Reconciling Competing Human Rights in Canada

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Human rights are interrelated, interdependent, and non-hierarchal, yet the enjoyment of these rights can conflict. Provincial and territorial human rights commissions address such cases on an *ad hoc* basis, rendering it difficult for right holders to determine when their rights are legitimately limited by the rights of others or *vice versa*. The Ontario Human Rights Commission (OHRC) is the exception, using a set of key legal principles applied on a case by case basis according to the rights concerned and context.[1] Though these principles add a layer of clarity, they are only expressly employed in Ontario. In order to enhance consistency and transparency, the Government of Canada should adopt a federal policy and national guidelines to clarify legal principles and the process for reconciling competing rights.

When asked, the average Canadian is unable to accurately respond to the question: What are my human rights? Though a seemingly narrow concept, human rights touch each facet of our everyday lives from freedom of expression through to the enjoyment of life, liberty, and security. Few people consider their entitlement to these rights unless they feel those rights have been infringed. There are vast misconceptions about the meaning and scope of human rights, let alone the process for resolving situations where one's human rights conflict with the human rights of another. Misunderstanding these concepts can lead to heated, drawn out interpersonal conflicts. Individuals who believe a particular right of theirs takes precedence over the right of an individual or group of individuals are unlikely to be able

PEACE RESEARCH
The Canadian Journal of Peace and Conflict Studies
Volume 47, Numbers 1-2 (2015): 179-195

to resolve the conflict independently. When this occurs, they may turn to human resource services if the conflict is employment related, provincial human rights, commissions or the courts.

Limited options are available to individuals whose rights come into conflict, because there is no comprehensive federal policy explaining the process of how to reconcile competing rights, hindering resolution at the interpersonal level. Without clear federal guidelines, even the Supreme Court of Canada has grappled with similar questions: Where does one draw the line when Charter rights appear to come into conflict? How does one define where one right begins and one right ends? At what point does one person's freedom begin to impinge upon another's?[2] Though there is no comprehensive federal policy on reconciling competing human rights, the Ontario Human Rights Commission (OHRC) has developed a set of key legal principles and goals. These principles are based on jurisprudence of the Supreme Court of Canada and have undergone extensive legal review and consultation.[3]

At this point, it should be acknowledged that the Ontario Human Rights Commission is governed by the *Ontario Human Rights Code*,[4] the first provincial human rights code in Canada, with each province and territory having its own commission and code or act. These acts are distinct from *The Canadian Charter of Rights and Freedoms* in that the scope of human rights provisions contained within the provincial acts are limited to preventing and addressing cases of discrimination, harassment, and a lack of accommodation in the workplace. In Canada, there is also a Canadian Human Rights Commission tasked with addressing similar human rights issues faced by those who work for the federal government or access their services. The *Charter*, on the other hand, forms part of the *Constitution Act*,[5] ensuring that a core set of human rights are entrenched under Canadian law. Unlike the provincial and territorial codes and acts, these rights are not primarily focused on human rights in the workplace, services, housing, and contracts. *Charter* protections extend to all individuals in Canada, though some are limited to Canadian citizens, such as the right to vote under section 3, while others take effect only under certain circumstances, as is the case for due process rights under section 11.

This paper draws on jurisprudence of the Supreme Court of Canada and the work of the OHRC to advance recommendations to the Government of Canada to adopt a federal policy and guidelines for reconciling competing

Charter rights. Such a policy would serve to maximize enjoyment of human rights and freedoms, while minimizing harm and interference when rights conflict. The federal policy and guidelines could also be adapted to apply to the provincial, territorial, and federal human rights commissions when resolving competing human rights complaints under their respective acts. This could take place at several levels. First, the provincial and territorial commissions may each choose to develop a policy similar to that advanced by the OHCR, modelling key legal principles used to resolve conflict arising from competing rights. The Canadian Human Rights Commission could supplement these efforts by developing a set of federal guidelines outlining a process for organizations and employers to help individuals resolve situations of conflicting human rights on an interpersonal level; this would be in line with the Principles relating to the Status of National Institutions (The Paris Principles).[6] As a positive step in this direction, the Canadian Association for Statutory Human Rights agencies, "charged with administering federal, provincial and territorial human rights agencies,"[7] has acknowledged the significant work of the OHRC to this end.[8]

