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Education Law Newsletter

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Hate Speech provision of Saskatchewan's Human Rights Code upheld as Constitutional after striking out a portion

In the recent unanimous Supreme Court of Canada (SCC) decision, *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, the SCC once again considered the constitutionality of certain hate speech provisions in Provincial human rights legislation.

In 2001 and 2002, Whatcott published and distributed four flyers which stated, among other things, that *"homosexuals want to share their filth and propaganda with Saskatchewan's children"*; that *"Sodomites are 430 times more likely to acquire AIDS and 3 times more likely to sexually abuse children!"*; that *"If Saskatchewan's sodomites have their way, your school board will be celebrating buggery too!"* and that *"Our children will pay the price in disease, death, abuse…if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong."*

Four individuals, who received these flyers at their homes, filed Complaints with the Saskatchewan Human Rights Commission. They alleged that the material promoted hatred against individuals because of their sexual orientation, thereby violating s. 14 of the

Saskatchewan Human Rights Code (*Code*). The Commission appointed a Human Rights Tribunal to hear the Complaints.

Section 14 of the *Code*, provides:

14. (1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

…

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

The Saskatchewan Human Rights Tribunal (Tribunal) held that all four flyers exposed homosexuals to hatred and ordered Whatcott to stop distributing them and to pay fines for his actions. Whatcott appealed the Tribunal's decision to the Saskatchewan Court of Queen's Bench, which upheld the Tribunal's holding. Whatcott appealed to the Saskatchewan Court of Appeal, which overturned the Queen's Bench decision, holding that s. 14 of the *Code* was constitutional and regardless, the flyers had not contravened the section. Next, the Saskatchewan Human Rights Commission appealed to the SCC, with the questions at issue being:

1) whether s. 14(1)(b) of the *Code* breached the freedom of expression and religion protections provided by the *Canadian Charter of Rights and Freedoms* (*Charter*); and

2) if so, whether the violations could be justified under section 1 of the *Charter*?

The SCC upheld s. 14(1)(b) of the *Code* as a reasonable limit on free speech and freedom of religion, but struck the phrase "ridicules, belittles or otherwise affronts the dignity of" from the provision for not being rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. Further, the Court found that the phrase "ridicules, belittles or otherwise affronts the dignity of" did not minimally impair freedom of expression or freedom of religion. The Court reasoned once those words were severed from s. 14(1)(b), however, that the remaining prohibition was not overbroad.

The SCC wrote that:

Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(b) of the Charter: R. v. Khawaja, 2012 SCC 69, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other Charter rights, the exercise or protection of which may infringe freedom of expression.

Further, the SCC wrote that:

Framing speech as arising in a moral context or within a public policy debate does not cleanse it of its harmful effect. Finding that certain expression falls within political speech does not close off the enquiry into whether the expression constitutes hate speech. Hate speech may often arise as a part of a larger public discourse but it is speech of a restrictive and exclusionary kind. Political expression contributes to our democracy by encouraging the exchange of opposing views. Hate speech is antithetical to this objective in that it shuts down dialogue by making it difficult or impossible for members of the vulnerable group to respond, thereby stifling discourse.

The SCC concluded that the Tribunal did not unreasonably fail to give proper weight to the importance of protecting expression that *"is part of an ongoing debate on sexual morality and public policy"* nor was the Tribunal's approach of isolating excerpts of the flyers for examination and its finding that the *"flyers criticized sexual orientation and not simply sexual behaviour"* unreasonable.

The SCC reasoned that genuine concerns about sexual activity would not likely fall within the purview of a prohibition against hate. The Court wrote that:

If Mr. Whatcott's message was that those who engage in sexual practices not leading to procreation should not be hired as teachers or that such practices should not be discussed as part of the school curriculum, his expression would not implicate an identifiable group. If, however, he chooses to direct his expression at sexual behaviour by those of a certain sexual orientation, his expression must be assessed against the hatred definition in the same manner as if his expression was targeted at those of a certain race or religion.

The SCC concluded that the Tribunal's conclusions with respect to two of the flyers were reasonable, as the flyers exposed homosexuals to hatred in that *"the message which a reasonable person would take away from the flyers is that homosexuals, by virtue of their sexual orientation are inferior, untrustworthy and seek to proselytize and convert our children. "* The SCC, however, found the other two flyers did not rise to the level of communicating hate, as they would be unlikely to expose persons of same-sex orientation to detestation and vilification.

The SCC held that by striking the appropriate phrase from s.14(1)(b) of the *Code*, the provision would no longer contravene the *Charter*, and allowed the appeal in part by reinstating the Tribunal's decision with respect to two of the flyers.

This case demonstrates the SCC grappling with the ongoing importance to Canadians of balancing the *Charter* protected freedom of expression and freedom of religion rights against the prohibition of hate speech found in human rights legislation.

Court confirms s. 23 minority language rights

The British Columbia Supreme Court recently considered the issue of minority language educational facilities guaranteed by Section 23 of the *Canadian Charter of Rights and Freedoms* (*Charter*) in *L'Association des parents de l'ecole Rose-des-vents v. Conseil scolaire francophone de la Colombie-Britannique*, [2012] BCJ No 2247 (BC Sup Ct.).

The petitioners, representatives of parents living in the City of Vancouver, argued that the only Francophone elementary School in the relevant catchment area, Rose-des-vents, was not equivalent to those provided to Anglophone students in Vancouver, contrary to s. 23 of the *Charter*. The petitioners sought a remedy under s. 24 of the *Charter* for the alleged breach of their constitutional rights and an Order setting aside certain funding decisions made by the Minister of Education. The challenge to the funding decisions was a separate action pursuant to the *Judicial Review Procedure Act*.

