CITATION: Baars v. Children's Aid Society of Hamilton, 2018 ONSC 1487
COURT FILE NO.:17-61225
DATE: 2018/03/06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DEREK AND FRANCIS BAARS	M. Moore, for the Applicants
Applicants	
- and -	
THE CHILDREN'S AID SOCIETY OF HAMILTON	J. Wood, for the Respondent
Respondent	
	HEARD: December 20, 2017

A. J. GOODMAN J.:

APPLICATION FOR A DECLARATION PURSUANT TO SECTIONS 2 AND 15 OF THE *CHARTER OF RIGHTS AND FREEDOMS*

REASONS FOR JUDGMENT

INTRODUCTION:

[1] The applicants Derek and Francis Baars ("the Baars") seek a declaration in respect of the respondent's Children's Aid Society of Hamilton's ("the Society") conduct and subsequent decision to remove two foster children from their home.

[2] The nub of the application stems from the Baars' refusal to utter or affirm the existence or role of the Easter Bunny and Santa Claus in relation to foster children under their care in celebrating Easter and Christmas respectively.

[3] Specifically, the Baars' seek a declaration that the Society violated their freedom of conscience and religion, freedom of expression, and the right to be free from discrimination under ss. 2(a), 2(b), and 15 of the *Canadian Charter of Rights and Freedoms,* [Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*,] ("*Charter*"). The Baars also seek a declaration that the closure of their foster home was unreasonable, discriminatory and contrary to their fundamental rights and freedoms. The Baars further seek an order requiring the Society to note that their decision to close their foster home violated their *Charter* rights.

[4] The Society denies any conduct giving rise to the alleged breach of *Charter* rights relief claimed in this application. The Society responds that it acted within its statutory mandate and disputes the validity of the remedy being sought.

THE FACTS:

[5] Derek Baars ("Derek") and Francis Baars ("Francis")[1] are a young couple who have been married since 2010. The Baars are Protestant (Free Reformed) and their religious beliefs are a major part of their lives. They currently reside in Calgary, Alberta.

[6] The Society is an organization tasked with statutory protection of children in the City of Hamilton.

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[1] With no disrespect intended and for ease of reference, I will employ the Baars' given names and the surnames of other individuals in the course of providing these Reasons.

[7] On May 29, 2015 the Baars applied to open a foster home with the Society. In July 2015, the Baars successfully completed the Society's Parent Resources for Information, Development and Education ("PRIDE") training. During this training, the Baars 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] In the SAFE Homestudy report ("the Homestudy report") that the Society completed on December 11, 2015, the Society made a note of the Baars' religious beliefs, particularly that they do not endorse Santa Claus or the Easter Bunny because they do not wish to lie to children. The Homestudy report concluded with the Society's recommendation that the Baars be approved for foster care.

[9] On December 17, 2015, the Baars entered into a Foster Parent(s) – Society Service Agreement ("the Agreement") with the Society. On December 18, 2015, the Society placed two sisters ("the children"), ages three and four, from the same biological family with the Baars.

[10] Shortly after the two foster children were placed in the Baars' care, an issue arose due to the Baars not promoting Santa Claus. On December 23, 2015, Children's Services Worker Jessica MacKenzie met with the Society's Placement worker, Tracey Lindsay ("Lindsay"), and expressed concerns about the children's placement with the Baars. It was reported that Francis recently told her that Santa does not come to her house. After receiving this information from Francis, the worker advised the children that Santa would be delivering their presents to their mother's home. The worker expressed her concern as to whether foster parents should have to honour their foster children's cultural practices.

[11] A further issue arose on January 6, 2016, when Lindsay and Society Homestudy Worker Sue Ross ("Ross") attended the foster home and met with the Baars for the first time. Particularly, Lindsay spoke with the Baars about the tradition of the Easter Bunny bringing chocolate Easter eggs for the children. The Baars reaffirmed that they could not accept the Easter Bunny as part of their Easter and would not lie about the existence of the Easter Bunny.

[12] On February 24, 2016, Lindsay again spoke with Francis to discuss the Easter holiday and Francis again stated that they would not perpetuate the existence of the Easter Bunny. They could not lie to the children. If the children asked them about the Easter Bunny, they would divert the conversation.

[13] On February 26, 2016, Lindsay consulted with Society supervisor Karen Chardola ("Chardola") regarding her concerns with the placement. Lindsay noted that the Society would not continue fostering its relationship with the Baars because "they are not prepared to support the agency position and support the needs of the children."

[14] Three days later, Lindsay spoke to Francis on the telephone. Again, the primary topic of conversation was the Baars' refusal to perpetuate the existence of the Easter Bunny. During this conversation, Lindsay expressed concern about the Baars' potential treatment of prospective same-sex adoptive couples. The Baars assured Lindsay that they would treat any same-sex couple as people worthy of dignity and respect. Later that same afternoon, Lindsay had spoken to Chardola, and they had decided that they would have to arrange to remove the children from the Baars' home.

[15] On March 3, 2016, the Society informed the Baars of their intention to remove the children from their care the following morning. The Society removed the children from the Baars' home and closed their foster home on March 4, 2016.

[16] On March 16, 2016, the Society sent a letter to the Baars confirming that their foster home had been closed. The Baars sought to appeal the letter by contacting the Society. After several calls, the Baars were directed to submit a letter to the Society, which they did on April 13, 2016. The Society did not respond.

JURISDICTIONAL QUESTION:

[17] Notwithstanding that s. 97 of the *Courts of Justice Act*, RSO.1990, c. C.43. provides for declaratory relief under the Superior Court's inherent jurisdiction, at the outset of these proceedings, I raised the question of whether this Court ought to entertain the request for a declaration in this case.

[18] A declaratory judgment is "a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs": *Zamir & Woolf, The Declaratory Judgment*, 3rd ed. (London: Sweet & Maxwell, 2002). The nature of the relief was articulated in detail by the *Supreme Court of Canada in Canada v. Solosky*, [1980] 1 S.C.R. 821, [1979] S.C.J. No. 130 at pp. 830-832:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd*, [[1921], 2 A.C. 438] in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

> The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

[19] It is trite law that a declaratory action is discretionary. Two factors will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, it will settle the questions at issue between the parties. A Superior Court will be disinclined to grant a declaration in situations that are abstract or theoretical in nature: *Hudson: Declaratory Judgments in Theoretical Cases: "The Reality of the Dispute"* ((1977) 3 Dal. L.J. 706).

[20] In the case of *Glaspell v. Ontario*, 2015 ONSC 3965, Perrell J. had occasion to comment on this issue. At paras. 27 to 29, the learned jurist held:

> Under section 97 of the Courts of Justice Act, R.S.O. 1990, c. C.43, the Superior Court may make binding declarations of right, whether or not any consequential relief is or could be claimed. Declaratory orders are in the discretion of the court: CTV Television Network Ltd. v. Kostenuk, [1972] 3 O.R. 338 (C.A.) at para. 5.
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> The court's discretion to make a declaration should be exercised sparingly and with extreme caution: Re Lockyer, [1934] O.R. 22 (C.A.). As a general policy, the court will not make a declaratory order or decide a case when the decision will serve no practical purpose because the dispute is theoretical, hypothetical or abstract, and the remedy of declaratory relief is not generally available where the dispute or legal right may never arise: Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342; Green v. Canada (Attorney General), 2011 ONSC 4778 (S.C.J.).
>
> Being a discretionary remedy, the court will withhold the exercise of its discretion to grant a declaration in circumstances in which a declaration cannot meaningfully be acted upon by parties; a declaration must have some utility: Solosky v. The Queen, [1980] 1 S.C.R. 821 Giacomelli v. Canada (Attorney General), 2010 ONSC 985.

[21] Perrell J.'s analysis and reasoning in *Glaspell* is instructive. I appreciate that the court has a discretion to refuse to grant declaratory relief and if granted, such relief is granted sparingly.

[22] I am also persuaded that this Court, as opposed to the Divisional court, is the appropriate forum and is suitably situated to hear the nature of this type of application for relief under the auspicious of the *Charter.*

[23] There is no dispute that the Baars have recently requested to be considered as suitable adoption candidates. In her affidavit, Francis states that they have been constrained or unable to seek favourable adoption options in Calgary. While CAS' counsel did not specifically claim that his organization was in contact with their analogous agency in Calgary in regards to the Baars, any such contact was neither disputed nor specifically denied.

[24] In any event, it is not a leap to the abyss of conjecture to draw the reasonable inference that government agencies tasked with the protection of children in their respective jurisdictions would conduct their due diligence in respect of potential foster or adoption candidates. I cannot fathom a situation where these two organizations had not been in communication with each other regarding the potential for the Baars to become foster or adoptive parents. For this question, I accept that as a result of their involvement with the Society, the Baars have been effectively ousted from further adoption or fostering opportunities.

[25] I recognize that this jurisdictional question was not pressed by counsel for the CAS. Nevertheless, I do not find that the request for declaratory relief in this case is merely theoretical, academic or in the abstract. I am satisfied that there is a question here that may impact on the applicants' legal rights under the *Charter.* Therefore I will exercise my discretion and decide this application on the merits.

PREAMBLE:

[26] Before I embark on my analysis of the live issues in this application, it is important to state what this decision does not purport to address. This ruling is not about whether parents or guardians ought to promote or discourage the practice of advising young children about Santa Claus or the Easter bunny. It is not about the existence or utility of proclaiming Santa Claus or the Easter Bunny as a part of the secular celebratory rituals that arise at Christmas or Easter respectively. It is neither about offering commentary over the veracity or validity of one's belief nor offering any commentary on general parenting or guardianship skills. This decision does not purport to advance any criticism or endorsement in relation to Christian or other religious beliefs or values.

WHAT ISTHE APPROPRIATE STANDARD OF REVIEW?

[27] The applicants challenge the decisions of administrative actors, namely the Society workers. Accordingly, I must consider the framework from *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613.

[28] In *Doré*, Abella J. explained that "a formulaic application of the Oakes test may not be workable in the context of an adjudicated [administrative] decision." Instead, an administrative law approach should be taken when a discretionary administrative decision engages *Charter* rights: paras. 5-6.

