4TH ANNUAL HUMAN RIGHTS SUMMIT

ADDRESSING CONFLICTING HUMAN RIGHTS: SOME RECENT CASE LAW

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In a society as diverse and multi-cultural as our own, in which individuals are becoming ever more aware of their legal rights, it is no surprise that we are seeing an increase in competing human rights claims. Of particular note, the media has recently been grappling with incidents in which an individual's assertion of his or her religious rights is seen to conflict with the rights of other individuals. Can a female passenger on an airplane be asked to change seats to accommodate the religious beliefs of a male passenger? Does a male barber have the right to refuse to give a haircut to a female customer on the basis of his religious beliefs? Can a sexual assault complainant be asked to remove her niqab while testifying in order to protect the right to a fair trial of the accused? The Ontario Human Rights Commission's "Policy on competing human rights" (January 26, 2012) provides a guide to striking a balance between competing rights.[1] The following review of recent cases illustrates the complexity of this issue and of the balancing act that it requires.

(i) *Kacan v. Ontario Public Service Employees Union* (Human Rights Tribunal of Ontario)[2]

This is one case in which the Commission's Policy is explicitly considered. The applicants were intellectually disabled individuals living in group homes operated by community living organizations. During a legal strike, the unions (whose members were support workers for the applicants) picketed outside of the community living locations. The Tribunal considered picketing, which is central to the right to freedom of expression and association, as competing with freedom from discrimination with respect to services and accommodation. Although it dismissed the application without having to consider these competing rights, on the basis that picketing does not fall into a social service protected by the *Code*, the Tribunal expressly endorsed the "key legal principles" from the Commission Policy in its decision (para. 32).

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[1] Ontario Human Rights Commission's "Policy on competing human rights" (January 26, 2012), available online: http://www.ohrc.on.ca/en/policy-competing-human-rights.

[2] 2012 HRTO 1388, [2012] O.H.R.T.D. No. 1340

(ii) *Taylor-Baptiste v. Ontario Public Services Employees Union* (Human Rights Tribunal of Ontario)[3]

In this case, the applicant was a manager at the Toronto Jail. She alleged that the Union President, who was also an employee of the jail, made comments in his blog that were sexist and discriminated against her on the basis of family status. The applicant's rights were in opposition to the Union's right of expression regarding its relationship with management, as the blog was the Union President's way of communicating with Union members about union-management issues. The Tribunal recognized that the blog posts were troubling and sexist, but found that they were made by the Union President in the context of his Union role and not as the applicant's co-worker. Ultimately, the "applicant is a manager, who has the power in the workplace that comes with that role" (para. 37). The blog posts are "analogous to comments on labour-management issues made at a union meeting or a union newsletter. Comments on such issues are at the core of the constitutional protections of freedom of association and expression and the union's right to operate independently of the employer" (para. 37). As a result, the Tribunal dismissed the applicant's claim of discrimination with respect to employment.

(iii) *Taylor-Baptiste v. Ontario Public Services Employees Union* (Divisional Court)[4]

On judicial review, the Divisional Court upheld the Tribunal's decision. The applicant and Attorney General asserted that the Tribunal's decision "creates a 'human rights-free' zone in union workplaces" and that "*Charter* rights to freedom of expression and freedom of association can never be a defence to harassment or discrimination under the *Code*" (paras. 28 and 30). In response, the respondents submitted that "*Charter* rights of freedom of expression and freedom of association are always a potential defence to complaints under the *Code*," and that "union speech" (except hate speech) is protected by the *Charter* (para. 33).

The Divisional Court rejected that in the Tribunal's decision the *Charter* rights of the Union and its President trumped the applicant's *Code* rights. The respondents' *Charter* rights were just one factor considered by the Tribunal in its analysis under s. 5 of the *Code*. As the Tribunal noted, it was necessary to consider ss. 2(b) and (d) of the *Charter* when determining the nature of expression made by the Union President in the context of his role. Reading the Tribunal's decision in concert with its reconsideration decision, the Divisional Court concluded that the

[3] 2012 HRTO 1393, [2012] O.H.R.T.D. No. 1336 (aff'd on reconsideration; in 2014 ONSC 2169 and 2015 ONCA 495; application for leave to appeal filed at SCC on September 29, 2015)
[4] 2014 ONSC, 240 A.C.W.S. (3d) 707

Tribunal "did not actually frame the issue as a case of competing *Charter* rights" and upheld the Tribunal's decision (para. 44).

