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Education Law Newsletter

— September 2013 —

IN THIS ISSUE —

Court deals with practical implications of minority-language funding

In *Conseil Scolaire Fransaskois v. Saskatchewan*, 2013 SKCA 35, the Court heard an Appeal by the Government of Saskatchewan (the Government) from interlocutory injunctive relief awarded in favour of the Respondent, Conseil Scolaire Fransaskois (CSF).

CSF operated French language schools in Saskatchewan. These schools were mandated by the minority language education guarantees found in section 23 of the *Canadian Charter of Rights and Freedoms* (*Charter*) which requires the accommodation of minority language educational rights of French-speaking communities outside Quebec. Under the section, where the number of children of citizens who have such a right is sufficient to warrant the provision of minority language education, the institution must be funded by the province. CSF believed that it had been chronically underfunded by the Government and sought a range of declaratory and injunctive relief aimed at correcting the perceived deficiencies in the relationship. CSF obtained three interlocutory injunctions and the Government was directed to provide it with supplementary funding beyond what the Government already agreed to provide.

The Government appealed the injunctions and claimed that two of them required it to pay for educational services provided to non-Saskatchewan students who attended two of the CSF schools in the areas of Lloydminster and Bellegarde. The Government claimed it had no duty to fund students who reside outside of the province and sought to have the injunctions set aside to the extent that they result in it carrying the cost of educating non-resident students.

The Court affirmed that under the *Constitution Act*, 1867, provinces are given exclusive jurisdiction to make laws regarding education in section 93. Section 23 of the *Charter*, which protects language rights, reinforced this, restricting the right afforded to citizens to the province in which they reside. The Government therefore did not have an obligation to pay for the minority language education of students who resided outside of its province.

The Court addressed each City to the Appeal. Lloydminster was a "Border City". The Alberta-Saskatchewan boundary ran down its main street, and the governments of Alberta and Saskatchewan

each agreed to provide funding for public and catholic schools within the city equal to the percentage of students from their respective provinces. Their agreement did not cover minority language schools. The CSF provided school had experienced considerable growth in student attendance and required a new location, and one was provided within Saskatchewan that required considerable renovation. However, 58% of its students were from Alberta. The Government considered it to be unfair that it solely fund the costs of relocating the school in light of the proportion of students from Alberta that attended the school.

The Court found it could not overturn the injunctions though as the relief that the Government was to provide could not be prorated or allocated based on the percentage of resident students. Specifically, the injunctions included funds required for work related to toilets, painting, refinishing floors, improvements to the security and mechanical systems, rental and maintenance costs for the next fiscal period as well as student transportation. The Court stated: "*It is not at all apparent how the cost of such things would have been lower if the property was being upgraded to handle only Saskatchewan students. A school building operates as a single integrated whole and must be safe and habitable regardless of whether it is used by 60 students or 30.*"

The Court did recognize the difficult issue that in upholding the injunction, it was requiring the Government to fund education for non-resident students which it had no obligation to do under the *Charter*. The Court found that this was unavoidable though and that the best solution, as a matter of policy, may be for the two provinces to amend their operational agreement on funding public and catholic schools to also include minority language schools. The Court highlighted that it was an example of highly effective inter-provincial co-operation. The Court did note though that the two provinces were under no legal obligation to agree to such an arrangement and their failure to do so did not create a legal void that would invalidate the injunction.

The situation in Bellegarde was somewhat different. Under section 172 of *The Education Act*, 1995 of Saskatchewan, a conseil scolaire may recover the costs of services provided to non-resident students. In Bellegarde, CSF was charging each student from Manitoba $12,000 per year to attend the school. The Government calculated the actual per student cost for services to be $20,617, and excluded the difference from CSF's budget for each student from Manitoba. The Court found it was unfair for CSF to undercharge the Manitoba students and expect the Government to make up the difference. In regards to the Bellegarde injunction, the Government was allowed to reduce the relief ordered by the difference between the per student cost for services for the students from Manitoba (which was determined by the Court) and the $12,000 CSF charged for tuition. The deduction was also prorated to reflect the fact that the school year was partially complete.

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Tribunal orders re-integration of student

In *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1436, the Ontario Human Rights Tribunal (Tribunal) dealt with the issue of discrimination and failure to provide appropriate accommodation to R.B., a nine-year-old student in grade 3. R.B.'s mother was a difficult parent to communicate with and this case highlights the importance of addressing parental expectations and Board conduct in response to such challenges. R.B. was excluded from Grade 3 on October 22, 2012 and in an Interim Decision dated January 25, 2013, R.B. the Tribunal ordered that he be transitioned back to school.

