CITATION: *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105
DIVISIONAL COURT FILE NO.: 221/08
DATE: 20100514

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, LEDERMAN and SWINTON JJ.

B E T W E E N :	)	
	)	
ONTARIO HUMAN RIGHTS COMMISSION The Commission (Respondent)	)	*Barbara Grossman, Adrian Miedema and Christina Hall*, for the Appellant Christian Horizons
– and –	)	*Raj Dhir* and *Anthony D. Griffin*, for the Respondent Commission
CONNIE HEINTZ Complainant (Respondent)	)	*Connie Heintz* in person
- and -	)	*William Sammon*, for the Intervenor The Canadian Council of Christian Charities
CHRISTIAN HORIZONS Respondent (Appellant)	)	*Iain T. Benson*, for the Intervenor Ontario Conference of Catholic Bishops
	)	*Peter Jervis* and *Tudor Carsten*, for the Intervenor The Evangelical Fellowship of Canada
	)	*Cynthia Petersen* and *Charlene Wiseman*, for the Intervenor Egale Canada Inc.
	)	**HEARD at TORONTO:** December 14, 15 and 16, 2009

BY THE COURT:

INTRODUCTION

[1] Christian Horizons appeals from a decision of the Human Rights Tribunal of Ontario ("the Tribunal") dated April 15, 2008, in which the Tribunal found that Christian Horizons was not entitled to the special exemption provision in s. 24(1)(a) of the *Human Rights Code*, R.S.O.

1990, c. H.19 ("the *Code*") and upheld the complaint of Connie Heintz that she had been discriminated against on the basis of sexual orientation.

[2] By order of December 22, 2008, Aston J. granted intervenor standing to Egale Canada Inc. ("Egale"), The Evangelical Fellowship of Canada, and The Canadian Council of Christian Charities. The Ontario Conference of Catholic Bishops was granted standing as an added party under r. 13.01. Each intervenor filed a factum and made helpful submissions to the Court.

[3] The Canadian Council of Christian Charities filed a notice of constitutional question on the hearing of this appeal, challenging the validity of ss. 24(1)(a) and 41(1)(a) of the *Code*. Christian Horizons did not serve any notice of constitutional question, and no constitutional challenge had been argued before the Tribunal. We refused to hear submissions on the constitutional question raised for the first time by an intervenor at this appellate level.

FACTUAL SUMMARY

[4] Christian Horizons was founded in 1965 with the goal of creating an organization to minister to individuals with developmental disabilities within an Evangelical Christian environment. It presently operates more than 180 residential homes in Ontario as well as camping and day programs, employing more than 2,500 staff and caring for more than 1,400 persons. Christian Horizons believes that it is an Evangelical Christian ministry providing an opportunity for Evangelical Christians to come together in order to reach out and assist historically disadvantaged and marginalized people. It has always hired only Evangelical Christians to staff its programs.

[5] In its reasons, reported at (2008), 65 C.C.E.L. (3d) 218, the Tribunal noted that most of the relevant evidence was not in dispute. It made the following findings with respect to the organization of Christian Horizons and the work it carried out (references to the paragraph numbers used by the Tribunal).

> [10] Christian Horizons identifies as a religious organization. It considers its work of supporting and caring for individuals with developmental disabilities as Christian ministry. Its core values are based on the sincere belief that Christians may be called to do God's work, and live out what they perceive as a Biblical mandate to care for the poor, the vulnerable and the marginalized in society. In so doing, they will wish to come together with others of common faith. It believes that if the organization, as a religious organization, is not able to ensure that everyone who is part of the ministry, members and employees alike, adhere to the core faith beliefs, then the organization will lose its unique character, and will eventually die. For Christian Horizons, this case goes to its very identity and existence.

…

[39] Christian Horizon's policy manual sets out the organization's Mission, its Value Statement and the Doctrinal Statement. It reads, in part:

> As Christians, possessing a personal faith in Jesus Christ as Lord and Saviour, we wish to further the aims of Christian Horizons in a true spirit of Love and compassion, combined with a genuine concern for the needs of those whom we will serve seeking to do all for the glory of God. The employees of Christian Horizons subscribe to the following doctrinal statement:
>
> > 1. The Holy Scriptures as originally given by God are divinely inspired, infallible, entirely trustworthy and the only supreme authority in all matters of faith and conduct.
> >
> > 2. Only one God eternally existent in three Persons: Father Son and Holy Spirit.
> >
> > 3. Our Lord Jesus Christ, God manifest in the flesh – His virgin birth, His sinless human life, His bodily resurrection, His divine miracles, His ascension, His mediatorial work, and His personal return in power and glory.
> >
> > 4. The salvation of lost and sinful man through the shed blood of the Lord Jesus Christ and regeneration by the Holy Spirit by faith apart from works.
> >
> > 5. The Holy Spirit whose indwelling the believer is enabled to live a holy life to witness and work for the Lord Jesus Christ.
> >
> > 6. The resurrection of both the saved and the lost; that they are saved unto the resurrection of Life, and that they are lost unto the resurrection of Life, and that they are lost unto the resurrection of damnation.
> >
> > 7. The unity of spirit of all true believers, the Church, the Body of Christ.

…

[44] Since the opening of the first home in 1976, Christian Horizons has gone through a period of significant growth, and now operates over 180 residences across Ontario. Part of the impetus for expansion was the view that there was a broad need to support Christian families who sought a distinctively Christian option for residential care. Coincident, and perhaps more important, was the move by the government to close its large institutions, and provide care and support for individuals with developmental disabilities in community-based residences. As an organization which identified as Evangelical Christian, Christian Horizons' members and leadership felt a deep calling to meet the needs of individuals who were disabled, regardless of the faith background of those individuals or their families.

…

[47] In addition, Christian Horizons has always sought to maintain the Christian character of all its residences. New residences are opened with a religious dedication service, many daily activities are centred on prayer and Bible reading. Christian Horizon's information and promotional materials clearly indicate that it identifies as a Christian organization, and that its residential programs seek to establish a "Christian home environment" for its residents. This Christian identity has also always been made clear to its government funders.

…

[52] A number of members and employees of Christian Horizons testified how they saw their work as Christian ministry, and how the work could not be separated from their spiritual beliefs. While the Commission and Ms. Heintz disputed that religion and spirituality were necessarily infused with the daily tasks of providing residential and support services to the residents, it was not disputed that many members and staff felt a deep calling as Christians to be involved with Christian Horizons, and they drew upon their faith commitment to support their work. Indeed, Ms. Heintz testified that she chose to work at Christian Horizons because she felt called by God to do Christian ministry.

…

[54] Christian Horizons is the largest single community living service provider in the province, though it is not the largest in any one area of the province. It receives approximately $75 million annually, and

> provides services and support to approximately 1400 individuals with developmental disabilities. [emphasis added.]

