

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

FRANCES BAARS and DEREK BAARS

Applicants

and

THE CHILDREN'S AID SOCIETY OF HAMILTON

Respondent

APPLICATION UNDER section 97 of the *Court of Justice Act* and rule 14.05 of the *Rules of Civil Procedure*.

FACTUM OF THE APPLICANTS

November 30, 2017

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PART I: Overview of facts

1. Derek and Frances Baars (collectively, the “Baars”) are a young couple who have been married since 2010, but have been unable to conceive.¹ They hold sincere religious beliefs based on their shared Christian faith. Frances is an experienced nanny, babysitter and homemaker, holding a degree in Early Childhood Education from Conestoga College. Derek is a candidate to serve as a pastor within the Reformed Presbyterian Church of North America.²

2. The Children’s Aid Society of Hamilton (“CAS”) is a provincial statutory delegate as a “children’s aid society” pursuant to the *Child and Family Services Act* (the “Act”),³ and is funded by the Ontario Government.⁴

A. Opening of the Baars’ Foster Home

3. On May 29, 2015, the Baars applied to open a foster home with CAS.⁵ There was, and continues to be, an ongoing need in the Hamilton area for more foster parents.⁶

4. In July 2015, the Baars successfully completed CAS’s Parent Resources for Information, Development and Education (“PRIDE”) training.⁷ During this training, the Baars proactively disclosed that, based on their religious beliefs, they do not celebrate Halloween or promote Santa Claus or the Easter Bunny, as they do not want to lie to children.⁸ The Baars were assured that as foster parents, they would not be expected to do anything that contradicted their beliefs.⁹

¹ Affidavit of Frances Baars, sworn April 10, 2017 (“Baars Affidavit”) para 4, CAR Vol 1, Tab 3, p 14.

² Baars Affidavit, paras 2-3, CAR Vol 1, Tab 3, p 14.

³ RSO 1990 c C11. See also Baars Affidavit, para 5, CAR Vol 1, Tab 3, p 14.

⁴ Baars Affidavit, para 5, CAR Vol 1, Tab 3, p 14.

⁵ Baars Affidavit, para 5, CAR Vol 1, Tab 3, p 14.

⁶ Baars Affidavit, para 6, CAR Vol 1, Tab 3, p 15; see also Hamilton News article, Jan. 13, 2017, CAR Vol 1, Tab 3(C), p 168.

⁷ Baars Affidavit, para 7, CAR Vol 1, Tab 3, p 15.

⁸ Baars Affidavit, para 7, CAR Vol 1, Tab 3, p 15.

⁹ Baars Affidavit, para 7, CAR Vol 1, Tab 3, p 15.

5. This assurance was further clarified in emails between the Baars and their CAS worker in November 2015.¹⁰ Contrary to the Affidavit of Tracey Lindsay, which claims that the Baars stated their position in response to a conflict with their foster girls' traditions¹¹, the Baars forthrightly shared their beliefs with CAS before they were approved as foster parents. In its own SAFE Homestudy Report on the Baars, completed on December 11, 2015, CAS specifically noted the Baars' religious beliefs and objections to Halloween, Santa Claus and the Easter Bunny, stating:

The Baars are Protestant (Free Reformed) and their beliefs are a major part of their lives. They do not celebrate holidays such as Christmas or Easter as others do. They understand that most of Canadian society does celebrate these so the child will not be isolated from that. **They do not endorse Santa Claus or the Easter Bunny as they do not wish to lie to children.** They are willing to give the children chocolate at Easter if the parents wish that they do so. They would also assist a child making Christmas gifts for their loved ones and would purchase gifts for them. However, they will be told who is giving the gifts. Frances' family does celebrate Christmas with gifts but usually closer to New Years and the children would be involved in that. They celebrate Canadian holidays such as Thanksgiving, but not Halloween.¹²

This report concluded with CAS' recommendation that the Baars "be approved for Foster Care".¹³

6. On December 17, 2015, the Baars entered into a "Foster Parent(s) – Society Service Agreement" with CAS. One day later, on December 18, 2015, CAS placed two sisters from the same biological family, ages three and four, (the "girls") with the Baars.¹⁴

B. The Requirement to Promote Santa Claus

7. Immediately after the girls were placed with the Baars, CAS began taking issue with the fact that the Baars do not promote Santa Claus. On December 23, 2015, CAS workers Jessica MacKenzie and Tracey Lindsay met to discuss this issue. Ms. MacKenzie expressed: "shouldn't

¹⁰ Emails dated November 24, 2015, CAR Vol 1, Tab 5(D), pp 215-16.

¹¹ Affidavit of Tracey Lindsay, dated April 18, 2017 ("Lindsay Affidavit") para 15, CAR Vol 1, Tab 4, p 201.

¹² SAFE Homestudy Report, December 11, 2015, CAR Vol 1, Tab 3(D), p 174 [emphasis added].

¹³ Ibid at p 182.

