

POLICY ON **COMPETING** **HUMAN RIGHTS**



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Policy on competing human rights

Ontario Human Rights Commission

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Summary

As people better understand their rights and wish to exercise them, some of those rights may come into conflict with the rights of others. This is especially true in Ontario's increasingly diverse and complex society. Conflicts can begin when an individual or group tries to enjoy or exercise a right, interest or value in an organizational context (e.g. in schools, employment, housing, etc.). At times, these claims may be in conflict, or may appear to be in conflict with other claims. Depending on the circumstances, for example, the right to be free from discrimination based on creed or sexual orientation or gender may be at odds with each other or with other rights, laws and practices. Can a religious employer require an employee to sign a "morality pledge" not to engage in certain sexual activity? Can an accuser testify wearing a *niqab* (a face veil worn by some for religious reasons) at the criminal trial of her accused? How do you resolve a situation where a professor's guide dog causes a severe allergic reaction in a student?

The Canadian *Charter of Rights and Freedoms*, provincial human rights legislation (including the Ontario *Human Rights Code*) and the courts recognize that no rights are absolute and no one right is more important than another right. Our laws guarantee rights such as freedom of expression as well as protection against discrimination and harassment based on gender, creed, sexual orientation and disability, among other grounds. They require we give all rights equal consideration. The law also recognizes that rights have limits in some situations where they substantially interfere with the rights of others.

The courts have said we must go through a process on a case-by-case basis to search for solutions to reconcile competing rights and accommodate individuals and groups, if possible. This search can be challenging, controversial, and sometimes dissatisfying to one side or the other. But it is a shared responsibility and made easier when we better understand the nature of one another's rights and obligations and demonstrate mutual respect for the dignity and worth of all involved. Finding the best solution for maximizing enjoyment of rights takes dialogue and even debate.

Ontario's *Human Rights Code* says the Ontario Human Rights Commission's mandate includes reducing tension and conflict in Ontario's communities and encouraging and co-ordinating plans, programs and activities to do this. The OHRC has developed this *Policy on Competing Human Rights* to help organizations and individuals address difficult situations involving competing rights.

Goals of policy

The *Policy on Competing Human Rights* is intended to be a useful tool for individuals and organizations as they deal with different types of conflict. It sets out a process to analyze and reconcile competing rights that emphasizes specific objectives and considerations.

For example, everyone involved should:

- show dignity and respect for one another
- encourage mutual recognition of interests, rights and obligations
- facilitate maximum recognition of rights, wherever possible
- help parties to understand the scope of their rights and obligations
- address stigma and power imbalances and help to give marginalized individuals and groups a voice
- encourage cooperation and shared responsibility for finding agreeable solutions that maximize enjoyment of rights.

The approach in the policy can help organizations and decision-makers resolve and even avoid rights conflicts altogether. Where litigation cannot be avoided, the policy provides a framework that can be used by courts and tribunals as they deal with these types of conflicts.

Practical steps to reduce potential for conflict

Employers, housing providers, educators and other responsible parties covered by the Ontario *Human Rights Code* have the ultimate responsibility for maintaining an inclusive environment that is free from discrimination and harassment, and where everyone's human rights are respected. As part of this, organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to situations involving competing rights.

Organizations can reduce the potential for human rights conflict and competing rights situations by:

- being very familiar with the Ontario *Human Rights Code* and with their obligations under it
- taking steps to educate and train responsible individuals on competing rights situations and the OHRC's *Policy on Competing Human Rights*
- having in place a clear and comprehensive competing rights policy that:
 - sets out the process to be followed when a competing rights situation arises
 - alerts all parties to their rights, roles and responsibilities
 - commits the organization to deal with competing rights matters promptly and efficiently.

Taking proactive and effective steps to address competing rights matters will help to protect organizations from liability if they are ever named as a respondent in a human rights claim involving competing rights.

What are competing rights?

In general, competing human rights involve situations where parties to a dispute claim that the enjoyment of an individual or group's human rights and freedoms, as protected by law, would interfere with another's rights and freedoms. This complicates the normal approach to resolving a human rights dispute where only one side claims a human

rights violation. In some cases, only one party is making a human rights claim, but the claim conflicts with the legal entitlements of another party or parties.

While many situations may at first appear to involve competing rights, one must recognize that not all claims will be equal before the law: some claims have been afforded a higher legal status and greater protection than others. For example, international conventions, the Canadian *Charter of Rights and Freedoms*, provincial human rights legislation and legal decisions all recognize the paramount importance and unique status of human rights.

Other non-human rights-related rights may also be protected in legislation, but may not have the same status that human rights do. Claims may also be based on interests or values held by individuals or groups.

While there are many situations in which rights, interests, and values may seem to conflict or compete, when evaluating situations of competing rights, human rights and other legally codified rights will usually hold a higher status than interests and values. The OHRC's *Policy on Competing Human Rights* is meant mainly to be a tool for resolving situations where there is a conflict of human rights and rights that are legally protected.

Examples of competing rights situations¹

A competing human rights situation exists when legally protected rights are present in both claims, and at least one of the claims connects to human rights law. Based on this definition, allegations of competing human rights scenarios might include:

1. Code right v. Code right
2. Code right v. Code legal defence
3. Code right v. other legislated right
4. Code right v. Charter right
5. Code right v. common law right
6. International treaty right v. Code/Charter defence
7. Charter right v. Charter right.

Key legal principles²

While the courts have not set a clear formula or analytical approach for dealing with competing rights, legal decisions have identified a number of fundamental principles that provide direction on how to deal with these types of scenarios, as well as what to avoid. The courts have recognized that the specific facts will often determine the outcome of the case and claims should be approached on a case-by-case basis. The main legal

¹ See section 4.2 of the *Policy on Competing Human Rights* for examples and discussion of each of these situations.

² See section 5 of the *Policy on Competing Human Rights* for detailed discussion and examples of each of these principles.

principles that organizations must consider when they deal with competing rights situations are:

1. No rights are absolute
2. There is no hierarchy of rights
3. Rights may not extend as far as claimed
4. The full context, facts and constitutional values at stake must be considered
5. Must look at extent of interference (only *actual* burdens on rights trigger conflicts)
6. The core of a right is more protected than its periphery
7. Aim to respect the importance of both sets of rights
8. Statutory defences may restrict rights of one group and give rights to another.

Analysis for addressing competing human rights situations

The *Policy on Competing Human Rights* includes a framework for addressing competing rights that the OHRC developed based on international human rights principles, case law, social science research, and consultation with community partners and stakeholders.³ The following table summarizes the framework's three-stage, five-step process for recognizing and reconciling competing human rights claims:

Process for addressing competing human rights situations

Stage One: Recognizing competing rights claims

Step 1: What are the claims about?

Step 2: Do claims connect to legitimate rights?

- (a) Do claims involve individuals or groups rather than operational interests?
- (b) Do claims connect to human rights, other legal entitlements or *bona fide* reasonable interests?
- (c) Do claims fall within the scope of the right when defined in context?

Step 3: Do claims amount to more than minimal interference with rights?

Stage Two: Reconciling competing rights claims

Step 4: Is there a solution that allows enjoyment of each right?

Step 5: If not, is there a "next best" solution?

Stage Three: Making decisions

- Decisions must be consistent with human rights and other laws, court decisions, human rights principles and have regard for OHRC policy
- At least one claim must fall under the *Ontario Human Rights Code* to be actionable at the Human Rights Tribunal of Ontario

³ The framework is set out in a summarized chart at Appendix C of the *Policy on Competing Human Rights*. See section 6 of the *Policy* for a detailed discussion of the analysis that underlies the framework.

By implementing the OHRC's proposed approach, organizations can be confident that they have a conflict resolution process in place that is consistent with human rights principles.

Organizational process for addressing competing rights⁴

Many competing rights situations can be quickly resolved through an informal process that may involve no more than one or two meetings. At the outset, organizations should consider whether the situation is suited to an informal and expedited process. For example, the facts of the situation and the framing of each claim may be straightforward and not in dispute. The parties may already be well-informed about each other's claims, rights and obligations. They may have shown respect for each other's interests and be willing to engage in discussions about solutions without delay.

A quick process will generally involve running through the analysis with both parties in a quick way. The focus here is less on a precise analysis of the rights at play, and more on finding solutions that benefit all sides and respect human rights. If the informal, quick process does not resolve the issue, then the organization may decide to use a full and more formal process. However, it is important to consider a quick resolution process first because workable solutions can be found relatively quickly in most cases of competing rights claims.

In a full, more formal process, the framework is applied more rigorously at Stage One to find out if a genuine competing human rights situation exists. If, after going through Stage One, an organization concludes that a competing human rights situation does exist, Stage Two will help guide it through the reconciliation process. The *Policy on Competing Human Rights* proposes an alternative dispute resolution (ADR) model to guide organizations through the Three Stage Analysis.

Conclusion

Competing human rights situations will inevitably arise in many different contexts, including workplaces, housing and schools. By following the approach outlined in the *Policy on Competing Human Rights*, organizations may be able to resolve tension and conflict between parties at an early stage. Resolving conflict early helps organizations to address matters before they fester and become entrenched. This in turn helps ensure the health and functioning of an organization, and can avoid costly and time-consuming litigation.

⁴ The case examples included in Appendix D can help organizations as they work through this part of the process. The case examples are presented in an analysis template that can help organizations frame the issues and assess all relevant considerations.

“All human beings are born free and equal in dignity and rights.”⁵

1. Introduction

As they interact with each other, individuals and organizations will encounter situations of tension and conflict. This is especially true in Ontario’s increasingly diverse and complex society. Conflicts can begin when an individual or group tries to enjoy or exercise a right, interest or value in an organizational context (e.g. in schools, employment, housing, etc.). At times, these claims may be in conflict, or may appear to be in conflict with other claims. Depending on the circumstances, for example, the rights to be free from discrimination based on creed or sexual orientation or gender may be at odds with each other or with other rights, laws and practices. How do you resolve a situation where a religious employer requires an employee to sign a “morality pledge” not to engage in certain sexual activity? Or, where a woman wants to testify wearing a *niqab* (a face veil worn by some for religious reasons) at the criminal trial of her accused? Or, where a professor’s guide dog causes a student to have a severe allergic reaction?

The Canadian *Charter of Rights and Freedoms* (the *Charter*), provincial human rights legislation and the courts recognize that no rights are absolute and no one right is more important than another right. Our laws guarantee rights such as freedom of expression and protection against discrimination and harassment based on gender, creed, sexual orientation and disability, among other grounds. They require that all rights be given equal consideration. The law also recognizes that rights have limits in some situations, particularly where they substantially interfere with the rights of others.

In recent years, competing human rights claims have emerged as a challenging issue for human rights commissions across Canada. The Ontario Human Rights Commission (the OHRC) has found that human rights claims increasingly involve situations where it appears that multiple claims are at stake. For example, a claimant may say that their statutory human rights have been violated by a respondent who then, in turn, claims a defence that is also established by human rights legislation. The human rights grounds most often cited in competing human rights claims include gender, creed, sexual orientation and disability, although other grounds and legal rights have also been invoked.

Ontario’s *Human Rights Code* (the *Code*) says the OHRC’s mandate includes reducing tension and conflict in Ontario’s communities and encouraging and co-ordinating plans, programs and activities to do this. The OHRC has developed this policy to help address difficult situations involving competing rights.

⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 1; available at: www.unhcr.org/refworld/docid/3ae6b3712c.html [accessed 17 January 2012].

Case law dealing with competing human rights claims has been developing slowly in Canada. The courts have said we must go through a process on a case-by-case basis to search for solutions to reconcile competing rights and accommodate individuals and groups, to the greatest extent possible. This search can be challenging, controversial, and sometimes dissatisfying to one side or the other. But it is a shared responsibility and will be made easier when we better understand the nature of one another's rights and obligations and show mutual respect for the dignity and worth of everyone involved. Finding the best solution for maximizing enjoyment of rights takes dialogue and even debate. To this end, there is a clear need for human rights policy guidance to supplement legal interpretation.

The OHRC has found that public debates on competing rights often relate to the presence of minority communities and how far the dominant culture should accommodate the rights of these groups. For example, in the post 9/11 world, various cultural and religious practices of Muslims have been called “inappropriate” or “unacceptable” by elements of the majority culture. These scenarios have commonly been referred to as matters of “competing rights” in the media. Others have questioned the extent to which publicly-funded schools ought to incorporate recognition of and respect for sexual diversity, including diverse family forms such as same-sex families.

The Right Honourable Beverley McLachlin, the Chief Justice of the Supreme Court of Canada, has extensive experience in the areas of human and *Charter* rights. She has written:

We need human rights. Whether we like it or not, religious, ethnic and cultural diversity is part of our modern world – and increasingly, part of our national and community reality. Human rights and the respect for every individual upon which they rest, offer the best hope for reconciling the conflicts this diversity is bound to generate. If we are to live together in peace and harmony – within our nations and as nations in the wider world – we must find ways to accommodate each other.⁶

The OHRC engaged in extensive background work to develop this policy. In addition to conducting legal and social science research, the OHRC developed a detailed case law review on competing rights.⁷ The OHRC also met with a wide range of individuals and organizations that either deal directly with competing rights situations, or have significant expertise in the area. For more detail on the policy development process, see Appendix B.

⁶ The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, “Human Rights Protection in Canada,” (2009) *Osgoode Hall Review of Law and Policy* (Vol. 2, Issue 1) at 20.

⁷ See *The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims*. This publication is available at www.ohrc.on.ca/en/issues/reconciling/shadow.

2. Practical steps to reduce potential for conflict

Employers, housing providers, educators and other responsible parties covered by the *Code* have the ultimate responsibility for maintaining an inclusive environment that is free from discrimination and harassment, and where everyone's human rights are respected. Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to situations involving competing rights.

There are proactive and practical steps that organizations should take to help reduce the potential for human rights conflict and competing rights. Organizations should be very familiar with the *Code* and with their obligations under it. They should take steps to educate and train responsible individuals on competing rights situations and the OHRC's *Policy on Competing Human Rights*.

It may be helpful for organizations to think of their responsibility to deal with competing rights matters as parallel to their already existing responsibilities relating to the human rights accommodation process. Organizations might consider assigning the responsibility for handling competing rights situations to the same people that are already responsible for dealing with accommodation issues. It could be the job of these people to educate and train others (including new staff), to monitor their environments to detect trends relating to competing rights, *etc.*

Employers, housing providers, educators and other responsible parties can help promote a healthy and inclusive environment for individuals protected by the *Code* by having a clear and comprehensive competing rights policy. The policy should include the process to be followed when a competing rights situation arises, alert all parties to their rights, roles and responsibilities, and commit the organization to deal with competing rights matters promptly and efficiently. An effective competing rights policy supports the equity and diversity goals of organizations and institutions and makes good business sense. For more detail on the suggested contents of an internal policy, see Appendix E of this policy.

Everyone in an organization should be aware of the policy and the steps for resolving complaints. This can be done by:

- giving policies to everyone as soon as they are introduced
- making all employees, tenants, students, *etc.* aware of them by including the policies in any orientation material
- training people, especially people in positions of responsibility, on the contents of the policies, and providing ongoing education on competing rights issues.

Tribunals and courts often find organizations liable, and assess damages, based on failure to respond appropriately to address discrimination and harassment. Some things to consider when deciding whether an organization has met its duty to respond to a human rights claim include:

- what procedures were in place to deal with discrimination and harassment
- how promptly the organization responded to the complaint

- how seriously the complaint was treated
- resources made available to deal with the complaint
- whether the organization provided a healthy environment for the person who complained
- how well the action taken was communicated to the person who complained.

