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Edu-Law Newsletter —

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Supreme Court deals with Kirpan issue

In *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] SCJ No. 6, the Supreme Court examined the issue of Canadian Sikhs wearing ceremonial Kirpans in the classroom, and was asked to analyze the intersection between a student's freedom of religion and the importance of school safety and security.

The Commissioners of the respondent school had refused to allow the claimant to wear his metal Kirpan, which is a ceremonial metal dagger, under any circumstances, and the student and his father alleged that his human rights under both the Canadian *Charter* and Quebec's *Charter of Rights and Freedoms* had been violated. While both the majority and the dissent agreed that the claimant's rights on the basis of his religious belief had been violated, the Supreme Court split on the issue of whether the analysis of this breach should be conducted as a review using administrative law principles or as a review under the Canadian *Charter of Rights and Freedoms*. The majority supported the latter position and concluded that the school's refusal to accommodate the claimant's religious belief was a violation of his right to freedom of religion pursuant to s. 2(a) of the *Charter* and that the violation was not saved by s. 1 (reasonable limits demonstrably justified in a free and democratic society).

The school negotiated a compromise with the student and his father, whereby the student would wear his Kirpan concealed under his clothes. The Multanis were amenable to this arrangement, however, the school Commissioners refused to ratify this agreement, insisting that a metal Kirpan proved a threat to the safety of the school and was in violation of its rule against weapons. The Multanis filed a motion in the Superior Court seeking a declaratory judgment that the school's decision was of no force and effect, and were successful on this motion. On appeal, the Quebec Court of Appeal concluded that the decision violated s. 2(a) of the *Charter* as well as the Quebec *Charter*, but the violation was saved pursuant to s. 1 of the *Charter* and a similar provision in the Quebec *Charter*.

The majority of the Supreme Court concluded that the Court of Appeal's analysis of the administrative law principles was inadequate and lead to an erroneous conclusion. While judicial review may involve an administrative law component *and* a constitutional law component, the central issue in this appeal was whether the Commissioners' decision violated the *Charter*. The Supreme Court clarified that the jurisdiction of the Commissioners to make the decision was not at issue, nor was the rule prohibiting weapons in schools being challenged.

The Supreme Court addressed a preliminary argument made by the Province that the Court of Appeal erred in finding a violation of s. 2(a) because the guarantee had inherent limitations. The Supreme Court disagreed. While agreeing that the right to freedom of religion is not absolute, the Supreme Court asserted that any balancing of the right with other interests should be done in the context of a Section 1 analysis. In reviewing whether there was a violation of the right to freedom of religion, the Court applied a standard of a sincerely-held belief. The Supreme Court upheld the Trial Judge's finding of fact that the appellant sincerely believed that he was required, among other faith-based obligations, to carry a metal Kirpan. The fact that other Sikhs felt comfortable substituting a wooden or plastic Kirpan was irrelevant because the guarantee recognized varying degrees of rigour with respect to religious practices and dogma.

Having made out a violation of the right, the Supreme Court conducted a Section 1 analysis. The Court easily concluded that the Commissioners' objective of ensuring "*an environment conducive to the development and learning of the students*" and "*the safety of students and staff*" was pressing and substantial. Further, the prohibition against the Kirpan, which does have the characteristics of a bladed weapon despite its religious significance for Sikhs, was rationally connected to the objective.

Having made out the first two principles of the test set out by the Court in a previous decision named *Oakes*, the Court turned to the minimal impairment requirement. The Court set out the framework for the test by explaining that a respondent does not have to present the most minimally impairing alternative, but the chosen method must fall into a "*range of reasonable alternatives*". The Commissioners argued that a metal Kirpan in the school raised a risk that another student could use it as a weapon, that it could lead to a proliferation of weapons in the school, and that it could have a negative impact on the school environment.