The Interim Decision of the Tribunal is reviewed in the Keel Cottrelle Education Law Newsletter, March 2013, "HRTO awards Interim Remedy to Student seeking Re-Integration to School".

R.B. was excluded from school by the school Principal for inappropriate behaviour including swearing, 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. In Kindergarten, R.B. was diagnosed with Pervasive Developmental Delay Not Otherwise Specified (PDD) manifested by mixed expressive and receptive language delay, gross and fine motor delays, attention, learning and memory difficulties. He was also diagnosed with a mild range intellectual disability which required substantial learning assistance in the classroom in the form of an education assistant.

The School Board (Board) has claimed that S.F. (R.B.'s biological mother) prevented it from accommodating R.B.'s needs through numerous acts of misconduct. The Tribunal stated that although S.F. was a difficult parent to communicate with, the Board could have dealt with S.F.'s behaviors directly by meeting with her to inform her of what they felt was an appropriate way for her to express concerns over her son's needs. The Tribunal concluded that a Board has a high burden to prove it cannot educate a student because of the conduct of a parent.

The Notice of Exclusion stated that R.B.'s return to school was conditional upon the completion of a psychological assessment by the respondent's school psychologist, Dr. Michael Stambrook, and the respondent being confident R.B.'s return would not compromise the physical and mental well-being of R.B. and his classmates.

In summary, the Application alleged R.B. was discriminated against by the Board when it failed to accommodate his disability at school, when it disciplined him for disability-related behaviours, when it excluded him from school, and when it failed to provide an appropriate education during an absence from school in May and June 2012 and during the total period of exclusion.

The Applicant was successful in establishing that R.B. was denied meaningful education when his EA support was cut in half in Grade 2, when he did not have an appropriate behavior management plan from Grade 2 onwards, when he was excluded from school in October 2012 without appropriate educational instruction, and when the communication ban denied S.F. the opportunity to meet with R.B.'s teachers and EA's in order to ensure that his needs were met: "*When a student is excluded from school, he is denied an education. No one would suggest that providing a student three hours of instruction per week in a public library, regardless of the effectiveness of that instruction, is an appropriate education.*"

The Tribunal paid close attention to the context of S.F's inappropriate behavior, and observed that S.F. was a fierce advocate for her son, and when she believed his needs were not being met, she disagreed and commenced a path to change that. The school responded negatively to her advocacy and banned all communication with her: *"The more S.F. was shut down, the more she spiralled out of control. None of this is to excuse her conduct, but it is the context in which she acted. It is a context that cannot be ignored."*

The Tribunal stated that at the end of the day, R.B. was denied meaningful access to the education provided to students in Ontario because of the Board's very negative relationship with his mother and not because the Board was unable to meet his needs. Given that this is not an appropriate basis to justify the discrimination, the Tribunal found there would be significant harm to R.B., and far less harm to the Board in returning one of its students to school and confirmed the re-integration Order in the Interim Decision.

The Board did argue that the presence of R.B. created a safety risk for other students. The Tribunal found that there was no evidence of any safety risk sufficient to justify an exclusion from an education. The behaviours which were *"extremely disconcerting ... consisted primarily of swearing and uttering profanities"*. In any event, the Tribunal determined that the circumstances did not demonstrate a safety risk.

The Tribunal also found that the Board had not demonstrated undue hardship, particularly since the Board had not made any real effort to work with S.F. with respect to R.B.'s concerning behaviours.

The Tribunal reiterated that the Tribunal had already ordered that the student be reintegrated in the Interim Decision (referred to above). As a result, the Tribunal supplemented that Interim Decision and ordered:

"a. Payment by the respondent [Board] in the amount of $35,000.00 as monetary compensation for the injury to the applicant's dignity, feelings and self-respect;

b. R.B. will return to school in the 2013/2014 school year with a full-time shared EA in the classroom, speech/language support for 30 minutes per week and an appropriate behaviour management plan that has been agreed to by S.F. in consultation with R.B.'s treating specialists.

c. S.F. is entitled to fully participate in the IPRC review meeting for the 2013/2014 school year and the development of R.B.'s IEP for this year;

d. The trespass notice and communication ban issued in December 2011 is lifted."

