

To: Professor Benjamin Berger & Professor Lori Beaman

From: Stephanie Voudouris

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Subject: Memo re *Religion and Diversity Project: Methodology, Themes & Trends*

Methodology

Purpose of the Project:

My contribution to the *Religion and Diversity Project* involved reading cases from the Ontario Human Rights Tribunal to try and determine how parties interacted with each other prior to bringing an application before a formal adjudicative body (the Tribunal). The research was meant to determine whether and how parties to a dispute tried to engage with each other to resolve religious differences, and when the relationship broke down, why the parties sought the help of the Tribunal to resolve their differences. As such, the focus was not on analyzing the law as applied by the Tribunal, but was instead on finding the human story—peeling back the law and facts as presented by the Tribunal to try and determine what really happened between the parties. For each dispute, I used the Tribunal’s decision to infer and extrapolate information about the interactions between the parties involved in the dispute to understand each of their perspectives regarding religious differences.

What is a Fact Sheet?

A “Fact Sheet” is a term for a form that was created by myself and Professor Berger which was used to organize the information in a given case. We wanted to organize the information, and provide an easily accessible form, to understand the following: what happened between the parties, why the relationship broke down, when the relationship broke down, whether any of the parties made any accommodations and if so what they were and why they weren’t enough, whether there was any power imbalance between the parties, why the parties chose to access the Tribunal, and whether the law mattered before the parties attempted to access the Tribunal. The sample Fact Sheet is organized into a series of “boxes” with different headings. The ‘Researcher’s Narrative’ included at the end of each Fact Sheet explains my own insights about the particularities of a given case and is meant to provide an opportunity to conduct a more in-depth analysis while ensuring that the information provided within the boxes remains concise.

Methodology Used to Find Cases:

I located cases using the CanLii.org database. Upon entering the CanLii website, there is a panel on the left side. Click on “Ontario” to open a new page which lists various adjudicative bodies within Ontario. Click on “Human Rights Tribunal” to open a new page with a search box at the top. In the line under “full text”, input the following search string: “religion” OR “creed”.¹

The search generator seems to list cases in order of relevance (i.e. how many times “religion” and/or “creed” appear within the decision). I was able to read all of the cases up to page 5 of the cases generated. However, new cases may have been included in the search string after the date of my last search (March 04/2013)—and if they use “creed” and “religion” often enough, they may appear in pages 1-4 of the generated search. I

¹ The Tribunal uses “creed” and “religion” interchangeably. Notably, the Ontario Human Rights Commission is undergoing a restructuring of their current policy on creed and this may affect the way “creed” versus “religion” is interpreted in future Tribunal decisions.

would recommend that if another search is conducted, the researcher should start from page 1 of the search generated by Canlii and cross-reference with the index I've provided to ensure that no new cases have come up. I would also recommend doing this once a month or so to ensure that no potentially fruitful cases are missed.

For each case that was generated by the search, I also completed an additional search. I would remove the search string "religion" OR "creed" from the "full text" box and would search only the case name (without the citation). I did this to see whether any other related cases came up (i.e., interim or reconsideration decisions). For the most part, if related cases did come up, they involved procedural issues. If the main decision yielded enough information to produce a Fact Sheet, I included any related cases in the box entitled "Procedural History/Reconsideration/Related Decisions" with a very brief summary of the issues. If a decision did not have enough information to produce a Fact Sheet, I would index the case and include any related cases. I would use information from all of the decisions related to a particular case to create a summary of the facts in the index.

One more important item to highlight is that older Tribunal decisions use the word "Complainant" whereas newer decisions use the word "Applicant". I chose to use the word Applicant for all of the cases I read, in keeping with the Tribunal's current description of the party bringing an application. Furthermore, throughout this memo I use the terms "applicant" and "respondent" even when referring to the parties involved in pre-Tribunal negotiations. The term "applicant" refers to the party who has experienced the discrimination and the term "respondent" refers to the party who has discriminated.

Methodology Used to Determine Whether Cases Should be Used to Create a Fact Sheet:

Not all cases provided enough relevant information to create a Fact Sheet. If I felt that a given case provided some insight into the overall picture of how parties negotiate religious differences, I included it. It is important to note that not all cases which resulted in a Fact Sheet were final decisions—some were interim decisions and some were reconsideration decisions. If a particular case had several related decisions, I created a Fact Sheet for the decision that yielded the most relevant information about religion/creed and included any related cases in the box entitled "Procedural History/Reconsideration/Related Decisions" (as mentioned above).

