



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

CREED CASE LAW REVIEW

May 2012

INTRODUCTION

When the Ontario *Human Rights Code* became law in 1962, creed was one of the original grounds of discrimination. This was likely to deal with the fact that at the time, there was significant overt discrimination against religious minorities. Over time, Canada's legal and societal approach to creed rights has evolved significantly. However, it continues to be one of, if not the, most complex and controversial area of rights law.

Perhaps more than any other ground in human rights codes, creed rights tend to give rise to strong opinions, even among those who may not otherwise have much to say about human rights. Everything from what is creed (and what beliefs and practices are protected under the ground of creed), how creed claims are proven, how creed must be accommodated and what to do where creed bumps up against other rights have led to judicial interpretation and public debate. In Quebec, the provincial government appointed a Commission on Accommodation Practices Related to Cultural Differences¹ in response to public discontent concerning accommodation of, among other things, creed rights.

This may be in part because creed is unique in some respects. It encompasses not just innate personal characteristics but also covers associated practices and beliefs. Rights in relation to religion have been recognized as not just equality rights, but also among the "fundamental freedoms" of every Canadian as listed in s. 2 of the Canadian *Charter of Rights and Freedoms*.² As well, as will be seen in the discussion of the human rights decisions in this paper, creed more than any other right is impacted by international events, as issues from around the world can lead to religious intolerance and discrimination in Canada. A growing trend towards secularization may mean that there is less tolerance for religious practices generally, even those practices of traditionally dominant religions in Canada such as Christianity.

Despite some of the unique aspects of religious rights, the Supreme Court of Canada has confirmed that there is no hierarchy of rights and creed is no less deserving of consideration, protection and respect than other human rights. Moreover, it has been said that how a society treats religious minorities indicates its tolerance towards difference

¹ The Commission, often referred to as the Bouchard-Taylor Commission, issued a report on May 21, 2008 entitled *Building the Future: A Time for Reconciliation*.

² Along with freedom of expression, freedom of peaceful assembly and freedom of association.

and diversity in general³. It is therefore particularly important from a human rights perspective that creed rights continue to be accorded equal recognition as other rights.

What follows is a discussion of significant legal decisions dealing with religious and creed rights in Canada. The focus is on decisions made since the Commission issued its 1996 Policy on Creed and the Accommodation of religious observances. It does not review every decision, but those that may be important from a human rights perspective. In addition to a description of the case law, trends and areas where it is anticipated the case law will continue to evolve or be clarified are identified. The review will form the basis for further research and dialogue concerning the law in Canada as it relates to this significant area of human rights. Many of the decisions will be incorporated into the development of a new Commission policy on creed as Commission policies are informed by the relevant case law.

THE PROTECTION OF CREED RIGHTS UNDER THE *CODE* AND *CHARTER*

The Ontario *Human Rights Code* (the *Code*), prohibits discrimination and harassment based on the ground of “creed” in five social areas: (1) employment, (2) goods, services and facilities, (3) housing accommodation, (4) contracts and (5) membership in trade unions, vocational associations and self-governing professions. Prohibited discrimination can either be direct⁴ or by adverse effect, i.e. rules or requirements that are not discriminatory on their face but have the effect of limiting rights or opportunities based on creed⁵.

“Creed” is not defined in the *Code*. Nor has it been clearly defined in the case law. However, the meaning of the word “religion”⁶ has been considered in a number of decisions. Historically, the Commission has tended to approach the term “creed” as interchangeable with “religious creed” or “religion” and this approach has been followed by the Human Rights Tribunal of Ontario and the courts. Therefore, this case law review discusses legal decisions that deal either with “creed” or “religion”. However, fact that the terms “creed” and “religion” exist in Canadian human rights legislation and are sometimes even used the same statute suggests that they are not identical and should be interpreted to have independent meaning.⁷ Further, the French version of the *Code*

³ See for example, H. Kislowicz, “Freedom of Religion and Canada’s Commitments to Multiculturalism”, (2009) online: http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/Cultural_Pluralism/Religion/Essay.Kislowicz.pdf. Others have described religious rights as the “canaries in the coal mine...” with threats to religious rights indicating potential threats to other rights and liberties as well. Brian J. Grim & Roger Finke, *The Price of Freedom Denied* (New York: Cambridge University Press, 2011).

⁴ Refusing to hire someone because of their creed.

⁵ A workplace dress code that comes into conflict with a religious requirement.

⁶ Other human rights statutes use the term “religion”, “religious creed” or “religious beliefs”. Many list both “religion” and “creed” as prohibited grounds of discrimination.

⁷ This is because the rules of statutory interpretation contain a presumption that every word in a statute is meant to have a specific role to play (a presumption against tautology, i.e. redundancy); R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Toronto: Butterworths Canada Ltd., 2002). The Ontario *Code* lists creed as a prohibited ground but then discusses “religious belief” in s. 18.1 (a

uses the term “la croyance” which means “belief”.⁸ As both the English and French versions of a law must be considered in its interpretation, the meaning of the term used in the French text is significant.⁹ Therefore, as part of the Commission’s further research and policy development in relation to creed, it will be important to consider whether relying on the definition of “religion” is appropriate or whether the ground of “creed” should be given a different meaning, and what that should be. This is discussed further in the section **DEFINING CREED**.

In addition to human rights laws which prohibit discrimination and harassment on the basis of creed or religion, s. 15 of the Canadian *Charter of Rights and Freedoms* (the “*Charter*”) states that everyone has the right to equal protection of and equal benefit of the law without discrimination based on religion. The right to “freedom of conscience and religion” is also protected under s. 2(a) of the *Charter*.¹⁰ Section 2(a) states:

2. Everyone has the following fundamental freedoms
 - (a) freedom of conscience and religion; ...

Unlike the *Code* which applies to both the public sector and private entities, the *Charter* applies only to government but includes government policies, programs and laws. As the *Code* and *Charter* share common objectives they are often interpreted in light of one another.¹¹ This paper also reviews decisions dealing with religious rights under the *Charter* and considers their relevance in the human rights context. However, an issue for further consideration is the extent to which the approach to religious freedoms in s. 2(a) of the *Charter* should influence equality rights under s. 15 of the *Charter* and the right to be free from discrimination on the basis of creed in the *Code*.

In addition to the sections that establish the right to be free from discrimination and harassment based on creed, the *Code* contains a number of other provisions that are relevant to creed rights. In particular, a number of statutory defences or exceptions to what would otherwise be considered discrimination are designed to protect and promote religious rights. These provisions include: (1) s. 18 which allows certain religious organizations to restrict membership on the basis of religion; (2) s. 18.1 which permits religious officials to refuse to preside over a marriage, or to allow a sacred place to be used for a marriage, that would be contrary to the person’s religious beliefs; (3) s. 19

defence that deals with solemnization of marriage by religious officials). The French version lists “la croyance” which translates to “belief” as a prohibited ground and uses “croyances religieuses” in the s. 18.1 defence. The fact that some human rights laws use both “creed” and “religion” further suggests that they were meant to have independent meaning. However, there has been little discussion of a potentially different meaning of creed and religion in the law to date.

⁸ *The Concise Oxford-Hachette French Dictionary* 2nd ed (Oxford: Oxford University Press, 1998).

⁹ *Dreidger*, *supra* note 7.

¹⁰ Some human rights laws also contain provisions that confirm that every individual has the right to freedom of conscience and religion, as well as the right to be free from discrimination on the basis of religion; e.g. the Yukon human rights legislation.

¹¹ See *Huang v. 1233065 Ontario*, 2011 HRTO 825 at para. 28 citing a number of decisions dealing with the relationship between the *Code* and *Charter* and *R. v. Badesha*, 2011 ONCJ 284 (CanLII).

which preserves any right or privilege enjoyed by separate schools under the Canadian constitution¹² or Ontario's *Education Act*¹³; and (4) s. 24 which, in the employment context, allows certain religious organizations to give preference based on religion as long as the qualification is a reasonable and *bona fide* one because of the nature of the employment.

Legal decisions interpreting these provisions will be discussed in detail later in the paper.

DEFINING CREED

Before assessing what is protected under the ground of creed, it is first necessary to discuss what creed means and what has been found to constitute a creed for the purposes of human rights laws and the *Charter*.

In its 1996 Policy on Creed and the Accommodation of Religious Observances, the Commission adopted the following definition of creed:

Creed is interpreted to mean "religious creed" or "religion". It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.

Religion is broadly accepted by the OHRC to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as *bona fide* newer religions (assessed on a case by case basis).

The Policy notes that creed is defined subjectively and that the *Code* protects beliefs, practices and observances, even if they are not essential elements of the creed, provided they are sincerely held.

The broad and subjective approach to creed adopted by the Commission has largely been confirmed by subsequent decisions by the Supreme Court of Canada dealing with religious rights. It has also been followed in decisions of the Human Rights Tribunal of Ontario.¹⁴

¹² *Consolidation of Constitution Acts, 1867 to 1982*.

¹³ R.S.O. 1990, c. E.2.

¹⁴ The Commission's 1996 definition also states that creed does *not* include secular, moral or ethical beliefs or political convictions. With the exception of the *Jazairi* decision (see below) which deals with political opinion, there does not appear to be any decision that has expressly dealt with the exclusion of purely secular or moral beliefs from the scope of "creed". However, *Amselem*, *infra* note 15 at para. 39 states that when dealing with religious freedom, only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected under the Quebec or Canadian *Charter*. Therefore, the issue of whether secular, moral or ethical beliefs can

The leading Supreme Court of Canada decision interpreting what is meant by “religion” is the decision in *Syndicat Northcrest v. Amselem*¹⁵ (“*Amselem*”). The court adopted a broad definition of religion stating at para. 39:

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 fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

The Court went on to note that the content of an individual’s right to freedom of religion under the *Charter* is also expansive and revolves around the notion of personal choice and individual autonomy and freedom.

Courts and tribunals have had no difficulty in concluding that a number of the world’s most commonly practiced religions such as Christianity, Islam and Judaism constitute creeds within the meaning of the *Code*. Indeed, it is likely that these religions were what was contemplated when creed was included in the *Code* in 1962. Other cases have found that the following faith groups are protected under the ground of creed: Jehovah’s Witnesses; Seventh-Day Adventists¹⁶; members of the Pentecostal church¹⁷; Sikhs; Hutterian Brethren¹⁸; Raelians¹⁹; practitioners of Falun Gong²⁰; and members of the Worldwide Church of God²¹, Christian Living Church of God²² and Christian Churches of God²³. Aboriginal spiritual practices have also been found to be covered.²⁴

In some instances, tribunals have tried to avoid deciding whether non-traditional belief systems are a creed. For example, in *Sauve v. Ontario (Training, Colleges and Universities)*, the HRTO found it did not have to decide whether the Metaphysical Church and tarot card reading is a creed: “I find that even if tarot could legally be included in the *Code*’s definition of creed, the decision to deny the applicant the SEB

constitute a creed for the purposes of the right to be free from discrimination under the Ontario *Code* is an issue that requires further consideration in future policy development.

¹⁵ [2004] 2 S.C.R. 551.

¹⁶ *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

¹⁷ For example, *Friesen v. Fisher Bay Seafood Ltd.* (2008), 65 C.H.R.R. D/400, 2009 BCHRT 1.

¹⁸ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567.

¹⁹ *Chabot c. Conseil scolaire catholique Franco-Nord*, 2010 HRTO 2460, *Gilbert v. 2093132 Ontario Inc.*, 2011 HRTO 672.

²⁰ *Huang*, *supra* note 11.

²¹ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

²² *Koroll v. Automodular Corp.*, 2011 HRTO 774.

²³ *Kerksen v. Myert Corps Inc.*, 2004 BCHRT 60.

²⁴ See *Kelly v. British Columbia (Public Safety and Solicitor General) (No. 3)*, 2011 BCHRT 183 (CanLII).

benefits was not based on tarot card reading; therefore, it is unnecessary for me to make a determination as to whether tarot in the context of this case constitutes a creed under the relevant case law...”.²⁵ In other cases, decision-makers have accepted, with little discussion or analysis, that a belief system is a creed and have instead focused on what practices are protected. For example, in a grievance arbitration decision, the labour arbitrator did not discuss why participation in the Rocky Mountain Mystery School, an organization that “teaches the ancient practice and knowledge of light and light work in the world” was a creed, instead focusing on whether the employer was required to accommodate the employee’s request for time off to attend a pilgrimage.²⁶ In finding that the employee should have been accommodated, the arbitrator implicitly accepted that the ground of creed was engaged.

Creed is not restricted to religious denominations and does not have to be based on the edicts of an established “church”²⁷. “Non-traditional religions” and “belief systems” have been found to constitute a creed. In *Huang v. 1233065 Ontario*, the Human Rights Tribunal of Ontario rejected the argument that Falun Gong is akin to a “cult” and should not be accepted as a creed because as a belief system it is not reasonable, cannot withstand scientific scrutiny, or espouses beliefs that are not consistent with *Charter* values. The complainant, in her testimony, referred to Falun Gong as a “practice” as opposed to a “religion”. However, the HRTO accepted expert evidence that the notion of “religion” is significantly different in China than in the West and that in western terms Falun Gong would be understood as a creed. The HRTO concluded that Falun Gong consists of a system of beliefs, observances, and worship and falls within the notion of “creed” for the purposes of the *Code*.

In *Re O.P.S.E.U. and Forer*, a 1987 labour arbitration decision, after reviewing evidence, including expert evidence, regarding its history, practice and beliefs, Wicca was found to fall within the term “religion” as used in the collective agreement. The panel adopted “a broad, liberal and essentially subjective” approach to religious observance set out in an earlier Ontario Court of Appeal decision²⁸. In that case, the Court of Appeal noted the variety of religions and religious practices in Canada and stressed that what may be regarded as a religious belief or practice by one religion may be regarded as secular by another. Religion is not to be determined from the perspective of the “majority” or “mainstream” in society.

A British Columbia decision considered an employer’s beliefs in the context of a claim of discrimination by two of his employees, who identified as atheist and alleged that he was attempting to convert them. The employer argued that his practice of Reiki was not

²⁵ 2009 HRTO 1415 at para. 39. See also *Hayes v. Vancouver Police Board*, 2010 BCHRT 324 re Paganism.

²⁶ *Communications, Energy and Paperworkers Union of Canada Local 722-M v. Global Communications*, [2010] C.L.A.D. No. 298 (QL).

²⁷ *Heintz v. Christian Horizons*, 2008 HRTO 22.

²⁸ *Re O.P.S.E.U. and Forer* (1985), 52 O.R. (2d) 705 (C.A.).

a spiritual practice²⁹, his beliefs about the importance of positive thoughts and words were not religious and the book he discussed with the complainants, *The Secret*, was not a religious text. The Tribunal concluded that the complainants failed to prove that the employer's beliefs amount to a religion such that the Tribunal could find that he was discriminating against them by attempting to impose his religion on them. The Tribunal noted that the essence of the book *The Secret* was what the book referred to as "the law of attraction" i.e. people have the power to control their thoughts and positive thoughts attract positive results. The Tribunal concluded: "in my view, this belief is not a particular and comprehensive system of faith and worship, and, therefore, does not meet the broad definition religion set out in *Amselem*". However, it is important to note that in this decision it was argued that the belief system was **not** a religion and therefore discussing it with the employees did not violate the *Code*. The findings with respect to whether the belief system met the definition of religion may have been different if the Tribunal had been considering a situation where individuals were arguing that they were being mistreated as a result of the same practices or beliefs.

Political opinions alone have been found not to be covered by the ground of "creed" in the Ontario *Code*. In *Jazairi v. Ontario (Human Rights Commission)*³⁰, the Ontario Court of Appeal confirmed that the complainant's opinions concerning the single-issue of the relationship between the Palestinians and Israel did not amount to a creed. However, the Court confirmed the importance of assessing each creed claim on its own facts and noted that whether or not some other political perspective that is made up of a cohesive belief system could amount to a "creed" was not before it. The court commented that would be a mistake to deal with such important issues in the abstract.

While "creed" may not be amenable to precise definition, it is nevertheless clear that there are some guidelines in the case law to assist in determining what may constitute a creed for the purposes of the *Code*.³¹ While the practice of one's creed is defined subjectively, when it comes to determining whether a newer or non-traditional belief system constitutes a creed, cases to date have suggested that there may also need to be some sort of an objective element, for example evidence of the existence of a particular and comprehensive system of beliefs, observances or worship. For newer or less well understood creeds, this is often demonstrated through the use of expert evidence: see for example *Huang* and *Forer*. Thus far, it appears that a political opinion has not been found not to be included. While secular, socially based or conscientiously

²⁹ He described it as a "vibrational healing modality" which involves the transfer of universal life force energy to a recipient.

³⁰ 1999 CanLII 3744 (ON CA).

³¹ Interestingly, in one of the earliest Ontario decisions dealing with creed, Professor Cumming, hearing the complaint of a Sikh man who was denied employment because of his beard and turban, described creed as derived from the Latin "credo" meaning "I believe". He also looked to the Oxford and Webster Dictionary definitions which were as follows:

Oxford: Creed... "An accepted or professed system of religious belief: the faith of a community or an individual, especially as expressed or capable of expression in a definite formula."

