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Edu-Law Newsletter —

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Parent obtains interim order securing specific E.A. for autistic daughter

The Divisional Court in *Fleischmann* v. *Toronto District School Board*, [2004] O.J. No. 160 (Ont. Div. Ct.), heard an interim application in the nature of a mandatory order brought by the parents of a student with autism on the severe end of the spectrum who wanted the Board to maintain a particular educational assistant for their daughter; one who they assisted in choosing and training.

The student, Carly, was an identified special education student who was placed in a special education program placement. Her Individual Education Plan (IEP) identified her as receiving individualized support from a Special Needs Assistant (SNA) on a 1:1 ratio. In the home environment, Carly was provided with what the court called "ABA", or what many educators may refer to as IBI Therapy (Intensive Behavioural Intervention Therapy).

Carly's parents had arranged for their personal therapist to be hired by the Board as Carly's SNA and, with the teacher's consent, Carly's SNA was allowed to provide "ABA" to Carly in the classroom. It should be noted that it is not clear from the decision of the court what the provision of "ABA" in the classroom would have looked like.

When Carly's SNA decided to return to school himself, the school principal together with Carly's teacher and Carly's parents interviewed potential replacement SNAs in Carly's home. When Yifat Barmapov was identified by the parents and the principal as an appropriate SNA, she was hired by the Board, and Carly's parents arranged for her to be trained in "ABA".

The court commented that, despite the position being taken by the Board that it does not provide IBI Therapy, Carly's IEP stated "Implement modified A.B.A. methods for teaching specific skills". This comment from the court suggests that the court did not appreciate the difference between the implementation of a therapeutic intervention in a classroom setting, such as IBI Therapy, and the implementation of principles of Applied Behavioural Analysis, which are used regularly by teachers in classroom settings with varying intensity.

Yifat's position was as a temporary employee with the Board and, accordingly, at the end of the school year she was terminated, but the posting process was delayed and she remained until November of the following school year. Her impending termination upset the parents and there was significant correspondence between them and the school. The court commented "It seems Mr. Moore's [the Principal's] greatest concern was that Carly's parents were interfering with his right to hire staff". This comment by the court suggests that the court paid little heed to a principal's responsibilities under the *Education Act* to be responsible for their school, including staff within that school. This seems to have been in part because, historically, both of Carly's SNAs were interviewed by both the principal and the family.

The court was very critical that when Carly's SNA was being replaced, the principal did not implement a transition plan and "no effort had been made to ensure that the new person who would replace Ms. Barmapov had ABA training". The court also appeared to accept that Carly was entitled to receive "ABA" regardless of the Board's position that principles of ABA appropriate for the classroom would be used with Carly and others. This conclusion by the court again seems to have resulted from the fact that "ABA" had been provided to Carly historically.

Carly's family brought an application for judicial review of the decision to replace her SNA, Ms. Barmapov, and an interim application for a mandatory order requiring the Board to maintain Ms. Barmapov as Carly's exclusive SNA until the hearing of the main application for judicial review.

The court outlined the Board's position that it alone has the responsibility for hiring staff, and stated:

"I ask rhetorically, how can the T.D.S.B. now suggest that decisions in respect of the staff to be assigned to this child are for it alone to make. While the Board's duty to hire staff and make staffing decisions may be tangentially affected by this application, they are not paramount. The specific decision made here may well affect Carly's rights under section 7 and 15 of the Charter.

For the Board to persist in its position that it alone (through the principal) has the right to make this decision (to replace Yifat Barmapov) without a transition plan in place and without ensuring that the replacement person is appropriately trained, seems to me to fly in the face of the duties set out in

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the legislation".

The court granted the interim application to have Ms. Barmapov continue as Carly's SNA.

The court appeared to be particularly swayed by the previous involvement of the parents in the hiring and training process, as well as the principal's failure to implement a transition plan for Carly. Training in "ABA", which was neither described in the decision nor defined by the court, also appears to have been central to the decision.