Methodology Used to Format Index

The cases are not organized in any particular order. I simply put them into the index as I read them. For each case, any related decisions are listed in reverse chronological order. If a particular decision yielded a Fact Sheet, any related decisions are included both in the index and in the Fact Sheet. For the most part, where a decision did not have enough information to produce a Fact Sheet, this was because the Tribunal's focus was largely procedural. This is also the reason for including the line "insufficient information regarding pre-Tribunal interactions" in the index.

Themes, Trends, & Crucial Cases

In this section I will provide an overview of some of the main themes I encountered in the cases. To avoid re-writing parts of the "Researcher's Narrative" I have briefly summarized each theme and indicated the main cases in which I discuss the theme at length.

Defining "Religion" and Defining "Creed"

In many of the cases, the dispute centered around whether a particular belief system could properly be classified as "religious". Although the Tribunal uses "creed" and "religion" interchangeably, there is a sense that the Tribunal understands and applies these terms differently. Religion is understood to mean a belief

system that involves communication with a deity and is ascribed to by a community of believers, whereas creed encompasses a broader set of beliefs that do not necessarily involve connection with the divine. Notwithstanding the Tribunal's policy that creed and religion as abstract concepts are interchangeable, the Tribunal's discussion in some of the cases seems to reflect the idea that belief systems which can be characterized as religious—because they involve a relationship with a deity—are more deserving of protection under the *Human Rights Code* ("Code") than belief systems which do not involve such a relationship (and are categorized as a creed).

Sometimes applicants try to fit their beliefs within the creed category when their belief system does not have the "typical" markers of a religion (i.e., texts, prayer, sacrament, connection to the divine). Where the belief at issue is not part of a major world religion (i.e., Christianity, Islam, Judaism, Buddhism etc.), or does not bear any of the typical markers of religious belief, the respondent is less likely to perceive its actions as discriminatory because it does not understand the applicant's belief to be significant enough to warrant protection under the *Code* either as religion or creed. Importantly, the Tribunal rarely engages in an extensive analysis of whether such a belief constitutes religion or creed and instead decides these kinds of cases on procedural grounds. Furthermore, even where an applicant belongs to a major world religion, if the belief at issue is not a "core" belief or is not "obligatory", the respondent is less likely to accommodate it. In this way, successful interactions (ones that are resolved without the help of the Tribunal, or ones where the Tribunal finds in favor of the applicant) may be those where the applicant is a member of a major world religion *and* where the particular belief at issue is central to the faith or where the particular practice is obligatory. Importantly, it is the respondent's perception of the obligatory nature of the belief or practice that is significant within the dispute—if the respondent believes that the belief or practice is a matter of personal choice, the respondent may be less likely to discuss the impact of any curtailment of such belief/practice with the applicant even if, from the applicant's perspective, the belief or practice is obligatory.

For example see:

- *Dunn v Edgewater Manor Restaurant* 2011 HRTO 1795
- *Bauer v Toronto (City)* 2011 HRTO 1628
- *Sauve v Ontario (Training, Colleges and Universities)* 2009 HRTO 1415
- *Forde v Avon Maitland School Board* 2011 HRTO 1075
- *Ketenci v Ryerson University*, 2012 HRTO 994
- *MacDonald v Anishnawbe Health Toronto* 2010 HRTO 329
- *R.C. v. District School Board of Niagara* 2012 HRTO 1591
- *Ross v Simcoe County District School Board*, 2012 HRTO 1960
- *Sauve v Ontario (Training, Colleges, and Universities)* 2009 HRTO 1415
- *TA v Grace MacInnis Cooperative Inc.* 2012 HRTO 1123
- *Tesseris v Greek Orthodox Church of Canada* 2011 HRTO 775
- *Theverajah v International Society for Krishna Consciousness Toronto*, 2012 HRTO 1772
- *Henry v Mrs. Beasley's Bake Shop*, 2004 HRTO 07
- *Lomba v Home Depot Canada* 2010 HRTO 1434
- *Muhammad Qureshi v G4S Security Services* 2009 HRTO 409

Some of the cases also involved members of the same faith disputing the interpretation of a particular practice. In these cases, the applicants felt discriminated against because their understanding of religious principles or texts were not shared by authorities in a given religious community. As mentioned in "Researcher's Narrative" in the Fact Sheet prepared for *Heintz v Christian Horizons* 2008 HRTO 22, cases like this may require us to question the way we conceptualize the "resolution" of religious differences between parties. Where both the applicant and the respondent abide by different interpretations of religious principles and practices, it may not be realistic to expect that one party will come around to the

interpretation of the other, especially when such interpretations form core parts of the individual's sense of self and relationship to the divine. In this way, perhaps disputes such as this can never truly be resolved because it would require one party to let go of their deeply held beliefs about what is required of them as religious individuals. These kinds of disputes can also involve clashes of different identity characteristics—for example, whether an individual can be both gay and Christian, or both Aboriginal and Catholic. The applicants in these disputes believe that different components of their identity do not preclude them from being religious whereas the respondents usually hold the opposite view.