Webster's: Creed ...Any formula of confession of religious faith; a system of religious belief, especially as expressed or expressible in a definite statement; sometimes, a summary of principles or set of opinions professed or adhered to in science or politics, or the like; as his hopeful creed." [Emphasis in original.]

held moral or ethical beliefs appear not to be included in ‘religion’ for the purposes of protections for freedom of religion under the *Charter*³², the question of whether they could fall under creed in the Ontario *Code* appears to remain open for further consideration³³. For example, one decision-maker has commented:

The term “creed” in the Code has a wide meaning and can be taken to include almost any belief system that encompasses a set of particular religious beliefs but, as well, many other philosophical, secular and personal beliefs – the “-isms” (such as are bound up in words like “environmentalism”, “conservatism” “liberalism” or “socialism”. Despite the fact that the word “creed” may have a wider meaning most cases involving the Code’s protections from discrimination will have dealt with matters of religion or some form of religious observance.³⁴

Decision-makers have cautioned that determining whether a belief system is a creed should not be based on a western or “mainstream” perspective about religion as this can lead to the exclusion of a number of valid religions such as those that are not “monotheistic”, or are considered “pagan” religions. It is not for a tribunal to evaluate the quality of the belief system, i.e. whether it is reasonable, would withstand scientific scrutiny or espouses beliefs that are not consistent with *Charter* values.³⁵

What is encompassed by the terms ‘creed’ and ‘religion’ is not necessarily the same thing as what is protected under freedom of religion, or the right to be free from discrimination based on creed. As discussed in the following section, decision-makers have found that not everything connected to creed is protected under the *Charter* or human rights laws.

WHAT IS PROTECTED UNDER RELIGION AND CREED

The Supreme Court of Canada has stated in *R. v. Big M Drug Mart Ltd.*³⁶

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. But the concept means more than that.

³² *Amselem*, *supra* note 15 at para. 39.

³³ For example, could persons who identify as atheist (Commonly defined as believing there are no deities) or agnostic (those who don't know for certain whether or not God exists. An agnostic is one who believes that the existence of God is unknown and most likely beyond human ability to discover) claim their beliefs constitute a creed under the Ontario *Code*?

³⁴ *Hendrickson Spring v. United Steelworkers of America, Local 8773 (Kaiser Grievances)*, [2005] O.L.A.A. No. 382, 142 L.A.C. (4th) 159.

³⁵ In *Huang*, *supra* note 11 the Respondent disputed that Falun Gong is a creed on this basis.

³⁶ [1985] 1 S.C.R. 295 at para. 94.

. . . Freedom means that . . . no one is to be forced to act in a way contrary to his beliefs or his conscience.

Therefore, freedom of religion includes both a freedom to believe, worship and practice according to one's choices, as well as a freedom from being directly or indirectly coerced to accept or adopt any beliefs, practices or forms of worship.

The Supreme Court has confirmed that the claimant's subjective or personal understanding of his or her religion is the focus, not the actual obligations of the faith or what others of the same faith believe or practice. The courts will not enter into theological debates.³⁷ Therefore, to claim a religious right a person must show the existence of: (1) sincerely held beliefs or practices; (2) having a nexus, or link, with religion; (3) which the individual demonstrates that he or she sincerely believes or is undertaking; (4) to connect with the divine or as a function of his or her spiritual faith; (5) irrespective of whether the practice or belief is required by religious dogma or religious officials or is practiced by others of the same faith.

In assessing the sincerity of an individual's religious belief, the court's role is to ensure that the asserted religious belief "is in good faith, neither fictitious nor capricious, and that it is not an artifice."³⁸ In many cases, these elements will be relatively easy to show. However, in other cases evidence will be required, usually from the person asserting the right, to establish that his or her claim is sincere. The credibility of the claimant's evidence may be examined, along with whether the belief is consistent with his or her other current practices.³⁹ However, in measuring the sincerity of an asserted religious belief, it is not appropriate to assume that if a person has made exceptions to, or has failed to follow, his or her religious beliefs in the past, his or her present beliefs are not valid or sincere. As stated by the Ontario Court of Appeal in *R. v. N.S.*⁴⁰: "Past perfection is not a prerequisite to the exercise of one's constitutional right to religious freedom."

Although the sincerity of a person's religious belief or practice is all that is relevant to establish whether their religious rights are at issue, the Supreme Court of Canada has recently confirmed that objective evidence is required to establish an infringement of their religious rights; *S.L. v. Commission scolaire des Chênes*.⁴¹ The Court said that to show that religious rights have been violated, objective proof is required. It is not enough for a person to say that they sincerely believe that their religious rights have been infringed. As with any other right, proving the infringement requires an objective analysis of the rules, events or acts at issue to determine whether they actually interfere with the exercise of the religious right, and to what degree. The person must prove the

³⁷ *R. v. N.S.*, 2010 ONCA 670 (CanLII), leave to appeal to S.C.C. granted.

³⁸ *Amselem*, *supra* note 15 at para. 52.

³⁹ *Ibid.* at para. 53.

⁴⁰ *N.S.*, *supra* note 37 at para. 68.

⁴¹ *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7.

infringement on a balance of probabilities. This may involve any legal form of proof but must be based on facts that can be proven objectively.⁴²

Even prior to this Supreme Court decision confirming the need for objective proof of a violation of creed rights, some decisions found that the claimant failed to provide sufficient evidence that a right was engaged or interfered with. In some cases, the person asserted a creed right in general or abstract terms without adequately explaining what it was or how it was affected by the actions of the respondent. In other cases, the decision-maker found that the creed was in fact a pretext for conduct motivated by some other consideration.

For example, in *Chiang v. Vancouver Board of Education*, a teacher argued, among other things, that her choice not to display a rainbow sticker (to show support for gay, lesbian, bisexual and transgendered students) on her classroom door might be viewed as related to her religious beliefs. However, the British Columbia Human Rights Tribunal found that she failed to allege facts to make a link between her religious beliefs, real or perceived, and discriminatory conduct on the part of her employer:

First, Ms. Chiang has failed to allege facts from which a nexus could be inferred between her religious beliefs, real and perceived, and the conduct she alleges to be discriminatory. Nowhere does Ms. Chiang allege facts from which one could conclude that her conduct was the result of her religious beliefs, or that she has suffered adverse employment consequences as a result of acting on her religious beliefs. In fact, throughout her dealings with the respondents, and in her complaint and submissions, Ms. Chiang has been very careful not to state what her religious beliefs are.⁴³

In *Kempling v. British Columbia College of Teachers*⁴⁴ the British Columbia Court of Appeal dismissed a teacher's s. 2(a) *Charter* claim as lacking a proper evidentiary foundation. The Court noted that *Charter* decisions are not to be made in a factual vacuum, particularly where freedom of religion is argued, as it is an individual, not a generalized, right. Evidence of a person's religious obligations and an opportunity to assess his or her sincerity may involve elements of credibility. In this case, there was no evidence which even identified Mr. Kempling's religion or its tenets and no evidence to establish that his ability to practice his religion would in any way be compromised by

⁴² *Ibid.* at paras. 22-24.

⁴³ 2009 BCHRT 319 at para. 115 (CanLII). In a similar case, the HRTO dismissed a creed claim where a university student alleged that she was graded unfairly due to her views on gay marriage, which she said were related to her creed; *Hsieh v. York University*, 2009 HRTO 606 (CanLII). The respondent argued that the student wanted to debate gay marriage, instead of focusing on the curriculum, which was perceived by some other students as homophobic. The respondent noted that the student's grades were not affected in any material way by her views on gay marriage. Although there is little analysis in the case, the HRTO did not accept there was evidence of discrimination on basis of creed disclosed by the facts.

⁴⁴ 2005 BCCA 327 (CanLII).

being restricted by the College of Teachers from public making discriminatory statements about “homosexuals”. There was insufficient evidence that his 2(a) rights were engaged or infringed.

These decisions demonstrate that abstract assertions about creed rights are not enough to establish a claim of discrimination or an infringement of freedom of religion.

There are also examples of situations where decision-makers have simply not believed a claimant’s assertion that his or her conduct is based on his or her creed beliefs, finding instead that the claimant was motivated by other factors. In *Bothwell v. Ontario (Minister of Transportation)*⁴⁵, the Court concluded that the claimant failed to demonstrate that his objection to a digital driver’s licence photo was related to his religious beliefs. The Court found numerous inconsistencies in his actions that called into question his sincerity. These included the fact that he himself had a website with a digital photo posted on it and had been digitally photographed in a number of other contexts. As well, in several letters to the Ministry and others, he raised privacy concerns, and not religious objections, with regard to a digital driver’s licence photo being stored in a government database.

In *Bauer v. Toronto (City)*⁴⁶ the HRTO considered a claim by an ambulance attendant that he was harassed and reprised against by fellow union members after he crossed the picket line and worked a shift during a strike. He asserted that his decision to cross the picket line was connected to his Christian faith as his faith prevented him from denying medical care for financial gain. Looking at all the evidence, the Tribunal found Mr. Bauer’s claim that he crossed the picket line because of his creed was not credible but rather was “revisionist history”. Mr. Bauer was in fact opposed to the strike because of tension with his union. Therefore, the ground of creed was found not to apply to the facts of the case.

Not everything that is related to one’s creed is protected. For example, a woman was unable to establish that volunteer activities at her church fell within the ground of creed under the *Code*.⁴⁷ Managing a children’s day camp put on by her church as a fundraiser was not religious in nature nor was it found to be required as a tenet of her faith. The fact that the activities were at her church were not sufficient to find that they were related to her creed. In a similar decision, an Ontario Arbitration Board found that social and community activities connected to religion are not covered⁴⁸. A Nova Scotia

⁴⁵ 2005 CanLII 1066 (ON SCDC).

⁴⁶ 2011 HRTO 1628 (CanLII).

⁴⁷ *Eldary v. Songbirds Montessori School Inc.*, 2011 HRTO 1026 (CanLII).

⁴⁸ *Hendrickson Spring v. United Steelworkers of America, Local 8773 (Kaiser Grievances)*, [2005] O.L.A. no. 382, 142 L.A.C. (4th) 159. This case was subsequently cited in another decision that found that giving out religious based gifts (e.g. pens with religious inscriptions) in the workplace is not a protected right, even though the ability to do so was extremely important to the grievor. There was no evidence that this activity formed any part of her religion as a Born again Christian; *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Barillari Grievance)*, [2006] O.G.S.B.A. No. 176, 155 L.A.C. (4th) 292.

Board of Inquiry rejected a claim that a condominium was required to accommodate a request to install a satellite dish, contrary to its bylaws, to receive Muslim religious and cultural programming from international sources. The Board stated that being able to establish discrimination requires something more than being able to draw some connection to religion. Unlike in *Amselem*, there was nothing to suggest that accessing the satellite service was a religious practice, belief, requirement, custom, or was part of the tenets of the family's faith or culture. While the complainant wanted access to the technology to allow his family greater exposure to their culture, language and religion, there was nothing to suggest that its absence would in any way compromise the practice of their faith.⁴⁹

Similarly, a Yukon Board of Adjudication did not accept that a First Nations man was entitled to special leave to attend land claim selection meetings because of his ancestral and religious duties.⁵⁰

Even where religious rights are triggered, not everything that interferes with them will constitute discrimination or an infringement of the *Charter*. As stated in *Amselem* and more recently in *S.L.*, no right, including freedom of religion, is absolute. Moreover, the *Charter* does not require governments to refrain from imposing any burdens on the practice of religion. With regard to claims under s. 2(a) of the *Charter*, the courts have said that an interference with religious rights must go beyond the "trivial and insubstantial". "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct.⁵¹

In its recent decision in *R. v. Badesha*, the Ontario Court of Justice noted that the degree of interference which must be shown before the impact on religious rights is found to be more than "trivial" or "insubstantial" may vary depending on the precise circumstances. The case involved a challenge by a Sikh man to an Ontario law that requires helmets when operating a motorcycle. Mr. Badesha argued that he could not wear a helmet because of his strongly held religious beliefs concerning the need to wear a turban. The Court found that the interference with Mr. Badesha's religious rights as a result of being unable to ride a motorcycle was trivial and insubstantial and therefore s. 2(a) of the *Charter* was not breached.⁵² The Court noted that any limit is on the individual's ability to ride a motorcycle in the fashion that he chooses, not on his right to worship or practice any belief associated with religion. Driving any motor vehicle is a privilege and not a right.⁵³ The court distinguished the Supreme Court of Canada's

⁴⁹ *Assal v. Halifax Condominium Corp. No. 4* (2007), 60 C.H.R.R. D/101 (N.S. Bd. Inq.).

⁵⁰ *Whitehouse v. Yukon* (2001), 48 C.H.R.R. D/497 (Y.T. Bd. Adj.).

⁵¹ *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* note 18.

⁵² *R. v. Badesha*, *supra* note 11. In case he was wrong in his conclusion that there was no s. 2(a) infringement, the judge also considered s. 1 of the *Charter* and found that the mandatory motorcycle helmet law was justified. The judge noted, based on the *Hutterian Brethren* decision, that human rights code analyses that involve accommodation and undue hardship are inapplicable in a s. 1 analysis that applies to a claim that a law infringes the *Charter*.

⁵³ In contrast, see *Multani*, *infra* note 121 which found that the prohibition on kirpans interfered with the claimant's freedom of religion in more than a trivial and insubstantial way as it deprived him of the right to attend public school.

decision in *Hutterian Bretheren* in which a majority of judges found that requiring all Alberta driver licence holders to submit to a digital photograph was a substantial interference with the religious beliefs of the Hutterian Bretheren colony stating that the costs or burden in that case was shown to be “of a different magnitude.”

The *Badesha* decision seems to significantly limit the scope of what is protected under freedom of religion. It appears to suggest that an interference with someone’s rights will only be considered substantial if the person would be required to choose participating in the activity, in this case removing a turban to drive a motorcycle with a helmet, over his religious beliefs. Whether this restrictive approach will be followed by other decision-makers remains to be seen.

When it comes to determining what is protected under creed, the courts have also held that the protection of religious beliefs may be broader than conduct motivated by those beliefs stating that “the freedom to hold beliefs is broader than the freedom to act on them”.⁵⁴ This is particularly the case where acting on those beliefs would have an adverse or harmful impact on the rights of others.⁵⁵ More will be said about how courts have dealt with situations where creed rights come into tension with other rights in the section entitled **RECONCILING CREED AND OTHER RIGHTS**.

Finally, the right to be free from discrimination on the basis of creed includes the right to be free from “compulsion of religious observance”, i.e. the imposition of someone else’s religious beliefs or practices. Therefore, those who choose not to identify as practicing a religion or creed may nevertheless claim *Code* protection under the ground of creed in some situations. Examples of this will be set out in the section on **Compelling Religious Observances and Imposing Religious Messages**.

To summarize, the courts have set out several important principles in determining what is protected:

- 1) It is the rights claimant’s personal or subjective understanding of his or her religion or creed that is the focus, not the actual obligations of the faith or what others of the same faith believe or practice.
- 2) The sincerity or the honesty of the belief or practice is what needs to be demonstrated.
- 3) Not everything related to religion or creed is protected. There must be a link to religion “in that it is either objectively required by the religion, or [the person] subjectively believes that it is required by the religion, or ... sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of [the person’s] spiritual faith.”⁵⁶ Social or cultural activities will generally not meet this requirement.

⁵⁴ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

⁵⁵ *R. v. Big M*, *supra* note 36 at para. 123.

⁵⁶ *Amselem*, *supra* note 15 at para. 69.

- 4) To establish a violation, there must be objective proof of interference with the religious rights.
- 5) With respect to freedom of religion claims under s. 2(a) of the *Charter*, interference with religious rights must go beyond the trivial and insubstantial. While this has not been fully developed in the law, some relevant factors may include whether the law, policy or action being challenged completely prohibits the practice or belief or whether it incidentally touches on matters of faith and the nature of the impact on religion (e.g. economic, social etc.).
- 6) The protection of religious beliefs is broader than the ability to act on those beliefs.

DISCRIMINATION AND HARASSMENT ON THE BASIS OF CREED

In the past ten years, there have been several interesting human rights decisions dealing with discrimination and harassment on the basis of creed. It is clear from the case law that discriminatory attitudes towards minority religions (in many cases linked with other *Code* grounds such as race, colour, ethnic origin, place of origin and ancestry) continue to exist and be reflected in unequal treatment on the basis of creed.⁵⁷ Other decisions suggest that religious tensions that may exist as a result of international events can be reflected in religious discrimination here in Ontario. Still others suggest a growing discomfort with those who openly identify as religious, regardless of the particular religion practiced.

