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Education Law Newsletter

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Court nixes distribution of religious materials in schools

In *Bonitto v. Halifax Regional School Board* (2014, N.S. Sup. Ct.), the Supreme Court of Nova Scotia recently ruled that the distribution of religious materials on school property and during school hours is not an activity that is protected by an individual's *Charter* rights to freedom of religion and expression.

Sean Bonitto (Bonitto) was a fundamentalist Christian and father of two children who attended Park West School, a public school operated by the respondent, Halifax Regional School Board (School Board). Bonitto brought an action alleging that the School Board violated his ss. 2(a) and 2(b) *Charter* rights, and claimed $85,000.00 in damages.

Pursuant to section 2 of the *Charter*:

"2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression."

Bonitto distributed religious pamphlets to individuals (including students) on School Board property during school hours. The main message of the religious pamphlets 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 Principal of the School and other representatives of the School Board directed Bonitto to cease distributing the religious pamphlets. Park West School had a policy that required approval and authorization of such distribution, and despite Bonitto's request, the School Board did not grant Mr. Bonitto approval.

The *Charter* applies if the actions of school boards are undertaken pursuant to a statutory authority. In determining whether this School Board violated Bonitto's *Charter* rights, the court analyzed whether the Park West School grounds were a location where the *Charter* rights to freedom of religion and expression were protected and, if so, whether the refusal to permit Bonitto to distribute religious pamphlets infringed his *Charter* rights.

In determining whether the school was a place where one would expect constitutional protection for freedom of expression, the court sought guidance from the decision in *City of Montreal v. 2952-1366 Québec Inc*., (2015, S.C.C.). To determine whether freedom of expression was protected on government-owned property, the court reviewed:

a) whether the historical or actual function of the place worked to promote democratic discourse, truth finding and self-fulfillment; and,

b) whether other aspects of the place suggested that expression within it would undermine the values underlying free expression.

The court found that the school was more like private than public property, and that Bonitto therefore did not enjoy protection of his right to freedom of expression.

The court found that the school was government property, and that the School Board could prohibit entry to persons by notice. The court also noted that there was no direct access to handout materials on school property, as the school had a specific policy regarding distribution, and that since the school was occupied by many young children, it was important that information be vetted to ensure it was age-appropriate. The court found that the messages in Bonitto's pamphlets were prohibited in public school programs, and distribution of any pamphlets would be disruptive to the school environment and learning process. Furthermore, distribution of religious material on the elementary school premises would not further democratic discourse, as elementary school students do not vote and would not be eligible to do so for many years.

Although the location analysis was meant to be in relation to freedom of expression rights, the court also applied it to the freedom-of-religion rights, and determined that the school was not a place where Bonitto's right to freedom of religion was protected.

Despite coming to the conclusion that the school was not a place where Bonitto's rights to freedom of religion and expression were protected, the court went on to continue its analysis, should its conclusion be wrong.

In determining whether the School Board's refusal to permit Bonitto from distributing his religious pamphlets was an infringement on his ss. 2(a) and/or 2(b) *Charter* rights, the court considered and balanced the conflicting rights of Bonitto and other individuals.

The court believed Bonitto's testimony that he had a sincere belief that his religion required him to preach the gospel to every creature, which included handing out religious pamphlets. The court noted that the Supreme Court of Canada has recognized that the right to freedom of religion includes the right to dissemination of religious materials and thus, the court concluded that Bonitto's ability to carry on his religious activities was interfered with in a way that was not trivial or insubstantial.

However, the court considered whether Bonitto's rights to freedom of religion conflicted with the rights to freedom of religion enjoyed by others in this case. The evidence indicated that the distribution of the religious pamphlets would have violated the rights of non-Christian students to be free from religious indoctrination in public schools. Therefore, Bonitto's right to freedom of religion was not protected in this case, as it would violate the religious rights of many more non-Christian students.

In considering whether Bonitto's right to freedom of expression was infringed, the court noted that the religious pamphlets he sought to distribute carried expressive content. However, the court weighed the impact of Bonitto's religious expression against the competing rights of others to conclude that Bonitto's right to freedom of expression should not be protected in this case.

Although the court found that the School Board's refusal to permit Bonitto from distributing his religious pamphlets was not an infringement on his ss. 2(a) and (b) *Charter* rights, the court

continued its analysis and went on to determine whether the School Board could justify the infringement, if one was found.

The court used the test from *Doré v Barreau du Québec*, (2012, S.C.C.) for reviewing the constitutionality of an administrative decision. The court was required to determine whether the School Board's alleged infringement disproportionately and unreasonably limited Bonitto's *Charter* rights.