¹⁴ Baars Affidavit, para 9, CAR Vol 1, Tab 3, p 15.

foster parents have to honour their cultural practices?” They noted that Frances “didn’t want to lie to the children about Santa,” and that the Baars “did not tell the children that there was no Santa.”¹⁵

8. During the holidays, the girls accompanied the Baars to family gatherings, and were given presents to open for Christmas.¹⁶ Further, during the girls’ weekly supervised visits with their family, they received Christmas gifts.¹⁷

9. Nevertheless, CAS claimed that the foster girls’ birth mother “expected her children to enjoy the experience of Santa Claus” and “wished to get a picture of her children with Santa.”¹⁸

Ms. Lindsay repeatedly castigated the Baars for not having the girls photographed with Santa Claus, claiming that foster parents are required to do so as part of the girls’ “cultural needs.”¹⁹

However, in weekly communications between the Baars and the birth mother, via a communication book, **the birth mother never asked the Baars to celebrate Santa Claus, or get a picture with**

Santa Claus. Rather, the birth mother in fact expressed gratitude in handwritten words as follows:

I would like to take the time to thank you for the towel it is very nice of you. I would also like to thank you for the Christmas pictures of them they looked beautiful and it looks like they were having fun opening the Christmas gifts!! Thank you for making Christmas a good time for them.²⁰

C. The Requirement to Promote the Easter Bunny

10. On January 6, 2016, at the Baars’ first meeting with their CAS Placement Support Worker, Tracey Lindsay, she challenged the Baars on how they were going to celebrate Easter. Ms. Lindsay told the Baars that it was part of their duty as foster parents to teach the girls about the Easter

¹⁵ Case Note, December 23, 2015, CAR Vol 1, Tab 5(G), p 252. It was also condescendingly noted: “Foster mom wears a long skirt all the time. Now the girls only want to wear skirts.”

¹⁶ Baars Affidavit, para 11, CAR Vol 1, Tab 3, p 16.

¹⁷ See Case Notes, December 29, 2015 and January 5, 2016, CAR Vol 1, Tabs 5(H) and 5(I), pp 254-257.

¹⁸ Lindsay Affidavit, para 11, CAR Vol 1, Tab 4, p 200.

¹⁹ Baars Affidavit, para 15, CAR Vol 1, Tab 3, p 16.

²⁰ Communication Book, CAR Vol 1, Tab 5(E), p 229. In the Communication Book, the birth mother provided instructions for the care of the girls which the Baars immediately complied with.

Bunny, because *she* considered it part of Canadian culture.²¹ In her notes, Ms. Lindsay records that the Baars “will give chocolate at Easter but no E. Bunny”, and that she explained that “we have to honour it” concluding that “we don’t have the option of not adhering to it.”²²

11. Ms. Lindsay repeatedly informed the Baars that it was their duty as foster parents to promote the Easter Bunny to the girls, and tell them that it was real.²³ The Baars continued to affirm to Ms. Lindsay that on Easter they intended to play games with the girls and have a chocolate egg hunt, but they could not lie to the girls and tell them the Easter Bunny is real.²⁴

12. The Baars became increasingly alarmed with Ms. Lindsay’s fixation with the Easter Bunny and the “air of unreality” around the relationship with her.²⁵ Ms. Lindsay took the issue of the Easter Bunny so seriously she set up a Child and Family Team Conference about the matter.²⁶ She continued to pressure the Baars, particularly Frances, to promote the Easter Bunny.²⁷

13. On February 26, 2017, Ms. Lindsay met with CAS Supervisor, Karen Chardola, to discuss the Baars. The Supervision Case Note for the meeting noted:

Concerns are evident with respect to the family’s religious values and beliefs such that they do not celebrate Christmas and Easter in a traditional manner such that they do not support Santa Claus or the Easter Bunny.

²¹ Baars Affidavit, para 12, CAR Vol 1, Tab 3, p 16.

²² Case Note, January 6, 2016, CAR Vol 1, Tab 5(K), pp 261-62. Although Tracey Lindsay here and elsewhere (Transcript of Cross-Examination of Tracey Lindsay, May 9, 2017 (“Lindsay Transcript”) CAR Vol 2, Tab 9, pp 398-399) states that foster parents must adhere to the practices and traditions of foster children’s families including religious beliefs, the Director of CAS, Dominic Verticchio, expressly excludes “beliefs”, limiting foster parents’ duty only to “the customs and norms that have been developed in North America such as the Easter Bunny, Santa on Christmas.” Transcript of Dominic Verticchio Interview, April 12, 2017, CAR Vol 2, Tab 6(A), p 322.

²³ Baars Affidavit, paras 12-13, CAR Vol 1, Tab 3, p 16-17.

²⁴ Baars Affidavit, para 13, CAR Vol 1, Tab 3, p 17; see also Lindsay Transcript CAR Vol 2, Tab 9, pp 378-80, where Ms. Lindsay admits that neither Santa Claus or the Easter Bunny are real.

²⁵ Baars Affidavit, para 16, CAR Vol 1, Tab 3, p 17.

²⁶ CAS Emails, dated February 12, 2016, CAR Vol 1, Tab 5(S), p 300-302. On February 12, 2016, she emailed a fellow CAS worker noting that “Easter is coming.... is there a CFTC scheduled regarding this file?” Ms. Lindsay then scheduled a CFTC (Child and Family Team Conference) to determine “what the plan is given the Easter Bunny isn’t coming soon.”

²⁷ Case Note, dated February 24, 2016, CAR Vol 1, Tab 5(U), p 307. In this Case Note, entitled “Purpose: Easter Bunny”, Ms. Lindsay recounted: “...the Easter bunny. They refuse to do it. [...] Will not tell them the Easter Bunny will come because that is lying to the children.”

The Note concludes with a decision that CAS would not continue its fostering relationship with the Baars because “they are not prepared to support the agency position”.²⁸ Yet, CAS admits that the Baars were meeting the girls’ most important needs of “being cared for and loved, and having safety, food, water, shelter, [and] clothing.”²⁹

14. Ms. Lindsay then threatened the Baars that the girls would be taken away, and that the Baars’ Foster Home would be closed, if they refused to inform the girls that the Easter Bunny was real.³⁰ In a February 29, 2016 Case Note titled “Purpose: Easter Bunny”, Ms. Lindsay again noted the Baars’ consistent position that “‘We will not lie to them.’ Saying that Easter Bunny brings chocolate is a lie.”³¹ Ms. Lindsay noted Frances’ imploring response to her threats:

We are doing “what god requires of us.” They are trying to work with this. They are being as flexible as they can be but **will not say the Easter Bunny brought it.** Can’t say she is happy but want it to be clear they don’t want them to move. “It will be other adults [*sic*] choice to have them move.” Is it more important to have the Easter Bunny or permanency?

