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RECONCILING COMPETING RIGHTS: THE JUDICIARY'S APPROACH

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I. Introduction

A nation's commitment to diversity and equality must be supported through clear articulation of human rights and fundamental freedoms. Our *Charter of Rights and Freedoms*,[1] applicable to government bodies, guarantees, *inter alia*, freedom of expression, religion and association[2] and affords protections to those accused of crimes;[3] human rights legislation in each jurisdiction seeks to ensure freedom from discrimination at the hands of private and public organizations, for historically marginalized persons.[4]

With cultural and religious diversity, rights can conflict or appear to conflict. The typical questions that arise are as follows:

- Are rights even an issue? Do Sikh students have the right to wear religious symbols that resemble weapons in a school setting where safety is paramount?
- Does Don Cherry exercise his right to freedom of expression by criticizing "you people"?
- Are certain rights more important than others? Is Freedom of Expression more "important" than Freedom of Religion?
- Is an accused person's right to a fair trial more important than a complainant's religious right to wear a niqab while testifying?
- How do we accommodate the diversity of human rights at play in our society, many of which will conflict?
- Can everyone reasonably expect to exercise their freedoms of religion, association and expression, in any way they see fit?

Making sense of conflicting rights is undoubtedly complex, but our courts have established frameworks for addressing such conflict, within the context of the facts, parties and statutory obligations

[1] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.),1982, c.11 ("*Charter*").
[2] Section 2.
[3] Sections 7-12.
[4] See also section 15 of the *Charter*.

before them. The Ontario Human Rights Commission's Policy on Competing Rights[5] provides its own framework for evaluating conflict rights cases. The Policy is informed by the decisions of our highest courts and will undoubtedly continue evolve as competing rights claims are resolved in Tribunals and Courts.

Below I highlight key cases (many involving religious freedoms) from the Supreme Court of Canada and one decision from the Ontario Court of Appeal. What becomes clear from these decisions is that accommodation, proportionality of harm and avoidance of bright-line tests are central principles in resolving rights conflicts.

II. Key Decisions

a. Trial Fairness and Religion

R v. N.S.[6] is an interesting and important case from the Supreme Court of Canada that addresses the conflict that can sometimes arise between a witness's religious rights and the right of an accused person to a fair trial.

N.S. accused M.d S and M-I S of sexual assault and both were charged. At trial, the accused argued that N.S. was required to remove her niqab while testifying. N.S.'s faith required her to wear the niqab in public where men, not her relatives, would see her.

The accused argued that the niqab, in concealing N.S.'s face, would prevent effective cross-examination and interfere with the judge's ability to assess the credibility of her testimony.

The Court approached the issue by asking the following four (4) questions:

1) Would requiring N.S. to remove the niqab interfere with her religious rights?

2) Would permitting her to wear the niqab create a serious risk to trial fairness?

3) Is there a way to accommodate both rights and avoid the conflict?

[5] Available at www.ohrc.on.ca
[6] [2012] 3 S.C.R. 726

4) If not, do the salutary effects of requiring removal outweigh the deleterious effects?

On the first question, the preliminary judge held that N.S.'s belief that she was required to wear the niqab was not sufficiently "strong". That decision was based on the fact that she had removed the niqab for other purposes (e.g. for her driver's license). The Supreme Court held that the preliminary judge applied the wrong approach and that N.S. simply had to show that her belief was sincere; the strength of her conviction was not relevant at the initial stage of analysis.

On the assumption that N.S's belief was sincerely held, the Court went on to consider the remaining questions.

On the second question, the Court accepted that, in certain circumstances, trial fairness could be compromised if a witness's face was concealed, such that the absence of facial cues and gestures would preclude effective cross examination and hinder the trier of fact from making proper credibility assessments. The court recognized that, under the common law, witnesses are required to testify in open court and face-to-face confrontation is the norm.

However, the effect of not seeing a witness's face would depend on the expected evidence. In some circumstances, the evidence may not be contentious and the niqab would pose no risk to trial fairness.

On the third question, the Court held that the answer to reconciling rights is not to adopt one extreme position or the other. The solution is not to ban the niqab outright, or prohibit its removal in all circumstances. Rather, the necessary approach would be to find a way to accommodate both sets of rights.

