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Edu-Law Newsletter —

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Cyberspace defamation results in damage award against parent

A B.C. Superior Court in *Newman v. Halstead*, [2006] B.C.J No. 59 awarded significant damages, including punitive damages, to school board employees for the defamatory statements made by the defendant Halstead against them, which had been published on the internet and in various email communications.

The allegations and accusatory statements about the plaintiffs were posted by the defendant on a website she had created and were repeated in emails she sent to various school officials. The plaintiffs, consisting of 9 public school teachers, 1 retired school board trustee and a parent of a former student, brought an action for defamation against the defendant and several internet servers and host sites. The action against the latter parties was dropped and the plaintiffs proceeded against the defendant alone. Prior to trial, the defendant, who was originally represented by counsel, took the position that she would not respond to the action and would not participate in any pre-trial hearings. The plaintiffs obtained a court order compelling her to participate in examinations for discovery, which she did. However, on the day of the trial, the defendant was absent and neither her counsel nor any agent appeared on her behalf. At the plaintiffs' request, the judge proceeded to try the case on its merits in the defendant's absence.

The defendant, a parent whose children attended schools in the Comox Valley District, had a long history of involvement with the school board and had been involved with several parent councils. She had also run unsuccessfully as a school trustee, was the president of two parent advocacy groups, and had written many letters to various local newspapers on education-related issues. She had also filed human rights complaints and freedom of information requests involving the school board. Several witnesses at the trial gave testimony as to the acrimonious nature of the defendant's relationship with the school system in the years prior to the action.

The evidence at trial indicated that, in February of 2003, the defendant established a website on which she posted information under such categories as "B.C.'s Least Wanted Educators", "Bully Educators" and "Bully Parents". Several of the plaintiffs were listed on the website under these categories. The defendant sent out large numbers of email outlining allegations against the plaintiffs to recipients who included supervisors, principals and government officials. Several of the allegations were very serious, including alleged RCMP investigations.

The court began by summarizing the law of defamation, noting that "the essence of a defamatory statement is its tendency to injure a person's reputation". In a defamation action, the plaintiff bears the onus of establishing that the alleged defamatory words were written and published, that they referred to the plaintiff, and that they were, in fact, defamatory. The burden then shifts to the defendant to prove justification for the statements. The court held that the statements were defamatory because the defendant had made her website publicly known, including making it known to the media, and the allegations published on the website and in her emails were without merit.

Further, although no arguments regarding justification were made because the defendant was absent, the judge could find nothing in the evidence that would suggest that such a defence would be available to the defendant.

In awarding damages, the court outlined the factors to be considered: the plaintiff's conduct, position and standing; the nature of the defamation; the mode and extent of publication; the absence of any retraction or apology; and, the whole of the defendant's conduct from the time of publication to trial. The judge noted that each plaintiff's situation was unique and damages should therefore be determined on an individual basis. Accordingly, damages in amounts ranging from $1,000.00 to $150,000.00 were set depending on the severity of the defamatory accusations and the impact that they had on each plaintiff. The court also awarded $50,000.00 in punitive damages to be shared between the plaintiffs on the basis that "the defendant had published the defamatory statements in the context of a prolonged and sustained campaign of character assassination against each of them". Finally, the court awarded injunctive relief, prohibiting the defendant from continuing to publish defamatory statements against the plaintiffs.

This case highlights the remedies available when baseless defamatory accusations or allegations are made against public officials. —

Commission may refuse to refer if settlement offer reasonable

In *Losenno v. Ontario (Human Rights Commission)*, [2005] O.J. No. 4315 (C.A.), the Ontario Court of Appeal dismissed Losenno's appeal of the Divisional Court's decision to dismiss his application seeking a review of the Ontario Human Rights Commission's (Commission) decision not to refer his complaint to the Human Rights Tribunal (Tribunal).