As noted, this decision is an interim step. The application for judicial review has not yet been heard by the court.

This case highlights the importance of consistency, both to the court and for school boards with respect to policies and practices. The court appears to favour the status quo even in those circumstances when it flies in the face of acceptable Board practice. Schools and Boards should be wary of concessions which appear to facilitate resolution of concerns but may create a precedent or interfere with Board practices, such as the process for hiring and training Ms. Barmapov. —

Waitlist for IBI found discriminatory in Nfld. Labrador

The Court in *Newfoundland and Labrador v. Sparkes*, [2004] N.J. No. 34, (Nfld. Ct.), heard an appeal arising out of the decision of a Board of Inquiry based on a complaint where the respondent alleged that her grandson, Brandon, had been discriminated against on the basis of mental disability. Brandon was diagnosed with autism or autism spectrum disorder. The Newfoundland and Labrador Department of Health and Community Services initiated a pilot project offering two years of Intensive Behavioural Intervention ("IBI") for children with autism in 1999. Several jurisdictions in Canada have, or are in the process of instituting, similar therapeutic programs based upon Applied Behavioural Analysis (ABA) principles. Initially, twenty children diagnosed with the syndrome were admitted to the project. The purpose of the project was to monitor the effectiveness of the intervention by observing child progress over two years of treatment and to identify and resolve any issue required to further implement the treatment for a larger group of children throughout the various regions of the province. Newfoundland and Labrador is believed to have the shortest waitlist in the country. Brandon was waitlisted and not given an opportunity to enter the program until November 2001, when he was four years old, past the window of time in which IBI has proven to be successful.

The Board of Inquiry viewed the issue not as one of refusal of treatment but delay in providing treatment. In essence, it found that Brandon was treated differently from children with other illnesses, such as cancer, by being denied effective and timely treatment. The Board of Inquiry found that Brandon had been discriminated against on the basis of serious mental disability. Additionally, the Board of Inquiry found that the Department had not shown that it could not provide Brandon with effective and timely treatment without incurring undue hardship. The Board of Inquiry stated that the Ministry had failed to show it could not have allocated adequate resources to provide treatment to Brandon and the small number of other autistic children who were waitlisted for early intervention treatment. The Board of Inquiry noted that the short-term funding required to develop challenged children with this disorder into productive adults is far less than the funding needed to support them if they do not receive treatment and have long-term needs as a result. The applicant appealed, seeking an order setting aside the award of the Board of Inquiry.

The basis of the applicant's appeal was the policy considerations that arose with the Board of Inquiry's decision that the practice of waitlisting was discriminatory. If so, the Board of Inquiry's decision would have much broader policy implications. For example, the decision would impact the entire healthcare system where waiting lists exist in numerous situations. The intervener, the Autism Society of Newfoundland and Labrador argued that, in other spheres of healthcare where individuals are waitlisted, they will all eventually receive effective treatment. This is not the case with autistic children, as an autistic child who does not receive early intervention treatment will ultimately be denied treatment because the opportunity to be treated is lost. In addition, unlike other waitlist situations, autistic children cannot be assessed in order to establish a priority of urgency for treatment.

The standard of review applied by the court was reasonableness. The court found that, on appeal, the applicant did not establish that the waitlist relating to autistic children and early intervention treatment had broader implications insofar as other waitlists are concerned in the healthcare system. As a result, the applicant was precluded from arguing any error on the part of the Board of Inquiry. With respect to the other legal issues, the standard of review applied was correctness and the Court held that the Board of Inquiry applied the proper legal tests in making its determination as to direct discrimination. The decision of the Board of Inquiry was confirmed by the court.

Although waitlists occur in healthcare and education, the essential factor in the present case was the limited time-frame that IBI therapy would be provided or offered to the complainant, as well as the fact that providing the service without the waitlist would not have been a hardship to the province. Time limits on the provision of IBI therapy have been imposed as a result of the paucity of evidence showing effectiveness after the age of 6. However, most experts would argue that since there are few studies of students receiving treatment for the first time after the age of 6 does not mean that the treatment would not be effective after the age of 6.

