# Balancing Conflicting Rights: Towards an Analytical Framework

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**The views expressed in this paper do not necessarily represent the views or opinions of the Ontario Human Rights Commission, the Chief Commissioner, or the individual Commissioners, nor has this paper been formally approved by the Commission.**

## INTRODUCTION

This paper will attempt to provide an analytical framework for balancing conflicting rights. The first two sections of this paper provide the backdrop for a close examination of the balancing process. Section I foregrounds the issues raised in conflicts of rights cases through a discussion of Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*[1], while Section II outlines criteria for identifying when there is *no* conflict of rights. Section III surveys approaches to balancing conflicting rights that have been taken in the Canadian context. A number of balancing tools emerge from an examination of three main sources: case law, the Preamble and Exception Sections of the *Ontario Human Rights Code* (the "Code"), and previous policy work in this area. Section IV applies these tools to balance conflicting rights in the contexts of employment and services. Throughout the paper, specific examples are used to illustrate how the balancing process may work within and across a range of protected grounds.

Two main paradigms for balancing conflicting rights are highlighted: pragmatic balancing and principled balancing.[2] These models represent two distinct approaches to the issue of balancing. The implications of these distinctions, in terms of how the tensions between conflicting rights are resolved by each model, are explored through specific employment and service examples. Each model tends to foreground certain balancing tools over others.

For instance, pragmatic balancing focuses on the need to carefully weigh competing interests in such a way that the resolution of these interests reflects a compromise position. Consequently, pragmatic balancing looks to tools such as the exception sections of the *Code* and the duty to accommodate as factors that allow two conflicting rights to be managed within a particular context. On the other hand, principled balancing often foregrounds factors such as the values underlying the *Code* and the *Charter*, and delineates the scope of each right in such a way as to avoid conflict as much as possible. Whereas pragmatic balancing will always proceed in a case-by-case manner, principled balancing may put forward overriding concerns that will apply across all cases and all contexts.

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[1] Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, 1st Sess., 38th Parl., 2004-2005 (assented to 30 June 2005).

[2] These two approaches to balancing rights must not be understood as binary opposites. They are necessarily intertwined and both will be considered in the analysis of any conflicting rights case. However, it is useful to tease out the ways in which these approaches differ in methodology and in results. Courts generally must grapple with both types of balancing in these cases because both principles and pragmatic outcomes are at stake. The Supreme Court explicitly states this in *Sydicat Northcrest v. Amselem* [2004] 2 S.C.R. 551: "This appeal requires the Court to deal with the interrelationship between fundamental rights both at a conceptual level and for a practical outcome" (at para. 1).

Although it is the aim of this paper to tease apart these two distinct theoretical approaches to balancing, in practice they necessarily co-exist. This will become particularly evident in the case law section of this paper where the tools associated with both pragmatic and principled balancing are often employed within a single judicial decision. It is important, however, to identify the separate strands of balancing in order to gain a better understanding of the actual factors that influence the balancing process in these difficult cases. This kind of close analysis also reveals the visions of equality that drive each balancing paradigm.

This paper should be understood as a starting point that may be used as a resource for approaching further policy work on balancing conflicting rights. It will highlight the conceptual toolbox that is employed by judges, lawyers, and policy makers as they undertake the complex task of balancing conflicting rights. Establishing a formulaic balancing test is not the goal of this paper. There is no 'correct' model for solving conflicts of rights issues. However, it is important to articulate the general factors that inform the task of balancing and to apply these factors in specific hypotheticals. The set of balancing tools presented in this paper is necessarily incomplete and, undoubtedly, future case law and legislation will supplement these basic tools. It is also important to note that the usage of these tools will vary depending on the balancing approach that is taken, as well as the right at stake.

## SECTION I: BACKGROUND

Much of the passionate and often heated debate over the recent legalization of same-sex marriage in Canada is emblematic of the difficulties that accompany the balancing of conflicting rights. Bill C-38 raised concerns about how to best ensure a balance between freedom of religion and sexuality equality rights. Opponents of same-sex marriage worried that freedom of religion would be trumped by sexuality equality rights, and they argued for stronger legislative guarantees that would protect the beliefs and practices of religious officials and institutions. On the other hand, proponents of same-sex marriage generally agreed that freedom of religion must be respected, but differed in their assessments of how far the protections of the *Charter of Rights and Freedoms* (the "Charter") should extend.

In many instances, the conflict between competing rights is settled through a delineation of the scope of the right at stake. It seems clear, for example, that freedom of religion and religious equality rights will allow religious officials to solemnize only those marriages that they believe adhere to the doctrines or tenets of their religion. This type of activity would fall squarely within established cultural and legal understandings of freedom of religion. The need for balancing arises only when the edges of two rights bump up against one another. That is, *actual* conflicts occur in the murky area of overlapping interests.

In the context of same-sex marriage, many difficult conflicting rights questions reside in this murky territory on the borders of rights. Should, for instance, the religious beliefs of civil marriage commissioners be accommodated in the workplace? Should religious organizations maintain their charitable tax status if they refuse to perform same-sex marriages? Should groups who are affiliated with religious organizations be given the protection of freedom of religion guarantees in, for example, the rental of their facilities for same-sex marriage celebrations? Should a religious organization be permitted to refuse to accept the valid civil marriage of any employee on the grounds that its own view of marriage is different?

In order to answer these questions, adjudicators must undertake a complex balancing of the rights at stake. The debate surrounding Bill C-38 is simply the latest instalment in an ongoing struggle to craft a paradigm for balancing conflicting rights in the human rights context. Undoubtedly, many of the issues raised by the legalization of same-sex marriage will eventually make their way to the Ontario Human Rights Commission (the "Commission") in the form of human rights complaints, so it is imperative that the Commission identifies the factors involved in balancing these conflicting rights.

Conflicts of rights are, of course, not limited to the grounds of religion and sexual orientation. Over the years, the Commission has dealt with competing rights claims across virtually all of the protected grounds under the Code. The Commission is sensitive to the need to find an appropriate balance between the different rights protected in the *Code* and the *Charter*. Previous briefing notes and policy documents produced by the Commission have outlined the tools used by tribunals and courts in the balancing of rights. These documents provide a useful starting point for a more detailed inquiry into the benefits and limitations attached to the balancing approaches taken up in previous cases.

## SECTION II: IDENTIFYING WHEN THERE IS *NO* CONFLICT OF RIGHTS

Many disputes in which there appears to be a conflict of rights will be revealed, upon closer examination, to be situations in which the resolution of the dispute is not contingent upon the complex process of balancing. Given the difficulties associated with the balancing process, it is imperative that only *actual* conflicts of rights are approached as balancing tasks. This section of the paper will briefly outline factors for assessing the extent to which competing rights are the real issue at stake. In particular, before proceeding to the task of balancing, careful consideration must be given to three key questions:

1. Are the rights claims characterized appropriately?
2. Are valid, legally recognized rights at stake?
3. Are the needs of both parties truly in conflict?

A 'no' response to any one of these questions will mean that wading into the murky territory of balancing conflicting rights is not required. Instead, the

competing claims will either be dismissed as inappropriate or invalid, or conflict management will occur through informal accommodation.

In any apparent conflict of rights case the appropriateness of the claim must be considered. Utilizing a conflict of rights analysis as a defence is common, however, the number of cases in which there may be an actual conflict will be much rarer. The use of a conflict of rights defence may be a mischaracterization of the issues. In order to test this characterization, it is important to ask whether or not the dispute actually engages two equally valid rights claims. The conflict may be framed as one of competing rights, but this framing is only appropriate if the claims are actually linked to protected grounds under the *Code* or *Charter*.