The School Board was authorized, pursuant to the Nova Scotia *Education Act* and its regulations, to create a policy regarding the distribution and display of materials in schools. Bonitto was not challenging the policy itself, but the constitutionality of the decision to prohibit him from distributing his religious pamphlets. The court noted that the School Board's decision sought to protect neutrality in matters of religion, inclusion in the school community and student safety, which the court believed were objectives of paramount importance. Given the paramount importance of these objectives, the court found that the School Board's refusal to permit Bonitto to distribute his religious pamphlets fell within the range of possible and acceptable decisions on the part of the School Board in balancing Bonitto's *Charter* rights against the important statutory objectives of the School Board.

The decision in *Bonitto* affirms that the *Charter* rights to freedom of religion and expression are not absolute**.** In every case, it is necessary to weigh and balance competing rights of individuals to determine whether an individual's *Charter* rights have been infringed. ■

SCC confirms substantive equality for minority-language schools

The Supreme Court of Canada (SCC) in *Association des parents de l'école Rose-des-vents v British Columbia (Education)* (2015, SCC) recently confirmed that the educational experience of French-language rights students must be equivalent to those of majority language students as guaranteed by s. 23 of the *Canadian Charter of Rights and Freedoms* (*Charter*).

As the only publicly-funded French-language elementary school for children living west of Main Street in Vancouver, *École Rose-des-vents* (RDV) became overcrowded as a result of high enrolment levels. The growth in enrolment resulted in the overpopulation of the school. Physical facilities, such as classrooms and washrooms, were also inadequate to sustain the number of students enrolled. Over two-thirds of students that travelled to school by bus had a commute of more than 30 minutes each way. Comparably, English-language schools in the same catchment area had bigger classrooms, libraries, washrooms, and most students resided within 1 km of their school.

In 2010, the *Association des parents de l'école Rose-des-vents,* and Joseph Pagé on his own behalf and as a representative of parents of children (Parents), enrolled at Rose-des-vents (RDV), and filed a petition seeking a declaration that that the Parents' minority-language education rights under s. 23 of the *Charter* had been breached. However, they sought to have the legal proceedings phased, in order to obtain declaratory relief first, leaving open the question of responsibility for any inadequacies or lack of equivalence for other phases of the petition.

The trial judge accepted the request to phase the proceedings and struck parts of the province's pleadings on the grounds that they were not relevant to the phase about declaratory relief. The judge declared that parents living west of Main Street in Vancouver had the right to have their children receive primary school instruction in French were not being provided with the minority language educational facilities that should be guaranteed by s. 23 of the *Charter*. Furthermore, the judge held that once the numbers were sufficient to warrant an elementary school, the rights-holders were entitled to an elementary school that was at least equivalent to majority language schools.

The British Columbia Court of Appeal set aside the lower court's order striking some of the province's pleadings and the declaration regarding s. 23 of the *Charter* and ordered a new hearing. The Parents submitted that the main issue was whether the facilities in the community met the requirements under s. 23 of the *Charter* once a sufficient number of minority Francophone students were present in a community. Accordingly, the judge considered the irrelevance of the pleadings by the province that did not directly address the issues, such as costs of providing similar French-language facilities as those that existed in English-language schools. In response, the Court of Appeal found the cost considerations valid as a number of s. 23 *Charter* cases dealt with costs as a factor that would be relevant once a sufficient number of minority Francophone students were present in a community.

On appeal to the Supreme Court of Canada, Justice Karakatsanis speaking for a unanimous court, noted that s. 23 of the *Charter* guarantees the right for primary and secondary school education in both English and French. The requirement to meet the standard provided in s. 23, which is one of substantive equality was examined by the SCC, in particular how equivalence between minority and majority educational language rights would be measured.

Section 23 is considered a remedial right under the *Charter*. It imposes a constitutional duty on provinces and territories to provide minority language education where the numbers of minority-language children warrant it. It is also intended to preserve language and culture. However, one of the limitations that attaches to this right is the delay associated with an entitlement that could result in minority language students assimilating, which may hinder access to this right. Moreover, section 23 guarantees a "sliding scale" of minority language education rights. At the upper echelon of this sliding scale, higher enrolment warrants the provision of the highest level of services to the minority language community. In such cases, full educational facilities must be equivalent to and distinct from those found in the schools of the majority language group in the same area. This may also necessitate separate minority language school boards. Once it is established that the highest level of services are needed based on the number of children, the quality of services then must be equivalent to those in Anglophone schools.

