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Education Law Newsletter

— March 2016 —

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Court crushes Nova Scotia anti-bullying legislation

In 2013, Nova Scotia was the first jurisdiction in Canada to pass legislation for the protection of victims of cyber-bullying. The *Cyber-safety Act* (S.N.S. 2013, c. 2) (*Act*) gave principals and school boards greater powers and responsibilities vis-à-vis the *Education Act* (S.N.S. 1995-96, c. 1), and it allowed for the creation of the cyber-investigative unit. Furthermore, the legislation created a mechanism in which victims of cyber-bullying could apply to the court for a protection order. Finally, the new statutory tort of cyber-bullying was established, allowing individuals to sue for damages or to obtain an injunction. The *Act* defined cyber-bullying broadly to include both minors and adults:

> [Any] electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way.

In *Crouch v. Snell* (2015 NSSC 340), the Supreme Court of Nova Scotia struck down the *Act,* finding that the legislation was contrary to the *Canadian Charter of Rights and Freedoms* (*Charter*). Crouch and Snell were former business partners. After their business relationship ended, Crouch alleged that Snell started a "smear campaign" against him on social media. Crouch was granted a protection order under the *Act* on an *ex parte* basis, without notice to Snell. Snell received notice at a later point when he was served with a copy of the protection order which prohibited him from engaging in cyber-bullying. Snell was also restricted from communicating with or about Crouch. Snell argued that the definition of cyber-bullying in the *Act* and the *ex parte* procedure for obtaining a protection order infringed his section 2(b) and section 7 *Charter* rights – freedom of expression and an individual's right to life, liberty and security of the person.

The Supreme Court of Nova Scotia found that Snell had engaged in cyber-bullying, pursuant to the definition under the *Act,* and that he would likely continue. However, the Court held that the *Act* violated sections 2 and 7 of the *Charter* and stated:

> [...] prevention of cyber-bullying is a purpose that aims to restrict the content of expression by singling out particular meanings that are not to be conveyed, i.e. communication that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation.

The Court stated that the *Act* did not provide sufficiently clear standards to avoid arbitrary and discriminatory application. The *Act* provided no limit prescribed by law. The *Act* allowed for punishments including fines up to $5000 or imprisonment for a term up to six months.

The Court held that the *Act* infringed on an individual's freedom of expression and right to life, liberty and security of the person, which could not be justified under s. 1 of the *Charter.* The Court concluded that the *Act* must be struck down in its entirety and that it must be eliminated right away, unlike other decisions which have struck down the legislation but offered the legislature a one-year grace period to rewrite the law. The Court stated: "To temporarily suspend the declaration of validity would be to condone further infringements of charter-protected rights and freedoms." The *Act* was found to be unconstitutional and the protection order was declared void and of no effect.

Nova Scotia Justice Minister Diana Whalen has stated that the Department of Justice is considering whether to appeal the decision or to draft new legislation. The legislation was enacted to fill a gap in the law and to provide added protections to victims of cyber-bullying. Individuals will now have to seek remedies through traditional avenues, such as an action for defamation or through any applicable criminal charges. ■

Principal's direction to stop parent from distributing religious pamphlets not a violation of Charter right

In *Bonitto v. Halifax Regional School Board* (2015 NSCA 80), Mr. Bonitto distributed religious pamphlets on the premises of a public elementary school, during school hours. The message in the materials was that unless 'one accepts Christ as their Lord and Saviour, they will go to hell'. Other messages denounced homosexual couples as blasphemers, condemned the beliefs of non-Christians, depicted violent imagery of animal and human sacrifices, and described injuries inflicted during crucifixion. The recipients of these materials included students.

The Policy of the Halifax Regional School Board (Board), which was adopted pursuant to the *Education Act*, stated that materials distributed on school premises during school hours required the principal's approval. Another policy stated that denominational religious instruction should not occur on school premises during school hours. The distribution of any materials at the Board's schools requires approval "at the discretion of the principal". The Park West School's principal directed Mr. Bonitto to desist distribution and Bonitto sued for an order that the restriction violated his right to freedom of religious expression under the *Canadian Charter of Rights and Freedoms* (*Charter*). A judge of the Supreme Court of Nova Scotia dismissed Bonitto's claim and Bonitto appealed to the Nova Scotia Court of Appeal.

The school had accommodated Mr. Bonitto's children, who attended Park West School, in that they not be exposed to materials or teachings which run contrary to his fundamentalist Christian beliefs. The children would be exempt from activities and materials relating to Halloween, the Easter Bunny, Santa Claus, magic, homosexuality and transgender issues.