(iv) *Taylor-Baptiste v. Ontario Public Services Employees Union* (Ontario Court of Appeal)[5]

The applicant's appeal to the Court of Appeal was dismissed. The appeal concerned "whether the Divisional Court properly applied the reasonableness standard to the Tribunal's decision that the blog posts did not infringe Ms. Taylor-Baptiste's right to equal treatment 'with respect to employment' without discrimination under s. 5(1) of the *Code*" (para. 33). The applicant's position, supported by the Ontario Human Rights Commission, included that "even if the Tribunal was entitled to take *Charter* values into account in its s. 5(1) analysis, it failed to balance in a reasonable way the *Charter* values with the statutory objectives of the *Code*" (para. 35).

The Court of Appeal agreed with the Divisional Court that "the Tribunal was entitled to delve deeply into the facts of the case in order to determine the key question of mixed fact and law – i.e. whether, in the particular circumstances of this case, the blog posts fell within or outside of s. 5(1) of the *Code*" (para. 48). Further, the Divisional Court properly concluded that the respondents' *Charter* rights were just one factor considered by the Tribunal in its s. 5(1) interpretation, an analysis that engaged the Tribunal's expertise. The Court of Appeal found that the Tribunal struck a reasonable balance between *Charter* values and the *Code*, and rejected that the decision effectively exempts all "union speech" from s. 5 of the *Code*.

(v) *McKenzie v. Isla* (Human Rights Tribunal of Ontario)[6]

The applicant in this case was the acting Chaplain of the Roman Catholic Diocese of St. Catharines. His position involved recruitment of Brock University students to do volunteer placements in developing countries. A professor in the Department of Sociology and the Centre for Women and Gender Studies actively opposed the volunteer program. She publicly alleged that the Diocese, and the volunteer program affiliated with it, was racist, classist, homophobic, sexist, and implicated in the physical and psychological abuse of youth and women. In response to the applicant's claim that he was harassed and discriminated against for his religious beliefs, the professor asserted her right to academic freedom and expression.

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[5] 2015 ONCA 495, 255 A.C.W.S. (3d) 954
[6] 2012 HRTO 1908, [2012] O.H.R.T.D. No. 1870

The Tribunal recognized that in cases of competing rights, "ambiguity in the scope of the *Code* should be resolved in favour of protecting matters at the core of the [*Charter*] rights and freedoms" (para. 33). Noting that the Catholic Church "is one of the most powerful institutions in the world," and often faces criticism for its views, the applicant "may be criticized by others because of the Church's, and his own, views on these issues" (para. 37). Finding that the professor's statements did not constitute harassment under the *Code*, the Tribunal dismissed the application.

(vi) *Trinity Western University v. The Law Society of Upper Canada* (Divisional Court)[7]

In this decision, the Divisional Court upheld the Law Society of Upper Canada's decision to deny accreditation to Trinity Western University's law school on the basis that it requires students to sign the Community Covenant, which prohibits sexual intimacy outside of heterosexual marriage. The Divisional Court had to consider equality rights, religious freedoms, and the jurisdiction of the Law Society to regulate lawyers in Ontario. Recognizing that there was an infringement of the applicants' rights to religious freedom pursuant to s. 2(a) of the *Charter*, the Court recognized the Law Society's longstanding mandate "to remove obstacles based on considerations, other than ones based on merit, such as religious affiliation, race, and gender, so as to provide previously excluded groups the opportunity to obtain a legal education and thus become members of the legal profession in Ontario" (para. 96). The Court noted that this case "necessarily involved two *Charter* rights": freedom of religion vs. equal access to membership of the Law Society (para. 102). Ultimately, the Court found that the Law Society's balancing of these rights was reasonable. The Law Society considered the impact on "the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women)" of accreditation, while recognizing the applicants' interest in freedom of religion, and reasonably concluded that refusing accreditation promoted its mandate (para. 116).