Taking proactive and effective steps to address competing rights matters will help to protect an organization from liability if it is ever named as a respondent in a human rights claim involving competing rights.⁸

3. Goals of this policy

The main goal of this policy is to provide clear, user-friendly guidance to organizations, policy makers, litigants, adjudicators and others on how to assess, handle and resolve competing rights claims. The policy will help various sectors, organizations and individuals deal with everyday situations of competing rights, and avoid the time and expense of bringing a legal challenge before a court or human rights decision-maker.

It is in keeping with promoting social harmony to ensure that effective conflict resolution mechanisms are in place to address various types of conflict. This policy provides a framework for addressing competing rights situations that can be used as is, or adapted to meet the specific needs of individual organizations.

The courts have been clear that context is crucial in competing rights cases and each situation must be assessed on a case-by-case basis. This policy is intended to be a useful tool for individuals and organizations as they deal with different types of conflict. It sets out a process, based in existing case law, to analyze and reconcile competing rights. This process is flexible and can apply to any competing rights claim under the Canadian *Charter of Rights and Freedoms*, provincial or federal human rights legislation or another legislative scheme.

The process builds in specific objectives and considerations for the organizations and individuals involved. They should:

- show dignity and respect for one another
- encourage mutual recognition of interests, rights and obligations
- facilitate maximum recognition of rights, wherever possible
- help parties to understand the scope of their rights and obligations
- address stigma and power imbalances and help to give marginalized individuals and groups a voice
- encourage cooperation and shared responsibility for finding agreeable solutions that maximize enjoyment of rights.

⁸ The OHRC's *Guidelines on Developing Human Rights Policies and Procedures* provides more information to help organizations meet their human rights obligations and take proactive steps to make sure their environments are free from discrimination and harassment. The guidelines are available at: www.ohrc.on.ca/en/resources/Policies/gdpp/view

The approach in this policy can help organizations and decision-makers resolve and even avoid apparent rights conflicts altogether. But in some cases litigation may be unavoidable, particularly where matters prove to be too complex to resolve informally, where parties are not willing to take part in the reconciliation process, or where all concerned may want the guidance of a court or tribunal.

4. What are competing rights?

In general, competing human rights involve situations where parties to a dispute claim that the enjoyment of an individual or group's human rights and freedoms, as protected by law, would interfere with another's rights and freedoms. This complicates the normal approach to resolving a human rights dispute where only one side claims a human rights violation. In some cases, only one party is making a human rights claim, but the claim conflicts with the legal entitlements of another party or parties.

4.1 Defining terms

Although there may be a perception that a competing rights situation exists, one must recognize that not all claims will be equal before the law: some claims have been afforded a higher legal status and greater protection than others. For example, after World War II, the United Nations enshrined the paramount importance of human rights in *The Universal Declaration of Human Rights*. The *Declaration* opens:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...⁹

Legal systems around the world have responded to this universal commitment to world peace by granting special protection to human rights. Canada recognizes the unique status of human rights in its *Charter of Rights and Freedoms*, a comprehensive list of rights and fundamental freedoms entrenched in the Constitution of Canada that is intended to unify Canadians around a set of principles that embody those rights.

In Ontario, the provincial legislature included a primacy clause in the *Ontario Human Rights Code*, giving it the ability to trump other provincial legislation. Courts have also commented on the “quasi-constitutional” status of human rights legislation and stated the importance of interpreting the guaranteed rights in a broad and purposive manner that best ensures that society's anti-discrimination goals are reached.

The following frequently used terms are defined in an attempt to show how they are distinguishable from one another.

⁹ *Universal Declaration of Human Rights*, *supra*, note 5.

Human rights

Human rights are inalienable, indivisible, universal entitlements codified in international and domestic law. In Canada, they are protected and interpreted through:

- the Canadian *Charter of Rights and Freedoms*
- provincial-territorial human rights legislation
- decisions of tribunals and courts
- human rights commission policy statements, interventions and other mandated functions
- international law/instruments (ratified treaties, treaty body comments/decisions, international and other jurisdictional court decisions).

Statutory human rights are also accompanied by defences, as set out in human rights legislation, and sections of the *Charter*. For example, the right to freedom of expression guaranteed by section 2(b) of the *Charter* may be circumscribed by reasonable limits as contemplated in section 1 of the *Charter*.¹⁰ A person's right to freedom of expression may be limited, for example, where their views incite hatred toward an identifiable group.

Legal entitlements

For the purposes of this policy, legal entitlements are non-human rights-related rights that are also codified in legislation (e.g. the *Occupational Health and Safety Act* and the *Residential Tenancies Act*), and the common law (i.e. case law). They are rights that are legally actionable: for example, the violation of a person's right to "reasonable enjoyment" of their rental housing could be litigated in Ontario before the Landlord and Tenant Board, the adjudicative body that administers the *Residential Tenancies Act*.

Interests

An interest is a matter in which someone has a personal concern, share, portion or stake. Interests may be societal and/or individual. Although interests are not legal rights, they are sometimes misunderstood and misclassified as such. In some cases, an interest could be elevated to the status of a right, if it is validated by a legal body. For example, a court or tribunal could find that an interest is *bona fide* (genuine) and reasonable in the circumstances: "the best interests of the child" have been given a high legal status and used by courts and tribunals to determine a wide range of issues involving children. Or, a court could find that an interest is of such magnitude that it constitutes a reasonable limit under section 1 of a *Charter* right. For example, the Supreme Court of Canada has held that a requirement that all licensed drivers be photographed, even though it interfered with the right to freedom of religion of Hutterites, was justified under section 1 of the *Charter* due to the state's interest in preventing identity theft and fraud.¹¹

¹⁰ Section 1 of the *Charter* states: "The *Canadian Charter of Rights and Freedoms* 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": *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹¹ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

Values

Values are moral principles, standards, and/or things that a person (or group) believes are vital for achieving “the good” or excellence in any sphere of life. Some values may be reflected in law. For example, the Preamble to the *Code* is informed by the principles of mutual respect and the recognition of the dignity and worth of every person. Generally, however, values are subjective and not legally actionable in and of themselves. Understanding the individual or social values that may underlie a human rights claim will help parties and may inform its ultimate disposition. For example, in *Ross v. New Brunswick School District No. 15*, the Supreme Court of Canada gave special recognition to the importance of public education and the vulnerability of children when it unanimously upheld a human rights Board of Inquiry finding that a teacher’s off-duty anti-Semitic comments undermined his ability to fulfill his functions as a teacher. The Court concluded that the Board of Inquiry was correct in concluding that his continued employment as a teacher constituted discrimination in public education.¹²

There are many situations in which rights, interests, and values seem to conflict or compete. When evaluating situations of competing rights, human rights and other legally codified rights will usually hold a higher status than interests and values. However, in some circumstances, interests and values may represent reasonable limits on rights and human rights, as envisioned by section 1 of the *Charter*. This policy is meant mainly to be a tool for resolving situations where there is a conflict of human rights and rights that are legally protected.

4.2 Examples of competing rights situations

A competing human rights situation exists when legally protected rights are present in both claims, and at least one of the claims connects to human rights law. Based on this definition, allegations of competing human rights scenarios might include the following:

4.2.1 Code right v. Code right

The Ontario *Human Rights Code* prohibits discrimination based on 15 grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability, receipt of public assistance (in housing only), record of offences (in employment only). Competing rights claims may potentially arise relating to any *Code* ground. However, situations of conflict often involve creed, sex, gender identity, sexual orientation, marital status or disability.

Example: A civil marriage commissioner objects to performing a marriage ceremony for a same-sex couple, claiming that it violates his religious beliefs. He claims that under the *Code*, he has the right to be free from discrimination based on religion in employment. The couple wishing to receive the service claims that their right under

¹² *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

the *Code* to be free from discrimination because of sexual orientation in services is being breached.¹³

It is also possible for competing claims to involve the same ground.

Example: A college professor's guide dog is affecting one of her students who has a severe allergy to dogs. Both individuals might make *Code*-based human rights claims on the ground of disability.

4.2.2 *Code* right v. *Code* legal defence

In addition to providing protection from discrimination based on specific enumerated grounds, the *Code* includes exemptions that may act as a defence to a claim of discrimination. In many cases, these exemptions are deliberate attempts by those who wrote the legislation to address and help resolve situations where rights might compete.¹⁴

Example: A religious organization, providing supportive group living to persons with disabilities of any denomination, requires staff to abide by a religious code of behaviour. The organization dismisses a support worker once it learns she is in a same-sex relationship. The dismissed worker might claim *Code*-based discrimination on the ground of sexual orientation while the religious organization might claim a *Code* defence under section 24(1)(a) that allows restrictions on terms of employment for religious and other types of organizations in certain circumstances.¹⁵

¹³ The Saskatchewan Court of Appeal recently considered whether civil marriage commissioners should have the right to refuse to perform same-sex marriage ceremonies based on their religious beliefs: *Marriage Commissioners Appointed Under the Marriage Act (Re)*, 2011, SKCA 3 (CanLII). In two separate decisions, all five judges of the Court found that proposed amendments to Saskatchewan's *The Marriage Act, 1995*, which would have allowed individual marriage commissioners to refuse to conduct a marriage ceremony if doing so would be contrary to their religious beliefs, violated the equality rights provision (s. 15) of the *Charter*. Consistent with the general approach to reconciling competing rights under the *Charter*, both decisions then balanced the right to be free from discrimination based on sexual orientation against the religious rights of the marriage commissioners under s. 1 of the *Charter* and concluded, for slightly different reasons, that the equality rights infringement could not be justified despite the goal of addressing the religious objections of the marriage commissioners. See also *Nichols v. M.J.*, 2009 SKQB 299 (CanLII).

¹⁴ See section 5.8 of this policy entitled "Defences found in legislation may restrict rights," for more detailed information.

¹⁵ *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII) dealt with the ability of a religious organization that operates residential homes and camps for persons with developmental disabilities to rely on the special employment defence in section 24(1)(a) of the *Code* in defence of a claim of discrimination because of sexual orientation. Connie Heintz, a support worker in a community living residence operated by Christian Horizons, had signed a Lifestyle and Morality Statement required by Christian Horizons. The statement identified, among other things, "homosexual relationships" as inappropriate behaviour rejected by Christian Horizons. Several years after beginning her employment, Ms Heintz came to an understanding of her sexual orientation and entered into a same-sex relationship. When this became known to the employer, she was offered counselling to assist her to comply with the Lifestyle and Morality Statement prohibiting "homosexuality." Ms Heintz alleged that after that, she was unfairly disciplined for her attitude and performance and exposed to a poisoned work environment. For Christian Horizons to rely on this defence it had to show: (1) that it is a "religious

4.2.3 Code right v. other legislated right

In some cases, competing rights claims may involve *Code* grounds and other legal entitlements.

Example: Some parents want the Ministry of Education to modify its sex education curriculum so it does not interfere with their beliefs: some for religious-based reasons, some for personal reasons. Other parents support the new curriculum changes: some based on the *Code* ground of family status and sexual orientation. Others want the new curriculum, based on the legislated right to public education. Parents opposed to certain types of sex education because of their beliefs might claim discrimination on the *Code* ground of creed. Other parents might claim a *Code* right based on family status, sexual orientation and a legislated right to a curriculum based on the broader purpose and requirements of the *Education Act*.

4.2.4 Code right v. Charter right

There may be situations where rights that are protected under the *Code* may compete with rights guaranteed by the *Charter*.

Example: A man describing himself as a “born again” Christian often discusses his new religious enthusiasm with his employees. He has tried several times to encourage workers to come to his church meetings, and for Christmas gives each employee a Bible as a gift. Employees have made it clear that they do not welcome or appreciate his comments and conduct in their secular workplace.

The employees could argue that the *Code* right to be free from discrimination based on creed includes the right not to be subjected to proselytizing at work. The employer might argue that he is exercising his freedom of expression rights under the *Charter*.

4.2.5 Code right v. common law right

In some cases, a right protected by the *Code* may bump up against a right established by common law.

Example: A Jewish family is asked to remove a temporary *sukkah* hut placed on their balcony for religious celebration because it does not comply with the condominium’s by-laws and is said to be interfering with the neighbours’ enjoyment of their balcony. The Jewish family claims discrimination on the ground of creed while the condominium co-owners might claim a right to peaceful enjoyment of property based on common law.¹⁶

organization;” (2) it is “primarily engaged in serving the interests of persons identified by” their creed and employs only people who are similarly identified; and (3) religious adherence is a reasonable and *bona fide* qualification because of the nature of the employment. On appeal, the Divisional Court found that Christian Horizons failed to meet the third element of the s. 24(1)(a) defence and discrimination was found.

¹⁶ *Syndicat Northcrest v. Amselem*, 2004 SCC 47

4.2.6 International treaty right v. *Code/Charter* defence

Canada has signed and ratified many different international human rights conventions, some of which include complaint mechanisms. There may be situations where rights set out in these treaties conflict with domestic rights and obligations.

Example: Non-Catholic religious school users claim a right to non-discriminatory religious school funding based on provisions of the United Nations' *International Covenant on Civil and Political Rights*.¹⁷ The UN treaty body responsible for the Covenant found that Ontario's public funding of the Catholic school system to the exclusion of all other religions was discriminatory.¹⁸ The Ontario government relied on provisions of the *Education Act*, an exemption in the *Human Rights Code*, the *Charter* and related case law in its defence.

4.2.7 Charter right v. *Charter* right

There may be situations where one person's rights under the *Charter* may compete with another person's *Charter* rights.

Example: A number of decisions dealing with the production of medical or other sensitive records in court or tribunal proceedings have considered the relationship between privacy and equality rights and the right to make full answer and defence, all rights protected by the *Charter*. In *R. v. O'Connor*, a case in which the accused was charged with a number of sexual offences, the Supreme Court of Canada established a procedure for determining when a victim's medical and therapeutic records, in the possession of third parties such as physicians, must be released to the accused for meaningful full answer and defence.¹⁹

¹⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: www.unhcr.org/refworld/docid/3ae6b3aa0.html [accessed 17 January 2012].

¹⁸ Consideration of Reports Submitted by States Parties. Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee*, Canada, CPR/C/CAN/CO/5, 20 April 2006, at para.21: The Committee expressed concern about the State party's responses relating to the Committee's Views in the case *Waldman v. Canada* (Communication No. 694/1996, Views adopted on 3 November 1999), requesting that an effective remedy be granted to the author eliminating discrimination on the basis of religion in the distribution of subsidies to schools (arts. 2, 18 and 26). The State party should adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario. Note, however, that in *Adler v. Ontario*, [1996] 3 S.C.R. 609, the Supreme Court of Canada considered the constitutional obligation to fund private denominational education and found that the *Ontario Schools Act* did not violate sections 2(a) or 15(1) of the *Canadian Charter of Rights and Freedoms*.

¹⁹ *R. v. O'Connor*, [1995] 4 S.C.R. 411.

5. Key legal principles²⁰

While the courts have not set a clear formula or analytical approach for dealing with competing rights, they have provided some guidance. Where rights appear to be in conflict, *Charter* principles require decision-makers to try to “reconcile” both sets of rights. Although there are no “bright-line rules”²¹ for dealing with competing rights claims, legal decisions have identified a number of fundamental principles that provide direction in how to deal with these types of scenarios, as well as what to avoid.²² The courts have recognized that the specific facts will often determine the outcome of the case. Therefore many of the principles are abstract, and allow for some flexibility in approaching claims on a case-by-case basis. While many of these principles arose in the context of *Charter* litigation, they also provide guidance for other types of human rights conflicts:

1. No rights are absolute
2. There is no hierarchy of rights
3. Rights may not extend as far as claimed
4. The full context, facts and constitutional values at stake must be considered
5. Must look at extent of interference (only *actual* burdens on rights trigger conflicts)
6. The core of a right is more protected than its periphery
7. Aim to respect the importance of both sets of rights
8. Statutory defences may restrict rights of one group and give rights to another.