Losenno filed a complaint with the Commission alleging that his employer, Metroland, had discriminated against him on the basis of physical disability, contrary to the *Human Rights Code* (Ontario). The Commission conducted two investigations but did not refer the case to the Tribunal because Losenno had refused to accept a reasonable settlement offer.

The Court applied the standard of patent unreasonableness to review the Commission's decision, because the decision not to refer was within the core jurisdiction and expertise of the Commission. The Court found that the decision of the Commission was not patently unreasonable in this case.

Further, the Court found that the disclosure of the settlement in the Judicial Review process did not violate the Mediation Agreement between the parties.

The Court held that it was proper for the Commission to consider whether the settlement offer was reasonable, and was consistent with the Code and with decisions of the Tribunal, when deciding whether to refer the complaint to the Tribunal.

The Court also found that the Commission had complied with its duty of procedural fairness. The Commission was required to provide notice to the parties of the facts, arguments and considerations upon which its decision would be based and to allow the parties to make submissions. The Commission was not required to disclose to the parties the actual correspondence from the other side, so long as the parties knew the case they had to meet.

Despite the stigma of human rights cases, it is beneficial for consideration to be given to settlement in order to avoid a costly investigation and possibly a public hearing. —

Human rights case refused because beyond timeline

In *Robertson v. Vernon School District No. 22*, [2005] B.C.H.R.T.D. No. 453, the B.C. Human Rights Tribunal dismissed a complainant's request that it hear his complaint, which was filed after the expiration of the six-month time limit for filing complaints.

The complainant had applied for a job with the respondent school board in 1994 and was refused a position. Each subsequent year he had applied again. He filed a complaint alleging that the Board had discriminated against him with respect to employment on the grounds of age, sex and place of origin. The B.C. *Human Rights Code* required that complaints be filed within six months of the alleged discriminatory events, with exceptions for claims of "continuing contravention" or of public interest, both at the discretion of the Tribunal.

The Tribunal concluded that the relied-upon complaint only related to the 1994 job application and therefore there was no "continuing contravention". Therefore, in order to justify an exercise of the Tribunal's discretion to allow the complaint to go forward, the complainant was required to provide extraordinary reasons for filing his complaint 10 years after the limitation had expired. The Tribunal found that there was insufficient evidence to justify the delay and dismissed the complaint.

The Ontario *Human Rights Code* provides a similar time limitation for filing a complaint with the Human Rights Commission. The Code gives the Commission the discretion to dismiss a complaint when "*the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay*".

Many education cases are alleged to be continuous and, therefore, respondent school boards must often defend complaints based on events that might have taken place 10 to 15 years before, or by staff who have subsequently moved on. —

Decision preventing transfer student from playing football upheld

In *Hammond v. Hamilton-Wentworth District School Board et al.*, [2005] O.J. No. 5139, a former student returning to the Board after graduating from an American high school brought an unsuccessful motion for an injunction prohibiting the school and sports authorities from applying a transfer policy that would prevent him from playing football at his new school. The plaintiff attended a school within the jurisdiction of the Board from grades 9 through 11 and played on the school's football team in grades 10 and 11. He then transferred to a school in Pennsylvania for his grade 12 year in order to be free from a peer group that had a negative influence on his academic performance. In Pennsylvania, his academic performance improved substantially and he was considered to be an outstanding player on that school's football team. Upon his graduation and return to Canada, the plaintiff learned that in order to be accepted into the business school at McMaster University he would be required to complete a calculus course. To meet the requirements of the program and to improve his overall academic record, the plaintiff re-registered for a further year of studies with the respondent Board.

The plaintiff attempted to join the school's football team to increase his chances of winning a scholarship or bursary for universities in Canada and the U.S. However, the plaintiff was ruled ineligible to play in regular league competition based on the Ontario Federation of School Athletic Association's (OFSAA) Transfer Policy, which had been adopted by the Hamilton-Wentworth Interscholastic Athletic Council of the Hamilton-Wentworth District School Board (Athletic Council). The Transfer Policy deemed a transfer student automatically ineligible to play on a school team for one year following transfer, subject to certain exceptions. The prohibition could only be overcome by pursuing an appeal process in which the onus would be on the student to establish that he or she fell within one or more of six exceptions.