Mr. Bonitto claimed that his faith compelled him to proselytize to others, including the children at Park West School. The Board regularly received requests from other groups to distribute religious materials on school property, including requests from the Jewish community, pagans, Catholic groups, and others. None of the requests were approved.

The Court of Appeal considered whether the principal's direction for Bonitto to stop the distribution of gospel pamphlets violated his right to freedom of religious expression under section 2(a) of the *Charter.* The Court of Appeal dismissed the appeal and held that the principal's direction infringed Bonitto's section 2(a) *Charter* right, however, the principal proportionally balanced the *Charter* right and his statutory objectives. The principal exercised a discretion that was given to him under the *Education Act.*

An Application for Leave to Appeal to the Supreme Court of Canada was dismissed, and the decision of the Nova Scotia Court of Appeal was upheld.

The Supreme Court of Nova Scotia decision in *Bonitto* was reviewed in the September 2015 KC LLP Education Law Newsletter: "Court nixes distribution of religious materials in schools". ■

HRTO awards damages to student with multiple disabilities for school board's failure to accommodate

L.B. v. Toronto District School Board (2015 HRTO 1622) dealt with an Application alleging discrimination with respect to services because of disability. The Applicant, L.B., was diagnosed with multiple disabilities, including learning disabilities such as attention deficit hyperactivity disorder (ADHD), and mental health disabilities including anxiety and depression. The Applicant was a student in a large collegiate institute (School) operated by the Respondent, Toronto District School Board (TDSB).

The Applicant alleged discrimination resulting from the failure of the TDSB to accommodate his disability-related needs to the point of undue hardship. As a result of the lack of appropriate and needed accommodations, his mother had no option but to remove him from the School and enrol him at a private boarding school. The Applicant claimed that due to his disabilities, he needed the regular involvement of a school staff member or mentor to motivate him to attend school on a regular basis. The Applicant stated that the current private school placement accommodates his needs and allows him to

overcome his anxiety by focusing on a key motivator – hockey.

The Respondent claimed that the Applicant was accommodated appropriately within TDSB's mandate under the Ontario *Human Rights Code,* R.S.O. 1990, c. H.19 (*Code*) and the *Education Act,* R.S.O. 1990, c. E.2. The Respondent claimed that the accommodations sought by the Applicant called for services that are outside the legislated mandate of a school board in Ontario.

During L.B.'s Grade 6 year, a social worker met with the Applicant for counselling and support. In addition, one of the teachers voluntarily agreed to go to the Applicant's home first thing in the morning on several occasions to encourage the Applicant to get up and get to school, resulting in L.B. attending somewhat more regularly.

L.B. was missing school in Grade 9 due to his depression and anxiety, and he stopped attending school during the winter months. The Vice-Principal agreed to explore potential supports, such as peer mentoring, peer tutoring and providing L.B. with some sports leadership-related opportunities that might motivate him. There was no evidence that there was any immediate follow up with L.B.'s teachers from the Vice-Principal. In February 2013, S.B., the mother of LB., met with the school guidance counsellor and special education teacher. The mother informed them that she was exploring the option of sending L.B. to a private boarding school that focused on hockey. She asked if the School could complete a recommendation form for L.B.'s admission to the private boarding school, and the guidance counsellor completed the form. The guidance counsellor confirmed that she did not suggest any alternative placements or programming.

In April 2013, L.B. transferred to a private boarding school. He continued to receive counselling and treatment as needed. His involvement in sports acted as a motivator for his attendance. Educational accommodations benefited L.B., including smaller class sizes, as well as access to 1:1 resource assistance and tutoring from teachers. The residential setting reduced the need for "getting to school" on a daily basis. However, his attendance issues were not fully resolved.

The Tribunal upheld the following principles in the context of a school board accommodating students with disabilities:

- School boards have an obligation under the *Code* to accommodate their students with disabilities to the point of undue hardship, regardless of whether the students are receiving any medical treatment in the community or not;

- School boards have an obligation under the Education Act to provide appropriate special education placements, programs and services to their exceptional students. Parental conduct or lack of parental authority cannot be used as a justification for not meeting an exceptional student's needs; and

- A parent's "fierce advocacy" for his or her child must not and cannot prevent a school board from accommodating the child's needs to the point of undue hardship.