Organizations must consider these legal principles when they deal with competing rights situations.

5.1 No rights are absolute

A consistent principle in the case law is that no legal right is absolute, but is inherently limited by the rights and freedoms of others.²³ In *R. v. Mills*, Supreme Court of Canada Justice McLachlin (as she then was) and Supreme Court of Canada Justice Iacobucci stated:

At play in this appeal are three principles, which find their support in provisions of the *Charter*. These are full answer and defence, privacy, and equality. No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims. As Lamer C.J. stated in *Dagenais* ... “When the protected rights of two individuals come into conflict... *Charter* principles require a balance to

²⁰ The information in this section has been adapted from the OHRC publication, *The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims*, *supra*, note 7, which provides a more detailed discussion of the case law dealing with competing rights.

²¹ *R. v. N.S.*, 2010 ONCA 670 at para 97. Leave to appeal to the Supreme Court of Canada granted: 2011 Can LII 14361 (SCC). The appeal was heard by the Supreme Court on December 8, 2011.

²² Examples of “what not to do” in a competing rights scenario include: (1) treating any right as absolute; (2) regarding any rights as inherently superior to another; (3) accepting a hierarchy of rights; and (4) approaching rights in the abstract or in a factual vacuum.

²³ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 29; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141 at 182; *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 226.

be achieved that fully respects the importance of both sets of rights.” This illustrates the importance of interpreting rights in a contextual manner - not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.²⁴

Justice Iacobucci emphasizes this point in an article entitled “Reconciling Rights: The Supreme Court of Canada’s Approach to Competing *Charter* Rights,” when he states: “A particular Charter right must be defined in relation to other rights and with a view to the underlying context in which the apparent conflict arises.”²⁵

Example: A person has a right to freedom of expression under the *Charter*, but they do not have a right to make child pornography.

In the context of freedom of belief or religion, the courts have found that the “freedom to hold beliefs is broader than the freedom to act upon them” where to do so would interfere with the rights of others.²⁶

The Ontario *Human Rights Code* protects against discrimination on the basis of creed. But this protection does not extend to religious belief that incites hatred or violence against other individuals or groups, or to practices or observances that are said to have a religious basis, but which contravene the *Criminal Code* or international human rights principles.

Other examples include limiting the right to freedom of expression guaranteed by section 2(b) of the *Charter* where the expression could compromise a fair trial guaranteed by section 11(d) and section 7 of the *Charter*,²⁷ incite hatred as defined in the *Criminal Code of Canada* and some human rights legislation,²⁸ or result in discrimination against a minority group in our society.²⁹

5.2 No hierarchy of rights

The Supreme Court of Canada has also been clear that there is no hierarchy of rights³⁰ — all rights are equally deserving and an approach that would place some rights over others must be avoided.³¹ No right is inherently superior to another right.³²

²⁴ *R. v. Mills*, 1999 CanLII 637 (SCC) at para. 61.

²⁵ The Honourable Justice Frank Iacobucci, “Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights,” *Supreme Court Law Review* (2003), 20 S.C.L.R. (2d) 137 at 139.

²⁶ *Trinity Western*, *supra*, note 23 at para. 29.

²⁷ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

²⁸ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

²⁹ *Ross*, *supra*, note 12.

³⁰ Note that there may be a hierarchy of *Charter* vs. non-*Charter* rights and *Code* vs. non-*Code* rights. The *Charter* has primacy over all laws in Canada. As well, quasi-constitutional rights contained in human rights laws generally have primacy over non-constitutional legal rights (see for example s. 47(2) of the Ontario *Human Rights Code*, R.S.O. 1990, CHAPTER H. 19).

³¹ *Dagenais*, *supra* note 27; *Mills*, *supra*, note 24 at para. 61.

Example: In *Dagenais v. Canadian Broadcasting Corporation*, the Supreme Court of Canada was asked to order a publication ban. The ban would have prevented the CBC from airing a mini-series showing a fictional account of sexual and physical abuse at a Catholic boy's school in Newfoundland during the trial of several members of a Catholic religious order. They were charged with physical and sexual abuse of young boys at schools in Ontario. The request for the publication ban required the court to balance the key constitutional rights of free expression (s. 2(b) of the *Charter*) and the right to a fair trial (s. 11(d)). Chief Justice Lamer stated:

A hierarchical approach to rights, which places some rights over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict ... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.³³

5.3 Rights may not extend as far as claimed

When faced with a competing right scenario, organizations must assess whether the rights extend as far as the parties claim. This validation process has two main components:

1. Does the claim engage a genuine legal right?
2. When the evidence is examined, can the individual with the claim bring himself or herself within the asserted right?³⁴

The courts have suggested that for a competing rights scenario to arise at all, a legal right must first be found to exist.³⁵ When the facts and law are set out clearly, in context, not every rights claim will be found to be legally valid.

Human rights tribunals have considered and rejected several justifications for discriminatory conduct which could appear to be competing rights. For example, decision-makers have not accepted “customer preference” or “business or economic

³² *R. v. N.S.*, *supra*, note 21 para 48. See also *Mills*, *ibid.*; *Dagenais*, *ibid.* at 877; *R. v. Crawford*, [1995] 1 S.C.R. 858, at para. 34.

³³ *Dagenais*, *ibid.*

³⁴ For example, a claim that there is an interference with freedom of religion may not be found to be legitimate if, on the facts of the case and in the relevant context, the asserted religious belief is not found to be sincerely held. In *Bothwell v. Ontario (Minister of Transportation)*, 2005 CanLII 1066 (ON S.C.D.C.), the Court considered all the evidence relating to the claimant's objection to a digital driver's licence photograph for religious reasons and found that the claimant did not meet his burden of establishing a sincerely held religious belief as set out in the Supreme Court decision in *Amselem*, *supra*, note 16. The Court was influenced, in part, by the fact that the claimant had raised a number of privacy, rather than religious, concerns and that his actions were not consistent with his asserted religious beliefs. Another example of failing to bring oneself within the right would be if asserting the right to free expression concerning activity that (a) does not convey or attempt to convey a meaning, and thus has no expressive content, or (b) that conveys a meaning but through a violent form of expression; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

³⁵ *R. v. N.S.*, *supra*, note 21 at paras. 49 and 65.

interests” as a valid competing right in cases involving discrimination contrary to human rights legislation.³⁶

Example: Organizations and individuals objecting to breastfeeding in public have claimed a “right” to request that a woman cover herself, move to a private area, *etc.* This right has sometimes been articulated as a freedom of expression claim. At first glance, there appears to be a conflict between freedom of expression and freedom from discrimination based on sex. But a careful consideration tells a different story. Court and Tribunal decisions have clearly established a woman’s right to breastfeed in public.³⁷ These decisions have concluded that actions which prevent a woman from breastfeeding in public are discriminatory. These precedents mean that in the absence of a compelling, equally valid right (or a *Code* defence such as health and safety), a woman has an unqualified right to breastfeed in public. Freedom of expression is not a valid counter-claim because there is no established positive legal right to individual preference. In other words, you may have an opinion about a woman breastfeeding in public, but you cannot use your preference to stop an activity that is already recognized as an established equality right.

If the claim does engage a legal right, it is then necessary to consider whether on the facts of the case, the individual can bring him or herself within that right. Evidence may need to be called to prove that the claim falls within the parameters of the right unless the engagement of the right is clear from the circumstances.³⁸

In the case of *Grant v. Willcock*, a refusal to sell property to a racialized person did not fall under the right to liberty guaranteed by section 7 of the *Charter*. A human rights tribunal (formerly the “Board of Inquiry”) found in the circumstances of the case that liberty rights did not extend to the liberty to discriminate based on a prohibited ground in the public sale of private property.³⁹

³⁶ See for example: *Giguere v. Popeye Restaurant*, 2008 HRTO 2 (CanLII) citing a number of other human rights decisions. In *Giguere*, the Tribunal stated at para. 77: “Economic interests and rights do not trump human rights, unless there is a specific exemption in the legislation.”

³⁷ See, for example, *Quebec et Giguere v. Montreal (Ville)* (2003) 47 C.H.R.R. D/67.

³⁸ In *R. v. N.S.*, the court noted that unlike an accused person’s right to make full answer and defence in a fair trial, a witness’ right to freedom of religion is not inherently triggered by taking part in the criminal justice process. A witness who seeks to exercise a religious practice while testifying must establish that the practice falls within the scope of the right to freedom of religion. That inquiry must almost inevitably involve testimony from the witness explaining the connection between the practice and his or her religious beliefs, although in most cases the inquiry would be relatively straightforward; *R. v. N.S.*, *supra* note 21 at paras. 65-66. In a B.C. Human Rights Tribunal decision, the applicant was found not to have alleged facts “from which a nexus could be inferred” between the alleged adverse treatment she received and her religious beliefs. Therefore, there was insufficient evidence to establish that a religious right was engaged; *Chiang v. Vancouver Board of Education*, 2009 B.C.H.R.T. 319 at para 115.

³⁹ *Grant v. Willcock* (1990), 13 C.H.R.R. D/22 (Ont. Bd.Inq.).

5.4 Consider full context, facts and constitutional values

5.4.1 Context and facts

Once the competing issues are identified and described, the rights must be defined in relation to one another by looking at the context in which the apparent conflict arises.⁴⁰ This approach is critical — the courts have repeatedly held that *Charter* rights and human rights do not exist in a vacuum and must be examined in context to settle conflicts between them.

Example: The Ontario Court of Appeal stated clearly in *R. v. N.S.*: “reconciling competing *Charter* values is necessarily fact-specific. Context is vital and context is variable.”⁴¹

Supreme Court of Canada Justice Frank Iacobucci expressed a similar view:

The key to rights reconciliation, in my view, lies in a fundamental appreciation for *context*. Charter rights are not defined in abstraction, but rather in the particular factual matrix in which they arise.⁴²

...

Courts must be acutely sensitive to context, and approach the Charter analysis flexibly with a view to giving fullest possible expression to all the rights involved.⁴³

Even slight variations in context may be critical in determining how to reconcile the rights. For example, in a situation that measures the right to freedom of expression against the impact of that expression on a vulnerable group, the precise tone, content and manner of delivery of the impugned message all have a significant impact on assessing its effect and the degree of constitutional protection it should be afforded. As noted by Justice Rosalie Abella in her dissenting judgement in *Bou Malhab v. Diffusion Métromédia CMR Inc.*, “[T]here is a big difference between yelling “fire” in a crowded theatre and yelling “theatre” in a crowded fire station.”⁴⁴

5.4.2 Underlying constitutional and societal values

As part of understanding the context, the constitutional and societal values at stake must be appreciated and understood.⁴⁵ This “scoping of rights” allows some rights conflicts to be resolved.

⁴⁰ *Mills*, *supra* note 24; *Trinity Western*, *supra* note 23.

⁴¹ *R. v. N.S.*, *supra* note 21 at para. 97.

⁴² *Supra*, note 25 at 141.

⁴³ *Ibid.* at 167.

⁴⁴ *Bou Malhab v. Diffusion Métromédia CMR Inc.*, [2011] 1 S.C.R. 214 at para. 96.

⁴⁵ *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099-1101; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 362-363, 366; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 253-255.

Several considerations come into play in scoping the rights. A contextual analysis will often involve weighing the underlying values of Canadian society incorporated in various legal instruments and case law. For example, as the Supreme Court of Canada stated in *R. v. Oakes*, a case that set out the test for determining whether an infringement of *Charter* rights can be justified in a free and democratic society:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.⁴⁶

The Preamble to the Ontario *Human Rights Code*, adapted from the *Universal Declaration of Human Rights*, also reflects societal values with respect to human rights and equality. To this end, four key principles emerge from the Preamble:

1. recognizing the dignity and worth of every person
2. providing equal rights and opportunities without discrimination that is contrary to law
3. creating a climate of understanding and mutual respect, so that
4. each person feels a part of the community and able to contribute fully to the development and well-being of the community and the province.

Inherent in these values is a balancing⁴⁷ of individual and group rights. The Preamble describes relational rights where the equality of each individual exists alongside community development and well-being. These values are not seen as hierarchical; one establishes and gives meaning to the other. In other words, the equality of each individual is fostered by creating a climate of mutual respect. At the same time, the community is fostered through the recognition of the inherent dignity and worth of each individual. The Preamble makes clear that human rights legislation does not simply deal with violations of equality rights — it is also designed to foster an inclusive climate of mutual respect.⁴⁸

⁴⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103. It is significant that these words very closely echo those that describe the values and principles underlying human rights as found in the preamble to the Ontario *Human Rights Code* and human rights statutes across the country.

⁴⁷ The term “balancing” has been used in a number of legal decisions involving competing rights: see, for example, *Ross*, *supra*, note 12 at paras. 73 and 74.

⁴⁸ For a more detailed discussion on this point, see Ontario Human Rights Commission, “Balancing Conflicting Rights: Towards an Analytical Framework,” (2005) at 7; available at: www.ohrc.on.ca/en/resources/discussion_consultation/balancingrights/pdf

International human rights law can also be an indicator of a society's underlying values. By endorsing an international convention, for example, Canada has publicly stated its commitment to uphold the values the convention contains.⁴⁹

There have been cases where a person's objections to what they see as a violation of their rights have not been successful because their views are not consistent with society's underlying values on human rights and equality. Decision-makers should apply a contextual analysis that considers constitutional values and societal interests including equality rights of women, negative stereotyping of minorities, access to justice and public confidence in the justice system.⁵⁰

Example: *Chamberlain v. Surrey School District No. 36*⁵¹ involved a challenge to a school board's decision not to approve three books showing same-sex parented families as supplementary resources for use in teaching the family life curriculum. The Supreme Court of Canada noted that, while religious concerns of some parents could be considered, they could not be used to deny equal recognition and respect to other members of the community. The majority decision recognized the right to *hold* religious views, including the view that the practices of others are undesirable. But it emphasized that if a school is to function in an atmosphere of tolerance and respect, these views could not become the basis of school policy.

In *Bruker v. Marcovitz*⁵², the Supreme Court of Canada dealt with the relationship between freedom of religion and gender equality rights. A domestic dispute arose out of a husband's refusal to give his wife a religious divorce. The couple had signed an agreement to resolve their matrimonial disputes. The agreement included a term that the husband would give his wife a "*get*."⁵³ However, for more than 15 years the husband refused to honour his commitment and argued that a civil court could not enforce the agreement he signed without violating his religious rights. The majority of the judges of the Supreme Court of Canada disagreed. They found that the contract was a valid and binding obligation and that the husband was not protected from liability for breaching the agreement based on freedom of religion. In doing so, they suggested that the wife's rights were a factor, and so too were fundamental values in Canadian society.⁵⁴ The

⁴⁹ For a more detailed discussion, see Sebastian Poulter, "Ethnic Minority Customs, English Law and Human Rights," (1987) 36 *International and Comparative Law Quarterly*, 589 at 596.

⁵⁰ See *R. v. N.S.*, *supra*, note 21.

⁵¹ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710.

⁵² *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607.

⁵³ A *get* is a Jewish divorce that would release a wife from marriage and allow her to remarry within the faith. Only a husband can give a *get* and there is no other process within the Jewish faith for releasing a wife from the marriage.