The plaintiff appealed under the exception for major academic program needs, which was defined as a series of related courses unattainable at the previous school but necessary for entrance to a specific post-secondary goal. The Athletic Council's by-laws provided for the right of appeal to the Athletic Council, the Southern Ontario Secondary Schools Association (SOSSA) and to OFSAA. The plaintiff appealed unsuccessfully to all three administrative bodies, and then brought the motion before the Court.

The Judge applied the three-part test set out by the Supreme Court of Canada in *RJR Macdonald Inc.* for interlocutory injunctions.

On the first issue (whether there was a serious issue to be tried), the Judge found that there was no evidence to support the plaintiff's assertion that the hearing by the OFSAA Board of Reference had been inconsistent with the principles of natural justice and lacked procedural fairness. Further, the Judge found that there was no evidence to support the allegations that the Executive Director of OFSAA was biased against the plaintiff and tainted the OFSAA Board of Reference. The Judge also noted that, in previous decisions when the court has been called on to review the OFSAA Transfer Policy, the function of the Court was to determine whether the decision was patently unreasonable, and not to comment on the wisdom of the policy itself.

In its decision, the OFSAA Board of Reference had found that the plaintiff's current course of studies did not fall within the exception, as he was required to demonstrate that he was ineligible for college or university entrance, not that he was ineligible for a

particular post-secondary programme, such as business or medicine. The Court held that it was not unreasonable for the OFSAA Board to interpret the provision as it did, and noted that the interpretation was consistent with the Notes explaining the Policy. The Court concluded that the decision of the OFSAA Board of Reference was not patently unreasonable.

Since the plaintiff failed to establish a strong *prima facie* case, there was no need to apply the second and third parts of the test. The Court noted, however, that the balance of convenience in this case would have favoured the defendant, because there was a strong public-interest component to the transfer policy in ensuring fairness in high school athletics and promoting participation among students, which would have outweighed the plaintiff's personal interests.

Participation in athletic events continues to be a significant issue for students in secondary schools. Clear policies and rights of appeal help to ensure fairness, which is recognized by the courts as an important public policy function. —

IPC mistakenly releases confidential records

The issue in *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, [2005] A.J. No. 1776, was the accidental release of information by the Information and Privacy Commissioner.

In the Fall of 2005, the Information and Privacy Commissioner of Alberta presided over an inquiry in which records from the Alberta Labour Relations Board were received. Prior to rendering a decision, a representative of the Commissioner's office inadvertently forwarded the records in question to the appellant, the Alberta Federation of Labour. The Federation, upon receipt of the records and believing the documents were no longer being held in confidence, forwarded the documents to its 350 union leaders. Three of the mistakenly released documents then became the centre piece of a front-page story in the Edmonton Journal.

Following the publication of the documents, the Commissioner filed an application with the Court of Queen's Bench seeking an order declaring any documents in the Commissioner's possession to be subject to privilege. The Commissioner also filed an application for an injunction to enforce the privilege and protect the confidentiality of the records that were released.

The Commissioner argued that a document in its possession should be given "statutory privilege" akin to the solicitor-client privilege. Further, the Commissioner argued that, even though the Federation received the three documents, it should have realized they were of a privileged nature and should not have released the documents until the Commissioner had published its decision with respect to the Inquiry.

The Court found that section 58 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) only conferred immunity from legal action. The Court held that, if the Legislature had intended for such a privilege to attach, it would have made it clear in the wording of the statute. The Court noted that, while the Act had a significant gap with respect to determining the legal status of documents while in the hands of the Commissioner, the Court was not prepared to correct the flaw by granting the Commissioner's requested order creating a new category of privilege.

Since the records in the possession of the Commissioner did not attract privilege pursuant to section 58 of FIPPA, there were no grounds upon which to grant injunctive relief.