The court highlighted that the test for equivalence must focus on substantive equivalence rather than per-capita costs or formal equivalence markers. The geographic scope should be local, and therefore the comparator group appropriate for assessing substantive equivalence should be the neighbouring majority-language schools that represent a "realistic alternative for rights holders". In assessing this equivalence, the court considered educational choices available from the perspective of s. 23 rights holders. The examination focussed on whether a reasonable rights-holder parent would be deterred from sending their child to a minority-language school because it was "meaningfully inferior to an available majority-language school". The SCC provided that, if the answer to the question was in the affirmative, then the remedial purpose of s. 23 was jeopardized.

In adopting an assessment for equivalence, the court outlined that all factors need to be comprehensively equated and examined in context, such as the schools' curriculum, quality of

teachers, facilities, extra-curricular activities to name a few. If it was found that both schools compared were substantively equal, then the s. 23 obligations were met. The SCC warned that minority-language rights holders cannot expect to have the very best of every aspect of education in their schools to achieve substantive equivalence.

The SCC simplified the test initially provided by the province which seemed overly complex, by divorcing the assessment for equivalence from the question of responsibility for a lack of equivalence. Although costs and practicalities are relevant to the determination of the level of services a group of rights holders are entitled to on the sliding scale, the SCC further provided that since costs were determined where "numbers warrant," they should not be re-considered after the appropriate levels of education services have already been determined. Thus, costs will be subsumed within pedagogical needs in determining what level of services the numbers warrant. While funds allocated to minority language schools should be at least the same per capita as those allocated to majority language schools, pedagogical needs would prevent the imposition of unrealistic financial demands upon the province.

In its equivalence assessment, the SCC reviewed the factual findings regarding RDV, and neighbouring English-language schools provided by the petition Judge. The findings demonstrated significant inadequacies at RDV. At least 710 students lived within the catchment area, with the Francophone population in the relevant area warranting the provision of elementary school facilities capable of accommodating approximately 500 students. Notwithstanding the fact that the Parents did not take issue with the quality of instructions provided to their children, the striking inadequacies students were subject to at RDV was in a sense discriminatory. Consequently, absent a justification under s. 1 of the *Charter*, the SCC found a violation of the claimant's *Charter* rights. The order striking the pleadings was also reinstated, while the SCC noted that the province's struck pleadings may be relevant to subsequent phases of the litigation, the decision to strike the pleadings was appropriate, given the phasing of the questions before the Court. The matter was remitted back to the Supreme Court of British Columbia for the next phase of the petition.

This is another significant decision on the issues relevant to s. 23 of the *Charter*. ■

SCC applies Charter to First Nation's election process re education qualifications

The Supreme Court of Canada (SCC) in *Kahkewistahaw First Nation v Taypotat* (2015 S.C.C.) recently considered whether the education provisions in the *Kahkewistahaw Election Act* were a violation of s. 15 of the *Charter.*

In order to achieve the goals of promoting good governance and encouraging education, the Kahkewistahaw First Nation in Saskatchewan spent 13 years developing an Election Code. The Election Code included a provision requiring candidates who wished to be a Chief or a Band Councillor to have obtained a Grade 12 education.

The applicant, Louis Taypotat, was a member of the Kahkewistahaw First Nation and was elected Chief for a total of more than 27 years. Although the applicant was Chief for the majority of the consultation process that led to the development of the new Election Code, he only had a Grade 10 education. This caused the provision to have the effect of prohibiting him from running again for

office. As a result, the applicant challenged the process, his disqualification, and the constitutionality of the Grade 12 requirement.

The impugned provision (ss. 9.03(c) of the *Kahkewistahaw Election Act*) specifies that candidates are required to have at least a Grade 12 education. Furthermore, as per ss. 10.01(d), they must demonstrate to the Electoral Officer that they have the requisite level of education before they are permitted to run.

After being prohibited from running in the May 2011 election (the first election under the *Kahkewistahaw Election Act*), the applicant brought an application for judicial review of the *Kahkewistahaw Election Act* process. The applicant argued that the Grade 12 educational requirement violated ss. 15(1) of the *Charter* because "educational attainment is analogous to race and age" for the purposes of ss. 15(1).

The Federal Court (2012, F.C.C.) dismissed the application on the basis that the applicant failed to produce evidence to demonstrate that education was an analogous ground for the purpose of s. 15. On appeal, the court found that the education requirement had a discriminatory impact on the basis of age and on "residence on a reserve", although neither of those grounds were pleaded or raised.

At the SCC, the applicant reformulated his s. 15 claim to argue that, "the education requirement violated s. 15(1) because it has a disproportionate effect on older community members who live on a reserve".

The court emphasized that the most recent approach to s. 15 was set out in *Quebec (Attorney General) v. A.* (2013 SCC 5), clarifying that, "the Charter requires a 'flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*'."

