

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

ONTARIO HUMAN RIGHTS COMMISSION

The Commission
(Respondent)

-and-

CONNIE HEINTZ

Complainant
(Respondent)

-and-

CHRISTIAN HORIZONS

Respondent
(Appellant)

-and-

THE CANADIAN COUNCIL OF CHRISTIAN CHARITIES

(Intervenor)

FACTUM OF THE CANADIAN COUNCIL OF CHRISTIAN CHARITIES

PART I - OVERVIEW

1. The Canadian Council of Christian Charities (hereinafter the CCCC) has been granted Intervenor status in the within appeal by Order of Justice Aston dated the 22nd December 2008 in order to formally add *Charter* issues to the issues on appeal. The Order granting leave to intervene has left it up to the panel hearing the appeal whether or not it will entertain the constitutional issues that are raised for the first time in the appeal.

2. The CCCC has served and filed a Notice of Constitutional Question on both the Federal and Provincial Attorney Generals questioning the constitutional validity of both s. 24(1)(a) and s.41(1)(a) of the *Ontario Human Rights Code*, R.S.O. 1990, c.h.19.

Justice Aston's Endorsement, para. 10

PART II - FACTS

HEINTZ DECISION

Background Facts

3. Christian Horizons (CH) which receives annual funding of \$74 million dollars from the Ontario Government, has approximately 180 residential homes providing services to 1,400 disabled residents through the work of approximately 2,400 employees.

Heintz Decision, paras. 1, 2, 54 [hereinafter Decision]

4. These employees were required to ascribe to a doctrinal statement which reflects CH's Christian character. They were also required to sign a "Personal Life Style and Morality Standards Expected of Staff Statement" (Life Style Statement) which reflected CH's intention that its employees act as Christian role models for those they serve.
5. The Lifestyle Statement set out examples of inappropriate behaviour including sex outside of marriage and homosexual relationships, as such conduct would be "incompatible with effective Christian counseling ideals, standards and values." The standards reflected in the Life Style Statement were developed as a result of the *Parks* decision and in conjunction with staff input.

Decision, paras. 39, 42, 65 to 68; *Parks v. Christian Horizons* (No.1)(1992), 16 c. H.R.R. D/40; 1993

6. Connie Heintz was one of the employees who was to provide these services in her capacity as a support worker and given her devout Christian background, she ascribed to these values when she signed on as a CH employee in March of 1995.

Decision, para. 253

7. Sometime in 1999 Heintz became aware of her sexual orientation and entered into a same-sex relationship in October of that year. After she “came out” rumours circulated that she had abused residents in her care. Subsequently she was confronted by CH about her relationship and was offered pastoral counseling, presumably to assist her to re-establish her original belief system. Ms. Heintz resigned and filed a Human Rights complaint alleging discrimination based on sexual orientation contrary to s.5 of the *Ontario Human Rights Code* (the *Code*).

Decision, paras, 27, 28, 78 to 85

Issues Before Tribunal

8. Having conceded that requiring employees to sign the Life Style Statement discriminated against Heintz on the basis of her sexual orientation, CH defended her complaint on the basis that s.24(1)(a) of the *Code*, which provides that s.5 is not infringed where a religious organization that is primarily engaged in serving the interests of their co-religionists, give their co-religionists preference in employment, provided the qualification is a reasonable and bona fide one, given the nature of the employment. There was no *Charter* challenge before the Tribunal.

Decision, paras. 86, 88

Relevant Findings

9. The Tribunal had no trouble in finding that CH was a religious organization whose creed was defined by its doctrinal and Life Style Statements, but as it was not primarily serving the interests of those who shared this creed, it did not have the protection of s.24(1)(a) of the *Code*.

Decision, paras. 115-117, 131, 136, 138, 140, 141, 143

10. Even if CH could have established it was primarily serving the interests of this creed, it

would not have met the bona fide occupational requirement test (BFOR), as CH had not established how its Life Style Statement was objectively necessary to the position of support worker.