With respect to its use as a weapon by another student, the Court concluded that under the restrictions that the appellant had initially agreed to, it was very unlikely that another student would access the Kirpan. Further, other school jurisdictions (Ontario) allowed metal Kirpans with no incidents of violence. Finally, the Court distinguished case law where prohibitions against Kirpans have been upheld on the basis that, in those contexts (courts and airplanes), safety was different from schools. The Court addressed the Commissioners' argument regarding the proliferation of weapons also finding that, under the restrictions agreed to by the appellant, the allegations of the potential dangers involved in carrying a Kirpan were without sufficient basis.

Finally, the Court examined the Commissioners' contention that allowing a Kirpan into the classroom would contribute to a negative school environment. The Supreme Court concluded that the assertion that a negative message will be sent because the Kirpan is a symbol of violence fails to respect Canadian multicultural values. Charron J. wrote "*If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is...at the very foundation of our democracy*". Having set aside the Commissioners' arguments, the Supreme Court found that they had failed the minimal impairment test and therefore the violation of s. 2(a) was not saved by s. 1.

Multani can be seen as recognition that a school board's obligations with respect to protecting fundamental rights and encouraging multiculturalism will not be casually set aside on unsupported grounds of school safety. With respect to the legal analysis, the Supreme Court confirmed that a constitutional analysis must be undertaken when determining fundamental rights in the context of an administrative decision.

These issues were effectively dealt with in Ontario under the *Ontario Human Rights Code* in the early `90s. The Ontario Human Rights Tribunal decided that Sikh students and employees have the right to wear a Kirpan in school subject to specific limitations, including: that the length of the Kirpan is subject to limitations; that the Kirpan is secured and worn under clothing; that the student or employee must declare to the Principal that the Kirpan is being worn; and other requirements. The decision of the Tribunal is reported in *Peel Board of Education v. Ontario Human Rights Commission* (1990), 12 CHRR D/364. The matter was appealed to the Divisional Court, and the decision of the Tribunal was upheld. This is reported in *Pandori v. Peel Board of Education*, 80 DLR (4th) 475 (Div. Ct.). The Court of Appeal refused leaved to appeal (28 ACWS (3d) 1068). As a result of this series of decisions, the issue of Kirpans in schools in Ontario has been well settled for 15 years. To our knowledge, there have not been any incidents in schools with respect to the use of Kirpans in an inappropriate manner. This is certainly referred to in the decision of the Supreme Court of Canada in *Multani*. —

B.C. Human Rights Tribunal finds liability against both school board and province in special education case

In *Moore v. British Columbia (Ministry of Education) and School District No. 44*, [2005] B.C.H.R.T.D. No. 580, in a lengthy decision of the British Columbia Human Rights Tribunal, the Complainant was successful in claiming discrimination by the Ministry and the School District, both personally and systemically, as a child with a severe learning disability ("SLD").

The Complainant had attended a school in the jurisdiction of School District No. 44 from Junior Kindergarten (Sept. 1991) through Grade 3. In Grade 2, he was diagnosed with severe dyslexia. The Complainant challenged the practices and policies of the Ministry and the way in which the District and Ministry met their obligations under the *School Act*.

The following is a selective review of the services and accommodations that had been provided to the Complainant.

- in Kindergarten and Grades 1 and 2, he was referred to the Elementary Learning Resource Team (ELRT), which was responsible for assessment and consultation;
- in Kindergarten; he underwent a screening test to identify students who might have trouble acquiring literacy skills;
- in Kindergarten and Grades 1, 2 and 3; he received individual assistance from a Special Education Teacher and volunteer, and in Grades 2 and 3, he received assistance from an Educational Assistant.
- in Grade 2, the ELRT recommended that he attend the District Diagnostic Centre (DC1), which provided programs for students with SLDs for a two-year period, after which they would return to their home school. DC1 was closed shortly thereafter. In March of Grade 2, the Complainant was diagnosed with dyslexia following a full psychological assessment (prior to this, it was the professional opinion of the School District that he was too young to undergo a full assessment);
- by the end of his Grade 3 year, the Complainant's performance was equivalent to a student in early- to mid-Grade 2 level. The following year, he attended a private school for students with learning disabilities.

