner. Nichols in turn appealed the ruling of the tribunal but lost his case in the Saskatchewan Court of Queen's Bench in July, 2009. In explaining his religious beliefs, Nichols stated that the Bible teaches him that "God hates homosexuals" (CBC News 2009; see also CBC News 2008).

In this case, Nichols's freedom of religion was pitted against his duties as a marriage commissioner performing civil marriage under Canadian law. The right to same-sex marriage would be meaningless if access was restricted because of the refusal of marriage commissioners to perform the ceremony. As the determination of the capacity to marry is a federal power, federal jurisdiction would also be undermined if the provincial power over the administration of marriage was used to circumvent a federal law. Further, it is very clear that the state's recognition of marriage in Canada is a civil, not a religious matter, as the legislation states: "nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs

and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs (*Civil Marriage Act,* S.C. 2005, c. 33)." Further, the Charter's protection for religious officials who refuse to marry same-sex couples on religious grounds was upheld by the Supreme Court of Canada in the reference case of 2004 (*Reference re Same-Sex Marriage* 2004). Nonetheless, some have argued that individual marriage commissioners should be able to pass the duty of performing same-sex marriages on to other commissioners if they have a religious or conscientious objection.

III. DELIBERATIVE DEMOCRACY

These cases demonstrate that there are strong views on different sides of the issue. However, litigation is an adversarial system in which there are winners and losers, each of which defines a position in jurisprudential terms. In contrast, a deliberative approach recognizes issues are by definition multifaceted and that they may be defined in terms of the voices of the stakeholders as well as the general public. From this perspective, the law itself is seen as mutable and solutions to interpretative conflicts over balancing religious rights and equality rights are not to be found in black letter constitutional law. Although deliberation emphasizes the importance of active listening and participating, it is based on the political idea that there is more than one way to balance rights that come into conflict.

Deliberation brings the stakeholders and policy-makers into conversation with each other through mechanisms such as citizen juries, consultative fora, or citizens' assemblies (Fishkin and Luston 2003; Gastil 2000). When we are discussing issues that are deeply held reflections of personal identity and belief, a deliberative forum can provide the opportunity for deeply entrenched opponents to listen respectfully to each other and to walk in each other's shoes. When given the opportunity to enter into conversation on the basis of mutual respect, what may appear to be two sides of an issue may transform into many sides and, out of many sides, a compromise position may be found which, while it is not the first choice of either side, may be minimally acceptable. These solutions may be seen as more legitimate and just, rather than remedies imposed by courts, and may open up new policy pathways for governments who are considering how to manage diversity conflicts (see the discussion in Warren 2006).

Deliberation may be organized in many different ways and deliberative exercises vary according to the nature and range of participants, the length of the deliberative process, the extent of its institutionalization, and the framing and resources of the participants. One of the most important questions is, who participates in the deliberation? Is the deliberative exercise organized for the mythical 'ordinary' citizen? Or, is the exercise organized for stakeholder groups? Do individuals speak for themselves or do individuals speak on behalf of groups? Related to this is the question of how individuals or groups are selected to participate in the process. Some of the mechanisms, such as the citizen jury, are institutionalized means of bringing a sample of mythical 'ordinary' citizens into the policy process to consider an issue of public policy. Other concepts, such as citizen engagement, seek to bring citizens together for consultation or in particular policy areas.

Political theorist Archon Fung has provided a parsimonious scheme to understand different types of deliberation. His schema considers a range of options along three different dimensions: who participates, how communication and decisions occur, and the link between deliberation and authoritative decisions (i.e. law-making and implementation) (Fung 2006). Fung provides numerous examples of deliberative exercises from the U.S., many of them based in urban areas around issues such as policing, arguing that "[c]itizens can be the shock troops of democracy. Properly deployed, their local knowledge, wisdom, commitment, authority, even rectitude can address wicked failures of legitimacy, justice, and effectiveness (Fung 2006: 74). Fung also makes clear, however, that successful deliberation consumes an incredible amount of time and energy from those who participate as well as the commitment of government and agency officials to crafting rules and procedures for successful communication and decision-making. Many of his examples are core issues of the implementation of public policy and public administration, rather than constitutional and jurisprudential questions such as the balance of religious freedom and equality rights, as we are dealing with here. Can the lessons of public administration be applied successfully to the conflicts between deeply held religious beliefs and equality rights?

I would argue that, in specific cases, stakeholder consultation based on deliberative principles can provide a useful complement to the adversarial structure of litigation. In public policy, controversies such as the debate over the marriage commissioners, a deliberative consultation held by human rights commissions can provide the means for different stakeholders to convey nuanced and diverse views on the issues. Deliberation creates a civil space which, unlike the disconnected postings of lone bloggers, adversaries must listen to each others' views and arguments in the same room. The creation of a civil space in which advocates of very different views agree to come together is one of the advantages of face-

to-face deliberation.

Deliberative exercises must be based on agreed-upon rules of personal conduct and even pre-determined limits on forms of speech such as blanket condemnation of all religions and religious people or statements that gay men and lesbians are seeking sexual access to children. Furthermore, the playing field must be level in terms of economic resources for deliberation. The economic costs of participation must be recognized, as well as the costs of developing deliberative expertise among stakeholders.

Much of Archon Fung's framework is also based on bringing groups of citizens into dialogue with state agencies; however, in the case of religion and sexual orientation, we need to bring groups of citizens into *dialogue with each other* in a context in which state agencies are providing the structure and the economic resources for democratic dialogue. Neutral third parties must manage the process and all sides must buy in to the structure of the deliberative exercise.

