THE NEED FOR GREATER PROTECTION OF RELIGIOUS ASSOCIATIONAL RIGHTS IN EMPLOYMENT

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ABSTRACT

The exemption from the prohibition of employment discrimination (section 24(1)(a) of the *Human Rights Code*) is a concern for religious communities; narrow interpretation results in undue infringement of the right to freely associate with others in a religious community. I argue in light of Supreme Court *Charter* jurisprudence that section 24 should result in robust protect for associational rights including the right to limit employment to other members of the association. I then propose a modification to the legislation that would see greater legislative clarity and greater protection for creed-identifying communities without abandoning the purpose and intention of the *Code*.

The *Ontario Human Rights Code*[1] allows for certain exemptions from the general prohibition against employment discrimination. The *Code* bans employment discrimination in section 5(1), but allows an exemption in section 24(1), the Special Employment Exception Section (hereafter, the SEES).[2]

The Supreme Court of Canada explained the purpose of the SEES as one which "confers and protects rights"; a section which is "a protection of the right to associate."[3] Justice Beetz later reinforced this purposive approach:

> *[the section is] designed ... to allow certain non-profit institutions to create distinctions, exclusions or preferences which would otherwise violate the [Québec]* Charter *if those distinctions, exclusions or preferences are justified by the ... religious ... nature of the institution in question. In this sense, [the SEES] confers rights upon certain groups. [It] was* ***designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits.*** *Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances.*[4]

Despite this clear directive from the Supreme Court, there still exist concerns within creed-identified communities with respect to the application and interpretation of the *Code* exemption. It has been narrowly applied such that the freedom to associate with other members of a religious group is unduly infringed; a troubling trend for creed-identified communities.[5]

RELIGIOUS AND ASSOCIATIONAL FREEDOMS

It is helpful to first discuss the legal principles surrounding the fundamental freedoms of religion and association as protected by section 2 of the Canadian *Charter of Rights and Freedoms.*[6] These are especially relevant to the discussion of employment discrimination in the context of religious organizations.[7]

In the *Hutterian Brethren* case[8] the Supreme Court emphasized the importance of recognizing the community and collective aspect of religious rights. Justice LeBel wrote, "[Freedom of religion] incorporates ***a right to establish and maintain a community of faith that shares a***

common understanding … Religion is about religious beliefs, but also about religious relationships… [This case] raises issues… about the maintenance of communities of faith."[9] This recognition of a communal right to the free exercise of religion is important for religious individuals who wish to collectively express their identity or who wish to engage in enterprise together to the exclusion of others. Justice LeBel's statement recognizes that freedom of religion includes a right to "establish and maintain a community of faith that shares a common understanding" about lifestyle or morality or religious practice whether or not these values are obligatory.[10]

Furthermore, the purpose of s. 2(a) of the *Charter* is "to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being."[11] The court in *Amselem* forcefully affirmed this by stating that

> *the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly,* ***courts should avoid judicially interpreting*** *and thus determining,* ***either explicitly or implicitly, the content of a subjective understanding of religious requirement****, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.*[12]

The freedom of religion then has both individual as well as collective rights protection. The freedom of association is an individual, not a collective, right. However, Professor Hogg states, "The right protects the exercise in association of the *constitutional* rights of individuals… freedom of religion [does] not lose constitutional protection when exercised in common with others."[13] The communal religious rights of individual members of religious organizations are also protected by their freedom of association. The Supreme Court explained that to not allow for this is contradictory and otherwise defeats the purpose of the s. 2(d) freedom:

> *[The] freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual.*[14]

This should include the freedom to limit membership in the religious community according to "subjective understandings of religious requirement"; this necessarily includes limiting employees to similarly identified believers.[15]

SUPREME COURT ON SPECIAL EMPLOYMENT EXEMPTIONS AND THE BFOQ

The final, most complex and most elusive step that religious organizations must pass to qualify for the special employment exception is that they must show on a balance of probabilities that their employment qualifications are reasonable and *bona fide* because of the nature of the employment. To determine this, the Supreme Court has developed a test that has a subjective and objective element.[16]

The Supreme Court has dealt with employment exemptions many times; however the *bona fide* occupational qualification (BFOQ) test it uses (and which by necessity all lower courts and tribunals use) is from the pre-*Charter* era[17] based on a fact scenario that is fundamentally different than those cases involving creed-based rights. There is a major difference between *Etobicoke* and cases like it and the *Christian Horizons* case and other cases like it.