In addition, the Tribunal noted:

"The applicant has requested remedies for the 2013/2014 school year and beyond. The education process for students with special needs is an annual process that depends upon a current assessment of the student's needs. It would not be appropriate for the Tribunal to constrain this process by adding future conditions. That said, if the respondent [Board] intends to remove the level of support provided to R.B. in the 2013/2014 school year, there must be an objective assessment of the impact of that removal."

Further, the Tribunal determined and ordered:

As I am sure is clear from this Decision, the relationship between the parties has been severely compromised. I am very concerned about R.B. returning to school under these circumstances. As I stated in my Interim Decision 2013 HRTO 130, I was unsure how the litigation process and my final decision was going to assist the parties in repairing their relationship. For this reason, I am ordering the respondent [Board] to retain a third party facilitator/mediator acceptable to the applicant to facilitate the reparation of S.F.'s relationship with the school and its staff. This order, made under section 45.2(3) of the Code, is necessary to ensure future compliance with the non-compensatory orders above. That person must be on retainer by the respondent for the 2013/2014 school year. In the event there are difficulties between S.F. and the school during this time, they will be mediated by the third party facilitator/mediator. The costs of this person must be paid by the respondent [Board]."

This Decision emphasizes the importance of ongoing communication notwithstanding a difficult parent, as well as appropriate accommodations.

There are a number of significant issues in the Decision. In particular, the Tribunal has made Orders which intervene significantly in the education requirements for the student. Further, the imposition of a third-party facilitator / mediator, which is quite usual in a settlement, is unusual in a Tribunal Decision.

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Tribunal deals with distribution of religious materials in schools

The issue of whether the prohibition on discrimination because of "creed" includes atheism under the Ontario *Human Rights Code* was considered in *R.C. v. District School Board of Niagara*, 2013 HRTO 1382. The applicants were the C Family, a family of atheists who describe the District School Board of Niagara's (Board) policies as discriminatory.

Under Board policy at the time, The Gideons International In Canada (Gideons) were permitted to distribute their version of the New Testament to grade five students in a Board school, if the principal in consultation with the school council agreed. The Gideons were the only religious group permitted to do so. Parental consent forms were distributed and distribution to students whose parents had agreed took place outside of class time. When S.C. was in grade 5, she brought home the consent form, however the School Council did not approve the distribution and the Bibles were not given out.

S.C. and her father, R.C. both allege that the Board policy discriminated against them with respect to services because of creed. The Board subsequently amended their policy to allow other religious organizations to distribute "religious publications" in the schools in certain circumstances. Though no materials other than the Gideon Bibles were actually distributed, the Applicants assert that the policy change has not addressed the discrimination and the new policy is also discriminatory. The family asked the Human Rights Tribunal to require the Board to rescind the policy so that no religious literature of any kind could be distributed in schools.

In its Decision, the Tribunal found that the protection against discrimination based on creed extended to atheism. The Tribunal held that both the School Board's policies and practices (old and new) were discriminatory in that they did not comply with the *Code*. The Tribunal considered a variety of factors including the importance of giving particular consideration to children's interests needs and rights. The interest in raising a child according to one's own religious beliefs is constitutionally protected, and when a public school is not neutral with respect to creed, it discriminates with respect to services against both parents and children whose creed is marginalized.

The Tribunal did not find that exposure to religion in schools violated any rights under the *Code*. Creed-based activities outside the classroom need not be eliminated so long as participation in them is optional, no pressure is applied on students to participate, the school is neutral and the school makes it clear that it is facilitating such optional activities for all creeds and is not promoting any particular creed.

The Tribunal ordered no distribution of religious materials shall take place in the Board's schools unless and until the Board designs a new policy consistent with the *Code* principles. The Board was given six months to develop a new policy.

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Court deals with issues of procedural fairness in student suspensions

The Nova Scotia Supreme Court (Court) recently evaluated what is considered fair surrounding a number of decisions made by a school principal to suspend a student in *Parsons v. Chignecto-Central Regional School Board*, 2013 NSSC 170. The student's mother wanted the suspensions to be removed from her son's record because as she argues, there was a lack of procedural fairness when the school principal made the administrative decision to suspend the boy.