Finally, deliberation over these kinds of issues must be based on recognition of the different power relations that underpin the resources and historical position of the stakeholders. Christianity has been the dominant religion in Canadian society since European settlement. While Canadian society has undergone substantial secularization over the last forty years, Christian churches in Canada command impressive economic and financial resources, institutional infrastructure, constitutional guarantees of publically funded religious education, tax exempt status and direct access to politicians and government. In contrast, Canadian lesbian and gay organizations are poorly resourced and organizationally fragmented. As a long stigmatized minority group, some lesbian and gay citizens have hardly come out and may hardly have come to terms with their sexual identity, while Christians enjoy a long-dominant social identity, which is well integrated in most Canadian communities. In the recent past, lesbians and gay men in Canada have been jailed, bullied, physically assaulted, and subjected to systematic discrimination in every area of life, from the most intimate areas of sexuality, relationships, and parenting, to the public arenas of politics and employment. Any deliberative exercise must take these inequalities in power relations into account in its design of the three key elements identified by Fung: participation, communication, and authority.

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NOTE

[1] The discussion of the Surrey book banning is drawn in part from my previously published article: "Questioning Heteronormativity: Lesbian and Gay Challenges to Educational Practice in British Columbia, Canada" Social Movement Studies 3: 2 (October 2004): 131-145. This research was supported by a grant from the Social Sciences and Humanities Research Council of Canada (2005-08).

THE INTERSECTION OF HUMANS RIGHTS AND PROCEDURAL FAIRNESS IN TRIBUNALS

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ABSTRACT

This paper examines the intersection of human rights and the general procedural rights of natural justice and fairness in adjudicative tribunals. Tribunals are expected to be impartial and independent, but also responsive to societal values. This challenge can be met with proactive and systemic approaches to promote diversity and engage in stakeholder relations.

I. INTRODUCTION

In such a diverse society as Ontario, what are the competing rights issues faced by adjudicative tribunals that try to be responsive to the diversity of the parties and still operate wholly within the rule of law with an impartial and fair process? This short paper will seek to examine the intersection of human rights and the general procedural rights of natural justice and fairness in adjudicative tribunals.

II. TRIBUNALS, NATURAL JUSTICE AND FAIRNESS

The competing rights issue in tribunals must be examined within the legal context of tribunals. A tribunal of course is bound by its enabling legislation. But more importantly, for the issue of competing rights, a tribunal is bound by the common law as it relates to the principles of natural justice and procedural fairness. It is this latter area where we find the most fruitful discussion about competing rights in a general sense. A party's right to natural justice and procedural fairness before a public decision maker is one of the key components of administrative law.

Natural justice basically involves the right to be heard and the right to an impartial decision maker. The right to be heard includes the right to know the case against you and the opportunity to respond to that case by presenting evidence and making arguments. This is very flexible and it depends upon such factors as the nature of the tribunal or government department, the governing legislation, the decision that is being made and its impact on the party, and so forth.

The second branch of natural justice is the right to an impartial decision maker, which is basically the rule against bias. An adjudicator is disqualified if there is actual bias or a reasonable apprehension of bias.

In addition to these legal limits on tribunals, there are practical and political factors that define the reality of tribunals. Adjudicative tribunals have a unique place in our system of justice and government – pulled by the demands and benefits of each of these institutions, and trying to find a place in the nebulous space between them. As noted below, the result can be conflicting expectations that reach to the core of a tribunal's existence.

III. ROLE OF PUBLIC OPINION AND SOCIETAL PRESSURES

If a tribunal can be responsive to societal values in a systemic sense (as opposed to individual cases), then it can effectively resolve competing rights issues. Democracy and democratic principles have legitimate roles in this area also. But minority groups often face an unfair battle in many of the democratic arenas – whether it is the media or a referendum. In contrast, courts and tribunals can provide a more level playing field with protections for adjudicative independence, and a process that may have more integrity and principle than the potential tyranny of the majority.

Adjudicative tribunals, like courts, depend upon independence and impartiality for their credibility or legitimacy. It is the tribunal's adjudicative independence that is essential to its identity. Otherwise, it would just be like another part of the government, and its members would be like other public servants.

Judges are provided lifetime security of tenure and protection from political interference so that they may make decisions without bending to public pressure. Tribunal members in most jurisdictions do not have a similar security of tenure. But regardless of legislative protections or government practices, there is certainly an expectation by the public – as well as a legal obligation imposed by the courts – that tribunal members act independently from government and be impartial when dealing with the parties, which in many cases would include a branch of the government.

At the same time, tribunals are easy targets when they make what may be unpopular decisions, and they may face criticism – usually unfounded or unfair – that they are out of touch with societal values. Because the role and identity of tribunals is often a hybrid one, we end up wanting tribunals to be sensitive to public opinions or government policies but still act independently from public opinion or government policy. There is a dissonance between these expectations and demands that is rarely identified or openly addressed.

We may expect or want judges and tribunal members to be responsive to society but that should not be equated with having these adjudicators be swayed by popular opinion about the specific cases that may be before them. There are many appropriate ways in which tribunals can be more responsive to societal values – these would be systemic ways that fully respect the impartiality and adjudicative independence of tribunals.

