TWO ERRORS IN RELATION TO RESPECTING RELIGIOUS RIGHTS: DRIVING A WEDGE BETWEEN RELIGION AND ETHICS/MORALS AND TREATING ALL KINDS OF RELIGIOUS EMPLOYERS THE SAME

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ABSTRACT

This article argues that "creed" and religion should be understood as something that informs what a person takes into the public and that necessarily includes beliefs that may (and often do) influence "morals and ethics" and even "politics." Second, religion may be diminished because, with respect to religious employers, there has been insufficient attention to the *kind of religious project* that is at issue when an employee challenges the employer's religious rules. The focus has been, in some cases, on the kinds of *job duties* rather than the nature of the religious association or project itself.

This article examines two important questions that relate to how we approach the definition of "creed" or "religion" and how we approach an organization that wishes to shelter its discriminatory behaviour under the "special employer exemption" found in section 24 of the *Code*.

Religion can and has been "read down" so that it is restricted in ways that are inappropriate to the nature of the right as public (not simply private) and associational (not just individual). This article argues that "creed" and religion should be understood as something that informs what a person takes into the public and that necessarily includes beliefs that may (and often do) influence "morals and ethics" and even "politics."

Second, religion may be diminished because, with respect to religious employers, there has been insufficient attention to the *kind of religious project* that is at issue when an employee challenges the employer's religious rules. The focus has been, in some cases, on the kinds of *job duties* rather than the nature of the religious association or project itself. There are different kinds of religious employers and it is a mistake to treat them all the same with respect to whether job functions are considered "core" or "peripheral" to the religious project itself. The focus should not be so much on *what kind of work* the religious project does but *what sort of religious project* is involved.

READING CREED DOWN BY EXCLUDING ETHICAL OR MORAL OR POLITICAL VIEWPOINTS BASED ON RELIGION

The current "creed" document of the Ontario Human Rights Commission[1] contains a positive definition and a negative qualification.

Positively, the document states that:

> *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....* [and] "Creed" is defined subjectively. The *Code* protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed provided they are sincerely held (italics in original)

Negatively, the document states that:

> "Creed does *not* include secular, moral or ethical beliefs or political convictions."

The rationale for the protection is held to be:

> ...that every person has the right to be free from discriminatory or harassing behaviour that is based on religion or which arises because the person who is the target of the behaviour does not share the same faith. This principle extends to situations where the person who is the target of such behaviour has no religious beliefs whatsoever, including atheists and agnostics who may, in these circumstances, benefit from the protection set out in the *Code*.

The Creed document dates from before decisions of the Supreme Court of Canada in the area of accommodation and religion such as *Chamberlain*[2], *Amselem*[3] and *Multani*[4]. When these are considered more broadly it is strongly suggested that the document on Creed needs to be updated and considerably revised to provide greater respect for the nature of religious belief and religious projects in society.

Recall that the *Canadian Charter of Rights and Freedoms* (1982) contains a mandatory interpretative principle that states:

> **Section 27:** This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[5]

Diversity is a principle that has been recognized as important to Canadian society and is often recognized by virtue of the principle of accommodation which has been held to be one of the core "values and principles essential to a free and democratic society." The phrase "free and democratic society" being one of the foundational concepts against which all *Charter of Rights* limitations are measured in Section 1 of the *Charter*. This linking of accommodation and diversity may be seen in the following passage from the Courts' decision *R. v. Oakes* where Chief Justice Dickson discussed the "ultimate standard" of Section 1 as follows:

> Inclusion of these words [free and democratic society] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution... The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, *accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.* The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[6]

It may be seen from the above that accommodation of "a wide variety of beliefs" and respect for "cultural and group identity" both of which resonate with a robust recognition of the place of associations (including religious associations) and diversity, has been seen to be at the core of the Canadian understanding of our free and democratic society.

Use of the term "secular" in the creed document in the way it is used and the bracketing out of ethical and moral beliefs from religion, in a way rejected by the Supreme Court of Canada in *Chamberlain* directly contradicts the existing Creed policy.

In *Trinity Western University* it was stated on behalf of the majority of eight judges that:

> The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected.[7]

In a well-known and often cited passage, Chief Justice Dickson, in the first Decision of the Supreme Court of Canada dealing with the definition of the freedom of conscience and religion in section 2(a) of the *Charter* stated:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as the 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*[8].