D. Suspicion and Fear of the Baars’ Christian Faith

15. During this February 29, 2016 phone conversation, Ms. Lindsay raised a completely new concern without a shred of evidence in any previous document or conversation, stating that she was personally worried that the Baars would fail to treat a prospective same-sex adoptive couple with respect, because of their Christian faith. Despite being blindsided by this accusation, Frances assured Ms. Lindsay that the Baars would treat any same-sex couple as people worthy of dignity and respect. Yet, Ms. Lindsay persisted in her unfounded allegation against the Baars, telling

²⁸ Supervision Case Note, dated February 26, 2016, CAR Vol 1, Tab 5(V), p 309.

²⁹ Lindsay Transcript, CAR Vol 2, Tab 9, pp 374-75.

³⁰ Baars Affidavit, para 17, CAR Vol 1, Tab 3, p 18.

³¹ Case Note, dated February 29, 2016, CAR Vol 1, Tab 5(W), p 310.

Frances that she intended to prevent them from ever encountering a same-sex couple, and that she intended to close their foster home.³²

E. Removal of the Girls and Closure of the Baars' Foster Home

16. Later that same afternoon, February 29, Ms. Lindsay emailed her colleagues at CAS, stating, "I talked to Karen and we will have to arrange to move the girls", suggesting that the girls be moved two days later.³³ It was not until March 3, 2016, at 2 P.M., that Ms. Lindsay told the Baars that CAS had decided to move the girls from their home, and that they would be moved the next morning.³⁴ Frances requested a transition period for the girls, but Ms. Lindsay refused.³⁵

17. CAS had previously rejected the Baars' offer to let the girls stay with another foster family over the Easter period.³⁶ However, Frances earnestly appealed to Ms. Lindsay to keep their home open for children from families that did not celebrate Santa Claus or the Easter Bunny, or as a relief home for newborns. CAS refused these requests without explanation.³⁷

18. The next morning, March 4, 2016, CAS removed girls from the Baars' home and closed their foster home. The Baars were not even able to pack all the girls' things in time.³⁸

19. Despite Ms. Lindsay's claim that "at all times I was acting in the best interests of the children and wishes of the birth mother", there is no indication in the record of the birth mother requesting that her girls celebrate the Easter Bunny, or Santa Claus, or have a picture with Santa

³² Baars Affidavit, paras 20-21, CAR Vol 1, Tab 3, p 19. Ms. Lindsay confirmed that she had a "same-sex family discussion" with the Baars (Lindsay Affidavit, paras 24-25, CAR Vol 1, Tab 4, pp 202-203) but did not record her personal concern in her case note. See Case Note, dated February 29, 2016, CAR Vol 1, Tab 5(W), p 310.

³³ Email from Tracey Lindsay, dated February 29, 2016, CAR Vol 1, Tab 5(X), p 312.

³⁴ Case Note, dated March 3, 2016, CAR Vol 1, Tab 5(Y), p 313; Baars Affidavit, para 22, CAR Vol 1, Tab 3, p 19.

³⁵ Baars Affidavit, para 22, CAR Vol 1, Tab 3, p 19.

³⁶ Baars Affidavit, para 19, CAR Vol 1, Tab 3, p 18; see also Supervision Case Note, dated February 26, 2016, para 3, CAR Vol 1, Tab 5(V), p 309.

³⁷ Baars Affidavit, para 24, CAR Vol 1, Tab 3, p 20.

³⁸ Baars Affidavit, para 25, CAR Vol 1, Tab 3, p 20.

Claus,³⁹ even while the birth mother gave the Baars numerous other instructions about caring for her girls.⁴⁰ There is further no record of a request from the birth mother to move the girls. Prior to the removal of the girls from the Baars' care CAS failed to even inform the birth mother of their decision to move the girls, or provide her with their reasons for the move.⁴¹

20. Dr. Kathleen Kufeldt, an expert on child welfare, upon her review of this case, stated:

In my opinion the best interests of the girls were lost sight of and considered secondary to Ms. Lindsay's own agenda. By her actions Ms. Lindsay clearly indicated that in her opinion reinforcing belief in the reality of the Easter Bunny was more important than maintaining stability and continuity of care.

...

I have grave concerns about the actions of an agency worker who apparently considered belief in the reality of the Easter Bunny was more important than maintain continuity of care.⁴²

21. The Baars sought unsuccessfully to appeal the decision to close their foster home, with the help of the United Foster Parents of Canada Corporation (UFPCC). Following a meeting between the UFPCC and CAS, the UFPCC informed the Baars that their meeting with CAS had been fruitless, and there was nothing further they could do to help.⁴³

³⁹ Letter from James Wood, dated August 10, 2017, para #9, CAR Vol 1, Tabs 5(B), p 212; Letter from James Wood, dated August 18, 2017, CAR Vol 1, Tabs 5(C), p 213; Case Note, March 1, 2016, CAR Vol 1, Tab 5(C), p 214.

⁴⁰ Baars Affidavit, paras 10, 15, 34, CAR Vol 1, Tab 3, pp 16, 17, 34.

⁴¹ Case Note, March 1, 2016, CAR Vol 1, Tab 5(C), p 214.