⁵⁴ The majority of the Court noted that while courts would be reluctant to interfere in "strictly spiritual or doctrinal" religious matters, they will intervene when property or civil rights are engaged. They went on to question the husband's religious rights claim, stating they were having "difficulty discerning" how requiring him to comply with his agreement to give a *get* could conflict with a sincerely held religious belief and have non-trivial consequences for him. However, even if he could establish this, his claim of a religious right had to be balanced against competing values or harm that would result. The OHRC's *Policy on Creed and the Accommodation of Religious Observances* also recognizes limits on religious freedom and states at page 5 that it "does not extend to religions that incite hatred or violence against other individuals

judges noted that the husband had “little to put on the scales” both because he had freely entered into an agreement which he later claimed violated his rights, and because to allow him to back out of it would offend public policy:

The public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests and values that outweigh Mr. Marcovitz’s claim that enforcing [the agreement] would interfere with his religious freedom.

Not all competing rights decisions deal with discrimination issues directly. But many of the values underlying human rights protections — respect for human dignity, commitment to social justice and equality, accommodating a wide variety of beliefs and circumstances, protecting vulnerable persons and minority groups — are important when deciding how to reconcile or appropriately limit rights.

5.5 Look at extent of interference

When rights appear to be in conflict, a key consideration is to determine if there is an actual intrusion of one right on the other, and the extent of the interference. If the interference is minor or trivial, the right is not likely to receive much, if any, protection.

Example: In *Syndicat Northcrest v. Amselem*, a Jewish family was asked to remove a *sukkah* (a temporary hut placed on their balcony for religious celebration) because it did not comply with the condominium’s by-laws and was interfering with the neighbours’ enjoyment of their balcony. The Supreme Court refused to engage in a balancing process under section 1 of the *Charter* between freedom of religion as it affected the right to peaceful enjoyment and free disposition of property, since, in the Court’s view, the effect on the Jewish family was substantial while the effect on the co-owners was “at best, minimal,” and therefore limiting religious freedom could not be justified.⁵⁵

Unless there is a substantial impact on other rights, there is no need to go further in the resolution process.

Example: Providing rainbow stickers (which show support for lesbian, gay, bisexual, transsexual, transgender, intersex, queer, questioning, 2-spirited and allied communities) to a teacher, who could choose to display the stickers or not, was found not to create any burden or disadvantage on religious rights.⁵⁶

or groups, or to practices or observances that purport to have a religious basis but which contravene international human rights standards or criminal law.” The Policy refers to female genital mutilation as a violation of human rights that is not protected on the ground of creed. The OHRC’s *Policy on Creed and the Accommodation of Religious Observances* is available at:

www.ohrc.on.ca/en/resources/Policies/PolicyCreedAccomodEN/pdf.

⁵⁵ *Amselem*, *supra*, note 16 at paras. 57 and 60.

⁵⁶ *Chiang*, *supra* note 38 at para 36.

Recognizing the rights of one group (e.g. the legalization of same-sex marriage) cannot, in itself, violate the rights of another (e.g. religious groups that do not recognize the right of persons of the same sex to marry) unless there is an actual impact on the rights of another (e.g. religious officials being asked to perform same-sex marriages). In *Reference re Same-Sex Marriage*, the Supreme Court of Canada stated:

[T]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.⁵⁷

Similarly, speculation that a rights violation *may* occur is not enough — there must be evidence, and not just an unsupported assumption, that the enjoyment of one right will have a harmful effect on another.

Example: Requiring teaching students in a religious teacher’s college to follow certain “community standards” prohibiting “homosexual activity” does not mean that graduates of the teaching program will discriminate against or show intolerance towards their students based on sexual orientation.⁵⁸

5.6 Core of right more protected than periphery

If there is a substantial interference with the rights in question, the rights must be weighed or balanced; one right will give way to the other or both rights will be compromised. It appears from the law that one set of rights is more likely to be restricted when an action would be contrary to the “core,” or a fundamental aspect, of another individual’s rights. For example, the courts have said that requiring religious officials to perform same-sex marriages contrary to their religious beliefs⁵⁹ is different than allowing a person operating a business to refuse to offer his printing services to a same-sex organization on the basis that it violates his religious beliefs. In the latter case, the court noted that commercial enterprise is at the “periphery” of freedom of religion, and therefore, the religious rights had to give way to the right to be free from discrimination in services based on sexual orientation.⁶⁰

⁵⁷ *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 46. In *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, the Supreme Court of Canada dismissed a challenge under s. 2(a) of the Canadian *Charter of Rights and Freedoms* by parents who argued that a mandatory course on ethics and religion would interfere with their ability to pass on their Catholic faith to their children. The Court found that a person must prove, through objective evidence, that there is an interference with a religious right. While the parents sincerely believed that they had an obligation to pass on the precepts of their religion to their children, they did not objectively demonstrate that their ability to do so had been interfered with. The Supreme Court also stated that children’s exposure to views that are different than what they have been taught by their families does not in itself violate religious rights (at para. 40).

⁵⁸ *Trinity Western*, *supra* note 23.

⁵⁹ *Reference re Same-Sex Marriage*, *supra*, note 57.

⁶⁰ In *Brockie v. Brillinger (No. 2)*, (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.), the Divisional Court noted that Mr. Brockie’s exercise of his right to freedom of religion in the commercial marketplace is, at best, at the fringes of the right. Therefore, limits on his right to freedom of religion were found to be justified where it

The court stated:

The further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of protection. Service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion.⁶¹

The courts have consistently acknowledged that individuals are free to hold religious beliefs or express their opinions – but they have also made it clear that there are limits to how these beliefs and opinions may be acted upon where they may deny equal recognition and respect to other marginalized members of society. To this end, the private exercise of a right is generally given greater protection than the public exercise of a right.

Example: The rights to freedom of expression and religion have been limited where the inherent dignity and equality of individuals protected under human rights legislation is significantly engaged, such as where the writings of a teacher were found to have poisoned the educational environment for his Jewish students.⁶²

For one right to prevail over another, the impact on the core of the right must be shown to be real and significant in the circumstances. Yet, even where this is found to be the case, there is still a duty to accommodate the yielding right as much as possible.

5.7 Respect importance of both sets of rights

Where rights appear to be in conflict, *Charter* principles require an approach that respects the importance of both sets of rights, as much as possible.⁶³ As noted in Supreme Court of Canada Justice Frank Iacobucci's article, and as cited with approval by the Ontario Court of Appeal:⁶⁴

...it is proper for courts to give the fullest possible expression to all relevant *Charter* rights, having regard to the broader factual context and to the other constitutional values at stake.⁶⁵

However, potential compromises to both sets of rights, recently described as “constructive compromises” by the Ontario Court of Appeal, are part of the reconciliation process. These compromises “may minimize apparent conflicts ... and produce a process in which both values can be adequately protected and respected.”⁶⁶ Searching for compromises involves exploring measures that may lessen any potential harm to each set of rights.

would cause harm to others, namely by infringing their *Code* right to be free from discrimination based on sexual orientation. The court left open the possibility that a different conclusion could be reached if the material being printed contained material that “might reasonably be held to be in direct conflict with the core elements of Mr. Brockie’s religious beliefs.” (at para. 56)

⁶¹ *Brockie v. Brillinger (No. 2)*, *ibid.* at para. 51.

⁶² *Ross*, *supra* note 12.

⁶³ *Trinity Western*, *supra*, note 23 at para. 31; *Dagenais*, *supra*, note 27 at p. 877.

⁶⁴ *R. v. N.S.*, *supra*, note 21 at para. 47.

⁶⁵ *Supra*, note 25 at 140.

⁶⁶ *R. v. N.S.*, *supra*, note 21 at para. 84.

This process of looking for options to reconcile competing human rights resembles the analysis under section 1 of the *Charter* and the process that must be followed as part of the duty to accommodate under human rights law. Similarly, in cases such as *Dagenais v. Canadian Broadcasting Corp.*,⁶⁷ the Supreme Court directed courts considering a request for a publication ban to search for a “reasonably available and effective alternative measure” which would achieve the important objectives at stake.

When rights are in true conflict, some balancing may be required. One right may give way to another, or constructive compromises to both sets of rights may be found. In *R. v. O’Connor*,⁶⁸ a case involving a victim’s right to privacy in medical records and an accused person’s right to make full answer and defence, a balance was achieved by first providing the disputed records to the court to review.

There may be rare cases where reconciling the rights in question is not possible. For example, in *R. v. N.S.*,⁶⁹ the Ontario Court of Appeal acknowledged that while all rights are to be treated as equal at the outset, if there is no way to reconcile them, one right may be forced to give way to another. For example, when a conflict arises that truly harms an accused person’s *Charter* right to make full answer and defence, that right will prevail. The countervailing right will have to yield as our justice system has always held that the threat of convicting an innocent person strikes at the heart of the principles of fundamental justice.⁷⁰

5.8 Defences found in legislation may restrict rights

Human rights laws and the *Charter* contain exceptions that allow differential treatment in certain circumstances. In many cases, these defences were put into legislation to recognize competing rights and may reflect law-makers’ efforts to reconcile a conflict between different rights.⁷¹

Often, statutory defences have been created to protect collective rights.⁷² They typically deal with matters such as religious education, the ability of certain types of organizations serving the interests of a particular group to restrict their membership to persons who

⁶⁷ *Dagenais, supra*, note 27.

⁶⁸ *O’Connor, supra*, note 19.

⁶⁹ *R. v. N.S.*, *supra*, note 21. The Supreme Court of Canada has granted leave to appeal the decision of the Ontario Court of Appeal. It will, therefore, soon have the opportunity to comment on or revise the approach to the competing rights at issue.

⁷⁰ *R. v. N.S.*, *ibid.* at paras. 88-89; *Mills, supra*, note 24 at para. 89.

⁷¹ Legislators are often in a good position to address the potential for rights to compete. As opposed to decision-makers, legislators have the ability to proactively address conflicts before they occur by drafting legislative language that can prevent conflicts from occurring in the first place. However, as one author notes, “Opting for the legislature as a preferential forum for dealing with conflicts of human rights may restrict the scope of the problem for the courts, but will not exclude it. There will always be cases in which the legislator does not foresee the negative implications that a rule protecting one right may have on another right”: see Eva Brems, “Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms,” *Human Rights Quarterly* 27 (2005) 294 at 305.

⁷² See *Caldwell v. Stewart*, [1984] 2 S.C.R. 603.

belong to that group; the ability to restrict access to certain facilities and shared housing by sex; and the rights of religious officials to refuse to conduct marriage ceremonies contrary to their religious beliefs.

The Ontario *Human Rights Code* also includes provisions that appear to be attempts by the Legislature to reduce competing rights conflicts. The Preamble to the *Code* offers initial guidance for addressing conflicting rights by reflecting the values underlying the *Code* and human rights legislation in general. The *Code* also contains several exceptions that help to avoid situations where rights could potentially compete. The exceptions under the *Code* that most often emerge in competing rights cases are sections 13, 18, 18.1, 20(3), and 24. The eligibility criteria contained in each of these sections restricts to whom and in what circumstances these exceptions will apply.

For example, section 13 of the *Code* attempts to balance a prohibition on an announced intention to discriminate with the freedom of expression of opinion.

13. (1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

(2) Subsection (1) shall not interfere with freedom of expression of opinion.

In recognition of the importance of freedom of expression as set out in this section, the OHRC intervened at the Human Rights Tribunal of Ontario in *Whiteley v. Osprey Media Publishing Inc. and Sun Media Corporation*. The case involved an allegation that an editorial in *The County Weekly News* discriminated against people who have moved to Prince Edward County from elsewhere. The applicant alleged discrimination in services because of place of origin. The OHRC argued that section 13 of the *Code* does not restrict newspapers from printing opinions that some people may not like. In its decision, the Tribunal agreed, saying "...publication of opinion in the media is a matter at the core of freedom of expression and freedom of the press in a democratic society."⁷³

In another example, section 18 of the *Code* addresses "special interest organizations":

The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

This section applies only to services and facilities that are restricted based on membership or participation in an organization that primarily serves the interests of persons identified by a prohibited ground of discrimination (e.g. an Italian club for older persons). To qualify for an exception under this section, membership and participation

⁷³ *Whiteley v. Osprey Media Publishing*, 2010 HRTO 2152 (CanLII).

must be restricted to persons who are similarly identified with the primary service interests of the organization. Therefore, this provision accommodates religious freedoms by allowing religious institutions to grant preferences in their admission policies or membership based on religion.⁷⁴ The interpretation of this section in the case law balances freedom of association with equality rights. Like each of the other exception sections, this section considers the relationship between the private and public spheres. The public's right to be treated without discrimination must be considered against a private organization's right to limit its membership to an identified group.⁷⁵

Section 1 is the primary site of internal balancing in the *Charter*. This section, also known as the "reasonable limits clause," allows the government to limit an individual's *Charter* rights. When the government has limited an individual's right, it has an onus to show, on a balance of probabilities, that the limitation was prescribed by law and is a reasonable limit in a free and democratic society. This is done by applying the "Oakes test." Simply put, the *Oakes* test considers:

1. Whether there is a serious and important government objective
2. Whether the way the government is trying to reach that objective is proportional (*i.e.* reasonable and justified). This consideration determines whether:
 - (a) the government's measures are carefully designed to reach the objective
 - (b) the approach used impacts on the rights at issue as little as possible
 - (c) the benefits from the government's measures outweigh the seriousness of the impact on the rights.⁷⁶

In a competing rights situation, the *Oakes* test should be applied flexibly to find a balance between the infringed right and the right the state seeks to foster to justify the infringement. Once again, this requires close attention to the full context in the particular circumstances of the case before the court.

Example: The majority of the Supreme Court in *B. (R.) v. Children's Aid Society*⁷⁷ found that the parents' decision to refuse a potentially life-saving blood transfusion for their baby was protected by freedom of religion. Using a process under the *Child Welfare Act*, the child had been made a temporary ward of the Children's Aid Society which had consented to the blood transfusion. However, despite the serious contravention of the parent's section 2(a) rights, the infringement was justified under

⁷⁴ For example, under section 18, a private Christian post-secondary school can restrict its admissions to students who agree that "homosexuality" is a sin and undertake to refrain from "homosexual" practices.

⁷⁵ *Martinie v. Italian Society of Port Arthur* (1995), 24 C.H.R.R. D/169 (Ont. Bd. Of Inquiry). Note, this section could also apply to other organizations; for example, women's groups, ethnic organizations, etc.

⁷⁶ The exact language for the test as set out in *R. v. Oakes*, *supra*, note 46 at para. 70 is:

1. There must be a pressing and substantial objective
2. The means to achieve that objective must be proportional
 - a. The means must be rationally connected to the objective
 - b. There must be minimal impairment of rights
 - c. There must be proportionality between the infringement and objective

⁷⁷ *B. (R.)*, *supra*, note 23.

section 1 of the *Charter*. The state interest in protecting children at risk was balanced against the parents' rights and found, in this case, to outweigh them.

Several things are clear when one reads the decisions that consider defences to discrimination in human rights statutes. First, unlike human rights defences that limit an individual's right based on other interests (such as financial undue hardship),⁷⁸ defences that also recognize and promote the competing rights of other groups in society must not be interpreted overly narrowly. Second, despite this approach to interpretation, the defence has to be found to actually apply in the case at issue. Finally, this last point requires a full consideration of context based on the evidence in the circumstances of the case. In particular, the organization seeking to rely on the defence must be able to show, through objective evidence, the link between the actions that have a discriminatory impact on others and its enjoyment of its group right.

6. Analysis for addressing competing human rights situations

This section is based on a framework for addressing competing rights that the OHRC developed based on international human rights principles, case law, social science research, and consultation with community partners and stakeholders.⁷⁹ The framework is set out in a summarized chart form at Appendix C.

The framework was developed with organizational settings in mind. This is where most competing rights situations happen and where they are best resolved. Employers, service providers, housing providers, unions and others have a legal obligation to address all human rights matters that may arise. This policy outlines a process to help organizations recognize and reconcile competing human rights claims. It is also an analysis tool that can be used by lawyers, mediators and adjudicators.