The Tribunal found that L.B. was a person with a disability, as defined by the *Code.* The Applicant's position was that the Respondent should have provided a residential school placement within its jurisdiction with a hockey focus or that it should have provided a daily staff member escort to get the Applicant to school. The Tribunal had to determine whether this was a "service" mandated under the *Code* obligations of school boards.

The Tribunal agreed with the Respondent that the establishment or funding for a residential

school (with or without a hockey or sports focus) is not within the school board's legislated mandate and is not a "service" for the purposes of the *Code.* Furthermore, section 264(1) of the *Education Act* does not call for teachers to go to the homes of pupils to motivate them to attend school. The primary responsibility for ensuring that a child attends school resides with the child and parent. The Tribunal concluded by stating that a school board has no obligation to develop and provide a service that is wholly different from their legislated mandate.

Nevertheless, the Tribunal found that L.B. established a *prima facie* case of discrimination. L.B. did not receive access to educational services offered by the Respondent and his disabilities were a factor in this treatment. The Respondent did not accommodate the Applicant to the point of undue hardship in accordance with the *Code* and its obligations under the *Education Act.* The Tribunal found that the Respondent failed to provide services and supports to the Applicant that were or should have been reasonably available, such as attendance counselling, as well as in-school special education programming support. If provided, the Applicant could have remained within the public educational system. The Tribunal noted that TDSB delayed referring the Applicant, for almost a full year, to appropriate support services such as potential alternative placements, including Section 23 programs or a provincial demonstration school for students with severe learning disabilities and ADHD. The Tribunal stated that this omission can be deemed discriminatory, since substantially delaying access to these services can amount to a substantive breach of the *Code.*

The Applicant requested remedies including $50,000 for compensation for injury to dignity, feelings and self-respect, however, the Tribunal awarded $35,000. The Tribunal did not award compensation representing tuition and all other costs for L.B.'s attendance at the private elite sports boarding school since this was not a service provided by school boards.

The interim decision of the Human Rights Tribunal of Ontario (HRTO) in this case was reviewed in the March 2015 KC LLP Education Law Newsletter: "HRTO limits evidence at hearing re parental care for special-needs child". ■

HRTO addresses school board's responsibilities to transgendered student

In *D.B. v. Toronto District School Board* (Board) (2015 HRTO 1592), the Ontario Human Rights Tribunal (Tribunal) considered an Application alleging discrimination on the basis of sex, gender identity, gender expression, and reprisal or threat of reprisal. The Application was filed by C.N., the mother and the litigation guardian of the minor child, D.B.

D.B. was enrolled in a French Immersion program at a public school. Starting in Grade 2, he requested that his teacher refer to him as "Happy Face" rather than by his registered birth name, and the teacher complied with the request. According to C.N., D.B. expressed gender dysphoria at an early age. He transitioned and presented himself as male at the start of Grade 4 with a new adopted name. The attendance sheets listed D.B. as female while he was presenting as male to his classmates.

There were also allegations of discrimination concerning the Grade 3 school year. Around February 2013, C.N. met with School representatives to discuss removing "Happy Face" from French Immersion. C.N. alleged that the Principal was resistant to D.B.'s transition and use of sex designation as the "trillium system" would not allow for that. Furthermore, the School Psychologist stated that a medical diagnosis was required and

that "Happy Face" should "come out". D.B. was kept at home when the School conducted workshops that segregated boys from girls to address building positive relationships. Moreover, there were incidents at the School involving classmates pulling each other's underwear or pants off. In the girls' pool change room, D.B. was confronted by female students who surrounded his stall, demanding to see his genitals. An older girl referred to D.B.'s transitioning as "gross". There was also an incident during recess where after a confrontation with a group of boys, the teacher directed D.B. to play in an area dominated by girls.

In Grade 4, at a cross-country track meet organized by the Board along age and gender categories, D.B. participated as male and was "outed" by a student, who knew him from Grade 1. There was an incident where D.B. had been asked to meet in the washroom during lunch, where he was cornered by three classmates and given 48 hours to prove his gender. After that incident, D.B. stayed away from school for a week. The Board investigated the incident and determined that it fell within the ambit of its sexual misconduct policy. Two boys received suspensions and later, returned to school. D.B. returned to school as well and participated in the investigation. The Board representatives met with C.N. and her spouse and refused to disclose the length of suspension given to the boys involved in the May washroom incident. The Board later met with D.B.'s father to disclose the results of the investigation.

The Tribunal had to determine whether these constituted a series of events within the meaning of section 34(1)(b) of the Ontario *Human Rights Code,* R.S.O. 1990, c. H.19 (*Code*). The Tribunal also had to consider whether the Application was timely, in that it falls within one year of the date of filing the Application. The Applicant sought to include allegations within 24 months of the date of filing the Application.