For instance, it is a long established principle in human rights law that customer preference cannot be used to justify a discriminatory act[3]. Customer preference, however, may be the driving force behind complaints that, on their face, seem to engage a conflict of rights. One way of testing whether or not this is the case is to carefully delineate the rights at stake. A particularly cogent example of framing customer preference within the language of competing rights may be seen in objections to breastfeeding in public spaces. Organizations and individuals objecting to this practice have frequently asserted that they have a 'right' to request that a woman cover herself, move to a private area, and so forth. This right has sometimes been grounded in a freedom of expression claim as a way of legitimizing these requests as a valid human rights issue.

At first glance, then, there appears to be a conflict between freedom of expression and freedom from discrimination based on sex. But a careful consideration of whether or not the rights claims are appropriately characterized tells a different story. Court and Tribunal decisions have clearly established a woman's right to breastfeed in public[4]. Importantly, these decisions have concluded that actions which prevent a woman from breastfeeding in public are discriminatory. These precedents mean that in the absence of a compelling, equally valid discrimination claim, a woman has an unqualified right to breastfeed in public. The freedom of expression claim is not a valid counter-claim because there is no established positive legal right to individual preference. That is, you may air your personal preferences about a woman breastfeeding in public, but you may not use those preferences to compel a woman to stop an activity that is already recognized as an established equality right. In this instance, what amounts to a community standards test for discrimination masquerades as freedom of expression claim.[5] Once this guise is exposed and the actual driving force of the complaint is revealed, there is no need to engage in the task of balancing.

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[3] *Berry v. Manor Inn* (1980) 1 C.H.R.R. D/152.
[4] See for example, *Quebec et Giguere v. Montreal (Ville)* (2003) 47 C.H.R.R. D/67.
[5] *Supra* note 2 at D/153.

There may be other cases, however, in which the first two questions concerning characterization and validity are answered affirmatively. In these situations, the conflict between competing rights will move to the third level of assessment: Are the needs of both parties truly in conflict? At this stage of analysis, it is important to focus on the *specific* needs of each party in order to determine whether or not informal accommodation is possible. If it is possible, then there is no need to move to a more formalized balancing.

By way of illustration, consider the following scenario: An individual with a disability uses a service dog in order to perform her work duties as a teacher, but a student in the classroom has her disability (allergies) triggered by the presence of the service dog. The *Code* requires employers to accommodate the needs of employees with disabilities, and it also requires service providers to accommodate the needs of customers with disabilities. The *Code* does not prioritize these needs or requirements – one is as important as the other. However, it is possible that these competing rights claims may be resolved by a precise assessment of the needs of both parties. The employer/service provider would first need to determine the accommodation needs of both the employee and the customer as accurately as possible to determine whether the needs of the two parties are necessarily in conflict. For example, in what ways is the service dog assisting the employee in the classroom? Are there other ways in which that support could be provided without the service dog? The Commission's *Policy on Disability and Duty to Accommodate* notes that "if there is a choice between two accommodations which are equally responsive to the person's needs in a dignified manner, then those responsible are entitled to select the one that is less expensive or that is less disruptive to the organization."[6] The needs of the student should be similarly evaluated. If the accommodation needs are directly in conflict, then the employer/service provider should explore solutions for accommodating both. In this case, there may be other instructors/sessions with whom the student can study.

While the first two stages of assessment focus on determining the appropriateness and validity of the claims, this third stage of assessment focuses on the specific needs raised by conflicting rights in order to narrow the scope of the conflict. When the precise location of conflict is identified, it may be possible to meet the needs of both parties concurrently without resorting to the complicated process of balancing these equally valid competing claims. Only after these initial three questions have each been answered affirmatively will it be necessary to employ the balancing tools outlined in Section III.

## SECTION III: THE BALANCING TOOLS

This section of the paper surveys the balancing tools found in the *Code* and relevant case law. Documents such as Commission briefing notes and Policy Papers provide invaluable commentary on these tools and their insights are woven into the following discussion. The goal of this section is to identify the

[6] OHRC, *Policy and Guidelines on Disability and the Duty to Accommodate* (2000) 19.

resources for balancing conflicting rights that will be utilized in the scenarios discussed in Section IV. Rather than evaluate the benefits and limitations of each of these tools, this Section is primarily concerned with assembling a conceptual toolbox whose contents represent the full spectrum of balancing tactics.

## Balancing within the provisions of the Code

The structure of the *Code* itself provides valuable balancing tools. A principled approach to balancing may focus on the values embodied in the Preamble and in the established statutory interpretive framework, while a pragmatic approach may foreground the relevant exception sections of the *Code* (ss. 18; 18.1; 20(3); and 24). This part of the paper examines each of these aspects of the *Code* in order to identify the specific balancing tools they contain.

### *A. The Preamble*

The Preamble to the *Code* offers initial guidance for balancing conflicting rights in that it embodies the values underlying the *Code* and human rights legislation in general. These values make up the general framework in which balancing occurs. Four key principles emerge from the Preamble:

1. Recognition of the dignity and worth of every person;
2. Provision of equal rights and opportunities without discrimination that is contrary to law;
3. Creation of a climate of understanding and mutual respect, so that;
4. Each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

Inherent in these values is a balancing of individual and group rights. The Preamble puts forth a vision of relational rights in which the equality of each person exists alongside community development and well-being. The dual focus of the Preamble on individual equality and creating a community-based climate of mutual respect sets in motion a consideration of the importance of both of these elements. These values are not conceived of as hierarchical but, instead, are described as mutually constitutive. That is, individual equality is fostered through the creation of a climate of mutual respect and, conversely, community is fostered through the recognition of the inherent dignity and worth of each individual. The Preamble makes clear that the purpose of human rights legislation is not simply to obtain concrete redress for violations of equality rights, but also to foster an inclusive climate of mutual respect.

### *B. Interpretive Principles*

From the outset, the *Code* grapples with the complicated relationship between conflicting rights and seems to anticipate that individual equality may sometimes be at odds with creating a climate of mutual respect. While the Preamble sets out the general aims of the *Code*, it has been left to the courts to craft the interpretive principles governing the *Code*. These interpretive principles also act as valuable tools that may guide the process of balancing. Indeed, the

issue of balancing may be an issue of statutory interpretation[7]. For the purposes of this paper, three broad interpretive principles are noteworthy.

Firstly, the *Code* should receive an interpretation that advances the overarching aims set out in the Preamble[8], and a key aim is the removal of discrimination. As has already been mentioned, the Preamble envisions a balancing process in which individual and group rights coexist.

Secondly, the rights recognized in the *Code* should be interpreted broadly, while legislated exceptions to the exercise of these rights should be interpreted narrowly[9]. This interpretive principle is explored in more detail below in Part C: The Exception Sections.

Thirdly, the *Code* must be interpreted in a manner consistent with the interpretation of the *Charter*. Specifically, the interpretation of s. 15 of the *Charter* should inform the interpretation of human rights codes across Canada[10]. Also, the meaning of a right should be determined by an analysis of its purpose and the interests it was meant to protect, and the context in which the right is asserted must be considered.[11] The relationship between the Code and the Charter is discussed at length in the Case Law Section of this paper below.