DEFINING COMPETING HUMAN RIGHTS

In Canada, a selection of human rights is constitutionally entrenched in *The Canadian Charter of Human Rights and Freedoms*;[9] additional human rights can be found in *The Canadian Human Rights Act*[10] and provincial and territorial human rights codes or acts, refined by a body of common law. Due to the number of laws protecting the human rights and freedoms of Canadians, there are many ways in which the human rights of one person can be seen to infringe on the human rights of another individual or group. The OHRC identifies seven situations where human rights can conflict:

1. *Code* right v. *Code* right
2. *Code* right v. *Code* legal defence
3. *Code* right v. other legislated right
4. *Code* right v. *Charter* right
5. *Code* right v. common law right
6. International treaty right v. *Code*/*Charter* defence
7. *Charter* right v. *Charter* right[11]

For the purposes of this paper, analysis is limited to human rights enshrined under *The Canadian Charter of Human Rights and Freedoms*.[12] Each province

and territory has a different human rights code or act, administered by its own human rights commission; commenting on the nuanced differences of each is beyond the scope of this paper. However, the process used for reconciling competing human rights complaints would be uniform, regardless of the source of the rights in conflict,. Thus, it is possible to model policies for the provincial and territorial commissions by looking at competing *Charter* rights. This strategy has been successfully employed in the reverse by the OHRC formulating a policy on the application of its provincial code that draws on *Charter* jurisprudence of the Supreme Court of Canada, as will be discussed in greater detail below.

Conflicting *Charter* rights can take various forms in countless situations. For instance, a marriage commissioner refusing to marry a gay couple for religious reasons under section 2(a) would appear to violate the couple's right to freedom from discrimination under section 15(1) if the marriage commissioner's freedom of religion is upheld. Another example is an employee with severe allergies to dogs sharing an office with a blind co-worker who requires a guide dog; both have a right to freedom from discrimination based on disability.[13] What about when a news source publishes inculpatory information about an accused, exercising the freedom of press and other media under section 2(b), which impacts the accused's right to be presumed innocent unless proven guilty under section 11(d)?

If the human rights and freedoms found in the *Charter* are entrenched and non-hierarchal, what is to be done when the *Charter* rights of one individual conflict with those of another? Justice Frank Iacobucci argues competing *Charter* rights should be reconciled, rather than balanced, suggesting that the right of one individual does not necessarily outweigh the right of another when a conflict arises; instead, every effort should be made to find a solution recognizing and upholding both sets of rights.[14] The terms "balancing" and "reconciling" have been used by the Court interchangeably when referring to cases of competing *Charter* rights. Iacobucci, however, draws a careful distinction between their meanings, explaining that their application varies according to who bears the onus for demonstrating or defending a violation or infringement.

The term "balancing" is most accurate when describing the *Oakes* test as applied to section 1 of the *Charter*. Here, analysis is limited to whether the individual has demonstrated a *Charter* violation by the state and, if so, whether the state is able to explain the violation "as demonstrably justified

in a free and democratic society."[15] In other words, "the Court must decide whether the enacting legislative body has made the appropriate compromise between the civil libertarian value guaranteed by the *Charter* and the competing social or economic objectives pursued by the law."[16] Conversely, the term "reconciling" is best applied to cases where the rights of one individual come into conflict with the rights of another. In such cases, no violation of the *Charter* has taken place. Rather, it is a question of whether an individual's exercise of his or her rights infringes on that of another. Adopting a process of reconciliation, rather than balancing, allows for the fullest possible expression of both sets of rights.Though an advocate for adopting a reconciling approach to resolving competing human rights, Iacobucci explains:

> There is no mechanistic rule that can be applied to yield a definitive answer to the pressing question: What should courts do when *Charter* rights conflict? Rather, courts must be acutely sensitive to context and approach the *Charter* analysis flexibly, and with a view to giving fullest possible expression to all the rights in involved.[17]

The present author acknowledges the impossibility of developing a single, strictly defined set of rules to reconcile competing human rights that is binding on the courts, as predicting every possible situation where rights conflict is inconceivable and impractical. This does not preclude, however, the development and application of a policy and set of guidelines used as a conflict resolution mechanism before matters reach the court system.