The court noted that it had repeatedly confirmed that s. 15 protects substantive equality and implements an approach that recognizes that persistent systematic disadvantages have operated to limit the opportunities available to members of certain groups. The court concluded:

"[t]he focus of s. 15 is therefore on laws that draw discriminatory distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group".

As such, the SCC confirmed that the s. 15 analysis is concerned with the social and economic context in which a claim of inequality arises in addition to the effects of the impugned provision or action on the claimant group.

The court then proceeded to outline the test that must be met in order to find a s. 15 violation. The first part of the s. 15 analysis must ask, "whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground".

The second part of the analysis would determine "whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their

disadvantage". The court noted that specific evidence required to demonstrate the second stage of the analysis would vary, depending on the context of the claim, however evidence that establishes a claimant's historical position of disadvantage will be relevant.

The question in the case at hand was which enumerated or analogous group faced the discrimination, and whether the applicant had established that the impugned law (the *Kahkewistahaw Election Act*) had a disproportionate effect on the members of any such group.

Upon a review of jurisprudence, the SCC concluded that there was no question that education requirements for employment in certain circumstances could be shown to have a discriminatory impact. The court referenced the decision by the United States Supreme Court which held that a requirement of a high school diploma for employees to work in maintenance at a power plant was a violation of the *Civil Rights Act of 1964* (1964, U.S.S.C.), as the effect of the facially neutral requirement was to disproportionately exclude African Americans from positions in the plant and an employment requirement unrelated to measuring job capability can operate as "built-in headwinds" for minority groups, and was therefore discriminatory.

The SCC distinguished these cases noting that in the present case there was "virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation to demon-strate the operation of such a 'headwind'." The court asserted that the reason for this lack of evidence may be due to the fact that the applicant had not pleaded those grounds on his own initiative.

The court noted that it had previously determined that an appellate court can only raise new issues on its own initiative when the failure to do so would risk an injustice and when the court is satisfied that there is a sufficient basis in the record on which to resolve the issue. As such, the SCC found the decision of the Federal Court of Appeal to raise the issue of "residence on a reserve" on its own initiative problematic because "residence on a reserve" had not been recognized as an analogous ground for the purpose of s. 15.

The SCC also found that there was no factual basis to support deciding the appeal as a violation of s. 15. The record was silent about the education levels of members of the Kahkewistahaw First Nation who lived on a reserve. In regards to the argument that the education requirement discriminated against older members of the community, the SCC found a similar lack of evidence to establish this conclusion. The court concluded:

"The evidence before us, even in combination, does not rise to the level of demonstrating any relationship between age, residence on a reserve, and education among members of the Kahkewistahaw First Nation, let alone that arbitrary disadvantage results from the impugned provisions."

The court aptly stated that, "while facially neutral qualifications like education requirements may well be a proxy for … a discriminatory impact, this case falls not on the existence of the requirement, but on the absence of any evidence linking the requirement to a disparate impact on members of an enumerated or analogous group."

Lastly, the court found that even if the ground had been properly raised and argued by the applicant, there were serious doubts about the merit of the argument that the education provisions

in the impugned legislation had the effect of imposing arbitrary disadvantage on community members based on their residence on the reserve. The court held that on the contrary, provisions of the *Kahkewistahaw Election Act* aimed to foster Chief participation in community governance by requiring three out of four of the Councillors to reside on the reserve during their term. Additionally, the court found that given the scheme of the *Kahkewistahaw Election Act* as a whole, "it is difficult to conclude that it has the effect of perpetrating arbitrary disadvantage against these community members".

The court did not have any hesitation in applying the *Charter* to Band actions, which confirms that Bands are considered "government" for *Charter* purposes. ■

Court extends deadline for Trustees to comply with Municipal Elections Act

In two recent decisions, the Ontario Superior Court of Justice considered the application of s. 98 of the *Courts of Justice Act* (*CJA*) in granting a candidate relief from penalty provisions of the *Municipal Elections Act* (*MEA*). In both cases, the candidates failed to file their financial statements and auditor's report by the established deadline. Subsection 80(2) of the *MEA* provides that a candidate who fails to comply with ss. 78(1) of the *MEA* within the requisite time will forfeit any office to which he or she was elected and the candidate is ineligible to be elected or appointed to any office to which the *MEA* applies until the next regular election has taken place. Under the *MEA*, there is no provision for relief from the penalties imposed by ss. 80(2). Both of these cases were heard alongside each other as they involved the same legislative scheme and issues.

In *Smith v. Toronto District School* Board, (2015, Ont. Sup. Ct.), the applicant, David Smith, failed to file his expense reports by the deadline imposed by the *MEA*.

