

What are Competing Rights?

According to the Ontario Human Rights Commission (2012), competing human rights involve situations where parties to a dispute claim that the enjoyment of an individual or group's human rights and freedoms, as protected by law, would interfere with another's rights and freedoms. This complicates the normal approach to resolving a human rights dispute where only one side claims a human rights violation. In some cases, only one party is making a human rights claim, but the claim conflicts with the legal entitlements of another party or parties.

Defining terms

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

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

Canada recognizes the unique status of human rights in its *Charter of Rights and Freedoms*, a comprehensive list of rights and fundamental freedoms entrenched in the Constitution of Canada that is intended to unify Canadians around a set of principles that embody those rights. In Ontario, the provincial legislature included a primacy clause in the Ontario *Human Rights Code*, giving it the ability to trump other provincial legislation. Courts have also commented on the "quasi-constitutional" status of human rights legislation and stated the importance of interpreting the guaranteed rights in a broad and purposive manner that best ensures that society's anti-discrimination goals are reached.

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

Human rights

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

- the Canadian *Charter of Rights and Freedoms*
- provincial-territorial human rights legislation
- decisions of tribunals and courts

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- human rights commission policy statements, interventions and other mandated functions
- international law/instruments (ratified treaties, treaty body comments/decisions, international and other jurisdictional court decisions).

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

Legal Entitlements

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

Interests

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

Values

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

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Court concluded that the Board of Inquiry was correct in concluding that his continued employment as a teacher constituted discrimination in public education.[\[12\]](#)

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

Examples of competing rights situations

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

4.2.1 *Code right v. Code right*

The Ontario *Human Rights Code* prohibits discrimination based on 17 grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability, receipt of public assistance (in housing only), record of offences (in employment only). Competing rights claims may potentially arise relating to any *Code* ground. However, situations of conflict often involve creed, sex, gender identity, sexual orientation, marital status, disability, gender identity and gender expression.

Example: A civil marriage commissioner objects to performing a marriage ceremony for a same-sex couple, claiming that it violates his religious beliefs. He claims that under the *Code*, he has the right to be free from discrimination based on religion in employment. The couple wishing to receive the service claims that their right under the *Code* to be free from discrimination because of sexual orientation in services is being breached.[\[13\]](#)

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

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

4.2.2 *Code right v. Code legal defence*

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

Example: A religious organization, providing supportive group living to persons with disabilities of any denomination, requires staff to abide by a religious code of behaviour. The

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organization dismisses a support worker once it learns she is in a same-sex relationship. The dismissed worker might claim *Code*-based discrimination on the ground of sexual orientation while the religious organization might claim a *Code* defence under section 24(1)(a) that allows restrictions on terms of employment for religious and other types of organizations in certain circumstances.[\[15\]](#)

4.2.3 *Code* right v. other legislated right

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

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

4.2.4 *Code* right v. *Charter* right

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

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

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

4.2.5 *Code* right v. common law right

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

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

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4.2.6 International treaty right v. Code/Charter defence

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

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

4.2.7 Charter right v. Charter right

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

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

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

[10] Section 1 of the *Charter* states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*.

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

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

[13] The Saskatchewan Court of Appeal recently considered whether civil marriage commissioners

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should have the right to refuse to perform same-sex marriage ceremonies based on their religious beliefs: *Marriage Commissioners Appointed Under the Marriage Act (Re)*, 2011, SKCA 3 (CanLII). In

two separate decisions, all five judges of the Court found that proposed amendments to Saskatchewan's

The Marriage Act, 1995, which would have allowed individual marriage commissioners to refuse to conduct a marriage ceremony if doing so would be contrary to their religious beliefs, violated the equality rights provision (s. 15) of the *Charter*. Consistent with the general approach to reconciling competing rights under the *Charter*, both decisions then balanced the right to be free from discrimination based on sexual orientation against the religious rights of the marriage commissioners under s. 1 of the *Charter*

and concluded, for slightly different reasons, that the equality rights infringement could not be justified despite the goal of addressing the religious objections of the marriage commissioners. See also *Nichols v. M.J.*, 2009 SKQB 299 (CanLII).

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

[15] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII) dealt with

the ability of a religious organization that operates residential homes and camps for persons with developmental disabilities to rely on the special employment defence in section 24(1)(a) of the *Code* in defence of a claim of discrimination because of sexual orientation. Connie Heintz, a support worker

in a community living residence operated by Christian Horizons, had signed a Lifestyle and Morality Statement required by Christian Horizons. The statement identified, among other things, “homosexual relationships” as inappropriate behaviour rejected by Christian Horizons. Several years after beginning her employment, Ms Heintz came to an understanding of her sexual orientation and entered into a same-sex relationship. When this became known to the employer, she was offered counselling to assist her to comply with the Lifestyle and Morality Statement prohibiting “homosexuality.” Ms Heintz alleged that after that, she was unfairly disciplined for her attitude and performance and exposed to a poisoned work environment. For Christian Horizons to rely on this defence it had to show: (1) that it is a “religious organization;” (2) it is “primarily engaged in serving the interests of persons identified by” their creed and employs only people who are similarly identified; and (3) religious adherence is a reasonable and *bona fide* qualification because of the nature of the employment. On appeal, the Divisional Court found that Christian Horizons failed to meet the third element of the s. 24(1)(a) defence and discrimination was found.

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

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

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[18] Consideration of Reports Submitted by States Parties. Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee*, Canada, CPR/C/CAN/CO/5, 20 April 2006, at para.21: The Committee expressed concern about the State party's responses relating to the Committee's Views in the case *Waldman v. Canada* (Communication No. 694/1996, Views adopted on 3 November 1999), requesting that an effective remedy be granted to the author eliminating discrimination on the basis of religion in the distribution of subsidies to schools (arts. 2, 18 and 26). The State party should adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario.

Note, however, that in *Adler v. Ontario*, [1996] 3 S.C.R. 609, the [Supreme Court of Canada](#) considered the constitutional obligation to fund private denominational education and found that the *Ontario Schools Act* did not violate [sections 2\(a\)](#) or [15\(1\)](#) of the [Canadian Charter of Rights and Freedoms](#).

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