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## **TRIBUNAL UPHOLDS RELIGIOUS SCHOOL RIGHT TO REJECT APPLICANTS BASED ON CREED**

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*By Terrance S. Carter and Theresa L.M. Man\**

### **A. INTRODUCTION**

On July 5, 2017, in *HS v The Private Academy*,<sup>1</sup> the Human Rights Tribunal of Ontario (the “HRTO”) dismissed three applications by a same-sex married couple (the “Parents”) alleging discrimination by an Evangelical Christian school (the “School”) that refused to admit their child into its preschool program. The Parents argued the School discriminated with respect to services against their child because of sex, creed, family status and marital status.<sup>2</sup> However, the School responded that it was entitled to rely on the exemption in section 18 of the Ontario *Human Rights Code* (the “Code”)<sup>3</sup> because it, as a “special interest organization”, is primarily engaged in serving the interest of persons identified by a particular creed and it is entitled to restrict participation to parents who subscribe to its creed.<sup>4</sup> This decision provides an important precedent concerning the application of the protection contained in section 18 of the Code for organizations primarily dedicated to providing services, goods and facilities to individuals identified by any of the prohibited grounds of discrimination, such as creed, sex, age, marital status, family status or disability, in their specific communities without the obligation to extend equal treatment to the broader public.

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<sup>1</sup> *HS v The Private Academy*, 2017 HRTO 791.

<sup>2</sup> *Ibid* at para 2.

<sup>3</sup> *Human Rights Code*, RSO 1990, c H.19.

<sup>4</sup> *Supra* note 1 at para 3.

## B. BACKGROUND

The Parents, who were seeking a preschool for their child, self-identify as Christians. They believed that the School was the most suitable option for them to provide a Christian educational environment to their child, even though the child would be exposed to views on marriage and sexuality that were not shared by them.<sup>5</sup>

The School was established as an alternative to the public school system for parents who shared the same Evangelical Christian values and traditions. It provides a “biblically-based curriculum in a Christ-centred learning environment”,<sup>6</sup> where “the school functions as an extension of the home, to support parents in their ‘responsibility before God’ to raise and teach children.”<sup>7</sup> Specifically, the School provides parents with a handbook (the “Handbook”) containing its Mission Statement, Statement of Faith, Core Family Values, and Lifestyle Policy, which include the beliefs that a human being exists from the time of conception and that marriage is between one man and one woman. Even though the preschool program application package did not provide all this information to prospective parents,<sup>8</sup> the Parents acknowledged having received additional information regarding the Handbook and the School’s stance on marriage and sexuality from the School’s principal.<sup>9</sup> The School receives no government funding, and as a result depends on tuition, fundraising and donations.

In its 20-year history, the School had previously rejected three other applications that did not meet the requirements set out in the Handbook and were contrary to the Core Family Values and Lifestyle Policy – where the parents were not affiliated with a congregation, where parents were in a cohabitation relationship, and where parents were in a same-sex relationship.<sup>10</sup>

## C. SPECIAL INTEREST ORGANIZATION EXEMPTION

Section 1 of the Code prohibits discrimination when providing “services, goods and facilities” based on a person’s “creed” or “race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual

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<sup>5</sup> *Ibid* at paras 9, 18.

<sup>6</sup> *Ibid* at para 13.

<sup>7</sup> *Ibid* at para 50.

<sup>8</sup> *Ibid* at para 15.

<sup>9</sup> *Ibid* at para 18.

<sup>10</sup> *Ibid* at para 16.

orientation, age, marital status, same-sex partnership status, family status or disability.” However, section 18 of the Code provides an exception to section 1 by special interest organizations from the requirement to provide equal treatment with respect to services, goods and facilities without discrimination when the organization is “primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination.”<sup>11</sup> Similarly, the Code provides other statutory exemptions to the rights to equal treatment without discrimination, such as in circumstances of providing special employment.<sup>12</sup>

The HRTO decision states that section 18 should not be interpreted narrowly because this section has been characterised by the courts as having a dual purpose – both to “protect the right to associate and to promote certain types of association, including religion.”<sup>13</sup> In this regard, the adjudicator relied on two cases, namely *Caldwell v Stuart*<sup>14</sup> and *Ontario Human Rights Commission v Christian Horizons*.<sup>15</sup> Both these cases are in relation to the provision of employment rather than the provision of services and therefore the organizations in question were subject to a different test to claim the benefit of the defence in section 24 of the Code.<sup>16</sup>

In applying the requirements in section 18, the HRTO applied the following three-part test adopted in two cases of the tribunal: *Kostiuk v. Toronto Community Housing Corporation* and *Martinie v. Italian Society of Port Arthur*.<sup>17</sup>

1. Is the entity a religious, philanthropic, educational, fraternal or social institution or organization?
2. Is the institution or organization “primarily engaged in serving the interests of persons identified by a prohibited ground”?

