



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Connie Heintz

Complainant

-and-

Ontario Human Rights Commission

Commission

-and-

Christian Horizons

Respondent

DECISION

Adjudicator: Michael Gottheil
Date: April 15, 2008
File Number: HR-0837-04
Citation: 2008 HRTO 22
Indexed as: **Heinz v. Christian Horizons**

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I) OVERVIEW

[1] In March 1995, the complainant, Ms. Connie Heintz, began employment as a support worker at a community living residence operated by Christian Horizons in Waterloo, Ontario. The duties of a support worker include providing care and support for individuals who have developmental disabilities, in a residential group home environment.

[2] Christian Horizons is a not-for-profit corporation which self-identifies as an Evangelical Christian ministry. It operates over 180 residential homes across Ontario, has over 2500 employees and provides care and support to approximately 1400 individuals with developmental disabilities. In providing this care and support, it is funded almost exclusively by the Ontario Ministry of Community and Social Services.

[3] Central to Christian Horizons' vision as an organization, are articles of faith as expressed in a Doctrinal Statement which all members of the organization are required to adopt and sign. However, not only are members of the organization required to adopt these articles of faith, but employees are as well, and Christian Horizons has made its Doctrinal Statement, along with a Lifestyle and Morality Statement, part of the contract of employment for all employees.

[4] Ms. Heintz is an individual of deep Christian faith. She is also a lesbian. Ms. Heintz came to an understanding of who she was, and her sexual orientation during her tenure as an employee of Christian Horizons. The Lifestyle and Morality Statement prohibits homosexual relationships, and the faith belief adopted by Christian Horizon views homosexuality as unnatural, immoral and contrary to the scriptures. Because she was not in compliance with the Lifestyle and Morality Statement, Ms. Heintz was required to leave her employment in the fall of 2000.

[5] The Commission and Ms. Heintz allege that Ms. Heintz was terminated from employment because of her sexual orientation, and the requirement that all employees sign the Lifestyle and Morality Statement is a violation of the *Human Rights Code*. They

also allege that the manner in which Ms. Heintz was treated, after she came out as a lesbian, constitutes discrimination on the grounds of sexual orientation.

[6] Christian Horizons argues that it falls within the “special employment” provisions of section 24(1)(a) of the *Human Rights Code*, which permits certain organizations to restrict hiring or give preference in employment to persons identified by one of the proscribed grounds of discrimination, in this case, creed. It submits that strict adherence to its articles of faith, Doctrinal Statement and Lifestyle and Morality Statement is a reasonable and bona fide qualification given the nature of the employment. It also submits that, although Ms. Heintz was not in compliance with the Lifestyle and Morality Statement and as a result was not entitled to remain an employee so long as she was in non-compliance, the organization treated her with respect and compassion and did not violate her right to be free from discrimination on the basis of sexual orientation.

[7] This case raises extremely difficult legal and public policy issues, and of course is critically important for the parties. The *Human Rights Code* is a quasi-constitutional statute. Its provisions prevail over other provincial laws and over private employment contracts. Section 5 of the *Code* prohibits discrimination in employment on the basis of certain proscribed grounds, one of which is sexual orientation. The Supreme Court of Canada has recognized sexual orientation as a prohibited ground of discrimination under the Canadian *Charter of Rights and Freedoms*. Absent a specific exemption in the *Code*, an employer is not permitted to refuse to employ, or to terminate an individual’s employment because of their sexual orientation.

[8] Freedom of religion is also a constitutional right, and the ability of individuals of common faith to come together to express their faith and to pursue activities in furtherance of their faith has been recognized as a constitutional value.

[9] At the same time, it has been said that no right is absolute. Rights may conflict, and courts and tribunals may be called upon to reconcile competing interests and balance conflicting rights. Section 24(1)(a) is one of the provisions in the *Human Rights*

Code which provides a framework and criteria to determine, in a particular case, how that conflict should be resolved and competing rights balanced. The nature of the exercise will necessarily be challenging. Individuals involved will generally view their rights as “fundamental” and any attempt to balance rights or to accommodate competing interests will be seen as diminishing their respective rights.

[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.

[11] For Ms. Heintz, this case is equally fundamental. It is tied to her identity and dignity, to her sexuality, to her sense as a person of faith. Though she has not worked for Christian Horizons for many years, and does not seek to be reinstated, she seeks validation of the wrong she perceives to have been done to her, and recognition as an equal human being.

[12] The Commission is a statutory agency with a mandate to promote human rights. It perceives the issue in this case as whether an organization which is effectively 100 per cent publicly funded, which provides social services on behalf of the government to the broader community, and offers those services to individuals without regard to their race, creed or cultural background, may discriminate in its hiring policies on the basis of one of the proscribed grounds in the *Code*.

[13] The Tribunal's task is to consider and determine the complaint referred by the Commission and must do so based on the facts and the *Human Rights Code*. In

determining whether there has been a violation of the *Code*, the Tribunal cannot decide based simply on what, in its view, is most “fair” or least controversial. The Tribunal’s mandate is to apply the statute as drafted and enacted by the Legislature in a way consistent with the objects of the *Code*.

II) THE COMPLAINT AND THE PROCEEDINGS

[14] This complaint alleges an infringement of sections 5(1) and 9 of the *Human Rights Code*, R.S.O. 1990, c.H.19, as amended (“the *Code*”). The complaint was filed on January 22, 2001 and was referred to the Tribunal on June 21, 2004.

[15] Between the summer of 2004 and the spring of 2005, the parties engaged in voluntary efforts to resolve the complaint. Those efforts were unsuccessful and, in May 2005, the Tribunal held a conference call with the parties at which an initial seven hearing dates were scheduled in the months of October and November 2005.

[16] Over the fall of 2005 and early winter of 2006, the parties raised a number of preliminary and procedural issues that were dealt with through teleconference hearings. These included requests for production and disclosure, a request by the respondent to stay the Tribunal proceedings pending a judicial review and requests to limit certain evidence.

[17] Christian Horizons also requested an order that the Commission was prevented from challenging that Christian Horizons was a “religious organization” which is “primarily engaged in serving the interests of persons identified by their...creed” within the meaning of section 24(1)(a) of the *Code*. The respondent based its claim on findings in a previous decision of a Human Rights Board of Inquiry (a predecessor to the Tribunal) in *Parks v. Christian Horizons (No.1)* (1992), 16 C.H.R.R. D/40; (1993), remedy varied in part, unreported, Ont. Div. Ct.). I declined to grant the motion. I have summarized the reasons for my ruling in an addendum to this decision.

[18] The hearing on the merits commenced on April 3, 2006 and concluded May 29, 2007. The hearing ran 40 days, during which 21 witnesses provided evidence.

[19] The length of the hearing and the protracted pre-hearing litigation is not surprising. As noted above, the issues in this case are both difficult and are of critical importance to the parties. Although there were times during the proceedings in which tensions and tempers were heated, the Tribunal is grateful to the parties and counsel for their assistance in ensuring all relevant facts and arguments were elicited and put before the Tribunal for consideration.

[20] Finally, the complaint was originally filed against both Christian Horizons as a corporate respondent and Ms. Dorothy Girling as a personal respondent. Ms. Girling is a program manager at Christian Horizons and was Ms. Heintz's immediate supervisor in 2000. At the conclusion of the evidence on April 12, 2007, the Commission and the complainant withdrew all allegations that Ms. Girling had violated the *Code*, and the parties agreed to have Ms. Girling removed as a respondent. As a result, the Tribunal orders that Ms. Girling be removed as a respondent in these proceedings and her name shall not appear in the style of cause.

III) FACTUAL BACKGROUND

[21] Most of the relevant evidence in this case is not in dispute, though the characterization and the legal implications of the evidence are hotly contested. In this section of the decision I set out the background facts and identify disputes on relevant facts. Credibility findings necessary to the determination of the complaint are made in Part IV of the decision.

Connie Heintz

[22] Connie Heintz is a 39 year old woman who was born into a devout Christian Mennonite family in southwest Ontario. She is the youngest of six children. Her family operated a dairy farm outside Palmerston.

[23] Growing up, Ms. Heintz's family was a member of the local Mennonite church and Ms. Heintz participated in church and community activities. She attended Sunday School and summer Bible school, and later as a youth, taught at both. She described

her family as a Christian family and her home as a Christian home where the family participated in regular prayer and Bible readings.

[24] After completing high school and a diploma at Georgian College in Barrie, Ms. Heintz felt that she was called by God to do Christian study and work, and decided to enter the Bachelor of Theology programme at Eastern Pentecostal College in Peterborough. After one year, she transferred to Emmanuel Bible College in Kitchener where she took a major in Christian ministry and a minor in counselling. She received a Bachelor degree in Religious Education, Professional Studies in April 1995.

[25] Ms. Heintz began work with Christian Horizons in March 1995 as a part-time support worker in a residence called Waterloo 2. In May 1995 she obtained a permanent position as a support worker in the newly opened Waterloo 6 home.

[26] As will be more fully discussed below, Christian Horizons has a number of residences or “programs” throughout Ontario. Different residences provide differing levels of support based on the nature of residents’ disabilities. Some residences focus on individuals who require high levels of support. Others may be supported-living programs for individuals who are able to live independently, but need assistance for things such as paying bills and shopping. Common to all the programs, however, is Christian Horizons’ desire to create a “Christian home environment” for residents. As such, all staff are required to participate in a variety of Christian, religious activities including devotionals, Bible reading and prayer. Ms. Heintz, as someone who was trained in Christian ministry and Christian counselling, and as an individual who felt a religious calling to do this work, participated fully in these activities.

[27] In 1999, Ms. Heintz began to develop an awareness of her sexual orientation. She testified that it was an extremely difficult time for her as her religious upbringing viewed homosexuality as immoral and unnatural, as did the organization she worked for. Beyond this, her contract of employment expressly prohibited homosexual relationships. She felt very confused and alone.

[28] In the summer of 1999 she confided with two of her co-workers about her new awareness of her sexual orientation. In or about October 1999, Ms. Heintz began a same sex relationship with an individual who was not an employee at Christian Horizons. In April 2000 two co-workers confronted Ms. Heintz and asked if she was a lesbian. Soon after, her supervisor, Ms. Dorothy Girling confronted her, and asked if she was in a same-sex relationship. Ms. Heintz did not deny her relationship and her sexual orientation. This encounter prompted a series of events that ultimately resulted in Ms. Heintz resigning her employment with Christian Horizons in September 2000.

[29] Ms. Heintz testified that she continues to consider herself a Christian. She described how her religious views and faith changed over time:

My own personal religious views have gone through a bit of a metamorphosis. I, from growing up, was taught very strongly of my parents of Mennonite Christian views. And after I left home in my early – or late teens, early 20s, there was a time that I didn't want to associate with -- with that belief system. And I sort of put my Christianity on the back burner and said I wanted to do my own thing.

Then in my mid 20s, I came across some very passionate Christians that spoke into my life. And at that point, again, I made a recommitment back to God. And then my final understanding of where my faith has developed is from when I was 30 years of age when I had to accept my orientation and also, at the same time, integrate that into my faith.

Christian Horizons

[30] Christian Horizons was founded in 1964 by Reverend James Reese. Rev. Reese, a Baptist minister, had a personal understanding and commitment to the needs and challenges of individuals with developmental disabilities and their families. This understanding and commitment came from two experiences in his life. His brother was severely developmentally disabled as the result of a brain injury while an infant. His son, Steven, was born with a developmental disability.

[31] Rev. Reese testified that, after Steven was born in 1963, doctors recommended that Steven be placed in an institution. He and his wife, Adrienne, refused that recommendation, choosing instead to raise Steven at home.

[32] In the early 1960's, individuals with developmental disabilities (at the time referred to as "mental retardation") were generally placed in large government-run institutions. There were no group homes and few supports for families who wished to raise and care for their children at home. Rev. Reese testified that, for an Evangelical Christian, it is extremely important to raise children in a "Christian home environment." Government institutions did not provide that environment, and there were no other options for Christian families. Also, parents who chose (and were able) to raise their developmentally disabled children at home knew that one day they would be too old to provide proper care and support, and their children would have to be placed elsewhere.

[33] Through his work as a pastor, Rev. Reese met a number of Christian parents and family members in similar circumstances. He decided it was important to create:

(...) a distinctively Christian, Evangelical Christian organization that would satisfy not only my own desires for my own son should there come a time when I wouldn't be able to care for him but also for the children of other parents – many parents across the province here that were facing the similar challenges and wanted a Christian home experience for their child when they were no longer able to give that.

[34] As a result, in December 1964, Rev. Reese met with Alan Howarth and Gordon Holmes, both men who identified as Evangelical Christians and who shared Rev. Reese's interests and commitment. The three discussed the idea of forming an inter-denominational Christian organization which would provide both "fellowship" for Christian families faced with the challenges of raising and caring for children with developmental disabilities as well as support programs to enable the children to achieve their full potential. Rev. Reese envisaged the organization working with local churches throughout Ontario, to provide financial support for the organization, as well as to promote an awareness and understanding, within their congregations, of developmental disabilities.

[35] The three men decided to form an ad hoc committee and to adopt the Doctrinal Statement of the Evangelical Fellowship of Canada (“EFC”) as the articles of faith for the organization they wanted to create. The EFC is an organization of churches and individuals who identify as Evangelical Christians.

[36] On June 10, 1965 a rally was held at the People’s Church in Toronto. Approximately 80 people attended. Rev. Reese led the rally and explained the vision for the organization. He explained that it was to be a Christian organization and would be based on the EFC’s Doctrinal Statement. He spoke about wanting to start a Christian summer camp program, and, in the future, residential programs. Attendees were invited to join the organization by signing as members and by agreeing to the Doctrinal Statement. The six Directors chosen at the meeting were all people who identified as Evangelical Christians.

[37] Christian Horizons was originally known as the “Ontario Christian Fellowship for Exceptional Children.” It received its Letters Patent on October 15, 1969. The objects of the organization set out in the Letters Patent were:

- To search out and provide information relevant to understanding and helping the exceptional child.
- To assist the exceptional child in finding a satisfying and purposeful place in society.
- To promote the physical, social, intellectual, and spiritual welfare of the exceptional child.
- To provide Christian fellowship for parents and other persons interested in the welfare of the exceptional child.
- To encourage and assist interested churches in the development of a special Christian education program for the exceptional child.
- To promote the establishment of a program of specialized facilities such as clinics, camps, schools, retreats, and homes for developing the full potential of the exceptional child and preparing him to lead a happy, meaningful, and useful life.

[38] Over the years the name of the organization evolved, eventually becoming Christian Horizons. Though certain terminology changed, throughout its evolution, the

objects and purposes essentially remained the same. The original EFC Doctrinal Statement continued to be a central document and was included in the Constitution and By-Laws of the organization.

[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 damnation.
7. The unity of spirit of all true believers, the Church, the Body of Christ.

[40] Christian Horizon's first program, a two week Christian children's summer camping program, was started in 1967. It was very successful and the next year, Christian Horizons expanded the program to two sessions. Some of the children came from their family homes and others came from government institutions. The participating families and all staff were Christians.

[41] Through its camping programs, Christian Horizons received requests from the Christian families that it establish residential care programs for the children. Responding to those requests the Board of Directors decided to establish a Christian residence to care for developmentally disabled children in 1974.

[42] Rev. Reese testified about an article he wrote at that time which set out the vision for the residence, and its objectives:

- the need to be loved by those who truly love them and who can express Christ's love;
- the idea of continuing the home environment that parents have created;
- the need to protect the individuals from influences in society with which they could not cope;
- the need for individuals to be exposed to truth, people and experiences that would edify them;
- the need for individuals to be accepted by peers and families of faith and by society; and,
- the need for individuals to be encouraged to find their true identity in Christ by faith and then develop abilities for personal fulfillment and productivity.

[43] The first home was located in Waterloo. It was purchased with monies that had been willed to Christian Horizons. The home opened in November 1976. All its staff were individuals who identified as Evangelical Christians.

[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.

[45] Although there was some evidence that Christian Horizons receives support through donations and bequests, it was not disputed that the residential programs are effectively 100 per cent funded through the developmental services programs of the Ministry of Community and Social Services (the “Ministry”).

[46] As a not-for-profit corporation, Christian Horizons has a membership and a Board of Directors. All members are required, as a condition of membership, to endorse and sign the Doctrinal Statement. Individuals served by Christian Horizons in the various programs, and their families, are not required to be members of the organization and are not required to adopt or sign the Doctrinal Statement. Christian Horizons accepts all persons into its programs regardless of cultural background or religious belief. However, from the outset of the organization, Rev. Reese has been clear that he wished all employees and staff of Christian Horizons to adopt the faith beliefs of the membership and be prepared to adopt and sign the Doctrinal Statement.

[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.

Christian Horizons as an “Evangelical Christian Organization”

[48] Reverend Dr. Brian Stiller was called as an expert witness on Evangelical Christianity, Rev. Dr. Stiller is former President of the Evangelical Fellowship of Canada and current President of Tyndale University College and Seminary. He is also a member of Christian Horizons.

[49] Rev. Dr. Stiller explained, in his view, what it meant to be an Evangelical Christian. He referred to a four point definition:

- Crucicentrism – the death and resurrection of Christ as being central to the faith;
- the trustworthiness of the Bible;
- the need for personal conversion; and,
- social action.