⁴² Expert Opinion of Kathleen Kufeldt, May 8, 2017, CAR Vol 2, Tab 7(C), pp 342-43. Dr. Kufeldt's opinion was critiqued by Dr. Kimberley Harris, a Clinical and Forensic Psychologist with the London Family Court Clinic. Dr. Harris' main critique was that "the limited data available to Dr. Kufeldt and ourselves about this cases raises more questions than answers". Letter of Kimberley Harris, dated June 16, 2017, CAR Vol 2, Tab 8(B), pp 360-61. However, on cross-examination, it was discovered that during her review, Dr. Harris had failed to review all the exhibits to the affidavits she was asked to review (approximately 175 pages), which including the SAFE Homestudy Report for the Baars and key communications between the Baars and CAS. See Transcript of Questioning of Dr. Kimberley Harris, September 27, 2017 ("Harris Transcript"), CAR Vol 2, Tab 11, pp 451, 454, 458. However, when questioned on her failure to review the exhibits, Dr. Harris doubled down, claiming that exhibits she had never reviewed "do including data that I did not review, but they most certainly would not include the necessary data to answer probably even most of the questions in my letter." Ibid at p 461. Further, CAS refused to request that Dr. Harris review all the exhibits to the affidavits and provide an updated opinion. Ibid. at p 492.

⁴³ Baars Affidavit, para 26, CAR Vol 1, Tab 3, p 21.

22. On March 16, 2016, CAS sent a letter to the Baars confirming that their foster home had been closed.⁴⁴ The Baars immediately sought to appeal the letter by contacting CAS. After a several calls, the Baars were directed to submit a letter to CAS,⁴⁵ which they did on April 13, 2016.⁴⁶ CAS did not respond to the Baars' letter.⁴⁷

PART II: Application of the Charter

23. Section 32(1)(b) of the *Canadian Charter of Rights and Freedoms* (“the Charter”) provides that the Charter applies “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

24. In Ontario, the *Act* empowers the Minister to delegate specified governmental authority over a territorial jurisdiction to an approved “children’s aid society.”⁴⁸ CAS is a designated “children’s aid society” under the *Act*.⁴⁹ The government functions delegated to the Respondent CAS include: to “provide care for children assigned or committed to its care under this Act” and “supervise children assigned to its supervision under this Act.”⁵⁰

25. The courts of Ontario recognize that children’s aid societies are subject to the *Charter*:

It was common ground that the society, through its employees, exercises the coercive power of the State in the prosecution of the purposes set out in the Act [...]. Accordingly, the society and its agents are instruments of the government within the meaning of subsection 32(1) of the Charter.⁵¹

⁴⁴ Letter to Baars, dated March 16, 2016 (“Closing Letter”), CAR Vol 1, Tab 3(E), p 183.

⁴⁵ Case Notes, March 21 and April 6, 2016, CAR Vol 1, Tabs 5(Z) and 5(AA), pp 315-16.

⁴⁶ Letter of Derek and Frances Baars, dated April 13, 2016, Vol 1, Tab 3(G), p 193-95.

⁴⁷ Baars Affidavit, para 30, CAR Vol 1, Tab 3, p 21.

⁴⁸ *Child and Family Services Act* (the “Act”), section 15(2).

⁴⁹ See Baars Affidavit, Exhibit B, CAR Vol 1, Tab 3(B), p 166.

⁵⁰ *Act*, sections 15(3)(d) and (e). See also *Act*, section 22(1), providing that if a “children’s aid society” fails to perform its delegated functions or directives, the Minister may operate and manage the society.

⁵¹ *Chatham-Kent Children's Services v K (J)*, 2009 ONCJ 589, para 24; see also *Halton Children's Aid Society v JT*, 2014 ONCJ 314 at par 38-39 citing *New Brunswick (Minister of Health and Community Services) v JG* [1999] 3 SCR 46 (“the Charter applies to child protection cases”).

26. When CAS approved the Baars as foster parents, it designated their home as a “Place of Safety” pursuant to section 18 of the *Act*.⁵² CAS’ decisions regarding the provision and supervision of the care of the girls were made under the statutory authority of sections 18 and 61(6). Under the Charter, CAS is obligated to respect and protect freedom of expression, freedom of conscience and religion, and to not discriminate against individuals on the basis of their religious beliefs in its decisions to approve foster parents and to open or close a foster home.⁵³

PART III: Charter violations

27. CAS’ decision to remove the girls and close the Baars’ foster home has no basis in CAS’ statutory authority, or in the best interests of the children. Rather, this decision is a gratuitous attack on the Baars’ *Charter* freedoms of conscience and religion, expression, and their *Charter* right to not suffer discrimination on the basis of religion. The Baars’ rights and freedoms in no way competed with the best interests, however construed, of the girls in their care. Here CAS lost sight of the well-being of the girls, in its ideological campaign against the Baars.

A. CAS Violated the Baars’ Section 2(a) Freedom of Conscience and Religion

28. Freedom of conscience and religion is a “fundamental freedom” that is enshrined in section 2(a) of the *Charter*. Freedom of religion protects sincerely held religious beliefs from “non-trivial” government interference.⁵⁴ In *R v Big M Drug Mart*, the Supreme Court of Canada described freedom of religion in the following way:

The essence of the concept of freedom of religion is **the right to entertain such religious beliefs as a person chooses**, the right to declare religious beliefs openly and **without fear of hindrance or reprisal**, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [...] **Freedom in a broad sense embraces both the absence of coercion** and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect

⁵² See Letter from Karen Chardola, Dated December 31, 2015, CAR Vol 1, Tab 3(E), p 183.