Certainly, as a result of this decision, it could be argued that there has been discrimination in an analogous situation where a student has been waitlisted for an educational service or program placement that is only offered in particular grades and that student has aged-out before they reached the top of the waitlist. —

Disclosure by employee is necessary if seeking accommodation

The Ontario Divisional Court in *Layzell v. Ontario (Human Rights Commission)*, [2003] O.J. No. 5448 (Ont. Div. Ct.), dismissed an application for judicial review of the Ontario Human Rights Commission's refusal to refer the applicant's allegations regarding discrimination and reprisal based on sex and disability to a Board of Inquiry.

On March 27, 2001, the Commission, acting under its jurisdiction pursuant to subsection 36(2) of the *Human Rights Code*, refused to refer the matter to a Board of Inquiry. It concluded that the matter did not warrant an inquiry based on the Commission's assessment of the extensive evidence obtained through investigation of the complaints and submissions of the parties. On April 17, 2002, the Commission upheld the refusal after reconsidering its initial decision.

The application concerned three complaints filed by the applicant, who was a teacher with the former Scarborough Board of Education since 1976 and who was diagnosed with multiple sclerosis in 1986. In 1994, she filed a complaint alleging inappropriate sexual touching by the head of her department, an inappropriate response from the principal to this issue, and subsequent retaliation against her in the form of a threat to move her from guidance counselling to classroom teaching. She also filed two separate complaints in October 1996; the first alleging that the Ontario Secondary School Teachers' Federation did not assist her sufficiently in her harassment complaints or in obtaining appropriate accommodation with respect to her disability, and the second alleging that the Board retaliated against her for her complaints by imposing a transfer to another school, during which time she suffered stress and reduced benefits.

The applicant's position was that the Commission's decision to refuse to refer her complaints to a Board of Inquiry was so unreasonable that interference by the court was necessary. The court applied a standard of review of patent unreasonableness acknowledging that the discretionary decisions of the Commission are to be given a high level of deference by a reviewing court. The court's role was to ascertain whether evidence existed that could support the Commission's findings.

On the issue of the re-assignment to a full-time teaching schedule and transfer to another school, the court agreed with the Commission's finding that the assignment was made without a full understanding of the scope of the applicant's illness. The court also accepted the Commission's finding that the subsequent re-assignment offer of 50% teaching and 50 % guidance was not unreasonable. The applicant referred the offer to her doctor for consideration and it was on his suggestion that she refused it. Similarly, the Commission concluded that the re-assignment to another high school at a two-thirds work schedule was also a reasonable offer in light of the applicant's medical condition. With regard to the final offer of a return to full-time guidance work, the court accepted the Commission's conclusion that, while the offer was made after Ms. Layzell was no longer able to work, it was made without full knowledge of her medical condition and was not made in bad faith. The court found that the evidence supported the Commission's conclusions on the re-assignment offers.

The court upheld the Commission's refusal to refer the complaint against the Teacher's Federation to a Board of Inquiry because it concluded that the fact that the Federation was not successful in resolving the case to the applicant's satisfaction was not evidence of discrimination against her.

The applicant claimed that the Commission inappropriately placed the onus on her as the complainant to disclose her disability. The court affirmed the Commission's decision that, in order for an employer to make appropriate accommodations, the employee must sufficiently disclose the nature of the disability.

The applicant also alleged that she was denied procedural fairness. The court held that the applicant *was* owed a duty of fairness — she was entitled to be informed of the substance of the case and to have an opportunity to respond by making representations and submissions. The court found that applicant was afforded these entitlements and took full advantage of the opportunity.

The court dismissed the application for judicial review.