In this case, the student, Christopher Parsons (Christopher) acted out on two separate occasions. The first suspension occurred with Christopher swore at a teacher and walked out of the classroom. The matter was referred to the school Vice-Principal, who contacted Christopher's mother by telephone to advise her of the 2 day suspension and explain the reasons for the suspension. No notification was provided in writing. Christopher did not attend school for 2 days and his mother made no complaint about the incident.

In a separate incident, Christopher told a teacher that he wanted to fight another student, and that he would pay someone to do it for him. On one of the two days that Christopher was serving his suspension, he actually offered a third student $100 to fight the second student, and following the offer of money, the second student was assaulted and injured. The teacher referred the incident to the Vice-Principal.

Following this incident, Christopher and his mother were notified in writing by the Vice-Principal of the decision to suspend Christopher in relation to this "assault for hire" incident for a period of 5 days. They were provided with notification in writing of their right to request a review of this decision within 3 days in accordance with the guidelines set out in the Nova Scotia *Education Act*. That same day, the Parsons were further notified in writing and by telephone of the Vice-Principal's recommendation to the School Board for a lengthier suspension and the reasons therefore.

Ms. Parsons subsequently requested a review of the decision, and a Suspension Review Committee Hearing was held. At this hearing, it was determined that Christopher's conduct was deserving of an extended suspension lasting 15 days. The Parsons were advised of the decision both by telephone and by mail. Ms. Parsons was again advised of the right to appeal the decision. Ms. Parsons once again appealed the decision, and the Appeal Committee upheld the 15 day suspension.

The Nova Scotia *Education Act* provides for a number of notice requirements as well as time limits. Of particular interest are sections 123 and 124 of the *Act*, as well as section 47(7)(e) of the Ministerial Education Act Regulations. Together, these sections provide that the student and their parents have the right to know the case to be met as well as the right to be heard at all stages of the discipline process.

Of particular interest is that individual school boards are permitted to create their own process and make their own procedural choices. In this case, the issue is whether the Chignecto-Central Regional School Board's (Board) code of conduct and guide for out of school suspensions met the minimum levels of procedural fairness.

The Nova Scotia *Education Act* provides a comprehensive legislative scheme to manage student conduct and discipline. In addition to the statutory provisions, there is delegated authority to the Board to put in place policies to respond to complaints of student misconduct, including the establishment of review bodies to provide oversight of school imposed discipline. It was clear to the Court in this case, that

in seeking to discipline the student, the school and the Board officials were acting within their statutory mandate and their delegated authority.

The Court highlighted the distinction between missing a few days of school and missing a month, in terms of the obligation on a Board to supply alternative arrangements for the education of students that are suspended for more than five days.

In the view of the Court, decisions of the Principal to suspend a student for less than five days attract a lower level of procedural fairness than decisions of the Board to extend that suspension. Students and their parents have interests at stake in any decision to suspend a student. However, the significance of that interest depends in part on the length of time for which the student is suspended.

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Court confirms privilege of OSR documents

In *Robinson v. Northmount School for Boys*, 2013 ONSC 1028, the Superior Court of Ontario (Master) dealt with a motion on the issue of whether names and addresses of students are part of the Ontario Student Record (OSR) and therefore covered by the privilege established by ss. 226(2) of the Ontario *Education Act*.

The Plaintiff, Robinson, was a teacher employed by Northmount School for Boys (Northmount) from 2005 to 2007. The Defendants in this matter are a husband and wife, L.L. and J.L. L.L. was employed as a teacher at Northmount during the time period relevant to the issues in the action. The son of L.L. and J.L. was enrolled as a student at Northmount and was taught by the plaintiff, Robinson.

During the 2006-2007 year, a dispute arose between Robinson and L.L. surrounding the academic performance of L.L.'s son. In 2007, Northmount became aware of allegations against Robinson by L.L.'s son of physical abuse. The school subsequently hired an investigator who concluded there was insufficient evidence to substantiate those allegations. The Toronto Police services investigated the complaint as well as the Catholic Children's Aid Society, however no charges were laid. Robinson's employment with Northmount ended on June 1, 2007.

One week later, a meeting of parents and students was held at the school. Robinson alleges that during the course of that meeting, the defendants J.L and L.L. made defamatory statements with respect to Robinson's conduct relating to their son.

In 2009, Robinson commenced an action claiming damages from Northmount for breach of contract, as well as damages from L.L. and J.L for defamation, malicious prosecution and inducing breach of contract. On this motion the Plaintiff sought the names and contact information of non-party students and others at the 2007 meeting who may have information relevant to the matters in issue in the action.