Following the municipal election on October 27, 2014, the applicant was elected to the position of Trustee with the Toronto District School Board (TDSB). Pursuant to the *MEA*, the deadline to file the expense reports with the clerk was Friday, March 27, 2015, at 2:00pm.

Evidence that the applicant took steps to try to fulfill his obligation included numerous visits to the office of his accountant between February and March 2015. During these visits, the applicant discussed the preparation of his documents and repeatedly reminded the accountant of the March 27, 2015, deadline. After providing additional documents to his accountant on March 23, 2015, the applicant drove to Kenora. While he had planned to leave for Toronto on March 25, 2015, he injured his foot subsequently delaying his return. The accountant informed the applicant on March 25, 2015, that the documents were ready for pick up, at which time the applicant planned for his personal assistant to pick them up and submit them to the clerk on his behalf. Only then did he discover that his original signature was required on the documents.

The applicant attempted to speak with the Regional Trial Coordinator at Old City Hall to discuss filing an application for an extension of time, but was unable to reach them. As the applicant was unable to obtain a flight from Kenora to Toronto, on March 26, 2015, he began the 1800 km drive from Kenora to Toronto, driving through the night in the attempt to file his documents on time. The applicant missed the deadline by one hour and thirteen minutes.

In *Singh v. Peel District School Board and The Clerk of the City of Brampton / Corporation of the City of Brampton*, (2015, Ont. Sup. Ct.), the applicants, Gurratan Singh and Harkirat Singh, both failed to file their expense reports by the deadline imposed by the *MEA*, and subsequently were subject to the penalties imposed by ss. 80(2) of the *MEA*. The applicants were both candidates in the municipal election for the City of Brampton held on Monday, October 27, 2014. Harkirat was elected to the office of Public School Trustee for the Peel District School Board (PDSB) and Gurratan ran unsuccessfully for the office of Regional Councillor in the City of Brampton. Harkirat's seat was automatically vacated, and both Gurratan and Harkirat were precluded from being elected or appointed to any office to which the *MEA* applied until the next regular election had taken place.

The applicants campaigned together, shared campaign resources and expenses, including a campaign manager. In September 2014, they met with an accountant, who agreed to assist the applicants with final accounting and auditing services. Relying on the applicants' affidavits, the Ontario Superior Court of Justice found that steps were taken by both of the applicants following the election to fulfill the financial obligations imposed on them by the *MEA*. Both of the applicants had demanding careers and spent a significant amount of time fulfilling community obligations and contributions. After the election, the campaign manager assumed responsibility for the final accounting process and the applicants had confidence that the accountant would prepare the financial statements on time.

During the time period until the deadline, the applicants reminded both the campaign manager and an associate of the accountant of the filing deadline of 2:00 pm on March 27, 2015, and stressed the consequences of missing the deadline to the campaign manager. Once the deadline had passed, the applicants retained the services of an accountant to prepare the audit of their financial statements on an emergency basis. By the time this was completed, Harkirat's and Gurratan's financial statement and auditor's report were five and six days late respectively. It was further noted that the clerk's office took significant steps to ensure that all candidates were fully aware of their obligations to file financial disclosure in the prescribed form.

Counsel for the applicants in both cases asserted that the Ontario Superior Court of Justice had the jurisdiction to exercise discretion to grant relief pursuant to s. 98 of the *CJA* which states, "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

In both decisions, the Ontario Superior Court determined it had jurisdiction to apply s. 98 of the *CJA* in granting relief to a penalty under the *MEA.* To determine the exercise of its discretion, the court applied the test set out in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co*. (1994, S.C.C.), which states, "the power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damages caused by the breach…"

In *Smith*, the court accepted that although the applicant was aware of the deadline, he "acted in good faith and made diligent attempts to file his documents on time." The court weighed the applicant's error of missing the filing deadline by one hour and thirteen minutes against the forfeiture of office and right to participate in the next municipal election and found the penalty to significantly outweigh his error.

The court in *Singh* held that although there was no doubt that the applicants were well aware of their filing obligations and the deadline, they both had a mistaken belief that the campaign manager was dealing with the requirements, and that the accountant was going to complete the preparation of the documents on time and also arrange for them to be audited. The court concluded that both of the applicants proceeded in good faith and believed that the accountant would have the documents prepared and audited in time to be filed by the deadline.

The court in *Singh* further noted that given the importance of the filing obligations, the applicants could have exercised great diligence in ensuring that their documents were properly prepared on time, in accordance with the *MEA.* Despite this lack of diligence, the judge emphasized that their conduct was a "far cry" from the conduct of the applicant in *Ecker v Hamilton-Wentworth Catholic District School* Board (2012, Ont. Sup. Ct.), where the court declined to grant relief in a similar situation. In *Ecker*, the court found the applicant's failure to meet the deadline spoke to indifference to complying with the rules, rather than acting in good faith or inadvertence. In comparing the conduct of the applicants in the case at hand, the court found their conduct to be much closer to inadvertence than indifference, citing the fact it was a first campaign for both of them, and that it appeared they believed that they had taken steps in order to comply with their filing obligations. The judge found evidence of good faith through their actions of attempting to remedy their error, specifically by hiring an auditor to complete the audit on an expedited basis, once they realized they had missed the deadline.