The Tribunal held that the service in issue was public education, which was offered by both the Ministry and the District. The Tribunal also held that the case was more appropriately analyzed from the perspective that, without supports and accommodations being offered to the complainant and other children with SLDs, they would be unable to benefit from the education system offered to all students, just as deaf people require sign language to effectively access medical services. The Tribunal commented that the "*goal of special education services is to ensure that sufficient supports are in place to allow a student with special needs to access the core curriculum*".

The Tribunal held that there was a *prima facie* case of discrimination against the individual complainant, regardless of the test for discrimination applied. The Tribunal also held that focussing on a comparator group analysis would not be helpful or necessary, but that if it were required to find one, the comparator group would be all students attending public schools and accessing public education services in B.C. who did not require additional supports and accommodations to do so. The Tribunal also found that there was a *prima facie* case of systemic discrimination. Neither the District nor the Ministry were able to establish undue hardship.

The Tribunal found that the District had discriminated against the Complainant in the following ways: firstly, by not providing interventions early enough or intensively enough to properly accommodate his disability; secondly, the District should have known about the importance of phonemic awareness although it was not well known by the teaching profession at the time; thirdly, by not providing him with an individual needs based assessment; fourthly, by not providing Orton-Gillingham or another similar reading program within the District; fifthly, by not following their own recommendation that he attend the DC1 and not ensuring that following the closure of DC1, that other sufficiently intensive and effective intervention replaced it.

With respect to all SLD students that attended the District, the Tribunal found that the District had systemically discriminated against them in the following ways: one, by closing the DC1 without ensuring that other sufficiently intensive interventions were available thereafter; two, by not ensuring that there was a range of services for SLD students adequate to meet their needs; three, by disproportionately cutting core services for SLD students.

The Tribunal found with respect to the Ministry that it imposed little systemic accountability, did not audit school districts to ensure special programs met the needs of individual students or groups of students, and failed to mandate early intervention or a range of services.

With respect to remedies, the Tribunal noted its own lack of expertise in determining the appropriate pedagogical approach to remediating SLDs and deferred to the Ministry and District with respect to their expertise or access to expertise to remedy "their failure to provide the appropriate strategies for SLD students".

The District and Ministry were ordered to, within one year of the decision, (i) establish mechanisms to determine whether its delivery of services to SLD students was appropriate and meeting the stated goals of the *School Act* and relevant policies; (ii) to have in place an early intervention program so SLD students could be identified early and provided with appropriate intensive remediation services; and (iii) to have in place a range of services to meet the needs of its SLD students.

Unfortunately, while the Decision was in reserve, significant changes were made to the delivery of programs and services for SLD, and these changes have not been tested against the principles set out in the Decision. The Decision is presently subject to judicial review.

Perhaps the most interesting aspect is the potential liability of the Province in similar situations. The principles applied with respect to the liability of the Board and the Province will likely surface again. —

Another cyberspace defamation liability case

The Alberta Court of Queen's Bench in *Angle v. LaPierre*, [2006] A.J. No. 304, recently released its judgment in a combined action involving alleged defamatory statements. The action evolved from the impugned publication of several Alberta Teachers' Association's 'cease and desist' letters sent to specific parents, and the comments regarding those letters on the defendants' website, titled SchoolWorks!. At trial, SchoolWorks! and Mr. Denis LaPierre, one of the defendants, admitted to publishing the letters on the website. It was determined at trial that Mr. LaPierre was the directing mind and will of SchoolWorks!, which had constant postings critiquing the teachers, schools and boards of Alberta.

The action was comprised of two parts. The first arose after Liam McGowan, a young boy, began attending Grade 1 at Crescent Valley School in 1998/1999. Liam's parents did not agree with certain aspects of school policy at Crescent Valley, and sought to reform school policy to the point where animosity between the parents and the school principal, Mr. Angle, caused other parents to seek the assistance of Denis LaPierre and SchoolWorks! Inc., while the Principal enlisted the support of the Alberta Teachers' Association ("ATA").

