

**ONTARIO HUMAN RIGHTS COMMISSION CONSULTATION  
PUBLIC DIALOGUE ON CREED-BASED HUMAN RIGHTS  
& FREEDOM OF RELIGION**

***The Need for Greater Protection of Religious Associational Rights in Employment***

The *Ontario Human Rights Code*<sup>1</sup> allows for certain exemptions from the general prohibition against employment discrimination on the basis of creed. The *Code* bans employment discrimination in section 5.(1)<sup>2</sup>, but allows an exemption in section 24(1), the Special Employment Exception Section (hereafter referred to as the SEES).<sup>3</sup>

The Supreme Court of Canada explained the purpose of the exception:

...the courts should not ... consider it merely as a limiting section deserving of a narrow construction. ***This section***, while indeed imposing a limitation on rights in cases where it applies, ***also confers and protects rights***. I agree with Seaton J.A. ...:

This is the only section in the Act that specifically preserves the right to associate... In a negative sense [this section] is a limitation on the rights referred to in other parts of the Code. But in another sense ***it is a protection of the right to associate***.<sup>4</sup>

This purposive approach was later reinforced by Justice Beetz as being

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.<sup>5</sup>

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

<sup>2</sup> *Ibid.*, at s. 5.(1), which reads, “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, family status or disability.”

<sup>3</sup> *Ibid.*, at s. 24.(1)(a) which reads, “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.”

<sup>4</sup> *Caldwell v. Saint Thomas Aquinas High School*, [1984] 2 S.C.R. 603 at 626 [Caldwell] [emphasis added].

<sup>5</sup> *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279; [1988] S.C.J. No. 79 at para. 100 [Brossard] [emphasis added].

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 Ontario *Code* exemption. It has been narrowly applied so that the freedom to associate with other members of a creed-identified community is unduly infringed. This trend has troubling ramifications not only for creed-identified communities, but also for other culturally, socially and ethnically identifying groups.<sup>6</sup>

### THE CHRISTIAN HORIZONS CASE

It is helpful to discuss one example of this trend;<sup>7</sup> Connie Heintz left her employment with Christian Horizons after five years as a support worker providing care for individuals with disabilities. Ms. Heintz self-identifies as an evangelical Christian who entered into a same-sex relationship in violation of the morality and lifestyle statement she had agreed to prior to accepting employment with the Christian ministry. The morality statement included the rejection of conduct such as extra-marital and pre-marital sexual relationships (adultery and fornication) as well as homosexual relationships. Such conduct is seen “as being incompatible with effective Christian counselling ideals, standards and values.”<sup>8</sup>

The Tribunal found that Christian Horizons discriminated against Ms. Heintz on the basis of sexual orientation contrary to the *Code* and that the SEES did not apply.<sup>9</sup> Christian Horizons was ordered to pay compensation and was also ordered to “Cease and desist from imposing the Lifestyle and Morality Statement as a condition of employment”.<sup>10</sup>

On appeal, the Divisional Court decided that Christian Horizons is an organization of co-religionists associated to engage in common action for the good of others, established through a

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<sup>6</sup> I agree with the conclusions of Grim and Finke who describe religious rights as the “canaries in the coal mine... serving as a ‘litmus indicator of whether freedom exists not only for them – but for all others in their societies.’ We expand the litmus test beyond a particular religious group to religious freedoms in general, and we agree that the violations of vulnerable religious liberties indicate potential threats to other liberties as well.” Brian J. Grim & Roger Finke, *The Price of Freedom Denied* (New York: Cambridge University Press, 2011) at 202.

<sup>7</sup> *Heintz v. Christian Horizons*, [2008] O.H.R.T.D. No. 21 [hereinafter *Heintz*]; *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 [hereinafter *Horizons*].

<sup>8</sup> *Heintz*, *supra* note 7 at para. 68.

<sup>9</sup> *Ibid.* at para. 202.