The court clearly confirmed that an employee seeking work-related accommodations from his or her employer must provide sufficient information to that employer to permit the employer to evaluate and institute such accommodations. There is no duty to accommodate a secret disability. —

Employee's obsessive behaviour leads to action and dismissal of claim

In *Heald v. Toronto District School Board*, [2004] O.J. No. 714 (Ont. S.C.), the action resulted from a fire at Downsview Public School in the early morning of Friday May 20, 1994, which damaged two classrooms. The school opened later that morning at the regular time after clean-up crews spent nearly five hours readying the premises. However, the north end of the school where the fire occurred remained cordoned off for the day.

The Toronto District School Board proceeded to retain Alara Industrial Hygiene Services Limited to prepare a report on the fire and subsequent action taken by the school. A Certified Industrial Hygienist attended the school on June 2nd and prepared a report dated June 10th. The report, referred to as the "Alara report", found that the action taken by the school was "appropriate and responsible" and that "... all reasonable precautions have been taken in the school to protect the health and well-being of staff and students".

The plaintiff, a special education teacher at the

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school, believed that the children should have been sent home on the Friday because of the health risks caused by the soot and poor air quality from the fire. In addition, he had grave concerns about the validity of the Alara report, as the author had no information about the condition of the school immediately after the fire and therefore the risks that this posed to the school children.

The plaintiff initially voiced his concerns through a letter-writing campaign and he received a number of replies from Board employees. As part of the plaintiff's claim, he alleged that the Board's letters and reports in response to his communications defamed him.

The plaintiff further alleged that, because of the position he took regarding the fire and the action taken by the Board, he was harassed by the Board to the point of having a mental breakdown, was forced to leave his teaching position in May 1998, and became totally disabled from any gainful employment.

The court first found that there was no merit to the defamation allegations. In all the incidents of alleged defamation, there was no evidence of malice toward the plaintiff, and the defendants were simply "doing their jobs" in responding the way they did. The letters from Board employees were all in response to the allegations and concerns made by the plaintiff. Even if the letters were defamatory, the defence of qualified privilege would have applied. Further, the plaintiff had copied as many as fifteen further individuals on certain letters, and the court found that these actions by the plaintiff damaged his reputation much more than any of the actions taken by Board employees.

The court further dismissed the plaintiffs' claims of harassment, finding that these arose from the plaintiff's misconceptions and were therefore baseless.

A number of further issues and allegations stemmed from the plaintiff's initial concerns about the fire and the procedures followed by Board employees. The court dismissed the plaintiff's claim that the investigation conducted by Marguerite Jackson, Associate Director of Education, was not satisfactory. To this end, the court found that "the only investigation satisfactory to the plaintiff would have been a report which concluded that the school should not have opened after the fire because there was a health risk to the children. Such a finding would be contrary to the evidence at trial". The court went on to state: "Once again, the question should be asked, 'Who is defaming whom?' The plaintiff's unfounded allegations against Ms. Jackson are scandalous".

The court further dismissed the plaintiff's claim that the Board was negligent for failing to follow up and to ensure that the Board's administrative staff responded appropriately to his concerns.

On the issue of damages, the court found that the damages suffered by the plaintiff were not caused by anything the defendants did or did not do, but rather the plaintiff's own reaction.

The court also found that the plaintiff's claims were barred based on jurisdiction. The defendants submitted that the court had no jurisdiction because these were matters involving employee-employer relationships, and that the remedy therefore fell exclusively through the grievance procedure under the Collective Bargaining Agreement.

Finally, the court ruled on the issue of the limitation period. Subsection 7(1) of the *Public Authorities Protection Act* provides a six-month limitation period for actions against persons carrying out a public duty or authority. The court found that the education system and the administration of schools was a public function, and that the defendants were involved in public duties in various capacities. The action was therefore statute-barred based on the limitation period as well.

What this case highlights is that harassing behaviour may come not only from parents and intruders, but also from within the school board by staff. In the present case, the teacher did much to aggravate and malign the senior administration of the Board.