The court in *Singh* also assessed the penalties imposed by ss. 80(2) of the *MEA*. The judge held that both the loss of elected office and loss of right to participate in the next municipal election outweighed the error of the applicants missing the deadline. While noting the importance of the deadline and the need to comply with it, the judge found the damage caused by the late filing of the applicants to be negligible.

In both cases, the court ordered that the time for the applicants to file the financial disclosure to be extended for a period of ten days from the decision, for the clerk to accept the financial disclosure as filed in accordance with the *MEA* and upon the filing of the financial disclosure prior to the end of the extended filing period, the applicants should not be subject to any forfeiture or penalty imposed pursuant to ss. 80(1) and 80(2) of the *MEA.*

The decisions emphasize the availability of a remedy under the *CJA* when the applicable legislation does not include a remedy. ■

Court imposes Education Act consequences against parent for truancy of child

In *Peel District School Board v. Fotini Kostoglou* (2015, Ont. Ct. of Jus), the Ontario Court of Justice considered a charge under the *Education Act* (*Act*) relating to student non-attendance. Pursuant to s. 30(1) of the *Act*, the parent was charged with neglecting and/or refusing to ensure that her son, who was a child of compulsory school age, attended school.

The court noted that several facts of the case were not in dispute by the parties. These included such facts as: the child was of compulsory school age pursuant to the statute, the school board complied with the statutory notice requirements and attempted to provide alternative programs,

and the program of home schooling provided by the parent was deemed unsatisfactory by a Provincial Attendance Officer. In light of these agreed upon facts, the court concluded that the child's non-attendance at school or an approved school program had been proven beyond a reasonable doubt.

The court identified the following as two issues that had to be resolved: whether the defendant parent had made out the defence of due diligence or any common law defence; and, whether there were exemptions that applied to the defendant parent.

The court concluded that the parent had failed to establish a due diligence defence. The court noted that with respect to strict liability offences (such as the offence at issue in the decision), the burden is on the Crown to prove the act beyond a reasonable doubt. To claim a defence of due diligence, the burden shifts to the defendant to prove on a balance of probabilities that they had in fact exercised all due diligence as a reasonably prudent person considering all the facts of the case, and therefore should not be convicted. In this case, the defendant admitted to pulling her child from the school programs, but did not express whether there may have been any valid reasons for it.

The parent submitted that she believed that the school programs were detrimental to the emotional, mental and physical well-being of the child. While the court noted there was no doubt that this belief was genuine on behalf of the parent, the court stated that it did not deal solely in beliefs and there was no evidence presented to establish that this was more than a belief. The only evidence that the court heard related to a diagnosis for mental health issues, and that there was no diagnosis. Therefore, the court concluded that there was no determination from an educational standpoint that the child had special needs, or required a special program. The court also noted that despite this lack of evidence, the school had still attempted to accommodate the needs of both the child, and the defendant parent. As such, the court concluded that this case was not one of necessity and therefore the common law defence of necessity was not proved.

The court then considered whether the parent defendant qualified to claim an exemption for her child not to attend school and to participate in the "unschooling program" at her home. The court referred to section 47(3) of the *Provincial Offences Act* which establishes that the burden is on the individual claiming the exemption to prove that they qualify for the exemption on a balance of probabilities. The exemptions available in this case were either that the child was in an approved home schooling program, or that the child no longer lived in the catchment area of school at the Peel Board and was attending school at another board, or that the child was over the compulsory school age. Given the circumstances of the case, the court found that none of these exemptions applied to the parent defendant.

The court also noted that there was considerable evidence presented and time spent discussing the issue of home schooling and "unschooling" compared to traditional schooling and curriculums. The court concluded that while there may be very valid reasons to have that issue addressed in another court or body, the law with respect to the issue at hand was clear. Furthermore, it was not the function of that particular court nor was it the issue to be determined at trial.

Ultimately, the court held that the parent defendant did violate section 30(1) of the *Education Act* in her refusal to comply with the direction of legitimate authorities and ensure her son participated in some form of school program with the Board. The court stated:

"The natural consequence is that you have refused to comply with a legitimate arm of the government that has the responsibility to ensure that parents and children receive the appropriate education that they need and require to become members of society, and also, have a right to".