The petitioners cited a number of inadequacies with the Francophone School including:

i) the elementary School shared a common site with a secondary school resulting in sharing of facilities between the secondary and elementary Schools including classrooms, washrooms, workshop, gymnasium and music room as well as increased close interaction between elementary and secondary students;

ii) limited space for a growing francophone student population, with a lengthy waitlist for acceptance at the daycare and after school programme, both attractive features to enrollment in the Francophone education system and essential for its success;

iii) the majority of classrooms not meeting the Ministry of Education's standards for recommended classroom size;

iv) a small and inadequate library; and

v) inadequate number of washrooms, with frequent line-ups.

As a result of the numerous inadequacies, the petitioners argued that there had been parents who decided not to enroll their children after examining the facilities, affecting the long-term success of the Francophone education system. Transportation was also cited as an inadequacy, as the majority of Francophone elementary students were transported to school by bus with lengthy bus rides of approximately 45 minutes to 1 hour one way.

The Anglophone Schools by comparison were described as more attractive and aesthetically pleasing, larger and more functional with ample playgrounds, large libraries and that most had multi-use classrooms.

In reviewing the rights provided under s. 23 of the *Charter* and jurisprudence on this issue, the Court highlighted that "*the Constitution requires the provision of full and complete education to minority language students where numbers warrant, not a limited, partial or truncated education, not an inferior or second-class education*". The Court accepted the submissions of the petitioners that, once sufficient student numbers existed for an elementary School, the rights-holders were entitled to an elementary school that was, at minimum, equivalent to that provided to Anglophone students.

Based on various factors including the evidence of inadequate facilities, overcrowding and long travel times, the Court determined that there was an unmet demand for Francophone facilities. The Court further acknowledged that the disparity in educational services was contributing to a lower enrolment in the Francophone program and to assimilation which is contrary to the purpose of the constitutional guarantee established by Section 23. The Court granted the petitioners declaration and retained jurisdiction to hear applications for further relief.

Court confirms safety trumps human rights

The reasonable accommodation of a student's disability was the subject matter of a recent Human Rights Complaint in *Holy Trinity Roman Catholic School Division (cob Ecole St. Margaret School)*(School Division) *v. Prisciak*, [2012] S.J. No. 484.

The student, H.M., who suffered from congenital fibre disproportion, required parental assistance to and from school and to class. In the past, the school accommodated his disability by providing his parents with a key to the door closest to the designated handicapped parking spot and his classroom.

In October 2006, however, the new Principal implemented a locked door policy for the security of the School and the safety of students and staff, that required all doors but the main front entrance to be locked at all times during the school day. Consequently, the School required the return of the parents' key to the east door. The parents were provided with the options of either entering through the front entrance or phoning ahead of time and having their son's aide meet them at the door closest to the handicapped parking spot. The parents continued to request a key to the east door, or alternatively, that a keypad be installed to permit

access to the east door. The refusal of both requests led to the Complaint. The parents believed that the options caused hardship on their family and argued that the School Division's decision was contrary to the *Saskatchewan Human Rights Code*.

The parents filed a Complaint with the Human Rights Commission that was subsequently dismissed on the basis that the School was reasonable in implementing a locked door policy, that the specified form of accommodation requested by the parents was not feasible and that the accommodation provided by the school was appropriate. In arriving at this decision the Chief Commissioner reviewed established case law on the duty to accommodate and the "undue hardship" defence, the submissions of the parties, particularly the School Division's submissions regarding incidents of vagrants entering the School, and concluded that the School had met the onus of proving that the locked-door policy was in the best interests of all students and staff at the School.

The parents requested a further review of the Decision, which allowed the matter to proceed to an Inquiry on the basis that the Chief Commissioner failed to provide sufficient reasons for the basis for his Decision such that it could not be determined whether the Decision was reasonable.

The Saskatchewan Queen's Bench disagreed, affirming the Chief Commissioners' Decision and concluding that sufficient reasons for dismissing the Complaint were provided based on the undue hardship the requested accommodation would cause to the School. The Queen's Bench highlighted that "*safety can constitute undue hardship and clearly it was in this case*" and quashed the Decision ordering an Inquiry.

This decision confirms the "safety" override for Human Rights.

Tribunal finds School Board met its duty to accommodate a student with severe disabilities

In *A.N. v Hamilton-Wentworth District School Board*, 2013 HRTO 67, the Ontario Human Rights Tribunal (Tribunal) dealt with a consolidated hearing with respect to allegations of discrimination on the basis of ethnic origin, disability, family status and association with a person identified by a *Code* ground, in the area of goods, services and facilities. The Applications were brought by A.N. by her next friend M.N. (A.N.'s father), and B.W. (A.N.'s mother).

A.N. has various severe disabilities and was enrolled as a student with the Respondent, Hamilton-Wentworth District School Board (Board). B.W. is employed with the Board as a Special Education (SE) Teacher at Sir Winston Churchill Secondary School (SWCSS).

The Applicants alleged that the Board failed to provide A.N. with appropriate accommodations relating to her disability, refused to allow her to be placed in her mother's SE class, and failed to take steps to engage her parents in a dialogue concerning the manner in which the Board would accommodate her disability-related needs.

The Applicants further alleged that the Board subjected B.W. to discrimination on the basis of family status by refusing to permit A.N. to be placed in her SE class, and by excluding her from being involved in A.N.'s education, as a parent, because she was teaching a SE class at SWCSS. The Applicants also alleged that the Board engaged in reprisal against B.W. in response to her requests that it cease the discrimination and that B.W. was subjected to increasing criticism and ostracism after she requested that A.N. be placed in her class, and after A.N.'s Application was filed with the Tribunal.