In *Loomba v. Home Depot Canada*⁵⁸ the HRTTO found that a requirement that hardhats be worn at a Home Depot store that was under construction was selectively and inconsistently enforced. A more stringent approach was applied to Mr. Loomba, a Sikh security guard, because he wore a turban, which was inextricably linked to his creed. This violated his right to be free from discrimination based on religion. The Tribunal also found that the personal respondent subjected Mr. Loomba to discriminatory treatment in the form of rude and offensive comments and conduct. The personal respondent was found to have goaded Mr. Loomba to remove his turban in order to be allowed to work and also to have threatened him with termination. The comments and conduct were derogatory in relation to the complainant's creed.⁵⁹ Interestingly, while the grounds of alleged discrimination also included race, colour and ethnic origin, the Tribunal chose to consider it as a case engaging only creed rights. The Tribunal has not yet issued its decision dealing with a second aspect of the case: the relationship

⁵⁷ It is important to note that reported decisions only represent a few of the claims that are made as many human rights cases are resolved through settlement, before a hearing is held.

⁵⁸ 2010 HRTTO 1434 (CanLII).

⁵⁹ No remedies were ordered in this decision as there is a second stage of the hearing to consider whether the respondents were justified in their enforcement of the *Occupational Health and Safety Act* and whether they considered the duty to accommodate.

between the *Code's* duty to accommodate and the safety requirements of the *Occupational Health and Safety Act*.⁶⁰

An Alberta Human Rights Panel found that the Tequila Bar and Grill's refusal to admit a Sikh man who wore a turban was intersectional discrimination based on race, religion and ancestry; *Randhawa v. Tequila Bar & Grill Ltd.*⁶¹ The Panel accepted evidence that the Bar used video surveillance to identify people waiting in line that it did not want to let in, based on their appearance. The Panel accepted Mr. Randhawa's evidence that he was told by the doorman that the line was being monitored by management who did not want to let him in because the Bar "had an image to maintain" during Stampede week and did not want "too many brown people in". Mr. Randhawa was awarded \$5000 in damages and the Bar was ordered to implement a policy on preventing racial discrimination and to participate in an education seminar conducted by the Alberta Human Rights Commission.

In *Yousufi v. Toronto Police Services Board*,⁶² the Human Rights Tribunal of Ontario considered a complaint of discrimination on the basis ethnic origin, place of origin and perceived creed (Muslim) made by a civilian employee of the Toronto Police Service (the TPS). On September 12, 2001, a police detective with the TPS left a voicemail message for another detective to the effect that he had information that the complainant, a man who identifies as a non-White person of Afghan descent, was involved in the events of 9/11. Specifically, disguising his voice and speaking in an accent supposedly of someone from the Middle East, the detective stated that Abdullah Yousufi had been taking airline pilot lessons at Buttonville Airport. He also suggested that Yousufi's locker should be searched for a flying manual in Arabic and stated that Yousufi was an "evil Islamic militant".

The message was referred to the Internal Affairs division of the TPS for investigation and, through the investigation, came to the complainant's attention. While the Tribunal accepted that the message was meant to be a "joke", the complainant was understandably very upset and believed that his employer failed to appropriately investigate and respond to the message. As well, the incident became widely known in the Division and Mr. Yousufi became the object of gossip and suspicion about whether he was involved in 9/11.

The Tribunal concluded that the message was filled with ugly stereotypes and that: "The accented voice, mimicking someone from the Middle East as speaking in heavily accented and broken English and casting suspicions on the complainant as being involved in the event of 9/11 amounts to discrimination on the basis of ethnic origin, place of origin and creed." With regard to the employer's response to the message, the Tribunal concluded that the employer appropriately investigated and disciplined the employee who left the message but did not do enough to address the gossip and

⁶⁰ R.S.O. 1990 c. O.1.

⁶¹ 2008 AHRC 3 (CanLII).

⁶² 2009 HRTO 351 (CanLII).

suspicion about Mr. Yousufi that flowed from the event. This was found to have poisoned Mr. Yousufi's work environment.

In a similar case in British Columbia, *Kinexus Bioinformatics Corp. v. Asad*,⁶³ a Muslim Canadian citizen was subjected to a humiliating RCMP investigation after a co-worker reported him to the RCMP as someone she suspected as having been involved in the 9/11 attacks. The Tribunal found that had Mr. Asad not been an Arab Muslim who had immigrated from Saudi Arabia, the co-worker would not have acted the way she did. The Tribunal found that Mr. Asad's employer was not responsible for the report to the RCMP, which was made outside the workplace. However, the employer was responsible for discriminatory racial profiling in the workplace. It allowed the suspicions about Mr. Asad to continue in the workplace and failed to take any actions to address the impact on Mr. Asad. Instead, the employer left Mr. Asad to fend for himself in a poisoned work environment.⁶⁴

In *Modi v. Paradise Fine Foods*, the Human Rights Tribunal of Ontario considered a complaint by a customer, who identified as a Christian black African born in Sudan, as a result of a verbal and physical altercation that occurred at a halal butchery. The Tribunal found that the personal respondent, who was the butcher at the store, had initiated the confrontation with inflammatory comments about ethnic and religious issues in Sudan which quickly deteriorated into a physical altercation. The Tribunal concluded that Mr. Modi experienced intersectional discrimination on the basis of ethnic origin (black African from a non-Muslim culture) and creed (not Muslim):

In confronting both Mr. Modi (and incidentally Mr. Ayumé) with his perception of the state of affairs in and what he considered appropriate for Sudan, Mr. Ben Aycha used language and engaged in conduct that indicated contempt for Mr. Modi as a black non-Muslim of Sudanese birth. Not only did he express his sense of the inferiority of those of Sudanese origin who were not Muslims but the rapidity with which this escalated into threats of violence and ultimately actual violence involving a meat cleaver provided evidence of a deeply-rooted antagonism towards persons of Mr. Modi's ethnic origin who were not Muslim and who expressed loyalty or continued adherence to those markers.⁶⁵

⁶³ 2008 BCHRT 293; applications for judicial review dismissed *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 (CanLII).

⁶⁴ See also *Dastghib v. Richmond Auto Body Ltd. (No. 2)* (2007), 60 C.H.R.R. D/167, 2007 BCHRT 197. A man who was born and raised Muslim and who was originally from Iran was discriminated against on the basis of race, colour and religion. The BC Tribunal noted the particular impact of the name-calling that occurred after the events of 9/11: "In my view, the references to Bin Laden and Hussein, in the context of 9/11, and the manner in which these two persons were being portrayed in the media, would lead to an inference that a person was being compared to a mass murderer, a dictator, or a terrorist. Especially in the aftermath of 9/11, such remarks made against a person of Muslim and Middle Eastern origin are extremely insensitive, a racial slur, and thus discriminatory." (at para. 212).

⁶⁵ 2007 HRT0 12 at para. 48 (CanLII).

The Tribunal noted for the purposes of determining whether Mr. Modi experienced discrimination, it did not matter whether the personal respondent knew that he was Christian. It was sufficient that the personal respondent behaved as he did because Mr. Modi clearly revealed himself as someone who was not a Muslim. The right to equal treatment based on creed covers discrimination on the basis that someone **does not** adhere to a particular creed and not just discrimination because of adherence to a particular creed.

Similarly, in *Hadzic v. Pizza Hut*⁶⁶ the British Columbia Human Rights Tribunal dealt with a case where international religious tensions were reflected in discriminatory acts in that province. The employer was held liable for not adequately addressing discriminatory comments by a worker who identified as a Bosnian Serb towards his co-worker, Mr. Hadzic, who identified as a Bosnian Muslim. The Tribunal found that the Serb co-worker made threats to kill Muslims in Sarajevo and to harm Mr. Hadzic and his family. He also used the term “Zacklan” which was found to be particularly offensive to Mr. Hadzic because of its violent meaning (decapitation) and its historical and current significance to a person of Bosnian ancestry. The Tribunal concluded that the comments were made to Mr. Hadzic because of his Bosnian heritage, ancestry, place of origin and religion. The employer was found liable. The employer’s response to the serious threats was inadequate.

In *Huang*,⁶⁷ a Chinese Seniors’ Association was found to have engaged in discrimination based on creed when it revoked a woman’s membership because she was a practitioner of Falun Gong. Then when she tried to discuss the revocation of her membership with the Association, it publicly referred to Falun Gong as “an evil cult”. The Tribunal noted that a religion is not immune from criticism and that disagreement with, or criticism of, the tenets of its belief system does not necessarily amount to discrimination. However, in this case, the reference to Falun Gong as “an evil cult” did amount to discrimination. In awarding the woman \$15000 in compensation for the effects of the discrimination, the Tribunal noted that the discrimination was public and caused the woman to lose face in her community. Interestingly, it also took into account the fact that the complainant was more vulnerable because she is part of a religious group that has been subject to persecution. The Association was also ordered to invite the complainant to rejoin.

An Irish pub that cancelled a “mini-lecture” that was to be held there by a group of Raelians was found to have violated the *Code*; *Gilbert v. 2093132 Ontario Ltd.*⁶⁸ The applicants had made a reservation at the pub and distributed flyers about the event. When the manager learned that the applicants had distributed over 500 flyers, he became concerned that the event would disrupt business on a Saturday night. The applicants were told they could not hold the event as planned. The HRTTO found that pub’s decision was made out of legitimate business concerns and not because of the

⁶⁶ (1999), 37 C.H.R.R. D/252 (B.C.H.R.T.).

⁶⁷ *Supra*, note 11.

⁶⁸ *Supra*, note 19.

applicants' creed. However, in his discussions with the applicants, the manager of the pub did state in an agitated manner that the pub did not want to be associated with their "cult". The HRTO therefore awarded \$100 to each applicant.

Two BC decisions dealt with access to Aboriginal spiritual services for prison inmates. In one decision, the BC Human Rights Tribunal found that an Aboriginal inmate was effectively denied access to Aboriginal spiritual services which amounted to discrimination based on his religion and ancestry; *Kelly v. British Columbia (Public Safety and Solicitor General) (No. 3)*.⁶⁹ Mr. Kelly wished to have access to the Aboriginal spiritual services that were offered through a Native Liaison person. These included healing, talking, sharing or sacred circles, smudge ceremonies, sweat lodges, one-on-one sessions, and making or using a medicine pouch, dream catchers or drums. Despite repeated requests, he did not receive a visit from the Native Liaison nor did he receive Aboriginal spiritual literature. However, he did receive a visit from a chaplain and Christian literature within a reasonable period of time. In essence, the Tribunal found that while Christian services were reasonably available, there was no effective access to Aboriginal spiritual services. The fact that Mr. Kelly was in segregation for much of the time was not found to justify the adverse treatment.

However, in an earlier decision involving a Métis inmate, *Smith v. B.C. (Ministry of Public Safety and Solicitor General) and another*,⁷⁰ the BCHRT did not find discrimination. It was Mr. Smith's classification (he had put himself into protective custody out of concerns for his safety) and not his race or religion that resulted in a denial of access to pow-wows. The pow-wows involved a gathering of all inmates with members of the outside community, including women and children, on the ballpark of the prison grounds and both Aboriginal and non-Aboriginal inmates could participate. There was evidence that Aboriginal and non-Aboriginal inmates were treated the same in regard to access to pow-wows and the decision to restrict or deny participation was based on the need to keep protective custody inmates separate from the general prison population to protect their personal safety.

It is not just practitioners of so called "minority" religions who may face discrimination based on creed. In a recent decision a woman alleged she was treated adversely as a foster parent because of her Christian faith or because of her perceived association with a Christian faith-based youth program called Freedom Village. In *Williams v. Children's Aid Society of Toronto*⁷¹, the Tribunal considered a complex situation involving a contractual relationship between Mr. and Mrs. Williams and the Children's Aid Society of Toronto and Alliance Youth Services Inc. (AYS). The Williams had entered into a contract with AYS to provide a foster home for children. After the Williams indicated that they hoped to develop and operate a Christian faith-based camp for troubled youth in rural Ontario, they were asked whether they had any association with Freedom Village, a Christian faith-based camp in the U.S., where there had been problems with

⁶⁹ 2011 BCHRT 183 (CanLII).

⁷⁰ 2008 BCHRT 36 (CanLII).

⁷¹ 2010 HRTO 265 (CanLII).

the care of the children. Despite their assurances that they were not, the respondents remained suspicious about the potential affiliation with this other Christian camp. An issue was also raised with respect to whether the applicant's and her husband's Christian faith or beliefs would pose a problem if a child in their care was gay.

The Tribunal concluded that the question concerning whether the applicant's creed would be an issue if a child in their care was gay was not asked in an inappropriate manner as alleged by the applicant. In the circumstances (including the fact that the applicant conceded that AYS had the right to ask the question), the question was not inappropriate. The respondents were satisfied with the answer they received and nothing further came of this matter. The Tribunal found no discrimination in relation to the fact this question was asked.

There were also many issues in the relationship between the Williams and the respondents that had nothing to do with the *Code*. There were credible and non-discriminatory reasons for AYS to reach the conclusion that the Williams were unable to work effectively and co-operatively with AYS staff. Nonetheless, the Tribunal found that issues raised by the Williams about racism and infringement of their religious beliefs were factors in the decision to terminate the contract. The continued suspicions about a potential affiliation between Freedom Village and the youth camp proposed by the Williams were based in part on the fact that both programs were Christian faith-based. Therefore, the Tribunal concluded that the Williams were discriminated against by both AYS and CAST.

A similar BC decision considered whether the complainant's pro-life views, which were related to her Christian faith, were a factor in the termination of her employment as office manager in a family medicine clinic; *C. v. A.*⁷² The Tribunal found that one physician was concerned about the complainant's pro-life beliefs and whether they would impact on patient care (particularly abortion referrals). Although the doctor had asked the complainant to remove from the waiting room a pro-life poster she had put up and a Bible and had spoken to the complainant about the impact of her views on patient care, the Tribunal found that her pro-life views were not a factor in her dismissal. While the Tribunal did not expressly say so, it appeared to accept that it was legitimate for the doctor to ensure that patients seeking an abortion were dealt with appropriately by the complainant. The Tribunal also noted that the clinic had accommodated the complainant's request that she not be involved in referrals for abortion services by having another medical assistant or the referring doctor process the referrals.

Discomfort with religious messages, leading to adverse treatment has also formed the basis for a claim of discrimination. A Nova Scotia town had an "operating policy" not to permit performances that had a religious or political message on its public stage. When Reverend Gilliard asked to use the Marina Stage for a presentation called "This Blood is For You" which included the performance of a short drama, gospel songs and preaching the gospel, the request was denied because the performance contained a religious

⁷² (2002), 43 C.H.R.R. D/395, 2992 BCHRT 23.

message. As religion was a factor in the decision not to grant Reverend Gilliard the use of the town stage, discrimination was found; *Gilliard v. Pictou (Town) (No. 2)*.⁷³ This case raises important questions concerning the extent to which secular institutions can refuse to allow the promotion of religious messages in public spaces (for example, out of a concern that allowing religious messages may result in complaints from individuals who may argue that they have the right to be free from the imposition of religious messages).

Making negative comments regarding a person's commitment to their faith or adherence to their beliefs, i.e. stating that the person is not acting like a "true Christian", has also been found discriminatory.⁷⁴

Finally, it is important to note that not every reference to religion has been found to violate the *Code*. For example, a Muslim woman who was questioned by her supervisor about fasting during Ramadan was unable to convince the Human Rights Tribunal that this was contrary to her human rights⁷⁵. The Tribunal did not accept that the comments were negative, but rather found that they reflected a genuine interest in Ramadan and fasting. The Tribunal stated that a reasonable person would not interpret such statements as demeaning and discriminatory. While clearly not every discussion of religion is problematic from a human rights perspective, there is little analysis in this decision of whose perspective the "reasonable person" approach reflects; that of the majority group or of the religious minority whose religious practices are being questioned. In another decision, the British Columbia Human Rights Tribunal found that while a co-worker called the complainant a "fucking Hindu" (in fact, he identified as Sikh) in the context of an isolated work incident, this did not constitute a violation of the B.C. *Code*.⁷⁶

There are also many examples of cases⁷⁷ where creed was found not to be a factor in allegedly discriminatory treatment. Each turns on its own facts and is not summarized in this case law review.

Compelling Religious Observances and Imposing Religious Messages

The freedom of religion and the right to be free from discrimination based on creed also include the right to be free from religious compulsion or coercion. This has been dealt

⁷³ (2005), 53 C.H.R.R. D.213 (N.S. Bd.Inq.).

⁷⁴ *McGuire v. Better Image Property Maintenance Inc.* (2006), CHRR Doc. 06-744, 2006 BCHRT 544.

⁷⁵ *Awan v. Loblaw Co.*, 2009 HRTO 1046.

⁷⁶ *Banwait v. Forsyth (No. 2)* (2008), CHRR Doc. 08-118, 2008 BCHRT 81.

⁷⁷ In Ontario, since June 30, 2008 individuals who believe they have experienced discrimination or harassment have been able to file an application directly with the Human Rights Tribunal of Ontario. The Tribunal is required to hold a hearing into every application filed that falls within its jurisdiction. Prior to this, complaints of discrimination were filed with the Commission and the Commission determined, after an investigation, whether there was sufficient evidence to refer the case for a hearing before the Tribunal. As a result of this "direct access" system, in recent years, there have been more cases where discrimination based on creed has been alleged but not proven at a hearing.

with through a variety of challenges to laws and practices that impose religious observances, typically those of the Christian faith, on persons who do not share the same faith. As well, decision-makers have dealt with situations where employers seek to impose their religious views on their employees.

Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others.⁷⁸ One of the leading Supreme Court of Canada decisions dealing with religious rights, *R. v. Big M. Drug Mart*,⁷⁹ was a *Charter* challenge to the federal *Lord's Day Act* which made it illegal for stores to remain open on Sundays, with some exceptions. The Supreme Court found that the purpose of the law was to compel the observance of the Christian sabbath and that this purpose infringed freedom of religion for non-Christians. The Court noted that imposing the requirements of the Christian faith creates a hostile climate for, and gives the appearance of discrimination against, non-Christian Canadians. Compelling a day of rest preferred by one religion was also found to be inconsistent with the preservation and enhancement of the multicultural heritage of Canadians. The violation of s. 2(a) was not found justified under s. 1 of the *Charter*.

Shortly after *Big M Drug Mart* was decided, the Court considered Ontario's *Retail Business Holidays Act*. The law also prevented businesses from opening on Sundays but the legislative history of the *Act* showed that its purpose was not religious but rather to provide a common day of pause for retail workers. Nevertheless, in *R. v. Edwards Books and Art*⁸⁰ the Supreme Court found the law infringed freedom of religion because while its purpose was secular, its effect was to impose an economic burden on retailers that observed sabbath on a day other than Sunday. However, unlike the *Lord's Day Act* which could not be justified under s. 1, in *Edward's Books*, the law was saved under s. 1 of the *Charter* as the secular goal of ensuring a common pause day was sufficiently important to justify a limit on freedom of religion.

The recitation of the Lord's Prayer in schools and at public meetings is another situation where the religious freedoms of non-Christians have been found to be violated. The Ontario Court of Appeal⁸¹ considered a regulation requiring public schools to open or close each day with religious exercises consisting of reading of the Scriptures or repeating the Lord's Prayer or other suitable prayers. The regulation allowed students not to participate. Even though it allowed for students to be exempted and was wide enough to allow for non-Christian prayers, the regulation was unconstitutional. Once again, the concern was with the coercive element and the pressure on students to conform to the majority's religious practices. The Court held that the existence of pressure or compulsion must be assessed from the "standpoint of pupils in the sensitive setting of a public school" and that the "peer pressure and the class-room norms to

⁷⁸ *S.L.*, *supra* note 41 at para 17.

⁷⁹ *Supra* note 36.

⁸⁰ [1986] 2 S.C.R. 713.

⁸¹ *Zylberberg v. Sudbury Board of Education*, 1988 CanLII 189 (ON C.A.).

which children are acutely sensitive ... are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices.”⁸²

In *Freitag v. Penetanguishene* the Ontario Court of Appeal held that the purpose of opening municipal meetings with the Lord's Prayer was to impose “a Christian moral tone on the deliberations of Council” and violated the rights of non-Christians. Subsequently, the use of a non-sectarian prayer by the Renfrew County Council was challenged by a resident of the County who identified as a “Secular Humanist” and who did not believe in God or in participation in prayers. In *Allen v. Renfrew (Corp. of the County)*⁸³, an Ontario Superior Court found that a broadly inclusive and non-denominational prayer, even one that refers to God, while not consistent with the beliefs of some “minority groups” was not an infringement of religious rights. The Court rejected the argument that mentioning God in a prayer at a government meeting could be seen as a coercive attempt to compel religious observance. It also suggested (at para. 27) that any interference with Mr. Allen's beliefs were a “minor affront” that did not rise to the level of a violation of freedom of religion:

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

Very recently, the Supreme Court of Canada emphasized that there has been a broad movement to secularize public institutions in the Western world and to adopt a policy of state “religious neutrality”. As noted by the Court, state religious neutrality is seen as a means to create a free space in which citizens of various beliefs can exercise their individual rights. The decision in *S.L. v. Commission scolaires des Chênes* dealt with an objection by a group of parents in Drummondville Quebec to a mandatory Ethics and Religious Culture program taught to all students in the province. In 2008, the Quebec government began requiring all students, in public, private and religious schools, to take a course each year entitled Ethics and Religious Culture. The course is said to have as its objective the instruction of children in a manner that will promote “the development of attitudes of tolerance, respect and openness”, thus “preparing them to live in a pluralist

⁸² *Ibid.* at pages 22-24. Following *Zylberberg*, the Ontario Court of Appeal considered a regulation that made periods of religious education a compulsory part of the school curriculum; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341. The Court held that the purpose and effect of the regulation were to provide for religious indoctrination, contrary to the *Charter*. Such indoctrination was not rationally connected to the educational objective of inculcating proper moral standards. However, the Court noted that a program that taught about religion and moral values without indoctrination in a particular faith would not breach the *Charter*. This has now been confirmed by the Supreme Court of Canada in the *S.L.* decision, *supra* note 41.

⁸³ 2004 CanLII 13978 (ON S.C.).

and democratic society.” The curriculum includes all the “major world religions as well as native spirituality, while reflecting Quebec’s Christian roots and citizenry”⁸⁴. The appellants argued that the state should not be able to impose, with no possibility of an exemption, a program of study of ethics and religion on parents who view it as infringing on their religious beliefs and conscience. The Quebec Superior Court⁸⁵ found that while the appellants and their children were sincere believers in their Catholic faith, the ERC program did not violate their freedoms of religion and conscience. It also ruled that the parents were unable to satisfy the court that their children would suffer harm as a result of being required to attend this program, therefore they would not qualify for an exemption. The Quebec Court of Appeal denied the appeal.

The Supreme Court of Canada also dismissed the parents’ *Charter* challenge. The Court found that a person cannot simply say that his or her s. 2(a) *Charter* rights have been infringed but must prove through objective evidence that there is an interference with a religious right. Furthermore, s. 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion as no right is absolute.

In this case, while the parents sincerely believe that they have an obligation to pass on the precepts of their religion to their children, they did not objectively demonstrate that their ability to do so had been interfered with. While the government cannot set up an education system that favours or hinders any one religion or a particular vision of religion, it can expose children to a comprehensive presentation of various religions without forcing them to join them.

With regard to the argument that exposing children to different beliefs is confusing to them, the court reaffirmed its discussion of cognitive dissonance in *Chamberlain v. Surrey School District No. 36*.⁸⁶ In particular, while parents are free to pass on their personal beliefs to their children, the early exposure of children to different realities is a fact of life in society and is arguably necessary if children are to be taught what tolerance itself involves. Moreover:

[t]he suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a

⁸⁴ It appears that one of the main objections is on the basis that the material portrays all religions as equally valid and that it will convey to children that all religious beliefs and all moral codes are of equal merit. See for example Catholic Insight website:

http://catholicinsight.com/online/church/education/article_877.shtml and the Evangelical Fellowship of Canada Frequently Asked Questions and Answers at <http://files.efc-canada.net/si/Education/LavalleeQA.pdf>.

⁸⁵ 2009 QCCS 3875 (CanLII). In a related case, another Superior Court judge reached a different conclusion; *Loyola High School c. Courchesne*, 2010 QCCS 2631 (CanLII). A Jesuit Catholic High School sought to teach the program from a Catholic perspective. The Ministry of Education denied the request. The judge found that the Ministry’s refusal violated the school’s freedom of religion under the Quebec *Charter of Rights and Freedoms*. The Ministry of Education has appealed the decision to the Quebec Court Appeal. It is not clear whether the differences between the *Loyola* and S.L. challenges to the ERC will result in a different outcome when the *Loyola* appeal is heard.

⁸⁶ [2002] 4 S.C.R. 710.

rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the *Canadian Charter* and of s. 3 of the *Quebec Charter*.

This case has the potential to be significant for several reasons.⁸⁷ First, it clarifies that there must be objective proof of an infringement of religious rights on a balance of probabilities; asserting a negative impact on a right will not be sufficient. It reaffirms earlier decisions that have found that being exposed to views that differ from one's religious beliefs is not likely to amount to an infringement of religious rights.⁸⁸ It also appears to provide the Court's view on the role of the state and public institutions with respect to religion.

In the human rights context, several decisions have considered the effects of an employer or manager imposing religious messages on employees. These decisions seem to suggest that some discussion of religious matters in the workplace is acceptable⁸⁹. However, where the employer places unwelcome "religious pressure" on an employee, engages in "religiously based mistreatment" or makes participation in religious matters a term or condition of employment, a violation of the *Code* will likely be found.⁹⁰ As well, questioning an employee on religious matters during an interview to determine whether he had the same "values" and would "fit" into the company culture was found to be contrary to section 23(2) of the *Code* which specifically prohibits oral inquiries of a job applicant which directly or indirectly classify or indicate qualifications on the basis of a prohibited ground, i.e. the applicant's religious beliefs.⁹¹

In *Akiyama v. Judo B.C. (No. 2)*⁹², the BC Human Rights Tribunal rejected a claim that being required to bow as a condition of participating in judo competitions was an imposition of a Shinto religious practice on persons who do not practice this religion. The complainants did not identify as having any religious beliefs. However, they argued that being required to perform certain judo bows⁹³ amounted to the imposition of a

⁸⁷ While *S.L.* was a *Charter* challenge on the basis of freedom of religion, the issues raised could have come forward as a human rights matter, in particular a request for accommodation of creed rights.

⁸⁸ See also *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

⁸⁹ In *Lapcevic v. Pablo Neruda Non-Profit Housing Corporation*, 2010 HRTO 927 (CanLII) the HRTO found that while a supervisor initiated discussions about religion, gave the applicant a Bible and talked about the comfort of religion in difficult circumstances, the evidence was not sufficient to establish that the supervisor ought to have known the conduct was unwelcome. In the circumstances, there was no unwelcome religious pressure on the employee. In *Dufour and Streeter*, *infra*, the Tribunal also made a point of noting that not all religious discussions violate the *Code*.

⁹⁰ See *Dufour v. J. Rogers Deschamp Comptable Agréé* (1989), 10 C.H.R.R. D/6153 (Ont. Bd.Inq.) and more recently *Streeter v. HR Technologies*, 2009 HRTO 841 (CanLII).

⁹¹ See *Streeter*, *ibid.* at para. 38.

⁹² (2002), 43 C.H.R.R. D/425, 2002 BCHRT 27.

⁹³ In particular, Ms Akiyama, who was born and raised in Japan and whose grandparents and parents were Shintoists, objected to bowing to inanimate objects because she did not accept that there is a god in an object and because she believed it is nonsensical to bow to objects.

religious practice on them because of their sincerely-held belief that bows are Shinto in origin. The Tribunal found that the complainants had not established any connection between judo bows and Shinto practice, other than the fact that Shinto priests bow (however, the Tribunal noted that bowing is commonplace in many Asian cultures). The Tribunal rejected the argument that the complainants should have the right to refuse to participate in activity sincerely believed to be religious, instead imposing the requirement that the activity must be objectively proven to be religious:

...Ms. Akiyama's conviction that there is a relationship between the bows in judo and Shinto is not a religious belief *per se*; it has nothing to do with a coherent belief system in a superhuman or supernatural power, or with the worship of a deity. Rather, her view that there is a relationship between the bows in judo and Shinto is a belief about their historical connection. As such, it would be incorrect for the Tribunal to accord the complainant's subjective, historical belief the same deference which a Court accords to an individual's religious beliefs. ... [T]he complainant can only engage the ground of religion if she can prove on a balance of probabilities that the bows in Judo are essentially religious in nature.⁹⁴

However, this decision was made before *Amselem* and is based on the ground of "religion" as opposed to "creed". There is certainly an argument to be made that on a large and liberal interpretation, human rights laws should protect people from adverse treatment based on a refusal to participate in activity that they sincerely believe is religious in nature. A broader definition of creed might also provide more protection for persons who do not identify as religious but who hold other beliefs.

In *Grant v. Canada (Attorney General)*⁹⁵ the Federal Court rejected a claim that the Royal Canadian Mounted Police Commissioner's decision to allow Sikh officers to wear turbans infringed religious rights of members of the public who are not Sikh. The Court noted that there is no necessary religious content to the interaction between the member of the public and the officer and there is no compulsion or coercion on the member of the public to participate in, adopt or share the officer's religious beliefs or practices. The only action demanded from the member of the public is to observe the officer's religious affiliation and this does not violate s. 2(a) of the *Charter*.

Intra-faith/Intra-Community Creed-based Disputes

Some creed claims connect to disputes that may exist among members of the same faith group or among persons of the same background who identify by different creeds. This trend suggests that the nature of creed claims is increasingly complex, and that there is a diversity of understanding of creed issues within groups of people who similarly identify.

⁹⁴ At paras. 68 and 69.

⁹⁵ [1995] 1 CF 158.

For example, in *MacDonald v. Anishnawbe Health Toronto*, Ms MacDonald who identified as an Aboriginal Catholic, alleged that once the organization's⁹⁶ Executive Director found out she was Catholic, he developed a dislike of her and took steps to ensure her employment was terminated. The applicant called evidence from a former co-worker, who had been in an intimate relationship with the Executive Director for four years, who testified that the Executive Director "strongly disapproved of Aboriginal persons who practised Christianity, or at least those sects of Christianity who were at one time involved in residential schools, such as Catholics and Anglicans." The applicant also alleged that her employer questioned why she would send her son to a Catholic school in light of the Catholic church's involvement with the residential school experience. The Tribunal ultimately did not accept that the employer held a negative view of Aboriginal Catholics or that the applicant's religion was a factor in her treatment at work⁹⁷. However, the case is an interesting example of the complexity and potential intersectional nature of creed issues. Here it was the fact that the applicant was both Aboriginal and Catholic that formed the basis of her discrimination claim.

In its decision in *Bruker v. Marcovitz*⁹⁸ (discussed further in the section **RECONCILING CREED AND OTHER RIGHTS**), the Supreme Court of Canada confirmed that the fact that a dispute between two parties has religious aspects does not mean that courts will not consider it. While courts will not usually interfere in spiritual or doctrinal issues, they will intervene when civil or property rights have been invaded.⁹⁹ Thus, a Jewish husband's prior agreement to grant his wife a religious divorce was upheld, even though he argued that enforcing the contract would interfere with his religious rights.¹⁰⁰ However, Justices Deschamps and Charron dissented, in essence finding that it would not be appropriate for the Court to step in to resolve what was a private religious dispute.

Consistent with this approach, the HRTTO rejected a preliminary argument made by a Diocese that the postulancy process (a two-year period of training and preparation for

⁹⁶ The decision states that Anishnawbe is a health service organization in Toronto which provides health care services primarily to members of the aboriginal community in Toronto.

⁹⁷ The main reason for this conclusion was that the applicant's evidence regarding the dislike for Aboriginal Catholics were vague. As well, the witness who corroborated this allegation was unable to point to any conversation or details to support her perception and there were issues with the applicant's credibility. There was also evidence that contradicted the suggestion that the Executive Director took an immediate dislike to her when he learned she was Catholic because she subsequently received a positive performance assessment.

⁹⁸ [2007] 3 S.C.R. 607.

⁹⁹ The Supreme Court cited its earlier decision which stated: "Once the court takes jurisdiction over a dispute with religious components, he continued, it must try "to come to the best understanding possible of the applicable tradition and custom"; *Bruker v. Marcovitz*, *ibid.* at para. 45 citing *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at p. 191.

¹⁰⁰ Note that Ontario has adopted legislation that deals with issues raised by faith-based family arbitration. Family arbitration typically deals with the division of property; custody and access; and child and spousal support after marital breakdown. As a result of 2006 amendments to the *Arbitration Act, 1991* and the *Family Law Act*, to be legally enforceable, family arbitrations must be conducted exclusively under Canadian law. Therefore, family arbitrations conducted under religious laws, while not prohibited, have no legal effect and cannot be enforced by a court.

ministry) to become an Anglican Priest was not a service within the meaning of the *Code*. The HRTO determined that it was not “plain and obvious” that the postulancy period is not a service. It found that it could hear a claim by a man of Sri Lankan origin who alleged discrimination on the basis of race and ethnic origin¹⁰¹. The HRTO noted that in Ontario the definition of services under the *Code* is not restricted to benefits that are generally available to the public, therefore a private relationship, like a postulancy, could be covered.¹⁰²

In another case, a Jewish man alleged creed discrimination against a Jewish organization on the basis that he was not certified to become a kosher caterer because he is not “orthodox or shomer Shabbat”; *Rill v. Kashruth Council of Canada*.¹⁰³ The respondent, the Kashruth Council is a corporation that certifies products and establishments that comply, in its view, with the laws of kashrut (Jewish dietary laws). The applicant, who had previously been certified, attempted to re-apply to become a kosher caterer in February 2008 because he understood the Kashruth Council’s policy permitted a non-orthodox caterer to be certified so long as an orthodox mashgiach was present at all times to supervise the cooking process. However, the respondent did not permit him to re-apply.

The HRTO dismissed his application on the basis that the applicant failed to show that the respondent’s refusal was in anyway related to creed. The Council’s policy did not require that a caterer be orthodox or shomer Shabbat. Indeed, the applicant was previously certified although he was not orthodox. There was no evidence the decision was related to the applicant’s creed.