The allegations regarding breaches of the *Code* during the Grade 4 school year primarily related to the Board's action or inaction in response to two events: (1) the cross-country track meet and (2) the boys' bathroom incident in May 2014. The Tribunal found that the allegations that arose in the Application in connection with incidents occurring in Grade 4 were timely. The girls' pool change room incident and the occurrence involving an older girl referring to D.B.'s transition as "gross" were both promptly addressed by the Board. There was no allegation that the Board's action in relation to these occurrences was inadequate.

The Tribunal agreed with the Board that the incidents relating to D.B.'s transitioning during Grade 3 were distinct in character from those encountered in Grade 4, after he presented as male with a new name, with clear notice to the school representatives that he was transgendered and would require their active support to eliminate as much as possible all categorization by gender, that might leave him vulnerable and exposed to ridicule.

In this interim decision, the Tribunal ordered that the allegations concerning events preceding August 26, 2013 be struck from the Application and only be referred to for the purpose of providing context.

This decision highlights the responsibilities that school boards have to accommodate transgendered students. ■

French school board ordered to pay damages to student for bullying and harassment

In *E.C. c. École Saint-Vincent-Marie* (2015 QCCS 5996), the Quebec Superior Court (Court) ordered damages of $10,000 against the school board, *Commission scolaire de la* Pointe-de-l'Île, resulting from harassment, of a

physical and sexual nature, of an 11 year-old female student.

The student stated that during the 2010-2011 school year, there were a number of incidents involving five boys in her class. They bullied her verbally and physically for nearly eight months, until the student was removed from the school including the following behaviour: pulling the victim's hair, calling her names, leaving threatening notes at her desk, and punching her in the stomach and in the face. One of the boys phoned the girl's home to threaten her. There were also incidents where several of the boys followed her into the school's unisex washroom and the boys touched her in a sexual nature. The school board did not deny that serious attacks took place in the washroom, though they raised questions about whether sexual touching took place.

According to the girl and her parents, she asked for help and reached out to teachers on numerous occasions, but the staff did not respond accordingly. The student had asked to be transferred to another school; however, the request was refused, in part because the school stated that the issues were not serious enough.

The school argued that sufficient action had been taken to address the behaviour of the boys; however, the Court found that there were behavioural issues with the five boys since the start of the school year and the problem only improved temporarily with the intervention of school staff.

The Court accepted the girl's version of events. Her life was seriously affected by the bullying. According to her testimony, the student is anxious with suicidal thoughts, she regularly missed days at school during the 2010-2011 school year, and following the springtime attack in the washroom, she did not return at all. She has had trouble attending school since.

The Court found that the legal test set out in Article 1457 of the Québec Civil Code was breached. Pursuant to the test, the claimant was able to establish that the boys were minorities, that they were students with the school board, and the incidents caused damages to the claimant. The school board was then required to show that they had appropriate surveillance. The Court held that the board failed to show that they had appropriate measures put in place. Furthermore, the damages caused to the student were foreseeable.

Following the second incident in the washroom, the school board had taken steps to protect the safety of the student. The Court highlighted that the school board had failed to take those steps before. Overall, there were several complaints by the parents, and the policies and measures in place at the school were insufficient to protect the girl. There was no policy on harassment at the school and no directive to teachers to deal with harassment and bullying. The unisex washrooms were problematic and specific measures needed to be in place such as surveillance of this area. The school could have foreseen that the incidents would continue, and that the situation would escalate. Furthermore, the departure of one of the boys from the school did not render the situation unforeseeable as there were other boys involved.

The Court highlighted the measures taken by the school board, although these measures were implemented after the incidents had taken place. The Vice Principal arranged to meet with the student every day to ensure that everything was going well, however the student did not come back to school after the last incident. The Vice Principal also communicated with community police to provide presentations on aggression and sexual intimidation.

The girl was claiming $50,000 in damages for stress, psychological disorders, and loss of enjoyment of life. Some medical notes were provided; however, there was no evidence of

medical treatment from the period of September 2010 to June 2011. Furthermore, while some impressions of Post-Traumatic Stress Disorder (PTSD) were noted, there was no formal diagnosis.

The Court also examined the issue of causation and whether the bullying and harassment caused the student to ultimately leave school. The student had some previous absences prior to the incidents, and her symptoms of stress might have been tied to other causes. The Court awarded the student $10,000 noting the gaps in the medical evidence and the issues with causation.