Where accommodation is not possible, the fourth stage of enquiry would require the court to weigh the *salutary effects* of removing the niqab against the *deleterious effects* of doing so. In this case, the salutary effects would include preserving trial fairness and the administration of justice, both undoubtedly important societal values. The deleterious effects would include harm to religious rights and

broader societal harm, including discouraging niqab-wearing women from reporting offences and participating as witnesses. In considering such effects, the *strength* of the person's belief in wearing the niqab could be considered, including other circumstances where the individual did remove the niqab. In addition to these effects, the nature of the proceeding, the stage of inquiry and whether the trier of fact is a judge-alone or a jury would be relevant considerations.

The Supreme Court remitted the case back to the preliminary inquiry judge to decide the issue in accordance with the balancing framework set by the Court. What *R v. N.S.* affirms, however, is that no right is absolute and that accommodation of competing rights is the preferred approach. If not possible, a proportionality approach that causes the least amount of harm must be adopted.

b. School Safety and Religion

The Supreme Court of Canada's 2006 decision in *Multani v. Commission scolair Marguerite-Bourgeoys*[7] addressed a conflict between the religious freedom of a student and the School Board's obligation to ensure safety in its schools.

Orthodox Sikhs observe a number of religious practices, one of which is to wear a kirpan (a small sword or dagger) under clothing. In 2001, Gurbaj Singh Multani accidentally dropped his kirpan in the schoolyard.

Gurbaj's parents subsequently agreed with the School that they needed to take measures to ensure that Gurbaj's kirpan was sealed inside his clothing. The school board refused to ratify the agreement between the school and the parents, reasoning that its Code of Conduct prohibited the carrying of weapons on school property. The board suggested that Gurbaj wear a plastic or wooden replica of the kirpan.

The Multanis brought a motion in Superior Court to nullify the board's decision on the basis that it violated Gurbaj's Charter rights. Specifically, his freedoms of religion and equality under Sections 3 and

[7] [2006] 1 S.C.R. 256

10. They also sought an injunction to permit Gurbaj to wear the kirpan under stipulated conditions. The Superior Court granted the requested relief, which the Court of Appeal then overturned.

The Supreme Court found that prohibiting the kirpan infringed Gurbaj's freedom of religion. He met the first part of the test for showing an infringement of religious rights by demonstrating that he held a sincere belief that his religion required him to wear the kirpan and that a wooden or plastic substitute would not suffice.

Secondly, the prohibition against an authentic kirpan interfered with his freedom of religion in a manner that was not trivial or insubstantial.

The Court went on to apply the *Oakes*[8] test to determine if the infringement was reasonable and could be justified in a free and democratic society pursuant to Section 1 of the Charter. In *R v. Oakes*, the Supreme Court considered when the violation of an accused person's Charter rights could be considered a reasonable limit prescribed by law and justified in a free and democratic society pursuant to Section 1 of the Charter. The Supreme Court presented a two-step test.

First, the legislative measure or government action limiting the Charter right in question must be sufficiently important to warrant overriding a fundamental constitutional right. The objective must be pressing and substantial.

Second, the means chosen to advance the objective in question must be reasonable and demonstrably justified. This stage of the test involves three considerations:

1) There must be a rational connection between the means chosen and the stated objective;
2) The means chosen must impair the right in question as little as possible; and
3) The effects of the measures limiting the Charter right in question must be proportionate to the objective in question. The more severe the infringement, the more important the objective must be to justify it.

[8] *R. v. Oakes*, [1986] 1 SCR 103, at paras. 29, 66, 68, 69.

The Court concluded that the school board's objective was to ensure a reasonable level of safety in the schools, which was pressing and substantial. The Court was satisfied that there was a rational connection between banning the kirpan and achieving reasonable safety. However, the prohibition was not minimally impairing.

The Court essentially applied principles of accommodation in assessing minimal impairment. If there was a way to accommodate Gurbaj while achieving the objective of reasonable safety, then an absolute prohibition of the kirpan would not be justified. In fact, it was not and there was no evidence that the kirpan presented a safety risk, any more so than other objects commonly found in a school which can be used as weapon. There was also no evidence that allowing Gurbaj to wear the kirpan could lead to a proliferation of weapons or potentially poison the school environment as a symbol of violence (which it was found not to be).