[29] The administrative law approach has two steps. The first step is to determine "whether the decision engages the *Charter* by limiting its protections." If so, the second step is to determine "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory

and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": *Loyola*, at para. 39.

[30] As Abella J. noted in *Doré*, in the *Charter* context it is still appropriate to pay deference to administrative decision-makers, just as legislators are afforded a margin of appreciation under the *Oakes* analysis: para. 5. Abella J. further explained, at para. 54:

> Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

[31] That being said, Abella J. observed that the nature of the reasonableness analysis is always contingent on its context, and "[t]he notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis": *Doré*, at paras. 5 and 7.

[32] Mr. Moore, counsel for the Baars, argues that a less deferential standard of review is appropriate in this case. He relies on the case of *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, in which Lauwers J.A. (with Miller J.A. concurring) expressed serious concern about the application of the *Doré/Loyola* framework to "line decisions": para. 112.

[33] Lauwers J.A. noted that the discretionary decisions of line officials are different from the "adjudicated administrative decisions" on the basis of which *Doré* was decided. His Honour noted that unlike adjudicators at a tribunal, line decision makers may not be equipped to weigh the importance of statutory objectives, or to exercise the necessary "justificatory muscles". Lauwers J.A. cautioned that "[t]here

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": *E.T. v. Hamilton-Wentworth*, at paras. 113, 117-120, and 125.

[34] Lauwers J.A. proposed that in the context of line decisions, courts should be reluctant to apply a robust concept of reasonableness. At the very least, "the record of evidence considered by the line decision makers should demonstrate the elements of accountability, intelligibility, adequacy and transparency courts expect from administrative tribunals": *E.T. v. Hamilton-Wentworth*, at paras. 120 and 125.

[35] With respect, Lauwers J.A.'s suggestion that certain types or categories of decision makers should be afforded less deference seems to conflict with the Supreme Court of Canada case of *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770.

[36] In *Wilson,* there was disagreement over which standard of review should be applied. At the Federal Court of Appeal, Stratas J.A. held that even if the standard was reasonableness, the adjudicator should be afforded only a narrow margin of appreciation: *Wilson v. Atomic Energy of Canada Ltd.*, 2015 FCA 17, at para. 58. On appeal, the Supreme Court rejected the margins of appreciation approach taken by Stratas J.A. Abella J. wrote, at para. 18:

> Nor do I accept the position taken in this case by the Federal Court of Appeal that even if reasonableness review applied, the Adjudicator should be afforded "only a narrow margin of appreciation" because the statutory interpretation in this case "involves relatively little specialized labour insight". As this Court has said, the reasonableness standard must be applied in the specific context under review. But to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity.

[37] In concurring reasons, Cromwell J. underlined his agreement with this part of Abella J.'s decision, explaining, at para. 73:

> [I]n my opinion, developing new and apparently unlimited numbers of gradations of reasonableness review — the margins of appreciation approach created by the Federal Court of Appeal — is not an appropriate development of the standard of review jurisprudence.

[38] The approach proposed by Lauwers J.A. in *E.T. v. Hamilton-Wentworth* is similar to the margins of appreciation approach which the Supreme Court rejected in *Wilson*. It is notable that in support of his proposition that line decision makers should be paid less deference, Lauwers J.A. cites Stratas J.A.'s decision in *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138. In that case, Stratas J.A. reviewed Supreme Court jurisprudence on the meaning of reasonableness and again concluded that some administrative decision makers in certain contexts are given a broader "margin of appreciation" than others. Stratas J.A. wrote, at paras. 33-36:

> The Supreme Court has told us that reasonableness is a range of acceptable and defensible outcomes or a margin of appreciation: *Dunsmuir* at para. 47; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.) at para. 38.

[39] Repeatedly, the Supreme Court has suggested that reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision-making involved and all relevant factors": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.) at para. 18; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) at para. 59; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 (S.C.C.) at para. 22; and many others.

[40] In other words, certain circumstances, considerations and factors in particular cases influence how we go about assessing the acceptability and defensibility of administrative decisions: *Catalyst* at para. 18; *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) at para. 54; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 (S.C.C.) at para. 44.

[41] From the perspective of reviewing courts, if the circumstances, considerations and factors differ from case to case, how reviewing courts go about measuring acceptability and defensibility will differ from case to case; in other words, reasonableness will "take its colour from the context" of the case. Looking at this from the perspective of administrative decision-makers, as a practical matter some decision-makers in some contexts seem to be given more leeway or a broader "margin of appreciation" than other decision-makers in other contexts.

[42] It should be noted that neither *Wilson* nor *Re:Sound* involved *Charter* rights, and consequently they may have limited application to the present case.

[43] The *"Dunsmuir"* standard of reasonableness discussed in *Wilson* and *Re:Sound* is somewhat modified when an administrative decision engages *Charter* rights. Indeed, the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, tells us that an administrative decision is reasonable if it falls within a range of possible, acceptable outcomes: para. 47. However, if the decision engages *Charter* rights, *Doré* adds an additional consideration. According to *Doré*, the administrative decision will be reasonable if it reflects a *proportionate* balancing of the *Charter* rights and statutory objectives: paras. 6 and 57.

[44] It is likely that the Supreme Court of Canada will comment on the standard of review for administrative decisions engaging *Charter* rights in it decisions on

Trinity Western University, et al. v. Law Society of Upper Canada and *Law Society of British Columbia v. Trinity Western University, et al.*, which were heard together on November 30 and December 1, 2017: leave granted at [2016] S.C.C.A. No. 418 and [2016] S.C.C.A. No. 510, respectively. The standard of review was discussed in detail by both the Ontario and British Columbia Courts of Appeal: *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518, at paras. 60-71, and *Trinity Western University v. Law Society of British Columbia*, 2016 BCCA 423, at paras. 117-134.

[45] I note that both Courts of Appeal in Trinity Western applied the *Doré/Loyola* framework and arrived at different results. The results are partly explained by significant factual differences. However, the British Columbia Court of Appeal also took a narrow approach to reasonableness, noting at paras. 130 and 192:

> It is instructive to note that even in the case of a standard of review calibrated at "reasonableness", the range of "reasonable" outcomes can be exceedingly narrow indeed, effectively amounting to one correct answer.
>
> In our view, while the standard of review for decisions involving the *Doré / Loyola* analysis is reasonableness and there may in many cases be a range of acceptable outcomes, here (as was the case for the minority in *Loyola High School*) there can be only one answer to the question: the adoption of a resolution not to approve TWU's faculty of law would limit the engaged rights to freedom of religion in a significantly disproportionate way — significantly more than is reasonably necessary to meet the Law Society's public interest objectives.

[46] In contrast, the Ontario Court of Appeal took a more deferential approach, commenting at para. 68:

> Nor can the fact that the LSUC's decision in this case required a careful analysis and balancing of the appellants' Charter rights with other Charter values remove the standard of review from the reasonableness category. Administrative tribunals are entitled, indeed required, to take account of, and try to act consistently with, Charter values as they make decisions within their mandate: see Doré, at para. 24, and Loyola High School v. Quebec (Attorney

> General), 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.), at para. 37. The balancing of Charter rights and values does not in and of itself take a decision outside of the expertise of an administrative tribunal. Here, the LSUC's accreditation decision, which took into account Charter rights and values, was within the LSUC's expertise.]

[47] It seems to me that "reasonableness", as described in *Doré* and *Loyola*, continues to be the appropriate standard of review in cases such as this one. In my view, Lauwers J.A.'s concerns about the *Doré/Loyola* framework were expressed in *obiter*. In applying the reasonableness standard, however, the court should be cognizant that reasonableness "takes it colour from the context," including the particular type of decision making involved: *E.T. v. Hamilton-Wentworth*, at para. 125; *Doré* at para. 54; *Wilson*, at para. 22; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at para. 18; and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

[48] That said, and having gone through the jurisprudence on this issue, in the present case it is unnecessary to decide between multiple degrees of deference or margins of appreciation. Regardless of whether the *Doré/Loyola, E.T. v. Hamilton-Wentworth* framework or a less deferential test as proposed by the applicants is employed; and even applying the more "robust" reasonableness test for the appropriate standard of review in this case, I arrive at the same conclusion.

DID THE SOCIETY LIMIT THE BAARS' s. 2(a) RIGHT TO FREEDOM OF RELIGION?

Positions of the Parties:

[49] The Baars' position is that they have a sincerely-held religious belief that it is wrong to lie and to promote belief in Santa Claus and the Easter Bunny. The

Baars submit that the Society interfered with their ability to act in accordance with those beliefs by demanding that the Baars proactively inform the children that the Easter Bunny is real. The Society threatened to (and in fact did) remove the children and close the foster home if the Baars did not comply.

[50] The Society submits that they recognized the applicants' religious beliefs. Neither the worker nor the organization ever asked the Baars to lie to the children or to betray their faith. Consequently, there is insufficient evidence of interference with the Baars' right to religious freedom.

[51] The Society takes the position that there is no evidence that they insisted that the Baars specifically inform the children about the Easter bunny. Moreover, there is no evidence that the applicants' foster home was closed as a result of their refusal to tell the children that the Easter bunny is real. The Society's decision to remove the children from care and to close the applicants' foster home was the result of concerns regarding the Baars' unwillingness to be flexible and support the beliefs of the children and their inability to support the Society's position and authority as ultimate decision-maker.

LEGAL PRINCIPLES:

a. Freedom of Religion Defined

[52] 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 practise or by teaching and dissemination": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336.

[53] In *Big M Drug Mart*, Dickson J. (as he then was) described freedom as the absence of coercion or constraint. Dickson J. explained, at p. 337, "Freedom means that, subject to such limitations as are necessary to protect 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."

[54] In its most recent freedom of religion case, the Supreme Court commented, "s. 2(a) has two aspects — the freedom to hold religious beliefs and the freedom to manifest those beliefs": *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, at para. 63. This two-part definition accords with Dickson C.J.'s comment in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, that freedom of religion protects both belief and conduct. Dickson C.J.C. wrote, at p. 759, that "[t]he purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."