⁵³ Lindsay Transcript, CAR Vol 2, Tab 9, pp 371-72.

⁵⁴ *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*] at par 58.

public safety, order, health, or morals or the fundamental rights and freedoms of others, **no one is to be forced to act in a way contrary to his beliefs or his conscience.**⁵⁵

29. In *Mouvement Laïque Québécois v Saguenay (City)*, the Court explained the state’s duty of neutrality in regard to belief, which applies to CAS in this case:

[T]he evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. **This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief** (*S.L.*, at para. 32). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.⁵⁶

The Court does not require “complete secularity”, but rather “true neutrality on the state’s part”.⁵⁷

30. Most recently, in *Loyola High School v Quebec (Attorney General)*, the Supreme Court reaffirmed the importance of state neutrality, not forced secularity, under the *Charter*:

Part of secularism, however, is respect for religious differences.... **The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.**⁵⁸

31. The test for infringement of the freedom of religion requires that the Baars show 1) a practice of belief, having a nexus with religion, 2) that the practice or belief is sincerely held, and 3) that there has been a non-trivial and non-insubstantial interference with the belief or practice.⁵⁹

32. The record shows that the Baars’ refusals to lie and promote belief in Santa Claus or the Easter Bunny have a nexus with religion, as they explained to Ms. Lindsay: “We will not and can not go against what our God says”, “We are doing ‘what god requires of us’”⁶⁰ and “they will not

⁵⁵ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 94 [emphasis added].

⁵⁶ 2015 SCC 16 [*Saguenay*] at para 72 [emphasis added].

⁵⁷ *Ibid* at para 78. See also *Trinity Western University v Nova Scotia Barristers’ Society*, 2015 NSSC 25 at para 19: “While the society may be largely secular, in the sense that religion has lost its hold on social mores and individual conduct for many people, the state is not secular in the sense that it promotes the process of secularization. It remains neutral.”

⁵⁸ 2015 SCC 12 [*Loyola*], at para 43 [emphasis added].

⁵⁹ *Amselem*, at paras 56, 59.

⁶⁰ Case Note, dated February 29, 2016, CAR Vol 1, Tab 5(W), p 310; see also Letter from Frances and Derek Baars, April 13, 2016, CAR Vol 1, Tab 3(G), p 194.

violate their religious beliefs.”⁶¹ The sincerity and consistency of the Baars’ deeply-held religious beliefs can also be seen in CAS’ SAFE Homestudy Report, which noted the importance of Christian belief in the Baars lives and specifically highlighted that the Baars “do not endorse Santa Claus or the Easter Bunny as they do not wish to lie to children.”⁶²

33. Despite the Baars providing clear and full prior disclosure about their beliefs, CAS repeatedly demanded that the Baars override their sincere and consistent religious objections by proactively informing the girls that the Easter Bunny is real. CAS sought to compel them to do so by threatening to remove the girls and closing their foster home if they failed to comply. When the Baars refused, CAS followed through on their threat, pulling the girls from the Baars’ stable, secure, happy and safe home. CAS then closed the foster home to all children. CAS deprived the Baars of further opportunity to participate in foster care. This is a non-trivial and non-insubstantial interference with the Baars’ religious beliefs.

34. CAS violated its duty to “neither favour nor hinder any particular belief [or] non-belief”⁶³ by closing the Baars’ foster home because they refused to promote the belief in the Easter Bunny. As the British Columbia Court of Appeal recently stated: “[A] well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in **a manner that is in itself intolerant and illiberal.**”⁶⁴

35. CAS completely lost sight of both the girls’ best interest and its duty to accommodate the Baars’ religious beliefs,⁶⁵ rejecting all the Baars’ proposed accommodations.

⁶¹ Supervision Case Note, dated February 26, 2016, CAR Vol 1, Tab 5(V), p 309.

⁶² SAFE Homestudy Report, December 11, 2015, CAR Vol 1, Tab 3(D), p 174.

⁶³ Saguenay at para 72.

⁶⁴ *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 193.

⁶⁵ *R v NS*, 2012 SCC 72 at para 54: “the Canadian approach in the last 60 years to potential conflicts between freedom of religion and other values has been to respect the individual’s religious belief and accommodate it if at all possible.”

36. By closing the Baars' foster home for their refusal to promote beliefs that violated their religious beliefs, CAS violated the Baars' freedom of religion under the *Charter*.

B. CAS Violated the Baars' Section 2(b) Freedom of Expression

37. Freedom of expression, guaranteed in Canada by section 2(b) of the *Charter*, is a basic individual right and a fundamental value with both "instrumental and intrinsic justifications".⁶⁶ Indeed, "[i]t is difficult to imagine a guaranteed right more important to a democratic society".⁶⁷

38. Moreover, freedom of expression is a cornerstone of all western liberal democracies, recognized as a human right under by the Universal Declaration of Human Rights and by the *International Covenant on Civil and Political Rights*, to which Canada is a member state. The *Charter* is presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations. International treaties binding on Canada require Canada to protect freedom of expression, and authorize restrictions on free expression only where "provided by law [and] necessary: (a) For respect of the rights or reputations of others; [or] (b) For the protection of national security or of public order (ordre public), or of public health or morals," none of which apply here.⁶⁸

39. One of the core values underpinning freedom of expression is "promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit".⁶⁹ Freedom of expression protects citizens from government action aimed at coercing or otherwise limiting speech; protection against *compelled* speech is even stronger. The Supreme Court of Canada has held that forcing someone to express an opinion that is not their own is a penalty that is "totalitarian

⁶⁶ *R v Keegstra*, [1990] 3 SCR 697 at 806.