The Board denied violating any of A.N.'s rights under the *Code* and submitted that it used

professional judgment to determine the best class placements for A.N. The Board further submitted that it was against its policy to place students in classes taught by their parents, although the Tribunal noted it was not a written policy. Moreover, the Board asserted it continually worked with A.N.'s parents in respect of A.N.'s placement. Last, the Board denied violating any of B.W.'s rights under the *Code*, including that it engaged in any reprisals against B.W.

The Tribunal noted that some of the issues addressed in its Decision turned on its assessment of the credibility of the Applicant B.W. and the witnesses, and observed that the Applicants had not produced any evidence of discrimination on the basis of ethnic origin, which had been included in the Application.

The Tribunal reviewed the evidence at length and concluded it was satisfied that the Board offered reasonable and appropriate accommodation with respect to A.N.'s class placements, having regard to her disability-related needs. In the Tribunal's view, *"the [A]pplicants [did] not present any cogent evidence that A.N. suffered any regression in development, or exhibited negative behaviours, as a result of the [R]espondent's action or inaction, including by not placing A.N. in B.W.'s class."* Further, the Tribunal found M.N.'s and B.W.'s suggestion that A.N. had an increase in "meltdowns" due to a lack of accommodation on the part of the Board to be overly speculative.

In its reasons, the Tribunal referred to a previous Tribunal decision, *E.P. v Ottawa Catholic School Board*, 2011 HRTO 657, that involved allegations that a School Board failed to accommodate a student's special needs. The Tribunal noted that in that case, *"the Tribunal referred to the Education Act, R.S.O. 1990, c. E.2 and commented that [t]he statutory scheme sets outs the procedural steps and the recommendations of the IPRC and/or found in the IEP will generally be the substantive accommodations offered."*

The Tribunal in the present case, found on the evidence that an Identification, Placement and Review Committee (IPRC) meeting had been held and that A.N.'s parents attended, along with the Board's Principal of Special Education, two Special Education Consultants, a Psychological Consultant, the Vice-Principal and Principal at SWCSS and a Teacher from A.N.'s previous school.

The Tribunal found that at the IPRC meeting, medical, psychological and other reports pertaining to A.N. were reviewed and the Board's SE staff subsequently determined that the best placement for A.N. would be in an Autism class at another school. Further, the Tribunal found the evidence did not support M.N.'s contention that placement in an Autism class would have been a "step backwards" for A.N. Rather, it appeared to the Tribunal that A.N.'s parents were simply determined that A.N. be placed in B.W.'s class, or at least at SWCSS.

The Tribunal held that the Board did not fail to accommodate A.N.'s disability-related needs or otherwise discriminate against her on the basis of disability and or family status, by denying her parents' request that she be taught by B.W. The Tribunal not only found that the Applicants did not establish a *prima facie* case of discrimination on the basis of family status, in relation to A.N. not being placed in B.W.'s class, but found that the Board in fact provided reasonable and appropriate accommodation for A.N. Moreover, the Tribunal held that the Board established a reasonable justification for **not** permitting A.N. to be placed in B.W.'s class. The Tribunal concluded that neither A.N. nor B.W. were subjected to any discrimination, including a failure to accommodate, with respect to A.N.'s class placements.

The Tribunal further found that A.N. was not subjected to any discrimination, or a failure to accommodate her disability-related needs, with respect to transition planning when she started school with the Board, nor with the Boards provision of Applied Behavioural Analysis (ABA).

Based on the evidence before it, the Tribunal found that the Board did face some challenges concerning A.N.'s programming at SWCSS, but held *"that these challenges were more likely than not as a result of A.N.'s parents insisting that A.N. attend SWCSS, rather than an Autism class at HPSS, which was determined by the respondent to be the best placement for A.N. In addition, it appears that the respondent used its available resources to address the programming challenges it faced with A.N."*

Further, the Tribunal found that the Board and A.N.'s Teachers did take steps to engage A.N.'s parents in a dialogue concerning accommodating A.N.'s disability-related needs. Lastly, the Tribunal found that B.W. failed to establish her allegation of reprisal. The Tribunal dismissed the Application for the above reasons.

This Decision demonstrates that a Board may successfully accommodate a Student with severe and varied disabilities. Further, the Decision serves as a reminder that a Board's policies should be in writing in order to protect the interests of the Board and its employees.

HRTO awards Interim Remedy to Student seeking Re-Integration to School

In the Interim Decision, *R.B. v Keewatin-Patricia District School Board*, 2012 HRTO 130, the Human Rights Tribunal of Ontario (Tribunal) heard the Request for Interim Remedy of R.B., represented by his next friend S.F. (R.B.'s mother). A hearing was scheduled for February 19, 2013, and for March 20-22, 2013.

The Application alleges that R.B., a 9-year-old student in grade 3, was discriminated against by the Respondent, Keewatin-Patricia District School Board (Board) during the 2011/2012 and 2012/2013 school years: when it failed to accommodate his disability at school, when it disciplined him for disability-related behaviours, when it excluded him from School, when it failed to provide an appropriate education during an absence from school in May and June 2012 and during the period of exclusion. The Application also alleged acts of reprisal by the Board, most of which involved S.F. In his request for Interim Remedy R.B. requested a return to School and a full-time Educational Assistant (EA).

R.B. was excluded from School by the Principal on October 22, 2012 for inappropriate behaviour including using profanity, spitting, yelling, cutting a child's sweatshirt, stomping on a child's leg, throwing material, and being non-compliant with his Teacher, Educational Assistant, Vice-Principal and Principal. The Notice of Exclusion stated R.B.'s return to School was conditional upon the completion of a psychological assessment by the School's psychologist, Dr. Stambrook, and the Board being confident R.B.'s return would not compromise the physical and mental well-being of R.B. and his classmates.