In a BC decision, the Tribunal considered an allegation by a Hindu woman that she was discriminated against by a Hindu Temple; *Krall v. Vedic Hindu Cultural Society*.¹⁰⁴ The Tribunal found that the Temple had asked one of its members, Ms. Krall, to leave on one occasion and to worship at the back of the temple due to the fact that when she prays she goes into a trance, screams, gesticulates and jumps up and down. The Tribunal noted that as *Amselem* confirmed that a person’s personal interpretation of their faith is protected, the restrictions imposed on Ms. Krall because of how she worships did constitute discrimination on the basis of religion. However, the Tribunal went on to find that Ms. Krall’s behaviour was disruptive to other worshipers and

¹⁰¹ For example, he alleged that he was questioned during his training and preparation for ministry about his comfort in dealing with an “all white” congregation.

¹⁰² *Thavarajasoorier v. Incorporated Synod of the Diocese of Toronto*, 2009 HRTO 314 (CanLII).

However, the BC Human Rights Tribunal reached an opposite conclusion regarding services under the BC Code, which requires the services be “customarily available to the public”. A Sabha Temple (which holds religious services and promotes brotherhood among its members and visitors) was found to be a purely “private organization” that could restrict its membership to persons of a particular community or caste. The matter was found to be outside the jurisdiction of the Tribunal as membership in the Sabha is not a “service customarily available to the public.” See *Sahota and Shergill v. Shri Guru Ravidass Sabha Temple*, 2008 BCHRT 269 (CanLII).

¹⁰³ 2008 HRTO 162 (CanLII).

¹⁰⁴ (2005), 56 C.H.R.R. D/306, 2005 BCHRT 56.

frightening for the children. Therefore, Temple reasonably accommodated Ms. Krall by asking her to worship at the back of the Temple.

Creed and the Duty to Accommodate

The right to be free from discrimination on the basis of creed also includes the right to have the needs related to one's creed accommodated to the point of undue hardship.¹⁰⁵ However, in some instances accommodations based on creed have proven to be controversial.

Accommodations based on creed range from modifying dress codes, modifying safety requirements (e.g. allowing a child to wear a sheathed ceremonial dagger to school), providing time and space for prayer and providing days off for religious holidays.

As is the case with other forms of accommodation, there is both a procedural and substantive component to the duty to accommodate creed rights. Therefore, when faced with a request for a creed-related accommodation, there is an obligation to consider the request and explore options for accommodation. Failing to do so can result in a finding of discrimination, even if providing the accommodation would have constituted an undue hardship.

For example, in *Qureshi v. G4S Security Services*,¹⁰⁶ the HRTO found that an employer's decision to reject an applicant from their recruitment process as soon as it learned that he would need approximately one hour each Friday in order to pray was discriminatory. Mr. Qureshi had passed the initial screening and revealed his need for accommodation for Friday prayers. While he was being trained, he requested time off for Friday prayer and offered to write a test that was scheduled for Friday afternoon later that evening. The employer refused him the time off and asked whether he would need time off for Friday prayers if he were to be hired by the company. After he confirmed that he would, it advised that it "couldn't go forward with his application."

In finding discrimination, the HRTO confirmed that the employer had a procedural duty to take adequate steps to assess and explore accommodation options. Instead, it "immediately rebuffed" the request without considering whether it could be accommodated. The employer's failure to meet the first branch of the duty to accommodate was enough to establish discrimination; however, the Tribunal also considered the employer's argument that the requested accommodation would cause undue hardship. The employer's claims regarding the collective agreement, "union problems", scheduling difficulties and overtime costs were vague and speculative, with no concrete evidence provided.

¹⁰⁵ *Ontario (Human Rights Commission) v. Simpsons Sears*, *supra* note 16; *Central Okanagan School District No. 23 v. Renaud*, *supra* note 16; and *Chambly (Commission Scholaire Regionale) c. Bergevin* 1994 CanLII 102 (SCC), [1994] 2 S.C.R. 525 (SCC).

¹⁰⁶ 2009 HRTO 409 (CanLII).

Finally, the Tribunal rejected the employer's argument that Mr. Qureshi was required to disclose his need for accommodation earlier in the recruitment process and, by not doing so, had been deceitful. The Tribunal noted that s. 23(2) of the *Code* prevents inquiries during the recruitment process that directly or indirectly classify applicants by a prohibited ground of discrimination. Therefore, requiring job applicants to reveal information to a prospective employer that would directly or indirectly classify them by a prohibited ground of discrimination would be counter-intuitive. As well, there was nothing to suggest that had the applicant revealed his need for accommodation earlier in the recruitment process, the employer's response would have been any different.

The company was ordered to pay Mr. Qureshi \$2520 for lost wages and \$5000 for compensation to dignity and self-respect as a result of the discrimination. It also ordered the company to amend its company policy (with the assistance of a consultant or lawyer with expertise in human rights and accommodation) to address the accommodation of persons on the basis of the prohibited grounds under the *Code*, including the process that the company will follow in order to address requests for accommodation, and to disseminate the policy to all its Ontario employees.¹⁰⁷

The obligation to participate in the accommodation process also applies to employees. Decision-makers have found that employees need to make their religious accommodation needs known in a timely way. Failing to do so may result in a finding that the employer did not breach its duty to accommodate. For example, in *Daginawala v. SCM Supply Chain Management Inc.*¹⁰⁸ the HRTO found that the applicant did not give sufficient notice of his need for four hours of unpaid leave to allow the employer to find a replacement.¹⁰⁹

i. Prayer Times, Sabbaths and Religious Holy Days

One of the most common issues arising out of the duty to accommodate creed rights relates to how to accommodate needs related to prayer times, Sabbaths and religious holy days. These needs must be accommodated by employers, service providers such as schools, and others to the point of undue hardship. The challenge has been in determining exactly how these needs must be accommodated and what could constitute undue hardship in the circumstances.

One of the earliest human rights decisions dealing with accommodating religious days off was the Supreme Court of Canada's decision in *O'Malley*. Full-time employees

¹⁰⁷ An employer who advised an employee that it would not allow any days off for religious holy days and then terminated his employment for an unauthorized absence on such a day was found to have violated the BC *Code*; *Derksen v. Myert Corps. Inc. (No. 2)* (2004), 50 C.H.R.R. D/109. There was no evidence that the employer made any effort to accommodate the employee.

¹⁰⁸ 2010 HRTO 205 (CanLII).

¹⁰⁹ The employee gave approximately 72 hours notice and the employer typically had provided time off in the past when sufficient notice was given. Unfortunately, there is little analysis in this case as to why the employer could not have found a replacement or how the employer typically deals with unexpected absences.

were required to work Friday evening and Saturday shifts on a rotating basis. After Ms O'Malley became a Seventh Day Adventist, she could no longer work on her Sabbath (from sundown on Friday to sundown on Saturday). As a result she was forced to accept part-time employment with a reduction in earnings and benefits. In finding that the respondent had not shown that it could not have done more to accommodate Ms O'Malley, the Supreme Court of Canada noted several key human rights principles that apply regardless of the type of discrimination alleged. First, there is no need to demonstrate any intent to discriminate. Second, discrimination can occur as a result of neutral rules or requirements that nevertheless have an adverse effect based on *Code* grounds. In the case of adverse effect discrimination, the employer has the obligation to provide accommodation to the point of undue hardship. The Court also noted the claimant has the onus to first establish a *prima facie* claim of discrimination. Once the claimant has done so, the onus shifts to the respondent to show that it has taken steps to accommodate to the point of undue hardship.¹¹⁰

In *Renaud*, the Supreme Court confirmed that where the collective agreement has an adverse effect on employees based on creed, the union has a joint and shared responsibility, along with the employer, to search for and provide accommodation to the point of undue hardship. Mr. Renaud, a school custodian, was also Seventh Day Adventist and was therefore unable to work Friday afternoons. Changing his shift schedule would have required an exception to the collective agreement which the union opposed. As a result of the union's threat to file a grievance, Mr. Renaud was not accommodated and his employment was eventually terminated when he refused to work his regular Friday evening shift. The Court confirmed that unions may be liable for discrimination in two situations. First the union may cause or contribute to the discrimination by participating in creating a work rule that has a discriminatory effect. Second, a union may be liable if it blocks the reasonable efforts of an employer to accommodate. In this case, the accommodation that was identified was reasonable and did not cause undue interference with the rights of Mr. Renaud's co-workers. Both the employer and union were found liable for a failure to accommodate Mr. Renaud's Sabbath.

In contrast, in 2002 the Ontario Divisional Court upheld a decision of a human rights Board of Inquiry which found that Ford Motor Co. of Canada had not discriminated against two members of the Worldwide Church of God by failing to permanently remove them from Friday evening shifts to accommodate their Sabbath.¹¹¹ Ford's undue hardship argument was accepted for a number of reasons including disruption to seniority, problems of morale, the interchangeability of the workforce and facilities and the cost and difficulty of replacing the complainants, the size and competitiveness of the

¹¹⁰ Subsequently, the Supreme Court considered the situation of an employee, a member of the Worldwide Church of God, who was denied Easter Monday as an unpaid religious holiday. The employer argued that Monday's were a particularly busy day at its plant. The Court found that there were no serious obstacles to accommodating the complainant's religious needs by allowing him to be absent one Monday; *Central Alberta Dairy Pool*, *supra* note 21.

¹¹¹ *Roosma v. Ford Motor Co Ltd.*, 2001 CanLII 26211 (ON HRT), upheld *Ontario (Human Rights Commission) v. Roosma*, 2002 CanLII 15946 (ON SCDC).

operation, and safety considerations. The Board noted that there was a record of high absenteeism on Fridays which made it more difficult to excuse the complainants from that shift. It is very important to note however that this case was decided before amendments were made to the Ontario *Code* which now limit the considerations for determining undue hardship to cost and health and safety. It is not clear that the outcome would have been the same had the case been decided based on the amended version of the *Code*.

Therefore, while the need to accommodate time off for religious holidays, Sabbaths and prayers has been repeatedly confirmed, what has been more complex is determining whether the employee is entitled to the time off **with pay**.

In *Chambly (Commission scolaire régionale) v. Bergevin*, the Supreme Court of Canada considered a request by Jewish teachers for access to the special purpose paid-leave provision in their collective agreement that would have allowed them to have Yom Kippur off with pay. They were told they could take the day off, without pay. The Court noted that Christian holy days of Christmas and Good Friday are provided for in the school calendar. Therefore, Christian employees were able to observe their religious holidays with pay. As this was not the case for the Jewish teachers, in the absence of some accommodation by the employer, the effect would be discriminatory. In this case, accommodation through scheduling changes was not an available option as a teacher can only work when schools are open and students are in attendance. Therefore, the employer was required to permit the use of paid days off.

Subsequent decision-makers have not accepted that the *Chambly* decision requires all employers to provide the same number of religious holidays **with pay** as is given to Christian employees. In *Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board*¹¹², the Ontario Court of Appeal considered the grievance of a member of the Worldwide Church of God who required eleven days off per year for religious holidays. The employer's policy permitted two days off with pay and then allowed employees to fulfill remaining religious obligations through scheduling changes. The employee was presented with a variety of proposals to meet his religious requirements but he rejected them arguing that he was entitled to the eleven days off with pay.

The Court of Appeal found that the employer's policy appropriately reflected the employer's obligation to accommodate. The scheduling options provided for in the policy were: "a viable means of accommodation for employees requiring extra days off over and above the two paid leave days already provided for. It enabled them to schedule their required hours of work in a way that relieved them from having to choose between losing wages or encroaching on pre-existing earned entitlements [i.e. vacation days] and observing their religious holy days." The Court noted that in *Chambly* the Supreme Court found that it was significant that it would be impossible for a teacher to make up the religious holiday by working an extra day. Therefore, the Court concluded

¹¹² 2000 CanLII 16854 (ON CA).

that employers can fulfill their duty to accommodate by offering appropriate scheduling changes, without first having to show that granting a leave of absence with pay would result in undue economic or other hardship.

In *Markovic v. Autocom Manufacturing Ltd.*,¹¹³ the HRTO considered a situation where the employer did not provide two days off with pay to correspond to the number of Christian religious days that are statutory holidays. Rather, the employer's policy provided a "menu of options" for accommodation which included making up the time, switching shifts with another employee, working on a secular holiday when the facility is in operation (subject to the *Employment Standards Act*), adjusting shift schedules, using vacation days and taking an unpaid leave of absence. Mr. Markovic complained that Autocom's failure to provide him with a paid day off to celebrate Serbian Orthodox Christmas was discriminatory.

The HRTO concluded that by providing a process for employees to arrange for time off for religious observances through options for scheduling changes, without loss of pay, the policy was appropriate and not discriminatory. The HRTO distinguished the Supreme Court of Canada's decision in *Chambly* on the basis that scheduling changes were not available in that situation due to the nature of the workplace and that although the collective agreement allowed for three days of special leave with pay, the employer took the position that they could not be used for religious observances. However, the HRTO did note that there may be individuals for whom none of the scheduling options in the policy would be suitable and stated that in such cases other accommodations must be explored. The HRTO left open the possibility that in a given circumstance, the outcome might be days off with pay.

In *Koroll v. Automodular Corp.*,¹¹⁴ the applicant, a member of the Living Church of God, alleged that his employer infringed his rights by not giving him time off with pay to observe High Sabbaths. He also alleged that the employer's Attendance Recognition Program discriminated against him as employees with perfect attendance received bonuses but he was denied bonuses when his attendance was perfect except for the Sabbaths when he was unable to work because of his religious beliefs.

The HRTO followed its earlier decision in *Markovic* and dismissed his claim that he was entitled to paid leave for holy days. However, the Tribunal found that the employer's requirement that the applicant attend work on all scheduled days in order to have perfect attendance and receive bonuses did discriminate on the basis of creed. The respondent did not show that the religious needs could not be accommodated without undue hardship. The HRTO awarded \$2000 for injury to dignity and self-respect and directed the respondent to review its Attendance Management Program to remove the discriminatory effect on employees whose religious beliefs require them to be absent from work.

¹¹³ 2008 HRTO 64 (CanLII).

¹¹⁴ *Supra* note 22.

A labour arbitrator considered an employer's implementation of "faith day" provisions in a collective agreement. Under the collective agreement, the first three days of religious holidays were provided as paid days. Two additional days were permitted but these absences were charged to the employee's sick leave account. After concerns about abuse, the employer implemented a centralized system which required the employee to submit a request electronically. If the holiday was not on a pre-approved list of "significant" faith days, the employee had to provide additional information confirming that the day was a significant faith day and that the employee's religion requires him or her from refraining from working on that day. The arbitrator found a centralized electronic process for dealing with requests that contained a list of pre-approved significant faith days was an acceptable and efficient means of implementing the religious leave entitlements under the collective agreement. However, the requirement that the day be significant to the particular faith and require to person to abstain from working was not consistent with *Amselem's* recognition that both voluntary and obligatory aspects of religious practice are covered. However, the employer could ask for additional information to satisfy itself that the request was consistent with the requirements in *Amselem* and the collective agreement, for example to ensure that the holiday is religious and not cultural or secular in nature.¹¹⁵

Therefore, it appears that in Ontario employers can fulfill their duty to accommodate time off for religious holy days by searching for solutions that permit time off without adverse employment consequences, including a loss of pay. Depending on the circumstances, it may be that this can be achieved through a variety of means including special/compassionate paid leave; scheduling changes; overtime; use of lieu time; and, if the employer operates on a statutory holiday, working on a statutory holiday (subject to the requirements of the *Employment Standards Act*). However, forcing an employee to use vacation time instead of exploring other options would likely be found discriminatory¹¹⁶. Providing several alternatives and choice, as through a "menu of options" is always preferable. As well, where the nature of the workplace or the employee's individual circumstances are such that the employee cannot make up the time that they must be absent from work for religious holidays, as was the case in *Chambly*, providing paid days off may be the only appropriate accommodation.

It is important to note that the duty to accommodate prayer times, Sabbaths and religious holy days applies not just in employment but in other social areas of the *Code*. This is particularly important in the context of education, although there does not appear to be any case law to date dealing with the specifics of accommodating religious observances in schools and universities. However, it has been dealt with in the context

¹¹⁵ *York Region District School Board v. Ontario Secondary School Teachers' Federation, District 16 (Faith Day Grievance)*, [2008] O.L.A.A. No. 442, 176 L.A.C. (4th) 97.

¹¹⁶ *Shapiro v. Peel (Regional Municipality)(No. 2)* (1997), 30 C.H.R.R. D/172 (Ont. Bd. Inq.). The employer's insistence that Ms Shapiro use vacation time, lieu time or take unpaid leave for Jewish holidays was discriminatory. Ms Shapiro's proposal to work overtime to make up the time was a reasonable one and could have been accommodated without undue hardship. The fact that overtime was not available to every employee was not relevant as accommodation is an individualized assessment and not every employee needs to be accommodated in the same way.

of contracts (under s. 3 of the *Code*). In *Janssen v. Ontario (Milk Marketing Bd.)* the complainant alleged that his right to be free from discrimination in contracts on the basis of creed was infringed by the Ontario Milk Marketing Board's policy regarding farmers who, for religious reasons, would not ship milk on Sundays. The Milk Board allowed farmers to be recognized as "no Sunday shippers" and arranged for milk pick ups on Saturdays and Mondays but at an extra cost to the farmer. The Ontario Board of Inquiry (the precursor to the HRTO) found that this did not sufficiently accommodate the dairy farmers who would not ship on Sundays for religious reasons. The Board found that this was the same as passing the cost of a wheelchair ramp onto those who use it. It would not be undue hardship to spread the cost of accommodation across the dairy farming community or for the Milk Marketing Board to find some other means to deal with the costs through its regulatory framework.

ii Religious Attire and Wearing Religious Objects

Where health and safety issues are engaged, for example in situations where a person seeks to be exempt from a helmet requirement or seeks to be able to carry a kirpan, decisions dealing with religious attire and wearing religious objects have been inconsistent.