It is critical that all parties involved have a chance to be heard and to hear the perspectives of opposing parties. As the Ontario Court of Appeal has noted:

If a person has a full opportunity to present his or her position and is given a reasoned explanation for the ultimate course of conduct to be followed, the recognition afforded that person's rights by that process itself tends to validate

⁷⁸ Section 17(2) of the *Code* prescribes three considerations in assessing whether an accommodation would cause undue hardship. These are: cost, outside sources of funding, if any, and health and safety requirements, if any.

⁷⁹ The OHRC has already taken steps to promote its framework in different legal proceedings involving competing rights. The OHRC intervened in the case of *R. v. N.S.*, *supra*, note 21, involving a witness who wore a *niqab*. In its facta submitted to the Court of Appeal for Ontario and the Supreme Court of Canada, the OHRC advanced a legal approach to resolving competing human rights claims consistent with the framework. Relevant portions of the Court of Appeal factum are available on the OHRC's website and were reflected in the decision of the Court of Appeal. The OHRC also relied on the framework's reasoning and analysis in its intervener factum filed with the Supreme Court of Canada in *Saskatchewan Human Rights Commission v. William Whatcott*, 2010 CanLII 62501 (SCC). The appeal was heard by the Supreme Court on October 12, 2011.

that person's claim, even if the ultimate decision does not give that person everything he or she wanted.⁸⁰

By implementing the OHRC's proposed approach, organizations can be confident that they have a conflict resolution process in place that is consistent with human rights principles. The framework helps organizations recognize and address any power imbalances that may exist and take steps to empower all parties involved. Also, having an objective process removes some of the elements of individual discretion on the part of each decision-maker, and helps parties to feel they are being treated fairly and in accordance with standard procedures.

By following the approach outlined in the framework, organizations can take steps to resolve tension and conflict between parties at an early stage. Resolving conflicts early helps organizations to address matters before they fester and become entrenched. This in turn helps ensure the health and functioning of an organization, and can avoid costly and time-consuming litigation.

The following table summarizes the framework's three-stage, five-step process for recognizing and reconciling competing human rights claims:

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| <p style="text-align: center;">Process for addressing competing human rights situations</p> <p>Stage One: Recognizing competing rights claims</p> <p>Step 1: What are the claims about?</p> <p>Step 2: Do claims connect to legitimate rights?</p> <p style="padding-left: 40px;">(d) Do claims involve individuals or groups rather than operational interests?</p> <p style="padding-left: 40px;">(e) Do claims connect to human rights, other legal entitlements or <i>bona fide</i> reasonable interests?</p> <p style="padding-left: 40px;">(f) Do claims fall within the scope of the right when defined in context?</p> <p>Step 3: Do claims amount to more than minimal interference with rights?</p> <p>Stage Two: Reconciling competing rights claims</p> <p>Step 4: Is there a solution that allows enjoyment of each right?</p> <p>Step 5: If not, is there a "next best" solution?</p> <p>Stage Three: Making decisions</p> <ul style="list-style-type: none">• Decisions must be consistent with human rights and other law, court decisions, human rights principles and have regard for OHRC policy• At least one claim must fall under the Ontario <i>Human Rights Code</i> to be actionable at the Human Rights Tribunal of Ontario |
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⁸⁰ *R. v. N.S.*, *supra* note 21 at para. 83.

6.1 Stage One: Recognizing competing rights claims

At one point or another, most organizations will face situations where the values, interests and rights of individuals come into conflict. Stage One guides organizations to three areas of inquiry to help determine whether claims amount to competing human rights.

Recognizing whether the claims involve legal “rights” is a preliminary consideration separate from reconciling claims. This is a crucial part of the analysis, even if the organization does not believe the situation involves competing rights. It helps educate parties about their human rights and responsibilities, an especially important goal given the general lack of public awareness and ambiguity around rights and related language. This in turn may help parties frame their claims properly.

At the outset, parties should try to be open and suspend judgement. Often there is a tendency for rivals to deny the legitimacy of each other’s rights claims. Working through this stage in a respectful and earnest way gives people a voice, helps diminish power imbalances (especially for historically marginalized groups), shows genuine consideration of different positions, and promotes the dignity of all claimants. It also encourages a spirit of cooperation that is very important for the reconciliation stage.

6.1.1 Step 1: What are the claims about?

Step 1 of the framework helps organizations draw out a detailed picture of each claim and the underlying situation or context. Parties should include facts, their perceptions about what happened, and views about the potential rights, values, and/or interests that may underlie the situation. It is important for parties to take part fully in this step. As one author notes:

Hearing directly from the people affected is crucial to developing effective and responsive ways to resolve tensions between or among rights claims. Those who experience a denial of their rights have a unique perspective on why that is the case and appropriate remedies.⁸¹

A broad, inclusive approach will help to give a full appreciation of the social and factual context in which the conflict arises. Such an approach also helps to avoid dismissing relevant factors prematurely, and helps to frame claims properly. Only then can it be determined if the situation is actually one of competing rights.

⁸¹ Patricia Hughes, “Competing Rights Policy: The Law Commission of Ontario Approach,” *Canadian Diversity*, Volume 8:3, Summer 2010 at 54.

6.1.2 Step 2: Do claims connect to legitimate rights?

Once the claims and context become clear under Step 1, organizations move to Step 2 to consider three questions to determine whether the claims connect to actual rights:

- (a) Do claims involve individuals or groups rather than operational interests?
- (b) Does at least one claim fall under a human right?
- (c) Do claims fall within the scope of the right?

(a) Do claims involve individuals or groups rather than operational interests?

Under the *Code*, many organizations, including employers, service providers, housing providers and unions have a duty to accommodate the *Code*-related needs of individuals. As part of determining what each claim is about, organizations must distinguish between claims that solely affect business operations from competing claims that affect the rights of other individuals and groups. Claims that affect business operations alone are properly considered within the scope of the duty to accommodate (*i.e.* whether an accommodation is appropriate or amounts to an undue hardship) and are not competing human rights claims.

Example: An employee claims discrimination when her employer denies her request for modified work hours to meet childcare responsibilities. Her request does not appear to affect the legal rights of others. Therefore, this situation is not a “competing rights” claim, but rather is one involving a request for human rights accommodation. The employer might argue undue hardship based on financial impact for his business, which could limit his duty to accommodate.

A request for accommodation may turn out to be a competing rights situation if, while dealing with the accommodation request, it turns out that the rights of another person or group might also be affected.

(b) Does at least one claim fall under a human right?

As part of this step, organizations must identify whether their claims are legally recognized (in other words, whether they are protected by the law). Rights might be guaranteed by the Constitution (including the *Charter*), legislation, international treaties or court decisions. It may help to ask: if the allegations were true, which rights would be violated? This may be straightforward in most cases. For example, one party might identify that they have a need that requires accommodation under the Ontario *Human Rights Code*. Another party might identify a *Charter* right, such as the right to make full answer and defence. Other claims may not fall under a legislated right, but could connect to situations already dealt with by a court, such as the right to peaceful enjoyment of public parks in the midst of a demonstration.

(c) Do claims fall within the scope of the right?

Organizations must determine whether each claim falls within the “scope” of the right. There may be a general right at play, but does it extend as far as the claim made in a particular situation? Are the rights claims characterized appropriately? Organizations should examine the claims in their context and compare the situation with any parameters already set by legislation or courts for similar situations. As mentioned earlier, sometimes legislation itself will put limits on rights it seeks to protect, or will provide defences to proactively address situations where rights may potentially compete.

Example: The scope of the right to non-discrimination in employment under the *Code* does not extend to personal care attendants hired directly by people in need. A person may hire someone of the same sex, for example, to provide their personal care.⁸²

Other times, the setting or sector may affect the limits on the exercise of a right.

Example: A woman objected to an inscription on a monument donated by a Catholic men’s organization that was located on property owned by the Catholic Church. She stated that the reference to life “from conception until natural death” is a statement against abortion, which is offensive and discriminatory because it denounces, victimizes and excludes women. She also claimed that the inscription violated her right to be free from religious coercion, including religious messages. The inscription could not be read from the public sidewalk and could only be read by a person on church property. In a summary hearing process, the Human Rights Tribunal of Ontario dismissed the claim saying it has no jurisdiction to examine the content of religious teaching and beliefs, particularly where these are conveyed on the premises of a religious organization.⁸³

The breadth of the right to freedom of expression as it relates to communicating offensive language will also vary depending on the context. For example, in media commentary, the right might be interpreted very broadly, but in a school or workplace it may be interpreted more narrowly. The *Criminal Code* sets out limitations on expressions of hate in both contexts.

In accordance with accepted rules of statutory interpretation, when considering the scope of rights, organizations should interpret rights broadly and defences narrowly (except where defences also recognize and promote the competing rights of other

⁸² Section 24(1)(c) of the Ontario *Human Rights Code*, *supra*, note 30.

⁸³ The HRTO described both the positive component (the right to express and disseminate beliefs) and the negative dimension (the right to be free from coercion to accept or adopt any beliefs, practices or forms of worship) of the competing rights at issue. In doing so, it noted that the applicant was asserting a *Code* right that engages issues that are at the core of others *Charter* rights, namely the respondent’s right to display a message consistent with its religious beliefs on the grounds of a religious institution. The HRTO stated that in interpreting the applicant’s rights under the *Code*, it must be careful not to strip the respondent’s positive religious rights of any meaning. The Tribunal concluded that it is not an appropriate use of human rights protections set out in the *Code* to challenge the Catholic Church’s belief system and teachings: *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII).

groups in society). The answer might be in previous tribunal or court decisions, which have decided limits in similar circumstances.

Many apparent rights conflicts may be resolved by asking whether the claims actually fall within the scope of the right in the particular context. Properly delineating or making reasonable adjustments to the rights may make it possible to resolve any conflict between them. After properly scoping the boundaries of the rights, there might be no actual intrusion of one right onto the other. As Justice Iacobucci has noted:

*B. (R.) is a classic example of definitional reconciliation. Where a parent's right to religion is defined as not extending to the right to allow for religious medical choices which can harm a child, there really is no conflict between freedom of religion and life, liberty, and security of the person. This sentiment was echoed in *Trinity Western* where the Supreme Court noted that 'this is a case where any potential conflict should be resolved through a proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case (emphasis in original).'*⁸⁴

Interpreting whether the scope of a right extends to claims made in a particular situation will often be open to debate. Again, the OHRC's framework encourages parties not to prematurely dispose of a claim unless there is a solid legal basis for doing so.⁸⁵

6.1.3 Step 3: Do claims amount to more than minimal interference with rights?

Where the scoping exercise does not resolve the conflict, it is necessary to determine the extent of the interference with the rights in question. If interference with a right is minor or trivial, the right is not likely to receive protection. There is no conflict unless there is a sufficient interference with, burden or intrusion on a right. Where the impact on one right is minimal or insignificant, that right must give way to the other.⁸⁶ If enjoying one right does not result in a real burden or impact on the other, the rights are not actually in conflict and do not need to be reconciled.⁸⁷ It is instructive to ask whether the "core" or fundamental aspect of a right is engaged. Where the conduct is at the "periphery" of a right, it will more likely need to give way to a right whose core values are engaged.⁸⁸

⁸⁴ *Supra*, note 25 at 163.

⁸⁵ See the OHRC publication, *The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims*, *supra*, note 7, which provides a detailed discussion of the case law dealing with competing rights.

⁸⁶ *Amselem*, *supra*, note 16 at para. 84; *Bruker*, *supra*, note 52.

⁸⁷ This was the conclusion of the Supreme Court of Canada in *Reference re Same-Sex Marriage*, *supra*, note 57 and *Trinity Western*, *supra*, note 23.

⁸⁸ *Brockie v. Brillinger (No. 2)*, *supra*, note 60 at para. 51.

Organizations need to determine whether a situation amounts to more than minimal interference on a claimant's rights. For this interference to be found, a relevant rights-related distinction or factor must exist, flowing from either claim, that imposes burdens, obligations or disadvantages not imposed upon others, or withholds or limits access to opportunities, benefits and advantages available to others.⁸⁹ Sometimes parties perceive interference where none really exists.

Example: Courts have generally rejected arguments made against same-sex marriage legislation on the basis that it offends religious rights. The courts generally agree that permitting such marriages for others does not substantially interfere with the religious rights of people opposed to same-sex marriage, unless religious organizations must perform those marriages.

If there is substantial interference with the rights in question, then the decision-maker must shift to a reconciliation exercise.

6.2 Stage Two: Reconciling competing rights

If the inquiries in Stage One show that a competing human rights situation exists, then organizations should move to Stage Two to see if rights can be reconciled. Ideally, reconciliation would result in neither side having to give up anything substantial. As a next best solution, it might involve parties having to give up things that are perhaps negotiable or at the periphery of a right, this being determined by legal principles or jurisprudence. Step 4 sets out the considerations involved in finding an "ideal" reconciliation. Step 5 looks at finding a "next best" solution when an ideal resolution is not possible.

6.2.1 Step 4: Is there a solution that allows enjoyment of each right?

Reconciliation is a process for exploring options to reduce or eliminate interference and allow full or at least "substantial" exercise of the rights of all parties within the given context. Often, reconciliation will involve changing conditions or adjusting the way one or both parties enjoy their rights. This may look like a multi-party human rights accommodation process involving secondary changes such as altering schedules, working conditions, activity locations, and so on.

Example: A woman with a disability uses a service dog to perform her work duties as a teacher, but a student in the classroom has her disability (allergies) triggered by the presence of the service dog. The *Code* requires employers to accommodate the needs of employees with disabilities, and it would also require educational institutions to accommodate the needs of students with disabilities. The *Code* does not prioritize these needs or requirements — one is as important as the other. However, these competing rights claims might be resolved by assessing the needs of both parties.

⁸⁹ The OHRC's framework relies on the analysis in *R. v. Kapp*, [2008] 2 S.C.R. 483 (S.C.C.)

The employer/service provider would first need to look at the accommodation needs of both the employee and the student in the context of the classroom to find out if the needs of the two parties are actually in conflict. In what ways is the service dog assisting the employee in the classroom? Are there other ways that support could be provided without the service dog?⁹⁰ Alternative options for meeting the student's needs should be similarly looked at. In this case, there may be other instructors the student can study with, or other sessions she could attend. The employer/service provider should then explore a combination of solutions for accommodating both, allowing each to enjoy their rights.

6.2.2 Step 5: If not, is there a next best solution?

If the reconciliation process does not lead to an ideal solution, there is still a duty to explore options that least impair or compromise a right. Even if one right prevails in the circumstances, there may still be a duty to accommodate the other claim to some degree.

Exploring ideal and next best solutions inevitably involves limiting or compromising rights. Organizations should apply established principles from human rights case law and OHRC policy. Undoubtedly, selecting, weighing and applying principles can lead to differing results. One human rights principle alone may not provide an answer. Consider principles together with the full context in mind. The following principles, which are discussed in greater detail in the “Key legal principles” section of this policy, will assist organizations as they search for next best solutions:

1. No rights are absolute
2. There is no hierarchy of rights
3. Aim to respect the importance of both sets of rights
4. The full context, facts and constitutional values at stake must be considered
5. Must look at extent of interference (only *actual* burdens on rights trigger conflicts)
6. The core of a right is more protected than its periphery
7. Statutory defences may restrict rights

The OHRC's framework offers a fluid approach to recognizing and reconciling competing rights. Organizations may need to go back to previous steps in the framework to test options for solutions; for example, whether a proposed option would now make the impact on rights insignificant.