[50] He explained that central to Evangelical Christianity is the belief that:

(...) being called by Christ requires by its nature for us to turn outward and not inward and that outward turning mobilizes one in concern for the social well-being – the spiritual well-being of others.

So an essential part of – and because the word “evangelical” comes from the New Testament word evangel, which means the good news, essential to being a Christian is to tell the good news, to live out the good news, whether it’s in telling others of Christ or administering in the name of Christ to the needs of others.

[51] Rev. Dr. Stiller went on to speak about the history of Evangelical organizations, and how they were all based on the biblical mandate that Christians are called to care for the poor and those in need. Rev. Dr. Stiller explained how many of these organizations established themselves as inter-denominational “ministries”, in order to live out what Evangelical Christians see as their calling. He referred to these organizations as “para-church”, organizations which identify as Evangelical Christian, that are engaged in social action and works of charity, but not in a way that is proselytizing for a particular church or denomination.

[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.

Christian Horizons and the Developmental Service Sector in Ontario

[53] Christian Horizons is one of approximately 370 community living organizations in Ontario that provide residential and other support programs for individuals who have developmental disabilities. These organizations, funded through the Ministry of Community and Social Services, provide service to 60,000 individuals. The Ministry's annual budget for developmental services in Ontario is approximately \$1.35 billion.

[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.

[55] As noted above, one of the reasons for the growth of Christian Horizons was the program of deinstitutionalization beginning in the mid 1980's. The government decided to close its large institutional facilities, and to provide services to individuals with developmental disabilities in community living or group home settings. This process was undertaken over a number of years.

[56] Mr. Hugh Robinson, a Program Manager with the Ministry, testified that organizations like Christian Horizons are funded through a system of transfer payments from the Ministry. The Ministry enters into a service contract with the organization which outlines the services the particular organization will provide, the funding allocation, along with detailed reporting and accountability measures. Different funding arrangements between the Ministry and the organizations may be targeted for start-up funding, capital improvements for homes, or for on-going service provision for residents.

[57] Mr. Robinson also testified about the placement process for individuals who require residential care. He explained that the Ministry provides a system of "single

point of access”. Individuals and families make an application for services through the Ministry which then determines eligibility. Agencies in a particular community provide information to the Ministry about their services and the availability of those services. The “single point of access” process attempts to match the needs of an individual applicant with the services available in the community. All placements must be made through this process. Christian Horizons, like other organizations, does not accept placements directly outside of the “single point of access” process.

[58] The “single point of access” process allows individuals or families to identify their choice of service provider based on religious or cultural preference, however an identified preference is only one factor in placing an individual needing services.

[59] Finally, Mr. Robinson testified that Christian Horizons was an agency with a particular willingness and ability to accept some of the most challenging placements from institutions and, in more recent years, from other community living agencies.

The Development of the Lifestyle and Morality Statement

[60] In 1992, following the decision in *Parks, supra*, Christian Horizons began a process to develop a Lifestyle and Morality Statement. *Parks* dealt with two complaints in which the employment of Christian Horizons staff members was terminated because they were living in common-law relationships. As in the present case, Christian Horizons took the position that the employees were not in conformity with what it believed were fundamental Evangelical Christian principles. The Board of Inquiry in *Parks* determined Christian Horizons did not fall within the special employment exemption in the *Code* because it did not consistently apply lifestyle standards, nor were those standards clearly communicated to individuals when they were hired.

[61] As a result of *Parks*, Christian Horizons decided to introduce lifestyle standards which would apply to all employees, and would form part of all contracts of employment.

[62] Reverend Noel Churchman, who was Executive Director of Christian Horizons in 1991, testified about how the Lifestyle and Morality Statement was developed. He explained that he organized a series of three retreats for front line staff of the

organization. Each retreat involved 100 staff. There were approximately 800 staff working for Christian Horizons at the time.

[63] At the commencement of each retreat, Rev. Churchman read the Mission Statement (“We will honour God and value people in all we do and with all our resources”) and then asked the employees to come up with a lifestyle statement that would be appropriate for them in their roles at Christian Horizons. He asked them to come up with a list of things they felt were important to them, given the faith character of Christian Horizons, and the expression of that faith in their day-to-day work with the individuals they served. The group of 100 staff were split into smaller groups of 10, and then brought back into a plenary session.

[64] Rev. Churchman testified that there was a high level of consensus amongst the groups in what they identified should be included in the lifestyle statement. There was also a high degree of agreement amongst the three retreat groups. Rev. Churchman said that, “I thought that was positive. I thought that we had indeed a community of like beliefs (...).”

[65] A one page document incorporating the results of the retreats was prepared and sent to all staff across the organization for review within their teams at staff meetings. Staff were asked to send in suggestions for additions or deletions. Again, there was an overall consensus and there were no suggested changes.

[66] At this point Christian Horizons decided to deal with new employees and existing employees differently, but both groups would be required to adopt and agree to the new Lifestyle and Morality Statement. Existing employees were presented with a new employment contract, which included the Lifestyle and Morality Statement. They were told that all existing contracts of employment would cease March 31, 1993, and they were required to sign the new contract prior to that date or set out the reasons for their refusal. Employees who were unable to sign the new contract were given a three month period to “resolve the issue.” New employees were required to sign the new employment contract and were not given an opportunity to explain why, or to take an opportunity to “resolve” any issues.

[67] Rev. Churchman testified between 5 and 12 employees felt they could not sign the new contract, and left their employment with Christian Horizons.

[68] The new Lifestyle and Morality Statement, which was made part of the employment contract and continues to form part of all employment contracts, reads as follows:

**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.

Connie Heintz's Employment at Waterloo 2 and Waterloo 6

[69] Ms. Heintz first applied for work with Christian Horizons in March 1995 as a relief support worker at the Waterloo 2 residence. After the initial interview process, Ms.

Heintz was given a Letter of Employment, which included the Doctrinal and Lifestyle Statements, discussed above, and “Appendix A: Job Description – Relief Counsellor.”

[70] In May 1995, Christian Horizons opened another residence in Waterloo called Waterloo 6. Ms. Heintz was seeking permanent work so she applied for a position at Waterloo 6. In May 1995 she obtained part-time work, and in December 1995, Ms. Heintz obtained a full-time support worker position at Waterloo 6.

[71] In May 1995, December 1995 and again in May 1996, Ms. Heintz signed employment contracts. Each of these contracts contained a Doctrinal Statement and Lifestyle and Morality Statement identical to that in her first March 1995 contract. The Job Description for the full time support worker provided, in part:

Duties and Responsibilities:

1. As people accepting and embracing the validity of evangelical Christianity as basic to the ministry of Christian Horizons, training, befriending, educating, and counselling of residents as an expression of our Christian faith and Christ's love to those we serve.
2. Set up long and short-term goals for each prime resident (...).
3. Assume community advocacy for each resident (...).
4. Develop and maintain a positive communication system with prime resident's family/advocate that will ensure by word and example that the values and integrity of Christian Horizons are maintained with full consistency and where the client's needs and aspirations are fully acknowledged and addressed according to Christian Horizons' philosophy and policy.
5. (...) reporting for each prime resident.
6. Schedule medicals and other appointments for prime residents, and whenever possible, accompany them. Document (...).
7. Oversee and plan accordingly for general needs of prime resident (...).
8. Perform necessary tasks in conjunction with the residents (...).
9. Liaison between resident and day program as directed
10. (...) participate in weekly staff meetings (...)
11. Participate in and supervise daily household chores and maintenance (...)

12. Develop general program areas, e.g. recreation, crafts, music, cooking, (...) assist in organizing program and activities for the residents.
13. Implement Christian Horizons' policies and procedures as written in the Program Reference Manual and in-house policy handbook, and co-operate in their evaluation in conjunction with Program Director.
14. Implement in-house policies as set out by Program Director and co-operate in their evaluation (...).
15. Co-operate within the staff schedule and be available for possible emergency shift changes.
16. Be flexible to adapt to changes within residences as the needs and choices of the residents change.
17. Attendance at staff retreats and staff training sessions as directed by Program Director (minimum of one per year).
18. Read and be familiar with P-2 CHRISTIAN HORIZONS EMPLOYMENT CONTRACT (05-09-08) and adhere to expectations, e.g. confidentiality of residents and fellow staff members, in-house policies, etc.

[72] As noted above, each Christian Horizon home is unique. Waterloo 2 was a home where most residents were high functioning with verbal skills. Waterloo 7 provided services to individuals with serious behavioural challenges. At Waterloo 6 the residents were considered "low functioning".

[73] Most Waterloo 6 residents had no verbal communications skills and were either deaf or blind. Most needed assistance with basic daily routines such as eating, personal hygiene and dressing. Ms. Heintz testified that most of the residents at Waterloo 6 had a cognitive level of one or two years old.

[74] There was no dispute between the parties that the job duties of a support worker included cooking, cleaning, doing laundry, and helping residents to eat, wash and toilet. Staff would take residents on outings and to appointments. Christian Horizons emphasized how staff approached their daily tasks as Christian ministry, and how, through prayer, singing, and Bible reading, staff created a Christian home environment and promoted an Evangelical Christian world view.

[75] In April 2000, two co-workers, Sophie Odhiambo and Jennifer Ward, confronted Ms. Heinz and asked whether she was a lesbian. A few days later, on April 26, 2000,

Ms. Dorothy Girling, Ms. Heintz's immediate supervisor, met with Ms. Heintz to advise there were rumours she was in a same sex relationship. Ms. Heintz admitted this to Ms. Girling. Ms. Girling said she would have to speak with Michael Alemu, who was the Administrator of District Services, West Region at the time.

[76] Ms. Heintz testified that, at the April 26, 2000 meeting, Ms. Girling said that Ms. Heintz would be terminated or would have to find work elsewhere because she was not in compliance with the Lifestyle and Morality Statement. Ms. Girling testified that she did not recall saying this at the initial meeting but spoke with Ms. Heintz about having signed the Lifestyle and Morality Statement, that she was not in compliance and this was "a matter of integrity."

[77] Over the following weeks, there were a number of discussions between Ms. Girling and Ms. Heintz, and Ms. Girling and Mr. Alemu. There was, again, some dispute as to precisely what was said at these various meetings regarding the suggestion that Ms. Heintz look for other work, and an offer of "counselling" made to Ms. Heintz by the organization. Ms. Heintz testified that Ms. Girling repeatedly told her that she would have to look for other employment, asked her how her job search was going, and provided Ms. Heintz with job postings for vacancies with other organizations. Ms. Girling and Mr. Alemu denied they suggested Ms. Heintz would be terminated or forced her to look for other work, however, Ms. Girling did admit to speaking to Ms. Heintz about finding other work and providing Ms. Heintz with job postings for positions with other organizations. Mr. Alemu also admitted telling Ms. Girling to suggest to Ms. Heintz she actively look for employment elsewhere and find employment that was a "better fit". He said Ms. Heintz would be given until September 2000 to "effect changes." He admitted that, had Ms. Heintz not resigned and remained in non-compliance with the Lifestyle and Morality Statement, she would have been terminated.

[78] Ms. Heintz testified that Ms. Girling had offered her "counselling" which she understood to be Christian counselling aimed at trying to get her to change her sexual orientation. Although Christian Horizons suggested that there was no evidence that Ms. Girling was offering Christian counselling, in cross-examination Ms. Girling admitted this is what she meant. Mr. Alemu also testified the purpose of the suggested counselling

was to effect “restoration” to a state of being in compliance with the Lifestyle and Morality Statement and the articles of faith of the organization.

[79] On June 23, 2000, Ms. Girling received an occurrence report from Ms. Odhiambo alleging Ms. Heintz had assaulted one of the residents on May 24, 2000. Ms. Odhiambo’s report also stated:

Since October 1999, I have endured months of harassment and abuse from Ms. Heintz. There have been times I have feared for my physical safety. My health has been at times affected. Our Program Manager is aware of my fears/apprehensions.

A prior conversation with our Program Manager led me to understand that Ms. Heintz’s behaviour was not as important as another underlying matter and therefore any behavioural matters were to be dealt with in her performance appraisal....

... A conversation [with Ms. Heintz] about the occurrence was impossible – I was alone with her, the Program Manager was away. It may have escalated the situation. Ms. Heintz is a bully and can become explosive.

I mentioned this matter to trusted staff... No one wanted to touch it or get involved. I think there is some fear but it is mixed with confusion over the other matter ... i.e. how to handle things. No one knows...

[80] Ms. Heintz did not know at the time that allegations of resident abuse had been made against her, and Christian Horizons management did not inform her. Ms. Heintz was also not made aware of the other allegations made in the occurrence report.

[81] Mr. Alemu held a series of “one-on-one” meetings with staff at the Waterloo 6 residence on June 26 and 27, 2000. Their purpose was to address what he recognized as a high level of stress at the Waterloo 6 program and a breakdown in the team dynamic and cohesiveness. He said he wanted to hear from staff on any conflicts, issues, disagreements or disputes that were affecting the program, including any complaints against staff, management or of mistreatment of the residents.

[82] Following the interviews, Mr. Alemu decided to set up a formal inquiry team to look into Ms. Odhiambo’s allegations of resident abuse. Ms. Heintz was suspended

with pay pending the investigation by the inquiry team. The results of the investigation were “inconclusive”, though Ms. Heintz was issued a disciplinary letter for her behaviour during the staff interviews conducted by Mr. Alemu. Ms. Heintz returned to work on July 12, 2000.

[83] I will deal in more detail with the events surrounding the staff interviews, the inquiry and the discipline, in the Reasons for Decision section below.

[84] Ms. Heintz testified that by the end of August 2000, she was so stressed that she was unable to function properly at work. Her doctor advised that she take medical leave. She went on medical leave effective August 28, 2000.

[85] On September 22, 2000, Ms. Heintz resigned from her employment with Christian Horizons. She testified she had given the decision a lot of consideration, but felt that the stress and the environment at work was not bearable. She felt the staff and co-workers at Christian Horizons thought she was “scum and dirt” and did not treat her “like a human being.”

IV) DECISION AND ANALYSIS

Issues

[86] At the commencement of closing argument, counsel for Christian Horizons conceded that, on its face, the Lifestyle and Morality Statement discriminates on the basis of sexual orientation. Therefore, in order to avoid a finding that Christian Horizons violated the *Human Rights Code* by insisting all employees sign and comply with the Lifestyle and Morality Statement as a condition of employment it must bring itself within the special employment provisions of section 24(1)(a).

[87] As a result, the Tribunal must decide:

- a. Is Christian Horizons entitled to the exemption provided in section 24(1)(a) of the *Code* in the circumstances of this case?
- b. Did Christian Horizons create, or permit a poisoned work environment, or otherwise discriminate against Ms. Heintz, such that her right to be free from discrimination was infringed?

- c. If the Tribunal finds that Christian Horizons has infringed the *Human Rights Code*, what is the appropriate remedy?

Is Christian Horizons Entitled to the Exemption in Section 24(1)(a) in the Circumstances of this Case?

The Legislative Provision and the Jurisprudence

[88] As noted at the outset of this decision, section 24(1)(a) provides a framework and criteria to determine how, in a particular case, conflicting rights and competing interests should be balanced. No rights are absolute, and the Legislature may make provisions to reconcile and balance competing rights. (See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772; *Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279). Such legislation will of course be subject to the Canadian *Charter of Rights and Freedoms*. In the present case, although the Commission, Ms. Heintz and Christian Horizons all made arguments about “*Charter* values”, there was no *Charter* challenge to the *Code*, and no Notice of Constitutional Question was filed by any party.

[89] Section 24(1)(a) of the *Code* provides:

Special employment

24. (1) 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

Section 5(1) reads:

5. (1) 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.

[90] The effect of section 24(1)(a) is to deem certain conduct that would otherwise be a violation of the *Code*, not to be an infringement in special, limited circumstances. It is an exception to the general rule that no employer may refuse to hire, or give preference in hiring, on the basis of one of the prohibited grounds set out in section 5(1) of the *Code*.

[91] The Commission and Ms. Heintz argued that, because section 24(1)(a) is an exception, it ought to be read narrowly and applied restrictively. (See: *Zurich Insurance v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321). In *Brossard, supra*, the Supreme Court of Canada comments on both the purpose and approach to interpreting special employment provisions such as section 24(1)(a). In *Brossard* the Court was dealing with section 20 of the Quebec *Charter of Rights and Freedoms*, a similar (though not identical) provision to section 24(1)(a). Mr. Justice Beetz, speaking for the Court, found such sections were:

(...) designed ... to allow certain non-profit institutions to create distinctions, exclusions or preferences which would otherwise violate the *Charter* if those distinctions, exclusions or preferences are justified by the charitable, philanthropic, religious, political or educational nature of the institution in question. In this sense, s. 20 confers rights upon certain groups. 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 "non-profit institution" and "political nature" their ordinary meaning, using the traditional rules of statutory interpretation. (*Brossard*, para. 100)

[92] The Court went on to note that the special employment provisions differ considerably from province to province and the scope of the "group rights" varies. (*Brossard*, para. 132). It is useful to examine these differences in relation to s. 24(1)(a).

In this regard, I will consider the Quebec regime and the provisions of the British Columbia *Human Rights Code*.