The ATA sent the McGowans a 'cease and desist' letter. The letter mandated them to stop their personal attacks on school administrators. Upon receipt of the letter, the McGowans forwarded it to SchoolWorks!, which immediately published the letter on its website, along with the McGowans' responses and defamatory comments.

The case of Cleary Reid, a Grade 9 student at Lindsay Thurber Composite High School, formed the second part of the action. Before attending Lindsay Thurber H.S., Cleary had received an assessment that suggested he be placed in the "Strategies Program", a program intended to assist special-needs students in attaining a better performance in regular course work. Cleary's mother, Robyn Reid, complained about the placement of Cleary in the Strategies Program. The complaints continued even after Cleary showed a marked improvement in his Grade 9 core classes. Ms. Reid eventually appealed the decision to place Cleary in the Strategies Program, but her appeals were denied. The interventions with staff also caused the Alberta Teachers' Association to send a 'cease and desist' letter to Ms. Reid. The letter and Ms. Reid's response to it were subsequently published on the SchoolWorks! website.

The Alberta Court of Queen's Bench in delivering its decision reviewed in detail the defence of qualified privilege. It had been the defendants' belief that they had not defamed the ATA or the other plaintiffs. The defendants believed that they were protected by qualified privilege when they posted the 'cease and desist' letters on the SchoolWorks! website with their corresponding comments. The Court, however, found that when Mr. LaPierre and SchoolWorks! published the letters on the world-wide web, qualified privilege was no longer a viable defence.

To be protected by qualified privilege, a publisher must ensure that the audience for his publication is one that has an interest or duty with respect to the content of the publication. A publication that is distributed beyond those who have a reciprocal interest or duty cannot be said to be protected by qualified privilege. The Court concluded that Mr. LaPierre did not have the protection of qualified privilege at the time he published the materials from the McGowans and Ms. Reid. Mr. LaPierre and SchoolWorks! were therefore liable for defaming the plaintiffs.

Defamation has become a significant concern among administrators with an increasing number of parents threatening to "go to the press" with their complaints. Fortunately, most reputable newspapers and other press are careful not to publish defamatory statements.

This decision can also be compared to the decision in *Newman v. Halstead*, reviewed in "Cyberspace defamation results in damage award against parent" (Edu-Law Newsletter, Feb. 2006, Vol. 4, Issue 1). —

Court of Appeal disagrees with drug searches using canines

In 2002, police attended a high school in Sarnia and conducted a warrantless, random search of the school with the assistance of a "sniffer" dog. During the course of the search, the police were directed to the backpack of A.M., and proceeded to inspect it. The police found marijuana and psilocybin in the backpack, and A.M. was charged with possession for the purpose of trafficking with respect to both drugs.

At trial, counsel for A.M. moved to exclude the evidence of the drugs found in the backpack on the basis that the search by the police was unreasonable and, therefore, offended section 8 of the *Charter* (right to be secure against unreasonable search or seizure). The Trial Judge agreed and acquitted A.M. of the charges (see "School Search by police contrary to Charter", Edu-Law Newsletter, Oct. 2004, Vol. 2, Issue 3). The Crown appealed the acquittal and the Ontario Court of Appeal recently dismissed the appeal in *R. v. A.M.*, [2006] O.J. No. 1663.

The Court of Appeal rejected the Crown's argument that the police were acting as agents of the school authorities. The Court focussed on the fact that no school authority had requested the presence of the police on the day of the search. Further, neither the principal nor any other staff member played an active role in the search or provided any direction. The fact that two years earlier the principal had issued a standing invitation to the police to search the school with sniffer dogs was not enough, in the opinion of the Court, to turn the search of A.M.'s backpack into a search by school authorities. The Court affirmed the Trial Judge's decision that the search was a police search.

The Crown argued that, since A.M. had left his backpack unattended in the school gymnasium on the day of the search, his expectation of privacy "was so significantly diminished as to be negligible". The Court of Appeal disagreed, and confirmed that a student's backpack should be afforded at least the same degree of respect as an adult's briefcase. The Court of Appeal held that A.M. had a legitimate expectation of privacy in his backpack.