Thus, the right to practice, teach and disseminate religious beliefs is recognized as an important aspect of the freedom of religion. The manifestation of religious *beliefs* and *practice* necessarily includes the practice of ethical and moral beliefs based upon religion or religion is rendered practically irrelevant since it is ethics and morals that are the practical outcome of many religious beliefs (for example, pacifism, promotion of social up-liftment of a wide variety or opposition to practices such as capital punishment or abortion). The existing Creed document unjustifiably reads religion down to practices that for some are ethically or morally less relevant than those that are ethical and moral *flowing from* religious beliefs.

Religion and religious teaching forms an important role culturally in the formation of ethical and moral positions and any reflection on the rise of the "civil rights" movements or arguments (in Canada) for national health care, vastly assisted as both were by religious figures and movements (Rev. Martin Luther King Jr. or Rev. Tommy Douglas and the CCF in Canada) should be sufficient to make this point without further elaboration.

Surprisingly, Canadian jurisprudence to date has not expressed the kind of robust understanding of the importance of the role of religions to the formation of ethical and moral beliefs that has been noted elsewhere.[9] Consider the following passage from a leading case from the Constitutional Court of South Africa:

> For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.[10]

The distinction between right and wrong is what ethics and morality is all about. What should be carefully guarded against is the tendency to "know what is best" from the outside of a community that holds to different mores and rules. A similar error, evident in a recent decision of the Supreme Court of Canada touching on religion, is to fail to properly investigate the principles of accommodation - - in this instance, whether alternative means of ensuring identification, could be used by the state.[11] The continuation of a bright line between religion and its outworking in "morals" and "ethics" is erroneous and should be removed from the creed document.

EMPLOYMENT CASES AND THE RELIGIOUS EMPLOYER

Case law often fails to attend to the different kinds of projects that may be at issue in the "religious employer" cases. In some, a focus on the job duties of the "ordinary employee" category may be appropriate where there is no overall religious ethos (or practice) required of all employees. In other cases, however, where there is an overall religious practice (prayers, bible studies etc. shared by all employees) then it is appropriate to recognize that such work-places are permeated by an overall shared religious ethos the fact of which is important and the maintaining of which essential to a broader understanding of the nature of religion as shared.

In the shared or permeated ethos kind of work-place it would be inappropriate to parse job duties to hive off for protection only those jobs that an outside view determines are "sufficiently connected with religion." For a shared ethos project *all job functions* (from gardener to CEO) are part of the religious mission and practice of the religious employer in a way that they are not where there is no such shared

religious practice. To apply a non-permeated ethos test (such as was done in *Heintz* with its job-parsing focus on education) so as to view only those that teach or proselytize as "religious" fails to satisfactorily recognize and protect shared ethos projects.

The case law in relation to this is emerging and the principles from place to place are rather contradictory. Thus the appeal decision of the Ontario Divisional Court in *Heintz v. Christian Horizons,*[12] while it purports to uphold the very important decision in *Caldwell v. Stuart* (where the Supreme Court of Canada allowed a Catholic school to refuse to re-hire a teacher who had married a divorced man in a civil ceremony in breach of Church teaching) did so in a manner that failed to attend to the deeper principles that animated the *Caldwell* decision itself. In short, *Heintz* was not about education, *Caldwell* was and it was incorrect to apply educational tests to the setting of *Heintz*.

The principal parties decided not to appeal so the point was not tested by a higher court than the one that narrowed the tribunal decision. Had the parties appealed, an argument on the appeal could well have been that the Court on review asked itself the wrong question.

In other decisions the overall ethos of the religious institution focus has enabled religious based discrimination to be upheld.[13] What this means, practically, is that the nature of the employer's religious ethos may well be relevant where it has been appropriately raised at hiring, consistently re-enforced in such things as employment contracts and the application of work rules and fairly applied in disciplinary matters where a breach is alleged. Where, on the other hand, an employer cannot satisfy tests as to notice and application and show that religious ethos is a real part of the work place setting, reliance on an ethos justification would fail.

NOTES

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1 See: "Policy on Creed and the Accommodation of Religious Observances" ISBN – 0-7778-6518-1. Approved by the Commission: October 20, 1996 (as revised):, http://www.ohrc.on.ca/en/resources/Policies/PolicyCreedAccomodEN?page=religious-Creed_.html#Heading36 Footnotes that accompany this document have been omitted here.

2 *Chamberlain v. Surrey School Board No. 56* [2002] 4 S.C.R. 710.

3 *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551.

4 *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256.