[55] In *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, Gascon J. stated the principle from *Big M Drug Mart* that "freedom of conscience and religion protects the right to entertain beliefs, to declare them openly and to manifest them, while at the same time guaranteeing that no person can be compelled to adhere directly or indirectly to a particular religion or to act in a manner contrary to his or her beliefs": para. 69.

b. The State's Duty of Neutrality

[56] The guarantee of freedom of religion has given rise to a duty of state of neutrality. Again, turning to the recent case of *Mouvement laïque québécois v. Saguenay (City)*, Gascon J. explained that "neutrality requires that the state neither

favour nor hinder any particular belief": paras. 71-72. This duty or obligation by the state or administrative body appears to be quite self-evident. Gascon J. continued, at paras. 74-5:

> By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. S. (N.)*, 2012 SCC 72, [2012] 3 S.C.R. 726 (S.C.C.), at paras. 31 and 50-51). On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the *Canadian Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the *Canadian Charter*, but also with a view to promoting and enhancing diversity (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 95; *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), at p. 757; *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter Edwards Books], at p. 758; *Big M*, at pp. 337-38; see also J. E. Magnet, "Multiculturalism and Collective Rights", in G.-A Beaudoin and E. Mendes, eds., Canadian Charter of Rights and Freedoms (4th ed. 2005), 1259, at p. 1265).
>
> I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the Quebec Charter and the Canadian Charter reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs (*R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), at p. 136; *Big M*, at p. 346; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912 (S.C.C.), at para. 27; *Reference re Provincial Electoral Boundaries*, [1991] 2 S.C.R. 158 (S.C.C.), at pp. 179 and 181-82; *R. v. Lyons*, [1987] 2 S.C.R. 309 (S.C.C.), at p. 326). The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice-versa.

[57] In *Loyola*, at para. 43, the Supreme Court reaffirmed the importance of state neutrality, not forced secularity, under the *Charter*:

> Part of secularism, however, is respect for religious differences. A secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another: Richard Moon, "Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality" (2012), 45 U.B.C. L. Rev. 497, at pp. 498-99. 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.

c. Establishing a s. 2(a) Breach

[58] To establish a violation of freedom of religion, a claimant must show two things. First, he or she must have a sincerely-held practice or belief that has a nexus with religion. Second, the impugned conduct must interfere with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 56-57 and 59. See also *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, [2006] 1 S.C.R. 256 at para. 34, and *Ktunaxa,* at para. 68.

[59] At the first stage, a claimant must show only that his or her belief is sincere. As noted in *Amselem*, "a court is not qualified to rule on the validity or veracity of any given religious practice or belief". The court's role is to determine whether the religious belief is claimed in good faith and that it is not fictitious or arbitrary. "[I]nquiries into a claimant's sincerity must be as limited as possible": paras. 51-52. See also *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 13.

[60] At the second stage, a claimant must put forward objective proof of an interference with the religious practice: *S.L. v. Commission scolaire des Chênes*,

2012 SCC 7, [2012] 1 S.C.R. 235, at para. 2. As stated in *S.L.*, at paras. 23-24, "it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities . . . [P]roving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom."

APPLICATION OF LEGAL PRINCIPLES TO THIS CASE:

a. The Baars have a sincerely-held belief with a nexus with religion

[61] As explained above, the Baars must demonstrate that they have a sincerely-held belief or practice that has a nexus with religion: *Amselem*, paras. 56-57.

[62] The facts clearly demonstrate that the Baars are devout Christians and sincerely believe that it is wrong to lie. Accordingly, they also believe that it is wrong to promote belief in the fictional characters of Santa Claus and the Easter Bunny. In her affidavit, Frances explains, "we believe all lying to be morally wrong".

[63] The sincerity of the Baars' belief is evident from their clear and proactive disclosure of those beliefs before becoming foster parents. As part of the SAFE Homestudy, Francis indicated in an email to Ross dated November 24, 2015, "[W]e do hold truth telling highly, and will not lie to children by teaching them that Santa and the Easter bunny are real. They will be told who is giving the gifts".

[64] The Homestudy report of December 11, 2015 reiterated the Baars' beliefs about Santa Claus and the Easter Bunny. Ross acknowledged:

> 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 other 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 assist a child making Christmas gifts for their loved ones and would purchase gifts for them.

[65] Ross did not consider that the Baars' beliefs would prevent them from being excellent foster parents. In her evaluation of Francis, Ross opined:

> She is careful not to be insensitive to others as she knows that she can easily be upset by insensitivity to her feelings. Frances knows that other people have different beliefs and ways from her and is fine with this. She respects and values human life in all of its aspects. Her judgment appears sound and she appears to be capable of sizing up a situation and behaving in an appropriate manner.

[66] About Derek, Ross observed:

> He is open to all cultures and beliefs. When he was in seminary school there were many people from different countries and cultures such as Syria, Philippines and Asia. They all had the same theological base, however, Derek is respectful of others beliefs that may be different from his. He advised that he feels it is not his job to change others.

[67] From the evidence presented during this application, it is clear to me that the Baars' belief that it is wrong to lie has a compelling nexus with religion. In communications about the Easter Bunny with Lindsay, and referenced in a case note dated February 29, 2016, Francis indicated, "We will not and cannot go against what our God says," and "We are doing what God requires of us".

[68] The Homestudy Report recognized that religion is a central part of the Baars' lives. The Report noted that the things that are most important to Francis "are her faith and her family and friends." Derek advised that "his relationship with God is the most important thing in his life followed by his relationship with Frances. He values loyalty, honesty and being respected" (emphasis added). Under the heading "Family Lifestyle," Ross noted that the Baars "attend church on Sundays

and it [is] mostly an all day event. A foster child would need to attend with them. They also say prayers at mealtime".

[69] The Baars also discussed their beliefs with the facilitator of the PRIDE training in July 2015. I accept that the trainer or facilitator explained to the Baars that they would not be expected to do anything that would contradict their beliefs. It is clear to me that the Society was prepared to accommodate the Baars before they became foster parents. At the outset, the Society clearly acknowledged and accepted the applicants' *bonafide* religious beliefs.

b. The Society interfered with the Baars' belief in a manner that is more than trivial or insubstantial

[70] Having found that freedom of religion is triggered, the court must next consider whether the Society's conduct interfered with the Baars' ability to act in accordance with their religious beliefs in a manner that is more than trivial or insubstantial: *Amselem*, para. 59.

[71] As noted above, the parties disagree on this point. The Baars claim that Lindsay insisted that they "positively tell the girls that the Easter Bunny was a real entity. The Society, on the other hand, contends that Lindsay "never ever asked the applicants to lie or to betray their faith".

[72] While I will develop this theme later in these Reasons, and will address the evidence in greater details, in my view, there is ample evidence to support the fact that the children were removed because the Baars refused to either tell or imply to the children that the Easter Bunny was delivering chocolate to the Baars' home.

[73] I am more than satisfied that the Society actions interfered substantially with the Baars' religious beliefs.

c. The Baars' refusal to lie was the reason for the closure of the foster home

[74] The series of interactions between the Baars and Lindsay demonstrates that the Society case worker was insistent that the Baars either tell or imply to the children that the Easter Bunny was real. This evidence provides that the Baars' refusal to violate their religious beliefs by lying to the children was the sole reason for the closure of the Baars' home.

[75] When the Easter Bunny issue was first raised in January 2016, Francis indicated to Lindsay that she planned to give the children chocolate at Easter, but could not say that the chocolate was from the Easter Bunny. Lindsay and her supervisors were unsatisfied with this plan. The Baars were told that "it is not an option not to abide by the requests made by the parents".

[76] Francis' evidence is that after this initial discussion, "each subsequent time Lindsay called us she would reiterate the 'requirement' that we celebrate Easter with the foster children by informing them that the Easter Bunny was real." The Baars would respond by telling Lindsay that they intended to hide chocolate eggs at Easter for the children to find and play other games.

[77] The Baars also informed Lindsay that they were not making efforts to spoil the magic by telling the children the Easter Bunny was fictional. In a case note dated February 24, 2016, Lindsay herself acknowledged that one of the children had raised the topic of Santa Claus, and the Baars had changed the subject rather than telling the child he wasn't real.

[78] In late January or early February, Lindsay told the Baars for the first time that the biological mother had wanted a photograph of the children with Santa Claus. If this was a genuine concern, it is unclear why it was not raised during the

Christmas season, either by Lindsay or by the biological mother, through the communication book, (an oft employed means to exchange information between the biological mother and the foster parents).

[79] Through the use of this book, Francis and the biological mother communicated at some length about the Christmas season. On December 18, 2015, Francis asked, "[B]efore Christmas, would you please let us know what they like to do so we have ideas of what to get them for Christmas?". A few days later, Francis noted that one of the children had asked for a certain doll for Christmas. Francis had been unable to find, but indicated she would keep looking because she wanted the child to have a happy Christmas. After New Year, the biological mother wrote, "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". A photograph with Santa Claus was never mentioned.

[80] With Easter approaching, Lindsay became increasingly concerned. She again discussed Easter with Francis by telephone on February 24. Baars reiterated that she intended to put on an Easter egg hunt, but would tell the children that she had purchased the chocolate. Francis suggested that if this was unsuitable, the children could go to another home to celebrate Easter. Lindsay advised Francis that this was "not acceptable".

[81] Lindsay raised the situation with her supervisor, Chardola, two days later on February 26, 2016. Chardola's Supervision Case Note indicates:

> 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. The difficulty is that they foster young children. Currently have in their care two siblings

> whose [mother] celebrates in a traditional manner and expects this will be the same for her children while in care.

[82] Interestingly, this issue was now being raised. The Supervision Case Note continued that the Society was concerned about the Baars' inflexibility. It was concluded that the Baars should be advised that the Society was "not able to continue to support a fostering relationship as they [the Baars] are not prepared to support the agency position and support the needs of the children".

[83] Lindsay and Francis had a final discussion on February 29, 2016. Francis indicated that she and her husband were being as flexible as they could, but that to lie to the children would be contrary to their religious beliefs. Lindsay replied that she would consult with her supervisor, "but felt we would be moving the children". A letter from the Society dated March 16, 2016 indicated that the home was closed because the Baars "were not in agreement with supporting the parent's wishes for the children's care".

[84] The Society removed the children and closed the Baars' home on March 4, 2016. The Closing Letter of March 16, 2016 indicated that the home was closed because the Baars "were not in agreement with supporting the parent's wishes for the children's care". Nothing can be further from the truth.