In *Bhinder v. Canadian National Railway*,¹¹⁷ the Supreme Court of Canada held that the CNR's hardhat rule was a *bona fide* occupational requirement. The employer did not need to make an exception in order to accommodate Mr. Bhinder, a Sikh employee who wore a turban. Subsequently, the Supreme Court of Canada stated that *Bhinder* is incorrect in so far as it found that accommodation is not a component of the *bona fide* occupational requirement test. It is now clear that even if a rule is reasonable and *bona fide*, there is a duty to accommodate, to the point of undue hardship, those that are adversely affected by the rule. Undue hardship includes health and safety concerns. The issue of the relationship between hardhats and workplace safety concerns is also being considered in the *Loomba* case (discussed above).

Whether religious rights include the right to be exempt from helmet requirements has come up in the context of mandatory motorcycle helmet laws in British Columbia and Ontario, with inconsistent results. In the BC case of *Dhillon v. British Columbia (Ministry of Transportation and Highways)*¹¹⁸ the BC Human Rights Tribunal found that the motorcycle helmet requirement had an adverse impact of members of the Sikh faith. The Tribunal accepted that while there is an increased risk of injury to non-helmet wearing motorcycle riders, that risk is borne by the motorcycle rider, not other members of the public. As a result, the increased risk to the motorcycle rider from an accommodation that would allow Sikh men an exemption from the requirement does not result in undue hardship to the province. The increased cost of treating head injuries was also found not to constitute an undue hardship. The Tribunal found the

¹¹⁷ [1985] 2 S.C.R. 561.

¹¹⁸ (1999), 35 C.H.R.R. D/293 (B.C.H.R.T.).

requirement discriminatory and ordered the Ministry of Transportation to cease and refrain from any similar discrimination.

The opposite conclusion has been reached in an Ontario challenge to the provisions of the *Highway Traffic Act* mandating helmets for all motorcyclists. In *R. v. Badesha*, a Sikh man charged with operating a motorcycle without a helmet argued that s. 104 of Ontario's *Highway Traffic Act* contravened his freedom of religion rights and equality rights under s. 2(a) and 15 of the *Charter*. He was unsuccessful both at trial and on appeal to the Ontario Court of Justice. Both judges concluded, although for different reasons that Ontario was not required to accommodate Sikh motorcyclists. At trial the judge accepted a rights violation but found that it was justified due to the increased risk of serious injury or death. On appeal, the judge disagreed that Mr. Badesha's rights had been infringed (see a more detailed discussion in the earlier section entitled **WHAT IS PROTECTED UNDER RELIGION AND CREED**).

In *Pannu v. British Columbia (Worker's Compensation Board)*, the BC Human Rights Tribunal dismissed the complaint of Mr. Pannu, a Sikh man who was removed from his position as a recaust operator¹¹⁹ at a pulp mill because he could not wear a self-contained breathing apparatus (SCBA) in the event of an emergency. Mr. Pannu kept a beard as a tenet of his faith and facial hair prevents the SCBA mask from properly sealing. Mr. Pannu was in charge of the recaust area in the mill and, in the event of a poisonous gas leak, was responsible for an emergency shutdown of the area. Mr. Pannu performed this job without being required to shave for a number of years. However, after a WCB inspection in which the employer was found to be in breach of WCB regulations concerning SCBAs, Mr. Pannu was removed from the recaust operator position. As a result, he filed a human rights complaint against the WCB and his employer.

WCB regulations required that anyone who may be exposed to poisonous gases wear an SCBA. These regulations also required that anyone who might have to wear an SCBA be clean-shaven because facial hair prevents the SCBA's face mask from sealing with the person's face and ensuring that the gas is kept out. The Tribunal found that the WCB requirements were justified. Providing an exemption for workers who wear a beard for religious would be an undue hardship as it would undermine the very reason for the regulation, to protect workers from exposure to poisonous gases. Moreover, this was not the same as the situation in *Dhillon* as the risk was not just to Mr. Pannu but also to other workers. If he became incapacitated from exposure to poisonous gases he would have to be rescued by co-workers, putting them at risk. As well, he would not be able to carry out the emergency shutdown.

¹¹⁹ The Tribunal described the responsibilities of a recaust operator as follows: "The recaust area is noisy, smelly, and hot. It can also be dangerous. This is where the poisonous gases from elsewhere in the mill are piped to be burned off in the 2,000-degree recaust kilns. Mr. Pannu is in charge of this area. His job carries a risk that he will have to shut down the recaust area equipment in the event of a poisonous gas leak, remaining behind while others evacuate the area."

The employer did not discriminate by including the emergency shutdown in Mr. Pannu's job description. Nor, did it have an obligation to exempt Mr. Pannu this task. Even though a gas leak had never occurred, the Tribunal found that the risk that it could be real. Exempting Mr. Pannu would mean having to train additional, less experienced and qualified personnel to ensure the procedure could be carried out when Mr. Pannu was on shift. The lack of experience of these individuals would mean an increase in the magnitude of the risk and, more importantly, it would result in shifting the risk to someone else. This would be an undue hardship. Therefore, the employer did not have to accommodate Mr. Pannu in his position by removing responsibility for emergency shutdowns from his job description. It is important to note that the employer had actively sought alternative work for Mr. Pannu. The issue was whether he was entitled to be accommodated in the recast operator position.

Health and safety concerns have also been raised in response to requests to be permitted to wear a kirpan, a small ceremonial dagger worn by Sikh men, as a religious accommodation. In a 1991 Ontario decision, *Peel Board of Education v. Ontario (Human Rights Comm.) and Pandori*¹²⁰ the Divisional Court upheld a human rights Board of Inquiry decision that rejected a school board's claim that it could not accommodate kirpans without undue hardship. In a 2006 decision, *Multani v. Commission scolaire Marguerite-Bourgeoys*¹²¹ the Supreme Court of Canada considered the same issue and found that a decision prohibiting a student from wearing his kirpan to school, under any conditions, violated his freedom of religion in a way that was neither trivial or insignificant as it deprived him from his right to attend a public school. The infringement was not found to be justified under s. 1 of the *Charter* as it did not minimally impair the religious rights. Interestingly, the court drew an analogy between the minimal impairment test under s. 1 of the *Charter* and an accommodation analysis and stated that the decision to implement a complete ban on kirpans did not fall within the range of reasonable alternatives. Instead the school board could accommodate the student by allowing him to wear his kirpan subject to certain conditions that would ensure safety.

In contrast, two decisions have found that wearing of kirpans may be prohibited on airplanes and in courts. In *Nijjar v. Canada 3000 Airlines Ltd.*,¹²² the Canadian Human Rights Tribunal dismissed Mr. Nijjar's complaint that he had been denied the right to wear his kirpan aboard a Canada 3000 Airlines aircraft because, among other things, he had failed to demonstrate that wearing a kirpan in a manner consistent with Canada 3000's policies would be contrary to his religious beliefs. It was apparent from Mr. Nijjar's testimony that wearing one particular type of kirpan rather than another was a matter of personal preference, not of religious belief. Similarly, in *R. v. Hothi*,¹²³ a Manitoba Court upheld a decision of a judge prohibiting wearing a kirpan in the courtroom. The Judge was hearing the case of an accused charged with assault.

¹²⁰ (1991), 14 C.H.R.R. D/403.

¹²¹ [2006] 1 S.C.R. 256.

¹²² (1999), 36 C.H.R.R. D/76 (Can. Trib.). Note that this case was decided before even more stringent safety requirements on airplanes have been implemented as a result of the events of 9/11.

¹²³ [1985] 3 W.W.R. 256 (Man. Q.B.), aff'd [1986] 3 W.W.R. 671 (Man. C.A.).

In considering these two decisions, the Supreme Court in *Multani* noted that these cases are always context specific. Consideration must be given to the environment in which the rule concerning kirpans is being applied. An aircraft or court environment is much different than an education or employment setting, and the safety considerations at stake are much different.

While safety considerations tend to be the main issue raised when it comes to religious attire, two recent cases deal with objections to religious clothing for other reasons. Both involved Muslim women.

In *Saadi v. Audmax*¹²⁴ the HRTO found that an employer's questioning of certain aspects of a Muslim employee's clothing and hijab constituted discrimination on the basis of creed. In particular, the HRTO found that the employer inappropriately disciplined Ms Saadi for violations of its dress code when she wore a "tight short skirt and leggings" an anklet that "jingled"; open-toed "slippers"; and a "cap". The HRTO concluded that the discipline in relation to the anklet and slippers were not related to creed. However, it found that with respect to the skirt and leggings, the employer's dress code was arbitrarily applied and subject to the manager's opinions and preferences about how she wants her staff to look. This was found to constitute adverse-effects discrimination on the ground of creed against the applicant, whose religiously-conforming attire at times conflicted with the employers' dress code. The HRTO also found that the employer overstepped the bounds of the *Code* when it dictated what style of hijab it would accommodate, based on personal preference. The HRTO stated that: "[t]he *Code* guarantees not only a woman's right to wear a religious headdress in the workplace, but also her right to choose the form of religious headdress, subject to any *bona fide* occupational requirements."

However, on judicial review the Ontario Divisional Court disagreed with the HRTO's conclusion that the employer's application of the dress code policy discriminated on the basis of the intersecting grounds of sex and creed. The Court noted a number of procedural problems with the hearing (for example, the fact that Ms. Saadi did not provide evidence concerning the clothing she was actually wearing along with the refusal to allow the employer to rely on a photograph which it said illustrated the kind of inappropriate apparel Ms. Saadi was wearing). The Divisional Court found that the HRTO should have considered whether Ms. Saadi could have complied with the dress code without compromising her religious beliefs:

There was nothing about Ms. Saadi's religion that required her to wear the particular form of *hijab* she was wearing on the day in question. If it was possible for her to wear a religiously acceptable form of *hijab* that was fully consistent with the dress code (as indeed she had done every day for six weeks), her religious rights were not affected. All that was affected was her sense of style, which apparently was in conflict with that of her employer.

¹²⁴ 2009 HRTO 1627.

The Divisional Court stated that the HRTO ought to have considered whether the dress code, or the employer's enforcement or interpretation of it, conflicted with what the employee was required to wear as part of her religion. As a result, the decision of the HRTO was set aside and the case was sent back to the HRTO for a new hearing before a different adjudicator.

In another recent decision dealing with religious attire worn by Muslim women, the Ontario Court of Appeal considered whether a Muslim woman who wears a niqab (a veil covering her face, except her eyes) for religious reasons be required to remove it when testifying about alleged childhood sexual assaults; *R. v. N.S.*¹²⁵ The case did not arise out of a human rights application or an allegation of discrimination on the basis of creed under the *Code*. Rather at the preliminary inquiry before the criminal courts, the accused persons, N.S.'s uncle and cousin, argued that their fair trial rights would be compromised if their accuser's full face could not be seen while she was giving evidence at the preliminary inquiry and trial. The Court of Appeal set out some general guidelines on how to reconcile the religious rights claim with the rights of the accused. The Court of Appeal confirmed the subjective nature of religious beliefs and practice and accepted that determining N.S.'s religious rights could be done by requiring N.S. to provide evidence, through her own testimony, concerning the nature of her beliefs, and to answer questions about whether those beliefs are consistent with current practices. The Court also noted that "past perfection is not a prerequisite to the exercise of one's constitutional right to freedom of religion"¹²⁶. However, the Court did not draw a conclusion on whether N.S. should be required to remove her niqab while giving evidence in the criminal trial process, preferring instead to leave the decision to the judge actually hearing the case. N.S. has appealed the decision to the Supreme Court of Canada arguing that the Court of Appeal should have confirmed her right to wear her religious covering because doing so would not interfere with the rights of the accused to a fair trial. The Supreme Court heard the appeal on December 8, 2011 and a decision is pending. The case is discussed further in the section dealing with **Reconciling Creed and other Rights**.

Finally, an RCMP cadet was permitted to wear a religious pendant despite a general rule prohibiting jewelry during physical training. However, the instructor announced the exemption to the entire class which resulted in his being questioned by his troop mates about his religion. The Tribunal found that singling him out in this way made the cadet feel he was being labeled as "different" from the rest of the troop therefore adverse treatment based on religion was established.¹²⁷

iii Photos and Biometrics

¹²⁵ *Supra* note 37.

¹²⁶ *Ibid.* at para. 68.

¹²⁷ *Tahmouropour v. Royal Canadian Mounted Police* (2008), 64 C.H.R.R. D/448, 2008 CHRT 10. The majority of the allegations concerned more serious and systemic claims of discrimination against minority candidates.

Religious beliefs that do not permit photographs have presented challenges in the context of universal photo requirements. The Supreme Court of Canada recently dealt with this situation in the context of a freedom of religion claim made by the Hutterian Brethren of Wilson Colony.

Before 2003, Alberta accommodated those who objected to having their photo taken on religious grounds by issuing a special Condition Code G licence. Members of the Hutterian Brethren colonies who believe that the Second Commandment prohibits them from having their photograph willingly taken were able to hold these licences and were therefore permitted to drive. However, in 2003, the province adopted new regulations which made the photo requirement universal. The photos would be stored in the province's facial recognition data bank. The purpose of this was to reduce the risk of driver's licences being used for identity theft, a growing problem.

The Supreme Court accepted that the universal photo requirement violated freedom of religion.¹²⁸ However, the majority of the Court concluded that the requirement was justified under s. 1 of the *Charter*. First, the goal of setting up a system that minimizes identity theft associated with licences is a pressing and substantial objective. Second, the majority ruled that the universal photo requirement was rationally connected to the government's objective and that it minimally impaired the *Charter* right. Without photos of all licence holders in the data bank, the risk of fraud would be increased and this would significantly compromise the government's goal. Third, the negative impact on freedom of religion for those in the Colony who wished to hold a driver's licences did not outweigh the benefits associated with the photo requirement: "it is impossible to conclude that Colony members who wish to obtain licences have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification bank. Driving automobiles on a highway is not a right, but a privilege." While colony members may have to make alternative arrangements for highway transport and this would result in financial cost and a loss of self-sufficiency, it does not seriously affect their rights to pursue their religion.

The majority decision rejected the s. 15 challenge on the basis that even if the regulation created a distinction based on religion, "it arises not from any demeaning stereotype but from a neutral and rationally defensive policy choice."

¹²⁸ The Attorney General of Alberta conceded that the Colony held sincere religious beliefs that conflict with the photo requirement. However, it did not concede that the photo requirement interfered with the religious rights in a manner that is more than trivial or insubstantial. The majority decision noted that in order for such a determination to be made, it would need to be shown that the claimants' "religious beliefs or conduct might reasonably or actually be threatened" by the universal photo requirement. Evidence of a state-imposed cost or burden would not suffice; there would need to be evidence that such a burden was "capable of interfering with religious belief or practice". However, as the courts below seem to have proceeded on the assumption that this requirement was met. Given this, the majority said nothing about whether, in its view, the requirement was met and instead focused on the s. 1 analysis. As noted earlier in this document, this suggests that the issue of what constitutes a non-trivial and substantial interference with creed rights continues to be a live one.

In contrast to the Hutterian Brethern decision, in *407 ETR Concession*¹²⁹, a labour arbitrator found that Pentacostal employees' religious objection to biometric hand scanning for company security purposes could have been accommodated without undue hardship. The company failed in its procedural duty to accommodate as it did not do enough to explore what it could do to accommodate the grievors. With regard to the substantive accommodation, the arbitrator rejected the company's argument that it would have to scrap biometric scanning if the grievors were to be exempted on religious grounds:

The Company's concern is that, if some are excused from having to use the scanner, the integrity of the information it wishes to gather will be undermined, and it will not be worth investing in a system which works only partially. This concern will depend on the number of employees who must be accommodated outside of the system. In my view, accommodating the three Grievors outside of the system, with the Company's other employees being part of the system, will have no significant impact on the efficiency of the new system. I recognize, though, that, if the Company must accommodate more than a small number of religious objectors, the viability of the biometric scanning system becomes questionable. However, it would be speculative and beyond my jurisdiction in this case to suggest what that number might be, given that the parties do not know how many employees will object, how many of them are sincere in their belief, how many of them can be accommodated within the system (e.g. by using the left hand, or a glove, or the smart card), and what numbers can be accommodated outside of the system.¹³⁰

This illustrates that each case of this nature turns on its own facts. The degree to which religious exemptions interfere with the integrity of a system that uses photos or biometrics to identify individuals will determine whether religious exemptions will be allowed.

iv. Other forms of accommodation

An employer was found to have breached the Newfoundland *Human Rights Code* when it suspended an employee who refused to sell tickets to a social event at which alcohol would be sold for religious reasons; *Warford v. Carbonear General Hospital*.¹³¹ Mr. Warford was an active member of the Pentecostal church and asserted that a tenet of the Pentecostal faith is that its members must abstain from the consumption of alcohol and must not encourage its use in any way. Once the employer learned of his religious objection, rather than suspending the employee, it should have accommodated him by having someone else sell the tickets.

