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ONTARIO COURT OF APPEAL UPHOLDS DENIAL OF RELIGIOUS ACCOMMODATION REQUEST

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A. INTRODUCTION

The Court of Appeal for Ontario (the "Court of Appeal") released its decision in *ET v Hamilton-Wentworth District School Board*[1] on November 22, 2017 (the "Appellate Decision"). This case was an appeal of a 2016 trial court judgement[2] in the application that upheld the Hamilton-Wentworth District School Board's (the "Board") denial of the appellant's ("ET") request for accommodation on religious grounds. While the Court of Appeal's decision reached the same result as that of the trial court, it held, contrary to the trial court, that ET's freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*")[3] was not violated and ultimately dismissed the appeal for evidentiary reasons. In its analysis, the Court of Appeal considered issues surrounding parental authority over the education of children, as well as ET's s. 2(a) freedom of religion under the *Charter*. This Bulletin focuses on the Appellate Decision only as it concerns freedom of religion in a summary fashion.

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[1] 2017 ONCA 893.
[2] 2016 ONSC 7313.
[3] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

B. RELEVANT FACTS

ET is a Greek Orthodox Christian who claimed that his sincerely-held religious beliefs required him to shelter his two primary school-aged children, who were students in a Board school, from "false teachings." These "false teachings" included matters such as "moral relativism", "environmental worship", "instruction in sex education", and "discussion or portrayals of homosexual/bisexual conduct and relationships and/or transgenderism as natural, healthy or acceptable."[4] ET had sought advance notification from the Board when these "false teachings" were being taught in his children's classes so that he could decide whether or not to remove his children from those classes.

The Board denied his requests overall on the basis that its Equity Policy stipulated that an "integrated secular and respectful learning environment that does not discriminate against any child." The Board further claimed that it was "neither practical nor possible" to logistically comply with his request for prior notification.[5] If it were logistically practical or possible, exempting the children from such classes, the Board argued, would create a risk of endorsing non-acceptance of students who conformed to these "false teachings." The Board further argued that granting the accommodation request would undermine the Board's policy of providing an inclusive and non-discriminatory program, and it had suggested during discussions with ET that he could alternatively consider choosing to have his children attend a public Catholic school, a private Christian school, or be homeschooled.

C. THE COURT'S DECISION

The issue before the trial court, and subsequently the Court of Appeal, was whether ET's and his children's s. 2(a) Charter right to freedom of religion had been violated. The trial court held that, although the Board's refusal to provide the accommodation interfered with ET's sincerely-held religious beliefs and his right to freedom of religion was violated, the refusal was not unreasonable. The trial court decision noted that the Board had taken account of the claim of religious freedom and had reasonably concluded that the constraint of ET's religious freedom was proportionate and no more than necessary. In particular, the Board had indicated to ET that it could only excuse the children from certain portions of the human

[4] *Supra* note 1 at para 2.
[5] *Ibid* at para 3.

development and sexual health curriculum, and that ET had other schooling options available for his children where they would not be subject to "false teachings".

Notably, the Court of Appeal, disagreed with the trial court's basis for its decision while still concluding that ET's *Charter* rights had not been violated. The Court of Appeal decided that ET's s. 2(a) *Charter* right to freedom of religion had not been violated, primarily on the basis that ET "provided no evidence of any actual instance where his or his children's religious freedom had been violated" or of where any "false teachings" had been presented to his children.[6] In this regard, it relied on previous decisions stating that an infringement of religious freedom "cannot be established without objective proof of an interference with the observance of that practice". The Appellate Decision also noted that ET must also demonstrate that the Board's decision burdened or interfered with his beliefs in more than a trivial or insubstantial way. In essence, the Court of Appeal found that exposing children to contrary views alone, without other relevant factors, does not amount to an infringement of religious freedom under the *Charter*.[7]

The Court of Appeal, however, acknowledged that ET had a legitimate fear that his children could be persuaded to abandon their religious beliefs if their teachers were to actively endorse the moral positions of the "false teachings." In this regard, the Court stated that "[t]he mores contained in [a school board's program to promote inclusivity] can conflict with parental religious views, particularly if it is premised on the proposition that true acceptance of another person can only be achieved by embracing all of their self-understandings."[8] If such a program were to undermine a parent's ability to transmit religious faith, and the Board were to refuse the provision of accommodation, the Court of Appeal opined that this may result in a violation of religious freedom. In terms of the facts of the case before them, however, the Court of Appeal noted that ET was unable to demonstrate that the Board's school programs substantially interfered with his religious freedom and ability to shield his children from "false teachings." The Court of Appeal therefore held that no infringement of ET's right to freedom of religion could be established.

D. CONCLUSION

Despite the Court of Appeal's ruling that no violation of religious freedom had occurred, it left open the possibility that, given the requisite circumstances, a violation could be found where an accommodation

[6] *Ibid* at paras 5, 25.
[7] *Ibid* at paras 26, 30.
[8] *Ibid* at para 92.

request is denied. Charities and not-for-profits that receive such requests for accommodation should take into consideration whether a denial of such accommodation would undermine the requester's *Charter* rights and ensure that they have the benefit of legal advice to assist in considering these requests. The fact is, however, that charities and not-for-profits generally wouldn't be subject to *Charter* scrutiny, as the Board was in this case, as only manifestations of the state/government are bound by the *Charter*. That being said, even if a charity or not-for-profit is not subject to the *Charter*, it is likely that a provincial human rights code, such as the Ontario *Human Rights Code* (the "Code"),[9] applies to them. The *Code*, for example, embodies many of the same principles, particularly when it relates to protection from discrimination on religious grounds under the *Code* and the duty to accommodate.

Charities and not-for-profits should also be aware of legislative exemptions from the requirement to accommodate, such as s. 18 of the Code, which exempts "special interest organizations" (which could be charities, religious schools or other not-for-profits)[10] from the requirement to provide equal treatment without discrimination with respect to services, goods and facilities. For a discussion of a recent case decided under the *Code* setting out under what circumstances religious schools were allowed to discriminate and deny schooling to students who didn't conform with its lifestyle policy and related cases considering when a school may deny accommodation based on an inclusivity policy, please see *Church Law Bulletin* No. 50, "Tribunal Upholds Religious School Right to Reject Applicants Based on Creed."[11]

[9] RSO 1990, c H.19.
[10] Special interest organizations are organisations that are primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination under the *Code*. *Ibid* at s 18.
[11] Terrance S. Carter and Theresa L.M. Man, *Church Law Bulletin No. 50*, "Tribunal Upholds Religious School Right to Reject Applicants Based on Creed," online: Carters Professional Corporation <http://www.carters.ca/pub/bulletin/church/2017/chchlb50.pdf>.