This judgment is a caution to school boards that appropriate and sufficient measures need to be in place to address bullying and harassment in schools and that such behaviours must be taken seriously and involving a pro-active whole school approach. ■

Ontario Superior Court of Justice recognizes new privacy tort of public disclosure

In *Jane Doe 464533 v. N.D.* (2016 ONSC 541), the Ontario Superior Court of Justice recognized the tort of "public disclosure of private facts" and expanded the scope of privacy protection in Canadian common law. The Defendant, the Plaintiff's ex-boyfriend, had posted an intimate video of her on a pornography website without her knowledge or consent. The video was available online for approximately three weeks and was viewed by their social circle. The Plaintiff experienced emotional devastation and serious depression in the aftermath of the incident.

The Plaintiff brought a default judgment motion for compensatory and punitive damages, as well as a permanent injunction to prevent any further similar conduct by the Defendant. Justice Stinson found that established and developed legal grounds supported granting civil recourse for individuals who suffer from harm arising from this type of misconduct. Justice Stinson examined the tort of intrusion upon seclusion recognized by the Ontario Court of Appeal in *Jones v. Tsige* (2012 ONCA 32), as well as the common law privacy torts in the United States. Justice Stinson found support in Canadian and American jurisprudence for the introduction and application of the tort of public disclosure in this case.

The Plaintiff established a cause of action for breach of confidence, intentional infliction of mental distress, and most importantly, invasion of privacy. The Court found that it was appropriate to infer that the Defendant acted with malice, and it was clearly foreseeable that his conduct would cause harm.

The Court set out the elements of the tort of public disclosure of private facts, as follows: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

Ultimately, the Court held that a reasonable person would find that the Defendant's actions of posting an intimate video of the Plaintiff on the internet would be making public an aspect of the private life of the Plaintiff, and that a reasonable person would find that disclosure to be highly offensive.

The Court concluded that to permit an individual who was confidentially entrusted with intimate images to intentionally reveal them via the Internet without legal recourse would leave a gap in available legal remedies. The Plaintiff was awarded general damages of $50,000, aggravated damages of $25,000, punitive damages of $25,000, plus full indemnity costs. She was also granted injunctive relief.

This new tort may have implications for school boards, such as in cases involving disclosure of information about the private life of students or employees. ■

BCHRT finds taxi driver had legitimate reasons to refuse to transport guide dog

McCreath v. Victoria Taxi (2015 BCHRT 153) was a case dealing with a taxi driver who refused to transport a legally blind man and his guide dog due to phobia of dogs and animal allergies. Graeme McCreath filed a complaint with the British Columbia Human Rights Tribunal (Tribunal) alleging discrimination in the provision of services available to the public due to his physical disability. McCreath also claimed that cab drivers are dishonest when they claim severe allergies, since the real issue is that they do not want the dogs in the cabs.

McCreath testified that on the evening of July 14, 2014, he called Victoria Taxi for a cab to be dispatched to pick him up along with some friends. The cab company's dispatcher was not told that the passenger would have a guide dog. Once the driver arrived and refused to transport the guide dog, an alternate driver was called and arrived within a minute or two to pick up McCreath.

Victoria Taxi had an exception policy that when a taxi driver filed a certificate signed by a medical doctor, attesting to a specific medical condition related to an animal, that driver would be exempted from accepting taxi fares involving the transport of animals. The medical certificate is kept on file and is required to be renewed annually.

Furthermore, when a person calling a cab tells the dispatch that they will be travelling with an animal, or when the person has special needs such as requiring lifting for a wheelchair, a “trip remark” is made by the dispatcher and the needs of the customer are noted. An appropriate driver is dispatched, taking into account any exception policy that may apply.

In this Application, the only evidence provided for by the cab driver was a doctor's note dated five months after the incident, excusing him “from all contact with any dog for medical reasons.” McCreath argued that this doctor’s note is vague and general, dating five months after the incident, and that there was no doctor’s note submitted at the time of the incident. Victoria Taxi stated that this medical certificate represented a renewal of an earlier medical certificate on file for the taxi driver. Although the earlier note was not introduced into evidence, the Tribunal found that the allergy was substantiated, in any event, by the later medical note.

McCreath also argued that this exception policy meant that 38 percent of Victoria Taxi drivers would be unavailable to service people with guide dogs, resulting in considerably longer wait times. The Tribunal found that out of a total of 225 lease operators or registered owner drivers of Victoria Taxi, only 15 of those had noted exceptions for allergies, and that it would be unlikely for all 15 of those drivers to be working at the same time.