Consequently, Gurbaj's right to observe his religion by wearing the kirpan was not outweighed by the School's Board's pressing and substantial interest to ensure school safety.

c. Equality and Religion

i. Re. Saskatchewan (Marriage Act, Marriage Commissioners)[9]

This reference to the Supreme Court of Canada concerned a clash of equality and freedom of religion rights under the *Charter.*

In 2004, the Saskatchewan Court of Queen's Bench found that the Province's refusal to issue marriage licenses to same-sex couples would constitute a violation of their equality rights under section 15(1) of the *Charter*[10]. Marriage commissioners were therefore required to perform marriage ceremonies for same sex couples, which resulted in eight (8) resignations.

[9] [2011] S.J. No. 3
[10] 2004 SKQB 434

Shortly thereafter, the Supreme Court of Canada in, *Reference Re Same-Sex Marriage*[11], validated federal legislation defining marriage without confining it to opposite sexes.

The fallout in Saskatchewan was litigation. Human rights complaints from commissioners alleged that their religious rights were violated. Court actions were brought against the province seeking remedies under the Charter. At least one marriage commissioner received a human rights complaint for his refusal to perform a same-sex marriage ceremony.

Against this backdrop, the province proposed amendments to *The Marriage Act*, *1995* to allow marriage commissioners employed by the province to decline to solemnize a marriage if doing so would be contrary to the commissioner's religious beliefs.

The Supreme Court was asked to rule on the constitutional validity of these proposed amendments. The specific issue was whether or not the amendments violated the equality rights of same-sex persons in Saskatchewan and, if so, whether the violation could be saved under Section 1 of the Charter as a reasonable limitation of those rights, pursuant to the *Oakes* test.

The Supreme Court found that the amendments did discriminate against same-sex couples and violated their section 15 right to equality.

In considering whether the discrimination was justified under the *Oakes* test, the Court considered the discriminatory impact of requiring marriage commissioners to perform same-sex marriage ceremonies, contrary to their sincerely held religious beliefs.

The Court found that such a requirement would interfere with their religious rights in a way that was not trivial or insignificant. Commissioners would be required to choose between their religious views or leaving office.

The objective of the amendments was found to be aimed at the protection of religious rights and the amendments were rationally connected to that objective. However, the amendments did not

[11] [2004] 3 S.C.R. 698

minimally impair the equality rights of same-sex couples because there were other means of providing marriage ceremony services without interference with religious freedoms. In particular, instead of couples directly contacting a marriage commissioner, the Province could establish a "single entry point" system whereby couples would be assigned to an appropriate marriage commissioner. If a commissioner objected to performing the ceremony for a same-sex couple, the couple could be accommodated behind the scenes with a commissioner who would be prepared to complete the ceremony.

On the third branch of the *Oakes* test, the Court considered whether the salutary effect of the amendments outweighed the deleterious effects. While the amendments gave effect to the religious freedoms of commissioners, the Court noted that these benefits were more apparent than real because the amendments did not abridge the right of the commissioners to hold the beliefs they chose or to worship as they wish. On the other hand, the deleterious effects to same sex couples were significant. Same sex couples would be hurt and offended by their inability to access government services. More importantly, government services would be unequally available to members of society.

In the result, the province's amendments could not be justified as a reasonable limitation of the equality rights of same sex persons. The result of a blanket exemption, without any attempt to reconceptualize the delivery of government services, was an extreme incursion on equality rights, which was not offset through the protection of religious freedoms.

ii. Trinity Western University v. The Law Society of Upper Canada[12]

In 2014, the Law Society of Upper Canada (as it was then known), denied accreditation to Trinity Western University ("TWU") for a law school it proposed to create. The basis for its decision was the fact that TWU, a private Evangelical Christian University, required its students to abide by a "Community Covenant", prohibiting "sexual intimacy" outside of marriage "between a man and a woman". Necessarily, the covenant excluded same-sex couples, even if they were married.

[12] 2018 SCC 33

The LSUC's position was that it was statutorily mandated under the *Law Society Act* to, *inter alia*, to advance the cause of justice, facilitate access to justice and protect the public interest. All of these considerations guided its decision making with respect to accreditation.

The Divisional Court and Court of Appeal were unable to find that the LSUC's decision was unreasonable and the Supreme Court of Canada agreed.

The Supreme Court applied the balancing framework established in *Doré v. Barreau du Québec*[13] and *Loyola High School v Quebec (Attorney General)*[14]. Under the *Doré/Loyola* framework, an administrative body, like the LSUC, is required to assess whether its decisions impact *Charter* rights and values. If so, then it must weigh that impact and determine the most proportionate outcome. Ultimately, the administrative body's decision must reflect a balancing of *Charter* protections against the nature of the decision and the relevant statutory and factual contexts.