The Court of Appeal found that the search was warrantless. The Court of Appeal referred to the passage in *R. v. M.R.M.* in which the Supreme Court states that the modified standard regarding a search by school authorities does not apply to police who wish to search a person at school. The Court of Appeal found that there were no provisions in the *Education Act*, the provincial *Code of Conduct*, or the school board's zero-tolerance policy towards drugs which gave the required authority to conduct a warrantless, random search.

The Court of Appeal noted that the entire student population was detained in their classroom for a period of one and a half to two hours in order to facilitate the search, and that there were no reasonable grounds to detain the students, nor any credible information to suggest that a search was justified.

The Court of Appeal held that there were no reasonable grounds upon which to justify a warrantless, random search with the entire student body held in detention. The Court did not deal with the circumstances where the principal has a reasonable suspicion that a student is trafficking or in possession of drugs in the school and whether this justifies a search using dogs. —

Supreme Court clarifies vicarious liability

In *Blackwater v. Plint*, [2005] S.C.J. No. 59, the Supreme Court of Canada heard an appeal related to four actions, which had been commenced in 1996 by 27 former residents of the Alberni Indian Residential School (AIRS) in B.C. alleging sexual abuse and other harm. The plaintiffs had been children when they were taken from their families to the school, which had been established by the Presbyterian Church of Canada, a predecessor to the United Church, in 1891 to provide elementary and secondary education to Aboriginal children whose families lived in remote areas. They were cut off from their families and culture. They were made to speak English, were disciplined by corporal punishment and some were "repeatedly and brutally sexually assaulted."

The trial judge found that all claims except those of a sexual nature were time barred. A dormitory supervisor, Plint, was found liable to six plaintiffs for sexual assault; Canada was found liable for those assaults on the basis of breach of non-delegable statutory duty; and Canada (75%) and the United Church (25%) were found jointly and vicariously liable for the assaults. General, aggravated and punitive damages were awarded, as was a future counselling fee in varying amounts to the plaintiffs. All parties appealed to the B.C. Court of Appeal [B.C.C.A.], which applied a doctrine of charitable immunity to exempt the Church from all liability; granted one of the plaintiffs a new trial; and increased damages for two. This was an appeal by the plaintiff, Barney, and Canada to the Supreme Court.

The Supreme Court of Canada allowed the appeal, holding that the Court of Appeal had erred in finding that the Church was protected by the doctrine of charitable immunity and that the trial judge had erred in finding a non-delegable statutory duty on Canada. The Supreme Court upheld the trial judge's findings on negligence, vicarious liability, breach of fiduciary duty and the assessment of damages.

With respect to negligence, the Court held that both the Church and Canada were sufficiently proximate to the plaintiffs to owe a duty of care. The standard applied was what Canada and the Church knew or ought to have known as judged by the standards at the time, i.e. was the risk of sexual assault of the children reasonably foreseeable at the time. The Court held that there was no evidence to find that the harm was foreseeable at the time; that the persons responsible knew about the sexual assaults; or that there was constructive knowledge of a foreseeable risk to the children at that time. Both the trial judge and the Court of Appeal were thus correct in not finding negligence.

With respect to vicarious liability, the Court held that the Church and Canada were vicariously liable for the wrongful acts of Plint, a dormitory supervisor. The Court clarified that "*[v]icarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires...The fact that wrongful acts may occur is a cost of business*".

In deciding whether to impose vicarious liability, the Court listed several factors that should be considered: "*(a) the opportunity afforded by the employer's enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer's interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of the potential victims*".

In finding the Church vicariously liable, the Court considered the following. First, the Church had a significant role in running the school – it hired, fired and supervised employees for Canada and was involved to meet its own ends of promoting Christian education. Second, the Church ran the dormitory and other parts of the school, whether or not that fell into the formal definition of its objectives in its involvement with the school. Third, joint vicarious liability was held to be acceptable where there was a partnership, as was found by the trial judge in the present case.