### *C. The Exception Sections*

The *Code* contains several exception sections that, when asserted by a respondent, operate as defences.[12] In many conflicts of rights cases, the interpretation of these sections is hotly contested. At issue is whether or not the respondent meets the criteria outlined in the relevant exception section and the onus is on the respondent to prove that she is entitled to the exception. To determine this, the adjudicator is in part guided by the established interpretive principles for exception sections. Generally, exceptions to the basic provisions and underlying values of the *Code* should be narrowly construed[13], while rights themselves should be broadly construed.

The exception sections of the *Code* that most often emerge in conflicts of rights cases are sections 18, 20(3), and 24. The newly legislated section 18.1 will undoubtedly figure in conflicts of rights cases in the near future[14]. The eligibility criteria contained in each of these sections delimits to whom and in what circumstances these exceptions will apply. What follows is a brief discussion of each exception section that outlines the parameters of the eligibility criteria.

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[7] *Garrod v. Rhema Christian School* (1991), 15 C.H.R.R. D/477.
[8] *Ontario (Human Rights Comm.) v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 (S.C.C.).
[9] *Dickason v. University of Alberta* (1992), 141 N.R. 1 (S.C.C.).
[10] *Quebec (Commission des droits de la personne & des droits de la jeunesse) v. Montreal (City),* [2000] 1 S.C.R. 665.
[11] *Ontario (Human Rights Comm.) v. Ontario (Ministry of Health)* (1994), 19 O.R. (3d) 387 (C.A.).
[12] *Gibbs v. Battlefords & District Co-Operative Ltd.* (1996), 27 C.H.R.R. D/87 (S.C.C.).
[13] *Ibid*.
[14] Section 18.1 of the Code was added by Bill 171, *An Act to amend various statutes in respect of spousal relationships*, 1st Sess., 38th Leg., Ontario, 2005 (assented to 9 March 2005).

These sections of the *Code* mediate between conflicting rights by providing adjudicators with balancing guidelines, but the proper scope of these sections must be ascertained before an exception may be factored into the balancing process.

**Section 18: Special Interest Organizations**

> The rights under Part I to equal treatment with respect to **services and facilities**, with or without accommodation, are not infringed where **membership or participation** in a religious, philanthropic, educational, fraternal or social institution or organization that is **primarily engaged** in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are **similarly identified**. (emphasis added)

The bolded sections highlight the key eligibility criteria that an organization must meet if it desires to use this section of the Code as a defence. Section 18 applies only to services and facilities that are restricted on the basis of membership or participation in an organization that primarily serves the interests of persons identified by a prohibited ground of discrimination. Additionally, in order to qualify for an exception under this section, membership and participation must be restricted to persons who are similarly identified with the primary service interests of the organization. For example, this provision accommodates religious freedoms by allowing religious institutions to discriminate in their admission policies on the basis of religion. Under section 18, a private Christian post-secondary school can restrict its admissions to students who agree that homosexuality is a sin and undertake to refrain from homosexual practices.[15]

The interpretation of this section in the case law balances freedom of association with equality rights. Section 18, like each of the other exception sections, considers the relationship between the private and public spheres. The public's right to be treated without discrimination must be considered against a private organization's right to limit its membership to an identified group[16]. In one prominent example, refusal to admit a woman to membership in a men's organization was not considered a discriminatory denial of services because members of a group against which discrimination is prohibited may be excluded from social or cultural organizations which are *not* a public service.[17] The onus is on the party seeking the exemption to prove that it falls squarely within the criteria of the section.[18] If an organization engages *primarily* in activities serving the interests of its members it will tend to receive the protection of this section

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[15] *Trinity Western University v. College of Teachers (British Columbia),* 2001 SCC 31.
[16] *Martinie v. Italian Society of Port Arthur* (1995), 24 C.H.R.R. D/169 (Ont. Bd. Of Inquiry).
[17] *Gould v. Yukon Order of Pioneers* (1996), 25 C.H.R.R. D/87 (S.C.C.).
[18] *Supra* note 15.

even if the organization also includes some community participation in its activities. 'Primarily' has been interpreted to mean 'for the most part' rather than 'solely'. Some leeway has also been given to the interpretation of 'similarly identified'.[19] For instance, an Italian organization whose goals include a desire 'to unite male members of Italian descent' can meet the requirement in section 18 that it restrict membership to persons similarly identified even though it admits males married to women of Italian descent. Such men are 'similarly identified' for the purposes of section 18.[20]

**Section 18.1: Solemnization of Marriage by Religious Officials**

> (1) The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the *Marriage Act* refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allow the sacred place to be used or otherwise assist would be contrary to,
> (a) the person's religious beliefs; or
> (b) the doctrines, rites, usages or customs of the religious body to which the person belongs.

In the wake of the legalization of same-sex marriage, the Ontario government introduced Bill 171, *An Act to amend various statutes in respect of spousal relationships*.[21] Included in this legislation is an amendment to section 18 of the *Code* that adds section 18.1. As indicated above, this new section addresses the issue of solemnization of marriage by religious officials and is a further attempt to balance conflicting rights within *Code* provisions. To date, there is no case law and, hence, no judicial interpretation of this section. However, it is possible to speculate on how the eligibility criteria will contribute to the balancing process. This section appears to apply only to religious officials (those registered under s. 20 of the *Marriage Act*[22]) and their actions in relation to services and facilities. It is unlikely this section will apply to civil marriage commissioners or other non-religious officials. It is also unlikely this section will apply to activities beyond those associated with the solemnization of marriage.

While this amendment clearly protects religious officials from solemnizing marriages that contravene their religious beliefs, the extent of these protections remains to be tested. At least two elements of section 18.1 (1) will require further interpretation: the range of events associated with the solemnization of marriage that a religious official may reject; and, the proper scope of spaces included

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[19] *Ibid*.
[20] *Ibid*.
[21] *Supra* note 13.
[22] *Marriage Act*, R.S.O. 1990, Chapter M.3.

under the ‘sacred place’ designation. The amendment provides some guidance on this latter issue in that it defines ‘sacred place’ as including ‘a place of worship and any ancillary or accessory facilities’ (s. 18.1(3)). The meaning of ‘ancillary’ and ‘accessory’ will be contested, especially in a case in which a building owned by a religious organization is offered to the public at large as a rental space, but is denied to a same-sex couple wanting to rent it for their wedding reception. Similarly, the range of events associated with the solemnization of marriage requires clarification. Will, for instance, a same-sex wedding anniversary or a same-sex wedding reception classify as ‘an event related to the solemnization of marriage’?

As an example of balancing conflicting rights, the defence offered by this section appears to reiterate the general principles of interpretation that accompany all of the exception sections of the Code in that it posits a narrow, rather than a broad exception. Section 18.1 reasonably circumscribes the exception to ensure full protection for religious officials while deliberately remaining silent on exceptions for civil marriage commissioners. This silence is likely to be interpreted as an implicit refusal to grant such exceptions for these secular officials.

Section 18.1 also follows the balancing principles found in Charter decisions on freedom of religion. Precedents indicate that freedom of religion is to be interpreted broadly,[23] but that services normally offered to the public must be offered in a non-discriminatory manner.[24] In section 18.1, it appears that it will be possible for a religious official to assert this defence even where the denomination he or she belongs to doesn’t have a position against same-sex marriage (a broad interpretation of freedom of religion). At the same time, however, it appears that only a religious official can assert this defence and that a church administrator cannot refuse rental of a sacred place and rely on the defence (an implicit recognition that individuals offering services to the public must provide equal treatment with respect to services and facilities).

**Section 20(3): Recreational Clubs**

> The right under section 1 to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or facilities or gives preferences with respect to membership dues and other fees because of age, sex, marital status, or family status.

