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Edu-Law Newsletter —

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Supreme Court does not extend funding for IBI

The Supreme Court of Canada recently released its judgement in *Auton v. British Columbia*, [2004] S.C.J. No. 71, (SCC).

The issue before the Court was that of funding Intensive Behavioural Intervention therapy as a medically necessary therapy for children with Autism. At the time the litigation began, the government of British Columbia did not provide either funding for or IBI therapy programs for parents whose children had Autism. This prompted court action by parents whose children were receiving IBI therapy. The Claimants argued that the failure by the Government to fund IBI Therapy for their children was a breach of their right to treatment without discrimination on the basis of mental disability pursuant to section 15 of the *Charter of Rights and Freedoms.*

The Court at first instance found that IBI therapy was a medically necessary therapy and that the Government of British Columbia's failure to make the therapy available or provide funding for the therapy was a breach of the section 15 Charter rights of children with Autism who might benefit from the therapy. The Court held that the Government had a duty to make the therapy available to children with Autism who might benefit from it, but the Court did not outline how the Government should make the therapy available, but rather left this decision to the political process.

Both the Claimant children (through their parents) and the Government appealed the decision. It should be noted that, neither party appealed the finding of the lower Court that IBI therapy was a medically necessary therapy. The Court of Appeal of British Columbia upheld the trial decision, and the matter was further appealed by both parties to the Supreme Court of Canada.

The issue before the Supreme Court was whether the Government's failure to provide IBI Therapy to children with Autism was a breach of those children's section 15 Charter rights. Section 15 of the *Charter of Rights and Freedoms* states:

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

The questions the Supreme Court identified as necessary for its analysis were:

"1. "Is the claim for a benefit provided by law, [and] if not, what relevant benefit is provided by law?;

2. Was the relevant benefit denied to the claimants while being granted to a comparator group alike in all ways relevant to benefit, except for the personal characteristic associated with an enumerated or analogous ground?;

3. If the claimants succeed on the first two issues, is discrimination established by showing that the distinction denied their equal human worth and human dignity?"

The Supreme Court summarized the analysis by saying that in order for the Claimants to succeed they must show that they failed to receive a benefit that the law provided, or that they were saddled with a burden the law did not impose on someone else. The Court explained that, the purpose of section 15(1) of the Charter is to ensure that when the government chooses to enact benefits or burdens they do so in a non-discriminatory basis.

The unequal treatment, the Claimants argued, resulted from the funding of medically required treatments for other disadvantaged groups but not their disadvantaged group. The Court identified that, flowing from the proposition put forward by the Claimants was the question of whether all disadvantaged groups received all of their medically required treatment funded by the Government of B.C.?

The answer to that question was no. The Canadian healthcare system, although universal - it is available to everyone, it is not comprehensive - it does not provide medical treatment for all ailments. The Government of B.C., consistent with the requirements of federal health care legislation, provides funding for "core" services, in addition, in some cases, there is partial funding for non-core services, such as dentistry. In other cases there is no funding at all. The Supreme Court stated:

"The legislative scheme in the case at bar, namely the CHA and the MPA, does not have as its purpose the meeting of all medical needs. As discussed, its only promise is to provide full funding for core services, defined as physician-delivered services. Beyond this, the provinces may, within their discretion, offer specified non-core services. It is by its very terms, a partial health plan. It follows that exclusion of particular non-core services cannot without more be viewed as an adverse distinction based on an enumerated ground. Rather, it is an anticipated feature of the legislative scheme. It follows that one cannot infer from the fact of exclusion of ABA/IBI therapy for autistic children from non-core benefits that this amounts to discrimination. There is no discrimination by effect."

Thus, the Supreme Court held there was no benefit provided by law and they dismissed the appeal by the Claimants and upheld the appeal by the Government of B.C.