Decision, paras. 184-187, 191

11. The fact that other religious organizations such as the Salvation Army and St. Mike's Hospital did not require their employees to sign a similar statement was further evidence that it was not an objective BFOR. CH had presented no evidence that it engaged in a process to determine whether such adherence was reasonably necessary

Decision, paras. 192-198, 200, 201

12. Even if CH had met the BFOR requirements, it still would have breached Heintz's rights under the Code by offering her pastoral counseling, allowing rumours to circulate unchecked, allowing "discriminatory attitudes" to prevail in the workplace without taking steps to prevent same, and by acting on discriminatory views in matters of human resources. The offering of pastoral counseling was, in the Tribunal's view, "profoundly disrespectful and oppressive". CH's religious beliefs as reflected in its doctrinal and lifestyle statement led to a poisoned work environment.

Decision, paras. 205, 209, 235, 236, 237, 238, 250, 253 and 256

13. There was no evidence before the Tribunal that CH or its employees discriminated in any way against those who received its charitable services. On the contrary the Tribunal found at para. 190, "The evidence shows that this deep religious commitment is displayed in excellent service and loving care provided to the residents, as well as support for their families."

Decision, para. 190

Tribunal's Orders

14. While awarding Heintz substantial damages under various headings, the Tribunal pursuant to s.41(1)(a) of the Code, ordered CH to train its employees, management, and Board of Directors on human rights issues and the requirements of the Code. It also ordered that its

life style statement cannot be applied to anyone. Finally, it ordered CH to review its employment policies to ensure they are consistent with the Code in consultation with the Commission.

Decision, paras. 278, 281, 284

THE CANADIAN COUNCIL OF CHRISTIAN CHARITIES

CCCC

15. CCCC is an association of charities, within the Christian community. Its purpose is to minister to Christian charities by integrating spiritual concerns of ministry with the practical aspects of management, stewardship and accountability including fiscal, tax and accounting compliance advice. CCCC is also a registered charity in its own right.

Affidavit of Rev. Dr. John Pellowe filed on the leave to intervene motion dated the 7th day of November 2008, para. 4 [hereinafter Pellowe Affidavit]

16. CCCC was founded in 1972 out of a concern that good stewardship practices be carried out by the Christian charities of Canada in order for them to more effectively conduct their Christian work. At the present time, CCCC has 164 certified members, being registered charities certified under the CCCC standards of organizational integrity and accountability, 2746 affiliate members, and 105 professional members who are individuals serving charities including accountants, lawyers and other professionals. CCCC is the largest single umbrella organization representing Christian Charities in Canada.

Pellowe Affidavit, para. 5; Justice Aston's Endorsement, para. 12

17. Affiliate members can access all of CCCC's services but may not publicly identify themselves as CCCC members. Certified members, on the other hand, may identify themselves as CCCC members and are encouraged to do so by using the CCCC seal of accountability. To be a certified member, the charity must qualify based on meeting the CCCC standards relating to ethical matters, fund raising, governance standards, etc.

Pellowe Affidavit, para. 6

18. All of CCCC's certified members identify themselves as Christian, not just religious. They identify as Christian but, motivated solely by true Christian faith, many supply services to the general public based solely on need. They do not just serve Christians. This is fundamental to their identity. They are motivated by their Christian faith to supply indiscriminately, particularly those charities engaged in prison ministry, as food banks, inner city missions, relief and development agencies and social assistance agencies. If these charities are no longer able to identify themselves as Christian in how they operate including whom they hire, their identity and, thus, their very reason for being will be gone. These charities would also lose their unique Christian approach to defining the problems they address and their uniquely designed services created to address those problems. Christian Horizons (CH) is a certified member of CCCC.

Pellowe Affidavit, para. 10

19. Over the last two decades the CCCC has been involved in many legal issues on behalf of the Christian Community as a whole. It has been a party or an intervener in the past, including specifically in the *Parks* case. CCCC's involvement in that case went beyond its role as an intervener. In *Parks*, the Ontario Human Rights Tribunal provided guidelines to Christian Horizons on the specifics of doctrinal or "Lifestyle Statements" employees would sign as a condition of employment with Christian Horizons. In response to the guidelines, the CCCC helped establish best practice standards for other charities and Christian organizations.

