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## **ONTARIO HUMAN RIGHTS TRIBUNAL RULES THAT ATHEISM IS PROTECTED AS A ‘CREED’**

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### **A. INTRODUCTION**

As reported in our July/August *Charity Law Update*, the Human Rights Tribunal of Ontario (the “Tribunal”) released on August 13, 2013 an important decision in *R.C. v. District School Board of Niagara*, 2013 HRTO 1382, (“Decision”) about a complaint brought by self-described atheists concerning the distribution of religious publications in a public school to students who expressed interest in receiving those materials and who had a signed parent permission slip. While the Decision included atheism in the term “creed” under the *Ontario Human Rights Code* (“Code”), the Decision’s significance for charities, particularly religious charities, is that it did so for the purpose of preventing discrimination on the basis of religious unbelief. It did not equate atheism with religion and did not prevent the distribution of religious publications in public schools, provided that parental consent is obtained, all creeds are treated equally and the publications are distributed outside the classroom.

### **B. THE FACTS**

The facts, which formed the basis of the Decision, were not contested.<sup>1</sup> Though their identities were kept anonymous, it was revealed that the two applicants were a father and his child who is a student at a school within the District School Board of Niagara (“Board”). The father described himself as an atheist or non-

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<sup>1</sup> The facts have been shortened for the purposes of this Bulletin

theist, in that “he rejects the idea that there is a deity of any kind and believes that the suggestion there is one is false.”

The Board had established a policy and procedure that required requests for distribution of religious publications and presentations in schools to be approved by the Director of the Board, and subsequently by the principal in consultation with the applicable school council. Presentations were preferably to be made after normal school hours and no religious instruction was allowed during the presentation. Attendance was optional at these presentations and permission to attend the presentation required parental consent (the “Presentation(s)”). The Presentations included the distribution of religious books and other materials.

The parent applicant subsequent to a Presentation at his/her child’s school, contacted the principal and requested to be allowed to distribute materials at one of the future Presentations at his child’s school a book called “Just Pretend: a Freethought Book for Children”, which promotes atheism. The book the parent applicant proposed to distribute encouraged children to, among other things: think critically and independently about religious norms, deities and traditions; boldly challenge the historical reality of major religious figures and deities; be prepared to conclude that none of the established religions held truth for the child. The book concludes with the following:

“No one can tell you what to think. Not your teachers. Not your parents. Not your minister, priest or rabbi. Not your friends or relatives. Not this book. You are the boss of your own mind. If you have used your mind to find out what is true, then you should be proud. Your thoughts are free. If you are an atheist, then you know that God Is Just Pretend.”

The parent applicant was subsequently refused permission by the Board to allow distribution of the book on several grounds, including that atheism is not a religion and that the book was not an authoritative source of any religion or belief.

## **C. THE TRIBUNAL’S DECISION**

The Decision primarily dealt with the question of whether atheism can be encompassed within the protected ground of “creed” under Ontario’s *Human Rights Code* (the “Code”). If atheism is considered a creed under the Code, then the Board would not have the right to exclude those types of materials or presentations at the same time as allowing materials from other creeds.

## 1. The Code

The central protection at issue in this Decision is set out in Section 1 of the Code, which 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 [...] family status or disability” (emphasis added). It is important to remember that this is Ontario provincial legislation, and only applies to those providing services, goods and facilities to others who don’t fall under the enumerated exceptions in the Code.

The Board took the position that the Code didn’t protect the applicant because atheism is not a creed. The applicant took the position that atheism is a creed. The Tribunal, using a liberal and purposive interpretation of the Code, concluded that it was not necessary to decide whether atheism is a creed or a religion because it is well established that creed includes religion and the Code protects individuals from discrimination on account of their beliefs about religion, including their non-belief. The Tribunal found support for this approach in both Canadian and international authorities.

## 2. Decision’s Authorities: Charter, French Translation and International Law

The Decision turned to case law from the Supreme Court of Canada (“Supreme Court”) interpreting the *Canadian Charter of Rights and Freedoms* (the “Charter”), specifically the guarantee of “freedom of religion and conscience” under section 7 of the Charter. The Decision refers to a triad of key Supreme Court cases, among others, interpreting what the guarantee of freedom of religion and conscience entails in the Charter context<sup>2</sup>, which governs the state’s treatment and relationship with the individual citizen in contrast to the Code which governs interactions in the private sphere. It should also be noted that the Charter does not use the term “creed” and the Code does not include “freedom of conscience.”

As the Decision notes, it has been well established by the Supreme Court since 1985 in the leading case of *R. v. Big M Drug Mart Ltd*, [1985] 1 SCR 295, that freedom of religion and conscience in the Charter context includes the protection of sincerely held beliefs and opinions regarding “religious non-belief”, the “refusal to participate in religious practice,” and that belief or opinion does not necessarily

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<sup>2</sup> The Charter jurisprudence, other than *R. v. Big M Drug Mart Ltd*. (supra) includes, *inter alia*; *R. v. Edwards Books and Art*, [1986] 2 SCR 713; and, *Syndicat Northwest v. Amselem* [2004] 2 S.C.R. 551 (collectively, the “Charter Jurisprudence”)

have to include worship or belief in a supreme being(s) or deity(ies). The Charter Jurisprudence referred to in the Decision calls for a “realistic and non-absolutist approach... towards religious beliefs” in that no person should be discriminated against because they “have no religious beliefs at all.”