Dr. Stambrook completed his assessment of R.B. on November 12, 2012, and reviewed his findings with S.F. on November 26, 2012. In his report dated November 26, 2012, Dr. Stambrook noted that R.B.'s diagnoses occur in the context of a lack of trust between S.F. and the School, as well as custody/access issues that are ongoing between S.F. and her former spouse, and made the following recommendations of the steps required to transition R.B. back to School:

a) R.B. should be in an integrated school environment with a full-time EA shared in the classroom;

b) R.B. requires a formal behaviour/feeling management plan that reinforces appropriate behaviour in all domains and has a proportional intervention process when his behaviour is discordant and at risk to himself and others. This plan will need to be professionally developed and signed off by the guardian, his mother and the School.

c) R.B. requires an up-to-date review of his academic and learning skills to assist in the titration of his current program.

d) There should be a single point of contact for S.F. and the School Board. The Superintendent of Education was suggested as that contact person.

e) There should be regularly scheduled meetings every four to six weeks (included in the report of November 12, 2012).

f) There should be no further e-mail contact between S.F. and the School Board.

g) There should be regular contact between S.F. and the School teacher via the school journal.

Dr. Stambrook further recommended that the transition process **not** begin until the human rights issues between S.F. and the Board had been resolved.

On November 30, 2013, the Superintendent of Education for the Board wrote to S.F. and advised her that it was prepared to implement Dr. Stambrook's recommendations and return R.B. to School on the conditions that S.F. agree to Dr. Stambrook's recommendations, and that the human rights process be completed. S.F. objected to the Board's requirement that R.B. would not be able to return to School until the Human Rights proceeding concluded.

On January 11, 2013, the Applicant filed a Request for Interim Remedy with the Tribunal seeking an Order to transition R.B. back to School on a gradual basis with the assistance of a full-time EA.

The Tribunal applied the test for awarding an Interim Remedy and found there would be significant harm to R.B. in denying the Interim Remedy. The Tribunal wrote *"It is beyond dispute that excluding a nine-year-old child from school for an entire school year causes irreparable harm that cannot be compensated by three hours of instruction per week, especially when that child has the kind of complex needs that R.B. has. While R.B. may not have suffered irreparable harm today, he will no doubt experience irreparable harm if he is not returned to school until September 2013. The respondent's psychologist agrees with the applicant's specialists that R.B. should be back in school."*

The Tribunal found any potential harm to the Board would be in returning R.B. to School prematurely, before a transition plan could be properly implemented, but concluded that the balance of harm favoured R.B. The Tribunal ordered R.B. be transitioned back to School on the terms recommended by Dr. Stambrook, with the exception of his suggestion that the transition be delayed until the conclusion of the human rights process. The Tribunal agreed that resolution of the human rights issues would give R.B. the greatest chance of success, but found that resolution did not appear to be possible at this time and that a final decision at the end of litigation may not help the parties either.

The Tribunal Ordered the terms for re-integration be implemented by February 15, 2013. The Tribunal held that R.B.'s behaviour management plan should be completed at the Board's expense. The Tribunal concluded that the timetable would allow R.B. to return to School on February 19, 2013, but left it to the parties to determine whether R.B. should return on a graduated basis. Further, the Tribunal noted that the transition plan was contingent on S.F., agreeing to Dr. Stambrook's recommendations.

The Tribunal declined to order the further Interim Remedy of Increasing R.B.'s home instruction. The Tribunal did, however, agree that certain documents requested by the Applicant related to the 2011/2013, 2012/2013 school years must be produced by the Board, and delivered to the Applicant, if they exist.

This case demonstrates the Tribunal's efforts to balance the right of a child to attend School, and

the prerogative of a School trying to keep all students safe.

H.R. Tribunal grants Interim Order for bussing based on disability of parent

An allegation of discrimination in the provision of student transportation services on the basis of a parent's disability was central to a recent Interim Decision of the Human Rights Tribunal of Ontario in *T.B. v. Halton District School Board* (Board) *and Halton Student Transportation Services* (HSTS), 2013 HRTO 304.

The Applicant, T.B., a mother of two children who attend an elementary school in the Board, stated that she had a permanent spinal cord injury that caused extensive pain and affected her mobility. The Applicant stated that due to her disability she was unable to consistently drop off and pick up her children from their designated bus stop and requested a bus stop closer to her home. As a result of her mobility issues, the Applicant claimed that her children had missed significant days of school and, in the case of the youngest child in junior kindergarten, did not attend school but rather remained in daycare.

HSTS, the non-profit corporation responsible for transportation of students in the Halton region, including students of the Board, denied the Applicant's request on the basis that no legal obligation existed to provide transportation services, except in accordance with HSTS and Board policies, which do not provide for the accommodation of parents' disabilities. HSTS and the Board submitted that the refusal was not in any way based on the Applicant's disability.

The Respondent Board and HSTS submitted that the Applicant's son attended a French Immersion program which was not at his designated home school, but was rather an optional program which provides transportation to eligible students. HSTS and the Board also allowed the Applicant's daughter to attend junior kindergarten at the same school as her brother and receive a courtesy seat on the bus from the home school.

Amongst a number of procedural requests, the Applicant filed a Request to Expedite Proceedings and a Request for an Interim Remedy. With respect to the Interim Remedy, T.B. sought an order that the Respondents add a temporary bus stop to the existing route, either at a nearby intersection or in front of her residential complex. In support of the request, T.B. submitted that her physician confirmed that she could not walk the required distances to meet the bus at the regular stop; as well as a declaration that stated that T.B. previously received the assistance of a friend and her son to transport her children to and from the bus stop, but that was no longer available, and that she was not in a financial position to hire a taxi. T.B. also noted that she applied for funding to purchase a scooter which, once received, would allow her to travel to and from the bus stop and therefore she would no longer require the special stop.