[6] In 1992, following a direction from an Ontario Board of Inquiry (the Tribunal's former name) in *Parks v. Christian Horizons* (1992), 16 C.H.R.R. D/40, Christian Horizons determined to create a statement of the lifestyle requirements that reflected its religious nature and that would be applicable to all its employees. After consultation with its employees, its Board of Directors approved a Life Style and Morality Statement ("L & M Statement"), which would be included in all employment contracts. The L & M Statement, as set out in para. 68 of the Tribunal's reasons, reads as follows:

> [68] PERSONAL LIFESTYLE AND MORALITY STANDARDS EXPECTED OF STAFF
>
> Staff conduct should comply with Christian Horizons' policies where stated, endorse the Christian commitment of the membership and be a positive example for the people we serve. Each staff person teaches by example, therefore, they may not use tobacco or alcoholic beverages or be perceived as endorsing their use, while being observed by our clients. Further, such conduct is strongly discouraged for the health and well-being of the staff. Similarly, we hold life to be sacred and the family model as endorsed by Jesus as fundamental.
>
> While not limiting examples in inappropriate behaviour deemed to be contrary to the teaching of Jesus and His followers as recorded in the New Testament, Christian Horizons does reject conduct such as:
>
> 1. extra-marital sexual relationships (adultery)
> 2. pre-marital sexual relationships (fornication)
> 3. reading or viewing pornographic material
> 4. homosexual relationships
> 5. theft, fraud
> 6. physical aggression
> 7. abusive behaviour
> 8. sexual assault/harassment
> 9. lying and deceit
> 10. the use of illicit drugs

> as being incompatible with effective Christian counselling ideals, standards and values.

[7] In 1995 the complainant, Ms. Heintz, began employment as a support worker at a community living residence operated by Christian Horizons. Her duties included providing care and support for individuals who have developmental disabilities in a residential home environment. She signed contracts, including the L & M Statement, in 1995 and again in 1996. Ms. Heintz has a deep Christian faith and has trained in Christian Ministry and Christian counselling. She participated in religious activities at Christian Horizons.

[8] Four years after beginning her employment with Christian Horizons, Ms. Heintz came to an understanding of her sexual orientation and entered into a same sex relationship in October 1999. In April 2000, she advised two co-workers of her relationship and subsequently, in answer to a question put by her supervisor, agreed that she was in a same sex relationship. Discussions ensued between Ms. Heintz and persons at Christian Horizons. She was offered counselling to restore her to a state of compliance with the L & M Statement.

[9] In June 2000 a co-worker complained of harassment at the hands of Ms. Heintz. There was an inquiry, and Ms. Heintz was issued with a letter of discipline that stated in part "if you fail to change your attitude and improve your performance, we have no alternative but to recommend termination of your employment".

[10] Ms. Heintz met with officials of Christian Horizons to discuss the discipline letter on July 27, 2000. She testified at the hearing before the Tribunal that by the end of August she had become stressed and unable to function properly at work. On her doctor's advice, she went on medical leave effective August 28, 2000, and on September 22, 2000, she resigned from her employment.

[11] On January 22, 2001, Ms. Heintz filed a complaint with the Commission against Christian Horizons and her supervisor, Ms. Girling, alleging that she had been discriminated against on the basis of her sexual orientation and had been exposed to a poisoned work environment. The Commission referred the complaint to the Tribunal in June 2004. A hearing began on April 3, 2006, concluding after 40 days on May 29, 2007. At the conclusion of its case, the Commission, joined by Ms. Heintz, agreed to withdraw all complaints against Ms. Girling. The decision under appeal was delivered on April 15, 2008.

RELEVANT LEGISLATION

[12] Subsection 5(1) of the *Code* confers a right to equality in employment in the following terms:

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

[13] This right is not infringed if an institution comes within s. 24(1)(a), which reads:

> The right under section 5 to equal treatment with respect to employment is not infringed where,
>
> (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

THE DECISION OF THE TRIBUNAL

[14] The main issue before the Tribunal was whether Christian Horizons could benefit from the protection given by s. 24(1)(a) of the *Code*. A secondary and discrete issue was whether Christian Horizons permitted a poisoned work environment that fostered discrimination against Ms. Heintz because of her sexual orientation.

[15] Christian Horizons conceded that it was discriminating against Ms. Heintz contrary to the *Code* unless it came within s. 24(1)(a). In dealing with the primary issue, the Tribunal held that in order for Christian Horizons to claim the benefit of s. 24(1)(a) of the *Code*, it had the onus to prove that:

1. It is a religious organization;
2. It is primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified; and
3. The restriction in employment to persons similarly identified by creed is a reasonable and *bona fide* qualification because of the nature of the employment (the "BFOQ requirement").

[16] The Tribunal found that the first requirement was satisfied. In dealing with the second requirement, the Tribunal found that while Christian Horizons provides opportunities for Evangelical Christians to live out a religious calling, the totality of the evidence and a plain reading of s. 24(1)(a) led to the conclusion that it was not primarily engaged in serving the interests of Evangelical Christians. Rather, it was serving the interests of people with

developmental disabilities (Reasons at para. 160). Therefore, it could not claim the exemption in s. 24(1)(a).

[17] In the alternative, with respect to the third requirement, the Tribunal found that in adopting the qualification on employment imposed by the L & M Statement, "no real effort was made to examine whether the requirement was in fact reasonably necessary or whether the employment could be performed without the discriminatory restrictions" (Reasons at para. 161). Therefore, it had not satisfied the BFOQ requirement.

[18] The Tribunal also found that Christian Horizons had created a poisoned work environment in its treatment of Ms. Heintz after it became known that she was lesbian.

[19] The Tribunal made a number of remedial orders (Reasons at para. 286). It ordered Christian Horizons to pay $8,000 in damages for the application of the discriminatory employment policy and $10,000 for the poisoned work environment, as well as $5,000 for the wilful and reckless infliction of mental anguish arising from the poisoned work environment. As well, it ordered special damages for wages and benefits that Ms. Heintz would have received between September 23, 2000 and July 12, 2002.

[20] The Tribunal also made orders of a systemic nature as follows:

> 2. The respondent Christian Horizons shall develop and adopt an anti-discrimination and an anti-harassment policy as well as a human rights training program for all employees and managers within six months from the date of the decision.
>
> 3. The respondent, Christian Horizons, shall cease and desist from imposing the Lifestyle and Morality Statement as a condition of employment. The effect of this order is stayed for a period of 8 months from the date of this decision, or for such longer period as the Tribunal may direct.
>
> 4. Within 30 days of the date of this decision, the respondent, Christian Horizons, must commence a review of its employment policies, in consultation with the Commission, to ensure that such policies comply with the *Code*.
>
> 5. No later than six months from the date of this decision, the respondent, Christian Horizons shall submit a report to the Tribunal outlining the steps it proposes to take to ensure that its employment policies are in compliance with the *Code*, including a time frame for implementation.
>
> 6. At least 30 days prior to the submission of its proposal to the Tribunal the respondent, Christian Horizons, shall provide its proposal to the Commission and Ms. Heintz.