⁶⁷ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326 (Cory J.) at 1336.

⁶⁸ *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, article 19; *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), article 19; see also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para. 65, and citations therein.

⁶⁹ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 75.

and, as such, alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.”⁷⁰

40. Recently, in his appearance before the *Standing Senate Committee on Legal and Constitutional Affairs*, Queen’s Law Professor Bruce Pardy denounced compelled speech as a serious breach of freedom of expression under the *Charter*:

[F]orced speech is the most egregious infringement of freedom of speech, and freedom of speech may be the most important freedom that we have. Compelled speech puts words in the mouths of citizens and threatens to punish them if they do not comply. When speech is merely restricted, you can at least keep your thoughts to yourself. Forced speech makes people say things with which they do not agree.⁷¹

41. CAS’ demand that the Baars positively tell the girls that the Easter Bunny is real is an example of government compelling speech, which is an egregious violation of their freedom of expression. The Baars had voluntarily agreed not to express their views on the Easter Bunny or Santa Claus to the girls. CAS required the Baars not only to stifle their own expression, but to express a statement that the Baars believe to be untrue and wrong.

42. The violation of the Baars’ freedom of expression, through attempted compelled expression, is particularly egregious in light of the penalty: the immediate removal of the girls, with potentially traumatizing consequences to them.⁷² CAS further exacerbated the harm to the Baars by shutting down their foster home, with potential negative and long-term consequences in relation to their fostering and adoption desires.

C. CAS Violated the Baars’ Section 15(1) Right to Equality and Non-Discrimination

43. Section 15(1) of the *Charter* grants equal protection to every Canadian before the law, without discrimination based on enumerated grounds. It states:

⁷⁰ *National Bank of Canada v Retail Clerks’ International Union et al*, [1984] 1 SCR 269, 296.

⁷¹ Bruce Pardy, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess, 42nd Parl, Issue No 29, 17 May 2017 at 29:65.

⁷² See Expert Opinion of Kathleen Kufeldt, May 8, 2017, CAR Vol 2, Tab 7(C), pp 342-43.

Every individual is equal before and under the law and has the **right to the equal protection and equal benefit of the law without discrimination** and, in particular, **without discrimination based on** race, national or ethnic origin, colour, **religion**, sex, age or mental or physical disability. [Emphasis added]

44. The Supreme Court has affirmed a two-part test for assessing whether there has been a violation of section 15(1): “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?”⁷³ Section 15(1) applies to government action and decisions as it does to laws.⁷⁴

45. Requiring the Baars to promote the Easter Bunny and tell the girls that it was real imposed **differential treatment** and a **distinction** against the Baars on the basis of religion. CAS had prior knowledge of the Baars’ religious beliefs. Yet, CAS unrelentingly insisted on the Baars violate their religious beliefs, with the result that the Baars’ foster home was shut down entirely, even for infants and for children who come from families that do not celebrate the Easter Bunny. This caused the Baars a **disadvantage**.

46. The Ontario Human Rights Tribunal has previously found that a children’s aid society unlawfully discriminated against foster parents on the basis of their Christian beliefs in closing their foster home. The Tribunal noted that this discrimination was based on “a stereotypical view of the applicant’s Christian faith” and “unreasonable and unsupported suspicions”.⁷⁵

47. CAS took a stereotypical view of the Baars’ Christian faith and also engaged in unreasonable and unsupported suspicions against the Baars. While it is not necessary for the Baars to demonstrate that CAS’s perpetuated “prejudice” or “stereotyping”,⁷⁶ such evidence also

⁷³ *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para 30.

⁷⁴ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2009 SCC 69 [*Little Sisters*]. In this case, the Court phrased the consideration as whether “the law, program or **activity** imposes differential treatment.” Ibid at para 110 [emphasis added].

⁷⁵ 2011 HRTO 265 (CanLII) at paras 116, 173, 203.

⁷⁶ See *Quebec (Attorney General) v A*, 2013 SCC 5 at para 325: “Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate”.

supports a finding of **discrimination**. There is clearly prejudice and stereotyping in Ms. Lindsay’s allegation that the Baars would not treat a same-sex couple well because of their Christian faith.⁷⁷ Further, evidence of prejudice can be seen in CAS’ criticism of the Baars’ standards of dress, the Baars’ regular church attendance, expressly excluding “religious tradition” and “beliefs” from CAS-required “respect”, refusal to respect the Baars’ religious beliefs and requiring that they be “willing to compromise” those beliefs.⁷⁸ These actions and positions taken by CAS against the Baars also discriminate against other Christians, and indeed against devout people of any faith or belief who will not “compromise” their convictions,⁷⁹ preventing them from participating in the meaningful service of foster care.⁸⁰ As an instrument of the government under the *Act*, CAS must “not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others.”⁸¹

48. CAS’ actions in this case discriminate against the Baars based on their religious beliefs, and will prevent others with sincere convictions from serving in the public service of foster care, contrary to section 15(1) of the *Charter*.⁸²

⁷⁷ Baars Affidavit, para 20, CAR Vol 1, Tab 3, p 19. Precisely this kind of reasoning has been soundly rejected by the Supreme Court of Canada. See *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31 at paras 35-39.

⁷⁸ Case Note, December 23, 2015, CAR Vol 1, Tab 5(G), p 252; Verticchio Interview, CAR Vol 2, Tab 6(A), p 322; Case Note, February 24, 2016, CAR Vol 1, Tab 5(U), p 307. Case Note, February 29, 2016, CAR Vol 1, Tab 5(W); Resource Closing Summary, CAR Vol 1, Tab BB, p 319.