[85] From the evidence presented here, I find that the Baars' foster home was closed in direct response to the applicants' refusal to lie to the children about the Easter Bunny. The Society rejected the Baars' proposals that the children enjoy an Easter egg hunt at the Baars' home or a celebration at a different foster home.

[86] It appears that the Society would not be satisfied with anything other than confirmation from the Baars that they would lie about the Easter Bunny.

[87] I am persuaded that it was impossible for the Baars to meet the Society's demands without acting contrary to their religious beliefs. As noted above, religious freedom means that "no one is to be forced to act in a way contrary to his beliefs or his conscience": *Big M Drug Mart*, at p. 337.

[88] The consequences to the Baars when they did not comply with the Society's demands were more than trivial or insubstantial. The closure of a foster home is serious. Even Lindsay herself wrote in her case notes that once a foster home is closed, it is almost impossible to reopen it again. The Society therefore infringed on the Baars' right to freedom of religion.

DID THE SOCIETY LIMIT THE BAARS' s. 2(b) RIGHT TO FREEDOM OF EXPRESSION?

Positions of the Parties:

[89] The Baars argue that, by demanding that they positively tell their foster children that the Easter Bunny is real, the Society attempted to compel the Baars' speech, which they argue is an egregious violation of their freedom of expression. They highlight that, as stated by the Supreme Court of Canada, forcing someone to express an opinion that is not their own is a penalty that is "totalitarian and, as such, alien to the tradition of free nations like Canada, even for the repression of the most serious crimes." The Baars submit that the attempted compelled expression is particularly egregious in light of the penalty, namely the immediate removal of the foster children, with potentially traumatizing consequences to them.

[90] Further, they submit that the Society further exacerbated the harm to them by shutting down their foster home, with potential negative and long-term consequences in relation to their prospective fostering and adoption desires.

[91] The Society submits that there is no evidence that the Society insisted that the Baars lie to the children and tell them that the Easter Bunny is real or that the Baars' foster home was closed as a result of their refusal to tell the children that the Easter Bunny is real. Rather, the Society argues, that their decision to close the applicants' foster home was because the Baars lacked capacity to meet the cultural needs of children in their care, and "due to concerns regarding their unwillingness to be flexible and support the beliefs of the children and their inability to support the Society's position and authority as ultimate decision maker".

LEGAL PRINCIPLES:

[92] The Supreme Court has adopted a three-part test for determining whether there has been a violation of section 2(b) of the *Charter,* as summarized in *Canadian Broadcasting Corp. v. Canada Attorney General,* 2011 SCC 2 at para. 38:

i) Does the activity in question have expressive content, thereby bringing it, *prima facie,* within the scope of the section 2(b) protection?

ii) Is the activity excluded from that protection as a result of either the location or the method of expression?

iii) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?

APPLICATION OF LEGAL PRINCIPLES TO THIS CASE:

<u>Step 1: Does the activity in question have expressive content, thereby bringing it, prima facie, within the scope of the section 2(b) protection?</u>

[93] As stated in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, the Supreme Court's decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 1030 "lay the groundwork for a large and liberal interpretation of freedom of expression" in holding that "prima facie, freedom of expression protects all expressive activity": at para 34. As a result, for an expressive activity to be considered expressive and, thereby, meet the first part of the test, the applicant must solely demonstrate that the activity "attempts to convey meaning": *Irwin Toy* at 968.

[94] Further, as the Baars allege that the Society attempted to compel their speech, which the Baars refused to do, it is important to note that freedom of expression also protects against compelled or forced expression. In *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, the Supreme Court made it clear that the *Charter* guarantees freedom of thought, belief, opinion and expression, and "these freedoms guarantee to every person the right to express the opinions he may have: a fortiori they must prohibit compelling anyone to utter opinions that are not his own": at 269. Further, in *Slaight Communications Inc v. Davidson*, [1989] 1 S.C.R. 1038, the Supreme Court stated "there is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do": at 1080. Therefore, silence and the refusal to utter a particular compelled opinion also constitutes expressive content.

[95] I find that the first part of the test is met and section 2(b) is *prima facie* engaged, as what is at issue is both (i) the Baars' expressive decision to tell the foster children that any gifts or chocolate they receive were coming from the Baars themselves; and (ii) the Baars' silence in their refusal to succumb to the Society's

pressure to positively endorse the existence of Santa Claus and the Easter Bunny. I find that both expressive activities were performed to convey meaning, particularly as their undercurrent was the Baars' religious belief in honesty.

Step 2: Is the activity excluded from that protection as a result of either the location or the method of expression?

[96] Again, as established by the Supreme Court in *Canadian Broadcasting Corp v. Canada (Attorney General),* for either the method or the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(*b*), namely self-fulfillment, democratic discourse and truth finding (*City of Montréal*, at para. 72): at para. 37.

[97] I find that neither the method nor the location of the expressive activities conflict with the values protected under 2(b). First, the method of expression in the case at bar was non-violent. Secondly, the location of the expressive activities was at the Baars' own, private home. If people have the right to freely express themselves anywhere, their private home is one of the most important places in which that protection should be upheld.

Step 3: If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?

[98] As stated in *Irwin Toy,* the court must next determine "whether the purpose of the effect of the impugned government action was to control attempts to convey meaning" through the expressive activity discussed at step 1: at 972. The Court went on to state that:

> If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to

> restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee: at 974.

[99] Even if the purpose of the government action is found not to violate a person's 2(b) rights, the effect of the government's action itself can constitute a violation. As the Court elaborated upon in *R. v. Keegstra,* [1990] 3 S.C.R. 697:

> If, however, it is the effect of the action, rather than the purpose, that restricts an activity, s. 2(*b*) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based: at 729-30.

[100] These principles and values underlying the freedom of expression are summarized by the Court in *Irwin Toy*: They include seeking and attaining the truth is an inherently good activity; participation in social and political decision-making is to be fostered and encouraged; and the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed: at 976.

[101] The Supreme Court affirmed that, if a person seeks to demonstrate that the effect of a government agency's action was to restrict their free expression, they "must demonstrate that [their] activity promotes at least one of these principles": at 976.

[102] The Baars were clear from the outset of their relationship with the Society that they would not lie to the children by teaching them that Santa Claus and the Easter Bunny were real. Despite this, the Baars disclosed that, while they did not traditionally celebrate Christmas or Easter themselves, they were open to giving

the children gifts and chocolate on those occasions. They made it clear, however, that the children would be told who is giving any gifts that they receive.

[103] Commencing shortly after the two foster children were placed in the Baars' care, the Society took issue with this approach the Baars had to the holidays, particularly their refusal to perpetuate the fictitious character of the Easter Bunny and Santa Claus. In her affidavit, Frances states multiple times that Lindsay, on numerous occasions, insisted that the Baars positively tell their foster children that the Easter Bunny was a real entity. This, in the Baars' words, was an attempt to compel them to say something that they did not believe and compelling them to lie to the children, which was contrary to their religious beliefs.

[104] Lindsay insists that she did not ask the Baars to lie. Suffice it to state that I reject Lindsay's evidence where it conflicts with the Baars'. However, even if she did not explicitly tell the Baars to lie, I find that the effect of what she did tell the Baars amounts to telling them to lie and express an opinion that was not their own. The evidence demonstrates that Lindsay did not perceive what the Baars were telling the children to be acceptable and made this clear to them on numerous occasions. The evidence also demonstrates that she attempted to persuade the Baars away from what they were telling the children. For example, in her affidavit she says: "I never asked the Applicants to lie or to betray their faith. I was concerned that the idea of the Easter Bunny would be destroyed for these young children if the applicants said to the Children that the Easter Bunny was not real".

[105] Lindsay further states in her affidavit that she "attempted to convince the applicants that the Easter Bunny was not a religious character and that it should not impact their beliefs." She states that Ms. Baars expressed that this would be lying and, therefore, they did not reach a compromise.

[106] I pause to observe that the aforementioned reference to Lindsay's comments may equally apply with the earlier discussion in respect of the section dealing with freedom of religion. As mentioned, religious beliefs are subjective: *Amselem*. It was not up to Lindsay to decide on the content of the Baars' religious beliefs. Nonetheless, this statement from Lindsay's affidavit also undermines her assertion that she never asked the Baars to act contrary to their religion.

[107] Lindsay further references attempting to dissuade the Baars from viewing the Easter Bunny as a religious character. In the case note, Lindsay stated that she "again explained that we are required to meet cultural needs of children as outlined in the service agreement and in the annual review," to which the Baars responded that they "will not and cannot go against what [their] God says." When Lindsay said "that the Easter Bunny and Santa were not really a reflection of religion," she notes that Francis responded that "there cannot be something that is not religion" and that they would not lie to children, as "saying that the Easter Bunny brings chocolate is a lie." At the end of this note, Lindsay states that she told the Baars that she would talk to her supervisor, but that they would likely be moving the children. Again from this case note depicting the conversation between Lindsay and Francis, it seems evidence that Lindsay was, essentially, trying to convince the Francis that her approach to the Easter Bunny was incorrect and tried to get her to change her approach with the children.

[108] Another example of Lindsay's attempt to control what the Baars told the children can be found in one of her supervision case notes, wherein it says:

> We are not asking [the Baars] to shift their beliefs, but we are asking them to support the beliefs of the children [...] She [Ms. Baars] advised that she would handle [the Easter Bunny] the same as Santa which is that he does not come there as they do not want to lie to children. She has been advised that this is not acceptable.

[109] Further proof of Lindsay's attempt to control what the Baars told the children was exposed on cross-examination by the Baars' counsel. In discussing the way the Baars planned on conducting the Easter egg hunt, namely by conducting the hunt but telling the children that the Baars bought the chocolate, not the Easter Bunny, Lindsay stated: "They agreed to put out the eggs for the children and said, clearly, they would tell the children that they purchased the eggs. I asked them to just put out the eggs and not indicate who purchased the eggs, and they said they couldn't do that". Later on in the cross-examination, Lindsay, again, suggested that the Baars "just put out the eggs and not get into a conversation about them purchasing the eggs".