In *Etobicoke*[18] and in *Meiorin*[19] the question regarding the "nature of the employment" in the dispute was in regards to the actual physical work itself, *i.e.* whether 60-year-old men or female workers were physically able to do the work of a firefighter and whether imposing such limits is reasonable and *bona fide.* Here, the BFOQ is a requirement that can be objectively measured with scientific studies: can men over 60 still perform satisfactorily as firefighters? In these types of cases, the original *purpose* of the SEES (the protection of associational rights) does *not* play a role in the analysis. Furthermore, creed-based organizations need a different test because their employment criteria are *not* empirically measurable and cannot be objectively evaluated, nor should tribunals and courts attempt to do so.[20]

A more helpful case is the *Caldwell* case[21] where a Roman Catholic teacher was not rehired because she married a divorced man, contrary to Catholic Church dogma. There was no issue with the complainant's ability; she was qualified to teach.[22] So in this case the BFOQ looks beyond the measurable, objective qualifications and considers qualifications that are particular to the employing organization. The Supreme Court ruled in favour of the school board and rephrased the objective branch of the BFOQ test to fit the religious and educational institution in question:

> *…the essence of the [objective] test remains applicable and may be phrased in this way: "Is the requirement of religious conformance by Catholic teachers, objectively viewed, reasonably necessary to assure the accomplishment of the objectives of the Church in operating a Catholic school with its distinct characteristics for the purposes of providing a Catholic education to its students?"*[23]

The objective test so stated is an improvement on the approach taken in *Etobicoke*. However, there remains problems with using "objective" criterion: first, there is no accommodation for associational rights which arguably need no justification for their limitations[24] and second, technically and actually, most (if not all) jobs at any religious institution can be performed regardless of religious affiliation when evaluated "objectively". So where do the courts and tribunals draw the line?

Can an atheist perform the job of a church organist? Can a Hindu complete the duties of a secretary in a synagogue? Can a homosexual man carry out the duties of a Roman Catholic alter server?[25] Can a woman in a common-law relationship teach Sunday school to children?[26] The "objective" answer to these questions is yes. But the result is absurd for many religious groups. The subjective religious views of the particular religious community must take precedence in any analysis. An objective assessment robs the religious members of the legitimacy of their own religious precepts and their freedom to associate and disassociate with whom they please. Instead of looking at employment with religious organizations in an instrumental or compartmental way, we must instead look at the employment with religious organizations in a holistic way – each employee of a religious organization should be seen as a functioning member of that religious community.

A BETTER LAW, A BETTER TEST

A better test in these special situations is one that simply recognizes and accommodates religious associational rights. An adjustment to the legislation can provide greater clarity on this issue and better direction for Tribunals in the future. This will ensure that individual freedoms of religion and association are properly balanced with the right to be free from employment discrimination.

The exception in the *Code* currently allows discrimination "if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment."[27] At the very least, this statement should add a phrase to read "… because of the nature of the employment, *the institution or the organization*". Appending these five words would direct our tribunals to use the approach of the Supreme Court in *Caldwell*, where the Supreme Court emphasized that the objective element in a BFOQ test analysis requires consideration of the nature of the religious organization itself and not simply of the job description.

A further improvement would be to remove the objective term "reasonable" from the equation. Religious groups should not have to demonstrate to the State the objective reasonableness in their associating with like-minded believers. A simple *bona fide* occupational requirement, which defers to the good faith policies of the organization, their "subjective understandings of religious requirement", [28] should be enough. Religious groups should be allowed to hire only people who completely identify with *all* parts of that community as long as the qualification is consistently applied by the organization and as long as the employment limitations are for associational reasons.

The *Human Rights Code* currently requires the tribunal to determine whether or not certain religious employment requirements are objectively reasonable. This forces the tribunal to go down a road she or he may not go down (see *Amselem*), wading through religious dogma and arbitrating contentious matters of religious doctrine. With the amendments suggested, the legislature will remove that burden from the tribunals and courts.