⁷⁹ See Letter from CAS, dated March 16, 2016, para 5, CAR 1, Tab 3(F), p 192; see also Supervision Case Note, dated February 26, 2016, CAR Vol 1, Tab 5(V), p 309.

⁸⁰ See Lindsay Transcript, CAR Vol 2, Tab 9, p 381-83, showing Ms. Lindsay’s unfamiliarity with the origins of the Easter (or “Eostre”) Bunny.

⁸¹ *Saguenay* at para 76.

⁸² CAS’ requirement of the Baars that they promote Santa Claus and the Easter Bunny and communicate an admitted lie to the girls, is based on a the line of thinking that would also require foster parents to celebrate the religious traditions of Easter (Christianity), Eid (Islam) or the Passover (Judaism). Lindsay Transcript, CAR Vol 2, Tab 9, pp 398-99.

PART IV: Justifications for breach

A. CAS's Actions are not "Prescribed by Law"

49. Section 1 of the *Charter* guarantees the above rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." However, "[v]iolative conduct by government officials that is not authorized by statute is not 'prescribed by law' and cannot therefore be justified under s. 1."⁸³

50. Thus, in the case of *Little Sisters* where customs officials were found to have interpreted and applied the Customs legislation in a discriminatory manner against homosexual materials, the Court held that those issues would "proceed directly to the remedy phase of the analysis."⁸⁴

51. Similarly, in the present case, CAS has no statutory mandate to force the Baars to actively promote belief in the Easter Bunny and tell the girls it is real. Thus, CAS' conduct cannot be justified under section 1 of the *Charter*.

B. Standard of Review for Line Decisions Limiting *Charter* Rights

52. The Supreme Court of Canada has held that it will review an "adjudicated administrative decision" to determine whether "the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right."⁸⁵ The Court further described this analysis:

In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on **ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives.**⁸⁶

53. In a recent decision from the Court of Appeal of Ontario, Justice Lauwers, joined by Justice Miller, criticized applying a deferential standard of review to a "line decision" made in a context

⁸³ *Little Sisters*, at para 141.

⁸⁴ *Ibid.*

⁸⁵ *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], at paras 4-6.

⁸⁶ *Doré* at para 7 [emphasis added]; see also *Loyola* at para 39: "A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate."

“that would not yield ‘an adjudicated administrative decision’”.⁸⁷ Their criticism focused on the importance of ensuring that the statutory objectives claimed by the decision maker are “pressing and substantial”; the need for there to be a proper exercise of the “justificatory muscles”⁸⁸ prior to making a decision potentially violating the *Charter*; the inappropriateness of a deferential standard considering the doubtful ability of a line decision maker to reason from constitutional principles; and the partiality of line decision makers.⁸⁹

54. Justice Lauwers found that “[w]here a person challenges the decision of a line official on the basis that it violates a *Charter* right, there is every prospect that the first impartial decision maker in the sequence will be a court or other adjudicative tribunal.”⁹⁰ Thus, he cautioned against deferring to a line decision maker – in that case educators, in this case social workers – on “constitutional matters”, stating:

I would be reluctant to apply a robust concept of “reasonableness” burdened by a standing obligation of judicial deference to a line decision maker’s discretionary decision. There is a real risk that a claimant’s *Charter* rights will not be understood and will not be given effect by the line decision maker.⁹¹

55. In addition to cautioning this Court against applying inappropriate deference, Justice Lauwers provided the following guidance specifically applicable to the decision made in this case:

In my view, in order to justify a *Charter* limit, the record of evidence considered by the line decision maker should demonstrate the elements of accountability, intelligibility, adequacy and transparency courts expect from administrative tribunals.⁹²

⁸⁷ *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893 [*ET v Hamilton-Wentworth*] at para 112.

⁸⁸ “Justificatory muscles” refers to the considerations of “balance and proportionality” underlying a traditional *Oakes* analysis. See *ibid* at para 119, citing *Doré* at para 5 where the Court stated that “while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality.”

⁸⁹ *ET v Hamilton-Wentworth* at paras 116-124.

⁹⁰ *ET v Hamilton-Wentworth* at paras 124.

⁹¹ *ET v Hamilton-Wentworth* at para 125.

⁹² *ET v Hamilton-Wentworth* at para 120.

C. CAS' Actions were Unreasonable and Violated the Girls' Best Interests

56. The “paramount purpose” of the *Child and Family Services Act* is “to promote the best interests, protection and well-being of children.”⁹³ Specifically, the *Act* only authorizes CAS to “remove the child from a foster home ... where ... it is in the child’s best interests to do so.”⁹⁴

57. Dr. Kufedlt, a child welfare expert, has provided her expert opinion that CAS lost sight of the best interests of the girls in this case, and risked traumatizing them.⁹⁵ Thus, CAS’ actions did not promote any “pressing and substantial” objective, but in fact directly undermined the “paramount purpose” of the *Act*: the “best interests, protection and well-being” of the girls. The Plans of Care for the girls do not show that girls need Santa Claus or the Easter Bunny; rather they state “[t]he goal for [blacked out] is to grow and develop in a stable, nurturing environment.”⁹⁶

58. CAS claims to be acting pursuant to the wishes of the birth mother.⁹⁷ This is not substantiated in the record.⁹⁸ In fact, this CAS claim is contradicted by the birth mother’s own direct communication to the Baars.⁹⁹ Further, CAS was certainly not acting on the wishes of the birth mother when they decided to remove the girls from the Baars’ home on less than 24 hours’

⁹³ *Act*, section 1. Further, additional purposes of the Act are only so if “they are consistent with the best interests, protection and well-being of children.” *Act*, section 2.