One approach is to ensure that the tribunal has members and staff who reflect society, and who have a background and understanding that is relevant to the area. Having tribunal personnel who are qualified and expert in a narrow sense will not be enough when trying to achieve legitimacy in dealing with value-laden issues of human rights and inclusiveness. There is both a "pure justice" rationale and "practical justice" rationale for diversity in tribunals. As an example of the former rationale, a decision maker who is culturally competent will provide better hearings and better decisions. And on a broader public policy or political basis, a tribunal whose personnel is reflective of its stakeholders will have more legitimacy and credibility.

Another way for tribunals to be responsive to societal values is to engage in stakeholder consultations, public education and media relations. It may not be surprising to know that tribunals traditionally shun publicity. This is manifested in the often-repeated fear of not making the front-page news and thereby causing the responsible Minister to answer questions about the tribunal. At the same time, there is a trend towards tribunals becoming more transparent and open about their processes, and taking deliberate actions with respect to media and community outreach.

These external activities, if done effectively, can have an impact on the overall reputation of the tribunal, on how well-informed the counsel and parties are, and on developing and implementing changes to practices and policies.

It is especially important for tribunals that deal in controversial areas or in highly polarized settings to have a proactive communications and stakeholder relations strategy. These tribunals are seen as fair game in the media and political arena. And since tribunals are so limited in how they can respond to case-specific criticisms, the best strategy will involve actions that enhance general reputation and foster supporters in the media, legal groups, community groups, and the government or political realm. Of course, all of this must be done within the limits of a tribunal's unique needs to always maintain its integrity as an impartial and independent decision maker.

IV. FOCUS ON PROCEDURAL ISSUES, NOT SUBSTANTIVE ISSUES

In discussing specific issues about tribunals dealing with competing rights, a discussion about substantive decisions by tribunals will not be very instructive because it would tend to be too subject-matter specific. Indeed, not many tribunals have true discretion in their substantive decisions to weigh competing public interests or competing rights. This would be more common in tribunals on the regulatory end of the tribunals spectrum – such as those dealing with public safety, land use, telecommunication regulation, and so forth.

On the other hand, in Ontario (and other provinces), parties may challenge the application of a law by saying that it is discriminatory under section 47(2) of Ontario's *Human Rights Code.* In those cases, the tribunal must explicitly consider the issue of human rights – and in some cases, competing human rights. While there is undoubtedly some interesting discussion that can occur in this area related to the tribunal's substantive decision making, it may be very subject-matter specific. The focus of this paper is not on challenges under the *Human Rights Code*, but rather on human rights in general and how that conflicts with or influences the procedural rights of parties. This is consistent with the focus of administrative law – which is on the procedural rights of the parties.

The discussion of rights becomes more interesting and relevant when we focus on process because that is also the area where tribunals have a great deal more discretion. It is only with the presence of discretion in the true sense that competing rights issues can become very significant. And it is only when the decision maker has broad discretion that the impact of societal values or public opinion becomes an interesting issue.

In an area with little discretion, the law may lead to a result that is seen as harsh or unfair, because tribunals are legally obliged to find the facts and to apply the law to those facts. The decision maker may have little choice in these situations – it is not a matter of whether he or she is insensitive or mean-spirited; it may simply be that the tribunal has no discretion and that it is simply upholding the law.

In contrast, procedural matters are rich in discretion. The rules of natural justice and procedural fairness are notoriously general and elusive. There is no single organized source with numbered paragraphs such as would be found in an Act or regulation. Instead, you must read many long court decisions, some of which may conflict with each other, all of which are open to interpretation, and most of which are specific to the particular case's fact situation.

There are several common situations involving adjudicative discretion where human rights may intersect or overlap with procedural rights:

- adjournment requests
- extension of time deadlines for filing materials or forms
- accommodation requests for persons with a disability
- reconsideration requests.

As illustrations, one can consider what a tribunal should do in the following situations:

- a party with anxiety disorder has a panic attack during a hearing and wants to stop, but the other side will be prejudiced by any further delay, and asks that the hearing continue after a short break
- a party asks for an extension of time to file an application for a postponement of the hearing date because his depression caused him to lack the motivation and energy to get someone to help him in a timely manner
- a party asks for an interpreter even though she understands English adequately, but would be more comfortable in a stressful situation to have some assistance
- a party starts using racially offensive words in his testimony and submissions
- a party enters the hearing room with her face covered by a veil that shows only her eyes – the tribunal member sometimes finds it difficult to understand her because she speaks very softly and the veil makes it even more difficult to hear her; also, her credibility is the key issue in the hearing.

These examples raise issues such as how to accommodate for disabilities and for diversity, what are the rights of one party when faced with a request by the other party that is based upon their human rights, and how does the tribunal deal with the intersection between human rights and procedural fairness when these two rights may conflict.

It is not easy to answer the questions that arise from these above examples. This is an area that is complex and developing. There is potential to develop practices and guidelines to address some of these areas specifically or to put forward some general principles and directions. But as with all areas of natural justice and procedural fairness, the multitude and diversity of tribunals and their specific circumstances will make it very challenging to provide any truly practical assistance. At this stage of dealing with these issues, it marks progress to at least begin to identify the problems, discuss the framework and concepts, and move towards a principled approach that respects both the human rights of a tribunal's parties and the natural justice procedural rights that are at the core of a tribunal's identity.

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)
>
> 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)
>
> 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?