¹²⁹ *407 ETR Concession Company v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada*, 2007 CanLII 1857 (ON LA).

¹³⁰ At para. 177.

¹³¹ (1988), 9 C.H.R.R. D/4947 (Nfld. Comm. Inq.).

Similarly, in *Jones v. C.H.E. Pharmacy Inc.*¹³² a Jehovah's Witness employee asserted that putting out Christmas decorations was contrary to his faith. Knowing this, the employer asked him to set up a poinsettia display in the store. When he refused, the employer told him that in order to keep his job, he must comply. There was no evidence that the employer could not accommodate the employee; in fact it had done so in the past. However, rather than accommodate the employee's religious beliefs, the employer effectively required the employee to choose between his faith and his employment. This was discriminatory. The respondent was ordered to pay the employee damages for lost wages and benefits and for injury to his dignity and self-respect.

A Labour Arbitration board considered the grievance of an Ontario nurse who, after becoming a Jehovah's Witness, would no longer perform certain steps in the transfusion of blood and as a result was dismissed by her employer.¹³³ The nurse worked in the intensive care unit at Peterborough Civic Hospital and following intensive Bible study concluded that she could no longer "hang blood" for a blood transfusion.¹³⁴ She made her own arrangements with other nurses to assist her complete this step in the blood transfusion process and only alerted her employer to her religious concerns after she ran into difficulty having other nurses do so. After learning that she would not hang blood, the employer dismissed her, arguing that this was essential to a nurse's duties.

The majority of the board found that the employer should have accommodated, rather than dismissing, the nurse. It was not necessary that every nurse in the hospital be able to hang blood (in fact about 15 percent were not qualified to do so). As it was a requirement that two nurses attend a patient who required blood (due to the strict requirement that at least two people check the blood unit against various records), there was always someone else present who could hang the blood. However, the board also found that the employer was not required to allow the nurse to remain in her position in the intensive care unit (or to work in the emergency room) as a requirement that all nurses in these units be able to hang blood was reasonably necessary for the efficient operation of these units. However, she should have been offered a position elsewhere in the hospital.¹³⁵

¹³² (2001), 39 C.H.R.R. D/93, 2001 BCHRT 1.

¹³³ *Re Peterborough Civic Hospital and Ontario Nurses' Association*, [1981] O.L.A.A. No. 97, 3 L.A.C. (3d) 21 [QL].

¹³⁴ She was willing to perform many other aspects of the procedure: record the patient's vital signs, insert the transfusion needle, run saline into the vein, requisition the blood from the laboratory and bring it to the patient's room, and do the necessary paperwork and verification. She was not willing to "hang the blood" which consisted of opening the blood bag, sticking the transfusion tube into the bag, closing the saline solution valve, opening the blood valve and hooking the bag to the transfusion stand. Hanging the blood took less than 30 seconds.

¹³⁵ The Supreme Court of Canada has also dealt with religious objections of Jehovah's Witnesses to potentially life-saving blood transfusions in a case dealing with parents' refusal of a transfusion for their infant child and another which considered at what age a child is mature enough to reject a blood transfusion. These decisions are discussed in the section **RECONCLING CREED AND OTHER RIGHTS**.

Although not a case dealing with the extent of the duty to accommodate an employee's religious objections to abortion, in *C. v. A.*¹³⁶ (discussed earlier), the Tribunal acknowledged that a family medical clinic had accommodated a Christian employee's pro-life beliefs by not requiring her to refer patients for abortions. Abortions referrals were processed by other individuals without compromising patient care.

An employer did not have a duty to accommodate an employee's sincerely held belief that he must "preach, teach, baptize and make disciples" in the workplace. In *Friesen v. Fisher Bay Seafood*¹³⁷ an employee, who was a supervisor, was eventually terminated when he would not stop preaching to his co-workers at work. The employer had received repeated complaints from his co-workers and had to move employees to other shifts so they would not have to work with Mr. Friesen. The termination was *prima facie* discrimination because the respondents admit that the only reason Mr. Friesen lost his job was because he refused to stop preaching in the workplace. Nevertheless, the Tribunal found that the requirement that he not preach was a *bona fide* one. The other employees had a right to work in an environment where they were not subject to religious preaching of their superior. The employer took every step it could to accommodate Mr. Friesen, namely explaining to Mr. Friesen that he had to respect the rights of others and allowing him to preach during his lunch hour if his fellow workers agreed. When he would not stop preaching, the employer reached the point of undue hardship and was justified in terminating him.

RECONCILING CREED AND OTHER RIGHTS

Several decisions have dealt with creed rights of one individual or group that have come up against different human rights or *Charter* rights including the right to make full answer and defence in a criminal trial and equality rights including the right to be free from discrimination based on sexual orientation, race and gender. Religious rights have also been considered in relation to the rights of children, in particular in situations where parents have refused potentially life-saving blood transfusions because of their religious beliefs.

In dealing with competing rights claims, the Supreme Court of Canada has confirmed that there is no hierarchy of *Charter* rights. All have equal status and no right is more important than the others.¹³⁸ At the same time, no *Charter* right is absolute. Every right is inherently limited by the rights and freedom of others.¹³⁹ Therefore, if rights do come into conflict, *Charter* principles require a 'reconciliation' that fully respects the importance of both sets of rights so that each is given full force and effect within the relevant context, to the greatest extent possible.¹⁴⁰

¹³⁶ *Supra* note 72.

¹³⁷ *Supra* note 17.

¹³⁸ *Reference re Same-Sex Marriage*, *supra* note 88; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 877; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 61.

¹³⁹ *Mills*, *ibid.*; *Trinity Western*, *supra* note 54 at para. 29. *S.L.*, *supra* note 41.

¹⁴⁰ *Mills*, *ibid.*; *Dagenais*, *supra* note 139.

It is also very important to note that the reconciliation of competing rights cannot be addressed in the abstract. *Charter* rights do not exist in a vacuum and their meaning and content are dependent on context. *Charter* rights must be examined in a contextual manner in order to settle conflicts between them. Context determines where the line should be drawn between competing rights in a particular case.¹⁴¹

When dealing with potentially competing rights, courts will first determine the rights that are being asserted and are actually engaged in the social and factual situation before them. In many cases the engagement of the right is self-evident. But in other cases it may be less clear that a right is triggered. In such circumstances, it may be necessary to conduct a further inquiry and hear evidence to establish that the claim falls within the scope of the right as defined by the courts.¹⁴²

In the context of religious rights, many apparent rights conflicts have resolved by asking whether the claim actually falls within the scope of the right in the particular context. In other words, proper scoping or delineation of the boundaries of each right may reveal that there is no actual intrusion of one right into another.

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

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

In *Trinity Western*, , the Supreme Court of Canada considered whether graduates of a private Christian university, which required its students to abide by certain “community

¹⁴¹ *Mills, ibid.* at paras. 17, 21 and 61; *Reference re Same-Sex Marriage, supra* note 88 at paras. 50 and 52; The Honourable Justice Franck Iacobucci, “Reconciling Rights: the Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 S.C.L.R. (2d) 137 at pages 140, 141 and 159; *R. v. N.S.*, *supra* note 37 at para. 48.

¹⁴² In *Bothwell v. Ontario (Minister of Transportation)*, *supra* note 45, the Court concluded that the claimant had failed to demonstrate that his objection to a digital driver’s licence photo was related to his religious beliefs. The evidence indicated that the claimant had raised a number of privacy, rather than religious, concerns and that his actions were inconsistent with his asserted religious beliefs.

standards” which among other things prohibited “homosexual activity”, should be licensed by the British Columbia College of Teachers to teach in the public school system. The College of Teachers argued that teaching programs must be offered in an environment that reflects human rights values and that an institution that wants to train teachers for entry into the public school system must demonstrate that it will provide a setting that properly prepares future teachers for the diversity of students found in a public school setting. In other words, the College argued that it was justifiably concerned about a risk that as teachers, graduates of Trinity Western’s program would discriminate on the basis of sexual orientation.

The Supreme Court found that this was a case that could be resolved through “the proper delineation of the rights and values involved.” Properly defining the scope of the rights avoided a true conflict. The Court found that the proper place to draw a line in this case was between the freedom to hold beliefs versus conduct based on those beliefs. There was no concrete evidence that holding beliefs about “homosexuality” would result in actions by graduates of Trinity Western that would be discriminatory.

Where the scoping exercise does not resolve the conflict, it is necessary to determine the extent of the interference with the rights in question. If an interference with a right is minor or trivial, the right is not likely to receive protection. There is no conflict unless there is a sufficient interference with, burden or intrusion on a right, including a religious right.¹⁴³ In *Bruker v. Marcovitz*, the Supreme Court of Canada considered a claim by a husband that an agreement he signed agreeing to give a religious divorce, called a “*get*”, to his wife could not be enforced by the courts as doing so would violate his religious rights. The majority of the Court noted that while courts would be reluctant to interfere in “strictly spiritual or doctrinal” religious matters, they will intervene when property or civil rights are engaged. They went on to question the husband’s religious rights claim stating they were having “difficulty discerning” how requiring him to comply with his agreement to give a *get* could conflict with a sincerely held religious belief and have non-trivial consequences for him. However, even if he could establish this, his claim of a religious right had to be balanced against competing values or harm that would result and the husband had “little to put on the scales”. He had freely entered into an agreement which he later claimed violated his rights and to allow him to back out of it would offend the public interest which included protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations.

In *Young v. Young*¹⁴⁴, the Supreme Court dealt with another marital breakdown that had religious implications. After a difficult separation, the mother was awarded custody of the couple’s three children and the father was granted access. However, as a result of concerns about the effects of his religious activities on the children, a judge ordered the

¹⁴³ *Syndicat Northcrest v. Amselem*, *supra* note 15 at para. 84; *Bruker v. Marcovitz*, *supra* note 99.

¹⁴⁴ [1993], 4 S.C.R. 3. In a case decided at the same time, the Court upheld a prohibition on the access parent “continually” indoctrinating the child with the Jehovah’s Witness religion as a majority of the judges accepted the trial judge’s view that this was necessary in the best interests of the child; *P.(D.) v. S. (C.)*, [1993] 4 S.C.R. 141.

father not to discuss the Jehovah's Witness religion with the children, take them to any religious services or meetings, or expose them to religious discussions with third parties without the mother's consent. The Supreme Court was asked to decide whether sections of the *Divorce Act* that required judges to take into account "the best interests of the child" when deciding on custody and access violated the father's freedom of expression, freedom of religion and equality rights. While the restriction was struck down by the Court, primarily on the basis that in this case it was not shown to be in the best interests of the children, the majority of the Court found that the right to freedom of religion did not guarantee religious activities that would not be in the best interests of the children. In effect, if religious practices were harmful to a child, the parent's right had to give way to the best interests of the child.

If there is substantial interference with the rights in question, then the court must shift to a reconciliation exercise. In a *Charter* case, this is done under s. 1. In a case that does not involve a *Charter* challenge, this balancing may also happen, having regard to the general approach and principles set out in under s. 1. In *Ross v. New Brunswick School District No. 15*,¹⁴⁵ the Supreme Court of Canada considered *Malcolm Ross'* claim that his religious rights were violated by a human rights Board of Inquiry decision that concluded that Ross' off duty anti-Semitic comments undermined his ability to fulfill his functions as a teacher. Ross had argued that his religious views were exhibited through his writings, statements and publications, Ross' freedom of religion had also been infringed. The Court noted that while freedom of religion ensures that every individual must be free to hold and to manifest beliefs without State interference, the right:

is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.¹⁴⁶

Nevertheless, the court noted that rather than formulating internal limits to the freedom of religion guarantee, a broader interpretation of the right is to be preferred with any reconciliation of conflicts left to the s. 1 analysis as set out in *R. v. Oakes*.¹⁴⁷ Balancing the rights of the students to an educational environment free from discrimination against Ross' rights to freedom of religion and freedom of expression, the Supreme Court found that the limitation imposed by the Board of Inquiry decision on Ross' ability to express his anti-Semitic views, was justified in a free and democratic society. In reaching this conclusion the court noted this about Ross' religious rights:

In relation to freedom of religion, any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a) -- a basis that guarantees that every individual is free

¹⁴⁵ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

¹⁴⁶ *Ibid.* at para. 72.

¹⁴⁷ [1986] 1 S.C.R. 103.

to hold and to manifest the beliefs dictated by one's conscience. The respondent's religious views serve to deny Jews respect for dignity and equality said to be among the fundamental guiding values of a court undertaking a s. 1 analysis. Where the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate.¹⁴⁸

In *B. (R.) v. Children's Aid Society*¹⁴⁹ a majority of Supreme Court of Canada judges concluded that the parents' decision to refuse a potentially life-saving blood transfusion for their baby was protected by freedom of religion. Using a process under the *Child Welfare Act*, the child had been made a temporary ward of the Children's Aid Society which had consented to the blood transfusion. However, despite the serious contravention of the parent's s. 2(a) rights, the infringement was justified under s. 1 of the *Charter*. The state interest in protecting children at risk was balanced against the parents' rights and found, in this case, to outweigh them.¹⁵⁰

Courts have said that a contextual approach to balancing interests under s. 1 requires a consideration of the extent to which the "core" or fundamental aspect of a right is engaged. Where the conduct is at the "periphery" of a right, it is more likely to be required to give way to a right whose core values are engaged.¹⁵¹

In a recent decision the Saskatchewan Court of Appeal balanced the religious rights of civil marriage commissioners against s. 15 equality rights under s. 1 of the *Charter*; *Marriage Commissioners Appointed Under the Marriage Act (Re)*.¹⁵² In two separate decisions, all five judges of the Court found that proposed amendments to Saskatchewan's *The Marriage Act, 1995*, which would have allowed individual marriage commissioners to refuse to conduct a marriage ceremony if doing so would be contrary to their religious beliefs, violated the equality rights provision (s. 15) of the *Charter*. Both decisions then balanced the right to be free from discrimination on the basis of sexual orientation against the religious rights of the marriage commissioners under s. 1 of the *Charter* and concluded, for slightly different reasons, that the equality rights infringement could not be justified despite the goal of addressing the religious objections of the marriage commissioners.

¹⁴⁸ *Ross, supra* note 148 at para. 94.

¹⁴⁹ [1995] 1 S.C.R. 315.

¹⁵⁰ In a recent decision, *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 the Supreme Court considered the right of a 14 year old Jehovah's Witness to refuse a potentially life saving blood transfusion. The provisions of the Manitoba *Child and Family Services Act*, which had been relied on by the Director of Child and Family Services to apprehend the girl as a child in need of protection and to seek a court order to authorize the blood transfusions, were constitutional. The "best interests" of the child test in the legislation should be interpreted in a way that grants increasing deference to a child's religious wishes as the child's maturity increases. This is a proportionate response to balancing religious rights against the state's objectives in protecting children.

¹⁵¹ *Ross v. New Brunswick School District No. 15, supra* note 148 ; *Brockie v. Brillinger (No. 2)* (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.) at paras. 51-56.

¹⁵² 2011 SKCA 3 (CanLII).

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

In *Smith v. Knights of Columbus*,¹⁵³ a British Columbia Human Rights Tribunal dealt with a claim of discrimination arising from a Catholic men’s organization’s refusal to permit a lesbian couple to hold their wedding reception in their hall. The hall was owned by the Catholic Church and operated by the Knights of Columbus. The hall was rented out to the public for a variety of events such as birthdays, anniversaries, AA meetings and a mother and tot program.

The Knights argued that they had a reasonable and *bona fide* justification for cancelling the contract with the couple and, that they were also entitled to the protection of the statutory defence in s. 41 of the British Columbia *Human Rights Code*. While the Tribunal rejected the application of the s. 41 defence (see the section on **Statutory Defences** for a discussion of this aspect of the decision), it accepted that the hall that could not be used for an event that was contrary to core Catholic beliefs. The Tribunal described this as a “spectrum analysis” meaning it had to decide where on a spectrum to balance the religious rights of the Knights and the equality rights of the lesbian couple. The Tribunal confirmed that the further an act is from the core religious beliefs of the person denying the service, the less likely the act will be found to be justified.