> 7. The Commission and Ms. Heintz are entitled to make submissions to the Tribunal on the respondent's proposal. The submissions will be provided to the Tribunal within 30 days of receipt of the respondent's proposal.

THE STANDARD OF REVIEW

[21] The parties are agreed that the standard of review on general questions of law and statutory interpretation of the *Code* is correctness, and that the standard of review of the Tribunal's findings of fact and the application of law to those findings of fact is one of reasonableness.

[22] In applying the reasonableness standard, we must be concerned "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Our role is to determine whether the Tribunal's findings of fact had "some basis in the evidence" to support the findings (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47; *ADGA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649 at para. 76).

THE KEY ISSUES

[23] The following issues are raised on this appeal:

1. Did the Tribunal err in its interpretation of s. 24(1)(a) of the *Code*?
2. Was the Tribunal's decision rejecting the reasonable and *bona fide* occupational defence reasonable?
3. Was there evidence to support the finding that Christian Horizons permitted the existence of a poisoned workplace?
4. Was the remedy reasonable?

ISSUE NO. 1: DID THE TRIBUNAL ERR IN ITS INTERPRETATION OF s. 24(1)(a) OF THE *CODE?*

Overview

[24] Subsection 5(1) of the *Code* confers a right to equal treatment with respect to employment without discrimination on specified grounds, which include creed and sexual orientation. As noted above, s. 24(1)(a) provides an exception to s. 5 and reads as follows:

> The right under section 5 to equal treatment with respect to employment is not infringed where,
>
> (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour,

> ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment; [emphasis added.]

[25] The parties agree, and the Tribunal held, that in order for s. 24(1)(a) to be available to the appellant, it must be determined that:

1. Christian Horizons is a "religious organization";
2. Christian Horizons 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.

[26] The Tribunal held that the appellant satisfied the first element, in that it was a religious organization. For the reasons given by the Tribunal, that conclusion was clearly correct (see, for example, *Alemu v. The Queen* (1999), 99 D.T.C. 714 (Tax Ct.) at paras. 25, 26, and 32).

[27] However, the Tribunal held that the second and third elements were not satisfied. At the heart of this appeal is whether Christian Horizons is "primarily engaged" in serving the interests of persons identified by their creed. If so, is religious adherence that involves refraining from same sex relationships a reasonable and *bona fide* qualification for support workers in the Christian Horizons' homes for people with developmental disabilities?

[28] In considering the second element, the Tribunal relied on the plain meaning of the words of s. 24(1)(a) (Reasons at para. 155), concluding that Christian Horizons could invoke s. 24(1)(a) "only to the extent the group is engaged in serving the interests of persons who are identified by one of the proscribed grounds of discrimination" (Reasons at para. 157). The Tribunal held that s. 24(1)(a) was not available because Christian Horizons has chosen to serve the broader public sector (Reasons at para. 160):

> I accept that as a religious organization, it provides opportunities for persons who identify as Evangelical Christian to come together to live out a deeply felt religious calling, either as members, volunteers or employees, and in this way the organization serves the interests of persons identified by a common creed. But the totality of the evidence, whether viewed subjectively or objectively, and a plain reading of s. 24(1)(a), does not support finding that Christian Horizons is primarily engaged in serving the interests of persons who are adherents to its articles of faith as expressed in the Doctrinal Statement and the Lifestyle and Morality Statement.

[29] Earlier, the Tribunal found the following (Reasons at paras. 140-141):

> Without in any way denying the sincerity of belief, the success of the organization in infusing religious commitment into the work, and the positive effect this religious commitment has on the quality of care, it is nonetheless clear that the primary object and mission of Christian Horizons is to provide care and support for individuals who have developmental disabilities, without regard to their creed. Its Letters Patent demonstrate this mission, its Constitution and By-laws demonstrate this mission, and the evidence of the staff and directors of Christian Horizons who testified in this case demonstrate this mission.
>
> The primary undertaking of Christian Horizons, the operation of community living programs, has as its main purpose, the provision of residential support services for persons with disabilities regardless of their faith background. That is its main activity.

[30] The Tribunal explained its understanding of the policy choice in s. 24(1)(a) (Reasons at para. 158):

> [The Legislature] has determined that where the organization is primarily engaged in serving the interests of its members or its community of co-religionists, it will be granted freedom to restrict hiring to members of its faith, subject to the qualification being reasonable and *bona fide*. Where, however, it branches out into the public realm, where the nature and primary purpose of its activity creates a relationship with the broader public, its rights are then limited, and, as pertaining to the social activity of employment, it cannot infringe on the fundamental rights of others.

[31] In reaching its decision, the Tribunal departed from the interpretation of the special employment exception given in *Parks*, *supra*, the earlier case involving Christian Horizons. In *Parks* the Board of Inquiry held that Christian Horizons was primarily serving two sets of interests: the Evangelical Christian interests of its founding and current executive, personnel and membership and the interests of the residents of the group homes and their parents and guardians (at p. D/48). Therefore, Christian Horizons could claim the protection of the special employment exception. However, the Board went on to find that Christian Horizons had not established that its prohibition on common law relationships was a *bona fide* occupational qualification. *Parks* was upheld on appeal to the Divisional Court; however, the Court did not refer to the Board's conclusion that Christian Horizons served two interests (unreported endorsement, 1993).

Issue Estoppel and Abuse of Process

[32] As a preliminary matter in this proceeding, Christian Horizons argued that the Tribunal erred in failing to find issue estoppel or abuse of process, given that *Parks* had determined the issues of whether Christian Horizons is a religious organization and whether it is primarily engaged in serving the interests of persons identified by their creed.

[33] For issue estoppel to apply, the parties to the earlier proceeding or their privies must be the same as those in the current proceeding, and the same question must have been decided in the earlier proceeding (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 25). Even if the criteria for issue estoppel are satisfied, the decision maker has discretion whether or not to apply the doctrine (*Danyluk* at para. 33).

[34] In this case, although the Commission was a party to the earlier proceedings and the current proceedings, Ms. Heintz was not a party in the earlier proceedings. The appellant argues that she is a privy of the Commission, as her interests are the same. While she had separate counsel at the commencement of the proceeding, the Commission counsel began representing her, as well, from about the mid-point in the hearing.