Justice Aston's Endorsement, para. 12; Pellowe Affidavit, para. 14

20. The *Heintz* Tribunal refused to follow *Parks* and interpreted s.24(1)(a) of the *Ontario Human Rights Code* in such a way that religious charitable organizations who provide services to the general public will never obtain the benefit of that section while the orders made by the Tribunal under s.41(1)(a) of the *Code* required CH to strip itself of its Christian character if it

wanted to continue to offer charitable services to the public. Thus the *Heintz* decision directly affects the CCCC and its certified members who in reliance on *Parks* instituted the CCCC's mandatory best practice standard.

Pellowe Affidavit, para. 14

Impact

21. The Tribunal's interpretation of s.24(1)(a) and the manner in which s.41(1)(a) of the *Ontario Human Rights Code* was applied will likely have profound negative consequences for the CCCC and its certified religious charitable organizations who are providing services to the public, some of which are:

- A Christian charity that is engaged in evangelizing those who are not members of that charity would not be permitted to restrict hiring to believers;
- Christian charities such as prison ministries, food banks, inner city missions, relief and development agencies and social assistance agencies that serve the broader community would be seen as not primarily serving a Christian community and therefore not be able to impose faith-based requirements on employment, including use of a Lifestyle and Morality Statement;
- Holding to values similar to the CH Lifestyle and Morality Statement could mean a charity "runs a serious risk of being a poisoned work environment";
- An offer of Christian pastoral counselling could be seen as violating the Code resulting in a poisoned work environment;
- A Christian charity could be forced to amend all its human resource policies in consultation with a human rights Commission;
- The decision affects freedom of religion in that it strictly curtails the ability of religious groups to define themselves; and
- The decision affects freedom of association in that it limits the freedom of

religious groups to have their members associate freely with each other without challenge from others not affiliated with the group.

Pellowe Affidavit, paras. 10, 15

PART III - ARGUMENT

A. The Charter Must Be Considered

22. Even though the Charter was not argued before the Tribunal, the Tribunal was aware that the issues before it implicated the Charter rights of CH, its directors, officers and employees, yet in the interpretation and application of s.24(1)(a) and s.41(1)(a) of the Code, the Tribunal simply ignored those rights. This was contrary to the Supreme Court of Canada's direction in *Reference re Same-Sex Marriage* where at para. 55 it said, "*It should also be noted that human rights codes must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the Charter.*" (underlining added)

Decision, paras. 7-9; *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75 at para. 55, [hereinafter *Reference re: Same Sex*]; *Grushman v. Ottawa (City)* [2000] O.J. No. 4444 at paras. 16, 21, 24, 27, 28 and 30

23. In *Christian Horizons v. Ontario Human Rights Commission* [1993] O.J. No. 1771 (*Parks*), the CCCC was allowed to intervene on the appeal to advance Charter arguments even though the parties had agreed not to argue the Charter before the Tribunal. As Justice Lane said in that case at page 3:

The issue in this appeal is the proper interpretation of s.24 of the Code. What the parties did before the Board, and the Commission seeks to do here, is to require that issue to be decided without reference to religious freedom guaranteed in the Charter. The Charter is the supreme law of the land. How can the Divisional Court be expected to interpret the Human Rights Code, 1981 without reference to the supreme human rights law of the land? Of what value would such an interpretation be when consideration of the Charter could lead to a wholly different result? In my view, it is not open to the parties to determine that a statute is to be interpreted by a court without reference to the Charter which is the supreme law of the land.