[110] In my opinion, the above instances make it clear that Lindsay's purpose in her discussions with the Baars was essentially "singling out particular meanings that are not to be conveyed," contrary to the Court's rule in *Irwin Toy.* As demonstrated in the evidence, the particular meanings that the Lindsay took issue with and sought to not have the applicant's convey to the children was the nonexistence of Santa Claus and the Easter Bunny and the lack of attendance of such figures at the Baars' home.

[111] The Society argues that they did not take the foster children away or close their foster home so as to restrict the Baars' expression, but they did what they did because the Baars lacked capacity to meet the cultural needs of children in their care and their inability to be flexible. I do not accept this argument.

[112] As stated in *Irwin Toy,* the "government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression": at 973. Such does not justify a violation of the freedom of expression. Assessing the expression from the standpoint of the guarantee in

question (at 973), as required by the court, demonstrates that the purpose of the Society's actions was to control the Baars' attempts to convey meaning, namely their attempts to convey their opinion and values with regard to lying in the context of Santa Claus and the Easter Bunny.

[113] The repercussion of the Baars not acceding to the pressures to change their stance on what they were telling the children about the Easter Bunny was the foster children being removed from the home and the capricious closure of the Baars' home as a foster home.

[114] I find that Lindsay's arbitrary conduct effectively sought to compel the Baars to express an opinion with regard to the Easter Bunny that was not their own. As mentioned above, the Court in *National Bank* emphasized that the right to freedom of expression prohibits compelling anyone to express opinions that are not their own: at 269. Lindsay attempted to convince the Baars that the Easter Bunny was not a religious figure and that, as a result, perpetuating its existence should not go against their religious beliefs. In addition, she essentially told the Baars that their approach to celebrating the Easter Bunny was not acceptable. In doing this, Lindsay was attempting to compel the Baars to perpetuate the Easter Bunny and celebrate the holiday in a manner contrary to their opinion and beliefs.

[115] As established in *Slaight Communications Inc*, the Baars had the right to respond to the Society's demand with silence and had a right to refuse to tell the children what the Society wished them to say. Their silence is protected under s. 2(b), and they should not have suffered the repercussions they did because of their decision to assert their right to silence.

[116] Further, by taking the children away and closing the Baars' foster home, I find that the Society also limited the Baars' ability to express themselves and

perpetuate their belief in honesty where Santa Claus and the Easter Bunny are involved. What the Society essentially did by taking the children away and closing down the foster home was "control the ability of the one conveying the meaning to do so," which, again, the Court in *Irwin Toy* expressly states is a violation of a person's s. 2(b) rights. As a result of the Society's actions, not only did they control what the Baars would tell the two foster children they had in their care, but they exerted additional control by ensuring that the Baars would not be able to express themselves in the same manner to any future foster children.

[117] While I do find on the "purpose" part of step 3 of the test that the Society violated the Baars' 2(b) rights, in the alternative, I believe the Society's conduct also meets the "effect' part of this third part of the test. The Society's actions had the effect of undermining the first principle upon which 2(b) freedom of expression is based as outlined in *Irwin Toy,* namely how seeking and attaining truth is an inherently good activity. In refusing to lie to the children about Santa Claus and the Easter Bunny the Baars were perpetuating that exactly value: promoting the truth. In attempting to limit what the Baars told the children about Santa Claus and the Easter Bunny, which was the truth, the Society's conduct, essentially, has the effect of undermining one of the core values underlying section 2(b) of the *Charter.*

[118] Therefore, on this basis as well, I would find that the Society violated the Baars' s. 2(b) rights.

SECTION 15 OF THE CHARTER:

[119] At this stage, as I have already ruled in favour of the applicants in regards to their claims of violations pursuant to s. 2 of the *Charter,* I need not delve into addressing this segment of the relief sought.

[120] In any event, I am not persuaded that the applicants have met their burden with respect to the first segment of two-part test as outlined in *Withler v. Canada (Attorney General)*, 2011 SCC 12. While the applicants have established the effect of breach of their rights related to freedom of religion, in my view, they have not demonstrated a distinction based on an enumerated class of persons or analogous grounds to sustain their argument.

[121] Succinctly, I would conclude that the applicants have not established a breach under s. 15 of the *Charter.*

Did the Society limit the Baars' *Charter* rights more than was reasonably necessary in order to meet the statutory objectives?

[122] The Society bears the onus of establishing that it limited the Baars' *Charter* rights no more than was reasonably necessary to achieve statutory objectives: *Loyola*, para. 146.

[123] The Society also failed to discharge its onus for two reasons. First, the Society's actions did not further a statutory objective. Second, the Society limited the Baars' *Charter* rights more than necessary.

a. The Society's actions did not further a statutory objective

[124] The Society argues that numerous sections of the *Child and Family Services Act*, R.S.O. 1990, c. C.11, emphasize the importance of 1) promoting the integrity of the family unit even when children are temporarily removed from the family homes, and 2) providing care that is respectful of cultural and religious differences.

[125] Section 1 of the *Child and Family Services Act,* R.S.O. 1990, c. C.11 ("*CFSA*") states that the paramount purpose of the Act is to promote the best interests, protection and well-being of children. The factors to be considered in determining the best interests of the child are at s. 37 of the *CFSA*. The relevant factors for this case include:

> 1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
>
> 2. The child's physical, mental and emotional level of development.
>
> 3. The child's cultural background.
>
> 4. The religious faith, if any, in which the child is being raised.
>
> 5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
>
> 7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
>
> 9. The child's views and wishes, if they can be reasonably ascertained.

[126] Section 86 provides that a child is "deemed to have the religious faith agreed upon by the child's parent."

[127] Section 1 sets out additional purposes of the *CFSA*:

> 1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.
>
> 2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.
>
> 3. To recognize that children's services should be provided in a manner that,
>
> > i. respects a child's need for continuity of care and for stable relationships within a family and cultural environment,

> ii. takes into account physical, cultural, emotional, spiritual, mental and developmental needs and differences among children,
>
> iii. provides early assessment, planning and decision-making to achieve permanent plans for children in accordance with their best interests, and
>
> iv. includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate.
>
> 4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences. [Emphasis added.]

[128] The Society submits that in accordance with the purposes of the *CFSA* and the best interests of the child, the beliefs of the parent remain paramount when a child is in care. These beliefs are followed as long as they do not disrupt the best interests and safety of the child.

[129] Similarly, the Society is obliged to ensure that a child's placement in care reflects the religious and cultural views of the parents. This obligation is set out at s. 104 of the *CFSA*, which provides, "A child in care has a right . . . to receive the religious instruction and participate in the religious activities of his or her choice, subject to section 106." Section 106 states that "the parent of a child in care retains any right that he or she may have (a) to direct the child's education and religious upbringing."

[130] The Agreement also reflects the Society's obligation to protect children's cultural needs and relationship with their birth families. The Agreement provides that foster parents shall be respectful of the diverse cultural and religious needs of the children and youth and to show respect for the child's emotional ties with the birth parent. The Agreement further stipulates that foster parents agree "to embrace the concept and philosophy of shared responsibility with the Society for

the care of the child, but to accept the authority of the Society as ultimate decision-maker as guardian designate of the foster child".

[131] The Agreement also provides for the procedures for the termination of fostering. It specifies that, if a child is in placement, it is necessary to give appropriate advance notice of termination, unless the reason for termination is of an emergency nature. Further, the Agreement states that, following a complete evaluation, the Society may terminate a foster arrangement if there is a finding that the level of foster care is unsatisfactory and does not meet required standards. The closing of the home may be immediate in situations such as excessive use of alcohol or drugs, or in cases of physical or sexual abuse.[2]

[132] In the March 16, 2016 letter confirming the closure of the Baars' foster home, the Society referred to the requirement in the Agreement that foster parents "be respectful of the diverse cultural and religious needs of children and youth." The letter continued that the children were removed because "it became evident during this placement that you were not in agreement with supporting the [biological] parent's wishes for the children's care".

[133] In their factum, the Society states that they told the Baars that "the children's best interests, their parent's wishes and cultural practices were paramount". However, s. 1(1) of the *CFSA* emphasizes that the paramount purpose of the *Act* is to promote the best interests, protection and wellbeing of children. The other purposes, including taking into account the cultural and spiritual needs and differences among children as so stated in subsection 1(2), are

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[2] In discussing the notice requirements in the Agreement, it refers to termination by foster parents, not the Society. I am assuming the same notice requirements would apply if the Society is the one to terminate foster care, but the wording is far from clear.

considered to be additional purposes. Those additional purposes must consistent with the best interests, protection and wellbeing of the children.

[134] There is no evidence that the Baars were not promoting the best interests, protection and wellbeing of the children. In fact, quite the contrary.

[135] The Society acknowledged multiple times that the children were being well taken care of. In cross-examination by the Baars' counsel, Lindsay acknowledged that on her first visit the children appeared well-cared for, well-fed, well-clothed and she had no concerns for their safety. Further, counsel for the Baars asked if Lindsay would agree that the children's "most important needs are, indeed, being cared for and loved, and having safety, food, water, shelter, clothing," to which Lindsay agreed. Counsel then asked whether Lindsay would agree that the Baars met those needs, and she agreed. In her affidavit, Lindsay acknowledges that while the children were in the Baars' care, the Baars were able to meet the children's basic needs.

[136] As well, in a number of case notes, the Society acknowledges that the Baars were caring for the wellbeing of the children. For example, a plan of care note indicates that one of the children often wakes up and calls out for the Baars as she was afraid to be left alone. The child also panicked often when they were going out. Despite these challenges, the note says "Foster parents continue to support [child] and make her feel safe and secure in the home."

[137] Further, since one of the children was exhibiting a delay in her speech and was having trouble being understood, Francis worked with the child using a mirror to get her to form her sounds properly. The note also mentions how Francis will continue to encourage the child's communication skills by working with her regularly, singing songs, reading books, among other activities. In addition, as the

youngest child was still not of school age, the plan of care outlines how the Baars had plans to take the child out into the community and look into opportunities to aid in the child's socialization. From this evidence alone, it is clear that the Baars were doing their best to ensure the proper development of the children

[138] Finally and of some significance, there was no indication that the biological mother was concerned with the manner in which the Baars were caring for her children. As evidenced in the communication book between the biological mother and the Baars, the applicants complied with all of the mother's requests. For example, the biological mother noticed that the children's skin was dry and that the hair oil the Baars were using was not the one that the birth mother wanted used on them, which the Baars remedied immediately. Further, when the birth mother asked Frances Baars to take one of the girls to the walk in clinic, Francis did so right away. I also refer to the positive communication between the biological mother and the Baars in reference to the children's Christmas celebrations.