The Defendants did not dispute that the information sought by Robinson was relevant; rather they argued that it was privileged under ss. 266(2) of the *Education Act.*

The Master came to the conclusion that Northmount need not answer the questions in dispute or produce the documents requested by Robinson. The Master relied on a prior decision of the Court to determine that the information requested was privileged and not accessible by virtue of ss. 266(2).

The Master also reviewed the OSR Guidelines, but determined that the Guidelines did not obviate the privilege of the information requested.

This case reinforces the principle that if information requested forms part of the OSR of a student, then this information cannot be disclosed without the appropriate consent. A student's name and address are a required part of the OSR and are therefore protected by privilege. In addition, the OSR "*is not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding*". The OSR Guidelines cannot circumvent this privilege.

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Court deals with liability of parents and playground supervision issues

In *Gu (Litigation guardian of) v. Friesen*, 2013 BCSC 607, the British Columbia Supreme Court (Court) considered liability for injury suffered by an 11 year old student at recess. The student (J) claimed in negligence against her classmate (L) who pushed her, his parents and Southridge School (Southridge) for failing to provide adequate supervision of the recess play area.

J was carrying her friend E piggyback style when E was pushed from behind by another friend and classmate, L. As a result of the push, J lost her balance and she and E fell, leaving J with a broken elbow. L testified that he pushed the girls to make them laugh and did not mean to injure anyone. Southridge was a university preparatory school with high behavioral expectations and extensive policies that students were required to sign. Safety policies were known to students and enforced. L admitted that he knew pushing was prohibited on the playground, but there was some discrepancy as to whether piggybacking was permitted.

In order to find L liable in negligence, the Court must establish the presence of 3 principle criteria: (1) that a duty of care exists, (2) that the conduct in question fell below the relevant standard of care; and (3) that the conduct actually caused the injury. The Court stated that it was clear from the evidence that L owed a fellow student using the playground a duty of care, and that it was clear that L's push directly caused J's injury. The issue at hand was whether L's conduct fell below the standard of care that is applicable to children, which has been held to be that of a child of similar age, intelligence and experience. Given there was no evidence that L was of less than normal intelligence for an 11-year-old, the Court found that a child with similar maturity and impulsivity would have foreseen that if he were running at a fast jog, even the gentle pushing from behind of another child who was being carried piggyback risked both people following over and being injured. The fact that the injury to J turned out to be more serious than a child in L's circumstances might have anticipated does not undermine liability. L was therefore found liable for the accident.

The liability of parents for the torts of the children must stem from a failure to supervise and control the child. In this case, there was evidence of appropriate efforts by the parents to discipline the child when required and the Court therefore held that there was no basis on which to find liability against L's parents.

In terms of the liability of Southridge staff, the standard of care applicable is that of a careful and prudent parent, which varies according to factors including age, activity, and number of students involved. There are three bases on which Southridge could be found liable here: (1) it could be found to have been negligent in allowing piggybacking to go on at all in the playground; (2) its overall supervision regime could be found to have been inadequate to prevent acts like L's; or, specifically, (3) the schoolyard supervisor on the date of the injury could be found to have fallen below the necessary standard.

In assessing whether the supervision regime met the standard of care, the Court looked at the size of the playground, the usual activities that went on there, as well as the age level of the students and found that this was the kind of set up that could be managed safely by a single supervisor, circulating around or scanning the various areas for signs of difficulties.

In assessing whether the actual teacher on supervision duty that day fell below the required standard of care, the question that must be asked is: if the supervisor had been doing her job, would the plaintiff certainly not have been injured? The Court stated that the brief duration of L's run and push could easily have fallen within a period where that area of the playground was not under direct supervision (when the teacher was circulating). L's negligent act and the resulting injury were just as likely to have occurred if the supervision system in place had been properly carried out as if it had not. The Court was therefore unable to find any liability on Southridge's part due to a failure to adequately supervise.

The Decision is interesting from the perspective of the assessment of the liability of parents as well as the supervision regime. In particular, the Court was satisfied that a single supervisor was sufficient given the circumstances.

— KC —

Professional Development Corner

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Friday, October 25, 2013 - KC LLP Professional Development Session

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

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October 21-22, 2013

Osgoode PD - Advanced Issues in Special Education Law

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