The Respondents argued that the issues in the case had recently been determined by the Tribunal in *Contini v. Rainbow District School Board,* 2012 HRTO 295, *(Contini),* where a similar allegation of discrimination on the basis of a parent's disability was alleged and dismissed by the Tribunal. The Respondents further submitted that the addition of the bus stop on an interim basis would create confusion and potential safety risks for existing riders, and if granted, would be an inappropriate preliminary determination of the matters at issue and adversely affect the fair and just resolution of the merits.

The Tribunal reviewed the three-part test for granting an interim remedy, where it must be satisfied that: a) the Application appears to have

merit; b) the balance of harm or convenience favours granting the interim remedy requested; and c) it is just and appropriate in the circumstances to do so.

Applying the three-part test to the facts, the Tribunal distinguished *Contini*, rejected the Respondents submissions, and held that: (i) the Applicant had an arguable case and that the Application had merit; (ii) the potential harm to the Applicant's children in missing school outweighed the harm, if any, to the Board and HSTS in granting the interim remedy; and (iii) that it was just and necessary in the circumstances to grant the Applicant's request.

The Tribunal required T.B. to advise the Respondents immediately if she obtained a scooter that allowed her to accompany the children to their bus stop for transportation to the French Immersion School and determined that, once the scooter was received, the Interim Order for the bus stop near the Applicant's residence would automatically cease. The Request to Expedite was denied.

This Interim Decision indicates that the issue of parental disability rights in bussing situations has not yet been determined definitively.

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HRTO holds discrimination on the basis of race and colour not proven by student as reason for suspension

At the time of the filing of the Application in *Marshall v Dufferin-Peel Catholic District School Board*, 2013 HRTP 256, the Applicant was a minor and was identified as J.M. in the style of cause. At the time of the hearing the Applicant had reached the age of majority and the Ontario Human Rights Tribunal (Tribunal) ordered that the style of cause identify the applicant by his given name, Jordan Marshall.

The Application alleged discrimination with respect to services on the basis of race and colour against Dufferin-Peel Catholic District School Board (Board). The Applicant self-identifies as black.

In Interim Decision *J.M. v. Dufferin Catholic District School Board*, 2012 HRTO 94, the Tribunal dismissed parts of the Application that concerned events before March 2010, on the basis that they were untimely. At that hearing the parties agreed that there were two remaining allegations of racial discrimination in the Application that were timely: (1) an incident where the Applicant was suspended for five days for touching his teacher Karen De Medeiros (De Medeiros) on March 2, 2010 during a biology class (Suspension); and, (2) the Applicant's participation in an entrepreneurship program organized by his School on Saturdays in the second semester of the 2009/2010 school year (Entrepreneurship Program).

The Applicant was enrolled in De Medeiros' Grade 11 biology class during the 2009/2010 school year. On March 2, 2010, while walking behind De Medeiros, the Applicant touched her backside. The Board investigated the allegation of physical contact and concluded that the Applicant had walked behind De Medeiros' and brushed her with his right shoulder. On March 5, 2010, the Applicant was suspended from School for five days, in accordance with the *Education Act* for *"an act considered by the principal to be injurious to the moral tone of the school"*. The Applicant's parents successfully appealed the suspension and the suspension was expunged from the Applicant's record.

The Applicant completed a grade 11 Entrepreneurship Program in the fall of the 2009/2010 school year. He received the highest academic standing in the class and received the business plan award. The Applicant was encouraged to participate in BizPlan, a program which required weekend attendance at School to work with his mentors on enhancing his business plan. The Applicant had a partner and attended

the first Saturday morning meeting. He did not go to the next meeting and he was late for the following meeting. The Applicant's partner dropped out and the Applicant stopped going altogether following his suspension in March 2010. The Applicant conceded that he was *"a challenging and temperamental student who had a record of suspensions."*

The Tribunal found that the Applicant's testimony and that of his witnesses, amounted to a bald assertion that his race must have been a factor in his suspension. The Tribunal noted that this was not sufficient to establish a violation of the *Code*; nor was the Applicant's own certitude and that of his witnesses that the only explanation for the suspension was racism. The Tribunal wrote that the onus was on the Applicant to show a link between his race and colour and his suspension.

In the absence of any evidence, either direct or circumstantial, showing a connection between the Applicant's suspension and the Applicant's race and colour, the Tribunal concluded that the Applicant failed to make his claim that his suspension was discriminatory within the meaning of the *Code*.

The Tribunal held the Applicant also failed to prove that he experienced any differential treatment by the Respondent relating to the Entrepreneurship Program. The applicant admitted through his testimony that his own actions caused the end of his participation in BizPlan. He stopped attending the Program. Further, the Tribunal concluded that the applicant provided no explanation as to why he stopped attending. In the Tribunal's view it was clear, based on the evidence presented, that the Applicant could not prove discrimination within the meaning of the *Code*. Thus, the Tribunal held that the Application had no reasonable prospect of success and the Application was dismissed.

The decision demonstrates the evidentiary threshold that must be met in showing discrimination under the *Code* and that it is not enough to make unsupported assertions of discrimination.

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H.R. Tribunal rejects request for Interim Remedy due to lack of medical evidence

In *J.L. v. York Region District School Board* (Board), 2012 HRTO 2229, the parent of two Applicant siblings brought an Application to the Human Rights Tribunal of Ontario (Tribunal) alleging that the Board had discriminated against the siblings on the basis of disability by refusing their request to provide bus service. The Applicant sought an interim remedy and expedited proceedings.

The Applicant siblings, in Grades 5 and 7, live within acceptable walking distance in accordance with the Board's transportation policy, and thus were not eligible for bus service from home to school. Both Applicants had been diagnosed with *pes planus*, also known as flat foot, and were prescribed orthotics. The Applicants had been experiencing foot pain which they claimed was exacerbated by carrying heaving backpacks.