While section 20(3) is not often employed as a defence, it offers another glimpse into the ways in which balancing conflicting rights occurs within the sections of the *Code* itself. This section appears to be based on assumptions regarding the irreconcilability of specific identity characteristics. Four grounds of

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[23] *Supra* note 14.
[24] *Ontario Human Rights Commission v. Brockie* [2002] O.J. No. 2375 (Ont. Sup. Ct.).

discrimination (age, sex, marital status and family status) are given exception status in this section. It is important to note the grounds that are not included: race, ancestry, place of origin, colour, ethnic origin, creed, sexual orientation, and disability. The four included grounds seem to represent those characteristics which are thought to contain actual or fundamental differences that deserve protection. The grounds which are not included seem to represent those characteristics which are thought to be socially or culturally imposed rather than actual. In other words, the actual differences between men and women are served by the existence of sex-specific recreational clubs, while a whites-only recreational club merely perpetuates stereotyping and discrimination based on race. The whites-only policy is not based on actual differences, but rather on the illusion of difference that is used to justify discriminatory practices.

Like section 18, section 20(3) attempts to balance freedom of association with equality rights. However, section 20(3) is a one-sided, essentialist form of balancing in that it is the mere fact of identity that determines whether or not an organization is eligible for protection under this section. This section raises a number of interpretive issues that, in turn, will have consequences for the balancing of conflicting rights: What constitutes the definition of a ‘recreational club’? Should there be a *bona fide* and reasonable connection between the interests of the particular group and the basis upon which it discriminates? Should there be a connection between the interests of the group and the services or facilities that it offers that advance those interests? What if there is a difference between the ‘stated’ and ‘practiced’ interests of the group or if these interests change or diminish over time? Can a recreational group selectively discriminate?

The lack of case law on section 20(3) means there are few interpretive guidelines for this section. On its face, this section appears to protect recreational clubs from complaints that they treat women, among others, differently in terms of the service they provide to their customers. For instance, under the auspice of this section, a golf club may argue that it is permitted to give preference to male members in terms of tee times and access to the golf course. It is unlikely, though, that such a defence would withstand the scrutiny of *Charter* equality rights. Given that *Code* provisions must be interpreted according to the principles of *Charter* review, the defences offered by this section of the *Code* are on shaky ground.

To date, the Commission has not developed a policy position on section 20(3), and the defences potentially permitted by this section are perhaps indicative of an underdeveloped approach to balancing. To allow exceptions that are based on the mere fact of identity is overly broad and does not honour the spirit of the law in the other exception sections of the *Code*. The rather arbitrary designation of certain identity characteristics as actual or fundamental does not resonate with the Preamble’s stated intention of creating a climate of mutual understanding and respect. The usefulness of this section in terms of understanding how to balance conflicting rights is that it highlights the dangers of

an overly simplistic approach. Intending to provide a defence that respects certain forms of association, this section may inadvertently legitimize the very discrimination that the *Code* seeks to eradicate.

**Section 24 (1): Special Employment**

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

Many of the prominent conflicts of rights cases engage section 24(1) and, as a result, the interpretative principles associated with this section have emerged as significant balancing tools. The balancing process within this section begins with an assessment of whether or not the respondent meets the section's eligibility requirements. As with section 18, the respondent must be primarily engaged in serving an identifiable group, and the preference in employment must be given to persons similarly identified. Additionally, section 24 requires the employer to prove that the preference in employment is a reasonable and *bona fide* qualification because of the nature of the employment. These criteria work to ensure a fair and proportionate balancing of rights because they build-in several hurdles that employers must overcome if they wish to employ this defence.

A hypothetical scenario will illustrate how the balancing of conflicting rights takes place within this section. An Evangelical Christian organization provides residential care to individuals with developmental disabilities. The organization receives public funding to run a group home for disabled children. Employees are required to sign a Morality Statement in which they agree not to engage in any of the listed behaviours, including homosexual relationships, because they are contrary to Christian beliefs. Sally, an employee, signs this Morality Statement but, after several years of working at the organization, becomes involved in a lesbian relationship. Her employer finds out, confronts her, and Sally confirms that she is in a relationship with another woman. Sally is encouraged to seek employment elsewhere and eventually resigns because of a poisoned work environment. Sally now alleges that her right to equal treatment with respect to employment without discrimination because of sexual orientation was infringed. The organization asserts that it is protected under section 24(1) of the *Code*.

Balancing these competing rights claims using the tools furnished by this section of the Code will begin by examining the mandate of the organization to

decipher their *primary* interest. If they are primarily concerned with serving the interests of disabled children, then the defence only permits them to receive insulation from the Code if they hire disabled persons ('similarly identified'), not evangelical persons. On the other hand, if their primary interest is serving evangelical individuals, then they may have a legitimate defence. However, as has already been discussed in the commentary on the other exception sections, these sections will be narrowly construed in relation to a public (as opposed to private) organization. In this scenario, if the organization is dependent upon public funding and a condition of that funding is that they accept all disabled children, then the organization will not be able to rely on evangelical identity as the primary interest.

If the organization manages to clear this first hurdle, they must still satisfy the reasonable and *bona fide* requirement. It has been noted that the requirement of a reasonable and *bona fide* qualification is a 'statutorily imposed tie-breaker'.[25] This aspect of section 24(1) inserts another level of balancing into the section and it must now be assessed in accordance with the three-part test developed by the Supreme Court in *Meiorin*.[26] Each stage of this test ensures that section 24(1) carefully weighs the interests of both parties:

> First, the employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. […] Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose. Third, the employer must establish 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.[27]

This test places the onus on the employer to demonstrate why it cannot accommodate Sally using the *impossibility*, short of undue hardship, standard. By using such a stringent standard of review, the Court adheres to a balancing process in which the justification for infringing an equality right must embody the values underlying the rights themselves.

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[25] *Supra* note 6.
[26] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* [1999] 3 S.C.R. 3.
[27] *Ibid*. at p. 4.

The Court's formulation of this test resonates with the aforementioned values articulated in the Preamble of the *Code*. While on its face, the test is an example of pragmatic balancing in that it focuses on the duty to accommodate, the stringency of this duty is an example of how principled balancing converges with this pragmatic exercise. An employer has a duty to reasonably accommodate an employee and this duty is an extension of the overarching principle that an individual has a right to be free of discrimination.[28] Conversely, an employer who meets *all* of the criteria attached to section 24(1) has the ability to justify preferential hiring practices.