24. This is particularly true where the factual record before the court and the findings by the

Tribunal provide a solid basis for a *Charter* analysis and where the purpose of the relevant sections are well understood or self-evident or where the legislative facts surrounding similar sections have been considered by the Supreme Court of Canada in other cases.¹

Danson v. Ontario (Attorney General) [1990] S.C.J. No. 92 at para 27; see also *Tadros v. Peel Regional Police Service*, 2008 ONCA 775 at para. 8

25. The only other way for affected religious charitable organizations such as the CCCC and its certified members to mount a constitutional challenge to the Tribunal's decision in *Heintz* is pursuant to s.52 of the *Charter* based on public interest standing. However, when public interest standing is sought to attack the constitutionality of legislation or its effect, the Court must consider three issues:
- a) Is there a serious issue raised as to the validity of the legislation;
 - b) Has it been established that the plaintiff is directly affected by the legislation, or if not, does the plaintiff have a genuine interest in its validity; and
 - c) Is there another and reasonable and effective way to bring the issue before the Court.

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] S.C.J. No. 5 at para. 37

26. Given the exhaustive factual record that has been established by the parties before the Tribunal, and given it is the Tribunal's interpretation and application of s.24(1)(a) and s.41(1)(a) of the *Code* that infringes the *Charter* rights of CH, its directors, officers and employees, this appeal would represent the most effective way of bringing these important *Charter* issues before the Court. For these reasons, any application by the CCCC or other affected charity for public interest standing in order to attack the constitutionality of the Tribunal's interpretation and application of these sections would likely fail.

¹For cases where provisions similar to s.5, 24(1)(a) and 41(1)(a) of the Ontario Human Rights Code have been considered by the Supreme Court of Canada, see for example: *Bhinder v. C.N.R.*, [1985] S.C.J. No. 75; *Brossard (Town) v. Quebec* [1988] S.C.J. No. 79; *Vriend v. Alberta*, [1988] S.C.J. No. 29; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *Ross v. New Brunswick School District #15*, [1996] 1 S.C.R. 825; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee's Union (Meiorin Grievance)*, [1999] S.C.J. No. 46

27. Justice Lane's comments in *Christian Horizons*, *supra* at p. 3 (QL) relating to CCCC's proposed intervention in that case are apposite here:

Accordingly, I have regard to the nature of the case, the issues raised in it and the likelihood that the intervenor can make a contribution. In my view, the evidence shows that the intervenor can likely bring to bear a different perspective than that of the parties on the issues to be canvassed. The point it seeks to argue is not raised in the existing factums and yet, in my view, it is a central one to the case. The nature of the council as an umbrella group for a broad group of religious organizations engaged in charitable activities throughout the country will, I think, bring a perspective to the argument that heretofore is lacking.

B. Heintz, the Charter and Human Rights Codes

Relevant Provisions of the Code

28. The sections of the *Code* that implicate the *Charter* rights of Christian Horizons² are:

s.5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.

s.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, same-sex partnership 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;*

s.41(1) Where the Tribunal, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the Tribunal may, by order,
(a) direct the party to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices;

Nature of Human Rights Code

29. The *Ontario Human Rights Code* is remedial legislation designed, among other things, to prevent discrimination in the work place and thus it is to be given a liberal interpretation by the

² When the name Christian Horizons (CH) is used it means its directors, officers and its employees.

Courts. Its main approach is not to punish the discriminator but to provide relief for the victims of discrimination.

Ontario (Human Rights Commission) v. Simpson Sears Ltd., [1985] S.C.J. No. 74 at para. 12

30. Like Codes in other provinces, the Ontario legislature has attempted to balance the individual employee's right to be free from discrimination (s. 5) with a religious organization's right to prefer employing those who ascribe to its religious practices in defined circumstances (s.24(1)(a)). When those circumstances are met, the preference granted by the religious organization is deemed non-discriminatory under the legislation.

Brossard (Town) v. Quebec, [1988] S.C.J. No. 79 at paras. 100, 117-120 [hereinafter *Brossard*]

Charter and Human Rights Codes

31. While ss.5, 24(1)(a) and 41(1)(a) of the *Code* deal with the relationship between parties in a private law context they are nevertheless subject to the *Charter* and must be justified on the basis of a *Charter* analysis. The Supreme Court of Canada has noted that human rights codes must be interpreted and applied in a manner that respects the broad protection guaranteed to religious freedom under the *Charter*. In this case, the only *Charter* rights that are implicated are those of Christian Horizons, its officers and directors and its employees, as the *Charter* would not apply to Ms. Heintz in this private law context.