Despite having answered the first question in their analysis in the negative, the Supreme Court continued and responded to questions 2 and 3 hypothetically. Their analysis will not be reviewed here. It will be interesting to see what impact, if any, this decision will have on the current IBI litigation in Ontario. The circumstances of the Claimants in the Ontario cases are different from those of the B.C. Claimants. The Ontario Claimants argue that they have been discriminated against on the basis of age, not disability, since Ontario provides funding for or direct IBI services for children for autism until they reach the age of 6. Therefore, in

Board vicariously liable for sexual assault by teacher

In *Doe v. Avalon East School Board*, [2004] N.J. No. 426, a teacher employed by the Avalon East School Board was convicted for the sexual assault of a student. The assault took place during school hours, while the student was alone in a classroom with the teacher. At issue, was the vicarious liability of the School Board.

The student argued that the assault was directly related to the abuse by the teacher of authority and that, as a result, the Board should be liable. The Board argued that it was not liable because the assault was beyond the authority granted by the Board. Moreover, the Board argued that the finding of liability would have an adverse impact on its ability to educate the students in its charge.

Unlike *S.G.H. v. Gorsline*, the Court found the Board liable, as the assault arose directly from an abuse of power by the teacher within the authority granted to the teacher. The Court also noted that there was a strong connection between the commission of the assault and the conduct of the Board's duties.

In determining when vicarious liability should be imposed, the Court applied a two-part test. The first part of the test was determination of whether the acts of the teacher were authorized by the Board. This was clearly not the case in *Doe*. The second part of the test was a determination of whether the act was so connected to the Board's role and responsibilities that liability would be imposed. To decide the second part of the test, the Court drew on the principles set out by the Supreme Court of Canada in prior decisions, which included consideration of the following factors, (a) the role and mandate of the employer and the potential risk of wrongdoing, (b) the relationship between the wrongdoer and the employer and whether the employer had control and the power to direct the wrongdoer, and (c) the connection between the wrongdoer's actions and the employer's mandate.

With respect to the first factor, the Court found that the Board had the kind of direct purpose, role and mandate that could provide an opportunity for a tortious act connected to that role and mandate. The Board, has legislated authority over the students in its schools. The process of educating children requires that a school board have a form of custody over its students. While the purpose of the Board did not require that the teacher or any teacher be given an intimate, parental role, it is nonetheless necessary for the Board, in carrying out its mandate, to require professional teachers to have a significant measure of power and authority over students. The Court concluded that when any entity exercises the kind of authority that provides it with a degree of control over a vulnerable population, there is a risk that harm may result if that employee abuses that authority. With respect to the second factor, the relationship between

Case Update: Vicarious Liability

The lower Courts' decision in *S.G.H. v. Gorsline*, [2004] S.C.C.A. No. 385 (SCC) were reviewed in previous Newsletter articles. This case addressed the issue of vicarious liability for the intentional tort of child sexual abuse by the child's teacher. At first instance, the Court of the Queen's Bench of Alberta held that the School Board was not vicariously liable for the assault committed by its teacher. The decision was appealed to the Alberta Court of Appeal where the appeal was dismissed. An Application for leave to appeal to the Supreme Court of Canada has since been dismissed without reasons.

the employer and the employee, the Court found that the teacher was, at all times, an employee of the Board who carried out his teaching duties under the supervision and direction of the Board.

The final stage of the analysis required a determination of whether the teacher's actions were so closely connected to the authority assigned to him by the Board, it would be fair and just that liability for the assault properly attached to the Board. Employers are not liable for the acts of employees that arise independently of the employment relationship, nor are they responsible when the workplace merely provides the opportunity for a wrongful act. In this case however, it was the employer's mandate as a school board that placed in the hands of its employees significant power and authority over the students, which enhanced the risk that such power could be abused. The Court also found that, it was the school board that gave the teacher, as a trusted professional employee, the authority to create the circumstances wherein the offence was committed. While the wrongful act itself did not further the employer's aims, providing one to one educational services in a room where the student was alone with the teacher was directly connected to the Board's responsibility to educate children. As a result, the Court concluded that the wrongful act was directly connected with the perpetrator's role as a teacher.

This decision is unique, in that, most cases of sexual impropriety by teachers have occurred during non-instructional periods when teachers were performing duties not related to the primary mandate of a school board, such as coaching. Clearly, the connection to the Board's primary responsibility influenced the Court in its determination. —

Church and State in Education and Evolution

In *Selman v. Cobb County School District*, [2005] U.S. Dist. Lexis 432 the plaintiffs, residents of Cobb County, brought an action pursuant to 42 U.S.C. § 1983 against the County School District and Board of Education to challenge the constitutionality of a sticker placed on science text books commenting on evolution. The sticker was adopted by the Board of Education in March of 2002. The Plaintiffs sought an order that the sticker violated the Establishment Clause of the First Amendment, and the Constitution of the State of Georgia.