[139] Based on all of the evidence, it is clear that the Baars were constantly promoting the children's wellbeing, and ensured that they were safe, secure, and happy. The Baars were clearly operating with the children's best interests in mind throughout their foster relationship they were very attuned to the children's needs.

[140] In my opinion, there were no legitimate concerns with the Baars' ability to care for the children or how they were caring for the children, aside from the obvious issue with the way the Baars celebrated Christmas and Easter. Therefore, it would not seem that the level of foster care the Baars were providing was "unsatisfactory" or that it did not meet required standards, which the Agreement stipulates is what would merit the termination of a foster arrangement.

[141] Conversely, it was the Society's actions, particularly their removing the children with so little notice that were not in the children's best interests. Firstly, this was not a situation that merited immediate termination of the foster arrangement. As stated in the Agreement, situations such as the excessive use of alcohol or drugs, or cases of physical or sexual abuse are examples of situations that warrant immediate closure of the home. In my view, the dissatisfaction with the Baars' lack of promotion of a 'fictitious' holiday characters clearly does not rise to a situation meriting immediate closure of the home. Yet, the Society gave the Baars solely one day's notice of their plan to take the foster children away and close the home.

[142] Secondly, as pointed out by Kathleen Kufeldt in her expert report, removing the children from the home with only one day's notice and "without adequate preparation or explanation is a potentially traumatizing event." Ms. Kufeldt says that such a decision is "particularly damaging for children who have already experience considerable disruption in their young lives," such as the two young girls that were in the Baars' care. As Ms. Kufeldt asserted, even the Society's director, Dominic Verticchio, stressed that a smooth transition for children is very important. However, there was no such smooth transition here. In fact, the children did not even have enough time to gather their things, with a Society worker having to visit the Baars' home weeks later to collect the remainder of their belongings. This is by no means an indication of a smooth transition that is so important for children.

[143] Dr. Kimberly Harris, in her responding expert report filed on behalf of the Society, agrees with Ms. Kufeldt; that it generally may be true that removing a child on one day's notice may be a traumatizing event for a child. While Dr. Harris says it is difficult to extrapolate this general idea to the individual child, particularly the

children in this case without certain information regarding the children, she does note that this situation "may have benefitted from an alternative dispute resolution process such as mediation, which may have prevented the conflict from escalating to this point". Therefore, it seems that from Dr. Harris' observation as well that the immediate removal of the children was not the most beneficial decision for the best interests of the children.

[144] While the Society referred to the removal of the children as being "unfortunate," I find that it goes much beyond being merely "unfortunate."

[145] Given the disruption that these young children had already faced in their lives, there is no doubt that there was a need for stability, permanency and care in their lives. It is very clear from the evidence that the children *were* being cared for, that the Baars were providing them with stability and were turning their minds to the facets of care required for the children's development and happiness. However, by taking the children away on such short notice, the Society took that away from them and contributed to the turmoil these children had already faced in their short lives. As Lindsay states in one of her case notes, "is it more important to have the Easter Bunny or permanency?" The Society very clearly chose the Easter Bunny.

b. There is no cogent evidence of the birth mother's insistence on the Easter Bunny and Santa Claus.

[146] The Society consistently refers to their solely acting according to the birth mother's expressed wishes with regards to how she would like the children to celebrate Christmas and Easter. In a Supervision case note, Lindsay notes that the Baars "Currently have in their care two siblings whose [mother] celebrates in a traditional manner and expects this will be the same for her children while in care".

[147] When the Baars' counsel asked Lindsay whether she knows if celebration of the Easter Bunny is required for all children in foster care with the Society, she responds that if the parents want it to be celebrated, then they need just ask.

[148] Further, in her affidavit, Lindsay says that the "birth mother expected her children to enjoy the experience of Santa Claus and the Christmas celebration in the traditional way that the children were accustomed to. The mother also wished to get a picture with Santa". Additionally, on cross-examination, Lindsay mentions the birth mother's expressed wishes multiple times. For example, when the Baars' counsel asks Lindsay about what she meant in her use of the expression"...enjoy the common tradition of the Easter Bunny" in her affidavit, Lindsay responds: "It means that the birth mother wanted the children to have the excitement of the Easter Bunny and to have that anticipation that, waking up on Easter, they would get to look for Easter eggs and be able to partake in that celebration. It was the birth mother's request".

[149] Specifically, on cross-examination, when the Baars' counsel asks Lindsay if it bothers her that the Baars were not willing to incorporate the Easter Bunny belief into their Easter egg hunt, she responds that the concern was not that it bothered her, but that it bothered the birth mother. The question remains; what is the basis for these assertions?

[150] The Society is unable to point to any concrete evidence as to these alleged wishes of the birth mother. When asked on cross-examination, for example, whether there is any written documentation of such a wish, Lindsay responded "no, but that there might be something in the case notes".

[151] During submissions, Mr. Wood counsel for the Society, mentioned that there was a case note denoting the birth mother's request for a picture with Santa

Claus and/or noting that the birth mother asked the Baars to embrace the concept of the Easter Bunny and Santa Claus. Counsel was unable to point me to that specific case note and, upon my own review of the evidentiary record, I was also not able to find such a case note. While this decision does not turn on this discreet fact, the only remotely related case note I found was the one dated February 26, 2016; in which it is written that the Baars "currently have in their care two siblings whose [mother] celebrates in a traditional manner and expects this will be the same for her children while in care".

[152] However, there is no mention of any of the birth mother's specific request or directions to the Society. In any event, any such reference to this case note to substantiate Lindsay's actions was clearly drafted after the fact. It is not lost on me that the date of the case note being February 26, 2016 implicitly suggestive of some retrospective, tacit concerns raised by the birth mother in reference to the previous Christmas season.

[153] I also observe that counsel for the Baars' requested an undertaking for "any record(s) that the birth mother requested that the children have the excitement of the Easter Bunny and have that anticipation that, waking up on Easter, they would get to look for Easter eggs and be able to partake in that celebration". In their response to that specific undertaking, counsel for the Society pointed counsel for the Baars to the case notes of February 24 and 26, "where the conversation relating to the Easter Bunny and Easter eggs was discussed which indicates the Society's expectations relating to the children and the children's beliefs".

[154] Overall, I reject the Society's submissions related to the desires or directions purportedly made by the birth mother to the Society with respect to the children and the live issues in this case.

[155] Rather, the evidence in existence from the birth mother directly largely contradicts the Society's submission that the birth mother had any issue with how the Baars were caring for the children or celebrating holidays. Specifically, with regard to Christmas, the Baars displayed their conscientiousness with regard to the holiday and how the children normally celebrated it. For example, in the communication book kept between the birth mother and the Baars, Francis asks: "Since we don't have much time to really get to know them before Christmas, would you please let us know what they like to do so we have ideas of what to get them for Christmas?" In her response, the birth mother does not mention anything about specific Christmas celebrations, but rather tells the Baars about toys that the children like. After Christmas, the birth mother thanks the Baars for the Christmas pictures that they took of the children and mentions how the girls "looked beautiful and it looks like they were having fun opening the Christmas gifts." The birth mother further says "thank you for making Christmas a good time for them".

[156] From this evidence, there is both no indication that the birth mother had any specific expectations as to how the Baars would celebrate Christmas or Easter with the children, and any suggestion that the birth mother was at all displeased with how the Baars did celebrate Christmas with the children. While Lindsay mentions that she told the Baars that the mother wanted a picture of the children with Santa Claus, there was no such communication to the Baars through the communication book.

[157] Given the amount of detail that the birth mother included in all of her communications with the Baars about the care of the children in the communication book, I find it difficult to believe that the birth mother would not have written such a request, or, at the very least, have expressed her displeasure at not having received a picture had she requested it. Also, based on this reasoning, if the birth

mother had any direct requests of the Baars with regard to the celebration of Easter she also would have communicated that to the Baars directly through the communication book.

[158] The Society insists that their decision to close Baars' foster home was reasonable given their duty to protect and prioritize the views and wishes of the biological parents and the family unit, as legislated by the *CFSA,* public policy and legislative standards. However, as stated by the Supreme Court in In *Multani,* the existence of safety concerns must be unequivocally established for the infringement of a constitutional right to be justifiable. The same reasoning can be applied here: in order to justify its actions, the Society must provide clear, unequivocal evidence that the statutory objectives were actually a concern or that the Baars acted contrary to the statutory objectives.

[159] The Society has not provided such unequivocal evidence. Rather, as discussed, there is a replete lack of evidence provided as to the views and wishes of the biological birth mother. Particularly, there is a complete lack of evidence denoting the birth mother's alleged insistence that the Baars celebrate the Easter Bunny in the way Lindsay consistently expressed she did, namely by telling the children that the Easter Bunny brought them chocolate.

[160] As a result, I cannot find that the Society was, indeed, acting upon the statutory objective of protecting and prioritizing the views and wishes of the biological parents and the family unit. Frankly, the sole evidence that exists pertaining to the alleged views and wishes of the birth mother comes from the word of mouth of one the Society's workers, that being Lindsay, whose evidence I reject as principally unsubstantiated and somewhat self-serving.

c. Are the Easter Bunny and Santa Claus significant enhancements of the holiday experience?

[161] Despite the Society's insistence upon the importance the perpetuation of Santa Claus and the Easter Bunny to the children's cultural values and celebration of the holidays, there is no concrete evidence offered that such fictitious characters are necessary for a child's full participation in and enjoyment of these holidays. This conclusion is supported by the expert reports proffered by both parties.

[162] Kathleen Kufeldt, in her expert report, states that the Easter Bunny is not, in fact, a cultural imperative, nor is the refusal to tell children that the Easter Bunny is real constitute grounds for closure of a foster home, nor would it be grounds for a declaration of neglect. Ms. Kufeldt is of the opinion that, in the case at bar, the best interest of the foster children "were lost sight of and considered secondary to Ms. Lindsay's own agenda".