[93] Section 20 of the Quebec *Charter* provides:

20. A distinction, exclusion or preference . . . 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.

[94] Section 41 of the B.C. *Human Rights Code* provides:

41. If 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 physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

[95] Comparing the Quebec and B.C. provisions to section 24(1)(a) discloses several important differences in language and approach. In section 20 of the Quebec *Charter*, the exemption is granted in respect of a preference that is related to the nature of the organization. In section 24(1)(a) and section 41, the exemption relates to the characteristics of the group or individuals whose interests the organization is primarily engaged in serving. However, *Brossard* holds that even given the specific language of section 20, it requires the organization claiming the exemption to have, as its primary purpose, the protection or welfare of a group identified by a prohibited ground of discrimination. (*Brossard, supra*, para. 130)

[96] Section 41 of the B.C. *Code* does not contain a “reasonable and bona fide” qualification requirement. However, a general bona fide defence is included in the rights granting provisions. By contrast, there is no general “reasonable and bona fide” justification defence to discrimination in the Ontario *Code* and the Court has said that

such a defence should not be read into the legislation. (See *Ontario (Human Rights Commission) v. Brockie* (2002), 222 D.L.R. (4th) 174). Rather, the Ontario Code defences, based on the reasonable and bona fide qualification justification, are only available in certain limited and specified circumstances.

[97] Where an organization claims a section 24 exemption, it must bring itself within the class of organizations (religious, philanthropic, educational, fraternal or social) to which that section applies. But that is not sufficient. It must also establish it is primarily engaged in serving the interest of persons identified by one of the prohibited grounds of discrimination and it seeks to restrict employment to persons similarly identified. Then, and only then, can it rely on a claim that the qualification is justified by the nature of the employment.

[98] There are other sections of the Code that permit an employer to justify a distinction or qualification as being reasonable or bona fide, but they are limited to particular circumstances or grounds. For example, section 11 permits distinctions based on a “reasonable and bona fide qualification”, but that section applies only to constructive or adverse effect discrimination. Christian Horizons did not rely on this provision, presumably because the requirement of religious adherence is discriminatory on its face. Section 17 permits an employer to impose a restriction or qualification where the basis for the qualification relates to the essential duties of the position (and the employer has demonstrated that accommodation is not possible without undue hardship), but this only applies in respect of discrimination on the basis of disability.

[99] The recent B.C. Human Rights Tribunal decision in *Smith v. Knights of Columbus*, 2005 BCHRT 544, further highlights the significance of the difference between the B.C. and Ontario Codes. In *Smith*, the B.C. Tribunal dealt with a claim that the Knights of Columbus refused to rent a hall which it operated on behalf of the Catholic Church to a lesbian couple who wished to use the hall to hold their wedding reception. The Knights, a not-for-profit, Catholic organization argued same sex marriage was contrary to its core religious beliefs. The Tribunal held the Knights were entitled to refuse to rent the hall for the celebration of same sex marriages on the basis

that is was “reasonable and bona fide” in the circumstances, considering their religious beliefs. However, it found the section 41 defence inapplicable because the Knights did not restrict rental to Catholics but, rather, made the hall available to the general public.

[100] A number of other court and tribunal decisions have considered special employment provisions. In *Caldwell v. Stuart*, [1984] 2 S.C.R. 603, a case referred to by the Court in *Brossard*, the Supreme Court considered a restrictive employment policy imposed by a Catholic school. The school had a policy that Catholic teachers were required to conform strictly to the teachings of the Catholic Church. Interestingly, the school allowed the hiring of teachers who were not Catholic, but those who were, had to be adherents to the faith. The school refused to continue the employment of Ms. Caldwell because she had married a divorced man in a civil ceremony, an act that was prohibited by the Church.

[101] The Court held that the requirement of strict religious adherence to the doctrine and teaching of the Catholic Church was justified under the special employment provision of the B.C. Code. In identifying the Church’s purpose in imposing the restriction the Court wrote:

It is a fundamental tenet of the Church that Christ founded the Church to continue His work of salvation. The Church employs various means to carry out His purpose, one of which is the establishment of its own schools which have as their object the formation of the whole person, including education in the Catholic faith. The relationship of the teacher to the student enables the teacher to form the mind and attitudes of the student and the Church depends not so much on the usual form of academic instruction as on the teachers who, in imitation of Christ, are required to reveal the Christian message in their work and as well in all aspects of their behaviour. The teacher is expected to be an example consistent with the teachings of the Church, and must proclaim the Catholic philosophy by his or her conduct within and without the school. The role of the school and its nature is described in paragraph 22(e) of the stated case in these words:

The Catholic School is a genuine community bent on imparting, over and above an academic education,

all help it can to its members to adopt a Christian way of life. (at para. 5)

[102] The Court held that the group whose interests the school primarily served should be defined as either the Catholic community in the Vancouver parishes or the Catholic community in the Vancouver area that supported the school.

[103] The Court also accepted that the school's policy was bona fide and reasonable. It made specific reference to the objects and purposes of the Catholic school and the role of the teacher within the Catholic school: to teach the students the principles of the Catholic faith and to form their "hearts and minds" in accordance with the religious teachings of the Church. It also described the Catholic school as a "genuine community bent on imparting, over and above an academic education, all help it can to its members to adopt a Christian way of life." (*Caldwell, supra*, paras. 5, 34)

[104] Finally, the Court made reference to the 1971 Ontario Board of Inquiry decision, *Gore v. Ottawa Catholic School Board* (1971), unreported, Ont. Bd. of Inq. In *Gore*, the Ottawa Catholic School Board refused to employ an individual in a secretarial position because she was not a Roman Catholic.

[105] The special employment section in force at the time provided that the prohibition on discrimination in employment did 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 for the welfare of a religious or ethnic group and that is not operated for private profit, where in any such case race, colour, creed, nationality, ancestry or place of origin is a reasonable occupational qualification.

[106] The Board of Inquiry, chaired by Walter Tarnopolsky (as he then was), determined that, while it might be legitimate for the School Board to require a teacher to be a Roman Catholic as the role of a teacher includes religious formation, it was not reasonable to require a secretary, particularly a part-time secretary, to be a Catholic.

[107] The special employment section of the Ontario *Code* was also addressed in *Parks, supra*, and *Garrod v. Rheema Christian School*, [1991] 15 C.H.R.R. D/477. In *Garrod* a Board of Inquiry found that a trans-denominational private Christian school was justified in imposing a restriction that all teachers conform to its articles of faith, and in particular a restriction that teachers not be living in common law relationships.

[108] The Board in *Garrod* struggled with the question of what constituted the “creed” of the persons whose interests the organization was primarily engaged in serving. Unlike most of the previous cases in which the religious tenets forming the basis of the “qualification” were those of an established church or denomination, the Rheema Christian School was a trans-denominational institution. The Board determined that the faith belief as expressed by the doctrinal statements contained in the school’s constitution and by-laws, and agreed to by all parents whose children attended the school, formed the creed. In so concluding, the Board was able to find that the school served the interests of persons identified by a common creed (the doctrinal statements) and restricted hiring to persons similarly identified (persons who were prepared to sign and adopt the doctrinal statements).

[109] A number of common themes run through the special employment cases where organizations have been successful in bringing themselves within the exemption. First, (apart from *Parks* which will be discussed below) most deal with religious schools where the persons served (students and families) were all adherents to the creed of the organization, and the purpose of the organization was religious indoctrination, education and formation. Second, the job of the employee to whom the qualification applied was to carry out the religious indoctrination, education and formation. Third, the organizations were either private, or publicly funded religious schools which enjoyed Constitutional protection.

[110] In addition, in special employment cases, there is typically an identity between the characteristics of the members of the organization and the characteristics of the individuals who are served by the organization.

Analysis and Application of the Facts to the Statutory Provision

[111] The Commission and Christian Horizons both submit that there are four elements to the section 24(1)(a) exemption. In order for Christian Horizons to succeed, it must establish, on a balance of probabilities that:

- a. it is a religious organization;
- b. that it is primarily engaged in serving the interests of persons identified by their creed;
- c. it employs or gives preference in employment to persons similarly identified; and
- d. that the qualification (the restriction in employment to persons similarly identified by creed) is a reasonable and bona fide qualification because of the nature of the employment.

Is Christian Horizons a Religious Organization?

[112] Christian Horizons is a not-for-profit corporation that identifies as an Evangelical Christian ministry. That it self-defines as an Evangelical Christian organization is not determinative. However, the evidence clearly shows that from its inception, through its entire history, and to the present, it is an entity whose membership is made up of people of Christian faith who have joined a Christian organization and who have agreed to adopt the particular articles of faith set out in the Doctrinal Statement. At Christian Horizons' founding meeting, Rev. Reese put before the attendees a Doctrinal Statement and asked all who were interested in becoming members to read and agree to the Statement. That Doctrinal Statement has remained a core document for over 40 years, and all persons who choose to become members are required to adopt and sign it. It is incorporated into the Constitution and By-Laws of the organization.

[113] The evidence shows that at both Board of Directors meetings and annual general meetings, the proceedings commence with devotionals and prayer. Likewise,

when Christian Horizons opens new programs, a religious dedication service is held. There was no suggestion that the religious observances and practices that permeate all formal activities of the organization, are done for reasons other than a deeply held conviction, and to maintain the “Evangelical Christian” character of the organization.

[114] The Commission argues that, while Christian Horizons may be organized around a Christian ethos, it is, in reality, a social service agency, contracted by the government, to provide care and support to individuals who are developmentally disabled. It points to the fact that Christian Horizons receives 100 per cent of its funding from the Ministry.

[115] In my view, there is no reason why an organization cannot be a religious organization within the meaning of section 24(1)(a) simply because it provides a social service. There is a long and honoured tradition of churches, religious orders and religious organizations providing social services in the community. Indeed the Commission called an employee of the Salvation Army to demonstrate how a religious organization that provides a variety of social services in the community can have policies which do not restrict employment to co-religionists.

[116] As to receipt of public funds, again, it is not clear why an organization that receives public funds cannot be a religious organization. In *Caldwell, supra*, the Court noted that the school received public funds through a defined funding formula, as well as being entitled to tax exempt status for certain property, a further source of public funding. Section 24(1)(a) may also apply to charitable, philanthropic and fraternal organizations. Those types of organization may receive public funds, either through tax exemptions, or through grants. There may well be legitimate public policy discussions and debate about whether an organization that has restrictive membership or employment policies should receive public funds. However, the mere fact that such an organization does receive public funding, even all its funding, does not preclude finding it to be a religious organization, provided other indicia of that status are established on the evidence.

[117] On the basis of the evidence presented in this case, I have no difficulty in finding that Christian Horizons is a religious organization.

Is Christian Horizons primarily engaged in serving the interests of persons identified by their creed?

Does Christian Horizons employ only or give preference in employment to persons similarly identified?

[118] I propose to address these two questions together because, while they are separate elements in a section 24(1)(a) analysis, they are related in a very practical way. Christian Horizons does not make the claim that it is primarily engaged in serving the interests of persons identified by their creed in the abstract. The claim is made because it seeks to employ only persons “similarly identified”, that is, by a common creed. It wishes to maintain its policy that all employees must be in strict compliance with the articles of faith of its founders and members.

[119] The Commission argues that a “creed” should be restricted to religious denominations, and as Evangelical Christianity is multi-denominational, it cannot be a “creed” within the meaning of the *Code*. The Commission argues that even if Evangelical Christianity can be considered a creed, the statements of faith adopted by Christian Horizons, particularly the Lifestyle and Morality Statement, are purely subjective and do not represent an accurate interpretation of Christian biblical mandates.

[120] I accept that a creed need not be restricted to a particular religious denomination. “Creed” has been held to be synonymous with “religion”, and has included trans-denominational organizations. (*Huang v. 1233065 Ontario Inc. (No. 2)*, 2006 HRTO 1; *Garrod, supra*; Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances*)

[121] What identifies a creed is a set of sincerely held religious beliefs and practices. These beliefs and practices need not be based on the edicts of an established church or

particular denomination. In *Amselem, supra*, the Supreme Court defined religious beliefs as beliefs that have:

... a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith.... (para. 46)

[122] Christian Horizons argues its creed is Evangelical Christianity, or alternatively, the faith belief of its founders and members as expressed in its Doctrinal Statement. Rev. Dr. Stiller testified that the Doctrinal Statement adopted by Christian Horizons is indicative of an Evangelical Christian organization, and is, in fact, the Doctrinal Statement of the Evangelical Fellowship of Canada. The Evangelical Fellowship of Canada is an organization made up of individuals and churches who identify as Evangelical Christians, but it is not a church or denomination. It was not suggested that only individuals or groups who are members of the Evangelical Fellowship of Canada can be called Evangelical Christians. Individuals may self identify as Evangelical Christian even though they are members of a denomination which would not identify as Evangelical Christian. Rev. Dr. Stiller testified that the Evangelical community is not a monolith where all persons or organizations that identify as Evangelical hold exactly the same beliefs.

[123] It was not disputed that most organizations that identify as Evangelical Christian have Doctrinal Statements which their members are required to sign. Some organizations may also require employees and members to adopt and sign a Lifestyle and Morality Statement. Typically these Statements will be similar in content to those adopted by Christian Horizons, but they are not necessarily identical in all respects, and need not be approved by the Evangelical Fellowship of Canada or other external religious institution. Indeed, Rev. Dr. Stiller testified that there is variation in the content of lifestyle and morality statements amongst organizations that identify as Evangelical Christian. There is no central body or individual that has the power to authoritatively define the tenets of “Evangelical Christianity” or that accredits churches or organizations as “Evangelical.”

[124] Rev. Dr. Brent Hawkes, the Commission's expert in theology, testified that there was a divergence of beliefs amongst individuals who would identify as Evangelical. Speaking about the meaning of the words "evangelical" and "fundamentalist" he said:

I'm not sure the Christian Church agrees on those terms either. They are terms that are often thrown around quite loosely. Oftentimes the term "fundamentalist" is used as a negative descriptor of some churches. So I'll do my best. I'll use the word "Evangelical" first. Evangelical is a more broader term. There are many Baptists, Pentecostals, Presbyterians, some United Church, even some Anglicans who would define themselves as Evangelicals, who would believe that their faith is good news, and they want to spread that good news and share that good news.

[125] Christian Horizons, relying on *Amselem*, argued that it was not proper for the Commission to question the tenets of faith of Christian Horizons, or for the Tribunal to embark on an inquiry of whether the Lifestyle and Morality Statement reflected an accurate or proper interpretation of the Bible. It argued that Christian Horizons was entitled to its faith beliefs and the Tribunal should not inquire into whether those beliefs were reasonable or consistent with those of other Christian organizations.

[126] In *Amselem*, the appellants, all orthodox Jews, sought to construct "succahs" on the balconies of their respective condominium apartments as part of their observance of the Jewish holiday Succot. The condominium corporation had rules that prohibited residents from placing any construction on balconies or otherwise altering the appearance of the balcony. In an effort to accommodate the religious observance of the appellants, the condominium corporation offered to permit them to construct a succah in the garden of the condominium property. The appellants refused, in part because they claimed their religion required them to construct and live in their own succah. The condominium corporation argued that such a requirement was not an obligatory requirement of the Jewish faith. Both the appellants and the condominium corporation presented competing evidence from Rabbinical scholars as to the proper interpretation of the religious texts and the requirements of the Jewish faith.

[127] The majority of the Supreme Court held that the appeal should be allowed. In coming to its conclusion, the Court stated that in cases where religious beliefs are asserted, a Court should not engage in an inquiry as to whether the beliefs conform to a majority position within a denomination or sect, or whether the beliefs are objectively mandated by religious texts. The issue is whether the beliefs are sincerely held:

45 In the United States, where there is a richness of jurisprudence on this matter, the United States Supreme Court has similarly adopted a subjective, personal and deferential definition of freedom of religion, centred upon sincerity of belief. For example, in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the court held that it was the plaintiff's subjective beliefs, and not the official position of the particular religion, which must be considered in evaluating the free exercise guarantees under the First Amendment of the U.S. Constitution. In delivering the opinion of the U.S. Supreme Court, Chief Justice Burger stated, at pp. 715-16:

(. . .) the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

(....)

49 To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in *R. v. Videoflicks*, *supra*, at p. 759: (quote omitted)

50 In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious

doctrine, unjustifiably entangle the court in the affairs of religion.
(emphasis added)

[128] What flows from the Court's decision in *Amselem* is that in defining the creed in this case, the Tribunal should not inquire into whether Christian Horizons' beliefs, or its view of what it means to be a Christian, or an Evangelical Christian, are necessary, or reasonable, or based on a proper interpretation of the Bible. That is not for the Tribunal to decide. However, the fact remains that being an Evangelical Christian is to identify as such, and individuals who identify as Evangelical Christian come from a wide range of Christian denominations, each with particular tenets of faith. There is no authoritative body which determines the religious tenets which defines whether an individual or organization can be called an Evangelical Christian. Christian Horizons itself does not permit its members or employees to simply self define as Evangelical Christian. They must be prepared to adopt and sign the Doctrinal Statement and Lifestyle and Morality Statement. In this context it is not useful to define creed as being "Evangelical Christianity."