In the fall of 2001 the School District adopted a new science textbook, which offered a comprehensive perspective of current scientific thinking regarding the theory of origins.

Upon selecting the textbook, the School Board was bombarded with complaints from parents that the textbook did not present the theories of origin in a fair manner. A petition containing the signatures of 2,300 residents was presented to the Board. The petition requested that the School Board "clearly identify presumptions and theories and distinguish them from fact."

In response to the complaints, the Board placed the following sticker on the textbooks:

"This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered".

The chair of the School Board issued a public statement in September of 2002, announcing that the Sticker was not intended to interject religion into science instruction, but simply was intended to make students aware that a scientific dispute might exist. The Board considered the Sticker's purpose to be that of facilitating open discussion in the classroom about controversial issues of a scientific nature. They had not intended religious beliefs on creationism to be taught in science classrooms.

The United States has a wealth of case law regarding the constitutional limitations that should be placed on public school curriculum materials concerning the origin of life and the separation of church and state.

Prior to deciding the case the Court felt it proper to identify what the instant case was not about. The Court commented that the present case would not resolve whether science and religion were mutually exclusive, would not determine whether it was constitutionally permissible for public school teachers to teach the theory of intelligent design, and would not determine whether evolution is fact or theory or whether evolution should be taught as a fact or theory. The Court clarified that the sole issue before them was whether the sticker placed on science textbooks violated the Establishment Clause of the First Amendment and/or Article 1, of the Constitution of the State of Georgia.

In arriving at its decision the District County Court felt it necessary to consider how the Sticker impacted science instruction on evolution. The court heard evidence that some students pointed to the language on the Sticker to support arguments that evolution did not exist. Furthermore, the Board's use of the word "theory" caused confusion in the science classrooms. To alleviate the confusion teachers were forced to spend more time distinguishing the meanings of "fact" and "theory" than actually teaching the theory of evolution.

In delivering its judgement the Court made mention of the usual restraint exhibited by courts when hearing complaints about educational policy decisions of school boards and administrators. However, the Court dealt with this custom by stating that federal courts will intervene when decisions of states or local school boards are not consistent with the guarantees of the First Amendment.

The Court considered whether the sticker conveyed a message of endorsement or disapproval of religion to the informed, disinterested, reasonable observer. The

informed, disinterested, reasonable observer would be someone familiar with the origins and context of the government-sponsored message at issue and the history of the community where the message is displayed.

The Court found the Sticker to be unconstitutional. To the informed, disinterested, reasonable, observer the Sticker conveyed a message of endorsement for religion. The Sticker sent a message to those who opposed evolution for religious reasons that they are favoured members of the political community, while simultaneously sending a message to those who believed in evolution that they were political outsiders.

The informed, disinterested, reasonable observer would understand the School Board to be endorsing the viewpoint of Christian fundamentalists that evolution is a problematic theory lacking an adequate foundation. The Sticker advanced the religious viewpoint of the Christian fundamentalists and creationists who were vocal during the textbook adoption process regarding their belief that evolution is a theory, not a fact, which students should critically consider.

The Court pointed to the critical language in the Sticker, which supports the conclusion that the Sticker ran afoul of the Establishment Clause. Specifically, the statement that "evolution is a theory, not a fact, concerning the origin of living things" crystallized the contravention of the Establishment Clause. The Establishment Clause, at the very least, prohibits governments from appearing to take a position on questions of religious belief, and this is exactly what the School Board did.

Further, the Court found that the Board's Sticker misled students regarding the significance and value of evolution in the scientific community for the benefit of the religious alternatives. By demeaning evolution, the School Board appeared to be endorsing the well-known prevailing alternative theory of creationism or variations thereof.

The Sticker did not reference "evolution" as a "scientific theory" or a "prevailing scientific theory." Instead the Sticker appeared to purposely question whether evolution is an accepted or established theory in the scientific community, even if evolution is subject to scientific critique.