With respect to the doctrine of charitable immunity, the Court held that the Court of Appeal had erred in finding that the Church would be exempt from liability on the basis of this doctrine. The Court of Appeal had, in effect, created a limited status-based exemption from liability for non-profit organizations based on a misapprehension of vicarious liability and the decisions of the Supreme Court in *Bazley v. Curry*, [1999] 2 S.C.R. 534, and *Jacobi v. Griffiths*, [1999] 2 SCR 570.

The Court also held that a non-delegable duty could not be inferred from the *Indian Act*, and noted that the power of the Minister to enter agreements with religious organizations made the duty clearly delegable. There was no positive duty imposed by the *Act* to ensure the health and safety of children in residential schools.

No fiduciary duty was found.

The apportionment of damages imposed by the trial judge of 75% to Canada and 25% to the Church was upheld. General damages of $125,000.00, $20,000.00 in aggravated damages and $25,000.00 in punitive damages as against Plint were upheld. Damages in the amount of $20,000.00 for loss of future opportunity were also upheld.

Obviously, school boards should be aware of the principles of vicarious liability. Appropriate policies and supervision of employees can help to minimize the risk of liability. —

Court effectively eliminates right of public agency to sue for defamation

Montague (Township) v. Page, [2006] O.J. No. 331 was a motion for summary judgement brought by the defendant Page for an order dismissing the plaintiff's action for defamation. The defendant was successful. The Court granted a declaration that a government entity is not entitled to bring an action for defamation against a private citizen, as such an action would be contrary to section 2(b) (freedom of thought, belief, opinion and expression) of the *Charter*. The Court held that absolute privilege was granted to members of the public to criticize government, except in small communities where the identities of individual members of the government are readily known, in which case defamatory statements about the government may reasonably be understood to be defamatory of the individuals in government and those individuals would have a cause of action. Otherwise, the Court held, governments are to respond to such publications and statements through the political process.

The plaintiff was a municipal corporation governed by the Ontario *Municipal Act*. The defendant was a resident of the Township.

The defendant had written letters and made public statements in which he criticized the actions of the Montague fire services in handling a fatal fire. He made specific allegations, for example, regarding training and the subsequent handling of the matter.

The Court noted that there was no binding decision in Ontario as to whether a government could bring an action in defamation against citizens, but held that the common law of defamation should be interpreted in a manner consistent with the *Charter*. Neither the defendant nor the intervenor contested the right of individuals elected to office to sue for defamation.

With respect to section 2(b), the Court found that it would be inconsistent with that provision for a government entity to bring a civil action for defamation against one of its citizens. The Court held the risk that a governing body would use defamation as a tool to inhibit criticism of institutional government activities, thereby inhibiting free speech, outweighed the risk of allowing such criticism.

In reaching its conclusion, the Court considered the following factors: the inequality of resources between a government and a citizen; the use of public funds obtained through taxation of the public to sue members of the public; the right of individuals to sue for defamation would mitigate the concern about recruiting the best for public life and would acknowledge that people who enter public life have an expectation of public scrutiny and criticism. The Court noted that in smaller communities where the identities of individuals are readily known, defamatory statements about the government "*may be reasonably understood to refer to every member of that government, in which case every member may have a cause of action*".

The Court held that "*every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government...If government were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms*".

The Court noted that false statements, especially those made with malicious intent, would be exposed through the political process and would be discredited in that way. The defence of fair comment, although adequate for litigation between two private litigants, did not, according to the Court, meet concerns about the risk to free speech for citizens or the cost they would incur in defending a suit brought by the government. The defence of qualified privilege similarly did not address the potential chilling effect on legitimate criticism of the government. Rather, the Court held that citizens ought to be granted an absolute privilege against the threat of action for defamation. The Court concluded that an action by the government against a citizen for defamation would be contrary to section 2(b).