[129] Christian Horizons identifies as a community of individuals who are called to minister to persons with developmental disabilities. It sees itself as a community of Christians, but it is distinctive; it is a community of Christians who are prepared to adopt and live by the Doctrinal Statement and the Lifestyle and Morality Statement. Those statements set out the tenets of faith of the organization and its faith beliefs. Christian Horizons seeks to restrict employment to persons who are identified by their willingness to adopt and sign those Statements. Those statements define the creed.

[130] This approach is consistent with the Court's decision in *Amselem*, and the Board's decision in *Garrod*, which identified the creed of the trans-denominational Christian school on the basis of the doctrinal statements contained in the Constitution and By-Laws, and adopted by the organization.

[131] I now return to the second and third elements in the section 24(1)(a) analysis. Dealing with the third question: does Christian Horizons employ only, or give preference to persons "similarly identified" by a common creed? The clear answer is that it does.

This is not surprising because, since 1992 and the *Parks* decision, Christian Horizons has made the adoption of both the Doctrinal Statement and the Lifestyle Statement a mandatory condition of employment. The evidence shows that Christian Horizons restricts employment to those individuals who are prepared to adopt and sign the Doctrinal and Lifestyle and Morality Statements.

[132] The second element of the section 24(1)(a) analysis remains the most difficult. Is Christian Horizons primarily engaged in serving the interests of persons identified by creed, that is, persons who adopt the articles of faith as expressed in the Doctrinal and Lifestyle and Morality Statements? The evidence on this point is not substantially in dispute. The answer depends on perspective, and the interpretation of this element within the context of the section as a whole.

[133] Christian Horizons says it serves a variety of interests: those of its founders, its members, its employees, its supporters, and Christian families who seek a Christian home environment for their children or siblings. While Christian Horizons admits that it also serves the interests of other persons, individuals with developmental disabilities and their families who do not adopt its faith beliefs, it sees the organization as a vehicle through which individuals who identify as Evangelical Christians can live out their faith. Rev. Stan Cox, Vice Chair of the Board of Directors explained:

(...) there are hosts of people in the Evangelical Christian community who long for opportunities to reach out in caring and practical, supportive ways to people who are marginalized, particularly those with disabilities. And so we serve their interest by offering opportunities for volunteer work, employment, for service on the board or for financial support.

[134] In this way Christian Horizons argues that it primarily serves the interests of persons who self-identify as Evangelical Christians. Their interests are to provide care and support for individuals who have developmental disabilities.

[135] In *Parks, supra*, the Board determined that Christian Horizons was primarily engaged in serving two sets of interests: the Evangelical Christian interests of its founding and current members, and the interests of the residents and their families.

Christian Horizon urges me to adopt the reasoning and finding in *Parks*. The Commission argues that *Parks* was wrongly decided, that it is absurd to conclude that an organization can be “primarily” engaged in serving “two sets” of interests. The relevant passage is found at paragraphs 50-52:

[50] A critical stage in this decision is now reached. If I agree with the assertion of counsel for the Commission that Christian Horizons is primarily serving the interests of the developmentally handicapped without discrimination as to creed, then Christian Horizons under the third element of s. 23(1)(a) can only discriminate in employment as regards to persons similarly identified. This means that Christian Horizons is permitted to hire or show preference in employment only as regards developmentally handicapped individuals! This is clearly an absurd result and would rob Christian Horizons of the protection of s. 23(1)(a) even as regards the highest policy-making and executive positions in the organization.

[51] In the course of oral arguments, I stressed to counsel for the Commission that such a ruling could threaten the continued existence of Christian Horizons, if I were to accept completely his argument concerning the interests Christian Horizons was primarily engaged in serving.

[52] I cannot so rule. As the former COMSOC Minister, the Honourable John Sweeny, testified in these hearings, Christian Horizons has been of tremendous assistance to parents and guardians of developmentally handicapped individuals since the former government began its five-year plan of de-institutionalizing the care of the handicapped in Ontario. The Christian Horizons group homes are a vital part of the "mosaic" of options open to parents and guardians that wish to place their children in a non-institutional setting that combines a high quality of care within a Christian, if not an overtly Evangelical Christian, environment. In the days of evidence when counsel for the respondents attempted to establish the Evangelical Christian nature of the entire operations of Christian Horizons, one thing started becoming clear [;] [a]s regards its founding personnel and its present policy-making and executive functions and offices, Christian Horizons is definitely Evangelical Christian in orientation. It also attempts to recruit primarily an Evangelical Christian membership as evidenced by the membership application pamphlet which, by its mission statement, objectives, doctrinal statement and its clear reference to "Evangelical Fellowship" and "Trans-denominational Evangelical Ministry," clearly seek to attract a

fellowship of Evangelical Christians. This organization, essentially Evangelical Christian in its orientation, policy-making and membership, then goes out into the community to establish group homes for residents and parents and guardians, not limited by creed, and employs staff for such homes who are again not necessarily Evangelical Christians. With such a characterization this Board concludes that Christian Horizons is primarily serving two sets of interests. The first is the Evangelical Christian interests of its founding and present executive personnel and membership. Second, Christian Horizons is also primarily serving the interests of the residents of the group homes and their parents or guardians, whom the evidence suggests largely belong to a broad range of Christian denominations and include some non-Christians. For these reasons Christian Horizons passes the second element of the s. 23(1)(a) exemption. Like the Board in the *Garrod* decision cited above, I have little difficulty equating the Evangelical Christian tenets of Christian Horizons as a "creed" for the purposes of this second element of the s. 23(1)(a) exemption.

[136] With the greatest of respect to the Board in *Parks*, I have considerable difficulty with the rationale presented for concluding that Christian Horizons is primarily engaged in serving two sets of interests. As I mentioned above, the Tribunal must decide the case based on the facts and the law. The Legislature has enacted a provision that seeks to strike a balance between competing rights, and a framework for determining how those rights should be balanced in a particular case. It appears that in *Parks*, as in the present case, Christian Horizons asserted it would cease to exist if not granted the section 24(1)(a) exemption. Such a result would be unfortunate. But it cannot be the rationale for finding that Christian Horizons falls within the section 24(1)(a) exemption. Were human rights tribunals to base their decisions on fears that a respondent would close down, move away, or cease to exist if unsuccessful, the protection of human rights would be entirely undermined. Legislation should be interpreted purposively, but not on the basis that what is otherwise the appropriate interpretation leads to a result that is unpalatable for one or other (or both) of the parties.

[137] Further, I have difficulty accepting that an organization can be "primarily engaged" in serving the interests of a group of persons who are identified by their creed, and at the same time, "primarily engaged" in serving the interests of a different group of

persons, individuals identified by disability. An organization can be engaged in serving a variety of interests, as is the case here. An organization can be primarily engaged in serving the interests of persons identified by a combination of proscribed grounds (for example elderly persons of a particular race). But the word “primarily” compels the Tribunal to determine, on the basis of the evidence, the class or group of persons whose interests the organization is engaged in serving, first and foremost.

[138] Objectively viewed, the evidence does not support the conclusion that Christian Horizons is primarily engaged in serving the interests of persons who are adherents to its Doctrinal Statement and its Lifestyle and Morality Statement. Indeed, the evidence does not support the conclusion that it is primarily engaged in serving the interests of Christians more generally.

[139] This is not to say that there is no evidence that Christian Horizons serves the interests of persons who are adherents to its articles of faith. I have already found Christian Horizons is a religious organization within the meaning of section 24(1)(a). As Rev. Cox stated, Christian Horizons provides both employment and volunteer opportunities for individuals who identify as Evangelical Christian. Much of the evidence called by Christian Horizons was to establish how its Board of Directors and management work to maintain the “Evangelical Christian” character of the organization, in every aspect of its operations. The “work” is defined as Christian ministry, where staff live out their Christian calling. The whole organization is structured as a community of co-religionists in which members and employees can express their common faith commitment.

[140] 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.

[141] 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. The evidence shows that while Christian Horizons makes clear to the Ministry that it operates its residential programs as “Christian homes”, the Ministry does not fund Christian Horizons as a Christian service provider. Christian Horizons does not give preference to individuals coming from Christian families. Individuals are placed with Christian Horizons through the Ministry run “single point of access” process. In order to receive service from Christian Horizons, residents and their families are not required to be members of the organization or to adopt or sign the Doctrinal Statement or the Lifestyle and Morality Statement.

[142] Christian Horizons’ rapid growth over the past 30 years was not primarily in response to requests from the Christian community for distinctively Christian residential care. It was due to the government’s policy of deinstitutionalization, the capacity of the organization to respond to the demand for community living support services, and the excellent service provided by the organization. Part of the original desire of Rev. Reese in establishing Christian Horizons was to provide a Christian home environment for Christian families who sought that option for their loved ones. Christian Horizons has met that need. But Christian Horizons never intended to serve only, or even primarily, the needs of Christian families, and with the closing of the government institutions, its service to the broader community has flourished. Whatever may have been the case in 1976 when the first home was opened, by 2000 when this complaint was filed, Christian Horizons was fully engaged in providing residential services and support to individuals regardless of creed who were not members of its faith community.

[143] There was conflicting evidence about whether, and to what extent, Christian Horizons staff actually provides Christian education and counselling at its various residential programs. The Commission argued that because of the cognitive ability of

the residents, they were not able to benefit from “Christian” education. Without deciding whether residents could understand or benefit from Christian education or counselling, the evidence clearly shows that Christian Horizons does not have as its purpose to proselytize or to convert the residents, or to require the residents to be educated in, or conform to the faith beliefs of the organization. While the homes are run as “Christian homes”, residents are free to express non-Christian religious beliefs.

[144] In this regard, the evidence demonstrated some inconsistency between the self-identity of the organization on the one hand, and its stated objectives and purpose on the other. Christian Horizons identifies as an Evangelical Christian ministry. Yet Christian Horizons’ witnesses were clear that it does not attempt to proselytize or engage in the religious indoctrination of residents. Unlike the schools in *Caldwell* and *Garrod*, Christian Horizons is not a religious institution whose purpose is to “form the hearts and minds” of its residents in the ways of faith of the organization.

[145] Both the Commission and Christian Horizons called a number of family members to testify, in part to establish their respective faith beliefs, and also as to whether they had an interest in having Christian Horizons provide spiritual support and religious education. The family members called as witnesses were all Christian, though not all self-identified as Evangelical Christians. Some were members of Christian Horizons. Some were not. Some said they would be comfortable with signing the Doctrinal Statement. Some said they would not. Some family members said they expressly sought to have their loved ones placed at Christian Horizons because it identified as an Evangelical Christian organization. Some said they were pleased that it was a Christian organization, but that was not the reason for choosing Christian Horizons. Most said they would not have any difficulty having their loved ones cared for by a gay or lesbian support worker. All said that Christian Horizons provided excellent care for their children and siblings.

[146] Christian Horizons does not keep statistics on the cultural, religious or faith backgrounds of the individuals it serves. However, Mr. Michael Alemu, Vice President of Operations testified that between 1991 and 1997, while he held the position of

Administrator of Program Development and Training, he visited all of the group homes operated by Christian Horizons. He estimated 70 per cent of the residents came from Christian families. Between 1999 and 2001, while Administrator of District Services, West District, he met 60 per cent of the families and, of those, he estimated 60 per cent were Christian. In 2000, all of the 12 individuals accepted in the Waterloo and Windsor programs came from Christian families. He did not say the Christian families self identified as Evangelical Christians.

[147] Ms. Jennifer Ward, the Systems Manager for Christian Horizons, receives calls from family members inquiring about service for their children or siblings. Approximately 50 per cent of the calls were from people looking for a Christian service provider.

[148] There was no evidence before the Tribunal to establish whether this anecdotal evidence of the percentage of families served by Christian Horizons who identified as Christian, was the same or different than the percentage of Christian families in the particular communities served.

[149] There was a dispute between the parties as to whether evidence from family members who had children or siblings in residences, other than Waterloo 6, was relevant to the issues to be determined in this case. I determined that the evidence should not be restricted to Waterloo 6. The complaint of discrimination was not filed against the Waterloo 6 program and, given the current corporate and organizational structure of Christian Horizons, the section 24(1)(a) defence is one that can only attach to Christian Horizons as a whole. At the same time, differences between the programs, including differences in job duties and requirements, and differences in the services provided to residents, may be relevant to the determination of whether qualifications imposed by Christian Horizons were reasonable and bona fide under the final element of the section 24(1)(a) test.

[150] I observed, however, that calling an endless number of family members by the parties would not be particularly helpful. The evidence clearly established, as I have

noted above, that families came from a range of Christian and non-Christian faith backgrounds, may or may not have had an interest in having Christian Horizons expose their loved ones to a Christian world view, and sought Christian Horizons as a service provider for various reasons. The evidence does not support a finding that, numerically, the organization is primarily engaged in providing service to persons who are adherents to the articles of faith as expressed in the Doctrinal and Lifestyle and Morality Statements.

[151] In any event, I would not consider raw numbers, taken alone, as determinative of whether Christian Horizons is primarily engaged in serving the interests of persons identified by their creed. The Tribunal must balance a range of considerations in determining this question. There may be situations in which an organization's primary purpose, mission and objects are to serve the interests of persons identified by one of the proscribed grounds in the *Code*, but it happens to provide the service to a greater number of persons who are not members of the group similarly identified. For example, an ethnic cultural centre whose primary object is to promote cultural and arts events in relation to the Greek community, may attract a great number of visitors who are not Greek. The mere fact that more non-Greek individuals frequent the centre's events will not in itself be determinative of whether the organization is primarily engaged in serving the interests of persons identified by race, national origin or ethnic background.

[152] In the present case, if Christian Horizons' purpose, mission and object was to provide residential support services to individuals who were adherents to its faith beliefs, but it was required, by government policy or demographics to accept non-adherents, it might be considered primarily engaged in serving the interests of persons identified by creed. Such a finding would, of course, be subject to other factors and evidence in that particular case (for example, the nature of the services provided, the interests of the community of individuals served). But I state this hypothetical to contrast the subjective and objective realities before me. Christian Horizons does not have as its primary purpose, mission, object and activity, to serve the interests of persons who are adherents to its faith beliefs, and Christian Horizons is not, in fact, primarily engaged in providing services to persons who are adherents to its faith beliefs.

[153] Indeed, Christian Horizons does not really identify as an organization that was formed to benefit the interests of its members. To the contrary, the deeply held conviction of its members, and its central mission, is one of selfless service to the vulnerable, the marginalized and the needy. This is precisely why Christian Horizons urges me to find that section 24(1)(a) must be read in a way which would permit religious organizations, whose primary mission is to do works of charity and mercy in the broader community, be permitted to give preference in employment to adherents of its faith. Otherwise, it says, religious organizations which sought to give preference to, or hire only its adherents, would be restricted to serving its small community of co-religionists.

[154] Christian Horizons argues, relying on *Brossard*, that the purpose of section 24 is to permit persons of common faith or creed to come together to pursue activities in furtherance of their faith. It is a section, it submits, which protects freedom of religion, and the right of religious organizations to employ co-religionists to pursue their faith-based activities.

[155] I cannot accept this argument. Such an interpretation would ignore the plain meaning of the statutory language and the policy choice adopted by the Legislature in balancing the competing rights of persons to be free from discrimination in employment, and of persons of common faith to come together to pursue certain activities. In contrast with section 20 of the Quebec *Charter*, section 24(1)(a) does not relate the distinction, restriction or qualification to the nature of the organization. It provides that the distinction, restriction or qualification must be related to the persons whose interests are primarily served by the organization.

[156] The Legislature could have made a different policy choice in drafting the special employment section, or have provided a general “reasonable and bona fide” defence. It did not. The Legislature could have provided that an organization, found to be a religious organization, is permitted to restrict hiring to co-religionists, regardless of its activity or purpose. It did not. The Tribunal cannot, and should not, override the policy choice of the Legislature. The legislation allows a distinction in employment, which

would otherwise be discriminatory, in order to facilitate and enhance service to, or promote the welfare of, a particular group or population, not to permit an organization to employ only members of its own community.

[157] Section 24(1)(a) may be said to protect group rights, but 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. This interpretation is consistent with *Brossard* where the Court held that an organization claiming an exemption under a special employment provision must have, as its primary purpose, the protection or welfare of individuals identified by a proscribed ground.

[158] As I have said, the Legislature has made a policy choice in determining how the rights of a religious organization, and the rights of an individual to be free from discrimination in employment should be balanced. It 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.

[159] The policy underlying section 24(1)(a) may appear to some to be unreasonable or counter-intuitive – that a religious organization may not, in furtherance of its religious activities, restrict employment to persons of common faith. Of course, one's view of the policy choice depends on one's perspective. For those who are members of groups who have been historically marginalized, and excluded from full participation in public life, the policy choice is entirely reasonable. Ms. Heintz admitted in cross-examination that if Christian Horizons did not receive public funds, she would have no quarrel with its discriminatory hiring practices. Ms. Heintz is not a lawyer, and I have found that receipt of public funds or support is not determinative of whether an organization may fall within the exemption provided in section 24(1)(a). But her intuitive sense of where the line

ought to be drawn, in my view, reflects the policy choice made by the Legislature. It is not the receipt of public funds per se, but an organization's choice to move from the realm where the nature and purpose of its activity is to serve the private interests of its community, into the broader public sector.