The Court held that the Sticker, considered in context, conveyed a message of endorsement for the religious alternative and was thus unconstitutional.

The *Selman v. Cobb County School District* case like previous cases reviewed in this newsletter provides another example of the conflict between church and state with respect to public schools. Public school boards cannot endorse religious beliefs, either in curriculum or practice. —

Protection under the Code did not apply to sibling without disability

The British Columbia Human Rights Tribunal in *L. v. Fraser-Cascade School District No. 78*, [2004] BCJRTD No. 237 held that being part of a family group, where one member of the group allegedly suffers discrimination based on an enumerated ground in the *Human Rights Code*, is not a sufficient basis on which to find that other members of the family group are also subject to discrimination.

L, the mother of two children, filed a complaint on behalf of her daughter M. The Complainant alleged that the Board of Trustees, of School District No. 78, discriminated against her daughter because of their family status, physical disability and/or mental disability. All of these allegations were brought pursuant to section 8 of the *Human Rights Code*, which applies to the provision of services.

Upon receiving the complaint the school district brought a motion to dismiss the Complaint. The school district argued that the Human Rights Tribunal did not have jurisdiction to hear the complaint because the allegations related to M did not fall under any prohibited ground found in the Code.

The school district argued that M did not suffer from any type of mental disability. The school records illustrated that M was not a special needs child. In fact, M met all of her expected learning outcomes for her age.

The Complainant argued that M fell within a discriminated "group" because her brother G suffers from Down Syndrome. She argued M's family status made her "disabled". Having a mentally challenged brother carries impairment for family members. The Complainant argued that impact of discrimination on one sibling, directly affects the other as they are one unit.

In reply, the school district argued that the Complainant failed to show how her daughter was treated differently. The Complainant did not establish or set out how her daughter's relationship to her disabled brother caused the alleged discriminatory conduct.

Under section 8 of the Code, a complainant must establish that he or she was discriminated against with respect to the provision of a service based on one of the enumerated grounds listed in the section. The grounds identified by L on behalf of M were mental and physical disability and family status. In deciding it did not have jurisdiction the Tribunal quoted from *Tsai and Tsai v. B.C. (Minister of Education)* for the principle that when a person is not captured by one of the enumerated grounds in section 8 of the Code, the Tribunal is without jurisdiction to hear the complaint.

The Tribunal found that there was no mention in the Complaint Form that M suffered from a mental or physical disability. What the material did describe was a well-adjusted child, who enjoys school and performs very well.

In referring to M's Complaint Form the Tribunal referenced how none of the bullying incidents complained of came about because of the Complainant's relationship with her brother. The description of the incidents related to alleged bullying behaviour suffered by M at the hands of her schoolmates. There did not appear to be any connection between G and the alleged negative treatment of M by her schoolmates or teachers. Further, these acts did not constitute a legal and/or factual foundation for an allegation that M was discriminated against

based on her family status. Without more, the connection was mere speculation on the part of the Complainant.

Simply stating that being part of a family group, where one member of the group allegedly suffers discrimination based on an enumerated ground in the Code, was not in the Tribunal's view, a sufficient basis on which to find that other members of the family group were also subject to discrimination.

In this case the Complainant failed to articulate a connection between M's relationship to her brother and the discrimination she suffered. M's complaint did not fall within the enumerated grounds of section 8; thus, removing any jurisdiction or power the Tribunal had to act. School boards should nevertheless, be mindful of addressing any bulling or negative treatment that might occur as a result of family relationship to an individual who is protected by the Code. —

Failure to follow policy did not invalidate school closure

In *Penney v. Avalon West School Board*, [2004] N.J. No. 329, the decision by the Avalon West School Board to close St. Joseph's Intermediate School in Carbonear, was challenged by the Applicants, parents of a student attending the school. The Applicants sought injunctive relief to prevent the closure. The parents and other stakeholders were given the opportunity to make written submissions, engage in a process of consultation, and attend study sessions and meetings between January and April of 2003 regarding the issue of school closure. The decision to close the school was overturned by the Board in May 2003. The Board then tabled a new Motion, with an alternative option. There were two public meetings in June, during which the new proposal to close the school was considered. There were two public meetings in June, during which the new proposal to close the school was considered, and at the second meeting the decision to close the school was passed. That decision was upheld in September.

