

Thank you for the incredible honour of being able to share at such a dialogue as this. I am flattered to be conversing with all of you and with such academic heavy-weights as Professors Moon and Mendes and Buckingham, Benson and Berger and to share the floor now with such distinguished guests as we've already heard.

I should mention that the original research I conducted for this paper was under the supervision of Prof. Mendes two years ago. I wrote a critique of the 2008 Christian Horizons case. In my critique I favoured the approach used by the Ontario Board of Inquiry in an earlier Christian Horizons case (1992) which had virtually the same fact scenario. That earlier approach was overturned by the Tribunal in 2008. Full disclosure: Prof. Mendes was that Board of Inquiry in 1992.

I should also say that on the point of disagreement between Prof. Mendes and the 2008 Tribunal, the Divisional Court on appeal vindicated Professor Mendes' approach. I guess I picked the right one, and not just because he was the one marking my paper.

My discussion here today however, goes beyond that particular legal issue. I want to look at the associational aspect, the community aspect, of creed and religion.

Section 2d of the *Charter* guarantees the fundamental freedom of association. That is, colloquially speaking, we can all hang out with whoever we want to hang out with. This must also include then the right to NOT hang out with some people.

Paradoxically, freedom of association, necessarily and by virtue of its very definition requires discrimination, not in a bad, bigoted sense, but simply in a communal definition sense. Tom Oden once said that, "*A center without a circumference is just a dot, nothing more. It is the circumference that marks the boundary of the circle. To eliminate the boundary is to eliminate the circle itself. The circle of faith cannot identify its center without recognizing its perimeter.*"

I specifically want to discuss the issue of associational rights in the employment context. Section 5 of the Code states that every person has a right to equal treatment with respect to employment without discrimination because of and then follows the list of grounds of discrimination.

But the Code also provides an exemption to that rule in section 24.

To gain the exemption, an employer must be

1. A religious, philanthropic, fraternal, educational or social organization;
2. primarily engaged with persons identified in some way;
3. employ or gives preference in employment to persons identified in a certain way;
4. and the qualification or limitation must be *bona fide* and reasonable with a view to the employment.

So, what's the purpose of this exemption? Well, as Reema, counsel for the OHRC, stated yesterday afternoon, this section should not be seen as a limit on the right not to be discriminated against; rather, it is a section that grants the right to associate.

Justice Beetz explained it in *Brossard* as, "***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.***"

I was quite encouraged by the very first panel yesterday morning; it spoke a few times about the communal aspect of religion or creed, and this has played out quite a bit throughout this conference. For example, Prof. Berger spoke of how the law imagines religion as individual but noted that this is not always the way religion manifests – religion is very much about the community.

We do see a recognition of that at the Supreme Court. In *Hutterian Brethren*, Justice LeBel wrote, "[Freedom of religion]... incorporates ***a right to establish and maintain a community of faith that shares a common understanding...***"

This echoes the *Universal Declaration of Human Rights* which describes the freedom of religion as the “freedom, either alone or in community with others... to manifest [one’s] religion or belief in teaching, practice, worship and observance.”

So, there is obviously and should obviously be a communal aspect to religious freedom, and it should be protected.

I suggest, however, that the Special Employment Exemption Section does not protect that communal aspect of religious freedom enough. The fourth and last requirement, the requirement that any limiting qualification has to be reasonable and bona fide in order for the qualification to stand, has become a big hurdle. There are two main problems with it.

First of all, the jurisprudence in Ontario that has developed on the *Bona Fide Occupational Qualification* (BFOQ) is, to be frank, terrible. The test used is still some version of the *Etobicoke* test, a case decided by the Supreme Court before the *Charter* was even enacted and which involves a fact scenario that does not engage the PURPOSE of the special employment section at all. Remember that the purpose of the section is to grant rights of association.

The *Etobicoke* test involves a subjective and objective element. I have no qualms about the subjective test. It’s the added element of an objective test that is troublesome.

The Supreme Court, in drafting that objective test, had a particular type of employment in mind – not religious work, but physical work that required analysis of the empirically measurable (in the *Etobicoke* case, whether 60 year-old firemen were still safely able do their job).

When we try to apply such an objective test to religious organizations, we run into big problems, especially because the so-called “objective reasonableness” of the limitation is measured, not by the associating group, but by the other.

For example,

Can an atheist perform the job of a church organist? Can a Hindu complete the duties of a secretary in a Jewish school? Can a Shiite Muslim complete janitorial duties at a Sunni mosque? Can a homosexual man carry out the duties of a Roman Catholic altar server? Can a woman in a common-law relationship teach Sunday school to children?

The “objective” answer to these questions is yes. But the result is absurd for many religious groups. A so-called objective assessment robs the religious members of the legitimacy of their own religious precepts –their religious customs, traditions, rules are evaluated and critiqued by some other.

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 necessarily being a functioning member of that religious community. The subjective religious views of the particular religious community must take precedence in any analysis.

The bigger problem though is that an objective reasonableness test requires the tribunal to go where they ought not to go. Such a test forces the trier to violate the principles set out in *Amselem*, that is, to determine whether or not certain religious prohibitions are actually or objectively reasonable and whether or not they should be a requirement for other co-religionists.

The Court in *Amselem* was very clear: “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.”

So, let's be bold. Let's dare to cut away the convoluted tests of *bona fide* and reasonable qualifications with their objective tests. Let's grant to religious organizations who engage with persons similarly identified and who employ persons similarly identified, let's give these people the benefit of the doubt – that they are being exclusive not out of malicious intent, not because they are a bunch of discriminatory bigots, but because they simply want to freely associate in a group that they defined for themselves in order to engage in particular pursuits together. Let's respect and even celebrate, not tolerate, or accommodate, but celebrate a diversity of identifiable communities within our community; let's celebrate particular societies within broader society.

Let me conclude 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 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 Schniederman, “Associational Rights, Religion, and the *Charter*” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 65 at 80