Interestingly, the Applicant siblings had received Board-provided bus service up until the previous school year. The Respondents submitted that this was due to an error in determining eligibility for bus service, and that they provided the siblings with a one-year grace period that ended the year before service was discontinued. According to the Applicant, however, this was not a grace period but an accommodation of their *pes planus*.

In support of the requests, the Applicant filed medical evidence consisting of identical physician's notes on a prescription pad and a declaration from the Applicant which stated that the siblings had been experiencing physical pain walking to and from school on a daily basis due

to their disability resulting in frequent lates. The Applicant also submitted that the siblings' pain was aggravated by having to carry heavy backpacks, and filed a study conducted by physiotherapists regarding the average weight of schoolbags for secondary school students in Ireland, in support of their submissions.

The Tribunal denied the request for an Interim Remedy on the basis that there was no medical evidence supporting the Applicant's claim that the siblings were unable to walk the distance to and from school without pain or explaining why the pain could not be alleviated through treatment, requiring accommodation in the form of an exception to the Respondent's bussing policy. The Tribunal noted that the general diagnosis of flat feet from a physician was not sufficient to claim a disability under the Code. "*To be successful, a Code claim of this nature requires, among other things, detailed medical information regarding these children's conditions and the reason they are experiencing pain despite the prescription of orthotics. They must establish that they have a disability within the meaning of the Code*."

The Request for an Expedited Proceeding was also denied, without reasons, in accordance with the Tribunal's *Rules of Procedure*. Among other procedural matters, the Applicant was directed to deliver within 35 days of the Interim Decision to the Respondents and file with the Tribunal any further detailed medical information which they intend to rely upon in support of their Application.

This Interim Decision confirms the requirement to provide appropriate medical information in order to obtain a remedy based on disability.

Human Rights Tribunal deals with disclosure issue

The request for production of a student's Ontario Student Record (OSR) in a Human Rights Application was the subject of the Ontario Human Rights Tribunal (Tribunal) Interim Decision in *C.M. v. Toronto Catholic District School Board* (Board), 2012 HRTO 2307.

The Applicant, J.H., is a grade 5 student enrolled in an elementary school of the Respondent Board. Both of his parents independently commenced Human Rights Applications alleging discrimination in the provision of services on the basis of race, colour, disability and association contrary to the Ontario *Human Rights Code* (*Code*). In a prior Interim Decision, the Tribunal consolidated the two Applications.

The Board requested that the Tribunal order the Applicant's mother and next friend of the Applicant to consent to the Board accessing and using the contents of the Applicant's OSR in order to respond to the allegations raised in the Application. The Board argued that the OSR materials were arguably relevant because the Applicant was, in part, relying on allegations that the Applicant was diagnosed with Attention Deficient and Hyperactivity Disorder (ADHD) and had been discriminated against by the Board due to his/her condition.

A student's OSR is a highly confidential document protected under Section 266 of the *Education Act* wherein it prescribes the individuals entitled to access and use the information contained in the OSR without the written permission or consent of the parent or adult student. Further direction regarding the contents of the OSR is provided by the Ministry of Education's OSR Guideline.

With respect to the production of records generally, the Tribunal indicated that the threshold for production and disclosure of documents before the Tribunal is "arguable relevance"; thus, the party seeking production must prove that some relevance to the Application exists and demonstrate a nexus between the information or document sought and the issues in dispute.

Following a review of Tribunal Decisions, the Tribunal accepted the Board's submissions that there were documents in the Applicant's OSR that could arguably be relevant given that the OSR contains documents that could relate to the interactions between the Board and the Applicant as a student of the Board. The Tribunal considered the Board's request to access the student's entire OSR overly broad, however, and instead limited the request for "*arguably relevant*" documents to documents that related to the student's experience at a specific school during the material times noted in the Application.

The Tribunal considered additional factors, including the fact that the matter was proceeding to a hearing and as such the request was timely, and that the Applicant's Next Friend failed to file a Response to the Board's request providing no clear indication of their position on the issue. Further, the Tribunal directed the Applicant's Next Friend to clarify whether permission to rely on OSR documents in whole or in part was being provided. The Tribunal noted that it was open to it to consider whether the Application should be dismissed as an abuse of process if consent was not provided as well as to dismiss the Application as abandoned if the Applicant failed to comply with the Tribunal's Interim Decision.

This Interim Decision reinforces the principles relating to disclosure, as well as the implications for an Applicant not complying with Tribunal Interim Decisions.

Parent held liable for damages based on defamatory emails about her child's teacher

In a decision by the Court of Quebec (Civil Division), *Lukawecki v. Bayly*, [2012] QJ No 9922, the Court dealt with the issue of whether a parent could be found liable toward one of her child's teachers for damages allegedly caused to the teacher's reputation resulting from a series of emails which purportedly describe and complain about the teacher's behaviour.

The Plaintiff, Francois Lukawecki, is a teacher who has worked at Bancroft Elementary School since 2001. The Defendant, Johanne Bayly, is the parent of the student attending the School, which student was taught by the Plaintiff.

The Plaintiff alleged that after an incident occurring in October 2007 (the October 2007 Incident), the Defendant organized a malicious campaign to destroy his reputation. The Plaintiff alleged that, in response to the October 2007 Incident, the Defendant sent various emails attacking the Plaintiff and that without his knowledge, these emails contained defamatory statements. The Plaintiff sought $10,000 in compensation for damages to his reputation caused by Bayly, as well as punitive damages in the amount of $5,000.

The Defendant filed a lengthy Defence, which expanded on the issue of defamation alleged by the Plaintiff to include a detailed assertion of the political context that prevailed at the School as well as the Parent Participation Organization (PPO) of the School, the involvement of the English Montreal School Board and of the Montreal Teachers Association (MTA) against her husband, Julien Feldman (Mr. Feldman) and herself.