[35] In our view, the Tribunal did not err in finding that issue estoppel does not apply. Ms. Heintz is an independent party to these proceedings, and she was not a party to the earlier proceedings (see *McKenzie Forest Products Inc. v. Ontario Human Rights Commission* (2000), 48 O.R. (3d) 150 (C.A.) at para. 34). Therefore, the first element of the test is not met.

[36] Similarly, the test for abuse of process is not met, as it has not been shown that this proceeding would violate principles of fundamental fairness or be oppressive or vexatious.

[37] The Tribunal concluded that even if Christian Horizons had established the elements for issue estoppel, the Tribunal would exercise its discretion to hear the complaint for a number of reasons: the length of time between the *Parks* decision and the current proceeding, including developments in the jurisprudence and changes in Christian Horizons; concerns of fairness to Ms. Heintz; the importance of the legal issues; and the Tribunal's serious doubts about the correctness of the *Parks* decision. We would defer to the Tribunal's exercise of discretion, particularly given concerns of fairness to Ms. Heintz and the developments in the jurisprudence in the years since *Parks* was decided.

The Interpretation of s. 24(1)(a)

[38] Christian Horizons argued that the Tribunal failed to consider the appropriate principles of statutory interpretation, enunciated by the Supreme Court of Canada in a number of decisions:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Bell ExpressVu Limited Partnership v. The Queen*, [2002] 2 S.C.R. 559 at para. 26, quoting Elmer Driedger, *Construction of Statutes* (2d ed., 1983))

Christian Horizons argued that had the Tribunal applied the correct approach, considering the objectives and purpose of the legislation, it should have concluded that Christian Horizons primarily serves the interests of persons identified by their creed.

[39] The standard of review with respect to questions of law is correctness. However, the Commission argued that the decision of the Tribunal turned on an application of the legislative provision to the facts of this case. As the Tribunal made evidentiary findings about Christian Horizons' primary activity in order to support its conclusion that the section did not apply, the Commission argued that this Court should defer to the Tribunal, unless those findings are unreasonable.

[40] In our view, the standard of review is correctness. We are not dealing here only with an evidentiary determination, but with the proper approach to the interpretation and application of s. 24(1)(a).

[41] In the interpretation of s. 24(1)(a), the key question is the proper perspective from which to determine whether a religious institution is primarily engaged in serving the interests of a group defined by creed: from the perspective of the group (as the appellant and a number of Christian intervenors urge) or from the perspective of those whose needs are served (the Tribunal's perspective, as seen in the Reasons at para. 132).

The Wording of the Provision

[42] The Tribunal emphasized the plain meaning of the words of s. 24(1)(a), an approach that the Commission and Egale supported on this appeal. However, the Supreme Court of Canada has made it clear that the wording of a provision is but one of a number of considerations in statutory interpretation (*Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21). The exercise of statutory interpretation requires, as well, consideration of the scheme of the whole Act and the object and intention of the Legislature.

[43] Egale supported the Tribunal's determination that s. 24(1)(a) is not available to religious organizations that are engaged in "public life" because such organizations are no longer "primarily" serving the interests of their creed. Egale argued that that the provision is meant to exempt religious organizations from s. 5 of the Code only if the religious organization is serving a particular religious community. Because Christian Horizons is fully engaged in the public life of the province, it is no longer primarily serving Christian interests and cannot invoke s. 24(1)(a).

[44] Like Egale, the Tribunal, adopted a public/private distinction, when it stated (at para. 158):

> ... [W]here the nature and primary purpose of [a religious organization's] activity creates a relationship with the broader public, its rights are then limited, and, as pertaining to the social activity of employment, it cannot infringe on the fundamental rights of others.

[45] Egale made reference to *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 in support of its argument for a public/private distinction. However, the legislation under consideration in that case expressly prohibited discrimination by an organization or institution "when offering or providing services, goods, or facilities to the public".

[46] In fact, the majority decision in *Gould* did not rely on this provision. More importantly, the words of s. 24(1)(a) make no reference to a public/private distinction, and it is inappropriate to read one in.

The Legislative History

[47] Both the Commission and Egale referred the Court to the legislative history of the special employment provisions, arguing that this showed a narrowing of the religious exemption over the years.

[48] Anti-discrimination legislation in Ontario has included special exceptions for religious groups since 1951. The *Fair Employment Practices Act*, S.O. 1951, c. 23 did not apply to any "exclusively religious" organization not operated for profit or to "any organization that is operated primarily to foster the welfare of a religious or ethnic group and that is not operated for private profit" (s. 2).

[49] That exemption was narrowed in the *Human Rights Code*, R.S.O. 1970, c. 318, which provided, in s. 4(4), that the prohibition on discrimination in employment did not apply to certain organizations, including an exclusively religious organization not operated for private profit or "to any organization that is operated primarily to foster the welfare of a religious or ethnic group" not operated for private profit – provided that race, colour, creed, nationality, ancestry or place of origin is a reasonable occupational qualification.

[50] This provision was further amended in the *Human Rights Code*, R.S.O. 1980, c. 340, as follows:

> 4(7) The provisions of this section relating to limitation or preference in employment because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin do not apply to an exclusively religious, philanthropic, educational, fraternal, or social organization that is not operated for private profit, or to any organization that is operated primarily to foster the welfare of a religious or ethnic group and that is not operated for private profit where in any such case race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin is a *bona fide* occupational qualification and requirement. (emphasis added)

[51] Section 24(1)(a), quoted above, has dropped the exemption for an "exclusively religious" organization not operated for private profit. The inquiry is now twofold in a case such as the present one: is an organization a religious organization, and is it primarily engaged in serving the interests of persons identified by their creed? If so, a religious qualification for employment must be a reasonable and *bona fide* qualification because of the nature of the employment.

[52] Thus, the legislative history shows that the Legislature has, over the years, narrowed the exception from the equal employment provision in s. 5 for religious institutions. Nevertheless, there has been a longstanding legislative decision to provide an exception for religious

organizations, now if they are primarily engaged in serving the interests of their religious community, where the restriction is reasonable and *bona fide* because of the nature of the employment.

The French Version of the Provision

[53] Christian Horizons found support for its argument that the focus should be on the purpose or perspective of the religious group from the French version of the provision. According to s. 65 of the *Legislation Act*, S.O. 2006, c. 21, Sch. F, the English and French versions of Acts and regulations enacted in both languages are equally authoritative. Christian Horizons argues that the French version shows more clearly than the English version that one is to consider the objectives of the religious group in determining whether the second element of the special employment provision is satisfied.

