

## CASE NOTE

# In Search of Limits on Accommodating Religious Beliefs Conflicting with Other Charter Values in the Context of Sex Education

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*E.T. v. Hamilton-Wentworth District School Board*<sup>1</sup>

*Administration of schools — Powers of school boards in curriculum decisions — Constitutional Law — Freedom of Conscience and Religion — Accommodation of parents' religious beliefs — Balancing Charter values — Education Act (Ont.), s. 169 — Canadian Charter of Rights and Freedoms, ss. 1, 2(a), (2(b)) — Human Rights Code (Ont.), s. 46.1*

## 1. OVERVIEW

In *E.T. v. Hamilton-Wentworth District School Board*, Justice Reid of the Ontario Superior Court dismissed an application brought by E.T., a parent. E.T., a member of the Greek Orthodox Church, was seeking a declaration that he has final authority over the education of his children and an order that the Hamilton-Wentworth District School Board (“the Board”) accommodate him by providing him with information in advance of specific curriculum areas being taught to his children, and granting him permission to withdraw his children from lessons that conflicted with his religious beliefs. The Board had previously denied E.T.’s accommodation request. Justice Reid held that the declaration sought in this case was not justified, the Board’s denial of accommodation was reasonable, and the Board had proportionally balanced the competing *Charter* values at issue: religious freedom, equality, and multiculturalism.

## 2. THE BACKGROUND

In 2009, the Ontario Ministry of Education issued several directives to school boards providing direction on the review, development, implementation and

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<sup>1</sup> *T. (E.) v. Hamilton-Wentworth District School Board*, 2016 CarswellOnt 18389, 2016 ONSC 7313 (Ont. S.C.J.).

monitoring of equity and inclusion education policies.<sup>2</sup> As a result, the Board developed an Equity Policy<sup>3</sup> that included a section on promoting the principles of equity through the curriculum, including striving to “deliver programs, provide learning materials and promote best practices in all accepted subject matter that reflects a balance of perspectives and includes a diversity of experiences including those of Lesbians, Gays, Bisexuals and Transgender communities.”<sup>4</sup>

In the spring of 2010, E.T. made a written request for accommodation in which he requested to be contacted prior to instruction whenever concepts or values were to be presented that he believed may conflict with his religious values, with the understanding that E.T. could choose not to have his children participate in those lessons. E.T. provided a detailed letter entitled “Spiritual Values/Issues in Education Form”, which set out a variety of issues and topics that he believed to be objectionable, including “discussions or portrayals of homosexual/bisexual conduct and relationships and/or transgenderism as natural, healthy”.<sup>5</sup>

The Board denied this accommodation request. The decision was originally made by the school principal, in consultation with supervisory officers, and was confirmed by the Board. At the hearing, the Board acknowledged that its decision engaged E.T.’s right to freedom of religion. However, the Board’s position was that it had undertaken a proportional balancing between the statutory objectives of the *Education Act*,<sup>6</sup> including the Board’s statutory duty of neutrality,<sup>7</sup> and the applicable *Charter* values, including equality and the multicultural nature of Canadian society. The Board took the position that withdrawing E.T.’s children from classes containing portions of the curriculum that he found objectionable would be contrary to the values of inclusion and student well-being.

The Elementary Teachers’ Federation of Ontario (“ETFO”) intervened, taking the position that it would be impracticable, it not impossible, to advise E.T. in advance when any of the positions that he considered objectionable were to be taught because the curriculum had so fully integrated the requirements for gender equity, antiracism, respect for people with disabilities, and respect for people of all sexual orientations and gender identities. ETFO further contended that because accommodations of this nature would have to be made generally

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<sup>2</sup> This included *Policy Program Memorandum No. 119*.

<sup>3</sup> Hamilton Wentworth District School Board, *Equity Policy No. 1.01*.

<sup>4</sup> *Ibid.* The Equity Policy also included a commitment to ensure its staff has access to a variety of bias-free teaching materials and to support staff who choose to use learning materials that reflect the diversity of sexual orientations, among other things.

<sup>5</sup> Above note 1, at para. 66.

<sup>6</sup> R.S.O. 1990, c. E.2.

<sup>7</sup> The Board maintained that its statutory duty of neutrality is implied in the requirements for inclusivity and student well-being set out in s. 169.1 of the *Education Act*.

available to all students, it would be an undue burden on teachers to keep track of all the possibly objectionable subjects and individual accommodations.

### 3. THE DECISION

#### (a) Standard of Review

Justice Reid held that the appropriate standard of review was reasonableness, noting that the task of the court was to determine whether the Board had proportionally balanced its governing statutory objectives and the applicable *Charter* values. Justice Reid noted that the appropriate analysis to be used in this case was the *Doré* approach, despite this not being a judicial review or a decision made by an adjudicative body.<sup>8</sup> He pointed out that this was the approach being taken by appellate courts when the matter involved discretionary administrative decisions that resulted in an alleged breach of *Charter* rights.<sup>9</sup>

In *Doré*, the Supreme Court of Canada held that when applying *Charter* values in the exercise of statutory discretion, an administrative decision maker must engage in a proportionality analysis that balances the severity of the interference with a *Charter* protection with its governing statutory objectives. On judicial review, the reviewing court must then ask whether the administrative decision reflects a proportionate balancing of the *Charter* rights at play, given the impact of the relevant *Charter* protection, the nature of the decision, and the unique statutory and factual contexts.