In its submissions on sentencing the Board noted that given the history and facts of the case, a probation order as opposed to a fine was more meaningful because the ultimate goal was a change in behaviour and the facilitation of the child receiving an education. Ultimately, the court found that a one year probation order against the defendant parent was in the best interests of the child and parties involved.

While charges against a parent for their child's non-attendance at school are rare, this decision highlights the importance of the mandatory attendance provisions under the *Education Act*. ■

Court denies insurance coverage for bullying claim

Homeowner policies can include liability coverage for the personal actions of an insured causing unintentional bodily injury or property damage. However, exclusion clauses can apply to prohibit coverage from applying to negligence claims against parents for their failure to prevent their child's bullying of a classmate.

In *D.E. v. Unifund Assurance Co*. (2014, Ont. Sup. Ct.), (*Unifund*), DE and LE, the insured, were involved in an action which alleged that their daughter and two other girls bullied a fellow student, causing the student physical and psychological injuries. The claim alleged that DE and LE were negligent in their failure to control their daughter. As a result of a claim, DE and LE brought an application requesting that Unifund, their insurer, defend and indemnify them pursuant to their insurance policy. The homeowner insurance policy with Unifund included liability coverage if their personal actions caused unintentional bodily injury or property damage.

Unifund refused on the basis that the claim fell outside of the policy's scope of coverage, relying on two exclusion clauses. Unifund relied on exclusion clause 6 which stated that claims arising from, "bodily injury or property damage caused by an intentional or criminal act of failure to act" were not insured. Unifund argued that the action against the parents in negligence was derivative of the claim against their daughter for her intentional actions of assault, threatening and bullying, and thus exclusion clause 6 applied. Unifund also relied on exclusion clause 7(b) which did not extend insurance protection to the "failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment."

In *Unifund*, the application judge found that the insurer did have a duty to defend and indemnify DE and LE in relation to the claims made against them. (This decision is reviewed in the KC Education Law Newsletter, March 2015.) The application judge also found that the negligence claim against the insured was not derivative of the intentional tort claim against their daughter. As a result, the application judge did not agree that the exclusion in clause 6 should apply because there was no allegation that the insured's acts were intentional. The application judge noted that clause 7(b)

was silent on whether the exclusion applied to only intentional or unintentional failures to take steps to prevent physical abuse or harassment, and concluded that it should be limited to only intentional failure. Unifund appealed.

The appeal was allowed by the Ontario Court of Appeal in *D.E. v. Unifund Assurance Co.* (2015 Ont. C.A.). The Court of Appeal held that, while the application judge did not err in concluding that the plaintiff's claim against the insured was not derivative of the intentional tort claim against their daughter, the judge erred in finding that the non-derivative claims triggered the insurer's duty to defend. The Court of Appeal applied the three-part test enunciated by the Supreme Court of Canada in *Non-Marine Underwriter, Lloyd's of London v Scalera* (2000, S.C.C.) for interpreting insurance policies in the context of the duty to defend and duty to indemnify. A court must first determine which of the plaintiff's legal allegations are properly pleaded, then determine if any claims are entirely derivative in nature, and lastly decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend. The court found that the plaintiff's claims against DE and LE were properly pleaded and that the claims were not derivative of the intentional tort claim against their daughter. However, the court noted that the Amended Statement of Claim against DE and LE significantly overlapped with the exclusion in clause 7(b) and thus the exclusion applied to the claim.

The exclusion clause that the insurer relied on clearly precluded coverage for a failure to take steps to prevent physical, psychological or emotional abuse or harassment. Considering the allegations in the statement of claim that listed various failures by the insured to prevent the bullying by their daughter, it was evident that the exclusion clause applied to the action. As a result, the insurer did not have a duty to defend or indemnify the insured in the action against them and their daughter.

C.S. v. TD Home and Auto Insurance Company, (2015, Ont. C.A.), (*TD Home*) was a companion appeal to *Unifund*. The principal parties, the underlying actions of bullying and harassment by the minor daughters of the insurance holders, and the relevant insurance policies were identical. However, in *TD Home*, the minor daughter was also a party. In *Unifund* the minor daughter was not a party. The Court of Appeal found that the insurer had no duty to defend the minor daughter as the claim against her was one for intentional torts and thus the exclusion clause applied.