For example, see:

- *Tesseris v Greek Orthodox Church of Canada* 2011 HRTO 775
- *Eldary v Songbirds Montessori School Inc.* 2011 HRTO 1026
- *Heintz v Christian Horizons* 2008 HRTO 22
- *Lloyd v Wellington Catholic School Board*, 2011 HRTO 1922 *Theverajah v International Society for Krishna Consciousness Toronto*, 2012 HRTO 1772
- *Davis v Searles* 2011 HRTO 1915
- *Hoekstra v First Hamilton Christian Reformed Church*, 2010 HRTO 245

“Reasonableness” as a Measure of Behavior

In many of the cases, the Tribunal assesses an applicant's perception of discrimination against a standard of reasonableness. “Reasonableness” is a common paradigm used to judge behavior and also factors into pre-Tribunal interactions whereby the parties assess each other according to a standard of reasonableness. For example, in some of the cases, the respondents believe that the applicant is unreasonable in asserting a claim of discrimination because the comments were meant to be taken as a “joke”. Importantly, the standard of reasonableness is subjective and depends on the perspective of the particular individual. If the respondent does not understand that her concept of reasonableness is informed by her own subjective perspective, she may be less willing to try and understand the situation from the perspective of the applicant. The ability to shift perspectives is crucial to successful dispute resolution, and the reluctance to do so can explain why many of the disputes were not resolved and prompted the applicants to reach out to the Tribunal.

The difficulty of perspective-shifting may be exacerbated in disputes involving religious differences. As mentioned above, an individual's religious beliefs inform the individual's sense of self and the normative order within which he views the world. Where the dispute occurs between two individuals who have a different understanding of each other's belief-systems, perspective-shifting might require each party to accept that their own beliefs are not necessarily truth-claims; and this may be too insurmountable a task such that it becomes an obstacle to successful dispute resolution.

For example, see:

- *Awan v Loblaws Companies* 2009 HRTO 1046
- *Dunn v Edgewater Manor Restaurant* 2011 HRTO 1795
- *Gilbert v 2093132 Ontario* 2011 HRTO 672
- *Yousufi v Toronto Police Services Board* 2009 HRTO 351

Diversity as a Defense to Discrimination

In some of the cases, the Tribunal relies on the presence of diversity in the respondent's workforce (where the respondent is an employer) or relies on the race of the respondent (where it is the same as the applicant's) to suggest that discrimination is not possible or highly unlikely. To the extent that the Tribunal's views about diversity as a defense mirror the views held by parties to the dispute, respondents may be unlikely to accommodate or engage in genuine negotiations with applicants on the basis that they believe that because of the presence of diversity, discrimination is not possible.

For example, see:

- *Francisco v Carlu Corporation* 2012 HRTO 1996
- *Saleem v Naseerudin*, 2009 HRTO 1652
- *Berisa v Toronto (City)* 2011 HRTO 912
- *Kalam v Brick Warehouse*, 2011 HRTO 1037
- *Mason v Peel Heating Service Experts*, 2012 HRTO 1865

“Freedom to” Versus “Freedom From”:

In some of the disputes, resolution seems improbable because the parties want fundamentally different things. The applicant does not want to discuss his religious beliefs or have the respondent proselytize while the respondent wants to be able to express her religious beliefs. For example, if the applicant and respondent have a dispute, and the respondent quotes a biblical passage as a metaphor for how she thinks the dispute should be best resolved, the applicant may experience this as discriminatory if he senses that the respondent believes he is less worthy of respect because he is either not religious or not religious in the same way as the respondent. The respondent may not be able to stop incorporating religion into her conversations because her religious beliefs may be fundamental to the way she structures her normative order and understands her relationship to others.