5 Multi-culturalism in Canada was adopted following the Royal Commission on Bilingualism and Biculturalism, a government body set up in response to the grievances of Canada's French-speaking minority (concentrated in Quebec). The principle, recognized by Section 27 of the *Charter*, has been recognized in the context of the freedom of religion by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295. In the early decision of the Ontario Court of Appeal in *Videoflicks Ltd. et al. v. R.* (1984) the court held that if a law limits the free exercise of religion then the law is of no use in promoting multiculturalism, since it effects a "part of one's culture which is religiously based." The recognition of religion as key to culture (the term culture is not protected per se in the Canadian *Charter* as an enumerated right unlike the Constitutions of some other countries) is recognized by the Constitutional Court of South Africa in *M.E.C. v. Pillay* 2008 (1) SA 474 (CC).

6 *R. v. Oakes* (1986) 1 S.C.R. 103 per Chief Justice Dickson. emphasis added.

7 *Trinity Western University v. College of Teachers* [2002] 1 SCR 772 at 812.

8 *R.v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336 (emphasis added).

9 John McLaren makes a similar observation about the reticence of the Canadian courts to give a more positive analysis of the role and nature of religion and comments that: "..religion can be a mind-expanding experience, a source of spiritual education, an inspiration in matters of social justice and a beacon of humanitarianism." McLaren calls on the courts to "…recognize the importance that religion plays in the life of individuals and communities…" see: "Protecting Confessions of Faith and Securing Equality of Treatment for Religious Minorities in Education" in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver, UBC Press, 2006) 153 – 177 at 169 and 173. See also a most helpful collection of essays, particularly those by Richard Moon "Introduction" and David Schneiderman "Associational Rights, Religion and the *Charter*" in Richard Moon ed. *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) at 1 – 20 and 65 – 86 respectively.

10 *Christian Education South Africa v. Minister of* Education 2000 (4) SA 757 (CC), paragraph 36; referred to in the judgment in Canada on the case *Bruker v. Marcovitz* 2007 SCC 54.

11 *Alberta v. Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 S.C.R. 567, ("Hutterian Brethern") a recent decision of the Supreme Court of Canada touching upon religion, ruled that Hutterites who do not believe, for religious reasons, in having their photographs used for identification purposes, must nonetheless comply with a provincial law for reasons related to the public interest in identity in relation to driving licences The decision has been widely criticized for not considering sufficiently that other means (such as finger-prints) could have been used to achieve the state's purposes without ignoring the concerns of the religious community. The decision was a very narrow majority with three justices of the seven in dissent.

[12] *Heintz v Christian Horizons* (2008) 65 CCEL (3d) 218 (Ont. H.R. Trib.) overturned in part on review by the *Ontario Divisional Court in Ontario Human Rights Commission et al. v. Christian Horizons* (2010) 102 O.R. (3d) 267 – 298 (Ont. Div. Ct.) (May, 2010) (decision overturning, in part, a Human Rights Tribunal Decision and held that the religious exemption provision of the Ontario *Human Rights Code* should apply to religions that do not restrict their work to their adherents. (I declare an interest as I acted for the Assembly of Catholic Bishops of Ontario who intervened in that case).

[13] See, for example, *Schroen* v. *Steinbach Bible College* (1999), 35 C.H.R.R. D/1 (Man. Bd. Adj. [D.R. Knight, Q.C.] in which the overall Mennonite nature of the Bible College precluded a successful claim by a Mormon clerk who lost her job. A focus of the job duties, minimizing the overall ethos, could have come to a different conclusion. See, further, Alvin Esau who helpfully illuminates the nature of "inside" and "outside" rules in "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups" in Richard Moon, ed. *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) 110 – 139.

COMPETING RIGHTS: SETTING THE STAGE FOR RESPECTFUL DIALOGUE

We live in an increasingly diverse and complex society in which all citizens enjoy a variety of rights, freedoms and corresponding obligations. It is inevitable that conflicts between rights will arise.

The Canadian Charter of Rights and Freedoms, provincial human rights legislation and the courts recognize that rights have limits if they interfere in a significant way with other people's rights. We know that no right is absolute, and we all have a shared obligation to search for solutions to reconcile competing rights on a case-by-case basis. The goal is to maximize enjoyment of rights on both sides. This starts with respectful dialogue, and sometimes requires legal steps as well.

It is often difficult to strike a balance between different rights – which is why we have supported public discussion and provided policy guidance. Our final goal was to create a Policy on competing human rights, which we launched in April 2012.

This policy outlines a series of steps that various sectors, organizations and individuals can take to deal with everyday situations of competing rights and avoid legal action. The policy may also give guidance to the Human Rights Tribunal of Ontario and the courts for addressing cases where litigation cannot be avoided.

The policy and the framework it contains are already being lauded as an important tool to help individuals, organizations and decision-makers effectively deal with some of the most challenging rights issues affecting Ontarians.

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