The Defendant also filed a Cross-Demand claiming moral damages of $20,000.00 and punitive damages of $10,000.00 for the Plaintiff's allegedly abusive behaviour towards her during the October 2007 Incident.

The Court reviewed the two incidents leading up to the October 2007 Incident. In September 2007, the Defendant and Plaintiff met for the first time at the parent teacher interviews. At that time, the Defendant asked the Plaintiff to refrain from giving her daughter candy at the end of his class. The Plaintiff said he would think

about it. The Defendant promptly emailed the Principal of the School to complain. The next incident occurred when the Defendant took issue with the Plaintiff requesting that Scholastic Book purchases be paid by parents in cash, so that he could pay for the books on his credit card, to collect air miles. The Defendant again emailed the Principal to complain.

The October 2007 Incident occurred when the Plaintiff declined to let the Defendant take pictures for the PPO newsletter of children auditioning for the School's talent show. The parties gave conflicting evidence on how the matter was handled and who said what, but the Court concluded it did not believe the Defendant's version of events. The Court found that the Plaintiff appropriately refused to allow the photos to be taken based on the School's photo policy. This conclusion led the Court to determine that *"in all probabilities, several of the allegations made by [the Defendant] in her Emails about the October 24th Incident and [the Plaintiff's] behaviour were essentially false and groundless."*

The Court held the demand to be granted in part and dismissed the cross-demand by the Defendant. The Court awarded $5,000 in moral damages to compensate the Plaintiff for damage caused to his reputation by the Defendant. To establish that amount, the Court took into consideration the gravity of the defamatory statements, the fact that they were essentially false, the obvious objectives sought by the Defendant and the fact that the Internet was used, a tool that facilitates widespread distribution. The Court found that the Defendant attempted to cast an image of the Plaintiff as a "bad teacher", a person who should not deserve the confidence of the School and of his peers.

The Court concluded that *"Taken as a whole, these statements definitely constitute remarks that cause someone [the readers] to lose in estimation or consideration, or that prompt unfavourable or unpleasant feelings toward [the Plaintiff]. Moreover, an ordinary person would believe that those remarks, when viewed as a whole, brought discredit to [the Plaintiff's] reputation. There is no doubt about it in the mind of the Court."*

The Court held that the worst insinuations in the emails related to the Defendant questioning repeatedly the safety of her daughter at the School in the presence of her teacher, the Plaintiff. In choosing to send the emails in the manner and to the extent that she did, the Defendant acted maliciously and committed an act against the Plaintiff that triggered her civil liability.

The Court reasoned that *"in our society, teachers who are entrusted with our children hold a unique and very special position, a position that entails a high level of responsibilities. But first and foremost, teachers must, at all times, enjoy and maintain an excellent reputation. A teacher's reputation is particularly crucial given his special role and responsibilities in society."*

In addition to moral damages, the Court awarded punitive damages against the Defendant in the amount of $5,000. In determining this award, the Court took into consideration: the nature and the gravity of the Defendant's defamatory remarks; the period of time during which they were made; the various persons targeted in order to maximize the obvious consequences on the Plaintiff's reputation and career; the fact that the Plaintiff was intentionally kept out of the various exchanges; and that he never did anything during that period of time to fuel the Defendant's *"growing rage or outrage"* towards him. In conclusion the Court determined that the evidence did not support in any manner, any wrongful behaviour on the part of the Plaintiff that would trigger his civil liability towards the Defendant.

Although decided in the context of the Quebec Civil Code, this case is a reminder of the risks involved in communicating ideas or beliefs about another person using social media or

email, even if one believes their opinion to be truthful.

Student did not show requisite nexus between the Board's failure to sufficiently discipline earlier assault and the injuries he sustained from subsequent assault

In *Jackson (Litigation guardian of) v. Okanagan Similkameen School District No. 53*, [2013] BCJ No 229, the British Columbia Supreme Court heard an action for negligence by a former student, Tylor Jackson, who had sustained injuries as a result of an assault by another student, Makwalla Hall. The essence of the alleged negligence was that the Okanagan Similkameen School District No. 53 (School District) fell below the standard of care of a prudent and careful parent when it failed to discipline Makwalla, in accordance with the School District's Progressive Discipline Model (PDM), for an altercation with another student which occurred seven months prior to the assault in question. As a consequence for that earlier incident Makwalla was given a one half-day "in school" suspension and written notification of the incident was sent to his parent. Tragically, Makwalla Hall died in a rodeo accident in July 2010.

The Defendant, the Board of Trustees of the School District (Board) sought summary dismissal of the claim on the basis of the Plaintiff not having proved the causal link between the earlier incident and the one in question. The Board conceded the existence of a duty of care between the School District and Tylor as well as the cause, nature and extent of Tylor's injuries.

On October 5, 2006, after classes at South Okanagan Secondary School (School) had ended for the day, Makwalla assaulted Tylor in a school corridor. The two boys were in the ninth grade at the time. The assault consisted of a single punch to the left side of Tylor's head, causing him to fall backwards and strike his head on a window. Unfortunately, Tylor sustained a traumatic brain injury from the blow which left him mentally and physically compromised. The assault was preceded by a threat uttered by Makwalla to Tylor in the final class of the day, when Tylor asked Makwalla if he could borrow a pencil. The Plaintiff alleged that had Makwalla been disciplined with a three-to-five day suspension, which it asserted was required by the PDM, it would have served a rehabilitative and deterrent effect which would have likely prevented the later assault on Tylor. Further, the Plaintiff alleged that if Makwalla had received the more severe punishment, it would likely have become known to Tylor and he would have known to take Makwalla's threat seriously and would have reported it.