With respect to accommodation in Sally's case, a pragmatic approach to balancing could argue that it is possible for Sally to work for this evangelical organization, and be a lesbian, but agree to not espouse her sexual orientation on the job. Indeed, as is discussed below, the split between beliefs and conduct is precisely the balancing approach taken by the Supreme Court in *Trinity Western*. It should be noted, however, that this pragmatic 'don't ask, don't tell' approach may not necessarily accord with the principle of creating a climate of mutual understanding and respect. Creating a workable solution to the problem of balancing competing rights may not always uphold the *ideal* version of anti-discrimination principles in which each right is fully realized. Instead, pragmatic balancing may result in a carefully crafted compromise which follows the edict that no right is absolute.[29]

**Balancing in the Case Law**

The balancing tools present within the *Code* itself are both informed by and taken up in judicial decisions on balancing conflicting rights. This section of the paper highlights three recent cases in which the complexity of balancing is explicitly addressed[30]: *Trinity Western* (2001)[31]; *Reference re Same-Sex Marriage* (2004)[32]; and, *Brillinger v. Brockie* (2002)[33]. In previous policy briefing notes and in the Commission's *Policy on Sexual Orientation*, these cases have been examined in detail and their balancing strategies have been noted. The goal of this section of the paper is to evaluate how courts rely on *both* pragmatic and principled approaches to balancing. *Trinity Western* is perhaps the most fully integrated vision of pragmatic and principled balancing. The absence of a factual

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[28] *Supra* note 7.
[29] *Supra* note 14.
[30] These three cases have been selected because they illustrate 3 different approaches to balancing: principled, pragmatic, and a mixture of both. One notable case not discussed in this section is *Hall v. Powers* 213 D.L.R. (4th) 308. The issues raised in *Hall* are almost identical to the ones dealt with in the 3 cases that are discussed. The case involved an application for an interlocutory injunction restraining the Catholic District School Board from preventing Marc Hall's attendance at his high school prom with his boyfriend. The Court was called upon to balance Hall's s. 15 *Charter* right to be free from discrimination on the basis of his sexual orientation with the right to freedom of religion in s. 2(a) of the *Charter* and the protection of denomination school rights in s. 93(1) of the *Constitution Act, 1867*.
[31] *Supra* note 14.
[32] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.
[33] *Supra* note 23.

context means that the *Same-Sex Reference* is necessarily focused on a principled articulation of balancing. On the other hand, the Superior Court's decision in *Brillinger* tends to privilege a pragmatic approach to balancing. Ultimately, the balancing tools forged in each decision expand the conceptual toolbox for balancing conflicting rights.

***Trinity Western***

Trinity Western University ("TWU") is a private institution in British Columbia associated with the Evangelical Free Church of Canada. TWU established a teacher training program offering baccalaureate degrees in education upon completion of a five-year course, four years of which were spent at TWU, the fifth year under the aegis of Simon Fraser University. TWU applied to the B.C. College of Teachers ("BCCT") for permission to assume full responsibility for a teacher education program. TWU offers education within a 'Christian context' and requires students to sign a document outlining 'Community Standards' containing a prohibition on homosexual behaviour. The BCCT refused to approve the application because it was contrary to the public interest for BCCT to approve a teacher education program offered by a private institution that appears to follow discriminatory practices.

As part of its disposition on this case, the Supreme Court had to consider how to balance two competing *Charter* guarantees: freedom of religion and sexual orientation equality rights. Although *Trinity Western* was decided within the context of the *Charter*, established interpretive principles require *Human Rights Codes* to be applied in accordance with *Charter* values. Indeed, *Trinity Western* has become the paradigmatic example of balancing in many subsequent Human Rights Tribunal decisions, and the tools offered by *Trinity Western* have tended to dominate the Commission's understanding of how to balance conflicting rights.

The Court's approach to balancing integrates both principled and pragmatic considerations. The overarching principle articulated in this case is that any potential conflict between rights should be resolved through properly defining the scope of the rights involved. This process is required because, in principle, there is no hierarchy of rights in the *Charter* or the *Code*: "Any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved. Properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute."[34] A clear delineation of the extent and reach of each of the rights at stake may resolve the balancing issue at a very early stage in the task. That is, once the scope of the right is determined, both the complainant and respondent will have a better sense of whether or not their actions are legally protected.

[34] *Supra* note 14.

In *Trinity Western*, the Court concluded that the distinction between beliefs and conduct could serve as the marker of the proper scope of freedom of religion; "The proper place to draw the line is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them."[35] So long as a discriminatory belief is not translated into a discriminatory behaviour, individuals and institutions have the right to uphold those beliefs.[36] This distinction functions as a key tool in principled balancing but, crucially, determining the scope of the right is not accomplished within a vacuum. The scope of one right is, in part, assessed in relation to other rights and with respect to the particular factual context at hand: "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." (ftnote Syndicat) This comparative and contextual approach to rights protection opens the door for pragmatic tools to enter into the balancing equation.

The pragmatic balancing tools espoused in *Trinity Western* foreground the context of the rights claims.[37] First, evidentiary requirements loom large in pragmatic balancing. The Court emphasized that the mere anticipation of discriminatory behaviour is not enough to justify limits on rights. Absent concrete evidence that teachers trained at TWU fostered discrimination in the classroom, the freedom of individuals to adhere to certain religious beliefs should be respected. In essence, unless evidence indicated otherwise, teachers trained at TWU could keep their own personal beliefs in check when they began to teach in a public school. Second, the Court continued to adhere to a public/private distinction in determining the appropriate balance between competing rights. They did not take issue with the ability of TWU, as a private religious institution, to require its students to sign the Community Standards Agreement. Although the Court did note that homosexual students would not be tempted to apply for admission there and could only sign this contract at great personal cost, the Court was of the view that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, was not in itself discriminatory. In *Trinity Western*, the emphasis on pre-existing evidence of discrimination, and the distinction between private and public institutions, provide two specific pragmatic approaches to balancing rights that uphold the larger principle of delineating the proper scope of the rights at stake.

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[35] *Ibid*.

[36] MacKinnon J. articulates this principle in *Hall*: "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." *Supra* note 29 at para. 31.

[37] Context-specific analysis plays a large role in the majority of balancing cases. MacKinnon J. states in *Hall* that "the Prom in question is not part of a religious service (such as a mass), is not part of the religious education component of the Board's activity, is not held on school property, and is not educational in nature." *Supra* note 29 at para. 26.

***Reference re Same-Sex Marriage***

In response to provincial court decisions in British Columbia[38], Ontario[39], and Quebec[40] that changed the definition of marriage to include same-sex couples, the Federal Liberal Government drafted Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*. Bill C-38 proposed to legalize same-sex marriage across Canada.[41] One of the most pressing issues that arose in the Provincial cases and in Bill C-38 was how to ensure that freedom of religion would be protected, especially in relation to the solemnization of marriage, while also recognising that the conventional definition of marriage inherently violated the equality rights of same-sex couples.

Mindful of the complexities involved in balancing two equally valid rights claims, the Liberal Government referred a draft of Bill C-38 to the Supreme Court for their guidance. Hoping the Court would provide a methodology for working out the tensions between freedom of religion and sexuality equality rights, the government asked the court if the freedom of religion guaranteed by s. 2(a) of the Charter protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs. The Court's answer to this question provides a further articulation of the principled approach to balancing and also reasserts that absent a factual context, the pragmatic application of these principles is impossible.

The most important principled balancing tool that arises in this case is that in order for a conflict of rights to occur, an *actual intrusion* of one right onto the other is necessary. According to the Court, "The mere recognition of equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster."[42] Equality rights, then, co-exist in a relationship that is consistent with the values of mutual understanding and respect underlying both the *Charter* and the *Code*[43]. This principle encapsulates the aforementioned third step in identifying when there is no conflict of rights; a conflict does not exist unless *actual* burdens on rights occur. Extending the right to marry to same-sex

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[38] Barbeau v. British Columbia (Attorney General) (2003), BCCA 406.
[39] *Halpern v. Canada (Attorney general)* (2003), 65 O.R. (3d) 161 (Ont. C.A.).
[40] *Catholic Civil Rights League v. Hendricks*, (2004) CanLII 20538 (QC C.A.).
[41] *Supra* note 1.
[42] *Supra* note 31 at para. 46.
[43] MacKinnon J. expressed this principle in *Hall*: "It is one of the distinguishing strengths of Canada as a nation that we value tolerance and respect for others. All of us have fundamental rights including expression, association and religion. Sometimes, as in this case, our individual rights bump into those of our neighbours and our institutions. When that occurs we, as individuals and institutions, must acknowledge the duties that accompany our rights. Mr. Hall has a duty to accord to others who do not share his orientation the respect that they, with their religious values and beliefs, are due. Conversely, for the reasons I have given, the Principle and the Board have a duty to accord to Mr. Hall the respect that he is due as he attends the Prom with his date, his classmates and their dates." *Supra* note 29 at para. 60.