THE DECLINE OF PUBLIC DISCOURSE: THE ATTACK ON HUMAN RIGHTS COMMISSIONS

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ABSTRACT

During the last few years there has been a disinformation campaign against human rights commissions. While it is not surprising that Internet blogs post things about HRCs that are false and malicious, these claims have seeped into mainstream discourse. This paper sets out some of the claims made about the CHRC and describes how they are misleading or just plain false and it considers how these deceptive and invented claims have entered mainstream discourse. This will involve some general observations about the state of public discourse in Canada.

I. INTRODUCTION

In the fall of 2008 I wrote a report for the Canadian Human Rights Commission [CHRC] (Moon, 2008) in which I recommended the repeal of s. 13 of the *Canadian Human Rights Act [CHRA]* (RSC, 1985) – the provision that restricts Internet hate speech. As I was preparing the report, I became aware of what can only be described as a disinformation campaign against human rights commissions. I am sure it comes as no surprise to anyone that there are Internet blogs that post things about the CHRC that are false and malicious. The problem is that these claims have seeped into mainstream discourse – they have been taken up by members of Parliament, they have been adopted in editorials in the *National Post* and columns in the *Globe and Mail* and *Maclean's* magazine and in a host of other publications, and they have been repeated on radio and television current affairs programming. They have created in the larger public – or a significant element of the public – a "feeling" that there is a serious problem with human rights commissions, and in particular the Canadian Commission, that needs to be addressed.

There is a serious debate to be had about the regulation of hate speech by HRCs. But the debate is difficult and complex and there are many reasonable positions one can take on the issue. I do not agree with those who argue that the CHRC should be involved in the regulation of Internet hate speech, but I do not doubt their good faith in taking this position. The most vociferous and indeed the most media-amplified critics of the CHRC are not interested in this debate. It is easier, and it seems more effective, to exaggerate the case – to invent injustices, and engage in personal attacks. This approach has several related strategic advantages: (a) The case against the CHRC becomes clear-cut. All complexity is washed away. There are no longer competing interests or trade-offs that need to be addressed; (b) The attack on hate speech regulation, when based on the corruption and incompetence of the Commission, undermines the entire human rights commission process and not just the regulation of hate speech; (c) The attack on human rights commissions can be made without having to defend unpopular ideological positions. The regulation of hate speech can be attacked without having to rely explicitly on a libertarian free speech position – the claim that speech should never be

subject to limits. And a broader challenge to anti-discrimination law can be made without having to defend the view that the market is a just and efficient mechanism for the distribution of goods that should not be subject to any form of regulation; (d) And, of course, it appears that this style of attack (personal and extreme) gets attention and is an effective means of self-promotion.

Why this style of attack is effective I will consider in a moment. First, I want to look at two claims made by the critics, and repeated or recycled in the mainstream media. These are: (i) The CHRC has a 100% conviction rate for s.13 cases; and (ii) Human rights commissions or tribunals make decisions that are oppressive, even bizarre. I have elsewhere shown that the claim that the CHRC has engaged in corrupt behaviour is entirely without foundation. (Moon, 2010 pp.108-116)

The techniques used by the critics are sadly familiar. They include (a) identifying one or two commission or tribunal decisions which seem unreasonable in their outcome, and presenting them as if they are representative of the larger body of decisions; (b) when describing a particular case, highlighting certain facts or findings and omitting mention of others to give a misleading picture of the case; (c) relying on dubious sources and reporting their claims as if true and uncontested; (d) using terms in a way that is intended to mislead the audience, ie making a claim that with some strain on the language may be 'true' but which on an ordinary reading (the reading encouraged by the speaker) is false; (e) making blatantly false factual claims; and finally (f) engaging in personal attacks against those with opposing views, in order to undermine their credibility.

II. THE CHRC HAS A 100% CONVICTION RATE

Levant, Steyn, and others have frequently asserted that the CHRC has a 100% conviction rate. Here is how Levant put it in a National Post op-ed: "The CHRC already has a 100% conviction rate for censorship prosecutions – no one in 32 years has ever beat the rap. That's not hard to believe when you learn that truth, fair comment and honest belief are not legal defences in human rights hearings – the commissions operate more like kangaroo courts than real courts that way."(16 June 2009) Levant, in his book *Shakedown* (2009, p.146), asserts that "no one had ever beaten a hate speech accusation … at the Canadian Human Rights Commission." The claim has also been made in a *National Post* editorial: "The CHRC, too, has a frighteningly undemocratic 100% conviction rate on hate speech cases." (18 June 2009)

This claim is a little like Bill Clinton's statement: "I did not have sexual relations with that woman, Miss Lewinsky". It is intended to be misread. It is possible to interpret the 100% conviction rate claim as true, but in its 'true' meaning it is entirely uninteresting and in no way a criticism of the CHRC. The ordinary reading of the claim is that the CHRC has found that s.13 has been violated in every complaint it has received (every "accusation"). The impression given is that the issue is fully decided by the CHRC, that it both investigates and adjudicates complaints and that once a complaint is made – once a respondent is unwittingly drawn into the process – the outcome, "conviction", is inevitable. This was the claim made in a *Windsor Star* editorial: "… the problem is that the CHRC is essentially the investigator, prosecutor and judge of complaints of racism and hate speech". (18 July 2009)