This decision would be applicable to school boards. Nevertheless, a board could be a party to an action together with individuals subjected to the defamation where one of the issues is restraint from entering property and/or restraint of further publications; for example, to shut down a defamatory website. —

Another Court confirms principles from *Montague*

In *Halton Hills (Town) v. Kerouac*, [2006] O.J. No. 1473, the issue before the Court was substantially the same as that in *Montague*. The defendant, Kerouac, successfully brought a motion to strike the claim for defamation brought by the Town as disclosing no cause of action. The defendant, an internet-based news purveyor, had called the plaintiff Terry Alyman "corrupt" in connection with his work for the Town. The Court held that since the advent of section 2(b) of the *Charter*, a governmental body was no longer able to bring an action in defamation against a citizen. The Court noted that "*the authority and respect now accorded to local governments brings them closer to constitutionally recognized legislative bodies...they are subject to the same public law values that constrain the Provinces and the federal government, at least in respect to democratic values*". The Court also noted that governments do not have private reputations or private interests but rather "*exist wholly in the public domain*". In reaching its conclusion that statements about government are absolutely privileged at common law and protected by section 2(b), the Court held that:

"The reason for the prohibition of defamation suits by government lies not with the use of taxes, or with some abstruse theory about the indivisibility of the state and the people who make up the state. Rather, it lies in the nature of democracy itself. Governments are accountable to the people through the ballot box, and not to judges or juries in courts of law. When a government is criticized, its recourse is in the public domain, not the courts. The government may not imprison, or fine, or sue, those who criticize it. The government may respond. This is fundamental. Litigation is a form of force, and the government must not silence its critics by force". —

Divisional Court deals with procedural issues in special education judicial review

Ismail v. Toronto District School Board, [2006] O.J. No. 1162 (Feb. 23, 2006), was a motion for an interim stay of a decision of the Special Education Tribunal regarding the educational placement of a 14 year old student with Down Syndrome. The motion was brought by his mother to maintain the student in a regular class for the full school day. The student had been placed in a special education placement in his home school in the morning and in a regular classroom in the afternoon. He had previously been placed in the regular classroom for the full day. Since the decision was made by the Tribunal, his mother had not complied with the Tribunal's Order, but the student had been attending the regular class in the afternoon.

The hearing was to be two months from the date of the motion. A single Judge of the Divisional Court held that the student would not suffer irreparable harm if he was not placed in the regular classroom for full days in the interim. The Court also held that it would be inappropriate for the Board to suggest proceedings for contempt or unclean hands against the mother for not complying with the Tribunal's order.

The Court noted the absence of up-to-date assessments of the student's academic and social functioning and Counsel agreed to provide same to the Court. The Court also provided a framework for choosing a psychologist to perform a psychological assessment prior to the hearing.

In its subsequent decision dated April 24, 2006, [2006] O.J. No. 1867, a panel of three judges of the Divisional Court held that the new assessment could not form part of the material before it on judicial review or part of counsels' submissions. The Court proceeded with the application for judicial review without the new material. —

Court of Appeal confirms dismissal of claim by employee

In *Heald v. Toronto District School Board*, [2006] O.J. No. 478 the Ontario Court of Appeal dismissed the appellant's appeal, upholding the decision of the trial judge (reviewed in "Employee's obsessive behaviour leads to action and dismissal of claim", Edu-Law Newsletter, June 2004, Volume 2, Issue 2) that the appellant had failed to establish any causes of action. The appellant had made several claims related to a fire at Downsview Public School in 1994, including that the Board had defamed him because of his position with respect to the fire and that the Board had been negligent in its reaction to the fire.

Fresh evidence adduced before the Court was not of assistance. The Court noted that the trial judge had intervened in the proceedings more than would be desirable, but held that this did not give rise to a reasonable apprehension of bias. Further, no denial of natural justice was disclosed by the trial record.

The Court set aside the trial judge's cost award, substituting costs to the respondent in the amount of $200,000.00, inclusive of GST and disbursements.

The applicant filed for leave to appeal to the Supreme Court of Canada on April 10, 2006 ([2006] S.C.C.A. No. 130). —

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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Friday, October 20, 2006

Keel Cottrelle LLP Complimentary Session: **"Special Education"**

Capitol Banquet Centre, Mississauga, Ontario

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