(vii) *R. v. N.S.* (Supreme Court of Canada)[8]

In this criminal case, two men were accused of repeatedly sexually assaulting the complainant (N.S.), their female family member, throughout her childhood. The two accused sought an order requiring that N.S. remove her niqab while testifying against them at the preliminary inquiry.

[7] 2015 ONSC 4250, 126 O.R. (3d) 1 (Div. Ct.).
[8] 2012 SCC 72, [2012] 3 S.C.R. 726

Their position was that if N.S. was allowed to conceal her demeanour and facial expressions, it would be difficult to assess or challenge N.S.'s credibility. Their right to a fair trial was juxtaposed with N.S.'s freedom of religion. The following issue was appealed by N.S. up to the Supreme Court of Canada: "when, if ever, a witness who wears a niqab for religious reasons can be required to remove it while testifying" (para. 7).

The majority of the Supreme Court dismissed N.S.'s appeal, outlined the proper approach when balancing a witness' freedom of religion against an accused's right to a fair trial, and remitted the matter to the judge hearing the preliminary inquiry. The Court held that a witness who wears a niqab for religious reasons will be required to remove it while testifying in a criminal proceeding if: (a) there is no other reasonable measure that can prevent the risk to fairness of the trial; and (b) the salutary effects of requiring her to remove the niqab outweigh the deleterious effects.

Applying this test requires consideration of four questions (quoted from para. 9):

1. Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?

2. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?

3. Is there a way to accommodate both rights and avoid the conflict between them?

4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

In freedom of religion analysis, pursuant to s. 2(a) of the *Charter*, the majority proceeded on the assumption that N.S.'s religious practice was based on a "sincere" religious belief (para. 14). In the context of ss. 7 and 11(d) of the *Charter*, the majority decided that allowing N.S. to testify in a niqab poses a "serious risk" to the accuseds' right to a fair trial because the ability to see a witness' face is so "deeply rooted in our criminal justice system" (para. 27). The majority noted that many factors must be considered to establish the salutary and deleterious effects of requiring the witness to remove her niqab, and recognized that further factors to consider will arise in future cases.

This decision adopted the language of "rights reconciliation" used by the Ontario Human Rights Commission in its Policy and in its intervention submissions before the Supreme Court in *R. v. N.S.* However, the Court's analysis does not exactly follow the Commission's proposed

approach to competing rights claims, which involves the following steps (quoted from para. 6 of their Intevener Factum[9]):

i. Understand the applicable legal and factual context.

ii. Determine the rights that are being asserted and that are actually engaged. This involves determining whether the claimed rights are appropriately characterized and defined and are legally valid.

iii. Determine whether the protections sought actually fall within the scope of the right in the particular context. This involves delineating the boundaries of the relevant rights. Determine whether proper delineation of, or reasonable adjustments to, the rights makes it possible to avoid any conflict between them. If so, this will effectively end the analysis.

iv. Assess whether there is a substantial interference with the rights in question beyond the trivial and insubstantial. If so, the rights remain in conflict requiring balancing under s. 1 of the *Charter*.

v. Balance the rights under s. 1 of the *Charter*. This would require the Court to choose one right over the other or to find compromises to both rights. In the case of a claim that does not arise under the *Charter*, the balancing still occurs having regard to the general principles articulated in the s. 1 analysis.

(viii) *Clipperton-Boyer v. RedFlagDeals.com* (Human Rights Tribunal of Ontario)[10]

This case required the Tribunal to consider an individual's claim of freedom of expression against the Forum Rules governing an online shopping platform that prevents use of the site for religious and political discussion. The applicant used a "Christ fish" avatar to post on the site, and was asked to switch to a non-religious, non-political avatar. The Tribunal recognized "the sincerity of the applicant's feelings about his use of the avatar," but dismissed the application because "it cannot reasonably be said that his use of the avatar engenders the kind of personal, subjective connection to the divine or to the subject or object of the applicant's spiritual faith that is required to engage the applicant's rights under the Code" (para. 19).

[9] Factum of the Intervener Ontario Human Rights Commission, available online: http://www.ohrc.on.ca/en/commission-intervenes-court-case-involving-muslim-womans-right-testify-wearing-her-niqab-face.

[10] 2014 HRTO 1796, [2014] O.H.R.T.D. No. 1799