EXISTING GOVERNMENT POLICIES TO RESOLVE COMPETING HUMAN RIGHTS

As aforementioned, the OHRC has developed a set of key legal principles used to resolve competing human rights complaints. It is through the application of these legal principles that the present author recommends a federal policy and set of guidelines be developed. This section discusses the rationale and jurisprudinal basis for the following key legal principles, as identified by the OHRC:

1. No rights are absolute.
2. There is no hierarchy of rights.
3. Rights may not extend as far as claimed.
4. The full context, facts and constitutional values at stake must be

considered.

5. Look at extent of interference (only *actual* burdens on rights trigger conflicts).
6. The core of a right is more protected than its periphery.
7. Aim to respect the importance of both sets of rights.
8. Statutory defences may restrict rights of one group and give rights to another.[18]

The first two principles are clearly defined in jurisprudence of the Supreme Court of Canada. "No rights are absolute" stems from *R. v. Crawford; R. v. Creighton* where the Supreme Court explained "*Charter* rights are not absolute in the sense that they cannot be applied to their full extent regardless of context."[19] This sentiment is echoed in *R. v. Mills* where the Court stated all human rights must "be defined in light of competing claims."[20] Given that *Charter* rights are constitutionally entrenched and the rights of one individual or group can conflict with those of another, it is necessary that no rights be absolute; otherwise, the result would be a nonsensical application of these rights in practice. As such, the reconciliation of competing rights is considered on a case by case basis.

In *Dagenais v. Canadian Broadcasting Corporation*, Justice Lamer warned that a "hierarchal approach to human rights…must be avoided." He further stipulated that when "the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."[21] From here, the second principle emerges: there is no hierarchy of rights; no human right is inherently superior to another right.These first two principles are essential to the enjoyment of any human right. There must be limitations of certain rights in exceptional circumstances, such as preserving Constitutional values or preventing significant harm to others in the interests of justice and fairness. Alternatively, if two sets of rights appear to compete, and it is not possible to reconcile them, there needs to be an understanding that one will necessarily yield to another. Further, if there were a hierarchy of rights, and one right always trumped another, would there truly be a right to the latter, particularly if that right were entrenched in the Constitution? Though these principles are fundamental, they are also a source of confusion as to the scope of one's rights in varying contexts, making it difficult to develop comprehensive guidelines on their application. Instead, it is recommended

that the rationale for these principles be explained in a federal policy.

In applying the third principle, rights may not extend as far as claimed and there is a two-pronged test. Distinguishing between "legal rights and values, interests or individual preference," a legitimate claim must engage a "genuine legal right."[22] Whether the claim is within the strictures of the right must also be assessed. This key legal principle would prove most useful for vetting baseless claims from the onset. When provided with guidelines stemming from a federal policy, most adults would be able to refer to the *Charter* to determine whether the claim is about a right or set of rights contained therein.

Another key principle is consideration of the "full context, facts and constitutional values"[23] concerned. In *R v. N.S.*, the Ontario Court of Appeal explained that "reconciling competing *Charter* values is necessarily fact specific. Context is vital and context is variable."[24] An appreciation for context allows for "the fullest possible expression to all the rights involved."[25] Foreseeing all potential variations of circumstances that may arise is impossible, which creates the greatest challenge for developing a federal policy on reconciling competing rights. It is recommended that this principle be left to human rights commissions and courts to determine if parties are able to satisfy all other legal principles and if the conflict may be resolved on an interpersonal level.

Fifth, the "extent of interference"[26] must be determined by assessing whether the enjoyment of one right interferes with another and, if satisfied, whether this interference constitutes a harmful effect.[27] The degree of harm is weighed for both parties. If the "harmful effect" is trivial or minimal for one party, yet substantial for the other, the former's rights are unlikely to receive protection. Similar to the third principle, this approach could be implemented at an interpersonal level, particularly if a neutral third party is involved, through assessing the degrees of interference or harm to each party. Human rights aside, this can often be determined in the interests of fairness and basic human decency. Why should an individual or group be unduly harmed by the preferences of another individual or group for whom there is little to no impact?