The current approach used for religious employment discrimination is unhelpful due to a flawed application of the SEES in the *Human Rights Code*, an antiquated test from a pre-*Charter* era, and a section whose language is overly restrictive. Foundational to a correct application of the special employment exception is a proper understanding of the fundamental freedoms set out in the *Charter*. Courts and tribunals must not read the SEES as an exemption from being bound by the anti-discrimination policies of the *Code*. Rather, the SEES should be read as an additional protection incorporated into the *Code*. The freedom for a religious organization to hire only co-religionists is the granting of a right, not a denial of rights.[29] By protecting associational rights, we ensure continued diversity through the viability of distinct and unique groups, contributors to our Canadian pluralist fabric.

NOTES

[1] *Human Rights Code*, R.S.O. 1990, c.H.19 [*Code*].

[2] *Ibid*., at s.24.(1)(a): "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."

[3] *Caldwell v. Saint Thomas Aquinas High School*, [1984] 2 S.C.R. 603 at 626 [*Caldwell*].

[4] *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 at para.100 [*Brossard*] [emphasis added].

[5] The Christian Horizons case is an example in which the religious associational rights of the group were ignored in favour of the individual; the Tribunal and the Divisional Court on appeal did not give adequate attention to the issue of associational rights and the true purpose of the SEES. See *Heintz v. Christian Horizons*, [2008] O.H.R.T.D. No. 21 and *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105.

[6] *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[7] In addition to the fundamental freedoms in section 2, we can look to section 15 and how that clause also applies to individual members of a religious organization. See Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities" (2007) 21 Emory Int'l L. Rev. 111 at 148.

[8] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

[9] *Ibid*. at para 180-182 [emphasis added].

[10] See *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R.551 [*Amselem*]. The Supreme Court rejected the argument that non-obligatory religious observance is not protected by freedom of religion; "voluntary expressions of faith" are equally protected (at para.47).

[11] *R. v. Edward Books*, [1986] 2 S.C.R. 713 at 759.

[12] *Amselem, supra* note 10 at para.50 [emphasis added].

[13] P.W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson-Carswell, 2007) at 1009.

[14] *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para 172. I believe that, with the exception of unions in labour law, associational rights have otherwise been undervalued. I agree with David Schneiderman who argues for greater protection of religious associational rights in "Associational Rights, Religion, and the *Charter*" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 65 at 80].

[15] See *Amselem, supra* note 10 at para.50.

[16] *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 [*Etobicoke*].

[17] *Ibid*. This case is a pre-*Charter* case, yet its test remains the standard used in employment discrimination cases. It was applied in *Caldwell, supra* note 3 and in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.,* [1985] S.C.J. No. 74, re-affirmed in *Bhinder v. Canadian National Railway Co.,* [1985] 2 S.C.R. 561, expanded in *Brossard, supra* note 4, and refined in British Columbia (Public Service Employee Relations Commission) v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 (SCC) [*Meiorin*].

[18] *Etobicoke*, *supra* note 16.

[19] *Meiorin*, *supra* note 17.

[20] See arguments regarding the proper interpretation and implementation of the *Amselem* case, *supra* note 12, and why tribunals and judges must refrain from delving into the objectivity of different religious requirements.

[21] *Caldwell*, *supra* note 3.

[22] *Ibid*. at para.28.

[23] *Ibid*. at para.33.

[24] There is a big difference between discriminating and associating. Both involve selection by preference. However, it is one thing to hire all kinds of different people except for one target group. That is discrimination. It is quite another to not hire any type of people except for a specifically defined target group. That is association.

[25] See *Corcoran v. Roman Catholic Episcopal Corporation of the Diocese of Peterborough,* 2009 HRTO 1600.

[26] See *Hoekstra v. First Hamilton Christian Reformed Church,* 2010 HRTO 245.

[27] *Code*, *supra* note 1 at s.24(1)(a).

[28] *Amselem*, *supra* note 10 at para. 50.

[29] *Caldwell*, *supra* note 3 at 626.