[54] The French version reads:

> 24(1) Ne constitute pas une atteinte au droit, reconnu à l'article 5, à un traitement égal en matière d'emploi le fait:
>
> (a) qu'un organisme ou un groupement religieux, philanthropique, éducatif, de secours mutuel ou social dont le principal objectif est de servir les intérêts de personnes identifiées par la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la croyance, le sexe, l'age, l'état matrimonial ou un handicap n'emploie que des personnes ainsi identifiées ou leur accorde la préférence si cette qualité requise est exigée de façon raisonnable et de bonne foi compte tenu de la nature de l'emploi… (emphasis added)

[55] The French version focuses on the principal objective of the religious organization, because it requires a determination as to whether the principal objective of the organization is to serve those identified by creed. In contrast, the English version appears to focus on the interests being served without explicit reference to purpose or objective.

[56] Christian Horizons submits, and we agree, that the French version suggests that the proper approach to the interpretation of the section is to focus on the subjective purpose of the group. In the case of a religious group providing charitable services, the question to be determined is whether its principal objective is to serve a religious calling or mission in carrying out this work.

The Purpose of the Provision

[57] Ultimately, in interpreting this provision, one must ask its purpose. Assistance in determining the purpose is to be found in two decisions of the Supreme Court of Canada interpreting comparable provisions from British Columbia and Quebec legislation.

[58] In *Caldwell v. Stuart*, [1984] 2 S.C.R. 603, the Supreme Court interpreted s. 22 of the former *Human Rights Code*, R.S.B.C. 1979, c. 186 of British Columbia, which read:

> Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

[59] In *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, the Supreme Court dealt with the application of s. 20 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12 (as it then read):

> A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

[60] In both cases, the Supreme Court rejected an argument that such provisions should be construed narrowly as rights limiting sections (*Caldwell* at p. 626; *Brossard* at para. 99). Rather, these provisions were characterized as having a dual purpose: they both confer rights on some persons and limit the rights of others in situations where the section applies (*Caldwell* at p. 626; *Brossard* at para. 100). They are meant to protect the right to associate and to promote certain types of association, including religion. As Beetz J. stated (*Brossard* at para. 100):

> In my view, this branch of s. 20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances. Rather than adopting a liberal or a restrictive interpretation of the second branch, I shall therefore endeavour to give the expressions "nonprofit institution" and "political nature" their ordinary meaning, using the traditional rules of statutory interpretation.

[61] Beetz J. repeated this conclusion (at para. 117):

> As I noted earlier, I believe the second branch of s. 20 is designed to promote the fundamental freedom of individuals to associate in groups, for the purpose of expressing particular views or engaging in particular

> pursuits, and for those individuals not to be inhibited, in so doing, by the anti-discriminatory norm.

He went on to emphasize that there are restrictions on an institution that wishes to give preference to members of its group – for example, Catholic schools invoking the Quebec Charter – as the institution must still show that the preference is justified by the religious or educational nature of the group.

[62] Beetz J. also observed that other provinces, such as Ontario, had included special employment provisions in their human rights legislation. While the wording of each provision differed, each had a similar purpose: namely to protect the fundamental freedom of association of individuals to join in a group or organization for specified purposes (*Brossard* at paras. 124 and 132).

[63] Again and again, Beetz J. emphasized that one looks to the primary *purpose* of the organization or institution to determine whether it means to serve or promote the interests and welfare of an identifiable group characterized by a common ground in the exemption provision (see e.g. para. 130).

[64] The problem with the approach adopted by the Tribunal in this case is that it ignores the purpose of the special exemption provision – to confer a right to associate on certain groups so that they can join together to express their views and carry out their joint activities. It follows that in determining whether a particular group serves the interests of its members, defined by a characteristic such as creed in the present case, one must look to the purpose of the association.

[65] The appellant and the Christian intervenors in this appeal all argued that the Tribunal's interpretation will lead to an absurd result that could not have been intended by the Legislature, given the inclusion of the special employment provision in the Code. If the Tribunal is correct, religious organizations like Christian Horizons or a religious group offering to feed the hungry will be unable to rely on s. 24(1)(a) if they minister to individuals regardless of their religious beliefs. Such an organization could not require even its senior officers, who constitute the organization's directing mind, to be adherents to its religious beliefs. They submit that the Legislature could not have intended to put out of business religious organizations that minister to the disadvantaged as an expression of their religious faith.

[66] We agree with the appellant and Christian intervenors on this point. In the interpretation of statutes, the courts can consider the likely results or effects of different interpretations of the language. It is "a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences" (*Rizzo*, *supra* at para. 27). If the Tribunal's strict, plain language approach is correct, a religious institution will not be able to rely on s. 24(1)(a) in order to argue that religious adherence is a *bona fide* qualification, even with respect to those directing a religious missionary or charitable activity, if the activity is offered to those outside the particular faith community. In effect, the religious character of the charitable mission would be rendered impossible if the mission served individuals outside of the faith group.

[67] The Legislature must be taken to have known of the long history of assistance to the disadvantaged offered by religious groups in Canada, which have not imposed a requirement of religious membership or adherence on recipients. Therefore, an interpretation of s. 24(1)(a) that respects this historic role is the better one and consistent with the purpose of the exemption, as described in *Brossard*, *supra*.

Interpretation in Light of Charter Values

[68] Where there is genuine ambiguity in a statute, *Charter* values can be used as an interpretive principle (*Bell ExpressVu*, *supra* at para. 62). In this case, there is ambiguity in the words of s. 24(1)(a), especially when the French and English versions are read together. Two human rights tribunals interpreting the section in application to Christian Horizons have given the section different meanings.

[69] Where there is ambiguity, the courts should interpret legislation to accord with the *Charter*, as it is presumed that the Legislature has enacted laws in accordance with the *Charter* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at para. 90).

[70] Here, the Tribunal failed to consider the impact of its narrow interpretation of the second element of s. 24(1)(a) on the rights and freedoms of members of religious organizations, despite the guarantee of freedom of religion in s. 2(a) of the *Charter*. Moreover, the approach of the Tribunal failed to give effect to the directive from the Supreme Court of Canada that the right to freedom of religion should be considered from the perspective of the religious minority whose rights are infringed (*Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paras. 43-46).

[71] Subsection 24(1)(a) seeks to balance the rights of certain groups against equality rights. An approach to s. 24(1)(a) that takes into account, in the determination of the primary activity of a religious organization, the perspective and purpose of the organization is consistent with the guarantee of freedom of religion. At the same time, the BFOQ requirement found in s. 24(1)(a) upholds the important *Charter* protection for equality rights.

[72] In the case of the members of Christian Horizons, the charitable work they do is an exercise of their religious beliefs and values. The Tribunal's interpretation of s. 24(1)(a) has the effect of severely restricting the manner in which that religious activity will be carried out, as the Tribunal's interpretation would require them to confine their charitable work to members of their faith group, when they see their religious mandate as to serve all of the needy without discrimination.