<sup>10</sup> *Ibid.* at para. 286.

common statement of faith and a lifestyle and morality policy based on those beliefs. The court also noted that the creation and use of a lifestyle and morality statement was acceptable.<sup>11</sup>

But what the Divisional Court gave with one hand, it took away with the other. The Court concluded that being involved in a same-sex relationship did not impact the job Ms. Heintz was doing, contrary to the accepted practices of the faith community with which she was serving. Accordingly, the Court edited the morality statement by removing the “same sex relationship” prohibition from the policy.<sup>12</sup> Although the Court is correct that a same-sex relationship will not affect the work itself, nevertheless the court shifted the focus away from the *purpose* of the SEES and focused instead on an objective measurement of whether the job could be fulfilled by an individual who fell outside the defined parameters of that particular religious group.

This precedent contradicts the rule set out by the Supreme Court of Canada in the *Amselem* case.<sup>13</sup> At issue in *Amselem* was whether orthodox Jews were allowed to build *succahs* on their balconies. The by-laws prohibited this for fire-safety and aesthetic reasons. One of the arguments made against allowing the *succahs* was that the practice was not obligatory since not all Orthodox Jews build them. Thus, they argued, such practices should not be protected by freedom of religion. The Supreme Court rejected this approach, arguing instead for an “expansive definition of the freedom of religion”<sup>14</sup> one that recognizes “a personal or subjective conception of freedom of religion...”<sup>15</sup> The court stated that the claimant does not have to perceive a certain practice as obligatory; “voluntary expressions of faith” are equally protected.<sup>16</sup>

What is perhaps most important is the affirmation of the rule set by Chief Justice Dickson in *Edward Books*:<sup>17</sup> 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,

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<sup>11</sup> *Horizons*, *supra* note 7 at para. 119.

<sup>12</sup> *Ibid.* at para. 118-119.

<sup>13</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [*Amselem*].

<sup>14</sup> *Ibid.* at para. 40.

<sup>15</sup> *Ibid.* at para. 42.

<sup>16</sup> *Ibid.* at para. 47.

<sup>17</sup> *R. v. Edward Books*, [1986] 2 S.C.R. 713 [*Edward Books*].

nature, and, in some cases, a higher or different order of being.”<sup>18</sup> 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.<sup>19</sup>

In *Heintz*, although recognizing that it ought not to delve into an investigation of the tenets of the Christian religion,<sup>20</sup> both the Tribunal and the Divisional Court probe anyway, comparing the religious requirements of Christian Horizons to the religious rules and prohibitions of other Christian organizations like the Salvation Army.<sup>21</sup> In doing so, the Court minimized Christian Horizons’ religious reasons for having certain requirements in their lifestyle and morality statement, implying that such rules are artificial or arbitrary.<sup>22</sup> However, in the eyes of the associating members of Christian Horizons, the morality statement is held to be a guide against “inappropriate behaviour deemed to be contrary to the teaching of Jesus and His followers as recorded in the New Testament”<sup>23</sup> – a religious tenet. In effect, the court and tribunal became arbiters of religious dogma.

## RELIGIOUS AND ASSOCIATIONAL FREEDOMS

Before discussing how the human rights system can avoid becoming so entangled in the affairs of religion, it is helpful to discuss the legal principles surrounding the fundamental freedoms of religion<sup>24</sup> and association<sup>25</sup> as protected by section 2 of the Canadian *Charter of*

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<sup>18</sup> *Ibid.* at p. 759.

<sup>19</sup> *Amselem*, *supra* note 13 at para. 50 [emphasis added].

<sup>20</sup> The Tribunal in *Heintz*, *supra* note 7 at para. 199 and the Divisional Court in *Horizons*, *supra* note 7 at para. 70.

<sup>21</sup> *Heintz*, *supra* note 7 at para. 192-198; *Horizons*, *supra* note 7 at para. 98, 104-5.

<sup>22</sup> *Heintz*, *supra* note 7 at para. 192.

<sup>23</sup> *Ibid.* at para. 68.