To show how this claim is deceptive I need to say a little bit about the CHRC process and the relationship between the CHRC and CHRT. Under the *CHRA* an individual or group may file a complaint with the CHRC, if they have "reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice" contrary to the Act. The CHRC is bound to investigate any complaint that falls within its jurisdiction and is not excluded as trivial, frivolous, vexatious or made in bad faith. The investigation of a complaint must be conducted in accordance with the principles of procedural fairness. This requires that the respondent be informed of the complaint made against her or him and given the opportunity to respond to it. A report is prepared by the investigation officer, which is then submitted to the Commissioners. The Commissioners may ask the CHRT to institute an inquiry into the complaint, if they conclude that "having regard to all the circumstances of the complaint, an inquiry ... is warranted" or they "shall dismiss the complaint" if they conclude that an inquiry is not warranted. The CHRT is an entirely separate and independent body that adjudicates complaints under the *CHRA* that are referred to it by the CHRC. If the complaint is referred to the CHRT for adjudication, the CHRC may appear in order to represent the "public interest"; however carriage of the case lies with the complainant. The CHRC has appeared in all but one of the s.13 cases that have been decided by the CHRT. The CHRC does not adjudicate the complaint, and it does not determine the appropriate remedy. Instead it serves as a kind of filter for s.13 (and other *CHRA*) complaints.

Section 13 complaints represent a very small part of the CHRC's workload. Between January 2001 and September 2008 the CHRC received 73 section 13 complaints (about 2% of the total number of complaints received by the CHRC. This number includes only those complaints that were not excluded prior to investigation as trivial or vexatious). In the Fall of 2008, when these numbers were compiled, 58 of the 73 complaints received by the CHRC had been resolved: 32 (about half) were

dismissed after investigation by the CHRC and did not go to adjudication; 10 were resolved through mediation at the CHRT prior to adjudication; only 16 were adjudicated. The CHRT found a breach of s. 13 in 100% of the 16 cases that it adjudicated – less than 1/3 of the complaints that were received and investigated by the CHRC.

It is true that all s. 13 complaints adjudicated by the Tribunal have been upheld – at least until recently. The Tribunal then has a 100% conviction rate. ("Conviction" is not the right term since the standard remedy given by the Tribunal is a cease and desist order, but this is a relatively minor distortion.) It is also true that the CHRC was represented, and argued that s.13 had been breached, in all but one of the Tribunal adjudications. The CHRC has a 100% "conviction" rate as an advocate before the CHRT, but since so few s.13 complaints are sent to the CHRT that is not so remarkable. The CHRC dismissed approximately half of the investigated complaints because in its view the speech was not sufficiently extreme to breach s.13. Ironically the 100% "conviction" rate by the CHRT could be used to support the very different claim that the CHRC is filtering out too many s.13 complaints, preventing some complaints that might have succeeded at adjudication from even being considered by the Tribunal.

There are, of course, real and significant problems with the process that the CHRC is by law required to follow. These problems, however, are obscured by the misleading 100% conviction rate claim.

III. HUMAN RIGHTS COMMISSIONS MAKE BIZARRE DECISIONS:

In his book *Shakedown,* Levant describes a handful of human rights code cases, dealing with issues other than hate speech, in which a provincial tribunal makes a decision that seems patently unreasonable. According to Levant the "craziest" of all the human rights decisions is the judgment of the BC HRT in *Datt v. McDonald's*. (Datt, 2007) On the CBC's The Current, Levant said this about the case: "A woman didn't want to wash her hands and she sued McDonald's in human rights tribunal and won. She allegedly has this human right not to have to wash her hands at McDonald's." (28 April 2009) On smaller radio programs his claims become even stronger: "One day she said, 'I don't like to wash my hands so much' … Nothing was wrong, she just didn't want to wash her hands ... There was no name for this mystery illness … [It was decided by the HRT that] "she had the human right not to wash her hands … McDonald's was ordered never to enforce its hand-washing policy on people with this hand-washing problem again ... That's just gross."(CFRA, 25 April 2009) In a blog entry on the case Levant informs us that the Tribunal "invent[ed] a human right for a worker to go to the bathroom and then handle meat without washing her hands in between …". (15 April 2008) The impression one gets from Levant's account of the case is of a tribunal that is entirely out of touch with reality, and indifferent to important health and safety concerns.

Of course anyone who combs through the thousands of human rights cases that have been decided over the years, is bound to discover decisions that seem wrong or unfair. This would be the case with any decision-maker, including the courts. With that said, however, let me tell you what Levant leaves out of his account of this case. Ms. Datt had worked for Macdonald's for 23 years until she developed severe dermatitis as a consequence of her frequent hand washing. There seemed to be no dispute that frequent hand washing had caused her or contributed to her skin problems. The Tribunal noted that once it had been established that Ms Datt suffered from a disability, the burden shifted to McDonald's to establish that "her disability was not capable of being accommodated in the workplace without incurring undue hardship" . The Tribunal "accept[s] that the goal of preventing the contamination of food is why McDonald's established its hand-washing policy. This goal cannot be understated and it accords with common sense in the handling and preparation of food." (para.239) The problem, said the Tribunal, was that McDonald's did not seem to have considered in any serious way whether there were other tasks that Ms Datt might perform that would not involve the handling of food and require hand washing with the same frequency. The Tribunal concluded:

> I am at a loss to understand why McDonald's did not take more steps to try to accommodate Ms Datt, a 23-year committed employee. Ms. Datt was not entitled to a 'perfect' solution, but she was entitled to a fulsome consideration of her restrictions and how those restrictions intersected with the hand-washing policies and the jobs that were available. Without having done so, neither Ms Datt nor McDonald's was in a position to know what the outcome of a return to work, with accommodations, might have been. It may be that, at the end of the day, Ms Datt could not have been accommodated at McDonald's because she simply could not meet its hand-washing policies doing any job or combination of jobs, but based on the evidence before me, I find that McDonald's failed to take all the necessary steps to make this final determination". (para. 249)

You can disagree with the decision – although that may only be possible if you believe that employers have no duty to accommodate employees with disabilities -- but the result is not shocking in the way Levant suggests. If that is among the most egregious injustices that he is able to mine from the thousands of human rights decisions, then human rights bodies must be doing far better than I might have guessed.