For example, see:

- *Huang v 1233065 Ontario Inc (Ottawa Senior Chinese Cultural Association)* 2011 HRTO 825
- *Lapcevic v Pablo Narudo Non-Profit Housing Corporation* 2010 HRTO 927 Ketenci
- *McKenzie v Isla*, 2012 HRTO 1908
- *R.C. v. District School Board of Niagara* 2012 HRTO 1591
- *Streeter v HR Technologies* 2009 HRTO 841

Power Imbalances

This theme permeates the majority of decisions that I’ve read. The concept of a power imbalance refers to the fact that the respondents, typically institutional actors, have greater “power” in the negotiation of religious differences both in pre-Tribunal interactions and within the hearing itself. The power imbalance often results because the respondents have access to information and evidence the applicant needs to prove that discrimination occurred. This notion of proof is important not only at the Tribunal level, but also when the applicant discusses his concerns regarding discriminatory treatment with the respondent.

In some cases, institutional actors also act as mediators between two parties having a dispute. For example, an employer may have to navigate a dispute between two employees and in so doing might open herself up to an accusation of discrimination. To rectify the power imbalance, applicants may turn to find support from the broader community in an effort to persuade the respondent to act. Furthermore, power imbalances can change depending on the perspective used to assess the relationship between the parties (i.e., in a dispute between a Catholic priest and a professor in a secular university, the priest can be viewed as a vulnerable religious minority or as a member of one of the most powerful global religious institutions).

Power imbalances can also manifest themselves as inequality of information. The applicant may want to discuss his concerns about discriminatory treatment but the information to prove that discrimination has occurred may be in the hands of the respondent. If a respondent is able to provide an alternative explanation for why she did something (either to the Tribunal or the particular applicant), it may be difficult for the applicant to assert that discrimination has occurred—again, the applicant does not have access to the true motivation behind a respondent’s actions and as such if the respondent can point to some other explanation for a particular action, the applicant may be unable to successfully prove that the action was discriminatory. I note this in the Fact Sheets, but to be clear, simply because there was an alternative reason for a given action does not mean that the action wasn’t motivated by discriminatory attitudes/beliefs. The point that arises in

many of the cases, however, is that the difficulty of proving discrimination affects the power imbalance that permeates pre-Tribunal interactions: if an applicant does not have the information to show the respondent that discrimination has occurred, the respondent may be less likely to engage in a genuine discussion about the applicant's concerns and work towards a solution. As such, the consequence of inequality of information manifests itself at both the Tribunal level and during pre-Tribunal interactions.

Furthermore, institutional actors are more likely to know and understand their obligations under the *Code*. If an applicant is able to frame the discussion in *Code*-related language, he may be more likely to catalyze a response from the respondent. In many cases, however, applicants are not initially aware of their rights under the *Code* and this may increase any intimidation the applicant feels if the respondent is armed with lawyers and *Code*-related knowledge even in informal discussions between the parties prior to bringing the claim before the Tribunal. On the other hand, if a respondent is not aware that the *Code* governs his behavior, he may be less likely to engage in any kind of genuine discussion about the applicant's concerns. In other words, the *Code* can itself be an incentive in pre-Tribunal negotiations for those who are aware that it exists and want to ensure that they are complying with the grounds set out in the *Code*. It seems, then, that the parties' perception of the formal legal system may influence the style, success, and duration of pre-Tribunal negotiations.

As I've mentioned above, the power imbalance is most readily observed in the employment context. Employees may be reluctant to discuss any claims of discrimination with the employer because they do not want to seem burdensome. This notion of employees as burdens comes up in the context of accommodation discussions. In these discussions, the Tribunal seems to imply that accommodation is symbiotic in that the employee must give the employer enough advance notice (for example) so that the request for accommodation does not unduly affect the employer's business interests. This notion of dual accommodation ignores the power imbalance that already exists in the employer-employee relationship, namely that the employer controls the parameters in which the work takes place. Requiring symbiotic accommodation can significantly affect the success of pre-Tribunal interactions if the employer feels that they have a right to demand that the employee should be sensitive to the employer in order to ensure that the employee's own religious needs are met. The cases demonstrate that accommodation does not necessarily mean that the relationship between the parties is harmonious. It is possible for a respondent to accommodate the applicant (prior to involving the Tribunal) and yet still remain hostile towards the applicant. Where this occurs, the applicant may feel the need to bring a claim before the Tribunal because although formal accommodation has occurred, the applicant still feels excluded or isolated by the respondent's treatment.

The experience of discrimination can also have a silencing effect which precludes any attempt at genuine discussion prior to accessing the Tribunal. Furthermore, to the extent that applicants perceive themselves as "burdens" as a result of their religion (i.e., because they have to ask for extra time off, cannot work certain hours, etc.) they may be reluctant to raise their concerns about ill-treatment with their employers. However, active attempts at negotiation can also be perceived as "instigating" conflict. Although the Tribunal has suggested that applicants should not be blamed for discriminatory conduct on the part of the respondents, at least in one case, the Tribunal decreased the monetary award because the Applicants had gone back into the restaurant to ask why they been kicked out (*Gilbert v 2093132 Ontario* 2011 HRTO 672). One of the reasons it may be difficult for parties to effectively settle religious disputes may be because of the (problematic) sense that the party claiming discrimination brought it on themselves. This kind of "blame the victim" mentality can be a roadblock to pre-tribunal dispute settlement.