<sup>24</sup> *Charter*, *infra* note 26, at s. 2(a), “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion...”

<sup>25</sup> *Charter*, *infra* note 26, at s. 2(d), “Everyone has the following fundamental freedoms: ... (d) freedom of association...”

*Rights and Freedoms*.<sup>26</sup> These are especially relevant to the discussion of employment discrimination in the context of religious organizations, associations and institutions.<sup>27</sup>

The *Universal Declaration of Human Rights* describes the freedom of religion and conscience as the “freedom, either alone or in community with others and in public or private, to manifest [one’s] religion or belief in teaching, practice, worship and observance.”<sup>28</sup> The *Declaration* recognizes that freedom of religion is for the individual *and* for the community; it is a freedom practiced privately *and* practiced publicly, it entails a freedom to believe *and* a freedom to manifest those beliefs through actions.

Chief Justice McLachlin echoed this sentiment in a speech where she stated that “the rule of law must incorporate within itself some space for the manifestation of religious conscience” and that “the courts have maintained an enduring responsibility for finding, in the comprehensive claims of the rule of law, a space in which individual *and community adherence to religious authority can flourish*.”<sup>29</sup>

More recently, in the *Hutterian Brethren* case<sup>30</sup> the Supreme Court again emphasized the importance of recognizing the community and collective aspect of religious rights. Justice LeBel wrote,

[Freedom of religion] includes a right to manifest one’s belief or lack of belief... It also 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

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<sup>26</sup> *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 [*Charter*].

<sup>27</sup> In addition to the s. 2 fundamental freedoms, we could also look to other sections including section 15 and how that clause also applies to and protects the individual members of Christian Horizons. Iain Benson makes this observation: “There are various rights within Section 15 that mirror rights found elsewhere. Thus, the right to be free from discrimination on the basis of religion is an equality dimension of religious rights in addition to the freedom of conscience and religion in Section 2(a). Over the years it has been startling to see how, for example, one aspect of an equality right, such as “sexual orientation,” is hived off and played against a Section 2(a) right without any realization that there is also a corresponding equality right touching on religion within Section 15 itself.” Iain T. Benson, “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities” (2007) 21 *Emory Int’l L. Rev.* 111 at 148.

<sup>28</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A(III), UN Doc. A/810, at 71 (1948), art.18.

<sup>29</sup> The Right Honourable Beverley McLachlin, PC, “Freedom of Religion and the Rule of Law: A Canadian Perspective” speech published in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) 12 at 20 [emphasis added].

<sup>30</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*].

relationships... [This case] raises issues about belief, but also about the maintenance of communities of faith.<sup>31</sup>

This recognition of a communal right to the free exercise of religion is important for creed-identified 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; interference with their belief system and their statement of values is an infringement on their freedom to manifest their religious beliefs as they see fit.

Like the freedom of religion, the freedom of association has been encouraged for centuries. John Stuart Mill wrote that "from this liberty of each individual follows the liberty, within the same limits, of combination among individuals: freedom to unite, for any purpose not involving harm to others..."<sup>32</sup> It is clear that the freedom of association is an individual right and not a collective right. As Professor Hogg puts it, "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."<sup>33</sup> The communal religious rights of individual members of religious organizations (like Christian Horizons as discussed above) are also protected by their freedom of association. This should include the freedom to limit membership in the religious community which necessarily includes limiting employees to similarly-identified believers. 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."<sup>34</sup>

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<sup>31</sup> *Ibid.* at para 180-182 [emphasis added].

<sup>32</sup> John Stuart Mill, *On Liberty*, eds. by David Bromwich and George Kateb (New Haven: Yale University Press, 2003).

<sup>33</sup> P.W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Carswell, 2007) at 1009.