couples does not, in itself, conflict with any *Charter* rights that others may have. As the Commission's Factum to the Court states, "Exclusion is discriminatory, inclusion is not. An individual denied access may complain of discrimination; an individual wishing to deny access may complain, but not of discrimination."[44]

In this *Reference*, the Court affirmed that freedom of religion is an expansive right that is "broad and jealously guarded in our *Charter* jurisprudence."[45] This principle also applies to Human Rights Codes: "human rights codes must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the *Charter*."[46] The Court decisively concluded that any compulsion on religious officials to perform same-sex marriages "would almost certainly run afoul of the *Charter* guarantee of freedom of religion, given the expansive protection afforded to religion by s. 2(a) of the *Charter*."[47] As in *Trinity Western*, the reasoning driving this conclusion stems from the Court's delineation of the scope of freedom of religion. Included in this right is the right to manifest religious beliefs through religious practice, and the performance of religious rights – such as the solemnization of marriage – is a fundamental aspect of religious practice. When the scope of the right is made clear, the potential for conflicting rights claims is significantly decreased.[48]

The Court suggested that tools found within the *Charter* itself will play a large role in balancing any potential conflicts of rights: "Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation."[49] This statement resonates with the previous discussion in this paper of the importance of the internal balancing provisions within the *Code*. While section 1 is the primary site of internal balancing in the *Charter*, the exception sections of the *Code* offer pragmatic balancing solutions with similar justificatory criteria as is found in section 1 jurisprudence.

But aside from these statements of principles and recognition of existing balancing tools, the Court in the *Same-Sex Marriage Reference* was wary of providing a more detailed analysis of whether or not the proposed legislation would create "an impermissible collision of rights."[50] This wariness stems from a refusal to examine a potential conflict of rights in a purely abstract form. When

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[44] *Factum of the Intervener Ontario Human Rights Commission*, at para. 35.
[45] *Supra* note 31 at para. 53.
[46] *Ibid*. at para. 55.
[47] *Ibid*. at para. 56.
[48] The relational nature of Charter equality rights is made explicit in *Syndicat Northcrest v. Amselem*, *supra* note 2. The court states: "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" at para. 62.
[49] *Ibid*. at para. 52.
[50] *Ibid*. at para. 50.

there is no factual context it would be "improper"[51] to assess how balancing may take place: "*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions."[52] This passage serves as a valuable reminder that the balancing of conflicting rights must *always* consider the factual context in which the conflict occurs. It is also a reminder that a generic formula is inappropriate when dealing with the balancing of conflicting of rights. Both a principled and a pragmatic approach to balancing provide valuable tools, but they are tools only. Neither approach should be understood as providing a determinative balancing test.

***Brillinger v. Brockie***

Ray Brillinger, in his capacity as president of the Canadian Lesbian and Gay Archives, attended the offices of Imaging Excellence Inc, a commercial printing company owned and operated by Scott Brockie, to ask Imaging to print blank letterhead and envelopes for Archives' general correspondence and some business cards for its officers. The copy presented to Imaging contained Archives' new logo and noted that Archives' represented interests of 'gays' and 'lesbians' but said nothing of Archives' objects, activities, or membership. Brockie refused to provide the requested printing services. Brillinger and the Archives brought a complaint based on discrimination based on sexual orientation. In response, Brockie focused his defence on freedom of religion and asserted that providing printing services to homosexual organizations would be in direct opposition to his religious beliefs.

The Ontario Board of Inquiry held that Brockie's denial of service contravened the sexual orientation protections of the Code and that it was reasonable to limit Brockie's freedom of religion in order to prevent harm to members of the lesbian and gay community and their organizations by the denial of services because of their sexual orientation. Brockie appealed to the Ontario Superior Court which upheld the Board's original decision, but amended it to add an explicit recognition of Brockie's freedom of religion. In coming to the conclusion that this was a necessary addition, the Court took a pragmatic approach to balancing conflicting rights that builds on the *Trinity Western* principle of separating beliefs and conduct.

The Court noted that the freedom to act on religious beliefs is circumscribed when it interferes with the rights of others. By examining the 'core' of the freedom, it is possible to determine which activities engage the protections of the *Code* and the *Charter*. Those activities at the 'periphery' of the freedom will be less likely to be protected: "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. Service of the public in a commercial service must be considered at the periphery of activities protected by freedom of

[51] *Ibid*. at para. 51.
[52] *Ibid*.

religion."[53] The Court's pragmatic balancing emerges out of this distinction between core and peripheral elements. Stating that the Board's order could have been less intrusive, the Court's addition to the Board's order makes clear that "this order shall not require Mr. Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed."[54] The Court worried that the original order is overbroad and could extend to other material with editorial content that is "repugnant to the fundamental religious tenets of the printer"[55], such as "material that conveyed a message proselytising and promoting the gay and lesbian lifestyle."[56]

While this form of pragmatic balancing is envisioned in both *Trinity Western* and the *Reference re Same-Sex Marriage*, the Court in *Brillinger* runs the risk of balancing conflicting rights within a factual vacuum. The Court's addition to the Board's order is grounded in "a few hypothetical situations"[57] rather than in an *actual* evidentiary context. This type of speculation is precisely what the Supreme Court sought to avoid in the *Reference* because they understood that the task of balancing is not accomplished solely through a reliance on a principled articulation of the scope of the rights at stake, but that this process must necessarily be grounded in the specific scenario at hand. As the briefing note on this case makes clear, this aspect of *Brillinger* has "the potential to open the door to future disputes about what actions could be considered to conflict with the core elements of religious beliefs. In particular, the notion that materials that 'proselytise' a gay and lesbian 'lifestyle' may be refused, leaves open the potential for future arguments that any number of activities strike at the core of religious beliefs."[58] *Brillinger* is an example of over-zealous balancing; the court's eagerness to imagine future hypothetical balancing scenarios oversteps the parameters created by the facts of the case. In short, the desire to engage in principled balancing must be tempered by the tools of pragmatic balancing.

## A Summary of the Balancing Tools

This section of the paper provides, in point form, a summary of the balancing tools discussed above. The two approaches to balancing that this paper identifies (principled and pragmatic) provide the framework for sorting these tools into two conceptual toolboxes. However, as has been noted many times through this discussion, these two approaches will necessarily overlap in the adjudication of conflicting rights claims and in the text of the *Code* itself.

| **Principled Balancing Tools** | **Pragmatic Balancing** |
|---|---|

[53] *Supra* note 23 at para. 51.
[54] *Ibid*. at para. 58.
[55] *Ibid*. at para. 49.
[56] *Ibid*. at para 56.
[57] *Ibid*.
[58] OHRC, Briefing Note, "Reconciling Rights: Trinity Western, Marc Hall and Brillinger v. Brockie" 3 July 2002.

| | **Tools** |
|---|---|
| • Maintain the inherent dignity and worth of each individual<br>• Foster a climate of mutual understanding and respect<br>• No right is absolute<br>• Delineate the proper scope of the right<br>• There is no hierarchy of rights<br>• Freedom of belief is wider than the freedom to act on those beliefs<br>• Mere recognition of the equality rights of one group is not a violation of the rights of another group<br>• Contextual analysis is always required<br>• Only *actual* burdens on rights trigger conflicts<br>• Use a purposive interpretation of rights<br>• Exception sections are construed narrowly; Rights are construed broadly | • Equally valid competing rights?<br>• *Actual* conflict?<br>• Core or Peripheral activities?<br>• Evidence proves discrimination?<br>• Public v. Private entity?<br>• Duty to accommodate?<br>• Exception Sections applicable?<br>• Extent of infringement on each right? |

**SECTION IV: USING THE TOOLS**

A number of conflicting rights scenarios and their potential resolutions have been presented throughout this paper in order to illustrate specific balancing tools. This section of the paper will utilize each of the tools noted above by working through one timely example of conflicting rights: same-sex marriage and civil marriage commissioners. This example has been chosen not only for its currency, but also because it encompasses both the service and employment contexts. There are distinctively different ways to balance the conflicting rights in this scenario, and the outcome will be determined by the extent to which one is guided by either a principled or pragmatic approach or some combination of the two.