IV. THE STATE OF PUBLIC DISCOURSE

I have, I hope, said enough to make my point. Many of the claims made by Levant, Steyn, and other critics of the CHRC are false or misleading. But how have these critics been able to make these false or deceptive claims go so far? Levant's claims are not just posted on his blog. They are in his book, which is published by a major Canadian publisher. They are repeated by him, often uncontradicted, in radio and television interviews. They are parroted by politicians and in newspaper editorials and columns. And, although this is more difficult to gauge, they appear to be taken up by Canadians, who watch or read the mainstream media.

The Internet has been the breeding ground for many of the false claims made about the CHRC. The audience for some of the blogs of Levant and other CHRC critics, while not insubstantial, is still relatively small and generally confined to like-minded individuals, who are receptive to the claims made. But when the content of these blogs passes into the mainstream media, not only does it reach a larger and more politically diverse audience, it acquires greater credibility.

Why have mainstream media outlets been willing to provide a platform for these false and misleading claims? There are several reasons for the media's failing. The most obvious is that media reporters and interviewers have limited time and resources, making it difficult for them to fact-check – to confirm or correct the claims made. And, of course, the more these claims are repeated in the media, the less it seems necessary to check their accuracy. But there are other more significant factors that seem to support non-critical reporting of these claims.

The first is the desire by most mainstream media outlets, in their role as reporter of news, to appear neutral or balanced in their reporting, particularly on matters of public controversy -- to avoid taking a position (or appearing to take a position) on a public issue. In seeking to avoid the appearance of bias, newspapers and broadcasters, at least in their news coverage, often present different positions without commenting on their merits. The problem is that the positions reported may not have any factual grounding or may be based on factual claims that are contested. If the media simply report the factual assertions of one side without ensuring that they are accurate, or if they report competing factual claims with no comment on the accuracy of the claims, then the audience will at worst be misled and at best be denied enough information to make a reasoned judgment. Levant appeared on at least three CBC national radio programs – *The Sunday Edition, Cross-Country Check-Up*, and the *Current*. Each program allowed him to repeat his false claims with little or no challenge and so gave them validation. When Levant asserts in an interview that the CHRC has a 100% conviction rate and is not challenged by the interviewer, the audience might reasonably assume that his claim is true.

When the media treats factual claims the same way it treats opinions, and simply channels them to the audience, how is the audience to know whether the claims made are true. The audience has no other meaningful access to the facts. Even when the audience hears competing versions of the facts how are they to decide between them, if the media does not arbitrate or even comment on these factual 'disputes'. Because there is often no common factual ground, it is left to the members of the audience simply to choose their position, based on 'gut instinct' or ideological predisposition. Not surprisingly individuals tend to adopt the factual claims that fit with the views they currently hold and to discount or reject those that do not. If I am already wary of 'big government' or resentful of 'political correctness', I will be more receptive to the claims of Levant. On the other hand, I am more likely to discount his claims, if I believe that government has a role in protecting minority groups from discrimination.

The second factor, contributing to the media's non-critical reporting of the false claims about the CHRC, is the increasing prominence of columnists, who engage in advocacy rather than analysis, and are concerned less with factual accuracy and more with simply provoking a reaction in their readers. Most mainstream print publications, although seeking to be impartial in their news reporting, publish opinion columns. Most of these columns offer a careful, factually grounded, analysis of current affairs, drawing on the knowledge and experience of the columnist. However, in recent years there has been a proliferation of columns, modeled on television commentary, that are designed to be provocative – to attract readers who strongly agree or disagree with the positions taken by the columnist. The authors of these advocacy columns are prepared to address a remarkably wide range of issues about which they have little or no background knowledge. Their object is advocacy rather than accuracy, and so they make simple and dramatic claims, often with little factual support. Indeed, they often seem to show the same indifference to factual

accuracy, as political spinners. Mark Steyn's column in Maclean's magazine is an obvious example. He seems to have no hesitation re-shaping the "facts" to fit the conclusion he wishes to reach. Rex Murphy, in the columns he has written for the Globe and Mail dealing with HRCs, has taken his information straight from Levant's blog. On one occasion Murphy wrote a column about how outrageous it was that the Chief Commissioner of the CHRC would lay a wreath at the war memorial in Ottawa, when she obviously had no grasp of the freedoms for which Canadian soldiers had fought. (14 Nov. 2008) Only two days earlier Levant had written about the very same thing, although in less grandiloquent terms. (12 Nov. 2008) Murphy has also repeated several of Levant's false claims, including the claim that the BC HRT has recognized a "right not to wash one's hands while working in a fast-food restaurant". (14 Nov. 2008) The emergence of this type of opinion column is part of the gradual reshaping of the print news media in the image of the entertainment-oriented current affairs programming that appears on television.

