SHIBLEY RIGHTON LLP
Barristers and Solicitors

Education Law eBulletin

A newsletter for educators

Issue No. 4 January 2018

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Court of Appeal clarifies *Charter*-protected Freedom of Religion in Schools

A parent commenced a court application after the Hamilton-Wentworth District School Board refused to accommodate his request to be notified in advance of any school instruction to his two children that touched on topics he described as "false teachings" and that contradicted his religious beliefs.[1] The topics included sex education, homosexual/bisexual relationships and transgenderism as being natural, healthy or acceptable. The Board concluded that his request undermined the Board's policy of providing inclusive and non-discriminatory programming and further, it was simply impractical and impossible to comply with his request given the broad range of topics identified. The Board offered to exempt the children from the human development and sexual health curriculum.

In the application before the Superior Court of Justice, the parent argued that the Board's refusal to accommodate his request violated his religious freedom as guaranteed under the *Charter* and he sought a declaration that his parental authority over his children's education had been denied. The Court recognized that the Board's decision engaged his religious beliefs, which were interfered in a non-trivial and substantial manner. However, the Board's decision was deemed reasonable and the constraint of the parent's religious freedom was proportionate and necessary given the objectives of the *Education Act* and relevant policies on equity and inclusivity.

The parent appealed the decision to the Ontario Court of Appeal. The Court of Appeal dismissed the appeal and held that the Board's decision did not interfere with or violate his religious freedom.[2] The Court found that there was insufficient evidence of the alleged infringement of the parent's right to religious freedom. The three-judge panel of the Court was divided with respect to the reasoning of the lack of evidence of interference with religious freedom. Justice Robert J. Sharpe, the minority, found that it was not enough to argue that mere exposure to ideas or concepts results in a violation of one's beliefs. He expressly highlighted that student exposure to ideas, whether or not they challenge their beliefs, is a fact of life in society. Further, J. Sharpe highlighted the Board's statutory mandate to provide "an inclusive and tolerant educational environment, one that respects the principles of equality" and Board policies that are aimed to prevent racism, religious intolerance and homophobia[3].

In contrast, the remaining two judges for the majority stressed the parental right to make decisions for their children, including decisions pertaining to education - primary over the state's authority, which is simply delegated authority.[4] The majority underwent an analysis of whether the Board's refusal to accommodate

[1] *E.T. v. Hamilton-Wentworth District School Board,* 2016 ONSC 7313
[2] *E.T. v. Hamilton-Wentworth District School Board,* 2017 ONCA 893
[3] para. 40.
[4] paras. 47, 65 and 67.

the parent prevented him from fulfilling his duty as a parent.[5] The evidence before the Court was that the appellant believed it was appropriate for his children to be aware that factually, there are same-sex families with children with whom they must accept and treat with respect. The appellant was more concerned about his children being taught that acceptance of individuals in society requires support of their choices, such as same-sex marriage.[6] The majority understood that a parent may have a legitimate fear that this may persuade their children to abandon their personal religious beliefs that they are taught at home.[7] The majority accepted that the appellant's religious freedom was therefore implicated.[8] However, there was no evidence that the Board's refusal to accommodate the appellant's request undermined his ability as a parent to teach the precepts of his religion.[9]

While it wasn't the case here, the majority made it clear that there could be evidence of classroom teaching that undermines a parent's effort to teach their religious faith to their children, which could limit the parent's right to religious freedom as protected under s. 2(a) of the *Charter*. The majority concluded that there are *Charter*-imposed limits on a province's power to use publicly funded education to instill teachings on children.[10]

Bill 89 - Changes to the *Child and Family Services Act*, R.S.O. 1990, c. C.11

Effective January 1, 2018, the age of protection is increased from 16 to 18 years of age, with a goal to support education and to help combat homelessness and human trafficking. While the duty to report remains for children younger than 16 years of age, an individual *may* report to a society with respect to 16 and 17-year-olds who may be in need of protection.

There are more changes forthcoming once the entire new *Child, Youth and Family Services Act* (CYFSA) is proclaimed into force and the existing CFSA is repealed, which is set to take place sometime in the spring of 2018. We will report on those changes when the date is identified.

Shibley Righton LLP associate **Jessica Koper** will be speaking at the upcoming Critical and Emerging Issues in School Law for K-12 Education Professionals program hosted by Osgoode Professional Development in Toronto, Ontario, on February 26, 2018.

We welcome your comments and questions. Send them, and any updated contact information, to jessica.koper@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to christen.broadbent@shibleyrighton.com

[5] para. 80.
[6] para. 90.
[7] paras. 91-92.
[8] para. 93.
[9] para. 97.
[10] para. 99