The Correct Interpretation

[73] For all these reasons, we conclude that the Tribunal erred in approaching the second element in s. 24(1)(a) from an objective standpoint (see Reasons at para. 138). In doing so, it failed to respect the religious character of Christian Horizons' activities and the purpose of s. 24(1)(a) as to protect group rights of association. The language and purpose of the provision require an analysis of the nature of the particular activity engaged in by a religious organization

to determine whether it is seen by the group as fundamentally a religious activity. This must be followed by an assessment of whether that activity furthers the religious purposes of the organization and its members, thus serving the interests of the members of the religious organization. If the organization falls within the exemption, a BFOQ assessment must follow.

[74] Egale submits that this approach renders the second element of s. 24(1)(a) redundant, because once it has been determined there is a religious organization, the second element is met. However, that is not the case. There may be overlap in the analysis of the first and second elements when dealing with religious organizations, but there is still a need to consider both the nature of the organization and the activity it undertakes, as well as the purpose for which it undertakes the activity.

[75] Given the findings of fact made by the Tribunal, it is clear that Christian Horizons operates its group homes for religious reasons – in order to carry out a Christian mission, imitating the work of Jesus Christ by serving those in need. It would not be doing this work of assisting people with disabilities in a Christian home environment but for the religious calling of those involved. As the Tribunal noted at para. 133, "[Christian Horizons] sees the organization as a vehicle through which individuals who identify as Evangelical Christians can live out their faith." The Tribunal also stated that the work of Christian Horizons is "defined as Christian ministry, where staff live out their Christian calling". The organization is structured as a community of co-religionists (Reasons at para. 139), where the members carry out the central mission "of selfless service to the vulnerable, the marginalized and the needy" (Reasons at paras. 134 and 153).

[76] Ms. Heintz agreed, in cross-examination, that the goal of the programme was to show Christ to the individuals in the home in all things (Transcript at p. 580).

[77] Thus, the Tribunal accepted that, from the perspective of the founders of Christian Horizons, its members and employees, the organization saw itself as an Evangelical Christian organization. The charitable work it undertook for persons with developmental disabilities was undertaken as a religious activity through which those involved could live out their Christian faith and carry out their Christian ministry to serve people with developmental disabilities. Christian Horizons is, in fact, primarily engaged in serving the interests of persons identified by their creed, with resultant benefits to individuals with developmental disabilities who live in their group homes and the families of those residents.

[78] Therefore, the Tribunal erred in its interpretation and application of s. 24(1)(a) when it found that Christian Horizons could not rely on the exemption because of the nature of its activity and the clientele served.

ISSUE NO. 2: WAS THE TRIBUNAL'S DECISION REJECTING THE REASONABLE AND *BONA FIDE* OCCUPATIONAL DEFENCE REASONABLE?

[79] The Tribunal found that even if Christian Horizons had succeeded in its position that as a religious organization, it is primarily engaged in serving the interests of persons identified by their creed, it would nevertheless have found that Christian Horizons did not meet the final

element in s. 24(1)(a) of the *Code*. The final element in s. 24(1)(a) of the *Code* is that "the qualification is a reasonable and *bona fide* qualification because of the nature of the employment".

[80] This defence, often referred to as the BFOQ defence, is well-tilled ground in human rights jurisprudence. Courts and tribunals have adopted the two part test laid down by the Supreme Court of Canada in *Ontario* (*Human Rights Commission*) *v. Etobicoke* (*Borough*), [1982] 1 S.C.R. 202 at p. 208 as follows:

> To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

Thus, the requirement or qualification must be both subjectively and objectively appropriate.

[81] The qualification in issue was defined by the Tribunal at para. 162 "as the requirement that all employees agree to and sign the Lifestyle and Morality Statement". The L & M Statement sets out conduct that Christian Horizons deems to be incompatible with effective Christian counselling ideals, standards and values. It prohibits homosexual relationships, extramarital and premarital sexual relationships, pornography, the use of tobacco or alcoholic beverages, theft, fraud, physical aggression, abusive behaviour, sexual assault and harassment, lying and deceit, and the use of illicit drugs.

[82] Although the L & M Statement is cast in broad terms, the only qualification at issue in this case is the requirement to refrain from same sex relationships. There is no suggestion that Ms. Heintz has engaged in any of the other behaviours prohibited by the L & M Statement. In fact, the Tribunal found, and Christian Horizons concedes, that Ms. Heintz, a self-identified Christian, viewed her work with Christian Horizons as the fulfillment of her calling to do Christian ministry.

[83] The qualification in issue, as it pertains to Ms. Heintz's employment, therefore should be more narrowly viewed as the prohibition of involvement in a same sex relationship, rather than the qualification that there be religious adherence to Christian Horizons' creed in all of its various aspects. The prohibition of involvement in a same sex relationship is the alleged discriminatory act contrary to the *Code*.

[84] The onus is on the employer to establish the BFOQ defence. The Supreme Court of Canada in *Brossard*, *supra*, reaffirmed at para. 56 "that *bona fide* occupational qualification exceptions in human rights legislation should in principle, be interpreted restrictively since they take away rights which otherwise benefit from a liberal interpretation".

[85] At paras. 179-180 of its decision, the Tribunal found that Christian Horizons satisfied the subjective element of the BFOQ test, in that it sincerely and honestly believed that the qualification is necessary for the performance of the support worker job.

[86] The intervener, Egale Canada Inc., argued that without having considered Ms. Heintz's job duties, Christian Horizons cannot even demonstrate that it has met the subjective test of the BFOQ defence, namely a sincerely held belief that the prohibition on same sex relationships was in the interest of the adequate performance of Ms. Heintz's work. However, given the finding of fact by the Tribunal, which is not challenged by the main parties on this appeal, we see no basis to interfere with this finding.

[87] The Tribunal, at para. 181, also accepted that there may be a rational connection between the qualification and the impression that Christian Horizons had of the nature of the employment. However, the Tribunal went on to say:

> Without consideration of whether the actual activity of the organization, the services it provides, and the job functions in the provision of those services, necessitates the imposition of the discriminatory qualification, the objective element is completely robbed of any meaning.

[88] In considering whether the objective test has been satisfied, a close examination of the nature of employment (i.e. the employees' actual duties, functions, activities and the abilities of the employee to perform the job) is critical.

[89] Accordingly, scrutiny of the actual employment in question is where the "rubber meets the road" in considering whether a valid BFOQ defence has been made out. The employer must clearly demonstrate that the qualification in issue "is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public" (see *Etobicoke*, *supra* at p. 208).

[90] A qualification of religious conformance is one that intuitively would generally not meet the objective criterion. As the Supreme Court of Canada said in *Caldwell v. Stuart*, *supra*, at p. 625: "it will be only in *rare circumstances* that such a factor as religious conformance can pass the test of *bona fide* qualification" (emphasis added). The qualification, to be valid, must not just flow automatically from the religious ethos of Christian Horizons. It has to be tied directly and clearly to the execution and performance of the task or job in question. A focus that is only on the religious organization and its mission, without regard to how it is manifested in the particular job in issue, would deprive the final element of s. 24(1)(a) of the *Code* of any meaning.