Any limitation of a right should consider human rights values, including respect for human dignity, inclusion of all, community and social harmony, and the collective interests of minority or marginalized groups.

⁹⁰ Section 4.3 of the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate* notes that “if there is a choice between two accommodations which are equally responsive to the person's needs in a dignified manner, then those responsible are entitled to select the one that is less expensive or that is less disruptive to the organization.” The Disability Policy is available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2/pdf

6.3 Stage Three: Making decisions

When it comes to addressing competing rights, organizations are not a neutral third party. They have a legal obligation to deal with competing human rights claims just like any other human rights matter that may arise in their environment. Ultimately, organizations will need to decide on and endorse an outcome. Along the way, they must remember their legal obligations and make sure parties understand the process. They must also make sure that any resolution reflects OHRC policy and is consistent with human rights and other law, court decisions and human rights principles.

By acting in accordance with human rights principles, organizations are taking steps to protect themselves from liability if they are ever named as a party in a case before the Human Rights Tribunal of Ontario or a higher court.

Other parties — potential claimants, respondents and unions, where applicable — also have a shared responsibility to act in good faith, show dignity and respect for one another, and cooperate in a process to recognize rights and find solutions for everyone involved. In other words, you cannot expect respect for your rights without respecting the rights of others.

After working through Stage One, organizations may find that competing human rights are not ultimately involved. The organization should communicate this assessment to the parties, but should still consider addressing the matter. In fact, in many cases, the organization may have a legal obligation to do so. Even if a claim is not interfering with someone else's rights, the organization will still have a duty to maintain a non-discriminatory, harassment-free environment and to accommodate any *Code*-related needs a person may have.

In other cases, an organization may assess the situation and decide that engaging claimants in a process is not needed, not desirable, or impossible. For example, the organization may have already dealt with a similar situation before and now has a policy on how to deal with these matters going forward. Or, the organization may decide the situation is too contentious or complex to reconcile and it may wish to seek legal advice instead.

Some claimants may raise claims that the organization feels lack merit, they may be unwilling to take part in a reconciliation process, or parties might not be able to reach agreement. While the organization might take action unilaterally, it should consider the decision to do so carefully and communicate clear reasons to the parties involved. One or both parties may not be satisfied and they may ask the organization to reconsider the decision. Parties may also have the option of taking their case to the Human Rights Tribunal of Ontario or another legal decision-maker.

For a party to bring their competing rights claim to a human rights tribunal, at least one of the claimed rights must fall under a human right established by law. For example, if one of the parties wishes to bring the matter to the Human Rights Tribunal of Ontario, then their claim must connect to the Ontario *Human Rights Code*.

In most cases, the organization will find it beneficial to engage in a process that tries to recognize and reconcile competing rights rather than make a unilateral decision.

7. Organizational process for addressing competing rights

7.1 Quick resolution

Many competing rights situations can be resolved quickly through an informal process that may involve no more than one or two meetings. At the outset, organizations should consider whether the situation is suited to an informal and expedited process. For example, the facts of the situation and the framing of each claim may be straightforward and not in dispute. The parties may already be well-informed about each other's claims, rights and obligations. They may have shown respect for each other's interests and be willing to engage in discussions about solutions without delay. A quick process will generally involve running through the analysis with both parties in a quick way. The focus here is less on a precise analysis of the rights at play, and more on finding solutions that benefit all sides and respect human rights.

Example: A community centre plans to celebrate National Aboriginal Awareness Day on June 21st. They partner with the local Aboriginal cultural centre for a full day of events about programs and services and the rich heritage of Aboriginal peoples. The day will open with a “smudging” ceremony. Notices go out encouraging staff and clients to take part. One staff worker raises concern about her asthma and the presence of smoke. Both sides recognize the legitimacy and importance of the other's interests. The worker wants the ceremony to proceed and the Aboriginal centre wants the worker to take part. They work together on a solution to move the opening ceremony outdoors and redirect smoke away from the audience and the worker.

If the informal, quick process does not resolve the issue, then the organization may decide to use a full and more formal process. However, it is important to consider a quick resolution process first because in the OHRC's experience, working through a full, formal process is usually not necessary. Workable solutions can be found relatively quickly in most cases of competing rights claims.

7.2 Full process

In a full, more formal process, the framework is applied more rigorously at Stage One to find out if a genuine competing human rights situation exists. The case studies included in Appendix D can help organizations as they work through this part of the process. The case studies are presented in an analysis template that can help organizations frame the issues and assess all relevant considerations. For detailed information on the legal

disposition of different types of competing rights cases, see the OHRC’s document, *The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims*.⁹¹

If, after going through Stage One, an organization concludes that a competing human rights situation does exist, Stage Two will help guide it through the reconciliation process. This policy proposes an alternative dispute resolution (ADR) model to guide organizations through the Three Stage Analysis.

7.3 Alternative Dispute Resolution (ADR) models

| ADR models for reconciling competing rights claims ⁹² | | |
|--|---|--|
| Types | When to use | Why to use |
| <p>(1) Negotiation</p> <p>A voluntary process of dispute resolution that does not involve a neutral party facilitator.</p> <p>Core elements:</p> <ul style="list-style-type: none"> • Recognition by the parties that they both have rights and obligations • Power balancing self-restraint by party with greater power in situation (usually the organization) • Takes place in “the shadow of the law” • Aims at remediation and prevention | <p>Two possible scenarios:</p> <ul style="list-style-type: none"> • Two parties are involved (an organization and a claimant); <p>OR</p> <ul style="list-style-type: none"> • Three parties (or more) are involved (an organization and two or more claimants) | <p>Parties cannot reconcile competing rights unilaterally</p> <p>Parties want to control the process of reconciling competing claims and also make their own decisions about how competing claims are reconciled rather than have a third party control the process and impose decisions on them</p> <p>Transaction costs (money, time, stress) of litigating before tribunals and courts are much higher</p> <p>Principled negotiation is a collaborative method of negotiation designed to preserve the core competing rights of both/all parties; if this is not possible, then aim is to ensure partial enjoyment of the competing rights of both/all parties</p> <p>The most durable settlements are the ones the negotiating parties make themselves</p> |

⁹¹ *Supra*, note 7.

⁹² The OHRC wishes to thank Desmond Ellis, Lesley Jacobs, Lorne Foster and Robin Smith of The York Centre for Public Policy and Law for their insights and contributions to this section.

| | | |
|--|---|---|
| <p>(2) Conciliation (also referred to as “mediation”)</p> <p>An impartial third party facilitates constructive communication and problem-solving aimed at reconciling the claims of competing rights claimants</p> <p>Core elements:</p> <ul style="list-style-type: none"> • Parties recognize that they both have rights and obligations • Parties are involved in crafting terms included in settlements of competing rights claims • An impartial third party (e.g. mediator, conciliator) facilitates principled negotiation • Impartial third party conducts power-balancing interventions • Settlements are legally enforced • Takes place in “the shadow of the law” • Aims at remediation and prevention | <ul style="list-style-type: none"> • When attempts at negotiation reach an impasse | <p>Parties could not settle their competing rights claims themselves by taking part in principled negotiation; or, organization may not have capacity to negotiate, and/or situation is too complex to address without outside expertise</p> <p>The transaction costs (money, time, stress, relationship damage) associated with litigation are higher, sometimes much higher</p> <p>Self-determination, <i>i.e.</i> parties still make decisions about terms of settlement, as with principled negotiation, but a conciliator (with no authority to make decisions on terms of settlement) will help parties to overcome the barriers to settlement they experienced when taking part in principled negotiation</p> <p>Conciliation is designed to preserve the core competing rights of both/all parties; if this is not possible, then the aim is to ensure both/all parties partially enjoy the competing rights</p> <p>The most durable settlements are made by the negotiating parties themselves</p> |
|--|---|---|

This ADR approach follows the mixed interest- and rights-based mediation model that is often used to address human rights claims. Under this model, mediators help parties to first frame their positions and understand each other’s rights before guiding them through a formal mediation process. The process involves searching for mutually agreed-upon solutions that factor relevant considerations into the context.

Mixed interest- and rights-based ADR is particularly well-suited to address competing human rights claims where no one claimant can assert that they are the only party affected. Rather, it requires creative and cooperative efforts to reach agreement on solutions. These efforts are more likely than litigation to uncover relatively harmonious and durable solutions. When parties work together to resolve a dispute, each side feels a sense of ownership of and commitment to the solution, and this fosters good will and mutual respect. Experts in the field of ADR have noted:

Seeing different claimants as fellow citizens and viewing those citizens in a way that is empathetic holds much greater promise than an adversarial process where there are only winners and losers.⁹³

⁹³ Lorne Foster and Lesley Jacobs, “Shared Citizenship as the Context for Competing Human Rights Claims: Towards a Social Policy Framework,” *Canadian Diversity*, Volume 8:3, Summer 2010 at 13.

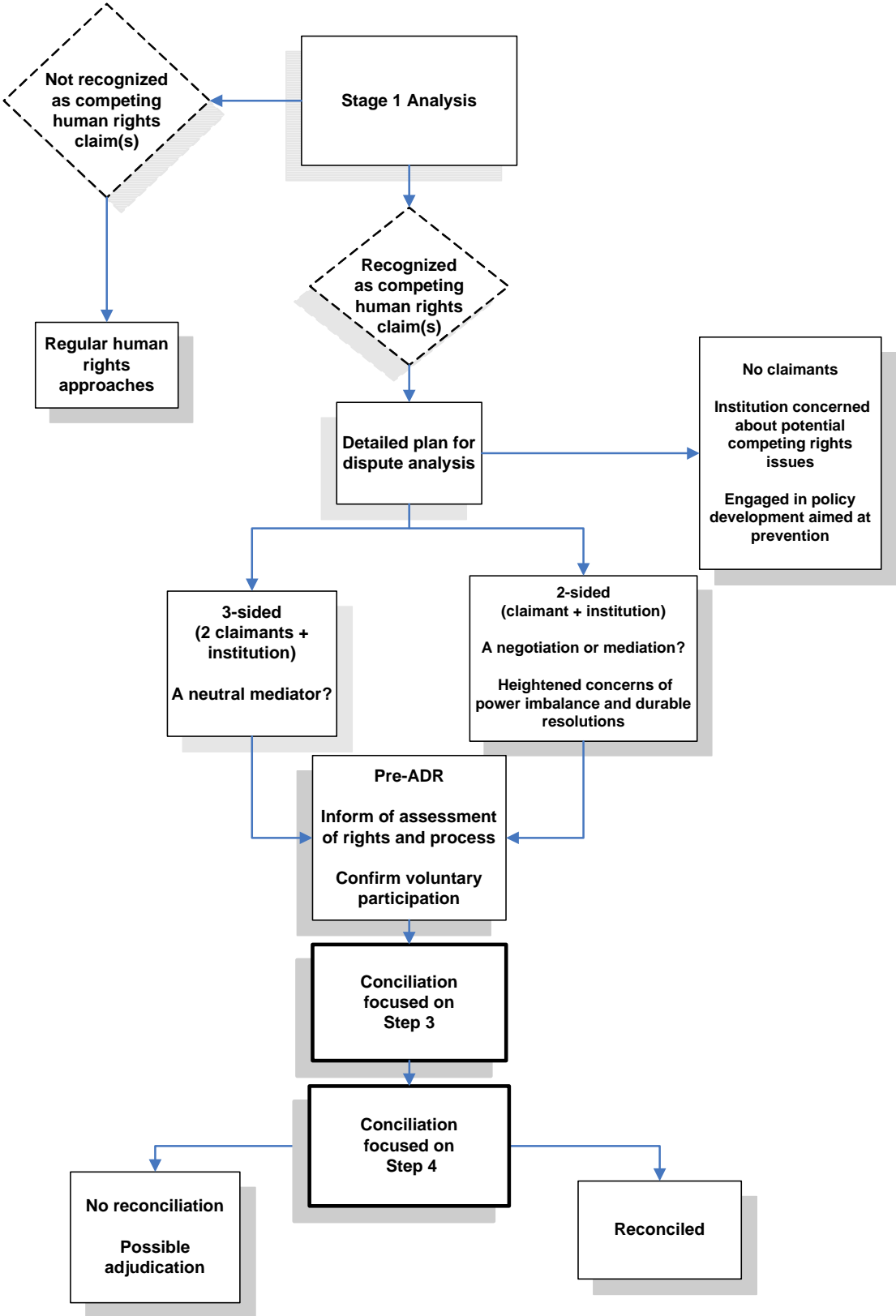
Once an organization decides that an ADR process is appropriate, and claimants agree to take part, it will then need to select the type of ADR that best suits the nature of the dispute. Where two or more competing claimants come forward, a conciliation approach might be best. Conciliation is another term for mediation and is defined as a facilitated negotiation involving a neutral or impartial third party. The term conciliation is preferred in this context as it better relates to the idea of “reconciling” claims already recognized as competing human rights under Stage One.

Even if only one claimant has come forward with a human rights claim, the organization might recognize that the claim may affect the rights of others. In this case, the organization may need to “wear two hats” and represent the rights of other individuals or groups potentially affected while negotiating with the claimant. Alternatively, it may choose to involve the individuals or groups potentially affected in the process in some way.

In some situations, it may not be prudent for the organization to take on the role of mediator, particularly where one or more of the parties believe that the organization has played a role in creating or worsening the problem. In some cases, it may be more constructive and to the greater satisfaction of all parties to bring in an external conciliator. This may be the case, for example, where the organization has expressed a view or an interest that creates a perception of bias.

Despite the best efforts of organizations, there will be some cases where ADR methods fail to resolve competing rights claims. Parties may not be willing to make concessions to the other parties involved; they may not be willing to respect or recognize the dignity of the other party or parties. They may believe, rightly or wrongly, that they will “get a better deal” by going to a tribunal or a court. In some cases, litigation is unavoidable. Where competing rights situations do end up before a tribunal or a court, the OHRC’s policy and approach can be a useful tool for decision-makers as they try to resolve these matters in a formal legal setting.

FLOW CHART FOR COMPETING RIGHTS CONCILIATION



8. Conclusion

Competing human rights situations will inevitably arise in many different contexts, including workplaces, housing and schools. Employers, housing providers, educators and other responsible parties covered by the *Code* have the ultimate responsibility for maintaining an inclusive environment that is free from discrimination and harassment, and where everyone's human rights are respected. Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to situations involving competing rights.

This policy is intended to provide clear, user-friendly guidance to organizations, policy makers, litigants, adjudicators and others on how to assess, handle and resolve competing rights claims. It sets out a process for addressing competing rights situations, based in existing case law, that organizations can use as is or adapt to meet their own specific needs. Taking prompt, proactive and effective steps to address competing rights matters will help organizations to resolve tension and conflict before it escalates, and can help to avoid costly and time-consuming litigation. Where litigation is unavoidable, taking these steps will help organizations to protect themselves from liability.

Appendix A: Purpose of OHRC's policies

Section 30 of the Ontario *Human Rights Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.⁹⁴ Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the HRTO may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervener in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and interveners are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervener, the OHRC may apply to the HRTO to have the HRTO state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,⁹⁵ applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.⁹⁶

⁹⁴ Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in the hard copy of that document. The OHRC is moving toward having up-to-date electronic versions of its documents available on its website. For more information, please contact the Ontario Human Rights Commission.

⁹⁵ In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

⁹⁶ The Ontario Superior Court of Justice has quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra*, note 90.

Appendix B: Policy development process

Over the past several years, the OHRC has taken many steps to advance understanding of how best to address competing rights. In 2005, the OHRC began the dialogue by releasing a research paper entitled, *Balancing Conflicting Rights: Towards an Analytical Framework*.⁹⁷ The paper provided the public with preliminary information that would promote discussion and further research without taking any firm policy positions.