Reference re Same-Sex Marriage, [2004] S.C.J. No. 75 at paras. 54, 54; s. 32 of the *Charter*

32. A section or sections of legislation can be subject to a *Charter* challenge as can a decision which interprets the legislation when such interpretation is contrary to the freedoms guaranteed by the *Charter*. One of the issues in this case will be whether s.41(1)(a) of the *Code* can be said to be a limit prescribed by law because the legislature has given the Tribunal a plenary discretion to do whatever seems best in light of the circumstances. As Justice McLachlin said in *Taylor*, "rights and freedoms guaranteed by the *Charter* cannot be left to the administrative discretion of those employed or retained by the State."

Multani v. Commission scolaire Margurite Bourgeois, [2006], S.C.J. No. 6 at para. 22 [hereinafter *Multani*]; *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.R. 892, at pp. 955, 964

33. When reviewing a decision such as *Heintz*, the administrative law standard of review is not applicable to the constitutional component of the review with the proper standard being correctness.

Multani, supra at para. 20

Heintz and the Charter

General Principles

34. In advancing a claim under s.2(a) of the *Charter* in relation to religious freedom a person need only show that:

- a) they have a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or in conformity with the position of religious officials; and
- b) they are sincere in their belief.

Syndicat Northcrest v. Amselem, [2004] S.C.J. No. 46 at para. 56

35. The right to freedom of religion encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice.

Reference re Same-Sex Marriage, *supra*, para. 57

36. Where there is the collision of constitutional rights such as religious freedom and the right to be free of discrimination based on sexual orientation the conflict must be approached on the contextual facts of the conflict. The first question is whether the rights alleged to conflict can be reconciled, and if not, a true conflict of rights will arise. In that case the Court will find a limit on religious freedom and go on to balance the interest of the state under s.1 of the *Charter*. In both cases, the Court must proceed on the basis that the *Charter* does not create a hierarchy of rights and that the right to religious freedom enshrined in the *Charter* is expansive. In this case there is

no collision of *Charter* rights involved as the Tribunal's decision does not implicate Ms. Heintz's *Charter* rights and therefore no balancing is required.

R. v. Keegstra, [1990] 3 S.C.R. 697 at pp. 833-835 [hereinafter *Keegstra*]; *Reference re: Same-sex Marriage*, supra, para. 50

Religious Freedom

37. The Tribunal's error in this case was to ignore the *Charter* rights of Christian Horizons and its employees when analyzing and interpreting s.5, s.24(1)(a) and s.41(1)(a) of the *Ontario Human Rights Code*.

38. When examining the *Charter* rights involved, it was necessary for the Tribunal to keep in mind the nature of the right to religious freedom which as noted includes the right to believe in and entertain religious beliefs of one's choice, the right to declare those beliefs openly through the life style statement and the right to manifest those beliefs through religious practice, which in this case was the delivery of charitable services to the disabled. That the religious nature of the enterprise had an impact on the quality of services provided was confirmed by the Tribunal when it found, "*The evidence shows that this deep religious commitment is displayed in excellent service and loving care provided to the residents, as well as support for their families.*"

Decision, para. 190; Janet Epp Buckingham, "*The Fundamentals of Religious Freedom: The Case of Recognizing Collective Aspects of Religion*", (2007), 36 S.C.L.R. (2d) 251, at pp. 255, 271, 273, 274, 275; see also Iain Benson, "*The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*" (2007), 21 Emory International Law Review, 111, at p. 123

39. Just as the British Columbia College of Teachers did in the Trinity Western case, the Tribunal in *Heintz* engaged in stereotyping Christian Horizons and its employees when it found, "*Its policy, based on the belief that homosexuality was unnatural and immoral, engendered fear, ignorance, hatred and suspicion ...the only response of CH to a gay person in the workplace, was to offer counseling so as to effect restoration.*" The finding of a poisoned work environment was also largely based on this stereotypical thinking.