<sup>34</sup> *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para 172. I believe that, with the exception of associational rights in relation to employment and labour disputes, associational rights have otherwise been undervalued. I agree with Mr. David Schneiderman, who suggests that "associational rights may provide a key resource to minorities who have experienced oppression elsewhere but who do not qualify for group-specific measures in multi-cultural societies. Associational rights may act in such instances as a prophylactic

## 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 in the *Etobicoke* decision.<sup>35</sup>

The Supreme Court has dealt with special 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<sup>36</sup> 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<sup>37</sup> and the *Heintz* case and other cases like it.<sup>38</sup>

In *Etobicoke*<sup>39</sup> and in *Meiorin*<sup>40</sup> the question regarding the “nature of the employment” in

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between the state and the pursuit of group purposes. To the extent, then, that a pluralist theory of the constitution accommodates vulnerable communities and subcultures, the world will be made a safer place. Associational rights, in this way, generate resources for survival in a modern setting.” [David Schniederma, “Associational Rights, Religion, and the *Charter*” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 65 at 80].

<sup>35</sup> *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 [*Etobicoke*]. The subjective part of the test: The qualification must be “imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved... and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code”.

The objective part of the test: the qualification “must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.”

<sup>36</sup> *Etobicoke*, *supra* note 35. This case is a pre-*Charter* case: the Supreme Court released their decision on February 9, 1982. The *Charter* was assented to on March 29, 1982 and came into force on April 17, 1982. Yet the *Etobicoke* BFOQ test remains the standard test used in employment discrimination cases. It was applied in *Caldwell*, *supra* note 4 and in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] S.C.J. No. 74; [1985] 2 S.C.R. 536 [*O'Malley*], re-affirmed in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, expanded in *Brossard*, *supra* note 5 at para. 69, 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*] at para. 54ff.

<sup>37</sup> See for example *Meiorin*, *supra* note 36.

<sup>38</sup> To name a few: *Caldwell*, *supra* note 4; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (SCC); *Garrod v. Rhema Christian School* (1991), 15 C.H.R.R. D/477 (Ont. Bd. Inq.); *Kearley v. Pentecostal Assemblies Board of Education* (1993), 19 C.H.R.R. D/473; *Schroen v. Steinbach Bible College* (1999), 35 CHRR D/1 (Man. Bd. Of Adjudication).

<sup>39</sup> *Etobicoke*, *supra* note 35.

<sup>40</sup> *Meiorin*, *supra* note 36.

the dispute was in regards to the actual physical work itself; the labour the individual complainants engaged in. These complaints revolved around the question of whether 60-year-old men or female workers were physically able to do the work of a firefighter, and whether imposing limits that are in effect discriminatory 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 (that is, the protection of associational rights) does *not* play a role in the analysis. It is clear that 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.<sup>41</sup>

A more helpful case is the *Caldwell* case<sup>42</sup> where a Roman Catholic teacher was not rehired because she married a divorced man, contrary to Catholic Church dogma. The issue was whether the school board could refuse to hire a teacher who disregards church teaching. There was no issue with the complainant's ability; she was qualified to teach.<sup>43</sup> Yet, 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 took the objective branch of the BFOQ test and rephrased it 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?"<sup>44</sup>

The objective test so stated is an improvement on the approach taken in *Etobicoke*. However, there remains a problem with using "objective" criterion: technically and actually,

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<sup>41</sup> See arguments regarding the proper interpretation and implementation of the *Amselem* case, *supra* note 13, and the importance of tribunals and judges refraining from delving into the objectivity of different religious observations or requirements.

<sup>42</sup> *Caldwell*, *supra* note 4.

<sup>43</sup> *Ibid.* at para. 28.

<sup>44</sup> *Ibid.* at para. 33.

most (if not all) jobs at a religious institution can be performed regardless of religious affiliation. So where do the courts and tribunals draw the line?