A third factor contributing to the problem of factual distortion is the tendency of the television (and increasingly radio and newspapers) to avoid complex analysis and to sensationalize issues. Television, as a visual medium, does better with spectacle, and with claims that are simple, direct and dramatic. (Postman, 1986) Television current affairs programming often focuses on extreme positions. Accusations of corruption, deceit, or patent injustice play much better on television than do more nuanced arguments or moderate or conciliatory positions. Issues are generally presented as if they have only two sides, each of which is simple, straightforward, and diametrically opposed to the other. Even when both sides of an issue are represented, they don't engage with each other, at least not in any way that might contribute to audience understanding, or to the discovery of common ground. The two sides generally make different factual assertions or assumptions. Because the competing positions are so far apart and rest on completely different versions of the facts, the audience cannot learn from each but must choose one over the other.

V. CONCLUSION

In the end the debate about human rights commissions, like so much public debate, involves no real engagement between competing positions, and no real opportunity for the audience to judge whether or not the current law is good policy. The complexity of the issue is avoided or suppressed. The merits of the case, either for or against hate speech regulation by HRCs, are lost in a sea of exaggerations and fabrications. It is left to the audience, if it is paying attention, to make a choice, not based on reasoned judgment, but on their existing views, on their ideological predispositions, either suspicion of government regulation or belief in the importance of human rights protection. While the critics of the CHRC have been successful in spreading their views, all they can hope for is a marginal win in a polarized debate. This is the most spin can accomplish. It will not advance democratic engagement or meaningful discussion of public policy, and it cannot bring about consensus or compromise or even respectful disagreement based on an awareness of the costs and benefits of the different responses. Spin encourages the fragmentation of the civic audience into insular ideological communities that are unable to engage with each other. (Hall Jamieson and Capella, 2008). The costs of spin are even more fundamental than this though. Spin degrades public discourse, so that we no longer expect to be told the truth and are no longer able to evaluate positions based on the accuracy of their claims or assumptions.

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NOTE

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COMPETING RIGHTS POLICY: THE LAW COMMISSION OF ONTARIO APPROACH

Dr. Patricia Hughes, the Executive Director of the Law Commission of Ontario, received a PhD from the University of Toronto and LLB from Osgoode Hall Law School. She was Dean of Law at the University of Calgary, among other positions, and has taught and written extensively in constitutional law and other areas.

ABSTRACT

In the development of the policy that underlies its law reform recommendations, the Law Commission of Ontario ascertains the often diverse interests of those who determine or are affected by the law. The author discusses the LCO's outreach and consultation processes, including it several objectives, and the challenges it poses.

I. INTRODUCTION

Hearing directly from the people affected is crucial to developing effective and responsive ways to resolve tensions between or among rights claims. Those who experience a denial of their rights have a unique perspective on why that is the case and appropriate remedies. Their views alone may not determine the outcome, however, for their claims may turn out to affect the rights – or interests – of others and the remedy they seek may turn out to curtail these latter rights or interests.

Claims may be based not only legally protected rights; normative, ethical or moral claims may also be accorded "validity". Tension between rights occurs because two people or groups each claim a right that does not fit well with the other's claim. There are times that rights might be termed "competing", but they are not always in competition: sometimes they can be reconciled creatively, although there may be instances when one claim must give way (when it is adversarial to broad societal values, or when a claimant is absolute in framing the claim or counterclaim).

This paper is not about how to resolve these various tensions, but rather about the value of including communities in the process, and specifically about the outreach and consultation by the Law Commission of Ontario ("the LCO").

The LCO was launched in September 2007 with a mandate to make recommendations to make the law more effective, relevant and accessible, to simplify and clarify the law and to see how technology might be used to increase access to justice, as well as to stimulate critical debate about law. It was created by an agreement to which the Law Foundation of Ontario, the Ministry of the Attorney General, the Dean of Osgoode Hall Law School, the Law Society of Upper Canada (all of whom provide funding to the LCO) and the other Ontario law deans are parties. The LCO carries out consultation for all its projects and receives formal submissions, emails or web-based comments; it also arranges focus groups, individual and group interviews, in person, over the telephone and web-based. For some projects, the consultation may be primarily with legal and other professional groups. For the socially-oriented projects consultation is broader in scope.

II. THE LCO'S OUTREACH AND CONSULTATION

The LCO carries out general outreach, not explicitly related to particular projects, that includes various professional organizations, the judiciary, government, legal clinics and community-based advocacy and service

groups. Usually, these are in-person meetings, sometimes with a particular organization and sometimes with a group of representatives from different organizations. For example, a visit to Thunder Bay in October 2009 included a presentation to the Thunder Bay Law Association, a meeting with the Regional Senior Judge of the Superior Court of Justice, discussion with several workers at the Kinne-Awaya Legal Clinic, the Ontario Native Women's Association and area legal aid offices and two meetings with representatives of various groups, including injured workers, disability advocates, a women's centre, the John Howard Society and social workers. Other outreach meetings have been with the African-Canadian Legal Clinic Board of Directors, the Executive Director and workers at the Metro Toronto Chinese and Southeast Asian Legal Clinic, the National Anti-Poverty Organization, Maytree, the Ontario Centre for Engineering and Public Policy, Windsor Women Working for Immigrant Women and the Social Planning Council, among others. Staff may also attend or speak at conferences on subject matter relevant to particular projects.