Trinity Western University v. British Columbia College of Teachers, [2001] S.C.J. No. 32; Decision, para. 256

40. As Justice Gonthier said in *Chamberlain*,

As discussed above, many persons are staunchly committed to the principle of non-discrimination and the inherent dignity of all persons, and yet concurrently hold views which disapprove of the conduct of some persons. To permit the courts to wade into this debate risks seeing s. 15 protection against discrimination based upon sexual orientation being employed aggressively to trump s.2(a) protection of the freedom of religion and conscience, as well as s.15 protection against discrimination based on conscience, religious or otherwise. This would be a reading of the Charter that is inconsistent with the case law of this Court, which does not permit a hierarchy of rights, as well as inconsistent with the purpose of the Charter itself.

Chamberlain v. Surrey School District, No. 36, 2002, S.C.C. 86 at para. 150

41. Like one's view of any form of sexual conduct such as extra-marital sex, the relative morality of homosexual sexual conduct is an issue on which reasonable people can disagree. One's moral view will not be based on stereotypical assumptions or ascriptions relative to group characteristics but on biological reality, religion and environmental factors relative to family, culture and education all of which inform a person's perception of their own moral conduct relative to others. It is, ultimately, a matter of individual conscience. As LaForest, J. noted in *Ross* at 879, the basis of the guarantee in s. 2(a) of the *Charter* is that "every individual is free to hold and manifest the beliefs dictated by one's conscience".

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at p. 879 [hereinafter *Ross*]

42. The effect of the Tribunal's decision in this case was to completely deny Christian Horizons and its employees their constitutional right to practice their religion by providing charitable services to the disadvantaged members of the **public** and their families.

Equality Rights

43. As noted in *Andrews*, when Human Rights Acts create exemptions or defenses, such as a bona fide occupational requirement or an exception for religious organizations, these generally have the effect of completely removing the conduct complained of from the reach of the Act.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.143 per McIntyre, J. at para. 39

44. Such exemptions establish the primacy of the rights of the group over the rights of the

individuals and such exemptions are meant to promote the fundamental freedom of individuals to associate for purposes of engaging in religious charitable pursuits free from the anti-discriminatory norms. This exemption will be recognized when there is a connection between the brand of discrimination practiced and the nature of the organization and where, as in the *Heintz* case, the mere fact of association results in discrimination under s.5 of the *Ontario Human Rights Code* by excluding those who do not ascribe to the same religious beliefs or values.

Brossard, supra, paras. 100, 117-120, 130

45. The Tribunal's interpretation of s.24(1)(a) of the *Code*, if correct, creates a distinction between religious organizations who are primarily engaged in serving the interests of their co-religionists and religious organizations who are primarily engaged in serving the interests of the public.

46. The legislation, therefore, clearly grants a benefit in the form of an exemption under s.24(1)(a) to religious charitable organizations who serve only the interests of their co-religionists while excluding those religious charitable organizations who serve the public.

47. The legislation has the effect of presenting a religious charitable organization like Christian Horizons with a choice: restrict their charitable activities to their co-religionists in order to obtain the benefit, or abandon their religious beliefs.

48. In other words, the legislation draws a formal distinction based on the scope of religious practices between those who confine such religious practice to the private sphere and those who practice in the public sphere, with the latter organizations being subject to deferential treatment based on an enumerated ground in s.15(1) of the *Charter*. This deferential treatment imposes a burden and withholds a benefit from those religious charitable organizations in a manner which reflects the stereotypical belief that those who practice their religion through the delivery of charitable services to the general public will somehow discriminate against or otherwise inappropriately treat the recipients of those services. This stereotypical thinking, which is explicit

in the Tribunal's finding, also promotes the belief that those individuals who ascribe to the religious values of a charitable organization cannot be trusted to provide services to the public in a non-discriminatory or appropriate manner, while no similar assumption is made in relation to such religious organizations when providing services to their co-religionists.