Consideration may have been given to having the action dismissed as out of time and given the nature of the claim as an employment grievance. As well, a counter-claim might have been considered with respect to the defamatory statements made by the teacher about senior administration. —

No school board negligence resulting from student suicide following potential discipline & police questioning

In *Schmunk Estate v Medicine Hat Catholic Board of Education*, [2004] A.J. No. 491, the Alberta Court of Queen's Bench dismissed a negligence suit brought by the plaintiffs, Terry and Susan Schmunk, against the Medicine Hat Catholic School Board, Lorne Nevin, the superintendent of the Board, and Charles Love, the principal of McCoy High School. The suit concerned the death of the Schmunk's son, Daniel, on April 29, 1999. The issue in the case was whether or not the principal and the school board were negligent in breaching a general or specific duty of care to high school student, Daniel Schmunk, and whether the alleged negligence contributed to his death.

Daniel was a healthy, well-adjusted 18-year-old senior at McCoy High School in Medicine Hat who led a happy home life, enjoyed restoring older model cars, and had plans to attend college to become a police officer after graduation. He was well liked and did not have any major behavioural problems. On April 29, 1999, the morning following the high school shootings in Taber, Alberta, and shortly after similar events at Columbine High School in Colorado, Daniel and a friend played a distasteful joke and left a note under a door that made reference to a fictitious plan involving guns. Following a report from another student that Daniel had a gun in his car, the principal, Mr. Love, called Daniel to his office. During the interview with Mr. Love, Daniel admitted that he had a pellet gun in the trunk of his car and, following the school's policies with regards

to weapons, Mr. Love called the police. He also explained to Daniel that there might be the possibility of suspension.

Two police officers arrived and, after Daniel signed a consent to a search, his trunk was searched by police with Mr. Love present. The officers told Daniel that he would not be charged because it was just a pellet gun, but the weapon, along with a hunting knife, were confiscated in light of the Taber incident. After the interview in the parking lot, Daniel left the school. When he left the parking lot he did not seem unduly upset over the events that had transpired.

Following this incident, Daniel's younger brother called his parents and Mrs. Schmunk contacted Mr. Love. The police also contacted the Schmunks to assure them that their son was not in trouble. During this time period, Daniel had not returned home. Returning home from an errand, Mrs. Schmunk stopped at their rental property where Daniel kept his restored car. David was found unconscious in the seat of one of the cars and was later pronounced dead as a result of carbon monoxide poisoning. The police and coroner concluded that the death was a suicide, although there were no previous indications that Daniel was in danger of committing suicide.

Terry and Susan Schmunk filed a claim against the School Board and Mr. Love alleging that the actions of the defendants caused Daniel humiliation, stress and embarrassment to such an extent that he intentionally took his own life or acted in a manner that showed that he did not care or realize he was endangering his own life.

At trial, there were conflicting psychological reports regarding the likelihood and cause of Daniel's suicide.

The court outlined the requirements for a finding of negligence on the part of the Board and Mr. Love — first, whether there was a duty of care owed, second what the standard of that duty of care was and finally, if the standard of care was breached, whether that breach caused the harm suffered.

The Schmunk's argued that Mr. Love had a specific duty of care to call them before calling David to his office and calling the police. ***The court disagreed that there existed a specific duty of care to call the parents following a suspected incident involving a gun. Following the Supreme Court decision in R v. M.R.M., [1998] S.C.J. No. 83, where the court recognized the importance of a principal's discretion in acting promptly and diligently, the court concluded that, given the seriousness of the allegation and the recent events in Taber, "Mr. Love acted reasonably and was not under a duty to call Daniel's parents prior to taking action".***

The court also concluded that Mr. Love did not owe any specific duty of care to keep Daniel at school following the incident or inform his parents of his absence. Daniel was taking an optional English course and, as an 18-year-old student, had no obligation to attend and could not be compelled to stay. The subject was optional for an 18-year-old to re-take and therefore the principal had no duty to inform his parents when he chose not to attend the class.