[163] In her report, Dr. Kimberly Harris highlights:

> It is not known how integral customs such as the Easter Bunny or Santa Clause were to the biological family, although it was reported by the Society that the biological mother's wish was for the children to celebrate these secular aspects of Easter and Christmas. Some families have elaborate traditions and it is possible that these traditions represent the happiest memories for the children within the context of their biological families it is also possible that learning the truth of the Easter Bunny and Santa Clause could have had little impact.

[164] There are many "rights" to be considered in this case, but the children are the most vulnerable of the parties involved and thus consideration of their wellbeing must take priority. Although focusing on the Easter Bunny may seem trite, there are potential larger implications. It is unknown from the documentation provided what policies exist within the system to balance these competing rights.

[165] Further, on cross-examination, Lindsay herself acknowledged that she was aware that not every person in Canada celebrated Easter or Christmas by celebrating the Easter Bunny or Santa Claus. She agrees that many Canadians who have children do not celebrate Easter Bunny and that Canadians have a right to celebrate Easter as they see fit. Lindsay concedes that parents and foster parents who celebrate the Easter Bunny are not better than those who don't. Assuming for the moment that I accept Lindsay's own acknowledgements, it lends to the suggestion that the Easter Bunny is not, in fact, a central facet of the Easter holiday for many children.

[166] While the Society argued that the *CFSA* dictates that both a foster parent's beliefs and those of the birth family must be respected, those of the children must be given prioritized given the overall purpose and spirit of the *CFSA*. However, there is a substantial lack of evidence that the Easter Bunny or Santa Claus were central to the children's beliefs and that such characters are central to the children's enjoyment of the holidays. Again, I find that there is no reliable evidence from the birth mother herself, either directly or through the workers, indicating that celebrating such characters were central to the children's cultural traditions. As a result, it cannot be found that the Society's decision to close the foster home on the basis that the children's cultural beliefs, traditions and values were not being respected was done in a valid pursuit of the *CFSA's* objectives.

[167] Even if the Easter Bunny and Santa Claus were central facets to the enjoyment of Easter and Christmas, the evidence sufficiently demonstrates that the Baars did make and were willing to make significant efforts to make the holidays special for their foster children. It is clear from the evidence that the Baars were willing to do all they could do without violating their own religious beliefs to ensure that the foster children were able to enjoy the traditional holidays.

[168] While the Baars did not believe in lying to the children and, thereby, refused to perpetuate the fictional characters of Santa Claus and the Easter Bunny, they were conscientious that others did not celebrate the holidays exactly as they did. In an email to Ross of the Society dated November 25, Frances explicitly states:

> Though we go not celebrate the holidays, we realize that our society does and children cannot be isolated from that reality. For Easter, it not being as big a celebration in society, it may slide by easier, but if the birth parent(s) want it to be a special day for the child, we are open to giving them chocolate or some small thing.

[169] In addition, for Christmas, Frances wrote in the communication to the birth mother asking about what gifts to get one of the children. Specifically, she mentions how one of the children kept asking for a "Sofia" doll. She writes to the birth mother: "so far we have been unable to find one, but I will keep trying. I want her to have a happy Christmas". Despite the Society's insistence about the importance of Santa Claus and the Easter Bunny, it is also evident from the record that the Baars knew that the children believed in the existence of such characters and they did not want to ruin their belief. For example, in the case note of February 24, Lindsay writes that one of the children was told at school that Santa was not real, and then seems to have come home and asked about whether Santa was real. Lindsay writes that the Baars "just talked about something else". The Baars clearly worked to deflect the children's questions so as not to have to lie to them and ruin their belief in Santa Claus.

[170] It is clear the Baars were, indeed, trying to preserve the children's belief in Santa, and there is no indication that they would not have done the same for the Easter Bunny. Telling the children that the chocolate in their home came from the

Baars themselves and not the Easter Bunny is not positively telling the children that the Easter Bunny did not exist.

[171] As a result, there is sufficient evidence to assert that the Baars did, indeed, attempt to preserve the children's enjoyment of the holidays, even if they were not able, pursuant to their religious beliefs, to positively perpetuate the existence of the fictitious characters that are associated with those holidays.

[172] Despite the Society's assertion to the contrary, there is a complete lack of evidence that the Baars failed to be respectful of the cultural and religious need of the children, nor that they were unsuccessful in their obligation to meet the children's cultural needs. Consequently, it cannot be found that there was a proportionate balancing between the Society's statutory objectives to prioritize and protect the children's cultural values and beliefs and the Baars' *Charter* rights.

d. Remarks about Same-Sex Couples

[173] While the Society insists that they were solely acting pursuant to their statutory objectives in taking the foster children away from the Baars' home and closing their foster home, as outlined above, there is evidence that suggests otherwise. In addition, there is potentially further evidence of an underlying *animus* underlying the Society's actions, arising with Lindsay's actions and enforced by her supervisor and the overall administration.

[174] According to Frances' affidavit, during a phone conversation with Lindsay on or about the end of February, she states that Lindsay "introduced a new, offensive and entirely unfounded complaint against us: she informed us that she was personally afraid that if a same-sex adoptive couple met us, that we would not treat them well." Francis states that Lindsay further expressed to them that she did

not think that the Baars would treat same-sex couples with respect and, further, that the Baars might teach the prospective adoptive children that the couple was "living in sin". The Baars assured Lindsay that they would treat any same-sex couple as people worthy of dignity and respect.

[175] Francis goes on to state that Lindsay's comments had no air of reality, as they were unrelated to the actual situation that the Baars were facing as foster parents. At that point in time, there had been no interaction with prospective adoptive couples nor was there any plan in the near future to do so, since the plan was for the current foster children to return to their biological family. Francis goes on to state that: "Ms. Lindsay, without any factual basis or grounding, persisted in telling us that because of our religious faith, we would discriminate against same-sex couples."

[176] In her own affidavit, Lindsay says the conversation relating to moving a child to a same-sex family is a usual dialogue with new foster parents to assess their acceptance of the possibility. This is helpful in matching foster parents with children who may move to adoption.

[177] I find that the above evidence raises a large question with regard to Lindsay's and, thereby, the Society's, motivations in removing the children from the Baars' home and ultimately the closure of their foster home. While Lindsay states that this discussion with regards to same-sex adoptive couples was a "usual dialogue" with new foster parents, the conversation occurred, not at the beginning of the Baars' time as foster parents, and the Society approving them to be foster parents, rather; on or about the end of February at the same time as the Easter bunny dilemma.

[178] At this juncture, the foster children had been in the Baars' care for over two months. While the Baars were still, "new," so to speak, I find it difficult to accept Lindsay's reasoning, given that there was absolutely no indication that the foster children in the Baars care at the time were to be adopted. It does not seem that adoption was on the table at all for these foster children. Therefore, I cannot imagine why, at that point in time, asking such questions would be "helpful in matching foster parents with children who may move to adoption." It cannot reasonable be said that the conversation took place with the intention of assessing the Baars' receptiveness to potential adoptive same-sex couples generally.

[179] As a result, it seems likely that Lindsay's discussion regarding prospective same-sex couples to the Baars was fueled by a potential stereotypical belief in the inability of Christians to support same-sex marriage and not, indeed, pursuant to any valid statutory objective.

e. The Society limited the Baars' *Charter* rights more than necessary

[180] The *Doré/Loyola* framework requires the Society to show that the Baars' *Charter* rights were affected as little as possible in light of the statutory objectives: *Loyola*, at para. 40. I am persuaded that the Society has been unable to do so. There were ways of promoting the statutory objective of providing culturally sensitive care to the children that would have had a much less serious impact, if any, on the Baars' rights to freedom of religion and expression.

f. Reasonable accommodation should be pursued when available

[181] The accommodation of religious belief has a long-standing and important place in Canadian law. In *R. v. N.S.*, 2012 SCC 72, [2012] 3 SCR 726, McLachlin C.J.C. wrote at para. 54:

> Third, 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. Employers have been required to adapt workplace practices to accommodate employees' religious beliefs: *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at p. 555; *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (SCC), [1994] 2 S.C.R. 525, at pp. 551-52; *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970, at p. 982. Schools, cities, legislatures and other institutions have followed the same path: *Saumur v. City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 S.C.R. 299, at pp. 327-29; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at pp. 336-37; *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at p. 782; *Amselem*, at para. 103; *Multani*, at para. 2. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. For over half a century this tradition has served us well. To depart from it would set the law down a new road, with unknown twists and turns.

[182] In *Multani*, Charron J, writing for the majority, confirmed a link between the concept of reasonable accommodation and the proportionality analysis. Her Honour reasoned that where reasonable accommodation possible, it will be difficult for the state to justify a rule or policy as minimally impairing. Charron J. explained, at paras. 52-53:

> In considering this aspect of the proportionality analysis, Lemelin J. expressed the view that [TRANSLATION] "[t]he duty to accommodate this student is a corollary of the minimal impairment [test]" (para. 92). In other words, she could not conceive of the possibility of a justification being sufficient for the purposes of s. 1 if reasonable accommodation is possible (para. 75). This correspondence of the concept of reasonable accommodation with the proportionality analysis is not without precedent. In Eldridge, at para. 79, this Court stated that, in cases concerning s. 15(1) of the Canadian Charter, "reasonable accommodation" was equivalent to the concept of "reasonable limits" provided for in s. 1 of the Canadian Charter.
>
> In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a

> policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. In my view, Professor José Woehrling correctly explained the relationship between the duty to accommodate or adapt and the Oakes analysis in the following passage:
>
> [TRANSLATION] 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. More specifically, in the context of s. 1 of the Canadian Charter, it is necessary, in applying the test from *R. v. Oakes*, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation. This is clear from the Supreme Court's judgment in *Edwards Books*, in which the application of the minimal impairment test led the Court to ask whether the Ontario legislature, in prohibiting stores from opening on Sundays and allowing certain exceptions for stores that were closed on Saturdays, had done enough to accommodate merchants who, for religious reasons, had to observe a day of rest on a day other than Sunday. (J. 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)

[183] *Multani* is an indication from the Supreme Court that a decision maker's failure to consider possible forms of accommodation may render that decision unreasonable. In that case, a school board's absolute prohibition against weapons at school prevented a Sikh student from wearing his kirpan. The school board rejected the student and his father's proposal for accommodation. Although the court in *Multani* split over the appropriate framework to be applied, all agreed that the school board's failure to consider the proposed accommodation made the

decision unjustified: per Charron J., at para. 79; per Deschamps and Abella JJ., at para. 99; and per LeBel J., at para. 155.