For examples of power imbalances see:

- *Huang v 1233065 Ontario Inc (Ottawa Senior Chinese Cultural Association)* 2011 HRTO 825
- *Loomba v Home Depot Canada* 2010 HRTO 1434

- *McKenzie v Isla*, 2012 HRTO 1908
- *Blais v Canadian Union of Public Employees Local 3902* 2011 HRTO 2113
- *Vasu v Toronto Community Housing Corporation* 2010 HRTO 344
- *Ketenci v Ryerson University*, 2012 HRTO 994
- *Yousufi v Toronto Police Services Board* 2009 HRTO 351
- *Noble v York University*, 2010 HRTO 878
- *Badvi v Voyageur Transportation*, 2011 HRTO 1319
- *Henry v Mrs. Beasley's Bake Shop*, 2004 HRTO 07
- *Gilbert v 2093132 Ontario* 2011 HRTO 672
- *Bodis v The Black Cat*, 2012 HRTO 1287
- *Awan v Loblaws Companies* 2009 HRTO 1046
- *Daginawala v SCM Supply Chain Management* 2010 HRTO 205
- *Jacob v Workplace Safety and Insurance Board* 2009 HRTO 1483
- *Baghdasserians v 674469 Ontario* 2008 HRTO 404
- *Heintz v Christian Horizons* 2008 HRTO 22
- *Eldary v Songbirds Montessori School Inc.* 2011 HRTO 1026
- *Moyal v Walmer Flats Property Management* 2010 HRTO 877
- *Francisco v Carlu Corporation* 2012 HRTO 1996
- *Daginawala v SCM Supply Chain Management* 2010 HRTO 205
- *Lapcevic v Pablo Narudo Non-Profit Housing Corporation* 2010 HRTO 927

Conclusion

This project was intriguing because in many ways, the Tribunal both reflects and is shaped by the broader society in which it operates. As such, the Tribunal's approach to resolving religious-based disputes reflects the status quo understanding of what constitutes both religion and discrimination and may not adequately address the uphill battle applicant's face in proving discrimination claims. For example, the burden of proof rests squarely on the applicant's shoulders even though the applicant may not have access to the true motivations behind the respondent's actions in a case where discrimination is not explicit. This is not to say that the Tribunal is acting in bad faith. Indeed, some cases showed the Tribunal's willingness to genuinely understand the position of the applicant and rectify the dispute. Notwithstanding these good intentions, the system is set up to favor respondents in a context where many respondents already sit comfortably in a powerful position vis-à-vis applicants. Going forward, I think that the Tribunal needs to reconsider its conceptualization of "religion" versus "creed" and may need to reassess the evidentiary burdens applicants face when trying to prove their claims. From what I've read, the cases involve applicants who are self-represented and in a vulnerable position vis-à-vis the respondents. It may be beneficial to applicants if discrimination cases involving religion (and perhaps generally) required a reverse onus of proof to rectify the inequality of information which typically exists in favor of the respondent.

In many ways, the disputes that arose were not the result of intractable differences between the parties but instead occurred because one of the parties was not as understanding, sensitive, or appreciative of the lived reality faced by the opposing party. Applicants did not simply want respondents to tolerate their religious beliefs; applicants wanted respondents to understand why those religious beliefs were so important and to respect those beliefs.

To conclude, the Fact Sheets exemplify the complex matrix of factors that influence pre-Tribunal interactions between parties regarding religious differences. From the cases I've read, it seems that religious disputes are difficult to navigate precisely because religious beliefs operate as truth-claims which inform an individual's sense of themselves and their relationship to the world. The majority of the cases suggest that successful

dispute resolutions require parties who are able to appreciate the influence of religion in an individual's life, and respondents who are proactive in ensuring that discrimination does not seep into any of its interactions by fostering a critical self-awareness and appreciation of their own motivations and biases by trying to view the situation from the applicant's perspective. Achieving this may not only require the Tribunal to change its approach to religious diversity (as suggested above) but may also require greater efforts within society to make this kind of perspective-shifting and appreciation (rather than simply tolerance) for difference the starting point for social interactions involving religious diversity.