#### (b) Infringement of Freedom of Religion

Justice Reid was satisfied that the decision of the Board to deny E.T. accommodation constituted a *prima facie* infringement of E.T.'s freedom of religion protected under section 2(a) of the *Charter*. E.T. had sought a declaration of parental authority to support his claim that he could assert his *Charter* rights were violated. E.T.'s claim was based on the common-law principle that parents and guardians have ultimate authority over their children, including their education. E.T. admitted to delegating his parental authority to the Board, but asserted that he retained the ability to reclaim his authority as he saw fit. Justice Reid held that E.T. was able to fully articulate and advance his position in the absence of the declaration, and declined to grant it.

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<sup>8</sup> *Doré v. Barreau du Québec*, indexed as: *Doré c. Québec (Tribunal des professions)*, 2012 CarswellQue 2048, 2012 CarswellQue 2049, 2012 SCC 12, [2012] 1 S.C.R. 395, 343 D.L.R. (4th) 193, 34 Admin. L.R. (5th) 1, 255 C.R.R. (2d) 289, 428 N.R. 146, [2012] A.C.S. No. 12 (S.C.C.).

<sup>9</sup> *Bonitto v. Halifax Regional School Board*, 2015 CarswellNS 711, 2015 NSCA 80, 388 D.L.R. (4th) 608, 364 N.S.R. (2d) 247, 1146 A.P.R. 247, [2015] N.S.J. No. 357 (N.S.C.A.), at para. 49.

The court held that E.T. had established that his sincerely held religious beliefs, particularly as to matters of marriage and human sexuality, were at odds with the Board's Equity Policy. In particular, E.T. believed that his faith compels him to ensure that his children are taught about marriage and human sexuality from a biblical perspective and in accordance with the teaching of the Greek Orthodox Church. Moreover, his faith requires him to prevent his children from engaging in activities and behaviours or being exposed to materials that he considers to be sinful. E.T. provided evidence that to allow his children to be exposed to the some of the teachings of human sexuality contained in the Equity Policy would expose his children to what he characterized as "false teachings", contrary to his faith.

The Board's argument that this situation was analogous to the one before the Supreme Court of Canada in *S.L. v. Des Chênes (Commission scolaire)*,<sup>10</sup> in which the Supreme Court was not satisfied that there was objective evidence of actual interference with the parent's religious practice, found little favour with Justice Reid. In *S.L.*, the parents submitted that the school board's refusal to exempt their children from the provincially mandated religion course impaired their ability to pass on their faith to their children. Although Justice Reid acknowledged that E.T. may have had the same underlying concern as the parents in *S.L.*, he held that it was not the role of the court to go behind E.T.'s assertion that it is sinful for him to allow his children to be exposed to "false teachings".

### (c) **Balancing of Charter Rights**

The court held that the Board had proportionally balanced the competing *Charter* protections. Justice Reid examined the context in which the Board's decision was made, including the need for religious neutrality and tolerance in a public institution. He noted that the Board was mandated by the Ministry of Education to implement policy in support of the statutory requirements of the *Education Act*, which links student achievement and well-being to its policies that require inclusivity and equity. In this case the Board preferred the values of inclusion and equality over individual religious accommodation and this decision was held to be reasonable.

Justice Reid held that the Board's denial of providing E.T. with advance notice of lessons involving potentially objectionable information only minimally impinged on his *Charter* rights, given that this accommodation did not relate to the actual exposure of his children to "false teachings". He noted it was E.T.'s request for the right to remove his children from the classroom, which most directly engaged the competing *Charter* considerations. Although E.T.'s preference would be to isolate his children from aspects of the curriculum that,

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<sup>10</sup> Indexed as: *L. (S.) c. Des Chênes (Commission scolaire)*, 2012 CarswellQue 741, 2012 CarswellQue 742, 2012 SCC 7, [2012] 1 S.C.R. 235, 341 D.L.R. (4th) 577, 252 C.R.R. (2d) 168, 426 N.R. 352 (S.C.C.).

according to his religious beliefs, would amount to “false teachings”, this isolation would be antithetical to the competing legislative mandate and *Charter* values favouring inclusivity, equality, and multiculturalism. Justice Reid concluded that there was no solution to the inclusion/exclusion option that would satisfy all interests — isolating some children may protect their religious freedom but, on the other hand, may create discomfort for those who remain (and possibly for those who are isolated). After reviewing the relevant Supreme Court of Canada jurisprudence Justice Reid quoted at length from several of the decisions, including the following dicta of Justice Deschamps:

Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Québec government’s obligations with regard to public education.<sup>11</sup>

Justice Reid ultimately held that legislative policy and judicial comment favoured inclusion rather than isolation, and that the Board had proportionally balanced the competing *Charter* protections.

#### 4. COMMENTARY

This interesting case highlights the limits of an individual right to freedom of religion within a publicly funded education system. Justice Reid noted that it may be that the legislated mandate of the *Education Act*, and through it the Board’s Equity Policy, may operate to preclude E.T.’s children from participating in the public education system and that E.T. may need to seek alternatives if he determines that his concerns about “false teachings” outweigh the other advantages of the public school system.

Although it was open for students to be removed from certain parts of the newly mandated sexual education segment of the curriculum, the Board decided not to provide accommodation by removing students from all lessons and classes, and this decision was upheld by the court as reasonable. Although accommodation must be examined on a case-by-case basis, this decision provides a strong precedent for school boards to deny the type of blanket and far-reaching accommodation sought by E.T. in this case.

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<sup>11</sup> *Ibid.*, at para. 40.