⁹⁴ *Act*, section 61(a).

⁹⁵ Expert Opinion of Kathleen Kufeldt, May 8, 2017, CAR Vol 2, Tab 7(C), pp 342: “Removing the children with only one day’s notice and without adequate preparation or explanation is a potentially traumatizing event. It is particularly damaging for children who have already experienced considerable disruption in their young lives.”

⁹⁶ See Plans of Care, CAR Vol 1, Tabs 5(M), (N), (O) and (P), pp 266-96. It should be noted that the “Child Profile” for one of the girls states a proclivity to lie and a need for “reassurance that foster parents are there”, on account of the girls’ past circumstances. Current Child Profile, December 22, 2015, CAR Vol 1, Tab 5(F), p 249-50.

⁹⁷ Lindsay Affidavit, paras 11, 13, 16, 26, CAR Vol 1, Tab 4, pp 200-03; see also Supervision Case Note, dated February 26, 2016, para 1, CAR Vol 1, Tab 5(V), p 309.

⁹⁸ In response to its undertaking to provide “[a]ny record(s) that the birth mother requested that the children have the excitement of the Easter Bunny and have that anticipation that, waking upon on Easter, they would get to look for Easter eggs and be able to partake in that celebration” (see CAR Vol 1, Tabs 5(A), (B) and (C), pp 209-14), CAS only cited the case note of February 24, 2016 (see CAR Tab 5(U), p 307) and the supervision case noted dated February 26, 2016 (see CAR Tab 5(V), p 309). In fact, these notes only repeat a vague claims that the birth mother “celebrates in a traditional manner and expects this will be the same for her children while in care.”

⁹⁹ Communication book, CAR Vol 1, Tab 5(E), p 229.

notice. Astoundingly, CAS failed to even inform the mother to notify her of their decision until after the girls had been removed.¹⁰⁰

59. In regard to this Court's task of "ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives", not only does CAS' actions seriously violate the Baars' *Charter* rights under sections 2(a), 2(b) and 15(1), CAS' actions directly violate the relevant statutory objectives.

60. CAS' records and communication also fail to reveal any reason why CAS would refuse the Baars' proposed accommodations of allowing a CAS worker to promote the offending celebration, permitting the girls to go to an alternative home for the Easter weekend,¹⁰¹ or allowing the Baars to foster children not requiring these celebrations, including infants.¹⁰² Indeed, the record reveals no reason why CAS could not permit the Baars' simple request to give the girls enough time to prepare to move. CAS has not met its burden to show that it was "necessary" to refuse to accommodate the Baars' requests.¹⁰³

61. CAS' records, including its March 16, 2016 letter to the Baars, show a lack of "accountability, intelligibility, adequacy and transparency". CAS' violation of the Baars' *Charter* rights was unreasonable and entirely disproportionate.

PART V: Remedies

62. Under section 24(1) of the *Charter*, infringements of rights or freedoms guaranteed by the *Charter* may be remedied in any way that a court "considers appropriate and just in the

¹⁰⁰ Letter from James Wood, dated August 10, 2017, para #9, Letter from James Wood, dated August 18, 2017, CAR Vol 1, Tabs 5(B) and 5(C), p. 212-214.

¹⁰¹ Baars Affidavit, para 19, CAR Vol 1, Tab 3, p 18.

¹⁰² Baars Affidavit, para 24, CAR Vol 1, Tab 3, p 20.

¹⁰³ Multani, *ibid* at para 53 citing José Woehrling, "L'obligation d'Accommodement Raisonnable et l'Adaptation de la Société à la Diversité Religieuse," (1998) 43 *McGill L J* 325, at p 360 : "Anyone seeking to disregard the duty to accommodate **must show that it is necessary**, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant." [Emphasis added]

circumstances.” The Supreme Court has held that courts have a wide discretion under section 24(1) of the *Charter* to issue an appropriate remedy and that remedies should “meaningfully vindicate the rights and freedoms of the claimants”.¹⁰⁴

63. The Baars maintain a desire to serve as either foster or adoptive parents.¹⁰⁵ Yet, on account of their refusal to tell the girls that the Easter Bunny is real, which was based on their sincerely-held religious beliefs, the Baars had their foster girls removed and their foster home permanently closed. Given the drastic steps taken by CAS against the Baars, other child welfare agencies reviewing “the previous involvement of a child welfare organization” with the Baars are likely to have serious red flags, which will likely prevent the Baars from fostering or adopting children.¹⁰⁶

64. The Supreme Court has held that “[a] court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it.”¹⁰⁷ Those factors are met in this case. Further a declaration is “an effective and flexible remedy for the settlement of real disputes”.¹⁰⁸ It should be presumed that government agencies, including child welfare agencies, will respect the declarations and orders of the Court.

65. The Baars therefore reiterate their request for the Declarations and Order applied for in their Notice of Application. Thus, the fact that CAS’ violated the Baars’ *Charter* rights by removing the girls against their best interests and closing the Baars’ foster home will be recognized and remedied so other child welfare agencies do not reject the Baars based on CAS’ actions.

¹⁰⁴ *Vancouver (City) v Ward*, 2010 SCC 27 at paras 16-21.

¹⁰⁵ Baars Affidavit, para 35, CAR Vol 1, Tab 3, p 23.

¹⁰⁶ See Case Note, April 6, 2016, para 5, CAR Vol 1, Tab 5(Z), p 316.

¹⁰⁷ *Canada (Prime Minister) v Khadr*, 2010 SCC 3, at para 46.

¹⁰⁸ *R v Gamble*, [1988] 2 SCR 595, 649.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 30, 2017


Justice Centre for Constitutional Freedoms