Broad consultation by law commissions has become an integral part of how they develop the policy underpinnings of analysis and recommendations. The Australian Law Reform Commission is committed to extensive and effective project consultation, as the current President (then Commissioner), Rosalind Coucher (2007), explains

> The ALRC has really taken consultation to heart and widespread community consultation is a genuine commitment. As Professor Weisbrot [then the President] has commented: This commitment to community involvement is part of the ALRC's DNA. We don't do public consultation just to tick that box; we do it because we know it significantly improves the quality, the grass roots applicability, and (not surprisingly), the public acceptability of our recommendations. [Footnote omitted]

Project-related consultations help define the scope of and inform the analysis and recommendations in the project. We try to identify interests and groups that might be affected by any changes to the law or policy and add to our list as we learn about others. The project relating to persons with disability involves an extensive consultation with 14 focus groups (with persons with disabilities and service and advocacy groups) in five different Ontario locations, individual interviews and an on-line survey. It and other projects have project-specific advisory groups that include representatives of community groups, the bar, the judiciary, government and academics. Prior to approval by the Board of Governors of a project in family law, the LCO held a Roundtable which brought together about 35 people from all areas of family law (practitioners, judges, community workers and advocates, academics, government policy-makers and others) to help identify the most important candidates for reform in family law. The pan-Ontario consultation for the resulting project, in person and by telephone, included a wide range of workers in or users of the family law system.

III. WHY OUTREACH AND CONSULTATION?

Outreach allows initial contact with groups to inform them about the LCO and to learn about their law reform needs. While the purpose is not to discuss the particular projects, inevitably they are raised. These initial meetings may lead to specific project consultation or broader relationship. For example, an initial meeting with ARCH, the legal clinic that addresses the needs of differently-abled persons, has led to partnering with ARCH in the LCO's consultations on its disabilities and the law project. These visits are also a way to communicate through action the LCO's interest in making connections with community outside the realm of existing projects and may also be a source for new projects.

Outreach and consultation have other benefits. They constitute a message about who should be involved in policy development. While the LCO is not responsible for changes in the law, to the extent that it has an impact, specific or otherwise, groups that have contributed to the projects have at least an indirect impact. They and their views become part of the debate around the project issues.

Commentators such as David Weisbrot (2002) have pointed out that consultation in a law commission project might help correct errors; these might be factual errors in a consultation document or errors in understanding a group's point of view, for example. Initial consultation may also reveal that the commission has omitted an issue crucial to understanding the full implications of the matter it is studying. Consultation may build support for a final report and recommendations and may promote use of the report in lobbying efforts by interested groups. The involvement of groups with different views may assist in giving the recommendations widespread legitimacy and acceptance, even if not agreement, and, as Weisbrot (2002) suggests, might promote "public ventilation of issues" to help develop consensus or at least "defuse lingering tensions" around issues.

Others see consultation as not only relevant for the law commission's own work, but also as a process that contributes to the development of civil society, of democracy, because it involves citizens in the law reform process (Neave, 2004). As Neave maintains, consultation

is not just a question of expressing views on a consultation paper; rather, it has a broader goal of involving citizens more broadly in the law reform process and in accepting the *idea* of contributing to law reform and promoting civic engagement.

On-line consultation methods (forums, on-line submissions or surveys) are more or less required today. They permit far less formal expression of opinion than the written submissions that previously constituted a major part of the feedback to a law commission paper. Because commissions post consultation papers (and other documents) on-line, the pool of potential participants is broader than it used to be. More people may be reached more cheaply. These methods may be less likely to create the "bond" or trust that may be developed by in person consultations, however.

Consultation is not without its difficulties and risks. It is important that people realize that their views may not be accepted, in whole or even in part. There may well be opposing views, between and within groups. Sometimes these can be reconciled, but sometimes they will not be. The LCO is not an advocate for any particular groups, although its objective is, roughly speaking, to increase access to justice.

Outreach may involve many groups with whom it is not feasible to do project-related in-person consultation. Groups who do not have an interest in a particular project may not see an immediate value to the commission. It is important to maintain contact (and important not to make assumptions about where people's interests lie) and to provide means by which these groups can continue to be involved, even if not in the most direct consultations. Others have had their fill of participating, of "giving away" their experiences, only to see no tangible change. Yet others feel they are merely treated as subjects of study rather than authors of their own lives. These are difficult hurdles that can be overcome only by perseverance, if at all.

IV. CONCLUSION

This paper assumes it is a "good thing" to include the views and experiences of affected groups (and this might be widely defined to include not only a variety of identified communities, but the public at large, or societal interests) in the development of policy.

Once that is accepted, other issues have to be addressed, including: how best to involve communities that are differently positioned in the conversation (and whether to include all groups that might have an interest, regardless of how their views accord with widely accepted societal norms around equality, for example) and how to ensure that the reality about the impact of their involvement is clear.

The objectives, processes and challenges around consultation with community groups carried out by the LCO are not unlike those arising out of attempts to resolve "competing" riwghts claims or to develop a protocol for the resolution of "competing" rights claims" in other contexts.

The development of policy, as the development of law commission recommendations, is almost always more complex than responding to one group's concerns. Even if a particular community's interests are the impetus for the policy, there may well be apparently conflicting claims within the community itself, interests of other groups with the right to make claims, and the societal interests "outside" the group that must be taken into account. Without as full an exploration of societal perspectives as possible, it will not be possible to advance policy that reflects these different interests nor to shape the policy in a way that seeks, even if not successfully, to reconcile the different interests at stake.

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