Applying this framework, the Court found that the LSUC's decision to refuse accreditation did engage the University's religious rights in a way that was not trivial or insubstantial.

The Court found, however, that the LSUC's decision was reasonable because it represented a proportionate balance between freedom of religion on the one hand, and the LSUC's statutory mandate, on the other. The LSUC had only two (2) options in the circumstances – to accredit or not accredit. If it decided to accredit, the consequence was an affront to equality and dignity rights, particularly for those in the LGBTQ community because they would be excluded from attending the law school. As such, the decision to refuse accreditation significantly advanced the LSUC's statutory objectives with respect to equal access and preventing discrimination.

The Court minimized the severity of the interference with TWU's religious rights by noting that the LSUC denied accreditation because of the mandatory nature of its Community Covenant. There was

[13] 2012 SCC 12
[14] 2015 SCC 12

nothing preventing TWU from operating a law school that appealed to certain religious standards or rules of conduct, without making such rules mandatory and excluding a class of persons with protected human rights.

In the result, the Supreme Court weighed the TWU's religious rights against the LSUC's mandate to facilitate equality and justice and held that it was appropriate to curtail religious freedoms in the circumstances. Abella J. held:

> *"Limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society. Religious freedom can be limited where an individual's beliefs or practices harm or interfere with the rights of others"*[15]

d. Freedom of Expression

i. Saskatchewan Human Rights Commission v. Whatcott[16]

In *Whatcott*, the Supreme Court considered the limits to the right to freedom of religion and expression under sections 2(a) and (b) of the *Charter* in the context of discriminatory publications targeting homosexuals.

William Whatcott distributed four flyers in Regina, Saskatchewan, on behalf of the "Christian Truth Activities". The flyers had the title "Keep Homosexuality out of Saskatoon's Public Schools" or "Sodomites in our Public Schools".

Section 14(1)(b) of the *Saskatchewan Human Rights Code* prohibited the publication or display of any representation "that exposes or tends to expose to hatred, ridicules or belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground", including sexual orientation.

[15] *Supra* note 7 at par. 40
[16] [2013] 1 S.C.R. 467

Four (4) complaints were filed with the Saskatchewan Human Rights Tribunal. The Tribunal found that the flyers exposed persons to hatred and ridicule on the basis of sexual orientation, violating Section 14(1)(b). The Court of Queen's Bench affirmed the decision, but the Court of Appeal overturned it on the basis that the flyers did not meet the test for "hatred". In other words, the flyers were protected under freedom of expression.

The two (2) issues for the Supreme Court were: 1) Whether section 14(1)(b) was unconstitutional insofar as it violated the Charter's Section 2(b) protection for freedom of expression; and 2) if so, whether the infringement was justified under Section 1 of the Charter.

The Court found, easily, that the Code's prohibition against hate speech contravened Section 2(b). It also contravened Whatcott's right to freedom of religion.

However, the prohibition was justifiable under Section 1 of the Charter.

The objective of the prohibition, to reduce discrimination and harassment against marginalized groups, was found to be pressing and substantial. Restricting hate speech was rationally connected to the objective. The section in question focused on public, not private, communications of hate speech, and focused on the characteristics of a category of protected persons, not the characteristics of an individual. As such, it was narrowly conceived.

The wording of 14(1)(b) was, however, found to be overbroad. The section prohibited published content that *"exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground".* The Supreme Court found that the words "*ridicules, belittles or otherwise affronts the dignity…"* were too broad. They did not rise to the level of "hatred", which should be the defining characteristic of any speech or communication sought to be abridged. Consequently, the Court amended the section to read "*exposes or tends to expose to hatred".*

With respect to minimal impairment, the Court found that s. 14(1)(b) was within the range of reasonable alternatives available to the legislature, once the language pertaining to "*ridicules, belittles or otherwise affronts the dignity of"* is removed.

Finally, the Court held that the benefits of suppressing hate speech outweighed the deleterious effects of curbing free expression. The effect of hate speech was to further marginalize disadvantaged groups, not promote the values underlying freedom of expression.

The Court also found an infringement under section 2(a) of the Charter. Mr. Whatcott sincerely believed that his religion required him to proselytize homosexuals and the prohibition substantially interfered with his ability to do so. However, limiting Mr. Whatcott to expressions that promote hate against homosexuals was reasonable under Section 1 of the Charter.