The next key principle is to protect the core of a right more than its periphery, best illustrated by example. According to the OHRC, "the further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of

protection."[28] For instance, in *Brillinger v. Brockie*,[29] the Ontario Board of Inquiry ruled that Scott Brockie, owner of Imaging Excellence Inc., had infringed the right of Ray Brillinger, President of the Canadian Lesbian and Gay Archives, by refusing to provide printing services on religious grounds. While Board adjudicator MacNaughton acknowledged that Brockie's freedom of religion would be infringed by having to print material that he sees to be in contravention of his religious beliefs, his right in this context was at the periphery, as the material being printed was not "in direct conflict with the core elements of his religious beliefs or creed."[30] Brillinger's freedom from discrimination based on sexual orientation, however, was considered a core right, directly and immediately affected by denial of the service. On appeal, the Ontario Superior Court upheld this decision.

Reconciling competing human rights involves aiming to satisfy the enjoyment of both sets of rights. According to the OHRC,

> For one right to prevail over another, the impact on the core of the right must be shown to be real and significant in the circumstances. Yet, even where this is found to be the case, there is a still a duty to accommodate the yielding right as much as possible.[31]

Constructive compromises may be necessary as part of the reconciliation process to "minimize apparent conflicts... and produce a process in which both values can be adequately protected and respected,"[32] fostering the fullest expression of both rights. Compromise through adopting an alternative measure is intended to lessen the harmful impact on both set of rights. Though it seldom occurs that compromise is not possible, one right may take precedence while the other yields, depending on the context and constitutional values at stake.

The final key legal principle states that statutory defences may restrict rights of one group and give rights to another,[33] particularly when efforts to reconcile competing rights are found in federal and provincial human rights legislation. In most cases, these efforts centre on protecting group rights, such as allowing exclusion of certain groups when an organization serves the interests of "persons identified by a prohibited ground of discrimination," as is found in section 18 of the *Ontario Human Rights Code*.[34] An organization whose mandate is to assist veterans, for instance, may decline to extend its services to other groups.[35]

Though legislators may foresee the potential for human rights to come

into conflict and insert language to mitigate or prevent such conflict, Eva Brems warns that

> Opting for the legislature as a preferential forum for dealing with conflicts of human rights may restrict the scope of the problem for the courts, but will not exclude it. There will always be cases in which the legislator does not foresee the negative implications that a rule protecting one right may have on another.[36]

It is precisely for this reason that a federal policy and set of guidelines would prove useful. Unlike provincial or federal legislation, policies can be altered more easily and do not bind the courts. Yet, such a policy and corresponding guidelines would provide invaluable guidance to members of the public and relevant stakeholders who are faced with a situation of conflicting rights.

MODEL PROCESS TO RECONCILE COMPETING HUMAN RIGHTS

In addition to defining a set of key legal principles used to reconcile competing human rights complaints, the OHRC has also developed a three stage, five step process for addressing complaints in an organizational setting where it is common for the "values, interests and rights of individuals [to] come into conflict."[37] Federal guidelines outlining a process for resolving competing rights could draw from the OHRC's example. Throughout the process, both parties should have the opportunity to voice their concerns and perspectives. Regardless of the outcome, the parties involved are more likely to be satisfied with a process where they feel like their concerns are heard through an open, respectful, and unbiased discussion that demonstrates "genuine consideration of different positions and promotes the dignity of all claimants."[38]

Recognition of competing rights claims occurs during the first stage of the process, beginning with a determination of the claim's content. During this step, the factual context is considered to determine whether both claims involve a *legal* right, though this step may not yet reveal if there is a case of competing rights. Each party should have the opportunity to describe their perspective, interests, values, and understanding of the right concerned. A full account of the situation and context will help distinguish legal rights from other interests and allow for the exploration of appropriate remedies.