[160] In summary, I find that Christian Horizons has not established it meets the second element of section 24(1)(a). 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 evidence, whether viewed subjectively or objectively, and a plain reading of section 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.

Is the qualification (the restriction in employment to persons similarly identified by creed) a reasonable and bona fide qualification because of the nature of the employment?

[161] Even had I accepted Christian Horizons' position that as a religious organization, it is primarily engaged in serving the interests of its members, its volunteers, its employees and others who adopt its faith beliefs, I would, nonetheless, find that it does not meet the final element in section 24(1)(a). I make this finding primarily because of the manner in which it came to require the qualification. In adopting the qualification, 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.

[162] For the purposes of the analysis here, I define the qualification as the requirement that all employees agree to and sign the Lifestyle and Morality Statement. It is true that Christian Horizons requires employees to adopt both the Doctrinal Statement and the Lifestyle and Morality Statement. However this case is about Ms. Heintz and the fact she was required to leave her employment because she was not in compliance with the Lifestyle and Morality Statement. At no time prior to her being

confronted about being in a same sex relationship was it alleged that she had failed to meet any other employment qualification.

[163] The section deems the violation of a right in section 5 (in this case freedom from discrimination based on sexual orientation) not to be an infringement where, in part, the qualification is reasonable and bona fide because of the nature of the employment. Ms. Heintz's right to be free from discrimination in employment is alleged to have been infringed by the imposition of the Lifestyle and Morality Statement. Therefore, I focus my analysis on the question of whether being in compliance with the Lifestyle and Morality Statement is a reasonable and bona fide qualification. I make no finding about the Doctrinal Statement.

[164] I would note that, during the hearing, it was suggested that the Lifestyle and Morality Statement did not prohibit gays and lesbians from working at Christian Horizons, only that they not engage in homosexual relationships. The implication was that the organization did not discriminate on the basis of sexual orientation. In his closing argument, I did not understand counsel for Christian Horizons to be relying on this argument, and the distinction has been consistently rejected by courts and tribunals. See: *Trinity Western, supra*; *Brockie, supra*; *Hall (Litigation Guardian of) v. Powers* [2002] O.J. No. 1803).

[165] The Commission and Ms. Heintz argue that, in order for the Tribunal to find that the qualification is reasonable and bona fide, Christian Horizons must meet the three part test set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, "*Meiorin*". They argue that Christian Horizons has failed to meet the *Meiorin* test.

[166] In *Meiorin*, the Supreme Court set out a three part test, the "unified approach", for determining whether a qualification or restriction imposed by an employer constituted a "bona fide occupation qualification." The three elements of the unified approach are:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and,

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[167] Christian Horizons takes the position that the third branch of the *Meiorin* test does not apply under section 24(1)(a) and there is no requirement to establish that it is impossible to accommodate individual employees without undue hardship. Christian Horizons argues that it need only show it adopted the qualification in an honest and good faith belief that it is necessary in relation to the nature of the employment and the qualification is rationally connected to the nature of the employment in a general way. It also argues that the words “nature of the employment” mean “nature of the organization.” It relies on the Supreme Court of Canada decision in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] 3 S.C.R. 228, in support of its claim that there is no duty to accommodate under section 24(1)(a).

[168] In *Maksteel* the Court was dealing with a provision of the Quebec *Charter of Rights and Freedoms* prohibiting employers from discriminating on the basis of a criminal conviction where the offence was unrelated to the performance of the job, or where a pardon had been granted. The employee was terminated for being absent as a result of having been incarcerated. The question arose as to whether the *Meiorin* requirement that an employer accommodate applied. The Court held (at para. 26):

In the context of an independent justification mechanism being provided in s. 18.2 itself, the “reasonable accommodation” standard established in *Meiorin* in relation to *bona fide* occupational requirements plays no role.

[169] While the decision in *Maksteel* may be of some assistance to Christian Horizons, in my view, what is determinative is the language of section 24 taken as a

whole. Section 24(2) imposes a duty to accommodate to the point of undue hardship, but only in respect of section 24(1)(b). Section 24(1)(a) is not covered by the duty to accommodate in section 24(2). In my view this is a clear expression of legislative intent not to require accommodation in respect of the section 24(1)(a) exemption.

[170] *Meiorin* eliminated previous inconsistency and confusion when addressing direct, as opposed to indirect, discrimination. But nothing in *Meiorin* suggests the Court intended the unified approach should override specific statutory language, where the Legislature has turned its mind to the criteria to be used in considering the validity of a requirement or qualification.

[171] Having said this, Christian Horizons cannot rely on *Meiorin* to modify the longstanding approach adopted by courts and tribunals in determining whether a qualification is reasonable and bona fide in special employment cases. Christian Horizons argues the objective and subjective tests used to determine whether a qualification is bona fide and reasonable are similar to the first and second tests in *Meiorin*. This is incorrect. While the second *Meiorin* test is similar to the traditional subjective test, the first is quite different than the traditional objective test.

[172] In special employment cases, courts and tribunals have adopted the two part test first articulated in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202. *Etobicoke* involved the question of whether a mandatory retirement requirement for firefighters was a bona fide occupational qualification. The test articulated by the Court was:

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. (at p. 208)

[173] In *Brossard, supra*, Mr. Justice Beetz expanded on the second, objective branch of the *Etobicoke* test. He stated that in considering whether the qualification was “reasonably necessary”, it was appropriate to ask two questions (at para. 69):

(1) Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question. In *Etobicoke*, for example, physical strength evaluated as a function of age was rationally connected to the work of being a fireman.

(2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. The sixty-year mandatory requirement age in *Etobicoke* was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength for the job.

[174] In *Caldwell, supra*, where the issue was whether the requirement that a teacher be in strict conformity with the tenets of the Roman Catholic faith, the Court described the objective branch of the test this way:

In addressing the second branch of the test however, it was argued that the requirement of religious conformance was not reasonably necessary to assure the efficient performance of the teaching function in any objective sense. Considerations of economy and safety are not involved. However, the essence of the test remains applicable and may be phrased in this way: “Is the requirement of religious conformance by Catholic teachers, objectively viewed, reasonably necessary to assure the accomplishment of the objectives of the Church in operating a Catholic school with its distinct characteristics for the purposes of providing a Catholic education to its students?” (para. 33, emphasis added)

[175] Finally, in *Meiorin, supra*, at paragraphs 57 and 59 the Court explains the first element in the unified approach:

57. The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. The initial task is to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases but there may well be other reasons for imposing particular standards in the workplace (....)

59. The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose. This inquiry is necessarily more general than determining whether there is a rational connection between the performance of the job and the particular standard that has been selected, as may have been the case on the conventional approach. The distinction is important. If there is no rational relationship between the general purpose of the standard and the tasks properly required of the employee, then there is of course no need to continue to assess the legitimacy of the particular standard itself. Without a legitimate general purpose underlying it, the standard cannot be a BFOR. In my view, it is helpful to keep the two levels of inquiry distinct. (emphasis added)

[176] The above quoted passages demonstrate that the objective element of the bona fide and reasonable test consistently used in special employment cases is more stringent, requires greater scrutiny, and involves a more detailed analysis than the first step of the unified approach proposed in *Meiorin*. Not only must the qualification be rationally connected to the nature of employment in a general sense, but it must be objectively “appropriate” and “reasonably necessary” to the performance of the job.

[177] In every case in which a court or tribunal has considered a special employment provision, and was called upon to consider whether a qualification was “bona fide and reasonable”, it has had reference to the two part test articulated in *Etobicoke*. In my view there is no basis for adopting a less stringent objective test.

[178] Further, the interpretation of the words “nature of the employment” suggested by Christian Horizons is inconsistent with the jurisprudence. Again, in each special employment case, the inquiry was whether the qualification was reasonably necessary

given the activity and objects of the organization, the nature of the job and the essential job duties. I agree that the words “nature of the employment” may provide for a broader consideration than examining only the individual job duties, but there is no support for the interpretation that the focus is solely, or primarily on the nature of the organization. (See also *Garrod and Parks*)

[179] In regards to the subjective branch of the test, I accept that Christian Horizons has established that it has an honest and good faith belief that the qualification is necessary for the performance of the job of support worker. The Directors and members hold a sincere belief that Christian Horizons is a community of “Evangelical Christians” and that the nature of the employment is religious ministry. The organization is structured in that way, the job duties are described in that way and the service is delivered in that way. Mr. Alemu testified that:

When we ask people to come and join the ministry of Christian Horizons, it's not just that they could do a job but that they become part of the body. In that sense, we are -- we are a group of Christians who are doing ministry together and in order to do ministry together, it's not just the activities that you do, but it's the unity of the spirit and the unity of the body and you can't -- you can't disassociate my personal life from the ministry that I do if it is to be called an Evangelical Christian ministry.

And so we expect everyone to adhere to and live out, and this is -- this isn't that we are better in the services that we do, but this is our community and our community is that not you live out just in words, but in deeds the truth of the scripture as we understand them.

[180] I find that Christian Horizons satisfies the subjective element of the test in that it sincerely and honestly believes the qualification is necessary for the performance of the employment.

[181] I also accept that, in some respects, there may be a rational connection between the qualification and the nature of the employment. As I have said, Christian Horizons has structured the organization and the employment as Christian ministry. But the objective branch of the test requires a respondent to do more than merely establish

a rational connection between the qualification and a subjectively defined impression of the “nature of the employment.” 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.

[182] Rev. Reese was asked a number of questions in cross-examination about the basis for the prohibitions contained in the Lifestyle and Morality Statement. Referring to an earlier version of a Lifestyle Statement:

Q. And in 1976, if you recall, was there a discussion about the content of the lifestyle document complying with the law at the time?

A. We recognized that everything that Christian Horizons did needed to conform to first of all the laws of God, and secondly, as much as is possible, to the laws of man.

Q. I'm talking about the employment laws of Ontario. Where do they fit?

A. We sought to fit those -- those regulations.

Q. So the morality standards of 1976 that you imposed on the staff, you're saying they complied with the employment laws of Ontario at 1976?

A. As I understand it, they did, but with the recognition that as a private interchurch Evangelical Christian organization, we had built into that document more detail than would be seen in the documents that would have been provincially used.

Q. I don't understand what you're saying.

A. Let me try to help you.

Q. Yes.

A. We recognized that in a pluralistic society, organizations that are seeking to serve pluralistically are limited in how far they can go in the detail of a lifestyle statement. But as a Christian organization, we did not feel that limitation; rather we sensed the responsibility to reflect clearly what the Bible instructs on lifestyle.

Q. Okay. So if I get you, you're saying that we make up our own rules based on what we believe?

A. I would prefer not to say we make up our own rules, but we seek to determine what God's rules are and obey them.

Q. And that's your first responsibility, to the rules established by God?

A. As Peter said in Acts chapter 5 to the leaders of his day, he said, "We ought to obey God rather than man," and when --

God's rules supersede man's rules. And it's on that basis that Evangelical Christians are to live. However, we are to obey the laws of the land in every way that we possibly can, and we always sought to do that in Christian Horizons.

Q. Unless they are in conflict with God's law.

A. What we see to be God's law.

[183] Later, in response to a series of question about a 1989 version of the Lifestyle and Morality Statement, and why it continued to prohibit homosexual relationships even though homosexuality was no longer a criminal offence and sexual orientation was by then listed as a proscribed ground of discrimination in the *Code*, Rev. Reese said:

First of all, Christian Horizons and I personally recognize that in this pluralistic society we must recognize the rights of the people as they pertain to society. But when it comes to placing people in positions of responsibility in Christian Horizons, we recognize that we desire to continue to maintain what we see to be the laws of God, and thus that statement.

[184] I accept Christian Horizons is a religious organization, and does identify as a Christian ministry, but it is also an employer of over 2500 individuals across Ontario. It started its residential program in 1976 with one home, with funds privately donated, and in response to requests from Christian families who sought a Christian home environment for their children. It is now the largest provider of community living services in the province. It receives \$75 million annually from the province to provide care and support to individuals with developmental disabilities, without discrimination based on creed or cultural background. It establishes its residences as Christian homes, but does not serve only, or primarily, the community of co-religionists. It is fully engaged in, to use Rev. Reese's words, "pluralistic society." Even assuming that it could be found that Christian Horizons primarily served the interests of persons who adopt its faith beliefs, by providing opportunities to live out a Christian calling, Christian Horizons does not satisfy the objective requirement of the reasonable and bona fide test under section 24(1)(a) the Ontario *Human Rights Code* by simply asserting that it is obliged to follow religious law and by saying that those who do not live by its Morality Statement can choose to work elsewhere. As the Court in *Hall* said:

If individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada because everyone who wished to discriminate against them could make that assertion. (para. 31)

[185] The evidence of Rev. Churchman and others established that, after the *Parks* decision, Christian Horizons took a series of steps to address what the Board of Inquiry saw as Christian Horizons' failure in justifying a special employment exemption under the *Code*. At paragraph 57 of *Parks*, the Board wrote:

(...) for Christian Horizons to avoid future liability in this area it must be consistent in the application of its policies concerning lifestyle requirements, if they satisfy the objective part of the *Etobicoke* test, from the very beginning of the employment period. Such lifestyle requirements must be clearly indicated or referred to in the employment contracts, and if at all possible, confirmed in the applicable and interview process leading to employment. Finally, to ensure insulation from liability in the future, Christian Horizons would be well-advised in new employee job orientation programs and updating sessions to confirm the necessity of such lifestyle requirements.

[186] There is no evidence Christian Horizons, rather than its employees, turned its mind to whether any of the particular provisions of the Lifestyle Statement were reasonably necessary, in an objective sense, given the objects of the organization, the nature of the services being provided, and the duties of the particular positions. Christian Horizons appeared to rely on the high degree of consensus amongst its employees about what they felt was important.

[187] This process, like Rev. Reese's assertion that Evangelical Christians must follow religious law, does not satisfy the requirements of the objective branch of the *Etobicoke* test to show that the qualification is "reasonably necessary", or "appropriate", particularly where the qualification infringes on the fundamental rights of individuals. There was, in fact, no objective consideration of the necessity of the qualification. There was only a process whereby employees, who were aware that their employment

was dependent upon agreeing with the subjective morality beliefs of their employer, came up with a list of morality and lifestyle qualifications.

[188] In my view, in imposing an onus on an employer to show that a proposed qualification is reasonably necessary, section 24(1)(a) 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. In this case the evidence shows that Christian Horizons took the dicta of Professor Mendes in *Parks* and embarked on an exercise designed to ensure that it would meet the section 24(1)(a) exemption if a challenge was raised in the future.

[189] Is it reasonably necessary for a support worker employed in an organization such as Christian Horizons to comply with a Lifestyle and Morality Statement, which prohibits homosexual relationships and discriminates against gay and lesbian individuals? The evidence before the Tribunal is equivocal on this point.

[190] Christian Horizons is unique as an organization and as a provider of an important service to a population with very particular and complex needs. The job of being a support worker to individuals with developmental disabilities can be amongst the most challenging in the social and health care services sectors. Seen from the perspective of being members of a religious ministry, Christian Horizons' staff are required to exemplify Christ, and show Christian love in all they do and in all their interactions with the residents. Religious commitment is seen by the organization as critical to both its approach to service delivery and to the carrying out of the job responsibilities. The evidence shows that this deep religious commitment is displayed in excellent service and loving care provided to the residents, as well as support for their families.

[191] But unlike the circumstances in *Garrod*, *Caldwell* and *Trinity Western*, Christian Horizons' purpose, and the service it provides, is not religious education and indoctrination. 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. While some residents may come from Christian families and the families chose Christian Horizons because of the Christian home environment, there is no evidence that the persons who receive services from Christian Horizons, as a whole, come from the community of co-religionists, or that they seek placement with the organization to further religious education and formation. As I have discussed above, the mission of Christian Horizons is to provide residential care and support to persons who have developmental disabilities.

[192] There was evidence from both Christian Horizons and the Commission about the practices of other organizations which either identify as Evangelical Christian, or are run by Churches or religious orders. Policies in relation to lifestyle statements, hiring and employment requirements vary widely. For example, Rev. Dr. Stiller testified that some organizations that identify as Evangelical Christian do not have a prohibition against homosexual relationships in their lifestyle statements.

[193] Mr. John Cobrough, the Territorial Director of Employee Relations for Canada and Bermuda for the Salvation Army, testified for the Commission. The Salvation Army was described as an Evangelical Christian organization and is a branch of the Salvation Army Church. It has a Doctrinal Statement almost identical to that of Christian Horizons, and its mission is similar. Its value statement requires all employees to support Christian values of respect, honesty, integrity, fairness, mercy and compassion. The mission is to preach the gospel of Jesus Christ, supply basic human needs, provide personal counselling and undertake the spiritual and moral regeneration and physical rehabilitations of all persons in need who come within the sphere of influence regardless of race, colour, creed, sex, age or sexual orientation.

[194] Mr. Cobrough testified that the Salvation Army is engaged in various social service activities, including hospitals and caring for individuals with developmental disabilities. In carrying out its work, it has approximately 1200 officers, 10,000 employees and 68,000 volunteers. Officers, who are ordained pastors of the church, and “soldiers”, are required to adopt the articles of faith of the organization and must

agree to live by the values and lifestyle statement. For example, they are not permitted to engage in homosexual relationships.