The Court wrote that *"[i]t is common ground that: (a) the standard of care required of the defendant is that of a careful and prudent parent: see Myers v. Peel (County) Board of Education, [1981] 2 S.C.R. 21; (b) a careful and prudent parent is one who will not expose his or her child to an unreasonable risk of foreseeable harm (Yasinowski (Guardian ad litem) v. Gaudry et al, [1995] B.C.J. No. 1513 (S.C.); and, (c) causation is established by application of the 'but for' test: see Clements v. Clements, 2012 SCC 32 at para 8."*

The Court found the Plaintiff's negligence claim rested principally upon the narrow question of whether the earlier March 2, 2006 incident (Earlier Incident) was a violent act by Makwalla; that is, one which the Vice-Principal wrongly characterized as "physical intimidation" rather than "assault" and, thus, one for which the disciplinary measures taken were inadequate and inconsistent with the School District's PDM. The Court found there to be a lack of evidence related to the Earlier Incident to show this.

The Court found that the Earlier Incident was reported to the Vice-Principal as a "punch" but was later referred to as "physical intimidation" on the Student Referral Form and in the letter to Makwalla's father. The Vice-Principal believed he investigated the incident prior to completing the Student Referral Form and the Court accepted the inference, finding it would make little sense to categorize a reported punch as an act of physical intimation without first investigating. Further, the Vice-Principal inferred from the disciplinary action he took and his decision not to include the Principal, that he had determined the incident was not serious.

The Court was satisfied that the inferences drawn by the Vice-Principal were reasonable and reliable. The Court was unable to conclude that the Plaintiff showed that the Earlier Incident was one which involved a serious and violent act by Makwalla; one for which the disciplinary measures taken were either inadequate or contrary to school policy or the PDM. As this was the foundation of the Plaintiff's case, the Court concluded that the Plaintiff's case could not succeed.

Moreover, the Court found that there was an absence of detail relating to the Earlier Incident which would make it difficult to determine whether the act warranted the imposition of disciplinary measures at the upper end of the continuum for a "first offence" as provided by the PDM. Finally, the Court concluded that even if harsher disciplinary measures than those taken ought to have been brought against Makwalla for the Earlier Incident, it would be unable to *"conclude that the [P]laintiff has established the requisite nexus between that failure and the subsequent assault upon him."*

The Court allowed the Board's summary dismissal of the claim.

This decision is a reminder to ensure that there are Progressive Discipline Models in place and that such models are clearly set out and followed by Board employees. It is also a reminder of the special nature of the legal relationship between Schools and their Students, and that where the requisite nexus is found, a Board may be liable for a Student's injury.

IPC Order deals with GSA speech

In *ORDER MO-2806; Hamilton-Wentworth District School Board*, [2012] O.I.P.C. No. 218, Ontario's Information and Privacy Commission (IPC) considered the appeal of the Board's Decision to deny access to a record related to a speech given at an assembly hosted by the Gay Straight Alliance (GSA) Club at a secondary School of the Board.

The GSA invited a number of speakers from the community to speak at the assembly. Following the assembly, concerns were raised by some parents of students who attended as well as members of the community about the content of one of the speeches made by a specific speaker.

The Board subsequently received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to a speech given by an identified individual during the assembly. The requester claimed that a typed copy of the speech had been kept by the Board as a general record and that all Board Trustees had been given a copy of the speech.

The Board located a responsive record and determined that the record contained personal information of an individual, and as such notified the affected party of the request and sought their views on disclosure of the requested record.

The affected party confirmed that the record contained her personal information, specifically with reference to her religion and marital/family status; employment history; personal opinions and views; and requested that the record not be

disclosed to the requester on the grounds that disclosure would be an unjustified invasion of her personal privacy.

The Board issued a Decision acknowledging the existence of a responsive record which was a portion of an issue note circulated to the Board's Trustees which contained the speaker's speaking notes. Further, the Board noted that the record was not a transcript of the actual speech and that the speech was delivered at a School, in private, to students at a student assembly. The Board denied access to the record based on the mandatory personal privacy exemption in Section 14 of *MFIPPA*.

The requester appealed the Board's Decision arguing that the compelling public interest override in section 16 of *MFIPPA* was applicable to permit disclosure of the record. The IPC reviewed the record, and accepted the submissions of the Board and the affected party that the record contained personal information including the affected party's religion, sexual orientation, marital and family status, employment history, personal opinion or views, all of which qualified as personal information as prescribed in section 2(1) of *MFIPPA*.

Following the determination that the record contained personal information, the IPC considered whether the mandatory exemption at section 14(1), where personal information is prohibited from release unless one of the exceptions, such as not constituting an unjustified invasion of personal privacy, applied to permit disclosure of the record. The Board and the affected party submitted that none of the exceptions applied to warrant disclosure. The appellant, to the contrary, argued that disclosure would not constitute an unjustified invasion of personal privacy as the personal information contained in the record was shared with numerous students and staff at an assembly of the Board. Also, the appellant argued that the disclosure was relevant for the purpose of subjecting the activities of the public institution, specifically the implementation of anti-bullying legislation in Schools and what Schools are teaching students, to public scrutiny.

The IPC concluded that the record contained details of the affected party's work history and personal information relating to her sexual orientation, religious beliefs and associations. Accordingly the disclosure of the record was found to constitute an unjustified invasion of the affected party's personal privacy. Further, the IPC noted that the public interest override did not apply as there was not a sufficient relationship between the record and the public's interest in decision-making with respect to anti-bullying legislation or what Schools Boards are teaching students. The Board's decision to deny access to the record was upheld.

This Order indicates how *MFIPPA* can inter-relate with GSA and public forums in schools.

— KC —

Professional Development Corner

Friday, April 12, 2013

KC LLP Professional Development Session

Special Education / School Operations / Student Discipline Session
at Dufferin-Peel Catholic District School Board

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