[184] Similarly, in *Loyola*, the decision of the Minister was overturned because there were other options available to achieve the statutory objectives that would not impair the applicant school's right to freedom of religion: para. 79.

[185] The Society submits that its decision not to accommodate the Baars was reasonable in light of the statutory objectives. The Society argues that in this respect, the present case is analogous to *E.T. v. Hamilton-Wentworth District School Board,* in which my colleague, Reid J. of the Superior Court of Justice in Hamilton upheld the school board's refusal to provide religious accommodation because the accommodation would undermine the other values and statutory objectives at play: 2016 ONSC 7313, at para. 105.

[186] It should be noted that in *E.T. v. Hamilton-Wentworth District School Board*, the Court of Appeal did not confirm Reid J.'s finding that the school board's failure to accommodate was reasonable. On appeal, the court found that the applicant had not provided sufficient evidence to establish an infringement of his religious rights: per Sharpe J.A., at paras. 33-34; per Lauwers and Miller JJ.A., at para. 97. Having found no *Charter* breach, the Court of Appeal never proceeded to consider whether the school board's failure to accommodate was reasonable.

[187] In my opinion, the present case is distinct from *E.T. v. Hamilton-Wentworth* for two additional reasons. First, the accommodation requested in *E.T. v. Hamilton-Wentworth* was onerous. The applicant, a father, had requested advance notice of and his children's exemption from, among other things, "value neutral education" and particularly material that dealt with sexual orientation: 2016 ONSC 7313, at para. 66. The school board agreed to exempt the children from the

sex education segment of the curriculum, but refused the rest of the request: para. 68. The Teacher's Federation argued before the Superior Court that concepts of equity and diversity, including respect for all sexual orientations, were so integrated into the curriculum, it would be impractical if not impossible to provide the applicant with advance notice of objectionable material: para. 76. Reid J. agreed that the failure to accommodate was a practical response to the applicant's "extremely difficult" request: para. 96.

[188] Second, the requested accommodation would have undermined the school board's statutory objectives. The school board argued that withdrawing the children from class "would be contrary to the values of inclusion and student well-being, and could lead to feelings of exclusion or marginalization by students, including the applicant's children": para. 75. Reid J. found that granting the applicant's accommodation request would undermine the values of inclusion and equality, which the school board was obliged to pursue under the *Education Act*. His Honour concluded, "it is not possible to say that the accommodation requests by the applicant, which was calculated to protect his and his children's freedom of religion, should trump the other values at play in the circumstances": para. 105.

[189] As discussed below, the accommodation proposed by the Baars was not onerous and would not have undermined the statutory objectives. In my view, *E.T. v. Hamilton-Wentworth* is distinguishable.

g. The Society was prepared to accommodate the Baars before they became foster parents

[190] The Society's refusal to consider religious accommodation is unreasonable given that the Society had been fully prepared to accommodate the Baars only a few months prior. As mentioned, the Baars raised the possibility of

conflict between a parent's wishes and their religious beliefs at PRIDE training in July 2015. I accept Francis' evidence to the effect that the PRIDE trainer assured the Baars that they would not be asked to do anything that contradicted their religious beliefs. The trainer indicated that if a parent wished their child to participate in Halloween for example, the Society would make alternative arrangements to ensure that parent's wishes were met. The Baars again raised their religious beliefs again during the SAFE Homestudy in December 2015.

[191] Again, I include the author's comments from this report:

> 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 other 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 assist a child making Christmas gifts for their loved ones and would purchase gifts for them.

[192] The author continued on to recommend that the Baars become foster parents. At the time, this was accepted by the Society without qualification.

[193] The Homestudy Report of December 11, 2015 reiterated the Baars' beliefs about Santa Claus and the Easter Bunny. Ross acknowledged: "As mentioned, at the genesis of their involvement with the Society, Ross did not consider that the Baars' beliefs would prevent them from being excellent foster parents".

[194] The same report also recognized the prominence of religion in the Baars' lives. All of this was in the mix of factors that prompted the Society to acknowledge the applicants' beliefs and accept the recommendation to have the Baars act as foster parents without qualification.

h. The Society could have accommodated the Baars' beliefs without removing the children

[195] The Society argues that a compromise between the beliefs of the Baars and those of the children's family could not be reached. However, the Society was presented with options that would have met both the Baars' and the children's needs. The Society has not explained to my satisfaction why these options were unsuitable.

[196] One option was for the children to celebrate Easter at a different foster home. Francis proposed this option in February 2016, when it became clear that Lindsay felt the Baars' Easter plans were unacceptable. She summarized her multiple proposals for accommodation in a letter to Lindsay and Chardola, dated April 13, 2016:

> In February you contacted us regarding how we were planning to celebrate Easter with the children. Though we don't normally celebrate Easter, we agreed to give the children chocolate, hide candies and get them Easter outfits. We also made clear that though we would not lie to the children by telling them that the Easter Bunny is real, neither would we say he was not real in order to respect the parent's wishes. When this was not thought to be enough, we agreed that if CAS so desired, we were willing to have them placed in a relief home for Easter weekend to allow them to celebrate according to CAS's wishes.

[197] In my view, the proposal to have the children stay briefly at a different home was a reasonable one. The children did in fact go on relief to another foster home while the Baars were away in Calgary from February 12-23, 2016. There is no evidence that a temporary transfer would have resulted in hardship for either the Society or the children.

[198] Moreover, the children could also have celebrated Easter with their biological mother. This is what had occurred at Christmas, when the children were

advised that Santa would be delivering gifts to their birth mother's home. The children received their gifts from "Santa" at an access visit in late December 2015. There is no evidence to suggest that that this arrangement was unsatisfactory. The case note from the birth mother's December 29, 2015 visit indicates, "Overall, this has been a positive visit. [Mother] and children spent time together in their pod. [Mother] provided Christmas gifts for girls. Later, [mother] gave them some oranges and candy canes... [The mother] played with girls in their pod with new toys. No issues or concerns to note about this visit".

i.The Society could have accommodated the Baars' beliefs without closing the foster home

[199] Even if all of the options described above were unsuitable, in my opinion, the Society need not have permanently closed the Baars' foster home. After the children were removed, Francis requested that the foster home remain open for Christian children, those who did not participate in the cultural practices of Santa Claus or the Easter Bunny, or for newborns. In her April 13, 2016 letter, Francis recalled:

> When we were told the girls would be removed from our home and our home closed, we requested that our home might remain open for infants, since they would not care about Santa or the Easter Bunny. Additionally, we expressed willingness to provide foster care for Christian families who did not want their children involved in those cultural practices, but Ms. Lindsay refused all our desires and proceeded to close our home.

[200] Francis' overture was entirely practical and reasonable. The Society has not explained why it was unreasonable to grant the Baars' request. Not then and not before me. Despite advising the Baars to write their concerns in a letter, the Society did not even have the courtesy to respond to Francis' letter. The Society's actions to shut the foster home were entirely arbitrary and without justification.

CONCLUSION:

[201] The applicants have satisfied me that pursuant to s. 24(1) of the *Charter*, their constitutional rights of freedom of religion and freedom of expression have been infringed and must be remedied in a manner that is appropriate and just in the circumstances. The Society did not reasonably accommodate the Baars or even attempt to accommodate the situation at hand. In my opinion, the declaration being sought by the Baars will meaningfully vindicate their rights and freedoms as guaranteed under the *Charter*.

[202] For all of the aforementioned reasons, I find that the respondent has breached the applicants' *Charter* rights. In the exercise of my discretion and pursuant to s. 97 of the *Courts of Justice Act*, the applicants' claim for a declaration by this Court is granted.

[203] The Court declares that the Society violated the Baars' fundamental rights to freedom of conscience and religion and freedom of expression, in respect of ss. 2 (a) and 2(b) of the *Charter* respectively, by:

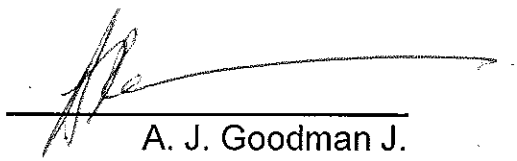
a. Creating in bad faith and for an improper purpose a requirement for these foster parents to actively or proactively inform the children in their care that the fictional character of the Easter bunny is real;

b. Ordering or otherwise directing the Baars to tell the foster children under their care that the Easter bunny is a real entity in celebrating Easter and threatening to close their foster home if the applicants refused;

c. Closing the Baars' foster home due to the applicants' unwillingness to lie and proactively inform the children in their care that the Easter bunny is real, such closure being unreasonable, arbitrary and discriminatory.

[204] Further, it is ordered that the Society note in the applicants' file that the decision to close the Baars' foster home violated the applicants' *Charter* rights in accordance with this judgment. In respect of the applicants' prospective desire to be adoptive or foster parents, should there be an inquiry to the Society into the Baars' suitability by any other organization entrusted with the statutory care of children, the Society shall fully apprise that agency about this ruling.

[205] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed five pages in length, (not including any bill of costs or offers to settle). The applicants shall file their costs submissions within 15 days of the date of this judgment. The respondent shall file its costs submissions within 15 days of the receipt of the applicants' materials. The applicants may file a brief reply within five days thereafter. If submissions are not received by April 9, 2018, the file will be closed and the issue of costs considered settled.



A. J. Goodman J.

Date: March 6, 2018

CITATION: Baars v. Children's Aid Society of Hamilton, 2018 ONSC 1487
COURT FILE NO.:17-61225
DATE: 2018/03/06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

FRANCIS BAARS AND DEREK BAARS

Applicants

- and -

THE CHILDREN'S AID SOCIETY OF HAMILTON

Respondent

APPLICATION FOR A DECLARATION PURSUANT TO SECTIONS 2 AND 15 OF THE *CHARTER OF RIGHTS AND FREEDOMS*

REASONS FOR JUDGMENT

A.J. Goodman J.

DATED: March 6, 2018