While the Court found that Mr. Love, as a principal and teacher, did owe a general duty of care to Daniel, the duty of care required Love to reasonably follow the Board's policies, use reasonable care to ensure that Daniel was protected from abusive or humiliating scrutiny and harm and, more generally, to ensure that students have a safe education environment at the school.

The court applied the standard of a careful or prudent parent in the circumstances, and concluded that Mr. Love met this general duty of care. Given the seriousness of a threat of a weapon and his duty of care to the entire student body, the court held that Mr. Love acted as a careful and prudent parent with respect to the duties he owed.

Despite the court's finding that Mr. Love did not breach his duty of care, the court went on to examine whether there was a connection between the defendant's actions and Daniel's death. The court found that if Daniel's death was a suicide, there was no way that such a result could reasonably be foreseen in the circumstances. —

Change to behaviour code not breach of private school contract

The defendant, St. Jude's School Inc., in *Kyriacou v. St. Jude's School Inc.*, [2004] O.J. No. 579 (Ont. Ct.), was a private school specializing in helping children with learning disabilities. The plaintiffs sought damages for breach of contract alleging that the school, in a letter sent home to parents, altered the terms of the original school contract with respect to the behaviour policy. The student had learning difficulties resulting from attention deficit hyperactive disorder and depression.

He was enrolled at St. Jude's commencing the academic year of 1999. In February of 2002, the school and its students experienced several thefts during the student's Grade 9 gym class. The school notified students and parents not to leave money in the change room but to deliver it to the gym teacher at the start of class. On February 26, 2002, two male students reported a theft in the change room and the school investigated. The students, generally speaking, failed to understand the seriousness of the theft and the investigation. The school was unable to determine the identity of the thief and prepared a letter home for the parents of the students. The letter proposed that a person who steals from their friends is one who would have a tendency to get into other kinds of trouble and, as a result, anyone in the class who was sent to the office would earn the highest number demerit points that could be allocated for each trip to the office and indicated: "... and I might very well eliminate the thief from the school". Parents were asked to sign the letter and return it to the school.

Parents of thirteen students signed the letter and returned it to the school. The parents of one child added comments, stating that they disagreed that the highest number of office trips was necessarily proof of guilt and were advising their son not to bring any money to school. The plaintiffs refused to sign the letter, arguing that the school varied the terms of

the original contract between St. Jude's and the family by proposing to vary the number of demerit points for each trip to the office. The contract included a "behaviour policy" setting out certain acts of non-acceptable behaviour, such as tardiness, swearing, fighting and illegal activity. A demerit-point system assigned points based on the severity of the conduct and established consequences from the accumulation points such as suspension and expulsion.

The action was dismissed. The court found that the discretion in the application of the behaviour policy and the demerit-point system was a matter of practice and not a term of the contract. The requirement that the parents sign the letter was nothing more than an acknowledgement of receipt and the plaintiffs could have indicated that they did not agree with the school's position in a number of ways.

This case is interesting for the court's commentary in that the letter sent home to the parents was not a letter seeking approval, but simply a letter asking them to acknowledge the actions being taken by the school. Parents often believe that their refusal to acknowledge a practice signals to a school or school board that they do not "consent" to the practice in circumstances when they are not being given the choice to consent or refuse consent, but are simply being asked to acknowledge what is taking place.

The court did not comment on the reasonableness of the possible connection between the theft and trips to the office and utilizing the demerit points to possibly remove the thief from the school. —

Indirect collection of personal information at registration upheld, but notice must be given

This decision of the Ontario Information and Privacy Commissioner in *Toronto District School Board, Toronto Catholic District School Board*, [2004] O.I.P.C. No. 49, deals with two related complaints under the *Municipal Freedom of Information and Protection of Privacy Act* (the "Act"). The complainants' son had ceased being a student with the Toronto District School Board (TDSB) and had applied to be enrolled in a school within the Toronto Catholic District School Board (TCDSB).

While the request was being considered, the receiving school's vice-principal contacted his counterpart at the complainants' son's former school, via telephone, to obtain information in order to verify the student's academic status and to assess whether the receiving school could meet his program needs.