In the excerpts the Decision relies upon, the Supreme Court makes it clear that “religious practices should be protected equally as expressions and manifestations of religious non-belief and refusal to participate in religious practice.”

The *Amselem decision* of the Supreme Court is a freedom of religion Supreme Court case which attempted to provide the “outer definition of religion “at paragraph 39 by saying the following:

“While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.”

In the Tribunal’s view, the *Amselem* decision didn’t affect the ruling in previous Supreme Court cases that the guarantee of freedom of religion and conscience protects non-belief. While this may be so, the Decision appears to not address the distinction the Supreme Court makes between beliefs and practices “rooted in religion” and those that are “secular, socially based or conscientiously held.”

A resulting question which the Charter jurisprudence and the Decision do not directly address is that if atheism is entitled to the same protection as religion, does it follow that atheism is a religion? The distinction is probably moot for the purposes of the Decision, as the extension of protection of creed (as opposed to finding that atheism is a religion) to atheists is the fundamental finding of the decision.

Other than the Charter, the Decision also relied on international human rights law and the Supreme Court case, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (“*Baker*”) which references it. *Baker* sets out an interpretation of the breadth of the protection of the freedom of

religious belief that reflects the same breadth as that in the Charter jurisprudence, the difference being it references article 18(1) of the *International Covenant on Civil and Political Rights* (ratified by Canada) as authority instead of the Charter.

The Decision lastly relied on the French translation of “creed” in the Code, “croyance”, because croyance “reflects a broader understanding of creed that reflects beliefs rather than only identification with a formal set of religious views.”

### 3. Decision Does not ban Creed from Public Spaces

As has been explained, the Decision provides protection from discrimination based on creed under the Code to those with atheist beliefs. Ultimately, the Decision directed the Board to revise its policy on Presentations to comply with the Code within six months.

The Decision is certainly notable for what it changed and expanded, but also for the principles and rights it upheld. The Decision confirms that the “Code ensures equality because of creed, but does not ban creed from all public spaces.” It is ultimately up to the Board or similar public institutions to decide whether or not to have programs like the Presentations.

So long as no particular religion or creed is promoted and none are specifically excluded in these after-school voluntary programs, the Code is not breached. The Decision makes it clear that: “[c]reed-based activities outside the classroom need not be eliminated, so long as participation is optional, no pressure is applied on students to participate, the school is neutral and it makes clear that it is facilitating such optional activities for all creeds, not promoting any particular creed.” While there is an obligation to be inclusive of a wider variety of beliefs as creed, the basic decision about whether to run these types of programs and how is still a protected choice of the institution or entity providing the good, services or facility in Ontario.

## **D. COMMENTARY**

On an initial reading of the Decision, it seems that atheism is being equated to religion, which presumably would be as unwelcome to atheists as it would be those who belong to a particular religion. The Decision is very careful not to conflate atheism and religion and it is important to be clear about what this Decision

actually decides. It uses the Charter freedom of religion cases simply to drive home the point that persons can't be discriminated against on the basis of religion whether it is because of a sincerely held religious belief or sincerely held non-belief. The Decision provides an example of the impact of accepting the Board's position that only religion is protected under the heading of "creed" in the Code. The example which follows is very helpful in understanding the rationale and limits of the Tribunal's conclusions:

"If an employer decided to dismiss all employees who did not share the religious faith of the president of the company, those who belonged to other religions would have a claim, but not those who are atheist, agnostic or who do not have a view on religion. It would allow the province, a service provider or an employer to enforce particular views and practices on those with atheist views or no clear views about matters, but not those who actively believe in a different religion."

Atheists are protected from discrimination on the basis of creed under the Code not because a decision has been made that atheism is a religion but because the discrimination is based on religion or a creed and engages the purpose of the Code to ensure that "people are treated equally regardless of their views and practices on religious matters."

If the Decision were to be interpreted, along with Charter jurisprudence, as labeling atheism as a religion *per se*, then certain complications could arise. The impact on the *Criminal Code*<sup>3</sup> or the treatment of "advancement of religion" as a head of charity at common law for purposes of applying for registration as a charity under the *Income Tax Act* (ITA) could potentially be impacted. However, if 20 years of varying Charter jurisprudence from the Supreme Court has not expanded the definition of "advancement of religion" to include atheism for purposes of registration as a charity under the ITA, then it is doubtful that this Decision from the Ontario Human Rights Tribunal would do so either.

## E. CONCLUSION

The Ontario Human Rights Tribunal built upon established Canadian precedent in its Decision, and its impact (if any) outside of Ontario and the human rights arena is yet to be determined. Much will depend on its interpretation and how it is referred to (albeit only as a persuasive precedent) by other Canadian courts under different legislation or case law that deal with the charitable purpose of advancing religion. While

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<sup>3</sup> For instance, section 718.2 of the Criminal Code references religion in the sentencing principles which may increase a sentence (a hate crime type of provision). Under this section, a sentence may be extended if there is evidence that a crime was committed because of prejudice or hate based on, *inter alia*, religion.

different areas of law can spill over into others, it is clear that: 1) the reference to protecting atheism as a creed is limited to the protection afforded by the Code and not to anything else, and 2) that school boards and other public institutions are not precluded from distributing religious materials by various religious groups, provided that the same opportunity is offered on a fair and equitable basis to all religious groups or creeds, which is a reasonable position for the Tribunal to take. In this regard, the Decision should prove to be of assistance in ensuring a continued diverse and respectful conversation in Ontario with respect to fundamental beliefs, principles of conscience and matters of faith.