The Court also commented that, once the Federation forwarded the documents to the 350 union leaders, the information contained within each document ceased to be confidential and any harm that could have resulted from the release of the information to the Federation had already occurred. This further negated the need for injunctive relief.

The Ontario legislation contains provisions requiring that information coming into the Commissioner's possession remain confidential. It is questionable whether a Court in Ontario would interpret the provision as attracting privilege, as argued in Alberta. —

IPC fee decision critical of school board

In *Order MO-1980; Toronto District School Board*, [2005] O.I.P.C. No. 158 (Ontario Information and Privacy Commissioner), the appellant, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, sought access to records regarding the operating costs and revenues of the Continuing Education Community Programs of the Toronto District School Board, which had been cancelled by the Board.

The Board initially provided a fee estimate of $6,000.00 to compile the records requested. The appellant appealed

the fee estimate and requested that the Board waive the fee. The Board denied the waiver and the requestor appealed this decision to the Information and Privacy Commissioner. Mediation of the fee appeal was unsuccessful, and the Board subsequently revised the cost estimate to $5,195,576.00, and the matter proceeded to adjudication.

The Commissioner noted that when an institution receives a request for information, the institution is required to provide an estimate to the requestor of the fee for the request if it is over $25.00. If the fee will be in excess of $100.00, the institution may require the requestor to pay a deposit of 50% of the estimate. The requestor may choose to proceed with the request, appeal the fee estimate, refine the request, or abandon the request. The Commissioner also noted that by issuing an "interim access decision" setting out the fee estimate and providing an indication as to whether or not access is likely to be granted, an institution can issue a fee estimate even when it has not made a final determination regarding access. The interim decision may be based on a review of a representative sample of the records or following consultation with a knowledgeable employee. The information provided to the requestor must be sufficient to allow him/her to make an informed decision regarding the payment of fees.

The Commissioner found that the Board did not comply with the Act in making its initial fee estimate because its response was delayed. Further, the Commissioner found that, when the Board did respond, it did not provide an access decision to the requestor or any explanation of how it had arrived at the fee estimated; it did not specify whether the response was interim or final; and it did not meet the statutory requirements for either an interim or final decision. The Commissioner held that the Board had not issued an access decision, but had created a reasonable expectation that some information would be released.

The IPC held that it was unfair for the Board to change the fee estimate from $6,000.00 to $5,195,576.00 within a year, since the requestor had relied on the initial estimate in deciding to follow the appeal route. Further, the Commissioner argued that allowing the Board to increase the fee in this manner, the excessive delays, and the prohibitive fee all undermined the integrity and defeated the purpose of the Act.

The Board was ordered to issue a final access decision and to re-calculate the fee estimate, to a maximum of $6,000.00. The Commissioner noted that the fee would actually exceed $6,000.00, and included the cap as a result of the Board's delays and failure to comply with the Act. The Board was further required to provide a breakdown of the final fee and the method of its calculation.

The appellant's request for a waiver of the fee, however, was denied by the Commissioner.

This decision highlights the importance of ensuring that obligations pursuant to the Act are strictly adhered to, or the Commissioner could potentially sanction a School Board by limiting the fee it would otherwise be paid. —

U.S. court strikes creationism in curriculum

In *Kitzmiller v. Dover Area School District*, Case No. 04cv2688 (U.S. District Court for the Middle District of Pennsylvania), the Court once again dealt with the issue of creationism in curriculum.

In the Fall of 2004, the Directors of the Dover Area School District Board, located in Dover, Pennsylvania, voted 6 to 3 to include a statement in the grade 9 science curriculum that pointed out the flaws in the Darwinian theory of evolution and posited "intelligent design" as a legitimate alternative theory. The change was in response to the concerns of certain members of the Board regarding teaching evolution as fact rather than as theory. As a result of the resolution, the three Board members in the minority resigned, and science teachers refused to read the statement to their grade 9 science classes, leaving the task to school administrators.