The parents' position was that there was no meaningful consultation or opportunity for input at the June meeting when the proposal was accepted or during the September meeting when the appeal was rejected. School community members alleged that the Board engaged in "tokenism" rather than true consultation with the stakeholders and had a closed mind during the meetings. They alleged moreover, that the Board failed to follow its own Process for Consultation. At issue in this case was whether the Board complied with the duty of procedural fairness owed to community members. The Board argued that the process of consultation following the second Motion should be regarded as a continuation of the consultations arising in relation to the original Motion. With respect to the school closure debate, when assessing the content of the duty of fairness owed by the Board to parents, the Board's position was that there must be recognition that school boards must be accorded some degree of flexibility when following their procedures. The Board also argued that the goal is not to achieve "procedural perfection", but rather a balance between the need for fairness, efficiency and predictability of outcome.

School boards are required to provide an opportunity for the school community to make representations to the board before deciding to close a school. The school community is entitled to sufficient information about the issues considered relevant by the board and adequate time to prepare and present arguments to the board. The Court agreed with the Board, that the process of consultation following the second Motion was a continuation of the consultation process implemented for the original Motion. In this case, the Court found that the community members had not demonstrated that the Board failed to provide an adequate opportunity to make representations to the Board, as required by s. 76(2) of the *Schools Act*. School community members did not present any evidence to show that they required more time to prepare their submissions or that they suffered any prejudice as a result of the consultation process. The Court, in dismissing the application for injunctive relief, found that the Board properly set out the rationale employed in its decision, conveyed adequate information to parents and allowed sufficient time for preparation and presentation by the school community members.

In this case, the application was not frivolous because the Applicants did have a reasonable expectation that the Board would follow the steps in its own Process of Consultation document before proceeding with the second Motion. However, this decision demonstrates that the duty of procedural fairness owed to school community members during the public consultation is served by allowing parents to become involved and pursue their rights, a school closing includes a measure of flexibility provided that there has been an appropriate consultation and review process providing a sufficient opportunity for the public to be heard by the Board. —

Meeting In-Camera must be authorized for confidentiality to apply

In *RSJ Holdings Inc. v. London (City)*, [2004] O.J. No. 2700 the City applied for leave to appeal a decision of the Court dismissing the City's application for an order striking the affidavits of two City councillors. RSJ was seeking to quash a City bylaw that prevented RSJ from developing certain lands it owned. Two councillors were requested by RSJ to swear affidavits. The councillors agreed and deposed in their affidavits that the City Council, sitting in camera as committee of the whole at a meeting closed to the public, voted to pass the impugned bylaw. The City's position was that the affidavits should be struck because it was improper for a member of City Council to swear an affidavit containing information about discussions that took place at an in camera meeting of the committee of the whole and because solicitor-client privilege attached to the in camera deliberations.

The Motion's Judge had held that the disclosure by the councillors did not breach confidentiality nor was it the subject of solicitor-client privilege. The Motion Judge's decision was upheld on appeal.

The Court hearing the appeal found that, although the members of the committee of the whole might have received some advice from the City in camera, to which solicitor-client privilege could attach, neither councillor disclosed that advice nor any in-camera discussions. What the councillors disclosed was simply the result of the in-camera meeting, which was that the members of the committee passed the interim control by-law. More important, the Court held that there was no statutory or other legal basis for concluding that the City was justified in holding a vote to pass the interim control bylaw in an in-camera meeting. As a result, there could be no sustainable claim of confidentiality with respect to deliberations and vote taken at the meeting. The Court noted that to find otherwise would encourage the holding of in camera meetings to vote on matters in secret that should be debated openly and subjected to public scrutiny. The Court held that the disclosure of the mere fact that the vote had been taken improperly did not constitute a breach of confidentiality or solicitor-client privilege. —

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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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Edu-Law continues to provide "In-House" Negotiation & Mediation Training Programs. Anyone interested in such In-House Programs, or a Program together with a coterminous Board, should contact Edu-Law.

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March 4, 2005

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