The second step applies three points of inquiry to determine whether the claims connect to legitimate rights:

1. Do claims involve individuals or groups rather than operational interests?
2. Does at least one claim fall under a human right protected by law?
3. Do claims fall within the scope of the right?[39]

At the first point of inquiry, the organization should identify whether the case involves the competing rights of individuals or groups or if it is a matter concerning operational interests. Under the latter category, the right of an individual or group does not affect the legal right of another; rather, it is a case of where he, she, or they believe the organization is failing to accommodate the rights of the individual or group within the organization. If the matter relates to operational interests, the claim would be addressed under the duty to accommodate, rather than as a case of competing rights. However, there could be overlap between these categories if the duty to accommodate an individual or group affects the legal rights of another individual or group.

Should the claim of both parties involve a right, rather than an interest or value, it must be determined whether both sets of rights are legally recognized under provincial or federal legislation, under international human rights law to which Canada is a party, or within previous decisions of the court system. Once this has been established, the third step is to identify whether the claims are consistent with the scope of the rights claimed. Do the rights "extend as far as the claim made in a particular situation [and is] the rights claim characterized appropriately?"[40] Relevant legislation and/or case law may set out limitations to the scope of application of a given right. For instance, there may be a *prima facie* violation of rights where an individual hires a personal care attendant on a seemingly discriminatory basis, such as only interviewing women for the position. However, the *Ontario Human Rights Code* expressly states that the prohibition of discrimination in employment does not extend to the hiring of personal care attendants under s. 24(1)(c).[41] Delineating the true scope of the rights concerned may reveal there is no real conflict between the set of rights, though it is important not to dispense of human rights claims at this step, as determinations on these points can be subjective.[42]

If it has been established that the claims are in fact legal rights falling within the intended scope of the applicable rights, the first stage has been satisfied, turning the attention to whether the claims constitute more than minimal interference with the rights concerned. This stage coincides with the fifth and sixth key legal principles discussed above regarding the extent

of interference and core of the right. In order to satisfy this stage, it must be demonstrated that the level of interference causes a real intrusion, burden, or harmful effect on the enjoyment of the core of a right by both parties. As reflected in the key legal principles, if the extent of interference is trivial or minimal, it is unlikely to receive protection or allow for the limitation of the right of others. In contrast, if substantial interference is a factor, there is a need to reconcile the competing human rights.

Whereas stage one focuses on establishing that there is a case of competing human rights, stage two centres on reconciling those rights to allow for their greatest possible expression for both parties. At this stage, options are explored "to reduce or eliminate interference and allow full or at least 'substantial' exercise of the rights of all parties within the given context."[43] Creative solutions could be employed to attempt to eliminate the conflict by changing circumstances, such as exploring variant schedules, locations, conditions, and other factors. While the goal is to strive for an "ideal" reconciliation where neither party relinquishes a substantial part of their right, there may be cases where this is not possible and a "next best" solution should be sought through constructive compromise that least impairs both rights. The key legal principles outlined above serve as an excellent resource and should be applied to any viable solution, while considering the fundamental principles of "respect for human dignity, inclusion of all, community and social harmony, and the collective interests of minority or marginalized groups."[44]

At the final stage, the organization reaches a decision. Challenges can arise leading up to this stage, complicating the process, including when one of the parties has not fully engaged in the process, the parties fail to agree on a solution, the case lacks merit overall, or is too complex for the organization to reach a resolution. If these challenges are absent or can be overcome, the organization may choose to render a decision regarding how to reconcile the competing rights or reach an appropriate compromise based on the evidence presented and discussed during the previous two stages. Perhaps the organization has already dealt with a similar case and has a procedure in place for resolving the conflict. Alternatively, the organization may decide that the case requires review by a human rights tribunal or other legal authority due to its complexity. Any decision that the organization reaches must be "consistent with human rights and other law, court decisions and human rights principles"[45] in the interests of justice and fairness for the complainants and

for employers and service providers to shield themselves from future liability should the case be brought before a tribunal or court.

THE BENEFITS OF A FEDERAL POLICY

Accessible guidelines on the scope of human rights and process for reconciling one's human rights with those belonging to others have a number of benefits. The most apparent of these is providing organizations with the knowledge required to be able to resolve situations where the human rights of an individual or group conflict with that of another. By preventing further escalation, all parties are spared stress, unnecessary costs, and misused time.