[195] The Salvation Army does not require all employees to sign a lifestyle and morality statement. Individuals who are not officers or soldiers are not required to sign a lifestyle statement. Adherence to lifestyle and morality standards is considered to be a qualification for some positions, such as youth pastor, but other positions, such as registered nurse, do not have such a requirement.

[196] In his testimony, Rev. Dr. Hawkes spoke about his experiences in the 1990's and working to ensure that the gay and lesbian community in Toronto had proper access to health care. He explained that several hospitals in downtown Toronto that had traditionally served the gay and lesbian community were slated for closure. As Dr. Hawkes put it, "in the height of the AIDS crisis, the only hospital that was going to be left was St. Mike's Hospital, a Roman Catholic hospital, a Roman Catholic institution with a terrible reputation [within the gay and lesbian community]."

[197] Rev. Dr. Hawkes testified:

So I went and met with them and I said what are you going to do because we don't feel we're going to be safe here. And they were amazing. This is a Catholic institution. They educated their staff on gay and lesbian issues, they started to treat gay and lesbian couples as full couples before the law required them. They put a rainbow flag into the foyer, they put signs up for Pride Day. They did all kinds of things to make it a safe environment, not only for gays and lesbians but for their partners as well. So there is a public institution -- sorry, a Roman Catholic institution that's probably 100 percent public funded or pretty close, that set aside the official teachings of the Roman Catholic Church, which said you're not to treat gay and lesbian couples as couples. Set that aside to say we have a greater public good here. We are serving the public here and so we have to move past what our priest might teach in the Church to say. We are a public institution, we are an institution serving the public, and we need to be able to have public policies that welcome everybody.

And so they have gay and lesbian staff that are fully welcome, where they get benefits even before it was required in law, and they welcome the gay and lesbian community. So we have a wonderful -- now I hear great stories about St. Mike's Hospital and how they're accommodating the gay and lesbian community.

[198] Christian Horizons argues that the practices and policies of other organizations are not relevant. It relies on *Amselem* in support of its position that, as a religious organization, it is entitled to its beliefs, and courts and tribunals should not question or require it to compromise those beliefs.

[199] The Court in *Amselem* did say that courts and tribunals should not question sincerely held religious beliefs, or question whether the beliefs require certain practices. However the Court in *Amselem* also said, following a long line of jurisprudence starting with the decision of Mr. Justice Dickson in *Big M.*, *supra*, that:

61. In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute: see, e.g., *Big M.*, *supra*; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182 *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 [39 C.H.R.R. D/357], at para. 29. This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at p. 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.

62. Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that

freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises. (emphasis added)

[200] The nature of the reasonable and bona fide test is one of a balancing of rights. The scheme of the *Code* is to establish a right to be free from discrimination in employment as fundamental. The *Code* then specifies circumstances in which an employer may impose a discriminatory restriction if the qualification is shown to be reasonably necessary. Even where there is no obligation to accommodate to the point of undue hardship, it is not correct to say there is no obligation whatsoever on an employer to at least consider whether there are ways to meet its objectives, other than an absolute ban on the employment of individuals based on a prohibited ground of discrimination. In this way the practice of other employers, similarly situated, is relevant to whether, in an objective sense, the qualification is reasonably necessary.

[201] An employer must engage in a meaningful process to consider whether the qualification is “appropriate” and “reasonably necessary” given all the circumstances. Otherwise, there is no balancing of rights. There is only the trump by one set of rights based on an assertion that it is necessary to discriminate.

[202] Based on the evidence before me, Christian Horizons has not demonstrated that the qualification is reasonable and bona fide because of the nature of the employment.

Did Christian Horizons create, or permit a poisoned work environment, or otherwise discriminate against Ms. Heintz, such that her right to be free from discrimination was infringed?

[203] I have found that Christian Horizons has not established that it is entitled to the exemption under section 24(1)(a). Therefore, the requirement that Ms. Heintz comply with the Lifestyle and Morality Statement as a condition of employment violated her right to be free from discrimination in employment. It was not seriously argued by Christian Horizons that it avoids liability on the basis that Ms. Heintz accepted the restrictive employment conditions when she was hired, or because she resigned, rather than having been terminated. It is clear that the discriminatory qualification played a central role in Ms. Heintz leaving her employment. Mr. Alemu told Ms. Girling that Ms. Heintz should look for other employment and that Ms. Heintz would be given until September to “effect changes.” Mr. Alemu also testified that had Ms. Heintz not resigned and remained in non-compliance with the Lifestyle and Morality Statement, he would have terminated her employment. It is also well established that employees and employers are not entitled to contract out of the *Human Rights Code*.

[204] Independent of whether Christian Horizons has met the conditions for the exemption under section 24(1)(a), I find that Christian Horizons has infringed Ms. Heintz’s rights under the *Code* as a result of the work environment and how she was treated once her sexual orientation came to light. Section 24(1)(a) provides an employer the right to impose restrictions, or give preferences in employment in certain specified circumstances. It does not exempt an employer from the application of the *Code* altogether. The *Code* places a range of obligations on an employer. For example, it has been found that an employer has an obligation to ensure that an employee is able to work in an environment free from harassment and discrimination (See for example *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84), that an employer is required to take steps to properly investigate incidents of harassment, and respond in an effective and timely way (*Hines v. Canada (C.E.I.C.)* (1988), 10 C.H.R.R. D/5683 (Can.Trib.), *Uzoaba v. Canada (Correctional Service)* (1994), 26 C.H.R.R. D/361 (Can.Trib.) , and that an employer is not permitted to base performance appraisals or issue discipline on the

discriminatory views of managers or fellow employees (See for example *Toth v. Sassy Cuts Inc.* (1987), 8 C.H.R.R. D/4376 (BC HRC).

[205] Had I determined that Christian Horizons had met the conditions for the exemption under section 24(1)(a), it would not have infringed the *Code* by telling Ms. Heintz that she was in violation of a term and condition of employment, and that continued non-compliance would lead to termination. But Christian Horizons did violate the *Code* by:

- a. Suggesting Ms. Heintz seek counselling in order to effect “restoration”;
- b. Creating or permitting a poisoned work environment in which rumours and discriminatory attitudes were allowed to pervade the workplace, and taking no steps to remedy the harmful effects on Ms. Heintz;
- c. Acting on discriminatory views in matters of human resources.

[206] As noted above, after Ms. Heintz was confronted about her same sex relationship, she was offered Christian counselling. Christian Horizons offers all employees pastoral counselling as part of the support for what it sees as the employee’s work in Christian ministry. The pastors who provide the counselling for employees come from churches which identify as Evangelical Christian.

[207] Mr. Alemu testified that the purpose of the spiritual counselling offered to Ms. Heintz was to effect “restoration.” He explained the goal of restoration was to have the individual return to the state of being in compliance with the articles of faith of the organization.

[208] The suggestion of spiritual counselling of the kind offered by Christian Horizons upset Ms. Heintz. She indicated to Ms. Girling she was not interested. She was undergoing a crisis of faith and was attempting to understand who she was, within the context of her Christian faith. She explained:

What I was going through was a complete dichotomy shift from what I was taught for 30 some years and what I truly believed, and at that point I had to reintegrate this new understanding of who I am. It was a complete struggle to come to this point and at that time I was experiencing a crisis of faith where I was trying to reintegrate this new belief which resulted from pretty much taking my whole core being and shaking it.

[209] I have no doubt that Christian Horizons' intention in providing spiritual counselling to employees generally, is to support individuals it considers members of its religious community. In this context, counselling is offered in a caring and compassionate way. But the attempt of "restoration" for persons who are gay or lesbian is profoundly disrespectful and oppressive. Notwithstanding that Christian Horizons sincerely believes that homosexuality is unnatural and immoral, homosexuality is neither a crime nor an illness. Gays and lesbians are entitled to be treated by their employers, even where those employers may be religious organizations, with respect and dignity, and not be offered counselling to cure them of their sexuality.

[210] The Commission argues that Christian Horizons infringed Ms. Heintz's rights by creating, or permitting a poisoned work environment. Apart from the Christian counselling, it points to the allegation of resident and personal abuse made by Ms. Heintz's co-worker, Sophie Odhiambo, and how Christian Horizons dealt with those allegations. It also relies on the reduction of Ms. Heintz's work hours, the issuing of discipline, and Ms. Heintz's final performance appraisal.

[211] I do not accept that the reduction in Ms. Heintz's working hours in the spring of 2000 was related to her sexual orientation. The evidence of Ms. Girling was that the organization needed to lower costs and she was instructed to reduce staff hours. She testified that she decided to implement the directive by reducing temporary hours from staff. Ms. Heintz was one of the staff whose hours were cut. There is no evidence that the decision was related to Ms. Heintz being gay. In respect of the other issues raised by the Commission, I find that they were either tainted by a discriminatory motive, or were not properly handled by the employer, such that human rights liability is triggered. In my view, the evidence demonstrates a clear animus against Ms. Heintz by Christian

Horizons' management from the point at which the organization discovered she was lesbian, and in a same-sex relationship.

[212] Ms. Odhiambo's June 23, 2000 written occurrence report alleged that on May 24, 2000, Ms. Heintz had struck a resident. It also alleged that Ms. Odhiambo had been the victim of harassment and abuse at the hands of Ms. Heintz.

[213] Christian Horizons did not call Ms. Odhiambo as a witness. It offered no explanation as to why Ms. Odhiambo had waited a month before making the resident abuse allegation. It offered no real explanation of why it had not investigated the allegations of personal harassment and abuse by Ms. Heintz against Ms. Odhiambo. It called no other evidence to support Ms. Odhiambo's allegations of personal harassment. It called no evidence of whether Ms. Odhiambo was forced to take time off work because of the negative health symptoms she allegedly experienced. It did not explain why it did not call Ms. Odhiambo as a witness. Ms. Heintz denied ever hitting a resident. She also denied ever harassing Ms. Odhiambo. I draw an adverse inference from the fact that Christian Horizons did not call Ms. Odhiambo. I find that it is likely Ms. Odhiambo's testimony would have shown inconsistencies in her allegations and revealed that she was an unreliable witness. Further the occurrence report appears on its face to be tainted by homophobia. The failure to call Ms. Odhiambo to explain the report leads me to find that the allegations were in fact tainted by a discriminatory animus.

[214] As a result of Ms. Odhiambo's allegations, Mr. Alemu held interviews with the Waterloo 6 staff. He testified he did not consider Ms. Heintz's sexual orientation relevant to his investigation, and told staff this when they raised the issue during the interviews. However, his notes of the interviews indicate he both recognized the issue was causing conflict within the team, and recorded staff's concerns about Ms. Heintz's sexual orientation.

[215] Mr. Alemu's notes also confirm Ms. Odhiambo and Ms. Ward raised the issue of Ms. Heintz's sexual orientation, and that Ms. Odhiambo also alleged Ms. Heintz was

using the Waterloo 6 computer to view gay and child pornography, and was misusing the organization's funds. The notes also reveal other staff said that they had heard of the resident abuse allegation from Ms. Odhiambo.

[216] Mr. Alemu interviewed Ms. Heintz on June 26, 2000. Mr. Alemu did not tell her about Ms. Odhiambo's allegations. After her interview, Ms. Heintz had a discussion with a fellow worker, Karri Girling, who said Mr. Alemu had asked her how she felt about Ms. Heintz being gay and about the abuse allegations. Ms. Heintz testified that she was extremely upset and, as a result, set up another meeting with Mr. Alemu.

[217] At that meeting Ms. Heintz expressed her upset and a concern about the manner in which Mr. Alemu was inquiring into the allegations against her. She told Mr. Alemu she felt it was unfair that she was not told of the allegations and was finding out from other staff. She felt that certain staff were being deceitful and that the organization would "prefer for me not to be working here." She told Mr. Alemu she thought the organization was "biased and hypocritical". Mr. Alemu took offence and indicated that her behaviour was grounds for termination.

[218] Mr. Alemu testified there was another encounter with Ms. Heintz during which she was loud and abusive, and he felt quite uncomfortable. Ms. Heintz denied this follow up encounter ever took place. Mr. Alemu did not have notes of this meeting.

[219] As a result of Mr. Alemu's interviews with staff, Mr. Alemu decided to call for a formal inquiry into the allegations of abuse. His notes record:

I am quite concerned about Connie.

- Complaint against this employee particularly from one staff and a number of staff state personal conflicts
- Poisoned and hostile to PM, ADS and very negative to Christian Horizons
- Given the nature of the employment her character is particularly prejudicial to our services
- Made it very clear that she is engaged in lesbian relationship
- Made it obvious that she has no value for Christianity

- On this and suspicious abuse allegations, her previous incident of abuse and staff's confirmation that she is able to hit an individual, I think I need to act.

[220] The following day Ms. Heintz was suspended with pay pending the formal inquiry into the abuse allegations. Ms. Heintz asked Ms. Girling for the details of the allegations. Ms. Girling refused, responding that she would be informed during the inquiry process.

[221] The inquiry was held on June 30, 2000. The inquiry team dismissed the resident abuse allegation as "inconclusive."

[222] During the inquiry, the issue of Ms. Heintz's sexual orientation was raised. Ms. Odhiambo indicated that she was afraid of Ms. Heintz, that Ms. Heintz was stalking her, and she carried her car keys at all times in case she had to escape from the residence. Ms. Heintz told the inquiry team that she felt that Ms. Odhiambo was extremely uncomfortable with the fact that she (Ms. Heintz) was gay.

[223] The inquiry team noted that "Sophie's fears must be taken seriously, and steps need to be taken to ensure that she can maintain a sense of well-being and safety in the workplace". The inquiry team made no comments about Ms. Heintz's well-being, nor did it recommend management take steps to address the apparent tension in the workplace related to some staff's discomfort with Ms. Heintz's sexual orientation.

[224] On the same day, June 30, 2000, Mr. Alemu issued a letter of discipline to Ms. Heintz. The letter stated in part that "if you fail to change your attitude and improve your performance, we have no alternative but to recommend the termination of your employment."

[225] There was no evidence that Christian Horizons took any other action arising out of Mr. Alemu's investigation into the breakdown of the team dynamics at Waterloo 6 or the abuse inquiry, either in terms of further investigation, discipline to other employees, conflict resolution sessions or training. Mr. Alemu's notes indicate there were complaints of abusive behaviour by another employee named "Pat." There was no

evidence these allegations were ever investigated, or that “Pat” received a warning or discipline.

[226] Ms. Heintz met with Mr. Alemu on July 27, 2000 to discuss the June 30, 2000 discipline letter. During the meeting, Mr. Alemu reported a number of negative comments and grievances which he said employees had raised about Ms. Heintz, including the allegation about stalking a co-worker. He also referred to comments made by co-workers included in performance reviews dating back to 1996 and 1997. Ms. Heintz said she felt completely alone, and felt staff and management were ganging up on her. Asked in cross-examination why he had referred to Ms. Heintz’s earliest performance appraisals when her recent appraisals showed “above average” performance, Mr. Alemu responded “that is why we keep records.”

[227] Ms. Heintz met with Ms. Girling in late August 2000 to review her performance appraisal. Ms. Heintz had indicated that she did not want to set performance objectives, and Ms. Girling admitted, in retrospect, that given Ms. Heintz’s level of stress, it may not have been the correct decision to require Ms. Heintz to participate in a performance review at that time. Ms. Girling signed the performance appraisal on August 15, 2000, Ms. Heintz on August 28, 2000 and Mr. Alemu on September 14, 2000. Mr. Alemu made a note that Ms. Heintz was under a written warning.

[228] The 2000 performance appraisal was markedly different than the one for the previous year. Ms. Heintz’s overall score dropped from “exceeds expectations” to “meets expectations”. In a number of categories she dropped to “requires improvement”. For example she received a ranking of 2.2 (requires improvement) in “displays professional behaviour”, 2 in “balances personal and work life”, 2 in “models expected behaviour” (with a comment of “extremes seen by team mates”), and 2 in “manages conflict.”

[229] There was no evidence from Christian Horizons that any of the shortcomings identified arose in the period prior to Ms. Heintz disclosing that she was gay, and several related directly to that disclosure. Consistent with other findings, it is clear that

Christian Horizons relied on the discriminatory perspectives of other employees and Ms. Heintz's reactions to a poisoned workplace when it was critical of her performance. In light of the fact that Christian Horizons had already determined that Ms. Heintz's employment would be terminated in September, I find that its insistence on conducting a performance review in late August was designed to urge her to resign because she was gay.

[230] In my view, the course of events described above demonstrates a complete failure of Christian Horizons to deal with Ms. Heintz in a way that is consistent with an employer's obligation under the *Code*. First, it is apparent that the investigation and inquiry into allegations of abuse and harassment by Ms. Heintz were biased and tainted by discrimination. Mr. Alemu testified that Ms. Heintz's sexual orientation was not relevant to his investigation and he did not ask staff about Ms. Heintz being gay during the interviews. He indicated that it never occurred to him that Ms. Odhiambo's allegations might have been related to Ms. Heintz's sexual orientation, or that Ms. Odhiambo was homophobic. Rather, he said he thought that Ms. Odhiambo's fears were well-founded. During his testimony, he did not accept any shortcomings on his, or the organization's, part in how the matter was handled. He laid all the blame on Ms. Heintz and on her "hostile" attitude during the investigation process and her negativity toward Christian Horizons. As he put it, just because Ms. Heintz's lifestyle had changed, did not mean that "all of a sudden the organization, the management is all of a sudden, is a rotten one."