In 2007-08, the OHRC conducted a detailed literature review scanning relevant articles from the fields of law, philosophy, conflict resolution, and political science. This review revealed a wealth of information on how competing rights claims have been and might be looked at from a variety of perspectives. At the same time, case law in Canada and the United States has continued to develop and some preliminary analysis has been conducted. Very recently, the OHRC developed a competing rights case law review and made it available to the public.⁹⁸

In many cases, the OHRC has also been actively involved in developing this case law. For example, the OHRC litigated *Ontario (Human Rights Commission) and Heintz v. Christian Horizons*⁹⁹, a case that dealt with religious rights of an organization and the rights of a lesbian employee. The OHRC has also intervened in relevant legal cases that examine competing rights questions. For example, the OHRC intervened before the Ontario Superior Court, the Ontario Court of Appeal and the Supreme Court of Canada in *R. v. N.S.*,¹⁰⁰ a case considering whether a woman wearing a *niqab* while testifying against the men alleged to have sexually assaulted her interferes with their right to make full answer and defence. The OHRC also intervened before the Supreme Court of Canada in *Saskatchewan Human Rights Commission v. Whatcott*¹⁰¹, a case considering whether freedom of expression and religion include the right to distribute pamphlets alleged to contain hate speech targeting gays and lesbians.

The OHRC has also conducted one-on-one interviews with a number of individuals who were known to be very familiar with situations of competing rights claims from a variety of stakeholder, legal and academic perspectives. These interviews represented initial efforts to identify issues and concerns emerging from the perspectives of groups associated with the *Code* grounds of gender, creed, sexual orientation, and disability, while also helping to identify individuals and groups who could take part in future public consultation activity to ensure a complete discussion.

⁹⁷ *Supra*, note 48.

⁹⁸ *Supra*, note 7.

⁹⁹ *Christian Horizons*, *supra*, note 15.

¹⁰⁰ *Supra*, note 21.

¹⁰¹ *Supra*, note 79.

In March 2010, the OHRC partnered with York University's Centre for Public Policy and the Law to hold a policy dialogue on competing human rights. Academics and researchers were recruited to develop articles within set parameters and to present these at the policy dialogue. These people represented different stakeholder groups and social and institutional perspectives. The Association of Canadian Studies and the University of British Columbia Press both published research papers from the policy dialogue.¹⁰²

After this dialogue, OHRC staff developed a draft policy framework for reconciling competing human rights that aimed to address the issues raised by its preliminary consultation and research. In December 2010, the OHRC tested its draft framework at a two-day workshop with representatives from Ontario's education sector and others. Over the past year, the OHRC has continued its dialogue with various groups and received positive feedback and constructive comment on its framework proposal. The framework represents the OHRC's recommended approach to addressing competing rights situations and provides the foundation for this policy. The OHRC has also used this approach in its interventions before the courts in high-profile competing rights cases.¹⁰³

¹⁰² The Association of Canadian Studies, *Canadian Diversity*, Vol. 8:3, Summer 2010. The UBC publication is forthcoming.

¹⁰³ *Supra*, notes 21 and 79.

Appendix C: OHRC framework

| STAGE | GOALS | ANALYSIS | ORGANIZATIONAL PROCESS | | LEGAL PRINCIPLES | DEFINITIONS |
|---------------------|---|---|---|---|---|---|
| | | | Quick resolution | Full process | | |
| RECOGNIZING RIGHTS | <p>Mutual recognition of interests & rights promotes mutual dignity & respect</p> <p>Helps frame rights</p> <p>Gives marginalized a voice</p> <p>Diminishes power imbalances</p> <p>Reduces stigma</p> <p>Rights & obligations awareness</p> <p>Maximum recognition of rights</p> <p>Encourages spirit of cooperation</p> | 1. What are the claims about? | <ul style="list-style-type: none"> Inquire into each claimant's story Values, beliefs, interests, feelings, context Determine whether informal or formal process appropriate | | <p>No rights are absolute</p> <p>No hierarchy of rights</p> <p>Right may not extend as far as claimed</p> <p>Must consider full context/facts & constitutional values at stake</p> <p>Rights defined in relation to one another & extent of interference</p> <p>Core more protected than periphery</p> <p>Usually no "bright lines"</p> <p>Courts have drawn some lines for particular case types</p> <p>Statutory defences may also restrict rights</p> <p>Aim to respect importance of both sets of rights</p> <p>Search for "constructive compromises" (procedural duty)</p> | <p>Some claims may have higher legal status than others...</p> <p>Values: individual/ social moral principles & standards; may reflect in/inform law or claim; not legally actionable</p> <p>Interests: individual/ social concerns or stakes; may elevate to legal entitlement if bona fide & reasonable in circumstances or satisfies legal limit or exemption</p> <p>Legal entitlements: codified in law or interpreted through court or tribunal decision</p> <p>Human rights: inalienable, indivisible, universal legal entitlements; include limits & exemptions; usually have higher status than other legal entitlements; both have higher legal status than interests, values, beliefs</p> |
| | | 2. Do claims connect to legitimate rights & interests? | <p>If claimants understand their rights, recognize each other's claims as legitimate, & demonstrate dignity & respect for each other, then...</p> | <p>BEFORE DISPUTE RESOLUTION</p> <p>Analyse situation: Could org. policy development help? Negotiation or conciliation? Internal or external conciliator?</p> | | |
| | | a. Individuals or groups rather than operational interests? | | | | |
| | | b. Human rights, legal entitlements or bona fide reasonable interests? | <p>Frame issues together</p> | <p>Identify parties & inform them of situation, roles & responsibilities & consequences of not participating...</p> | | |
| | | c. Context of claim falls within scope of right or interest? | | | | |
| | | 3. Amounts to more than minimal interference with right? | | <p>CONDUCT DISPUTE RESOLUTION</p> | | |
| RE-CONCILING RIGHTS | <p>Claimants & organization engage in shared responsibility to find agreeable solutions</p> | 4. Is there a solution that allows enjoyment of each right? | <p>Explore/discuss & attempt to reach mutually agreeable solutions that are ideal or next best</p> | | | |
| | | 5. If not, is there a next best solution for one or both rights? | | | | |
| MAKING DECISIONS | <p>Organizations take responsibility for: corporate liability; substantive & procedural duties; policies; training</p> <p>Protection from litigation</p> | <p>Must be consistent with human rights and other law, court decisions, human rights principles and have regard for OHRC policy</p> <p>At least one claim must fall under Code to be actionable at Human Rights</p> | Internal decision | | | |
| | | | Internal appeal | | | |
| | | | External appeal/complaint/decision at tribunal or higher court | | | |

Appendix D: Case examples for resolving competing rights

| SCENARIO 1: The Prom | Matt's Claim | Catholic School Board Claim |
|--|--|--|
| RECOGNIZING RIGHTS | | |
| 1. What are the claims about? | Matt is a gay 17-year-old student attending a publicly funded Catholic high school. He wishes to go to the prom with a same-sex date. The prom is being held at a rental hall off school property. He is considering seeking a court injunction because the prom is only weeks away. | The school principal and the School Board have said no on the grounds that this would be endorsing conduct contrary to the Catholic Church's teachings. Matt believes that this is a violation of his human rights. |
| 2. Do claims connect to legitimate rights and interests? | | |
| a. Does the situation involve individuals or groups rather than only operational interests? | <ul style="list-style-type: none"> • Matt and his boyfriend who attends another school • Matt's school friends and peers can bring their opposite sex dates • Other LGBTQ students who might have liked to bring dates • Matt's parents and parents of other LGBTQ students who are involved in school life and look forward to this "rite of passage" for their children • School staff who have worked hard with students and want to support their celebration • LGBTQ community members and advocates who could not bring same sex dates to their proms and continue to experience stigma and discrimination | <ul style="list-style-type: none"> • Catholic school principal who understands his job responsibilities to cover instilling a religious environment across extra curricular and social activities • Catholic school board members who understand their responsibilities to include upholding religious teachings through board policy and practice • Catholic Church sees its role as the spiritual guide to school board policy & practice over religious matters • Other students, staff and parents who are concerned about maintaining a Catholic environment and not promoting the "gay lifestyle" • Other schools in the board may have to address similar requests and are watching the outcome of this case |
| b. What human rights, other legal entitlements or bona fide & reasonable interests might be invoked? | <ul style="list-style-type: none"> • Freedom from discrimination based on sexual orientation including poison-free environment under Ontario <i>Human Rights Code</i> s.1 & <i>Charter</i> equality rights s.15(1) • Freedom of expression, <i>Charter</i> s. 2(b) • Freedom of association, <i>Charter</i> s. 2(d) | <ul style="list-style-type: none"> • Separate (Catholic) school rights preserved under <i>Ontario Human Rights Code</i> s.19, <i>Charter</i> s.29, 1867 Constitution Act s. 93 • <i>Education Act</i> provisions and regulations relating to Roman Catholic Boards |

| SCENARIO 1: The Prom | Matt’s Claim | Catholic School Board Claim |
|---|--|--|
| | <ul style="list-style-type: none"> • Reasonable limits on rights <i>Charter</i> s.1 • Right to and requirement for elementary and secondary school education from age 6 to 18 under Ontario <i>Education Act</i> • Right to education without discrimination under <i>UN Convention on Economic Social and Cultural Rights</i> articles 2 and 13.1 & 2 • Freedom of religion only limited by need to protect rights of others, <i>UN Convention on Civil and Political Rights</i> article 18.3 • School sanctioned extracurricular and social activities may be a bona fide reasonable benefit of school life | <ul style="list-style-type: none"> • Freedom of conscience and religion under <i>Charter</i> s. 2(a), and under <i>UN Convention on Civil and Political Rights</i> article 18.1 |
| <p>c. Does the claim fall within the scope of the right or other entitlement in this context?</p> | <ul style="list-style-type: none"> • Extracurricular/social activities held off school premises not at the core of teaching • Prom is not a religious event, is not educational in nature, and is held off of school property • Diversity and inconsistency of Catholic opinion and practice: school accepts gay students but wishes to suppress all activity connected with their sexuality | <ul style="list-style-type: none"> • Catholic school rights include full board discretion over religious matters • All school sanctioned activities, on or off site, must promote and uphold religious teachings • School board practice has been consistent with policy, even if diversity of Catholic opinion exists |
| <p>3. Amounts to more than minimal interference with a right?</p> | <ul style="list-style-type: none"> • Unlike other students, he is not free to choose his date for school social functions, would have to go without his boyfriend • Prohibiting a same-sex date substantially interferes with nature of a prom which typically involves bringing a date and or dancing with a partner of choice • Would miss out on this end of school/graduation “rite of passage” • Differential treatment based on sexual orientation amounts to serious injury of dignity | <ul style="list-style-type: none"> • Allowing same sex date at extracurricular/ social activities would impede school’s ability to promote religious school environment and teach religious curriculum consistent with tenets of the faith during core hours • Would have broad impact on other Catholic schools and Catholic Church |

| RECONCILING RIGHTS | | |
|---|--|---|
| <p>4. Is there a solution that allows enjoyment of each right?</p> | <p>Option 1</p> <ul style="list-style-type: none"> Prohibit non-LGBTQ students from bringing formal “dates” to the prom as well Allow any student to bring a “guest” who is not a student of that school Require all students to refrain from intimate behaviour Such neutral terminology and inclusive policy approach could help avoid further stigmatizing individuals based on their sexual orientation School would otherwise limit upholding formal Catholic board policy and Church position on religious tenets to educational settings and core hours Board could maintain position that a “don’t ask don’t tell” guest policy would not prejudice Catholic school rights <p>Option 2</p> <ul style="list-style-type: none"> Change school/board policy to no longer sanction/organize/fund proms as official school events; such events would be left entirely as a student-initiated responsibility held offsite without any formal connection to the Catholic school or board | |
| <p>5. If not, is there a next best solution for one or both rights?</p> | <ul style="list-style-type: none"> Allow Matt to attend with a “guest” friend of his choice while allowing other students to attend with their formal opposite sex “date” | <ul style="list-style-type: none"> Comply with any court injunction and allow Matt to attend the prom with his “boyfriend” in this case only Take the position that such an injunction does not prejudice Catholic school rights Examine Church doctrine more closely against school/board policy to deem whether proms are at the core or periphery of Catholic school rights |
| MAKING DECISIONS | | |
| <ul style="list-style-type: none"> Must be consistent with human rights & other law, court decisions, legal principles and have regard for OHRC policies | <ul style="list-style-type: none"> <i>Hall v. Powers</i>, Ont. Superior Court 2002 (injunction order allowing Hall to attend prom with same-sex date) <i>Smith v. Knights of Columbus</i>, BCHRT 2005 (re: scope of organizational obligations on versus off premises) | <ul style="list-style-type: none"> <i>Hall v. Powers</i>, Ont. Superior Court 2002 (did not rule on Catholic school rights) <i>Ross v. New Brunswick School District No. 15</i>, SCC 1996 (re: poisoned environment) |
| <ul style="list-style-type: none"> At least one claim must fall under the <i>Code</i> to be actionable at the Human Rights Tribunal | <ul style="list-style-type: none"> Schools fall under <i>Code</i> s.1 “service” Matt’s claim involves <i>Code</i> ground of sexual orientation | <ul style="list-style-type: none"> Catholic board claim falls under <i>Code</i> s.19 defence |

| SCENARIO 2: College Admission Standards | Christian Teachers' College Claim | Provincial Governing Body Claim |
|---|---|---|
| RECOGNIZING RIGHTS | | |
| <p>1. What are the claims about?</p> | <p>A private Christian teachers' college claims the provincial governing body is discriminating based on religion by refusing to certify the college's program because of the college's admissions policy prohibiting homosexual behaviour for its student teachers. This would discourage those wishing to pursue teacher training in a religious institution denying them certification and the opportunity to work in the public school system.</p> | <p>The governing body claims the college's prohibition on homosexual behaviour is discriminatory based on sexual orientation. Approving their teaching program would be contrary to the public interest because these teacher graduates may exhibit bias, prejudice and intolerance towards LGBTQ students or their LGBTQ parents and be seen to poison the learning environment in the public school system.</p> |
| 2. Do claims connect to legitimate rights and interests? | | |
| <p>a. Does the situation involve individuals or groups rather than only operational interests?</p> | <ul style="list-style-type: none"> • The college's religious students, faculty and administrative staff who wish to follow the tenets of the faith • Other public or private Canadian colleges and universities with traditional religious affiliations • Christian churches and religious organizations | <ul style="list-style-type: none"> • LGBTQ students (and their parents) and teachers in the public school system • Prospective LGBTQ or non-Christian students to the college • Teacher education governing bodies and other accreditation boards across Canada • Other self-governing professional bodies across Canada |
| <p>b. What human rights, other legal entitlements or <i>bona fide</i> and reasonable interests might be involved?</p> | <ul style="list-style-type: none"> • Freedom from discrimination in services and employment based on creed under Ontario <i>Human Rights Code</i> ss.1, 5 and 9 • Defence for religious organizations under <i>Code</i> s.18 • Freedom of conscience and religion under <i>Charter</i> s. 2(a) and under <i>UN Convention on Civil and Political Rights</i> article 18.1 • Equality rights under <i>Charter</i> s.15 based on religion • Right to free expression under <i>Charter</i> 2.b | <ul style="list-style-type: none"> • Freedom from discrimination in services based on sexual orientation including a poison-free classroom environment under Ontario <i>Human Rights Code</i> s.1 • Equality rights under <i>Charter</i> s.15 based on religion • Right to education directed to strengthen respect for human rights under <i>UN Convention on Economic, Social and Cultural Rights</i> article 13.1 |