The complainants claimed that TCDSB should not have sought information about their son from TDSB without their written consent, that TDSB should not have provided the information about their son to TCDSB without written consent, and that these actions were contrary to the Act.

The investigator first found that the information was "personal information" as defined in subsection 2(1)(b) of the Act, which includes "information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual...".

The investigator then examined section 32(c) of the Act, which states: "An institution shall not disclose personal information in its custody or under its control except,... (c) for the purpose for which it was obtained or compiled or for a consistent purpose".

The investigator found that section 32(c) applied in these circumstances, and that disclosure of the personal information was for the original purpose for which it was obtained, "namely the proper assessment and accommodation of the son's special needs".

The investigator went on to say, "Furthermore, in my view, the complainants should have reasonably expected that under the circumstances, there would be contact between the two boards to address the enrolment request. The urgency expressed in the complainants' communications with the TCDSB in their application to have their son admitted to a school within the board, the timing of the application (after the school year had begun) and their apparent persistence in pursuing the application supports this view".

The investigator then examined section 28 of the Act. Section 28 requires express authorization through statute for the collection of personal information which is necessary for the proper administration of a lawfully-authorized activity.

The collection of the son's information was necessary for the son's registration, which is outlined as a duty of the principal of a school under subsection 265(1)(c) of the *Education Act*.

However, under subsections 29(2) and 29(3) of the Act, when personal information is collected on behalf of an institution, the individual to whom the information relates must be informed, unless exempted under subsection 29 (3). Here, the two boards did not provide notice of the collection to the complainants and were not exempted through any provisions of the Act. The collection, therefore, was not in accordance with section 29 of the Act.

The investigator recommended that TCDSB ensure in the future, where an indirect collection of personal information occurs under subsection 29(1) of the Act, that notice be given under subsection 29(2), unless an exception under subsection 29(3) applies.

Given the finding and direction of the investigator in this case, it would be prudent for school boards who intend to seek oral information from a student's previous school board to include on their registration forms a statement that information may be collected indirectly by the school from the student's previous school in furtherance of the registration process, pursuant to section 29 of the Act. —

Human Rights Commission must apply undue hardship analysis before refusing to hear Complaint

In *Lalji v. British Columbia (Human Rights Commission)*, [2004] B.C.S.C. 4, (BCSC), the applicant applied for judicial review of a B.C. Human Rights Commission decision that dismissed one of her two complaints against the Coquitlam School District. The School District applied for judicial review of the decision to refer the applicant's other complaint to the Human Rights Tribunal.

The applicant was a mother of a 12-year-old boy who was disabled and required assistance from a special education assistant (SEA) to enable him to attend school. The student had been diagnosed with Duchenner Dystrophy, a terminal disease of rapid progression, as well as autism. He was non-verbal, non-ambulatory and had great difficulty expressing himself. Changes to his environment triggered self-injurious behaviour.

In the 1999-2000 school year, the student attended Porter Elementary School in the District and received assistance from a SEA, Ms. Edel. He was again enrolled at Porter Elementary School in the Fall of 2000. SEAs in the District were members of the Canadian Union of Public Employees Local 561 (CUPE), and the District assigned SEA positions to schools each June, according to the number of students needing SEAs in the coming year. The SEAs were not assigned to particular students but to schools, and normally rotated among students within a school. The SEAs were governed by a Collective Agreement that allowed a more senior assistant to bump a more junior assistant from his or her position if the senior assistant's hours were reduced or eliminated.

Two Letters of Understanding between CUPE and the District governed the bumping of SEAs. In the second Letter of Understanding, CUPE and the District agreed that, in the case of students with extreme behavioural needs, the employer would advise the union of the need for exceptional circumstances in a SEA posting in advance and that bumping rights would not be implemented in the school year. This is referred to as the "exceptional circumstances exemption". The Letter also provided that the specialized postings would not exceed five postings in a year.