[231] I have difficulty accepting Mr. Alemu's contentions. The contents of his notes do not bear out his assertions that he did not consider Ms. Heintz's sexual orientation relevant and did not raise it with staff during the interviews. Ms. Odhiambo's June 23, 2000 occurrence report should have, at a minimum, caused Mr. Alemu to question whether it was motivated by a fear or dislike of homosexuals. Beyond this, it is inconceivable that, in an organization where one of the core beliefs is that homosexuality is immoral, and fundamentally incompatible with "Christian ministry", Ms. Heintz's sexual orientation played no role in Mr. Alemu's consideration of a "breakdown in the team dynamics."

[232] Second, I find that Ms. Heintz's sexual orientation was a consideration in Mr. Alemu deciding whether to call for a formal inquiry into resident abuse allegation. Ms. Heintz did testify in cross-examination that she felt that Christian Horizons was correct in holding an inquiry. That may be so. However, there was no evidence that there was any legal or policy obligation to hold an inquiry in the circumstances. Mr. Alemu's testimony suggested that he had discretion, and part of the purpose of his investigation was to determine whether a formal inquiry team should be established. In addition, his notes indicate that the suspicion of resident abuse was only one of the reasons he decided to hold the inquiry.

[233] Third, in my view the discipline issued to Ms. Heintz was tainted by a discriminatory animus. Assuming that Christian Horizons was justified in issuing a warning because of Ms. Heintz's comments to Mr. Alemu, the discipline letter went much further. The letter indicated that Ms. Heintz needed to improve her performance, yet Ms. Heintz's last two performance appraisals were exemplary, and there was no evidence that any performance issues had been previously brought to her attention. Mr. Alemu spoke of negative grievances by co-workers, but these were primarily grievances by Ms. Ward and Ms. Odhiambo, the two employees who had raised concerns about Ms. Heintz being gay.

[234] Finally, the entire course of events, and the workplace atmosphere at Christian Horizons generally, must be seen in the context of an organization that sincerely believes that homosexuality is a sin and that homosexuals cannot be part of "the community." Rev. Cox explained how profound this belief is:

Well, among other things, it would -- it might -- it might reflect the fact that they're not really committed to our vision and what it means to be human and what it means to be a flourishing human being. So if they're not committed in that area, in what other areas might they also not be committed to expressing in practical ways this strong Christian conviction about God's creation of us in his image? So sexual behaviour then becomes really almost a touchstone among other behaviours of their commitment to our vision of what it means to be a human being in a faith. If they're -- If they don't want to follow what

we're committed to as God's way in that area, who knows what other areas they may also not follow.

[235] Rev. Dr. Stiller also described how having a gay or lesbian employee was completely antithetical to an Evangelical organization:

And I must tell you that within the Evangelical community, this is not a -- this is not a knee-jerk response to social trends. But it, at the very heart, is our understanding of who we are in Christ as his creation and in his image. And sexuality is a very critical part of that. And so to go outside of what we think is normative sexuality, male/female, take a homosexual lesbian, it isn't that those persons aren't cared for loved, but to have a person like that salaried by the organization, what -- that strikes at the very heart of its -- of its identity and its commitment.

(. . .)

What I was referring to was that our understanding of sexuality strikes at the very heart of our theology, which is that we are created in God's image and that he has created within human civilization and within human life a particular -- what we call normal sexuality which is the male/female relationship. And that's critical to our theology.

[236] A workplace where the above beliefs form the fundamental, core ethic that all employees are required to live out on a daily basis runs a serious risk of being a poisoned work environment. It may be that, as Rev. Dr. Stiller states, this belief is not a knee jerk reaction and lies at the center of the theology of individuals who identify as Evangelical Christians. But employers in Ontario are not allowed to permit, let alone foster work environments in which these attitudes are acted out.

[237] Christian Horizons says that its core beliefs require adherents to treat all persons, particularly those who are marginalized, with care and compassion. The ultimate goal of human rights legislation is not about caring for the marginalized, or treating them with compassion, it is about removing the barriers and discriminatory attitudes that cause individuals to be marginalized in society. The obligation placed on employers by the *Code* is to ensure that the working environment under their control does not become a place where discriminatory attitudes are permitted to poison the atmosphere and require employees, as a condition of their employment, to endure

attacks on their dignity and self-respect. In *Hinds, supra*, the Canadian Human Rights Tribunal framed the obligation of an employer this way:

(,,,) there is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment ... To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself ... To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case. (para. 41611)

[238] Christian Horizons had a responsibility to respond to the rumours and allegations which were clearly tied to Ms. Heintz's sexual orientation. It had an obligation to investigate, to inquire, and to take steps to put an end to the effects of the attitudes that were poisoning the workplace and having a detrimental impact on Ms. Heintz. Christian Horizons says, and Ms. Heintz agreed, there were a number of events and issues that were causing stress in the workplace in the spring and summer of 2000. But it is clear, and should have been clear to Christian Horizons, 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.

[239] Ms. Heintz testified that during the period after she came out as a lesbian, she felt the organization just wanted her to leave. The evidence demonstrated that she was correct. Certain individuals, like Dorothy Girling and some of Ms. Heintz's co-workers, were clearly conflicted. However, as an organization, Christian Horizons was totally ill-equipped to deal properly with the circumstances of a staff member who came out as being gay. Given the nature of the faith beliefs of the organization, I fully appreciate that this presented a dilemma. But it was a dilemma Christian Horizons was required to solve. Ms. Heintz should not have been required to endure the humiliation, attacks and mistreatment because Christian Horizons had not developed an understanding of the

obligations placed on all employers by the *Code*, whether or not they are entitled to a section 24(1)(a) exemption.

[240] In *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 the Supreme Court said:

When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. (para. 66)

REMEDY

[241] The Tribunal's remedial powers are set out in section 41 of the *Code*:

41(1) 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.

[242] It is well established that the purpose of the *Code* is remedial, not punitive. Orders should provide fair and effective remedies for the victims of discrimination. In addition, the *Code* has as a purpose to eradicate discrimination and remove discriminatory barriers and policies. In this regard remedies should be crafted in a way to best ensure the discrimination will not reoccur and the underlying policies or behaviour that resulted in the discrimination are removed. Human rights remedies can also have an important educational value, both for the parties to a complaint, and for the

broader public. (*Robichaud, supra*, at para. 9; *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at p. 547 “O’Malley”).

[243] In order for remedies to be fair and effective, they must be tailored to the particular facts in a case. The *Code* provides the Tribunal with considerable discretion in fashioning a remedy and the Courts have upheld remedial orders that are both expansive and novel. (See for example *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 “*Action Travail des Femmes*”) But in all cases, the remedy must flow from the violation that has been found and must be designed to further the remedial purposes of the *Code*. (*Metcalfe v. Papa Joe’s Pizza & Chicken Inc.*, 2005 HRTO 46; *Pchelkina v. Tomsons (No. 2)*, 2007 HRTO 42)

[244] In the present case I have found that Christian Horizons violated Ms. Heintz’s right to be free from discrimination in two respects. First, by requiring that all employees sign and conform to the Lifestyle and Morality Statement, it imposed a discriminatory condition of employment on Ms. Heintz, which ultimately resulted in the loss of her job. This violates section 9 of the *Code* and is not saved by section 24(1)(a). Second, 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 section 5. This infringement is not subject to a section 24(1)(a) exemption even had the exemption been found to otherwise apply. As a result, and because of the particular circumstances of this case, I will address the remedies for the violations separately.

Personal Remedies

General Damages

[245] A complainant is typically entitled to an award of general damages to compensate for the loss of the right to be free from discrimination. There is no ceiling on general damages. These awards should not be so low as to trivialize the violation or amount to a “licence fee” to discriminate. (*Shelter Corp. v. Ontario (Human Rights Commission)* (2001), 39 C.H.R.R. D/111, paras. 43-44 (Ont. Div. Ct.); *Gohm v. Domtar*

Inc. (No. 4) (1990), 12 C.H.R.R. D/161, paras. 126-127 (Ont. Bd. Inq.) Awards should focus on the effect of the discrimination on the complainant. No evidence of malice is required although the existence of an intention to discriminate may impact on the seriousness of the violation and the harm suffered by the complainant.

[246] In *Sanford v. Koop*, 2005 HRTO 53 at para. 35, I set out a non-exhaustive list of factors that has been used by the Tribunal in assessing the appropriate quantum of general damages:

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect
- A complainant's loss of dignity
- A complainant's loss of self-esteem
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the discriminatory treatment.

[247] The *Code* also provides for damages to compensate for mental anguish or particularly severe mental or emotional harm caused by malice or wanton disregard for the effects of discriminatory behaviour. Here, the intention or reckless behaviour of the respondent is relevant. (*Ketola v. Value Propane Inc.*, [2002] O.H.R.B.I.D. No. 14 (QL) at para. 9 -10 (Ont. Bd. Inq.).

[248] In respect of the violation resulting from the imposition of the Lifestyle and Morality Statement, I award \$8000.00 in general damages. I find that the discrimination is both serious and harmful.

[249] Christian Horizons' policy is discriminatory. While some elements of Canadian society may continue to debate whether gays and lesbians should be treated equally

and entitled to equal rights and opportunity, from a legal perspective that debate has ended. Differential treatment of homosexuals is no different than discrimination based on race, colour, gender or disability.

[250] Christian Horizons' policy is based on an albeit sincere belief that homosexuality is a sin, and by extension, homosexuals are sinners. No matter an individual's competency to provide quality and loving care to residents, no matter an individual's skill, experience and training, no matter an individual's Christian faith commitment, purely because of a personal, human characteristic Christian Horizons' policy excludes the gay or lesbian individual from employment or forces him or her to deny or conceal their sexuality. A number of cases have commented on the particularly harmful effects these types of policies can have on gays and lesbians (See *Hall, supra*, *Brockie, supra*, *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Trinity Western, supra*). The discriminatory policy is in direct conflict with societal advances over the past 20 years in terms of ensuring respect, understanding and acceptance of gay and lesbian persons as equal members of the human fabric.

[251] On a personal level, for Ms. Heintz, the effect of the discriminatory policy was to say to her, because of who you are, you are no longer welcome. Ms. Heintz worked for Christian Horizons for five years. She was dedicated to her work and the individuals she supported. She was a valued employee and a full member of the Christian Horizons "community." The effect of the policy was to make her a pariah within the organization and force her to leave her employment. Her years of education, hard work and commitment were all unimportant in comparison to her sexual orientation. The policy was a fundamental affront to Ms. Heintz's dignity and self-respect.

[252] I would have awarded a greater level of general damages for the violation of Ms. Heintz's rights occasioned by the application of the policy, but I find that part of the stress Ms. Heintz experienced arose from her own crisis of faith. Ms. Heintz testified that when she joined the organization, she had no difficulty signing the Lifestyle and Morality Statement because it reflected her own beliefs. She lived by and in accordance with the Doctrinal Statement and the Lifestyle and Morality Statement until

late in 1999. She testified that when she began to gain an understanding of her sexuality and sexual orientation, it was a “complete dichotomy shift” and “a complete struggle.”

[253] While Ms. Heintz’s agreement to the Lifestyle and Morality Statement is not a defence to a finding of liability against Christian Horizons, it is a factor which must be taken into account in assessing the appropriate level of damages for the violation of her rights. Ms. Heintz grew up with similar faith beliefs as those adopted by Christian Horizons. She believed that homosexuality was wrong. Part of the reason she sought employment with Christian Horizons was that its religious and spiritual values were consistent with her own at the time. It is clear that part of her vulnerability and questioning of her self-respect in the spring of 2000 arose from her own internal spiritual struggles, independent of the imposition of the discriminatory policy. I have considered these factors in assessing the appropriate level of general damages.

[254] I have determined that an award for mental anguish is not appropriate in relation to the imposition of the Lifestyle and Morality Statement. The Commission argues that the Lifestyle and Morality Statement was adopted “wilfully.” This is true in a sense, but the facts of this case are unique and have a particular history. The issue of whether Christian Horizons was entitled to require all employees adhere to its faith beliefs was dealt with in *Parks, supra*, where a Board of Inquiry gave directions to the organization on how it could meet the special employment exemption in the future. Notwithstanding the Divisional Court did not endorse those “directions”, in my view the actions of Christian Horizons in adopting the Lifestyle and Morality Statement are not of the kind which justify an award of damages for acting wilfully and recklessly.

[255] In regards to the violation of Ms. Heintz’s rights because Christian Horizons created or permitted a poisoned work environment and failed to properly ensure that she did not have to endure discrimination based on her sexual orientation, I award \$10,000.00 in general damages for the violation of her right to be free from discrimination, and \$5000.00 for mental anguish caused by actions that were wilful and reckless.

[256] I find this violation to be particularly serious and deserving of a substantial damage award for several reasons. First, I have found that Christian Horizons failed completely to ensure that its workplace environment was free from discrimination against gays and lesbian. Its policy, based on the belief that homosexuality was unnatural and immoral, engendered fear, ignorance, hatred and suspicion. It sent the message to employees that gays and lesbians were not equal members of the workplace community. There was no effective process and no training to respond to or prevent the likely consequences of these beliefs and policies. The only response of Christian Horizons to a gay person in the workplace, was to offer counselling, so as to effect “restoration.”

[257] Second, the manner in which Mr. Alemu responded to Ms. Odhiambo’s allegations of resident abuse and personal harassment by Ms. Heintz was both inadequate and tainted by discrimination. Ms. Heintz was subjected to an ordeal which resulted in profound emotional anguish and physical symptoms.

[258] Ms. Heintz testified about how distressed she was at the course of events that unfolded after June 23, 2000 when Ms. Odhiambo submitted the occurrence report. She was not told of the resident abuse allegations or of the allegations of personal harassment. She found out from other staff that these allegations had been made. She found out that Mr. Alemu was asking staff about how they felt about her sexual orientation. She testified that she felt under attack.

[259] During the formal inquiry, she expressed concern that certain staff were uncomfortable about her sexual orientation. Ms. Odhiambo made allegations about abusive and threatening behaviour by Ms. Heintz which was tied to her sexual orientation, and to stereotypes of gays and lesbians. The outcome of the inquiry was to find the allegations of resident abuse to be inconclusive, and that Ms. Odhiambo’s concerns should be taken seriously.

[260] The only formal measures to be taken by Christian Horizons’ management following Mr. Alemu’s investigation and the formal inquiry was to issue discipline to Ms.

Heintz. None of her concerns about being targeted because of her sexual orientation were addressed. No formal steps were taken to address the other apparent issues causing stress in the team. No other discipline was taken against any other employee. Ms. Odhiambo's dubious allegations were taken seriously, and Ms. Heintz's performance was questioned unjustifiably. The actions of Christian Horizons were tainted by discrimination and caused Ms. Heintz to be victimized at a time when she was particularly vulnerable.

[261] The Commission called evidence about the stress and emotional distress suffered by Ms. Heintz. Ms. Heintz testified that she felt completely emotionally drained after the investigation and inquiry process. She felt that the staff and management were ganging up on her, and she felt completely alone. She felt hurt that the organization that she had worked for, and was so dedicated to, had abandoned her.

[262] Her physician, Dr. Bedrosian, testified she saw Ms. Heintz on a number of occasions before and after Ms. Heintz resigned. She diagnosed Ms. Heintz with a depressed mood, anxiousness, difficulty sleeping, and poor concentration. She identified Ms. Heintz's symptoms, including shoulder pain, as arising from situational stress at work. She recommended a month's medical leave in late August.

[263] As noted earlier, Christian Horizons elicited evidence, through Ms. Heintz and other Waterloo 6 employees, that a number of issues were causing stress among all members of the Waterloo 6 staff in the spring and summer of 2000. While I have taken this into account in the assessment of damages, the fact remains the feelings of vulnerability, isolation, self doubt, loss of dignity and emotional exhaustion experienced by Ms. Heintz were tied to her experience as a gay person in an environment that was anti-gay, and, as a result of an investigation process, which was tainted and targeted against her. In all the circumstances I find that a substantial award for general damages is appropriate.

[264] I find the facts outlined above also support the award of damages for the wilful or reckless infliction of mental anguish. The conduct of the investigation, and the

discipline show both wilful and reckless behaviour. Mr. Alemu's reliance on past performance appraisals to undermine Ms. Heintz, when recent appraisals showed above average performance, was both wilful and reckless. The evidence confirms the devastating effect this behaviour had on Ms. Heinz. The failure to provide any sensitivity or human rights awareness training or to respond to what was clearly a poisoned work environment for Ms. Heintz constitutes reckless conduct.