The Panel determined that on the facts of this case, the Knights could not be compelled to act in a manner that is contrary to the core of their religious beliefs. Although they were not being asked to participate in the solemnization of a same-sex marriage, renting the hall for the celebration of the marriage would have required them to “indirectly condone” an act that is contrary to their core religious beliefs. However, the Tribunal’s analysis did not end there. It found that in the face of the steps that had already been taken to rent the hall to the complainants, the duty to accommodate the rights of the complainants was triggered. The Knights should have searched for a workable solution that would have lessened the negative effect on the complainants’ rights. In particular, before contacting the complainants to cancel the contract, they should have taken additional steps that would have recognized the inherent dignity of the complainants such as meeting with the complainants to explain the situation, formally apologizing, immediately offering to reimburse the complainants for any

¹⁵³ (2005), 55 C.H.R.R. D/10, 2005 BCHRT 544.

expenses as a result of the cancellation of the contract and perhaps offering assistance in finding another solution. In essence, the Tribunal was searching for a compromise position whereby the Knights' religious rights were preserved but the impact on the dignity of the complainants of suddenly being told they could not rent the hall, after already having signed the contract and sent out the wedding invitations, was acknowledged.

The case of *Brockie v. Brillinger* dealt with a human rights complaint filed by a gay man who went to Mr. Brockie's company to have letterhead and business cards printed on behalf of The Gay and Lesbian Archives. Mr. Brockie refused to provide the services on the basis that serving the Gay and Lesbian Archives would conflict with his religious beliefs. A human rights Board of Inquiry found that Mr. Brockie had discriminated against Mr. Brillinger and the Archives on the basis of sexual orientation. The Board ordered Mr. Brockie to provide printing services to gays and lesbians and gay and lesbian organizations and to pay \$5000 in damages.

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

In deciding whether the Board's order unduly limited the rights or whether it could be justified as a reasonable limit under s. 1 of the *Charter*, the Court noted that the further an activity is from the "core" elements of freedom of religion, the more likely the activity is to impact on others and the less deserving the activity is of protection. The commercial printing services provided by Mr. Brockie were found to be at the "periphery" of activities protected by freedom of religion. Limits on the exercise of his right were therefore justified to prevent discrimination on the basis of sexual orientation. However, the court did leave open the possibility of a different result in a different context, for example where the content of the materials being printed might more directly conflict with the core elements of Mr. Brockie's beliefs.¹⁵⁴

In another case dealing with religious rights and sexual orientation in the context of secular public education, the Supreme Court of Canada considered a school board's decision not to approve three books showing same-sex parented families as supplementary resources for use in teaching the family life curriculum; *Chamberlain v. Surrey School District No. 36*¹⁵⁵. The Board's decision was based on some parents' religious objections. The majority of the Court noted that British Columbia's *School Act* required secularism and non-discrimination and found that the Board's decision was unreasonable in the circumstances. The decision noted while religious concerns of some parents could be considered, they could not be used to deny equal recognition

¹⁵⁴ The Court modified the Board's order to reflect this by adding the following to the Board's order that Mr. Brockie must provide printing services to gays and lesbians, and their organizations: "Provided that this order shall not require Mr. Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed."

¹⁵⁵ *Supra* note 86.

and respect to other members of the community. The majority decision emphasized the right to hold religious views, including the view that the practices of others are undesirable. However, if a school is to function in an atmosphere of tolerance and respect, these views could not become the basis of school policy. It noted that the Board gave no consideration to the needs of children of same-sex parented families or the relevance of the material to the curriculum's objectives.

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

If there is a substantial interference with the rights in question, one right may ultimately have to give way to the other, or both rights may have to be compromised. Nevertheless, decision-makers have said that measures should be adopted that lessen the impact on rights. When rights remain in conflict it may not be necessary for one right to be completely overridden by the other. Rather a search for "constructive compromises" is preferred that will still allow maximum enjoyment of each right as is possible in the circumstances.¹⁵⁶

For example, in the N.S. decision the Ontario Court of Appeal noted that measures might be available to reduce any potential harm to both N.S.'s right to exercise her religious beliefs and the accused's rights to fully defend themselves. The Court offered several examples including use of an all female court staff and a female judge, and closing the court to all male persons other than the accused and counsel should N.S. be required to remove her niqab. This case is under appeal to the Supreme Court of Canada.

Finally, in *Dallaire v. Les Chevaliers de Colomb*,¹⁵⁷ the HRTO found that a woman who objected to the Catholic Church's beliefs on abortion could not use the *Code* to challenge an inscription on a monument on Church property. In interpreting the meaning of a "service" or a "facility" under the Code, the HRTO considered the right of the Catholic church to express its freedom of religion. The HRTO concluded "that the manifestation of religious belief in an inscription displayed on church property is not a "service" or a "facility" within the meaning of s. 1 of the *Code*.

The Commission has developed a case law review looking at how courts and tribunals have dealt with a variety of competing rights issues, not just those involving creed (available online at www.ohrc.on.ca). In January 2012, it approved a *Policy on Competing Human Rights* which will help organizations and individuals address difficult situations involving competing rights.

STATUTORY DEFENCES

¹⁵⁶ *R. v. N.S.*, *supra* note 37 at para. 84.

¹⁵⁷ 2011 HRTO 639 (CanLII).

The Code contains several defences for actions that would, if it were not for the defence, violate the *Code*. Some of these are meant to protect creed groups, in particular, from allegations of discrimination (s. 18.1 and 19 of the *Code*), while others can be relied on by a number of different organizations, including religious organizations, to argue that they have not violated the *Code*.

Section 18.1 was included in the *Code* in 2005, likely in response to the discussion concerning the rights of religious officials to refuse to solemnize same-sex marriages in the Supreme Court of Canada's *Reference re Same-Sex Marriage* decision. It states:

Solemnization of Marriage by Religious Officials

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

- (a) the person's religious beliefs; or
- (b) the doctrines, rites, usages or customs of the religious body to which the person belongs.

Same

- (2) Nothing in subsection (1) limits the application of section 18.

Definition

- (3) In this section,

“sacred place” includes a place of worship and any ancillary or accessory facilities.

So far, there have been no decisions interpreting this provision (but see the *Knights of Columbus* decision of the British Columbia Human Rights Tribunal discussed in the section **RECONCILING CREED AND OTHER RIGHTS**).

This section only protects religious officials and only applies to sacred places. Therefore, civil marriage officials would not be able to rely on this defence (see also the *Marriage Commissioners Appointed Under the Marriage Act (Re)* case also discussed in the section **RECONCILING CREED AND OTHER RIGHTS**).

Another *Code* defence that expressly deals with religious rights recognizes the rights and privileges of separate schools under the *Constitution* and the *Education Act*.

Separate school rights preserved

19. (1) This Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*. R.S.O. 1990, c. H.19, s. 19 (1).

Duties of teachers

(2) This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers. R.S.O. 1990, c. H.19, s. 19 (2).

While there do not appear to be any human rights tribunal decisions interpreting this particular provision, several decisions have dealt with aspects of separate school rights.

A significant decision for the funding of Catholic Schools in Ontario is *Adler v. Ontario*¹⁵⁸. The Supreme Court of Canada rejected the claim brought by a group of parents who attended private religious schools that were not government funded that this preferential funding of Catholic schools infringed their religious rights and equality rights under sections 2(a) and 15 of the *Charter*. The Court confirmed that because of section 93 of the *Constitution Act, 1867*, Ontario is required to fund Roman Catholic separate schools. This special status is the product of a historical compromise crucial to Confederation.¹⁵⁹

Denominational school rights enjoyed at confederation have been found to include the right to prefer Catholic teachers for employment.¹⁶⁰

In another decision, a Catholic school board was not able to rely on s. 2(a) of the *Charter* and section 93 of the *Constitution Act, 1867* to support its decision not to allow Marc Hall, a gay teen, to bring his same-sex partner to his high school prom. Mr. Hall successfully applied to an Ontario court for an injunction restraining the board from preventing him from attending the prom with his boyfriend.¹⁶¹

In applying the test for an injunction, the Court acknowledged that the protections for Catholic schools in s. 93 of the *Constitution Act*. However, the Court also stated that this does not mean that separate schools are exempt from the *Charter*. With regard to whether s. 93 of the *Constitution Act*¹⁶² could be relied on to justify violations of Mr. Hall's equality rights, the Court noted that s. 93 does not mean that the *Charter* does not apply to separate schools. The courts must strike a balance on a case-by-case basis

¹⁵⁸ [1996], 3 S.C.R. 609.

¹⁵⁹ A detailed review of case law dealing with separate school rights is beyond the scope of this document.

¹⁶⁰ *Daly, et al v. Attorney General of Ontario*, 1999 CanLII 3715 (ON CA).

¹⁶¹ *Hall (Litigation guardian of) v. Powers*, 2002 CanLII 49475 (ON SC).

¹⁶² Section 93 was intended to preserve and protect denominational schools and was a fundamental part of the "Confederation compromise."

between conduct essential to the proper functioning of a Catholic school and conduct which contravenes *Charter* rights such as equality under s. 15. In this case, the question is whether allowing a gay student to attend his prom with his boyfriend prejudicially affects rights with respect to denominational school under s. 93 of the *Constitution Act*?

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

Ultimately, the Court concluded that Mr. Hall's equality rights would be more severely impaired if he lost out on the opportunity to attend his prom. On the other hand, an injunction would not compel or restrain teachings within the school or affect Catholic beliefs. As an injunction would restrain conduct and not beliefs it would not impair the defendants' freedom of religion. While the injunction was granted and Mr. Hall was allowed to attend the prom with his same-sex partner, the case was discontinued and never proceeded to trial for a final decision.¹⁶³

Sections 18 and 24 of the Code also allow religious and other organizations that meet the requirements of these sections to give preference in membership and employment in certain circumstances. While these provisions are defences to actions that would otherwise be a violation of the *Code*, they also recognize the rights of religious groups to give preference in certain circumstances to persons who share the same religious beliefs and practices. As noted by the Supreme Court of Canada, these types of provisions should be treated not only as rights-limiting provisions, which require a narrow interpretation, but should also be seen as conferring and protecting rights; namely the right to associate based on religious grounds, in a defined set of circumstances.¹⁶⁴

Sections 18 and 24 state:

Special interest organizations

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

¹⁶³ *Hall v. Durham Catholic District School Board*, 2005 CanLII 23121 (ON SC).

¹⁶⁴ *Caldwell v. Stewart*, [1984] 2 S.C.R. 603.

Special employment

24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

- (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

In *Caldwell v. Stewart*,¹⁶⁵ the Supreme Court of Canada concluded that a Catholic school could terminate the employment of a Catholic teacher who married a divorced man in a civil ceremony contrary to the Church's rules. The Court accepted that the respondent school had the "right" to preserve the religious basis of the school by employing teachers who accept and practice the teachings of the Church. Therefore, the requirement of religious conformity by Catholic teachers was found to be a legitimate and *bona fide* job qualification. As well, the school could rely on section 22 of the British Columbia *Human Rights Code*, which was similar to s. 18 of the Ontario *Code*, to grant preference to Catholic teachers who accept the practice and teachings of the Church.

The BC Human Rights Tribunal has found that a provision similar to Ontario's s. 18 allows a religious organization/temple to select its members based on a common race, religion, ancestry and place of origin; *Sahota and Shergill v. Shri Guru Ravidass Sabha Temple*.¹⁶⁶ Two complainants alleged that they were not allowed to become members of the Sabha because they are not from the Ravidassi (or of the Chamar caste) but are of a higher Jat caste. The evidence before the Tribunal suggested that the Chamar or Ravidassi caste was considered the lowest caste in Indian society and was discriminated against, particularly in Sikh temples, by the Jat caste which enjoyed a higher social status. The respondent argued that the Sabha was created to promote the interests of the Ravidassia community and that to promote the interests of that distinctive community it was necessary to restrict membership to members of that community. In particular, it would be inappropriate to be required to admit members of higher castes that had historically discriminated against the ancestors of the Ravidassia community. On the other hand, the complainants argued that while the temple could restrict membership to those with the same religious views, it should not be able to do so based on caste, race or economic standing. The Tribunal found that the Sabha was not offering a service "customarily available to the public" as required by the BC *Code*. However, even if it were, the temple is a non-profit religious and cultural organization whose primary purpose is to promote the interest of persons in the Ravidassia

¹⁶⁵ [1984] 2 S.C.R. 603.

¹⁶⁶ *Supra*, note 102.

community which is a group characterized by a common race, religion, ancestry and place of origin. As such, based on a statutory defence, the Sabha could grant preference to Ravidassia or members of the Chamar caste without contravening the BC Code.

The special employment defence in s. 24(1)(a) of the Ontario Code was considered in *Ontario Human Rights Commission v. Christian Horizons*.¹⁶⁷ In that case, Christian Horizons, an Evangelical Christian organization that operates residential homes and camps for persons with developmental disabilities argued that s. 24(1)(a) protected it from a claim of discrimination on the basis of sexual orientation by an employee.

Connie Heintz, a support worker in a community living residence operated by Christian Horizons, had signed a Lifestyle and Morality Statement required by Christian Horizons. The statement identified, among other things, “homosexual relationships” as inappropriate behaviour rejected by Christian Horizons. Several years after beginning her employment, Ms Heintz came to an understanding of her sexual orientation and entered into a same-sex relationship. When this became known to the employer, she was offered counseling to assist her to comply with the Lifestyle and Morality Statement prohibiting “homosexuality”. Ms Heintz alleged that after that, she was unfairly disciplined concerning her attitude and performance and exposed to a poisoned work environment.

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

The first requirement was easily satisfied. With regard to the second, the HRTO had found that Christian Horizons was not primarily serving persons identified by their creed because its main mission was to provide care and support for persons with developmental disabilities, regardless of their creed. However, the Divisional Court overturned that finding. It followed the Supreme Court of Canada decision in *Caldwell* saying that s. 24(1)(a) should not be interpreted narrowly because while it limits some rights, it also confers a right to associate on certain groups so they can join together to express their views and carry out their joint activities. In interpreting the section, the guarantee of freedom of religion for members of religious organizations was also important: “An approach to s. 24(1)(a) that takes into account, in the determination of the primary activity of a religious organization, the perspective and purpose of the organization is consistent with the guarantee of freedom of religion.”¹⁶⁸

¹⁶⁷ 2010 ONSC 2105 (CanLII).

¹⁶⁸ *Ibid.* at para. 71.

The Divisional Court went on to find that the charitable work of Christian Horizons was a religious activity through which its members lived out their Christian faith and carried out their Christian ministry. Therefore, the organization was primarily engaged serving the interests of its members and its clients with developmental disabilities experienced the related benefits.

However, on the third requirement of s. 24(1)(a), the reasonable and *bona fide* occupational requirement component, the Divisional Court agreed with the HRTO's finding that Christian Horizons had not shown that complying with the Lifestyle and Morality Statement, including the ban on same-sex relationships, was necessary to perform the essential duties of a support worker. Support workers were not actively engaged in promoting an Evangelical Christian way of life. In fact, residents were not required to be Evangelical Christians. As well, the prohibition on same-sex relationships was not required to effectively perform the job tasks of a support worker which included responsibilities such as cooking, cleaning and helping residents to eat. Therefore, unlike *Caldwell*, where the role of the teacher was to instill Catholic beliefs in the students through teaching and example, here there was nothing in the nature of the employment which would make it a necessary qualification of the job that support workers refrain from engaging in same-sex relationships. Therefore, Christian Horizons failed to establish the third element of the s. 24(1)(a) defence and discrimination was found.¹⁶⁹

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

Based on the above decisions, it is clear that statutory defences in the Code play an important role in recognizing some creed rights. As such, they are not to be interpreted overly narrowly. Nevertheless, the requirements of the defence must apply in the circumstances of the case. In particular, the religious organization seeking to rely on the defence must be able to demonstrate, through objective evidence, that the actions

¹⁶⁹ See however *Schroen v. Steinbach Bible College* (1999), 35 C.H.R.R. D/1 in which the Manitoba Board of Adjudication dismissed a complaint by a woman who was terminated from her employment for religious reasons. A woman who was hired as an accounting clerk for the Mennonite College was dismissed two days later when College officials learned that she was Mormon and not a member of the Mennonite faith. The Board found that as the College functions as a tightly knit community with all staff being expected to interact with students, attend prayer meetings and College functions, invite students to their homes for Bible study sessions and be available to discuss faith matters with students, acceptance and observance of the Mennonite faith was a *bona fide* and reasonable occupational requirement.

that have a discriminatory impact on others are required for the enjoyment of its religious right.

CONCLUSION

The law related to freedom of religion and the right to be free from discrimination on the basis of creed continues to evolve. The Supreme Court of Canada is set to deliver several decisions that may have significant implications for those who follow this area of human rights. A review of applications alleging discrimination on the basis of creed filed at the HRTO suggests that it is dealing with unique and complex claims that raise novel legal issues. No doubt, decision-makers will be called upon to consider the outer limits of the definition of creed and what is protected under religion and creed, as well as to rule on different types of accommodation issues that arise in the context of creed rights. Differing perspectives on what to do when creed rights bump up against other rights will continue to inform public debate on these challenging issues.

This case law review sets the stage for an ongoing dialogue on how the law impacts on the interpretation of creed rights under the *Code*. This discussion will ultimately lead to an update to the creed policy that is grounded in the case law. The Commission will continue to refine its legal analysis based on legal developments and ongoing research and discussion. To this end, the Commission welcomes any feedback on this document and its analysis of the cases and issues in it. Comments can be sent to:

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