[91] In *Caldwell*, *supra*, a Roman Catholic teacher in a Roman Catholic school was not rehired because she had married a divorced man in a civil ceremony contrary to Church dogma.

She filed a complaint of discrimination with the British Columbia Human Rights Commission. One of the defences raised was that this was a case where religion and marital status constituted a BFOQ. The teacher was engaged in educating students in the Catholic faith and expected to assist in their adopting a Catholic way of life. At p. 625, the Court stated as follows:

> In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a *bona fide* qualification.

[92] In the instant case, the Tribunal, at para. 191, found that the service Christian Horizons provides is not religious education and indoctrination. Rather, unlike the teacher in *Caldwell*, *supra*, "the primary role of a support worker is not to help all residents to adopt a Christian way of life, or to carry out a mission of salvation, or to convert residents to the faith beliefs of the organization".

[93] Except for the supervisors (who are called program managers), all of Christian Horizons' employees in its over 180 homes have the same job title, description and function, namely, support workers. Christian Horizons argued that support workers, such as Ms. Heintz, in fact are the "face of the organization" to the individual residents and their family members. A religious ethos infuses the very work that support workers do and, therefore, the Christian ministry and how the work is carried out cannot be distinguished in any meaningful way. Christian Horizons submits that one cannot separate out the religion from the tasks performed by the support worker. Christian Horizons' religious practice includes ministering to the poor and vulnerable. Accordingly, the organization submits that the requirement that its support workers subscribe to the L & M Statement is objectively reasonable. And as the Tribunal pointed out, the religious commitment of Christian Horizons and its support workers has resulted in excellent service.

[94] Christian Horizons has argued that rather than assessing the objective reasonableness of the qualification, the Tribunal made an error by focusing on the process by which Christian Horizons created the L & M Statement. The development of the Statement occurred through a process whereby Christian Horizon employees were asked to come up with a list of lifestyle and morality qualifications for the organization. Christian Horizons has argued that the Tribunal was wrongly concerned about the process and did not do a comprehensive assessment of the evidence to determine whether the objective branch of the BFOQ defence had been met.

[95] In the process conducted by Christian Horizons, however, there is no evidence that the leadership of Christian Horizons did a close examination of the nature and essential duties of the position of support worker and why adherence to a L & M Statement, including a ban on same sex relationships, is necessary in relation to those duties, or that such was taken into account by the employees when they made recommendations for the list to be included in the L & M Statement. It was just assumed that a morality code of some kind was required. In other words, whether or not the L & M Statement was generated from the bottom up by the employees, there is no evidence that anyone, including the Christian Horizons leadership, ever considered whether

the prohibition on same sex relationships was necessary for the effective performance of the job of support worker in a home where there is no proselytizing and where residents are not required to be Evangelical Christians.

[96] The Tribunal found that s. 24(1)(a) of the *Code* requires evidence that the employer put its mind to the issue in a meaningful way, with a recognition that there is an obligation to consider the fundamental rights of others (Reasons at para. 188). This is consistent with the test set out in *Etobicoke*, *supra*.

[97] The evidence about process is relevant to the BFOQ inquiry, as it demonstrates that Christian Horizons never did turn its mind to the reasonable necessity of the qualification in question in relation to the performance of the actual tasks of a support worker. It was therefore reasonable for the Tribunal to take into account how the L & M Statement was developed in considering whether it constituted a valid BFOQ.

[98] The Tribunal also considered the practices of other organizations, such as the Salvation Army, in its BFOQ analysis. Although Christian organizations will vary in their religious mission and activities, it is instructive to consider how such organizations have treated religious conformance qualifications as being reasonably necessary to the performance of particular jobs. It was reasonable for the Tribunal to engage in this exercise to see how other religious organizations balance rights and whether they impose qualifications of religious or morality conformance for all job functions or just for certain ones related to leadership.

[99] The Tribunal acknowledged that Christian Horizons is a unique organization, and seen from the organization's perspective, its staff is required to exemplify Christ and show Christian love in all that they do and in all of their actions with the residents of the homes. There was no question that religious commitment is seen by the organization as fundamental to both its approach to service delivery and to the carrying out of the job responsibilities.

[100] Christian Horizons argued that the requirement of religious conformance by support workers, objectively viewed, was reasonably necessary to assure the accomplishment of the goal of Christian Horizons to operate Christian homes, with its distinct characteristics for the purpose of providing Christian ministry to people with disabilities and their families. It argued that it was reasonably necessary to have its staff share its beliefs in its mandate to show God's love in their work.

[101] The evidence shows that the "Christian environment" that was provided in the homes by the support workers mainly manifested itself through prayer, hymn singing and Bible reading. There is no evidence that Ms. Heintz refused to participate in these activities. In doing so, the support workers are not engaged in converting the residents to Evangelical beliefs or lifestyle.

[102] On the critical question of whether Christian Horizons had discharged its burden of showing that adherence to the L & M Statement was reasonably necessary for a support worker such as Ms. Heinz, the Tribunal at para. 189 found that the evidence was equivocal.

[103] A discriminatory qualification cannot be justified in the absence of a direct and substantial relationship between the qualification and the abilities, qualities or attributes needed to satisfactorily perform the particular job. The Tribunal must consider the employment or job

function of providing care and support to people with developmental disabilities and not extraneous or collateral circumstances (see *Ontario* (*Human Rights Commission) v. London Monenco Consultants Limited*, [1992] O.J. No. 1599 (C.A.) at para. 21).

[104] In the end, notwithstanding some of the Christian practices engaged in by the support workers with the residents as described above, the Tribunal found that the support worker was not engaged in actively promoting an Evangelical Christian way of life and that services were provided to the people with developmental disabilities of all faiths and those without any faith. There is nothing about the performance of the tasks (cooking, cleaning, doing laundry, helping residents to eat, wash and use the bathroom, and taking them on outings and to appointments) that requires an adherence by the support workers to a lifestyle that precludes same sex relationships. In fact, Ms. Heintz, herself, remains an Evangelical Christian, a follower of Christian Horizons' ethos in every other way, and is committed and quite capable of performing the job functions of a support worker with the love and care that has typically characterized Christian Horizons' service to people with developmental disabilities and with respect for the Christian activities in the homes.