| SCENARIO 2: College Admission Standards | Christian Teachers' College Claim | Provincial Governing Body Claim |
|---|---|--|
| | <ul style="list-style-type: none"> Liberty to choose religious education under <i>UN Convention on Economic, Social and Cultural Rights</i> article 13.3 | |
| <p>c. Does the claim fall within the scope of the right or other entitlement in this context?</p> | <ul style="list-style-type: none"> Freedom to hold beliefs is broader than the freedom to act on them The college's policy only prohibits homosexual activities of students while they attend the College The college's policy says nothing about proselytizing against homosexual behaviour or otherwise singling out or treating LGBTQ students differently in the public school system There is no evidence that other graduates have engaged in such behaviour | <ul style="list-style-type: none"> Adhering to the college's policy prohibiting homosexual behaviour can lead to intolerant and discriminatory behaviour and even a poisoned environment in the public school environment Governing body and schools/boards have legal obligations under the <i>Code</i> to ensure welcoming environments free from discrimination and harassment |
| <p>3. Amounts to more than minimal interference with a right?</p> | <ul style="list-style-type: none"> Denial of program certification for a religious teachers' college would bar graduates from pursuing employment and a career in teaching They would have to be trained at a certified "secular" teachers' college instead, denying them the freedom of religion they could have otherwise enjoyed while attending a religious teachers' college | <ul style="list-style-type: none"> Public school students who identify as LGBTQ are already extremely marginalized and face extensive harassment and discrimination. They also experience higher rates of mental illness and suicide. Schools and governing bodies should not condone certification and employment of teachers who might not respect, protect and promote equality and freedom from discrimination and harassment for LGBTQ students |
| <p>RECONCILING RIGHTS</p> | | |
| <p>4. Is there a solution that allows enjoyment of each right?</p> | <ul style="list-style-type: none"> Without limiting the religious college's policy against homosexual behaviour, certify the college's teaching program therefore allowing graduates to seek employment at public schools Assume the college's graduates will not harass or discriminate or otherwise fail to respect, protect and promote the human rights of LGBTQ students If such behaviour does happen, address it quickly through normal complaint mechanisms and performance reviews including discipline up to and including dismissal | |

| SCENARIO 2: College Admission Standards | Christian Teachers' College Claim | Provincial Governing Body Claim |
|---|---|--|
| | <ul style="list-style-type: none"> Educate all staff and students about their human rights obligations and ensure they promote equality, respect and a welcoming environment for LGBTQ students | |
| <p>5. If not, is there a next best solution for one or both rights?</p> | <ul style="list-style-type: none"> Amend the college's policy to be silent on any prohibition against homosexual behaviour altogether Add to the amended policy, or to the existing policy, a provision that student teachers have human rights obligations to respect, protect and promote the Code rights of LGBTQ and other students | <ul style="list-style-type: none"> Certify the religious college's teaching program regardless of the college's prohibitive policy At the same time, require its graduates to complete additional requirements regarding their human rights obligations Or, require all teacher training programs regardless of religious affiliation to include requirements on teachers' human rights obligations |
| MAKING DECISIONS | | |
| <ul style="list-style-type: none"> Must be consistent with human rights and other law, court decisions, legal principles and have regard for OHRC policies | <ul style="list-style-type: none"> <i>Trinity Western University v. British Columbia College of Teachers</i>, SCC 2001 | <ul style="list-style-type: none"> <i>Chamberlain v. Surrey School District No. 36</i>, SCC 2002 <i>Ross v. New Brunswick School District No. 15</i>, SCC 1996 <i>R v. Jones</i>, SCC 1986 (public interest in maintaining and improving supportive environments in the classroom) |
| <ul style="list-style-type: none"> At least one claim must fall under the Code to be actionable at the Human Rights Tribunal | <ul style="list-style-type: none"> College would need to argue that the governing body's certification power is a "service" within the meaning of the Code and make a claim based on creed accordingly | <ul style="list-style-type: none"> LGBTQ students and/or their parents/guardians, or someone or some group on their behalf, would have to make out a claim against either the school/board and/or the governing body in "services" on the ground of sexual orientation and/or sex (gender identity) |

| SCENARIO 3: County Newspaper Editorial | Goods Importer’s Claim | County Newspaper’s Claim |
|--|--|--|
| RECOGNIZING RIGHTS | | |
| 1. What are the claims about? | A goods importer claims that his local county newspaper discriminated against him based on his place of origin when they published an editorial about the negative economic impact of goods and services imported into their community from the big city. | The newspaper says it has freedom of the press to write what it wants in its editorials based on the right to freedom of expression. |
| 2. Do claims connect to legitimate rights and interests? | | |
| a. Does the situation involve individuals or groups rather than only operational interests? | <ul style="list-style-type: none"> • The goods importer in this claim • Other goods importers living and or doing business in the county • Immigrants or visitors to the county | <ul style="list-style-type: none"> • The county newspaper publisher, its editorial board and staff • The county newspaper’s corporate parent • Other media publishers and journalists |
| b. What human rights, other legal entitlements or bona fide and reasonable interests might be invoked? | <ul style="list-style-type: none"> • Right to equal treatment with respect to services, goods and facilities without discrimination based on place of origin and possibly other related grounds under section 1 of the <i>Code</i> • <i>Code</i> s.13(1) prohibits announced intention to discriminate by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I | <ul style="list-style-type: none"> • Section 13 (2) of the <i>Code</i> protects opinion and says section 13 (1) shall not interfere with freedom of expression of opinion • Right to freedom of expression under section 2(b) of the <i>Charter</i> |
| c. Does the claim fall within the scope of the right or other entitlement in this context? | <ul style="list-style-type: none"> • The goods importer would have to show how the content of the editorial amounts to a notice, sign, symbol, emblem, or other similar representation that indicates the intention of a person to discriminate in employment, housing or services • Editorial based on a prohibited ground of discrimination such as place of origin • He might also have to show why the right to | <ul style="list-style-type: none"> • Editorials are “opinion.” They are not a “service” within the meaning of the <i>Code</i> • Even it were a service, the editorial cannot be considered a “similar representation” to a sign, notice or symbol under s.13 (1) • Nor does the editorial declare an intent to discriminate in employment, housing, |

| SCENARIO 3: County Newspaper Editorial | Goods Importer’s Claim | County Newspaper’s Claim |
|---|---|--|
| | freedom of expression under section 2 (b) of the <i>Charter</i> should be limited under section 1 of the <i>Charter</i> in this circumstance | services, etc • Nor does the editorial violate the hate provisions of the <i>Criminal Code</i> |
| 3. Amounts to more than minimal interference with a right? | <ul style="list-style-type: none"> • The goods importer might argue, for example, how the editorial would result in the local community refusing to buy from those who import goods from outside the county putting them out of business without economic means to support themselves and their families. • He might also argue there is a negative impact on business people who are perceived to be “foreigners” because of race or related grounds | <ul style="list-style-type: none"> • Any limit on editorials, outside of <i>Criminal Code</i> provisions against hate, would put a chill on a newspaper’s ability to operate freely and independently on the basis of free expression in a democratic society |
| RECONCILING RIGHTS | | |
| 4. Is there a solution that allows enjoyment of each right? | <ul style="list-style-type: none"> • The goods importer’s claim does not appear to fall within the scope of the right to be free from announced intent to discriminate under the <i>Code</i> • The goods importer does not have a competing right that requires consideration for reconciliation • Publication of opinion in the media is a matter at the core of freedom of expression and freedom of the press in a democratic society. Any ambiguity should be resolved in favour of the exclusion of such matters from the <i>Code</i> | |
| 5. If not, is there a next best solution for one or both rights? | <ul style="list-style-type: none"> • The newspaper in its discretion might consider printing letters to the editor written by non-country residents, giving opportunity for these individuals to oppose the editorial opinion | <ul style="list-style-type: none"> • Not required |

| MAKING DECISIONS | | |
|---|---|---|
| <ul style="list-style-type: none"> Must be consistent with human rights and other law, court decisions, legal principles and have regard for OHRC policies | None applicable to the goods importer's claim | <ul style="list-style-type: none"> <i>Whiteley v. Osprey Media Publishing</i>, HRTO 2010 In 2008, OHRC concluded it did not have jurisdiction under the <i>Code</i> to proceed with complaints about an article in Maclean's magazine |
| <ul style="list-style-type: none"> At least one claim must fall under the <i>Code</i> to be actionable at the Human Rights Tribunal | The goods importer's claim could not be made out under s.13(1) of the <i>Code</i> | <ul style="list-style-type: none"> Freedom of expression of opinion protected under s.13(2) of the <i>Code</i> |

Appendix E: Suggested contents of an internal policy

Under the Ontario *Human Rights Code*, education providers, employers, housing providers and other responsible parties have the ultimate responsibility for maintaining an inclusive environment that is free from discrimination and harassment. As part of this, they have a legal duty to take steps to prevent and respond to situations involving competing rights. Having in place an effective “competing rights policy” is one concrete and practical way that organizations can fulfil their responsibilities under the *Code*. The OHRC’s *Policy on Competing Human Rights* provides guidance to organizations when they are developing their own internal policies. While each organization should tailor its policy, taking into account such factors as its mandate, size, resources and culture, the following are suggested basic features of an effective policy:

- 1) A vision statement setting out the organization’s commitment to maintaining a fair and equitable environment where everyone’s human rights are respected, and where discrimination, harassment, and competing rights situations are dealt with promptly and effectively.

Example: We recognize and value the diversity of Ontario and of our own [workplace, school, apartment building, *etc.*] We strive for equality in our [employment, education, housing, *etc.*] practices and delivery of services. We recognize that sometimes rights may come into conflict with one another. Therefore, we will equip management and all [employees, students, tenants, *etc.*] with knowledge and skills to recognize and address competing rights in our [workplace, school, apartment building, *etc.*] and service delivery.

We will foster respect on a daily basis amongst management and all [employees, students, tenants, *etc.*]. We will ensure that management staff understand their legal responsibilities to act immediately to deal with competing rights situations. We will continually monitor and assess progress in recognizing and addressing competing rights situations in our organization.

- 2) A clear statement of the goals of the policy, namely:
 - show dignity and respect for one another
 - encourage mutual recognition of interests, rights and obligations
 - facilitate maximum recognition of rights, wherever possible
 - help parties to understand the scope of their rights and obligations
 - address stigma and power imbalances and help to give marginalized individuals and groups a voice
 - encourage cooperation and shared responsibility for finding agreeable solutions that maximize enjoyment of rights, and
 - a commitment on the part of the organization to make sincere efforts to achieve these goals when addressing competing human rights scenarios.

- 3) A statement of rights and obligations under the Ontario *Human Rights Code*.

Example: We recognize that under the Ontario *Human Rights Code*, we have the ultimate responsibility for maintaining an inclusive environment that is free from discrimination and harassment, and where everyone's human rights are respected. As part of this, we have a legal duty to take steps to prevent and respond to situations involving competing rights.

Example: Under the *Code*, [employees, students, tenants, *etc.*] have the right to file a human rights claim with the Human Rights Tribunal of Ontario if they believe that they have experienced discrimination in [employment, housing, education, other services, *etc.*]

- 4) A list of the prohibited grounds of discrimination listed in the *Code*.

Example: The *Code* prohibits discrimination based on 15 grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability, receipt of public assistance (in housing only), record of offences (in employment only). Competing rights claims may potentially arise relating to any *Code* ground.

- 5) A definition of "competing human rights" (see section 4 of this *Policy*).

Example: In general, competing human rights involve situations where parties to a dispute claim that the enjoyment of an individual or group's human rights and freedoms, as protected by law, would interfere with another's rights and freedoms. This complicates the normal approach to resolving a human rights dispute where only one side claims a human rights violation. In some cases, only one party is making a human rights claim, but the claim conflicts with the legal entitlements of another party or parties.

- 6) Examples of competing rights scenarios that are meaningful and relevant in the organization's context.

- 7) A description of who the policy applies to (such as employers, employees, unions, *etc.*).

- 8) How internal complaints and competing rights situations will be handled with details on:

- who to complain to and/or raise competing right concerns with

- an assurance that the person handling complaints and/or competing rights concerns should be independent, expert, *etc.*
 - confidentiality
 - reassurance that the person(s) making a complaint and/or raising competing rights concerns will be protected from reprisal, or threat of reprisal
 - help that is available for parties
 - the availability of Alternative Dispute Resolution, such as mediation, to resolve a complaint and/or competing rights situation (see section 7.3 of this *Policy*)
 - how the complaint and/or competing rights situation will be investigated
 - how long the process will take
 - a commitment that decisions made and/or actions taken by the organization will be communicated to the parties.
- 9) A commitment to act in accordance with the following key competing rights legal principles:
- a) No rights are absolute
 - b) There is no hierarchy of rights
 - c) Rights may not extend as far as claimed
 - d) The full context, facts and constitutional values at stake must be considered
 - e) Must look at extent of interference (only *actual* burdens on rights trigger conflicts)
 - f) The core of a right is more protected than its periphery
 - g) Aim to respect the importance of both sets of rights
 - h) Statutory defences may restrict rights of one group and give rights to another, and a recognition of the obligation to consider these legal principles when dealing with competing rights situations, and to stay apprised of case law developments (the OHRC will provide on-line legal updates to this *Policy* at www.ohrc.on.ca). (See section 5 of this *Policy* for more detail.)
- 10) A commitment to use the OHRC's analysis when addressing competing human rights situations (see section 6 of this *Policy*).
- 11) A statement reinforcing the right of individuals to file other types of complaints, such as:
- a human rights application with the Human Rights Tribunal of Ontario at any time during the internal process, as well as an explanation of the one-year time limit in the *Code*
 - a complaint under the *Occupational Health and Safety Act*, if applicable
 - a grievance under a collective agreement, if applicable
 - criminal charges, if applicable.

Appendix F: Table of cases

Adler v. Ontario, [1996] 3 S.C.R. 609

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Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General) (2008),
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Brockie v. Brillinger (No. 2), (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.)

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Caldwell v. Stewart, [1984] 2 S.C.R. 603

Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892

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1992 CanLII 116 (S.C.C.)

Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710

Chiang v. Vancouver Board of Education, 2009 B.C.H.R.T. 319

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835

Dallaire v. Les Chevaliers de Colomb, 2011 HRTO 639 (CanLII)

Danson v. Ontario (Attorney General), 1990 CanLII 93 (S.C.C.)

Eagleson Co-Operative Homes, Inc. v. Théberge, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.))

Giguere v. Popeye Restaurant, 2008 HRTO 2 (CanLII)

Grant v. Willcock (1990), 13 C.H.R.R. D/22 (Ont. Bd. Inq.)

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Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927

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Nichols v. M.J., 2009 SKQB 299 (CanLII).

Ontario Human Rights Commission v. Christian Horizons, 2010 ONSC 2105 (CanLII)

P. (D.) v. S. (C.), [1993] 4 S.C.R. 141

Quebec et Giguere v. Montreal (Ville) (2003) 47 C.H.R.R. D/67

Quesnel v. London Educational Health Centre (1995), 28 C.H.R.R. D/474

R. v. Crawford, 1995 CanLII 138 (SCC)

R. v. Kapp, [2008] 2 S.C.R. 483

R. v. Keegstra, [1990] 3 S.C.R. 697

R. v. Mills, 1999 CanLII 637 (SCC)

R. v. N.S., 2010 ONCA 670

R. v. O'Connor, [1995] 4 S.C.R. 411

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

Reference re Same-Sex Marriage, 2004 SCC 79

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825

Syndicat Northcrest v. Amselem, 2004 SCC 47

Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772

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www.ontario.ca/humanrights

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Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim (called an application), contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights application, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-597-4903 or Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

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