In August 2000, the applicant learned that her son's assistant would be bumped and that she would not be granted an exceptional-circumstances exemption. The student did not return to school in September of 2000. In February of 2001, the student returned to school and was assigned a new SEA who remained with him for the rest of the school year. In July of 2001, the applicant again asked the District for an exemption. The District's Assistant Superintendent wrote to CUPE requesting a sixth exemption, which was provided in August of 2001. The applicant filed two complaints with the Human Rights Commission, the first being an individual complaint claiming that her son was discriminated against on the basis of his disabilities because of the bumping policy. The second complaint was systemic, brought on behalf of all students who had physical and mental disabilities. The Commission dismissed the individual complaint but allowed the second to proceed.

The court held that the decision to dismiss the individual complaint was patently unreasonable. The court held that the Commission did not apply the test from the 1999 decision of the Supreme Court of Canada in *Meiorin* to determine whether CUPE and the District had a successful occupational requirement defence. The test requires a determination of whether:

"(1) the employer adopted a particular standard for a purpose rationally connected to the performance of the job, (2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of the legitimate work-related purpose and (3) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose in that it is impossible to accommodate the individual employees sharing the characteristics of the complaint without imposing undue hardship on the employer".

It was unchallenged that CUPE and the District met the first two criteria of the *Meiorin* test. At issue was whether the third criterion was applied in a patently unreasonable manner. At the systemic level, the third prong was applied to conclude that CUPE and the District had not necessarily shown that the provision of five exemptions met the test of undue hardship.

With respect to the individual complaint, the Commission had concluded that the District and CUPE had accommodated the student by granting a sixth exemption. There was no evidence before the Commission regarding the method by which the District and CUPE reached the decision to grant the student the exemption or in what way the respondents' process was reasonably necessary to avoid undue hardship. The onus was on the respondents to demonstrate on the balance of probabilities that their response to the applicant's request was short of undue hardship. As there was no evidence on this point, the court concluded that the Commission did not apply the third prong of the *Meiorin* test in deciding that the respondents had accommodated the student. The court also found that the appropriate remedy was to refer the matter back to the Tribunal.

With respect to the District's application, the court reiterated that it would be reluctant to embark on judicial review unless all alternative remedies available to the applicant had been exhausted. In this case, there was an alternative remedy available to the District under subsection 27(1)(c) of the Code, which provides that the Tribunal may dismiss all or part of the complaint without a hearing if there is no reasonable prospect that the complaint will succeed. The District's application for judicial review of the decision to refer the systemic complaint to the Tribunal was therefore, premature.

The application of the *Meiorin* test appears inappropriate on its face, as it anticipates that an employee must be accommodated with respect to a job requirement because of their disability, not that a third party requires accommodation by an employment policy. Nevertheless, the test to be applied was whether the student's needs could be accommodated short of undue hardship. It was the procedural failure by the Human Rights Commission not to apply the appropriate text in its analysis that the Court took exception to. It is interesting to note however, that the student had been accommodated when the sixth exemption was granted.

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Professional Development Corner

Edu-Law provided a series of "In-House" Negotiation & Mediation Training Programs in April and May. Anyone interested in such In-House Programs, or a Program together with a co-terminous Board, should contact Edu-Law.

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October 16-18, 2004

Canadian Association of School Administrators

"**Annual National Conference**"

Niagara Falls, Ontario

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October 22, 2004

Keel Cottrelle LLP

Joint Session: "**Special Education & Student Discipline**"

Capitol Banquet Centre, Mississauga, Ontario

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Edu-Law Consulting Services Limited provides a full range of professional development for educators. In particular, Edu-Law provides Negotiation and Mediation Training Programs. In addition to the Newsletter, Edu-Law publishes tri-annually the Edu-Law Human Resources Digest.

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For any information with respect to Edu-Law or the services provided by KEEL COTTRELLE LLP, please contact **Bob Keel** at **905-501-4444**, or at **rkeel@keelcottrelle.on.ca**.

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