Law v. Canada, [1999] 1 S.C.R. at pp. 548-549

49. If the main purpose of the exemption in s.24(1)(a) is to accommodate religious freedom by allowing like minded individuals to associate in order to practice their religion through charitable works, then the proper comparator group are religious charitable organizations who wish to serve the public with charitable religious organizations who wish only to serve their co-religionists.

Ontario (Attorney General) v. Ontario (Human Rights Commission), [2007] O.J. No. 4978

Limits prescribed by Law

50. S. 41(1)(a) of the Code allows the Tribunal to direct the party to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with the Act, both in respect of the complaint and in respect of future practices.

Taylor, supra at p. 955

51. Where there is no intelligible standard in a provision such as this and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit" prescribed by law as required by s.1 of the *Charter*.

Taylor, supra at p. 955

52. Sections such as this one cannot achieve their objective in a manner consistent with the Oakes proportionality test as it has a broad and vague ambit and it is unconditioned by any limitations of significance. If this provision is allowed to stand as it is, the right to religious freedom as guaranteed by the *Charter* in cases similar to this one will be left to the administrative discretion of those employed by the State.

Taylor, supra at pp. 959, 964; *Keegstra*, supra at p. 818, 819

53. The Tribunal in *Heintz* used this provision to require Christian Horizons to strip itself of

those aspects of its Christian identity that the Tribunal, based on stereotypical thinking found offensive - a clear breach of s.2(a) of the *Charter*.

Section 1 of the Charter

54. The Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Once CH establishes a Charter breach the onus will shift to the OHRC to prove that the legislation and its decision based on such legislation can be reasonably justified in a free and democratic society on the preponderance of probabilities based on the following criteria: (1) the objective to be served by the measures limiting a *Charter* right must be sufficiently important, at least relating to societal concerns which are pressing and substantial in a free and democratic society, to warrant overriding a constitutionally-protected right or freedom; and (2) the means must be reasonable and demonstrably justified, in proportion to the importance of the objective. The proportionality test involves three components: i. the measures must be fair and not arbitrary, carefully designed to achieve the objective in question, and rationally connected to that objective; ii. The means should impair the *Charter* right as little as possible; and iii. there must be a proportionality between the effects of the limiting measure and the objective.

R. v Oakes [1986] 1 S.C.R. 103

55. Under a s.1 analysis, the *Oakes* test must be applied flexibly as to achieve a proper balance between individual rights and community needs.

Ross, supra at p. 872

56. The Court must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. The analysis involves a close attention to context.

Ross, supra, p. 872

57. Here the context has the following factual elements:

- a) Christian Horizons is a charitable religious organization of like-minded individuals that operates 180 residential homes providing services to 1,400 disabled residents and their families in a non-discriminatory fashion;
- b) In order to provide and maintain the high quality of services, Christian Horizons has a restrictive hiring policy that discriminates against those who do not ascribe to the same doctrinal or lifestyle values;
- c) The complainant in this case, Connie Heintz, initially ascribed to these values and thus benefitted from the restrictive hiring policy;
- d) The Ontario Government, who provided funding to Christian Horizons, was, at all material times, well aware of the Christian nature of the organization and its restrictive hiring policy;
- e) There was no evidence before the Tribunal that Christian Horizons or any of its employees discriminated in any way against those members of the public who received its charitable services;
- f) On the contrary, the Tribunal found that there was a direct causal connection between the religious nature of the enterprise and the “excellent service and loving care provided to the residents as well as support for their families.”
- g) The Tribunal in its decision stereotyped Christian Horizons, its officers, directors and employees as being homophobic and as a result of that stereotyping imposed a remedy pursuant to s.41(1)(a) designed to strip Christian Horizons of its religious beliefs that the Tribunal assumed resulted in that homophobia.

58. While it can be accepted that the eradication of discrimination in the employment context is a pressing and substantial concern in a free and democratic society that would justify placing limits on *Charter* rights, this concern loses most, if not all, of its force when the discrimination arises out of the religious nature of the enterprise. Section 24(1)(a) of the *Code* is simply a

recognition of this fact.