In *Whatcott,* the Supreme Court affirmed that freedom of expression is not an absolute right and ends at speech that is hateful and destructive to the equality rights of individuals.

ii. Taylor-Baptiste v. Ontario Public Service Employees Union[17]

In *Taylor-Baptiste*, the Ontario Court of Appeal considered the reasonableness of the Ontario Human Right's Tribunal decision to reject a complaint of workplace discrimination. The original complaint to the Ontario Human Rights Commission was in relation to sexist blog comments that targeted a female supervisor. The Tribunal, applying the *Doré*[18] framework, was required to balance the respondent's freedom of expression rights.

Mr. Dvorak, a Correctional Officer, reported to Ms. Taylor-Baptiste, a Deputy Superintendent, at the Toronto Jail. In addition to his employment duties, Mr. Dvorak served as the president of the local union and operated a blog about union-management matters. Mr. Dvorak authored a blog and authorized a blog comment, both of which accused Ms. Taylor Baptiste of nepotism and incompetence. The blog

[17] 2015 ONCA 495, Application for Leave to Appeal to the Supreme Court of Canada dismissed, 2016 CanLII 34004
[18] *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 SCR 395

posts referenced Ms. Taylor Baptiste in a demeaning and sexist manner, stating that she achieved her position because of her common law spouse.

Ms. Taylor Baptiste alleged that she was discriminated against in employment on the basis of gender and marital status contrary to section 5(1) of the *Human Rights Code*,[19] and harassed contrary to section 5(2).

Vice-Chair David Wright at the Human Rights Tribunal of Ontario dismissed both arguments. The Tribunal could not find that there was harassment contrary to the *Code*. It also could not find discrimination "with respect to employment", despite acknowledging that the blog posts were sexist and demeaning. The Tribunal relied, in part, on Mr. Dvorak's rights to freedom of expression and association in relation to the discharge of his union related duties.

The Court of Appeal held that the Tribunal's decision was reasonable in dismissing the discrimination complaint under section 5(1) of the Code. Ms. Taylor Baptiste did not appeal the decision concerning harassment.

In assessing discrimination, the Tribunal examined all of the relevant circumstances including the conduct in question, and its effects and the respective roles of the parties. Applying *Doré*, a key factor considered by the Tribunal was the nature of the expression at issue, which it held was protected by the Charter, however rude, distasteful and sexist. Expressions based on sexist stereotypes simply do not fall within the same category as hateful expressions, which was determined to fall beyond the scope of Charter protection, in *Whatcott*.

Further, the blog posts engaged Mr. Dvorak's freedom of association rights because the blogs were directed at union membership and dealt with matters related to union business.

With respect to Ms. Taylor Baptiste, her concern related more to the fact that the blog posts commented on her personal life, not the sexist stereotypes reflected in the posts. The Tribunal also found

[19] RSO 1990, c H.19.

an absence of any negative consequences for Ms. Taylor Baptiste and the comments about her only appeared twice among a large number of posts.

Accordingly, the Court of Appeal held that the Tribunal appropriately balanced its statutory objective in ameliorating discrimination and harassment against the respondent's freedom of expression and association rights. In this case, and unlike *Whatcott*, Mr. Dvorak's rights to freedom of expression were recognized as a factor in negating the discriminatory effect of his conduct.

III. Conclusion

This paper examined a number of cases from the Supreme Court of Canada and one case from the Ontario Court of Appeal in relation to conflicting rights. The cases dealt with Charter rights insofar as they conflicted with rights and values in relation to school safety, trial fairness, freedom of expression and the equality rights of historically disadvantaged persons.

Rights will continue to conflict. Charter rights will conflict with themselves and with quasi-constitutional human rights. Those rights will also conflict with other statutory human rights and rights and principles unrelated to human rights or fundamental freedoms.

In any case of a conflict of rights, the learnings from the cases discussed are:

- Rights are not absolute. In a free and democratic society, rights are not unfettered and we must be prepared, within reason, to be flexible.
- There is no hierarchy of rights. However, certain rights may take precedence in circumstances where disregarding those rights does more harm than good.
- Where we must impair rights for the greater good of a free and democratic society, we should strive to do so in a way that minimally impairs.
- We are obliged, as a society, to make efforts to accommodate the rights of others. Sometimes rights conflict because we refuse to change the way we think, act or organize our affairs.

Much like the accommodation of disabilities, mindset changes, creative thinking and fundamental respect for human dignity are necessary.