Special Damages

[265] Where a violation of the *Code* has been found, a complainant is entitled to be compensated for monetary losses suffered as a result of the breach. Complainants have a duty to mitigate their losses, but the onus of proving that a complainant has failed to take reasonable steps to mitigate lies on the respondent. When assessing wage loss, the principle of "reasonable notice" used in wrongful dismissal actions does not apply, though where reinstatement is not requested or ordered, Tribunals must assess what is reasonable in the circumstances. The Tribunal must determine what the complainant would have earned if the discrimination had not occurred. (*Smith v. Ontario Human Rights Commission*, [2005] O.J. No. 377, para. 28; *Gohm, supra*, paras. 127-131)

[266] Ms. Heintz resigned from employment on September 23, 2000. The evidence established that Mr. Alemu told Ms. Girling that Ms. Heintz would have until September to effect changes, and he admitted under cross-examination that if Ms. Heintz had not resigned, and remained in non-compliance with the Lifestyle and Morality Statement, Christian Horizons would have terminated her employment.

[267] The Commission and Ms. Heintz seek lost wages for the period commencing September 23, 2000 to July 2002 when Ms. Heintz obtained full time work. During the period after she left Christian Horizons, Ms. Heintz did obtain work for a short period of time. She participated in training and placement programs and also attended a full-time information technology college program between July 2001 and July 12, 2002.

[268] Ms. Heintz testified about her extensive job search after she left Christian Horizons. As a result of the extreme emotional anxiety she suffered as a result of her treatment by Christian Horizons she concluded she was unable to continue working in her chosen field. She made committed efforts to find work in other fields. Ultimately, she decided to retrain and went back to school to learn a new career. I have no reason to doubt Ms. Heintz's evidence and find, in these particular circumstances, her efforts to mitigate her losses were both diligent and conscientious.

[269] As a result, I order Christian Horizons to pay to Ms. Heintz all wages and benefits she would have received in the period commencing September 23, 2000 and ending July 12, 2002, less any monies she earned elsewhere.

Pre and Post-Judgement Interest

[270] Pre-judgment interest on the general damage awards is payable from September 23, 2000 to the date of this decision and shall be calculated in accordance with section 128 of the *Courts of Justice Act*.

[271] The appropriate date for the commencement of pre-judgement interest on the special damage award is the mid-point between September 23, 2000 and July 12, 2002 when she commenced full-time employment. That mid-point date is August 2, 2001. Interest on the special damages award runs from that date to the date of this decision.

[272] Post-judgment interest on the awards is payable pursuant to s. 129 of the *Courts of Justice Act*.

Public Interest Remedies

[273] The Commission requested the following public interest remedies:

- a. An order that Christian Horizons cease and desist from using their current pre-employment contract at Waterloo 2 and 6,

including adherence to a statement of personal lifestyle and morality statement standards.

b. An order that any future morality statement in a pre-employment contract at Waterloo 2 and 6 cannot refer to sexual orientation, marital status, same-sex partner status or family status.

c. An order that Christian Horizons cannot subject existing or future employees to counselling because they are in a non-traditional marriage, or private living arrangement, or because of their sexual orientation.

d. An order that Christian Horizons cannot subject existing or future employees to a contract that governs conduct in their personal lives in a manner that would conflict with the employer's obligations under the *Human Rights Code*.

e. An order requiring Christian Horizons to report to the Ministry of Community and Social Services and the Ontario Human Rights Commission within four months of the date of your decision as to what steps they have taken to ensure that all contracts for all positions of employment at Christian Horizons are in conformity with the *Code*. This report will include a detailed review of the qualifications and requirements for all positions of employment to ensure that they are bona fide and reasonable. A job requirement will not be bona fide and reasonable unless it cannot be accommodated short of undue hardship. The report will also identify those jobs which Christian Horizons regards as ones in which the requirement that the employee be Evangelical and not engage in gay relationships is a reasonable and bona fide qualification and cannot be accommodated short of undue hardship.

f. Finally, the Commission requests that the Tribunal remain seized of this matter to deal with any future issues arising from its order e.g. if the Commission disagrees with Christian Horizons that a particular job requires that an employee be Evangelical and not engage in gay relationships and cannot be accommodated short of undue hardship.

[274] I have difficulty with several of the requests made by the Commission either because they are overly broad and do not flow from the circumstances, or they are inconsistent with the terms of the *Code* itself. For example, the Commission requests that I declare that the Lifestyle and Morality Statement does not apply at Waterloo 2 and 6. In respect of the other residences, the Commission requests that Christian Horizons

take steps to justify why gays and lesbians should be excluded from holding particular positions. The Commission argued, and I have found, that Christian Horizons does not meet the terms of the section 24(1)(a) exemption. Having so found, there is no authority to permit Christian Horizons to continue to apply the discriminatory policy at certain residences even if it can establish a reasonable and bona fide requirement for particular jobs.

[275] Also, the request that I order Christian Horizons not to impose terms and conditions of employment that govern conduct in employees' personal lives is overly broad and would cover conduct not protected by the *Code*. Further, the Commission asks that Christian Horizons undertake a review of its job requirements and report to the Ministry of Community and Social Services. The Ministry was not a party in these proceedings. It made no representations and took no positions on any issue in this case. There was no request by the Ministry for any order arising from these proceedings.

[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 future violations. But for remedies to be truly effective in achieving the goals of human rights legislation, they must make sense in the circumstances. Remedies that simply make grand statements or impose requirements that cannot be achieved will not eradicate discrimination and remove barriers to equal access. This is not to say that only remedies that are easily achieved at little or no cost to a respondent are appropriate. To the contrary, where a remedy will be effective in achieving equality and the protection of human rights, human rights tribunals should not hesitate to make orders that require significant policy or operational changes, the adoption of particular programs, or measures that carry a heavy price tag. The object of the remedial order is to remove discrimination in a real, meaningful, effective and timely way.

Remedy in Relation to the Poisoned Work Environment

[277] Christian Horizons must adopt policies that will enable it to ensure that its beliefs do not result in a poisoned the workplace for gays and lesbians and, where conflicts or tensions do arise, they are dealt with in a way that is consistent with the *Code*. This should include the adoption of an anti-discrimination and anti-harassment policy. The policy should provide clear statements about employees' rights to be free from discrimination and harassment based on all of the grounds in the *Code*. It should also provide for a complaint mechanism for employees who believe they have been subjected to discrimination, along with an investigation procedure. I accept that, as a religious organization, Christian Horizons will want to develop such a policy that incorporates its beliefs. This is legitimate. But Christian Horizons is also an employer to which the *Code* applies. Therefore, it will need to balance its interests as a religious organization with its obligations under the *Code*. Where there is a conflict, the *Code* must prevail.

[278] Christian Horizons should also institute a training program for all employees and management, as well as for the Board of Directors. The training program should address human rights issues, the requirements of the *Code*, and the policy referred to above. Again, it is legitimate for Christian Horizons to seek to have its religious identity recognized in this process, but the content of the training must be consistent with the *Code*.

Remedy in Respect of the Discriminatory Qualification

[279] This aspect of the remedial order is particularly difficult and complex. Christian Horizons is a large organization with over 2500 employees, 180 residences, as well as corporate offices. The evidence establishes that the residences vary widely in terms of the nature of services provided to residents. Also, some families and individuals served by Christian Horizons do seek a Christian home environment and spiritual support.

[280] Christian Horizons has operated within the framework of its religious faith beliefs, its Doctrinal Statement, and some version of a Lifestyle and Morality Statement

for over 40 years. It has grown from a small private organization running a summer camping program, to being the largest community living service provider in the province, always within this framework. The organizational structure, its employment policies and its service delivery are all based on its self-identity as an Evangelical Christian ministry.

[281] In addition, as I have found in my reasons above, the Ontario *Code*, unlike the B.C. *Code*, does not have a general reasonable and bona fide defence. I make no comment on whether Christian Horizons would meet such a defence if the statute were written differently. But the *Code* provides only limited exemptions to specified employers seeking to impose job qualifications that are discriminatory or have a discriminatory effect. So, on the basis of the language of the Ontario *Code* and the facts present in this case, Christian Horizons cannot impose its Lifestyle and Morality Statement on any employee. Indeed, as Professor Mendes observed in *Parks*, without the exemption provided under section 24(1)(a), Christian Horizons cannot require even its senior management to be adherents to its faith beliefs.

[282] I find that there needs to be a period of time for Christian Horizons to consider this award, and make some decisions about how it will structure its affairs in a way that will allow it to achieve its mission and at the same time comply with the *Human Rights Code*. It is neither fair nor in the public interest, given the particular circumstances, to order Christian Horizons to immediately rescind all religiously based job qualifications, from all job classifications within the organization. That would not achieve compliance with the *Code* in a way that balances and respects the rights of the members of the organization who hold deep, sincere religious beliefs. Also, because it might cause disarray within the organization, it could seriously risk the care and support to the residents.

[283] Christian Horizons is not entitled to continue its practice of requiring that all employees agree to the Lifestyle and Morality Statement, as it is currently drafted, as a condition of employment. However I believe that it is appropriate to delay any order that it cease and desist from this practice. Christian Horizons must undertake a complete review of its employment policies to ensure that they are consistent with the *Code*. This

review may include a broader consideration of other changes: corporate, organizational and operational, which might provide a better opportunity for it to meet its mission, incorporate the religious beliefs of its members, and comply with the *Human Rights Code*. In the circumstances, and with the evidence before me, I am not in a position to redesign Christian Horizons' operations in a way that the various rights and interests present are appropriately balanced. However, Christian Horizons must bring its employment policies into line with the *Code*. If it does not, the Tribunal will make an order to ensure compliance.

[284] I order that the declaration that Christian Horizons cease and desist from imposing the Lifestyle and Morality Statement as a condition of employment is stayed for a period of 8 months, or for such longer period as the Tribunal may direct. In the meantime, within 30 days of the date of this decision, Christian Horizons must commence a review of its employment policies, in consultation with the Commission, to ensure that such policies comply with the *Code*. Christian Horizons may engage external consultants or other advisory assistance as it determines useful. The Tribunal will also offer the assistance of a mediator if the parties so wish.

[285] No later than six months from the date of this decision, Christian Horizons shall submit a report to the Tribunal outlining the steps it proposes to take, along with a time frame for implementation, to ensure that its employment policies are in compliance with the *Code*. At least 30 days prior to the submission, Christian Horizons shall provide its proposal to the Commission and Ms. Heintz, and the Commission and Ms. Heintz shall be entitled to make submissions to the Tribunal on the proposal. Any agreement reached between the parties should be identified in a joint submission. Following receipt of the proposal and submissions, the Tribunal will provide directions for a process to finalize the award in this case.

ORDER

[286] Having found the respondent Christian Horizons violated section 5(1) and section 9 of the *Human Rights Code* and that section 24(1)(a) of the *Code* does not apply to the respondent, the Tribunal makes the following orders:

1. the respondent, Christian Horizons, shall pay the complainant, Connie Heintz, the following amounts:
 - (a) general damages in the amount of \$8000 for for the application of the discriminatory employment policy;
 - (b) general damages in the amount of \$10,000 for the poisoned work environment;
 - (c) damages in the amount of \$5000 for the wilful and reckless infliction of mental anguish arising from the poisoned work environment;
 - (d) pre-judgement interest on the amounts in paragraphs (a), (b) and (c) payable from September 23, 2000 to the date of this decision in accordance with the *Courts of Justice Act*;
 - (e) special damages amounting to all wages and benefits the complainant would have received between September 23, 2000 and July 12, 2002 less any monies earned elsewhere during that period, plus pre-judgement interest on those amounts commencing August 2, 2001 payable in accordance with the *Courts of Justice Act*;
 - (f) post-judgement interest payable in accordance with the *Courts of Justice Act*.
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.

[287] Following receipt of the proposal and submissions, the Tribunal will provide directions for a process to finalize the award in this case. I remain seized.

[288] In respect of all other matters I remain seized for a period of 12 months from the date of this decision to deal with issues or disputes related to the application of this award.

Dated at Toronto, this 15th day of April, 2008.

"Signed by"

Michael Gottheil
Chair

ADDENDUM TO FINAL DECISION

[1] This Addendum provides brief reasons for an interim “bottom line” decision issued November 3, 2005, on a motion brought by Christian Horizons. The request was for a preliminary order that the Commission be prevented from challenging that Christian Horizons is a “religious organization”, and is “primarily engaged in serving the interests of persons identified by their creed” within the meaning of section 24(1)(a) of the *Code*. Christian Horizons argued that it was entitled to an order either by operation of the doctrine of issue estoppel, or because of an abuse of process. It relied on the decision of the Board of Inquiry in *Parks, supra*.

[2] I denied the motion on two bases. First, the test for issue estoppel is not met in this case. Second, the application of issue estoppel and the granting of relief for an abuse of process is discretionary. The purpose of both doctrines is to ensure fairness and prevent injustice. In the circumstances, fairness and justice do not support the respondent’s request.

[3] In *Parks*, the Board was dealing with two complaints by former Christian Horizons employees who were terminated because they were in common-law relationships. Christian Horizons relied on section 23(1)(a), now 24(1)(a), to justify its policy that all employees must strictly adhere to its faith beliefs, which included a prohibition on common-law relationships. The Board, in analyzing the elements in section 23(1)(a), determined that Christian Horizons was a “religious organization” and was (in part) primarily engaged in serving the interests of persons identified by their creed. The Board found that Christian Horizons failed to establish that the qualification was reasonable and bona fide given the nature of the employment. As a result, the Board determined that Christian Horizons had failed to meet the terms of Section 24(1)(a), and the complaints were sustained.

The Test for Issue Estoppel

[4] The preconditions for the operation of issue estoppel are the following:

1. that the same question has been decided in earlier proceedings;
2. that the earlier judicial decision was final; and
3. that the parties to that decision or their privies are the same in both the proceedings.

[5] If the party claiming the estoppel is able to establish these three elements, it is still in the discretion of a Court or Tribunal whether to apply the doctrine in light of the circumstances. (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, para. 25)

[6] In my view, Christian Horizons fails in its estoppel claim because the third element of the test is not met. Ms. Heintz, the complainant in the present case was not a party in the *Parks* case. Christian Horizons argues that the Commission was a party in *Parks*, and under the *Code*, the Commission has carriage of a complaint before the Tribunal. It argues that it would be manifestly unfair for the Commission to use the fact of a subsequent complaint to relitigate an issue that was finally determined in a previous complaint.

[7] A complainant is a separate legal party before the Tribunal. She has an independent right to participate, and to take positions that may be different than the Commission. (See *McKenzie Forest Products Inc. v. Tilberg (No. 1)* (1998), 33 C.H.R.R. D/258, restored on appeal in *McKenzie Forest Products Inc. v. Ontario (Human Rights Commission)* (2000), 48 O.R. (3d) 150 (O.C.A.) “*Tilberg*”). There is no support for the respondent’s position that unless or until the Commission decides to withdraw from a proceeding before the Tribunal, there is an identity or “privity” as between the Commission and the complainant. The case before me involves the complaint of Ms. Heintz. Ms. Heintz was not a party in the *Parks* case, and as a result the third element of the test is not met.

[8] I would also note that in *Parks*, the Board of Inquiry found that Christian Horizons did not establish it fell within the scope of the special employment provisions. Christian

Horizons appealed that decision, and the Court denied the appeal. It is questionable whether these circumstances even support a claim that the first two elements of the issue estoppel test have been met. It is not clear that it is appropriate to parse certain findings from a decision which ultimately rejected a party's claim that it was covered by a statutory provision such as 24(1)(a).

Exercise of Discretion

[9] There is significant value in consistency and in finality of Tribunal decisions. Parties should not generally be put to the time and expense of relitigating issues that have been finally determined. Particularly with decisions of tribunals like the Human Rights Tribunal, which have an important educational purpose, the community should have confidence that legislative interpretations and policy approaches are followed with consistency, unless there is good reason to depart from previous decisions. As the Court in *Danyluk*, *supra*, said:

The law rightly seeks a finality to litigation (....) An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. (paras. 18-19)

[10] On the last point, the Court emphasized that, since the purpose of estoppel is to promote fairness, a decision maker must ensure that its application does not instead lead to an injustice. Quoting Finch J.A. in *Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1, the Court in *Danyluk* said: "It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case." (para. 63).

[11] The same considerations apply when determining a claim for abuse of process.

[12] In the present case there are a number of reasons which militate against my exercising the discretion to apply issue estoppel or finding an abuse of process:

- The length of time between the *Parks* decision and Ms. Heintz's complaint. This is relevant because of the potential impact the growth of the organization might have on the legal questions to be determined. Also, there have been significant developments in the jurisprudence since *Parks* both in relation to the rights of gays and lesbians, and on freedom of religion.
- The balance of fairness favours the full hearing of all the issues. This is a complaint filed by Ms. Heintz alleging that her fundamental human rights have been breached. The *Parks* case dealt with complaints of two other individuals. This is not a case where the granting of the request would significantly reduce the time or expense of the litigation.
- The complaint raises important legal issues, and the interpretation and application of a "quasi-constitutional" public policy statute. Without deciding whether, as a matter of law, estoppel can operate against the Commission in the context of a complaint brought under the *Code*, I do not believe that it is appropriate to apply the doctrine here.
- I had serious doubts about the correctness of the *Parks* decision.

[13] The above factors are not listed in order of importance, and none are necessarily determinative. Taken together however, they lead me to find that, even if the three elements of estoppel were present and there was an abuse of process, this is not an appropriate case to grant the request.