For the purposes of this scenario, let us assume that civil marriage commissioners are employed and authorized by the Province to solemnize

marriages. A same-sex couple decide to get married at Toronto City Hall. After filling out the requisite paperwork, license in hand, they want to make an appointment for the solemnization. They are told that the only commissioner available that day is, because of deeply and sincerely held religious beliefs, unwilling to solemnize a same-sex marriage. The couple is told that they should return the following day when another commissioner will be able to perform their ceremony. The Provincial Justice Department is aware that some commissioners are refusing to perform same-sex marriages because of their religious convictions and so they have decided to introduce legislation that will require all civil marriage commissioners to solemnize same-sex marriages regardless of personal religious beliefs. Several commissioners have lodged a joint complaint at the Human Rights Commission claiming that their religious rights have been violated. In the meantime, the same-sex couple have also brought a discriminatory service complaint before the Human Rights Commission. The two cases have been joined together.

The questions outlined in Section II of this paper provide the starting point for assessing this scenario. In order to identify if there is an *actual* conflict of rights, we must begin by asking whether or not the rights claims are characterized appropriately and whether or not they are valid, legally recognized rights. The same-sex couple grounds their claim in the right to be free from discrimination based on sexual orientation in a service context (Section I of the *Code*)[59]. Since they were explicitly refused service because they were a same-sex couple, a discrimination claim based on sexual orientation is the appropriate characterization of the issue. So, too, this is a valid, legally recognized right found in the text of the *Code* itself. The marriage commissioners base their claim on a right to be free from discrimination based on creed in the workplace (Section 5(1) of the *Code*)[60] and the duty of an employer to reasonably accommodate religious beliefs (Section 11(2) of the *Code*)[61]. The commissioners argue that the tenets of their religion do not permit them to solemnize same-sex marriages and that to do so would undermine their deeply and sincerely held religious beliefs. They want their beliefs accommodated in the same way that the celebration of religious holidays must be accommodated, short of undue hardship. Assuming the commissioners provide evidence of the requirements of their religious beliefs,

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[59] Section I of the *Code* states: “Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, or disability.”

[60] Section 5 of the *Code* states: “Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place or origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.”

[61] Section 11 (2) of the *Code* states: “The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.”

they appear to have characterized their rights claim appropriately according to the legally recognized right to freedom from discrimination based on creed.

We may now move on to the third question of whether or not the needs of the parties are truly in conflict. In the service context, an argument could be made that the couple's 'need' to get married is indeed being fulfilled, but just not within their preferred time frame. However, it is unlikely this argument will stand up to scrutiny because it amounts to adverse effects discrimination in that preferential treatment is inadvertently given to non-same-sex couples. In effect, to allow this argument would be to accord same-sex couples second-class citizenship. On the other hand, the 'need' to adhere one's religious beliefs is met within the service context because the commissioners simply refuse to solemnize these couples. The commissioners' religious need directly conflicts with the couple's solemnization need. The Province, as the employer *may* have a duty to accommodate the commissioners' needs, but they *absolutely* have a duty to provide services without discrimination. It appears that these two needs will not be easily reconciled and that they are truly in conflict.

At this point in our assessment, we may begin to consider the balancing tools and the different outcomes produced by using either a pragmatic or principled approach. In the service context, from a principled perspective, the denial of same-sex solemnization services violates the values underlying the *Code*. Specifically, the inherent dignity and worth of these individuals is undermined by this refusal. The failure to provide service to this couple is a denial of their equality rights. This, in fact, is the position that the Commission has taken. In his letter to the Attorney General on this issue, the Chief Commissioner states: "The denial of service by a public official to a same sex couple is no less a violation of the *Code* and the *Charter* than a denial of this service to an interfaith or interracial couple."[62] Indeed, allowing marriage commissioners to pick and choose to whom they offer their services potentially opens the door to an endless number of refusals based on religious beliefs. For instance, a practising Catholic may refuse to solemnize the marriage of a previously divorced Catholic. A principled approach in the service context foregrounds the anti-discriminatory mandate of the *Code* as embodied in the Preamble's call for "a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community." As the Chief Commissioner reminds us, "Inclusion is an essential part of equality."[63]

A pragmatic approach to the service issue would undoubtedly begin by stating the principles and values above and then go on to look at this particular service context. Factors to consider include: the solemnization of marriage by civil officials is a *public* service; the couple meets the eligibility criteria for marriage, so there is an obligation to provide this service whether or not it

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[62] Letter to The Honourable Michael J. Bryant, Attorney General of Ontario, 20 December 2004 at p. 2.
[63] *Ibid*.

conflicts with the views of an individual employee; there is clear evidence of discrimination against an identifiable, protected group; there is no exception section of the *Code* for the provision of services; case law has determined that the freedom to hold beliefs is greater than the freedom to act on those beliefs when it negatively impacts the equality rights of others, especially in a service context[64]; case law also recognizes that providers of public services must be able to 'check their personal views' at the door.[65] Both a pragmatic and principled approach to balancing would agree that under the *Code* and the *Charter* there is no doubt that same-sex couples are entitled to equal service. The attitudes of individual employees must not be allowed to 'poison' the environment for same-sex couples requesting civil solemnization services. However, the analysis becomes more complicated when the employer-employee relationship is factored into this equality equation.

The most intense conflict in this scenario occurs in the employment context where the debate shifts to a consideration of whether or not a duty to accommodate exists in this particular case. On the national stage, the governments of Alberta and Saskatchewan have taken opposite stances on this issue. Alberta's Premier Klein has opted for an absolute exception for civil marriage commissioners, stating that, "those who hold social, or cultural beliefs or values, whether religious or non-religious, will be free to express opposition to the change to the traditional definition of marriage and will not be required to advocate, promote, or teach about marriage in a way that conflicts with their beliefs."[66] This reasoning creates an overarching, extraordinarily broad duty to accommodate. On the other hand, the government of Saskatchewan has refused altogether the duty to accommodate in this particular context, and they have declared that any civil marriage commissioner who refuses to solemnize a same-sex marriage will be fired.[67]

The government of Ontario appears to have taken the middle road in that they have clearly legislated an exception for religious officials who refuse to solemnize same-sex marriages (Bill 171)[68], but have remained conspicuously silent on the issue of civil marriage commissioners. This silence, as has already been noted, signals an implicit refusal to formally accommodate the religious beliefs of commissioners, but it also suggests that the government is relying on the practice of informal accommodation to strike a balance between these competing equality rights. While it is easy enough to achieve this informal accommodation in a large urban center such as Toronto where there are enough marriage commissioners to make equal access to marriage commissioners possible at all times, informal accommodation will not be possible in rural Ontario

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[64] *Supra* note 29.
[65] *Supra* note 14.
[66] Daniel Girard, "Gay Marriage Fight Over; Alberta to begin issuing licenses. But law to protect opponents' rights" *Toronto Star* (13 July 2005), A12.
[67] Gloria Galloway, "Refused gays rites, marriage official expects to get axe" *The Globe and Mail* (19 July 05) A4.
[68] *Supra* note 13.

settings without disrupting equal access to the services of civil marriage commissioners.