### **RAMIFICATIONS OF THE CURRENT LAW**

Can an atheist perform the job of a church organist?<sup>45</sup> 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 boy?<sup>46</sup> Can a Mahayana Buddhist clean a Theravada Buddhist temple or a Sunni Muslim explain the Koran in a Shi'a mosque? Can a woman in a common-law relationship teach Sunday school to children?<sup>47</sup> 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. The problem lies in the question asked. 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.<sup>48</sup>

The ramifications of a purely objective approach reach beyond religious communities. Note that the exception in section 24 is a protection not only of religious associations but also fraternal, social and cultural groups. This approach can also negatively affect those groups that have suffered historical disadvantage. For example, a gay baseball league in the United States was recently under fire for removing a team because three of the teammates were bi-sexual and

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<sup>45</sup> The author personally knows an atheist employed as an organist in a United Church and I know of other Christian churches where such an arrangement would be totally unacceptable. An objective approach denies a particular religious community of their autonomy.

<sup>46</sup> See the dispute between Jim Corcoran and his parish and bishop for being removed from his volunteer job as an alter server. *Corcoran v. Roman Catholic Episcopal Corporation of the Diocese of Peterborough*, 2009 HRTO 1600. Reported by Charles Lewis, “Gay altar server contests firing” National Post (14 July 2009), online: <<http://life.nationalpost.com/2009/07/14/gay-altar-server-contests-firing/>>.

<sup>47</sup> See *Hoekstra v. First Hamilton Christian Reformed Church*, 2010 HRTO 245 where the complainant argued she was discriminated against and not hired to teach Sunday school due to her marital status. The Tribunal ruled that the other applicant who was hired was more qualified and dismissed the matter declining to enter into a s. 24 analysis.

<sup>48</sup> Applying the objective test in the way that the Tribunal does in *Heintz* is also troublesome in that it tempts the trier to violate the principles set out in *Amsalem* (see discussion in text accompanying note 13 above), that is, to determine whether certain religious prohibitions are actually or objectively reasonable and whether or not they should be a requirement for other co-religionists.

not fully gay.<sup>49</sup> Objectively viewed, this may make sense, but it violates the league's rights to define for themselves who their members are.

### **A BETTER LAW, A BETTER TEST**

It is not enough to simply point to failures; we must be willing to offer improvements. A better test in these special situations is one that recognizes and accommodates religious associational rights and the broader associational rights of non-creed based communities. An adjustment to the legislation<sup>50</sup> 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..."<sup>51</sup> At the very least, this statement should have an additional phrase added. It should read "... if the qualification is a reasonable and *bona fide* qualification 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.

However, the better alternative would be to remove the *bona fide* occupational requirement altogether. 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.<sup>52</sup> Religious

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<sup>49</sup> United States District Court Judge John Coughenour ruled in favour of the North American Gay Amateur Athletic Alliance (NAGAAA) and dismissed discrimination claims against it. The Court found that "it is reasonable that an organization seeking to limit participation to gay athletes would require members to express whether or not they are gay athletes." The complaint was based on other competitors' belief that more than two members of the San Francisco D2 team were heterosexual, and therefore violated Rule 7.05 of the NAGAAA Softball Code, which limits the participation of non-LGBT players to only two per team. See *Apilado v. North American Gay Amateur Athletic Alliance* (W.D. Wash. Nov. 10, 2011)

<sup>50</sup> This adjustment is suggested in light of the current review undertaken by lawyer Andrew Pinto of the Ontario *Human Rights Code*, as required by section 57 and as directed by the Attorney General of Ontario on August 17, 2011.

<sup>51</sup> *Code*, *supra* note 1 at s. 24(1)(a).

<sup>52</sup> There is a big difference between discriminating on one hand, and associating on the other. 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

associations must be allowed to define for themselves who they are in order to protect religious communities and creed-identifying individuals.

The *Human Rights Code* currently requires the tribunal to determine whether or not certain religious employment requirements are objectively reasonable qualifications. This forces the tribunal to go down a road she or he may not want to go down, 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 Ontario *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 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.

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of people except for a specifically defined target group. That is association, a fundamental freedom that necessarily requires discrimination against anyone who does not belong to the defined group.