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## **HUMAN RIGHTS TRIBUNAL FINDS SOCIAL ORGANIZATION DISCRIMINATED IN EXPELLING FALUN GONG PRACTITIONER**

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*By Terrance S. Carter and Ryan M. Prendergast\**

### **A. INTRODUCTION**

The Human Rights Tribunal of Ontario (the “Tribunal”) released its decision on April 27, 2011, in *Huang v. 1233065 Ontario*.<sup>1</sup> The decision concerned whether or not the practice of Falun Gong was a “creed” within the meaning of the Ontario *Human Rights Code*<sup>2</sup> (the “Code”), as well as whether or not the cultural association discriminated against the complainant in the provision of a “service” under the Code by revoking her membership on the basis of her being a Falun Gong practitioner.

The decision affirms that the Tribunal has no authority to determine whether or not a belief system is reasonable, whether it would withstand scientific scrutiny, or whether its beliefs are consistent with the values contained in the *Canadian Charter of Rights and Freedoms*<sup>3</sup> (the “Charter”).

This *Church Law Bulletin* provides an overview of the facts of the case, together with a brief commentary on the Tribunal’s analysis of the Code and Charter contained therein.

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<sup>1</sup> 2011 HRTO 825 (CanLII) [*Huang*]

<sup>2</sup> R.S.O. 1990, c. H.19.

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, being Part I of the *the Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

## B. OVERVIEW OF CASE AND TRIBUNAL'S ANALYSIS

In *Huang*, the complainant, Daiming Huang, a Falun Gong practitioner was a member of the Ottawa Chinese Seniors Association (the "Association"). The complainant brought a complaint against both the Association and certain individuals who were members of its governing body. The complainant alleged that she was discriminated against on the basis of "services" under the Code because of her beliefs.

The complaint arose due to her attendance at functions put on by the Association in 2001 and 2002, at which disparaging remarks were made about Falun Gong, or where anti-Falun Gong materials were distributed, such as an anti-Falun Gong petition. The complainant also alleged that her membership in the Association was revoked because the Association no longer accepted Falun Gong practitioners as members.

### 1. Tribunal's Analysis of the Code

#### a) Was Falun Gong a "creed" within the meaning of the Code?

In finding that Falun Gong was a "creed" within the meaning of the Code, the Tribunal relied on expert evidence concerning the beliefs and practices of Falun Gong practitioners. The Tribunal stated that the practice of Falun Gong consists of meditative exercises, together with the reading of scriptures.

Counsel for the Association argued that Falun Gong should not be given protection under the Code because its beliefs ran counter to Charter values, and should more properly be considered a cult, which is generally not afforded the same protection under the Code. As such, counsel for the Association raised specific beliefs of Falun Gong through the expert witness, such as condemnation of homosexuality or that the founder of Falun Gong possessed paranormal abilities.

The Tribunal referred to the Supreme Court of Canada decision of *Syndicat Northcrest v. Amselem*,<sup>4</sup> which stated that the level of protection available under the Charter and in the Code for freedom of religion may intersect with other Charter values. In the *Amselem* decision, the Court held that when courts undertake to analyze religious doctrine in order to determine the truth or

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<sup>4</sup> 2004 SCC 47 (CanLII), [2004] S.C.R. 551.

falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious obligation, “they enter forbidden domain.”

In this regard, the Tribunal stated that, while Charter values may be relevant in determining the scope of religious freedom and must be interpreted in light of the common objectives shared with the Code, inconsistency with the Charter is not an appropriate ground on which to exclude the protection of the Code offered to religious beliefs. As such, the Tribunal concluded that:

It is not for the Tribunal to determine whether or not a belief system is reasonable, whether it would withstand scientific scrutiny, or whether it espouses beliefs that are consistent with Charter values.

The Tribunal found, therefore, that Falun Gong was a “creed” within the meaning of section 1 of the Code, and declined to make any finding concerning whether or not its beliefs were consistent with the Charter.

b) Did the Association Provide a Service?

The Association, which provided a place for seniors to gather and partake in various activities, argued that it was not providing a service because “service” under the Code does not include private clubs.

In support of their argument, the Association relied on the Supreme Court of Canada decision, *Gould v. Yukon Order of Pioneers*.<sup>5</sup> In this regard, the Supreme Court in that decision had concluded that membership for men only in a historical society in the Yukon did not amount to a “service offered to the public” within the meaning of the Yukon human rights legislation.

However, the Human Rights Commission (the “Commission”), which took part in the Tribunal hearing, argued that the Code is materially different from Yukon’s legislation, as the Code was amended by legislation in 1981 to remove reference to “available in any place to which the public is ordinarily admitted.” As such, the Tribunal rejected the argument put forward by counsel for the Association that the wording from the Yukon human rights legislation should be read into the Code because doing so would frustrate the intent of the Ontario Legislature. The Commission also

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<sup>5</sup> 1996 CanLII 231 (S.C.C.), [1996] 1 S.C.R. 571.

argued that section 18 of the Code, which provides an exemption for special interest social clubs which serve the interest of those persons identified by a ground of discrimination, would not be necessary if section 1 of the Code did not apply to membership in social clubs.

The Tribunal also referred to past decisions where the Tribunal had found that the relationship between a social club and its members falls within the meaning of section 1 of the Code.

Lastly, the Tribunal also rejected the argument that the right to freedom of association under the Charter allows social clubs like the Association to distinguish between individuals on Code-related grounds.

In this regard, the Tribunal concluded that the Association was providing a service within the meaning of section 1 of the Code.

## 2. Remedy Granted by the Tribunal

The Tribunal concluded that an award of \$15,000 to the complainant was appropriate, given the public nature of the discrimination and the complainant's loss of face within her community, having derived indirect social benefits from membership in the Association. The Tribunal also agreed that the Association should be ordered to formally invite her to once again become a member of the Association.

The individuals on the governing board of the Association who were also respondents were not ordered to personally pay any part of the award to the complainant, as they were acting in their capacity as officers of the incorporated Association. In this regard, section 46.3 of the Code deems discriminatory actions of officers, officials, employees or agents of a corporation to be actions of the corporation.

## C. COMMENTARY

Certain charities and non-profit organizations, such as religious organizations primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination such as creed, which are exempted under section 18 of the Code with respect to membership or participation, are not affected by the Tribunal's decision. However, the decision affirms that private social clubs which do not qualify for the exemption under section 18 cannot discriminate on grounds prohibited under the Code with respect to determining who can be a member.

More importantly, similar to the decision of *Dallaire c. Les Chevaliers de Colomb*<sup>6</sup> reported in our April 2011 *Charity Law Update*<sup>7</sup>, the Tribunal also affirmed that it has no jurisdiction to scrutinize the content of religious beliefs or teachings. The Association had argued that since the Association was a secular organization, it was within its rights to limit the alleged proselytising of the complainant. In this regard, the Association and individual respondents had adopted a similar position to that of the complainant in *Dallaire*, wherein the complainant's assertion to be *free* from "religious messaging" had to be interpreted in light of a Christian organization's right to manifest its beliefs. In this regard, the Tribunal in *Huang* found that the fact that the complainant was communicating information about her faith was not a reasonable, non-Code related explanation of a decision to revoke her membership.