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<sup>11</sup> *Supra* note 3, s. 18.

<sup>12</sup> *Ibid* at s. 24.

<sup>13</sup> *Supra* note 1 at para 25.

<sup>14</sup> *Caldwell v Stuart*, [1984] 2 SCR 603, 1984 CanLII 128 (SCC).

<sup>15</sup> *Ontario Human Rights Commission v Christian Horizons*, 2010 ONSC 2105.

<sup>16</sup> *Supra* note 1 at paras 25, 80.

<sup>17</sup> *Ibid* at para 28. See *Kostiuk v. Toronto Community Housing Corporation*, 2012 HRTO 388 (CanLII) at para. 44 and *Martinie v. Italian Society of Port Arthur* (1995), 24 C.H.R.R. D/169 (Ont. Bd. Of Inquiry) at paras. 47-49.

3. Is the membership or participation in the institution or organization restricted to those identified by that prohibited ground?

While recognizing the harm caused by discrimination and the disadvantages that members of different groups face, the HRTO found the School had met all three elements and that it may rely on section 18 of the Code as a full defence to what would otherwise be discrimination. The School was allowed to restrict admission only to those who shared its professed creed.

With respect to the first question, the adjudicator found that the School was a religious organization providing educational services that defined itself according to its “sincerely held religious beliefs and practices.”<sup>18</sup>

Regarding the second question, the Parents argued that Evangelical Christianity is broader than the School’s professed creed and was, therefore, not a prohibited ground worthy of protection. However, the HRTO held that, although “creed” is not defined in the Code, it has been interpreted to have a nexus with religion and an individual’s sincere belief,<sup>19</sup> as in *Syndicat Northcrest v Amselem*.<sup>20</sup> It also held that, even though some Evangelical Christians may accept a broader definition of marriage, the point here was that the community served by the School shared those specific beliefs. It was acceptable to the HRTO that the School defined itself according to its sincerely held views and convictions, and did not align itself with other Christians, or even Evangelical Christians who may accept and believe that marriage is broader than heterosexual unions.<sup>21</sup>

The Parents also argued that the School served the interests of the children, not their parents, and that the School had more than one service, particularly with respect to its pre-school program that could serve a wider community. The adjudicator was satisfied that the School served the interests of Evangelical Christians who subscribe to its creed (the prohibited or protected ground) and who want their children educated at an Evangelical Christian school that teaches and promotes the particular tenets of that creed. The School is similarly a religious group engaged in the charitable service of providing education, which

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<sup>18</sup> *Supra* note 1 at para 32.

<sup>19</sup> *Ibid* at paras 35-36.

<sup>20</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551.

<sup>21</sup> *Supra* note 1 at para 40.

is viewed as a religious calling and mission for the school. In this regard, the School relied on a passage from the Handbook which highlighted the School's "primary role of assisting and supporting parents relative to their responsibility before God." It was the parents who chose the School, not the child and, in any event, the religious interests of a young child were presumed to be those of the parents.<sup>22</sup>

The adjudicator accepted that the School was not running an independent daycare or secular preschool that subscribes to a different creed or set of beliefs or to which its creedal views and ideas are not meant to apply. It was clear that the preschool program was an extension of the School's biblically-centred focus, resulting in the School as an extension of the Evangelical religious community, just as it did for the rest of the School's religious and educational programming. The adjudicator further clarified that section 18 does not preclude special interest organizations from providing services to the broader community as long as they are "primarily engaged" in servicing members of a group identified by a prohibited ground, as in this case.<sup>23</sup>

The HRTTO answered the third question in the affirmative.<sup>24</sup> It held that the prohibited ground was the School's creed, and that the Handbook had a clearly stated mission to support parents who shared the faith-based beliefs supported by the School. It further held that, even though the Parents did not object to their child learning different views, "[t]o obligate the school to admit a child whose parents do not share those beliefs is to encroach on the rights of the parents served by the school to practice the creed and religion they sincerely believe in."<sup>25</sup>

## D. CONCLUSION

This tribunal decision serves as a reminder that charities and not-for-profits, and particularly religious organizations, may be exempt from the requirement to provide equal treatment with respect to services, goods and facilities, without discrimination, under section 1 of the Code if they meet the requirements for the exemption under section 18 of the Code. However, the record of the HRTTO on this point consists of very few decisions and the courts have yet to directly address what constitutes the requirements for the

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<sup>22</sup> *Ibid* at paras 34, 46, 49 and 51.

<sup>23</sup> *Ibid* at paras 58 and 58.

<sup>24</sup> *Ibid* at para 60.

<sup>25</sup> *Ibid* at para 78.

exemption under section 18 of the Code, although some principles can be drawn from the *Christian Horizons* case. Therefore, religious organizations that wish to rely on the section 18 exemption should remember that the protection provided under section 18 will largely depend upon the circumstances of each case and whether it meets the three elements referred to above.



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