Private businesses, academic institutions, and public service workers would likewise benefit from improved morale among employees who are able to resolve human rights conflicts constructively. The formal resolution of human rights complaints can be costly and lengthy; it is in the best interests of hiring institutions and government service providers to know how to resolve competing human rights complaints via human resources services if interpersonal efforts are unsuccessful.[46]

On a larger scale, fewer tax dollars would be allocated toward addressing drawn out conflicts that reach provincial human rights commission or court levels. Each year, provincial human rights commissions receive hundreds of complaints, more than half of which were dismissed, settled, or not pursued (see Figure 1). Accessible, clear guidelines available to members of the public, employers, landlords, and other relevant stakeholders would significantly reduce caseloads before provincial human rights commissions by encouraging settlement or other resolution at an interpersonal level and vetting baseless claims.

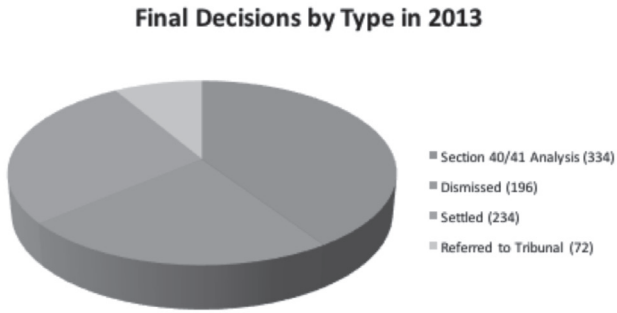

Figure 1. Final Decisions by Type in 2013[47]

Policies and guidelines on reconciling competing human rights would also help ensure fairness and consistency of application, whether at an interpersonal level, among provincial human rights commissions, or in the court system. Better understanding the scope of their human rights and applicable limitations, members of the public will likely be more satisfied with the outcomes rendered by the commissions and courts if the conflict reached either level.

RECOMMENDATIONS TO THE GOVERNMENT OF CANADA

Based on the demonstrated need for more consistent Canada-wide policies and guidelines on reconciling competing human rights, it is recommended that the provincial, territorial, and federal commissions work together to clarify the substance and scope of human rights and freedoms in Canada:

1. Provide support for provincial and territorial governments to integrate education on human rights into school curricula from the elementary level onward.
2. Develop a policy on how to resolve competing human rights complaints, including key legal principles and a step by step process, similar to those adopted by the Ontario Human Rights Commission, which could likewise be modified and adopted in other provinces and the territories.
3. Provide the public with an accessible guide for reconciling competing human rights, written in plain language.
4. Provide consultative services to the public on reconciling competing human rights as an alternative or precursory measure to provincial, territorial, and federal human rights commissions or the courts.
5. Develop an organizational policy on reconciling competing human rights complaints for implementation by employers, service and housing providers, unions, and other relevant stakeholders in line with the proposed national policy.

CONCLUSION

As aptly noted by Lorne Foster and Lesley Jacobs, "issues of competing human rights claims arising from diversity have become in Canada one of the most important and pressing challenges for the human rights system."[48] Commissions should address this challenge head on by developing a federal

policy or more congruent provincial/territorial specific policies and corresponding guidelines on reconciling competing human rights complaints, drawing from the "Policy on Competing Human Rights" set out by the Ontario Human Rights Commission. Such guidance is necessary to allow members of the public to better understand the content and scope of their rights, while providing organizations with the tools required to effectively resolve competing rights. Doing so will help facilitate the resolution of competing rights at the interpersonal and organizational levels, reserving review by the provincial, territorial, and federal human rights commissions and courts for exceptionally complex cases. This would yield a number of benefits for society, including the conservation of public resources, improving morale in the workplace, and empowering individuals to resolve their own conflicts through a human rights framework.

ACKNOWLEDGMENT

The author extends her thanks to Dr. Shaheen Amzi, Director of the Policy, Education, Monitoring, and Outreach of the OHRC, for reviewing and commenting on this piece prior to publication.

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