McCreath argued that the cab company should have considered solutions such as installing barriers around its drivers or asking them to take allergy medication. The Tribunal stated that these solutions were "untenable". McCreath also objected to the suggestion that he needed to inform the dispatcher about his dog when he called for a cab, but the Tribunal stated that McCreath "cannot expect to be accommodated if he chooses not to ask for an accommodation".

The Tribunal found that McCreath had established a *prima facie* case of discrimination. He had a physical disability, he suffered from an adverse impact when he was denied a ride by the taxi driver, and he was denied the ride because he was accompanied by his guide dog. The burden then shifted to Victoria Taxi to establish a *bona fide* reasonable justification for its treatment of McCreath. The Tribunal found that while Victoria Taxi must accommodate the needs of blind passengers, it also has a duty to consider the health of its drivers since allergies can qualify as a physical disability under the B.C. *Human Rights Code* (R.S.B.C. 1996, c. 210, as amended). The taxi company's policy of allowing drivers with allergies to decline fares with service animals strikes a balance between the rights of the physically disabled employee to a safe and healthy working environment, and the

rights of physically disabled passengers to have access to services.

This case highlights that discriminatory behaviour of service providers can be justified if there is an appropriate balancing of the rights of the stakeholders, such as the rights of employees of a cab company and those of passengers with disabilities. The principles can be applicable to the education sector. ■

School board requests OSR for response to human rights application

In *S.L. v. York Region District School Board* (2015 HRTO 1642), the York Region District School Board (Board) brought a Request for Order During Proceedings (RFOP) seeking written consent to access the Applicant's Ontario Student Record (OSR) in order to prepare its Response to the Human Rights Application. The Board also sought access to a psycho-educational assessment and related documents.

The Applicant argued that while the Respondent Board could access the OSR, he objected to the Board's counsel accessing the record. The Applicant argued that the disclosure to the Board's counsel would somehow violate the Applicant's privacy rights. The Ontario Human Rights Tribunal (Tribunal) stated that counsel is subject to the same restrictions in regard to disclosure of any documents that the party, the Board, would be subject to.

The Applicant argued that the Tribunal has found requests for access to an OSR in the early stages of an Application to be premature. In *Campbell v. Toronto District School Board* (2010 HRTO 463), the Tribunal stated that the general approach regarding disclosure and exchange of documentation is that there is no obligation to exchange arguably relevant documents among the parties until a hearing date is confirmed.

The student was alleging discrimination with respect to education because of disability contrary to the *Human Rights Code* (R.S.O. 1990, c. H.19, as amended), more specifically that the Applicant's academic progress was hindered by a failure to properly accommodate a disability. The Applicant suggested that the Board and its counsel could rely on other information that would be sufficient for the preparation of the Response. The Tribunal stated:

"The OSR clearly contains documents that are not only relevant, but essential to an understanding of the nature of the accommodations that were provided, whether the academic progress was in fact hindered, what accommodations were provided, and whether they were appropriate."

Furthermore, the Tribunal explained that the OSR is a unique document because it is privileged and its uses are limited by virtue of the definition of "record" in section 266 of the *Education Act* (R.S.O. 1990, c. E.2). However, the OSR is in the physical control of the school board, and it is referred to on a regular basis in providing education services. The Tribunal concluded:

> "In my view, when an Application includes allegations of failure to accommodate a student or allegations that relate to a student's academic progress, in the absence of exceptional circumstances, there is no principled reason for an applicant to withhold consent to allow the respondent to access the OSR so that it can provide a full Response to the Application."

The Tribunal held that the Board's counsel should be able to use the Applicant's OSR in order to respond to the Application, and only for the purposes of the Application. The Tribunal denied the Board's request for access to medical records as being premature. The Vice-Chair ordered that the Applicant advise whether he gives consent to the Respondent to allow it to access the Applicant's OSR for the purpose of responding to the Application. If the Applicant does not consent, the Application may be dismissed as an abuse of process.

This is a change in the Tribunal's practice, as previous decisions suggested written consent was not needed until the documentary disclosure stage, and not at the initial stage of providing a Response to the Application. ■

Professional Development Corner

April 8, 2016

KC LLP Professional Development Session

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

April 26, 2016

Osgoode Law School Professional Development

Education Law Webinar – Family Law

November 17, 2016

Osgoode Law School Professional Development

Advanced Issues in Special Education Law

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Education Law Newsletter

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