In December of 2004, the American Civil Liberties Union filed suit on behalf of 11 Dover-area parents challenging the Board's intelligent design resolution. Following a highly publicized trial, the Federal Court concluded that intelligent design was nothing less than the progeny of creationism, and found that the religious nature of the intelligent-design theory would be readily apparent to an objective adult or child. The Court held that the Board's intention behind the resolution was to promote religion in the public school classroom which constituted a violation of the Establishment Clause, which constitutionally protects the separation of church and state. —

Leave denied in human rights complaint involving homophobic bullying

In *North Vancouver School District No. 44 v. Jubran*, [2005] S.C.C.A. No. 260, the Supreme Court of Canada denied the applicant (North Vancouver School District) leave to appeal the B.C. Court of Appeal's decision in favour of the complainant, Azmi Jubran. The complainant had been successful in a complaint filed with the B.C. Human Rights Tribunal alleging that the respondent school district discriminated against him on the basis of sexual orientation. The complainant, who does not identify himself as homosexual, was the object of homophobic bullying at his secondary school, and he alleged that the school did not do enough to prevent the bullying. The Tribunal found that the complainant's actual sexual orientation was irrelevant and concluded that the respondent failed to provide a harassment-free environment.

On appeal to the Superior Court, in a decision covered in the March 2003 Edu-Law Newsletter (Vol. 1, Issue 1), the school district was successful in overturning the Tribunal's decision.

The complainant appealed to the B.C. Court of Appeal and was successful in having the Tribunal's decision reinstated. In concluding that the school district was discriminatory in failing to ensure that the school environment was free of homophobic bullying and harassment, the Court of Appeal noted that the Tribunal had found that the school staff was implementing a disciplinary approach that was not effective, and that the school district lacked resources to adopt a broader, educative approach to deal with the difficult issues of harassment, homophobia and discrimination. The Court of Appeal's decision was covered in the June 2005 Edu-Law Newsletter (Vol. 3, Issue 2).

Since the Supreme Court denied leave to appeal, the Court of Appeal's conclusions are final. —

Autism Human Rights Tribunal

In two decisions of the Human Rights Tribunal in *Arzem v. Ontario*, 2005 HRTO 42 and 2005 HRTO 43, the Tribunal sought assistance from the parties with respect to who should be provided with notice of the complaints, as well as their scope and potential role.

The complaints were filed against the Ontario Government with respect to its failure to fund Intensive Behaviour Intervention (IBI) therapy for children with autism over the age of six. School boards in the province do not provide IBI therapy in the classroom, which leaves children over the age of six without government-funded IBI therapy.

The complaints were referred by the Commission to the Tribunal for a hearing and determination.

The relevant school boards were not named as parties to the complaints. The Tribunal itself was concerned that school boards and bargaining agents had not been provided with notice of the complaint and that any potential outcome of the complaints would undoubtedly effect their interests. Further, the Tribunal was struggling to decide whether or not to name the school boards as parties pursuant to the Tribunal's powers to add parties under section 39 of the *Human Rights Code* (Ontario). Accordingly, the Tribunal sought submissions from the parties on three issues: determining whether or not notice should be given to school boards and bargaining agents; identifying the proper parties; and, determining the extent to which school boards and bargaining agents should participate in the process.

After reviewing the submissions, the Tribunal concluded that notice should be provided to school boards and bargaining agents, as each of these parties could potentially be impacted by any decision ultimately reached by the Tribunal. Further, the Tribunal held that counsel for the Commission and for the complainants were the proper parties to provide such notice thereby determining which school boards and unions would receive notice. Finally, all parties were ordered to provide school boards and bargaining agents with copies of relevant pleadings and, where appropriate, any disclosure to date. Deadlines for the orders and for the school boards' and unions' responses were set in a short decision that followed.

The responses of the school boards and unions have been filed, as well as responses from the existing parties. At publication, the decision of the Tribunal is still reserved. The decision will be reviewed in a future Newsletter. —

Professional Development Corner

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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April 30, May 1 & 2, 2006

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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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