A principled approach to accommodating these employees may begin with an examination of the scope of the right. It is crucial to note, however, that this principled approach is intertwined with several pragmatic balancing concerns including an assessment of core versus periphery activities, public versus private entities, and the definition of 'duty to accommodate'. In this scenario, a comparison to religious officials will be useful. The Commission's factum to the Supreme Court on the *Reference re Same-Sex Marriage* notes that, "religious officials acting in an official religious capacity express their religiosity in the performance of their job functions. In contrast, secular service providers that hold personal religious beliefs cannot claim that the performance of their job functions is an expression of their deeply held religious beliefs."[69] Delineating the proper scope of freedom of religion is aided by this comparative approach in that the two different contexts (secular and religious) highlight core versus periphery religious activities. Core activities will generally receive a much more generous reading of exceptions than periphery activities.

A comparative contextual analysis such as this makes it possible to tease out the extent to which religious beliefs will be protected in specific situations. Similarly, using case law precedents, the public nature of the duties of civil marriage commissioners will tend to mean that their privately held religious beliefs may be held but not acted upon: "The expectation that an individual perform certain job duties may not, at the end of the day, violate freedom of religion if, by virtue of that person's public office, such duties are essential, and if the failure to perform them violates the *Charter* rights of others."[70] Courts have mainly concluded that freedom of religion will not usually be sufficient justification for a conduct that discriminates against others in areas of public life to which human rights legislation applies.[71]

The question of accommodation may not need to be entertained if it is found that the scope of freedom of religion, in terms of acting on one's beliefs when they conflict with another's equality rights, does not extend to public officials employed in a public service context. Regardless, accommodation cannot negatively impact the delivery of services: "the obligation to provide the service to the public would set limits on the ability of the service-provider to accommodate employees."[72]

A principled approach to balancing may focus on *Code* values in order to determine whether or not a duty to accommodate exists in this particular

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[69] *Supra* note 43 at 15-16.
[70] *Ibid*. at 16.
[71] For a discussion of this issue see: Paper prepared by the Canadian Human Rights Reporter for the British Columbia Human Rights Commission, "Human Rights Law in B.C.: Religious Discrimination" (March 2001).
[72] *Supra* note 43 at 17.

scenario. Human rights tribunals and courts would need to ask "whether a need that appears to be inconsistent with the *Code* is less deserving of accommodation than a need that does not conflict with the values of the *Code*."[73] A duty to accommodate may not extend to situations in which discrimination against another group is the by-product of accommodating a particular belief. A principled approach to balancing would ask if it is desirable to protect a value that is antithetical to the *Code*.

A pragmatic approach to the duty to accommodate will also attempt to map out the parameters of this duty, but will focus more on the 'short of undue hardship' aspect of accommodation. That is, if same-sex couples have equal access to the solemnization of marriage and the same calibre of service when employees' religious beliefs are accommodated, then balancing has been achieved. Recognizing that freedom of religion is not absolute, and hence the duty to accommodate religious beliefs is also not absolute, a pragmatic approach would seek to set limits on accommodation only when the rights of same-sex couples are infringed (directly or indirectly), or when a poisoned atmosphere is created by the accommodation of an employees religious beliefs. This pragmatic approach would rely on same-sex couples to 'police' their equal access to services and report any discrepancies or inequities. [74]

In this scenario, balancing conflicting rights in the *service* context showcases a harmonious relationship between the pragmatic and principled approaches to balancing. Both approaches would reach the same conclusion in regards to the provision of services. However, balancing conflicting rights within the *employment* context of this scenario highlights the different outcomes that each approach may produce. The benefit of a principled approach in the employment context is that it strictly adheres to the underlying values of human rights legislation and it relies on established interpretive principles for *Code* exception sections. Principled balancing would provide the most certainty for all

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[73] *Ibid*.

[74] One prominent example of a pragmatic approach to an employer's duty to accommodate in conflicting rights cases may be seen in the settlement reached in a complaint against Markham-Stouffville Hospital. Seven nurses objected to participating in abortion procedures due to their religious convictions. They filed a complaint with the Commission claiming that their religious rights were violated when the Hospital required them to participate in abortion procedures. Under the terms of the settlement, the Hospital adopted a policy that allows staff with a religious objection to abortions to be excused from directly performing or participating in such procedures, except where the mother's life is in danger. In this situation, the religious convictions of the nurses are accommodated without affecting a patient's ability to access abortion procedures. In the particular context of this case it is possible to ensure equal, unaffected access to a public service while concurrently protecting an expansive understanding of freedom of religion. It must be noted, however, that this pragmatic approach to a duty to accommodate does not appear to be the Commission's current position on civil marriage commissioners. The Commission appears to favour an approach in which employees providing a public service may not be entitled to a duty to accommodate if the right they are asserting is based on the exclusion of others' rights. For example, if a freedom of religion right is based on the need not to provide certain services or not to serve particular individuals, that right may be less likely to be protected than if it was a positive right to do something such as prayer time during work hours, accommodation for religious holidays, etc.

parties in this scenario in that employees would have the scope of their religious beliefs in the workplace clearly delineated, employers would have ‘either/or’ guidelines for the provision of services and accommodation would be clearly linked to the ability to provide equal, accessible service, and same-sex couples would be assured that service would always be available in an un-poisoned environment. But, the certainty that comes from an analysis grounded solely in principled balancing is also the greatest limitation of this approach. It may not be flexible enough to provide the very mutual respect and understanding that it espouses. It may also privilege ideals and overarching values at the expense of actual, real-world concerns.

On the other hand, flexibility characterizes a pragmatic balancing approach to the employment context of this scenario. Pragmatic balancing focuses on specific contextual questions and is more attentive to the actual working conditions of the everyday. This approach generally embodies a compromise-mentality that attempts to accommodate the needs and rights of all parties. But flexibility and compromises may come at the expense of underlying anti-discrimination values. Pragmatic balancing will tend to rely more heavily on the particular situations of individual actors to assess the extent to which compromise is possible. As noted above, this means that these individuals will be expected to regulate and monitor how well the compromise is actually working.

**CONCLUSION**

This scenario highlights the different resolutions that principled and pragmatic balancing may offer. It also illustrates the overlap of these two approaches and the wide range of balancing tools that may be employed in any given situation. The best approach appears to be one that mixes and matches these two styles of balancing. Indeed, it is crucial that these two approaches compliment and inform each other. For that reason, these approaches should not be understood as binary opposites. Rather, pragmatic and principled balancing may be located on a continuum in which most balancing occurs in the middle ground where these approaches overlap. Finally, it is always appropriate to let the context at hand dictate which balancing tools will be employed. Otherwise, we run the risk of over-stepping what is actually required to resolve a particular conflict and, in doing so, place unnecessary constraints on future balancing scenarios. The different outcomes discussed in this scenario are not simply the product of pragmatic or principled balancing, they are also markers of different philosophical understandings of equality and rights. But that is far beyond the scope of this paper.