[105] It may be that from Christian Horizons' perspective, the support worker's job is of a religious nature, and it is therefore necessary that the support worker adhere to all aspects of the L & M Statement. However, from an objective perspective, the support workers are not actively involved in converting the residents to, or instilling in them, a belief in Evangelical Christianity. There is nothing in the nature of the employment itself which would make it a necessary qualification of the job that support workers be prohibited from engaging in a same sex relationship. To some extent, the support workers maintain a general Christian culture in the home by engaging the residents in prayer and bible reading, but support workers are not hired or expected to bring the residents into the Evangelical Christian religion by having them adopt a certain lifestyle. The fact is that the support workers' employment and the tasks they perform are not intended to infuse the residents of the homes that Christian Horizons serves with the lifestyle morals that Christian Horizons demands of its adherents.

[106] The Tribunal applied the correct test and, given the evidence, it was reasonable for the Tribunal to decide that Christian Horizons has not discharged its burden of showing that the qualification that its support workers adhere to the L & M Statement by not participating in same sex relationships is reasonable and *bona fide* because of the nature of that employment.

ISSUE NO. 3: WAS THERE EVIDENCE TO SUPPORT THE FINDING THAT CHRISTIAN HORIZONS PERMITTED THE EXISTENCE OF A POISONED WORKPLACE?

[107] The Tribunal found that Christian Horizons "infringed Ms. Heintz's right to be free from discrimination in employment by creating or permitting a poisoned work atmosphere, and by failing to take necessary measures to ensure Ms. Heintz did not have to endure discrimination at work because of her sexual orientation contrary to s. 5" of the *Code* (Reasons at para. 244).

[108] In particular, the Tribunal found that "the negative and discriminatory attitudes towards gays and lesbians that were being played out in a real and active way, was a central factor in the discord at Waterloo 6" (Reasons at para. 238). The Tribunal found that an investigation and inquiry into allegations of abuse and harassment made against Ms. Heintz by a co-worker were "biased and tainted by discrimination" (Reasons at para. 230). The Tribunal found that the co-worker's allegations of harassment were dubious, but that Christian Horizons took the allegations seriously, whereas the organization did not address any of Ms. Heintz's concerns that she was being subjected to discrimination based on her sexual orientation. In arriving at its conclusions and the assessment of damages, the Tribunal found that Christian Horizons did not have in place an effective process or training program to educate and combat any tendencies of employees to discriminate against gays and lesbians.

[109] There was a further finding that Ms. Heintz's sexual orientation was a consideration when Michael Alemu, then Administrator of District Services for Christian Horizons, decided whether to call for a formal inquiry into an allegation that a resident had been abused (Reasons at para. 232). Finally, a discipline letter issued to Ms. Heintz was found to be tainted by a discriminatory animus (Reasons at para. 233).

[110] The Tribunal correctly held that this infringement of the *Code* was not subject to the s. 24(1)(a) exemption, even if the exemption had been found to protect Christian Horizons if it imposed a discriminatory condition of employment.

[111] Christian Horizons argues that the Tribunal's finding that Ms. Heintz suffered "humiliation, attacks and mistreatment" was not supported by the evidence.

[112] In our view, there was evidence to support the Tribunal's findings. We are not to retry the matter but simply determine whether the Tribunal's decision was reasonable, based on the evidence. As there is evidence in the record to support the Tribunal's conclusions, the decision is tenable and was reasonable. Accordingly, we would not give effect to this ground of appeal.

ISSUE NO. 4: WAS THE REMEDY REASONABLE?

[113] Subsection 41(1) of the *Code* sets out the remedial authority of the Tribunal as follows:

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

> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

[114] The Tribunal acknowledged that "[i]n order for remedies to be fair and effective, they must be tailored to the particular facts in a case" and must flow from the violation that has been found (Reasons at para. 243). The Tribunal also stated (at para. 276):

> Remedial orders must flow from the violations found by the Tribunal. They should be broad, creative and effective. They must be targeted at removing the discrimination found and preventing further violations. But for remedies to be truly effective in achieving the goals of human rights legislation, they must make sense in the circumstances.

[115] There is no basis to interfere with the awards of general and special damages, given our conclusion with respect to violations of the *Code*.

[116] However, the Tribunal imposed several "public interest remedies", and Christian Horizons submits that the Tribunal overreached in making such orders.

[117] Christian Horizons takes issue with the order to develop and adopt an anti-discrimination and anti-harassment policy and a training program. We find that this requirement is overreaching. Given the Tribunal's findings of discrimination on the basis of sexual orientation and on the BFOQ issue, a reasonable remedy is to require that Christian Horizons develop a policy and provide training for its employees and managers that targets discrimination on the basis of sexual orientation.

[118] In our view, the order to cease imposing the L & M Statement as a condition of employment (stayed for eight months) is overbroad. The offending part of the Statement was the requirement that employees not engage in same sex relationships. Understandably, given the Tribunal's conclusions, the reference to same sex relationships must be deleted from the Statement, as it is discriminatory.

[119] However, there is no explanation from the Tribunal as to why many other provisions of the Statement are suspect – for example, prohibitions on theft, fraud, physical aggression, abusive behaviour, sexual assault and harassment, lying and deceit. Other elements of the Statement may raise issues in relation to the *Code*, but they were not the subject matter of the complaint before the Tribunal. Therefore, paragraph 3 of the order is amended to state that Christian Horizons shall cease to impose a requirement in the Statement that support workers not engage in same sex relationships.

[120] Paragraphs 4 through 7 of the order require a review of all Christian Horizons' employment policies in consultation with the Commission and, after receiving comments from the Commission and Ms. Heintz, approval by the Tribunal. These paragraphs are deleted. The

complaint was with respect to discrimination on the basis of sexual orientation. A remedial order designed to prevent future discrimination on this ground would be a reasonable one. However, the Tribunal has gone well beyond the circumstances of the present complaint in fashioning its order, and its order, therefore, is unreasonable.

CONCLUSION

[121] The appeal is allowed in part. The order of the Tribunal is varied as follows: paragraph 2 is amended to require that the anti-discrimination and anti-harassment policy and training program shall be directed to discrimination on the basis of sexual orientation; paragraph 3 is amended to state that Christian Horizons shall cease to impose a requirement in the Lifestyle and Morality Statement that support workers not engage in same sex relationships; and paragraphs 4 through 7 are deleted.

[122] If the parties cannot agree on costs, brief written submissions may be filed with the Registrar of the Divisional Court within 30 days of the date of release of these reasons.

_____
JENNINGS J.

_____
LEDERMAN J.

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SWINTON J.

RELEASED: May 14, 2010

CITATION: *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105
DIVISIONAL COURT FILE NO.: 221/08
DATE: 20100514

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, LEDERMAN and SWINTON JJ.

BETWEEN:

ONTARIO HUMAN RIGHTS COMMISSION

The Commission
(Respondent)

– and –

CONNIE HEINTZ

Complainant
(Respondent)

- and -

CHRISTIAN HORIZONS

Respondent
(Appellant)

REASONS FOR JUDGMENT

BY THE COURT

RELEASED: May 14, 2010