A.J. Esau, "Islands of Exclusivity", *Religious Organizations and Employment Discrimination* (2000) 33 U.B.C.L. Rev. 719-827 at para. 31

59. As noted above, the main purpose of the exemption in s.24(1)(a) of the Code is to accommodate religious freedom by allowing like-minded individuals to associate in order to practice their religion through charitable works. If such an exemption had not been provided for by the Legislature, the *Charter* would have required it.

60. The Tribunal's interpretation of s.24(1)(a) in this case limits the benefit of that provision only to those religious charitable organizations who restrict their charitable activities to their co-religionists. The Tribunal's purpose in imposing this restriction would appear to be the promotion of Heintz's individual rights as recognized in s.5 of the *Code* over the *Charter* rights of Christian Horizons, its directors, officers and employees to practice their religion by providing charitable services to the **public**.

61. This purpose cannot be said to be pressing and substantial given the following contextual facts:

- Connie Heintz was a beneficiary of the restrictive hiring practices;
- The Tribunal found a causal connection between the religious nature of the enterprise and the quality of care it provided; and
- CH operates 180 residential homes providing services to 1,400 disabled residents and their families in a non-discriminatory fashion.

62. If the primary purpose of s.24(1)(a) of the *Code* is to promote religious freedom then there can be no rational connection between the Tribunal's interpretation of that section and the objective of the section, as the Tribunal's interpretation seriously restricts religious freedom by confining its practice to the private sphere.

63. If, on the other hand, the purpose of s.24(1)(a) is as the Tribunal found to restrict religious freedom in order to promote the non-discriminatory norms contained in s. 5 of the *Code*, then the

Tribunal's interpretation cannot possibly represent minimal impairment as any religious charitable organization that primarily serve the public would never get the benefit of that section.

64. In drawing the line between private and public religious charitable works the Tribunal's decision was completely arbitrary and resulted from stereotyping Christian Horizons, its officers, directors and employees. The Tribunal's interpretation also stigmatized CH, its directors, officers and employees as it has the effect of holding that anyone who ascribes to the views reflected in Christian Horizons' doctrinal and lifestyle statements are homophobic and are not fit to deliver charitable services to the public.

65. While the orders made by the Tribunal under s.41(1)(a) of the *Code* cannot withstand even a rudimentary s.1 analysis as outlined above, those orders which were designed to strip Christian Horizons of its Christian character make little sense in light of its finding of a causal connection between the Christian nature of the enterprise and the high quality of services it provided.

66. Accordingly, the Tribunal's interpretation and application of s.24(1)(a) and s. 41(1)(a) of the *Ontario Human Rights Code* cannot withstand a s.1 *Charter* analysis.

PART IV - ORDER REQUESTED

67. The proposed Intervenor seeks an Order as follows:

- (a) The Tribunal's decision breached the *Charter* rights of CH, its officers, directors and employees as guaranteed by s. 2(a) and s.15(1) of the *Charter* and such breach cannot be saved by s.1 of the *Charter*. The proper remedy pursuant to s.52 of the *Charter* is to strike out the words "...primarily engaged in serving the interests of persons identified by their ... creed ..." in s.24(1)(a) and strike down in its entirety

s.41(1)(a) of the Code.³

- (b) In the alternative, (a) a declaration that the interpretation put on the phrase “...primarily engaged in serving the interests of persons identified by their ...creed..” in s.24(1)(a) of the *Code* in *Parks v. Christian Horizons* (No.)(1992), 16 c. H.R.R. D/40: 1993 is consistent with the guarantees to religious freedom and equality under s.2(a) and s.15(1) of the *Charter* while the interpretation put on that phrase in *Heintz* is contrary to those guarantees; and (b) a declaration that the orders made by the Tribunal pursuant to s.41(1)(a) of the *Code* are contrary to the guarantees to religious freedom and equality under s.2(a) and s.15(1) of the *Charter* and as a consequence are of no force or effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF JANUARY 2009

WILLIAM J. SAMMON

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Council of Christian Charities

³ As far as religious charitable organizations the exemption in s.24(1)(a) should read: The right under section 5 to equal treatment with respect to employment is not infringed where, a religious organization 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.