Given the number of claims of bullying and harassment in the school context, it can be expected that victims will resort to claims against the perpetrator, and perhaps the family of the perpetrator. The difficulty with these decisions is that the perpetrator and family of the perpetrator may be liable, but may not have any assets to satisfy any judgment. The decision of the Court of Appeal in both *Unifund* and *TD Home* precludes recovery under the applicable insurance policies. It is likely that similar exclusions will apply in other home-owner policies. ■

YCJA records in board proceedings fall exclusively under youth court jurisdiction

In *Applicant v. Society* (2015, CFSRB 32), the Child and Family Services Review Board (CFSRB) determined that motions for access to and use of records pertaining to the *Youth Criminal Justice Act* (*YCJA)* in CFSRB proceedings should be made before the Youth Court without the need for further vetting by the CFSRB.

The issue in this case was whether parties should seek orders from the Youth Court where the CFSRB is granted the authority to screen requests or whether the Youth Court should carry out a screening process where it would vet parties' interests and make a final order.

The Ontario Court of Appeal in *S.L. and L.L. et al v Attorney General of Ontario* (2015, Ont. C.A.) held that the *YCJA* has exclusive jurisdiction over access to and use of records, as there are privacy concerns related to the information of young persons that would need to be protected. In order to gain access, an order from the Youth Court must be sought prior to using the records in another proceeding.

In this case, the Children's Aid Society (CAS) sought an order from the Youth Court delegating the decision about access to the records to CFSRB, in accordance with *D.P. v Wagg*, (2014, Ont. C.A.) (*Wagg*), on notice to the Attorney General. The *Wagg* principles set out the need to notify the Attorney General and the police of any production request in order to allow them the opportunity to raise public interest concerns. The rationale for the screening process is to allow the appropriate state agencies such as the Crown and police to vet the information ensuring that no privacy interest may be jeopardized upon disclosure or use of such information in another proceeding.

The practice routinely employed in school board expulsion appeals before the CFSRB have been by way of a motion to Youth Court, on notice to the young person, as well as other relevant agencies (ie. the Crown and the police), where a final order is rendered by the Youth Court without any further delegation to the CFSRB. This practice was agreeable to the CFSRB to be an appropriate procedure. The *Wagg* process did not seem suitable in this case, since the Youth Court has exclusive jurisdiction, notwithstanding the fact that the Youth Court did make a delegation to the CFSRB under *Wagg* based on the wording of the Society's motion. However, Counsel for the Society clarified that the *Wagg* vetting process was not necessary.

In analogizing a *YCJA* records access motion with the common practice in school board expulsion appeals, the CFSRB found that the *Wagg* vetting process, which essentially creates a second tier of screening, unnecessary. As such, this is left to the Youth Court to apply its expertise in balancing interests of the parties and rendering a final order. ■

OIPC dismisses board's application for closed-meeting exemption

The Ontario Information and Privacy Commissioner recently ordered the Toronto District School Board (Board) to provide access to its *Focus on Youth 2012* audit report.

The Board runs a summer program entitled "Focus on Youth Toronto" with the objective of providing high quality summer program opportunities for children and youth in Toronto's urban inner city areas. An audit of the program was conducted with a report issued May 2013, which became the contentious subject in this appeal.

Upon receiving a request for access to the report from the appellant, the Board responded advising that the report is exempt from disclosure pursuant to the discretionary exemption under section 6(1)(b) of the *Municipal Freedom of Information and Protection and Privacy Act* (*Act*) for records that would reveal the substance of discussions of a closed meeting. In order for the exemption to

apply, previous orders of the Commissioner's office have held that the institution is required to establish: 1) a council, board, or a committee of one of them, held a meeting; 2) a statute authorizes the holding of the meeting in the absence of the public; and 3) disclosure of the record would reveal the actual substance of the deliberations of the meeting.

In applying this test to the appeal before it, the Adjudicator found the Board met the first prong of the three-part test by the Board's own admission that an *in camera* meeting of the committee of the whole Board was held on December 11, 2013. Next, the Adjudicator had to determine whether the Board met the second prong of the test, specifically whether the report that was discussed at the closed meeting involved the "security of the property of the board" by examining ss. 207(2) of the *Education Act*, which authorizes the holding of the meeting in the absence of the public.

The Adjudicator referred to interpretations of previous orders regarding the "security of the property" in order to determine whether the appeal before it fell within the exemption set out in ss. 6(1)(b) of the *Act*. Order MO-2468-F involved an *in camera* report of the City of Toronto's meeting, where the City felt that disclosure of the information could potentially harm its financial and economic interests. However, the Adjudicator found that, the "security of the property of the municipality" concerned the physical loss or damage, as well as public safety in relation to the property. Therefore, the information deliberated at the meeting did not amount to "property" and "security" as contemplated by the Act.

Order MO-2683-I distinguished "security of the property" from the Adjudicator in Order MO-2468-F by recognizing other forms of property, such as "corporeal" and "incorporeal" property, as provided in law as "property interests". In that case, the Adjudicator noted that if the subject matter being considered in a meeting is the "security" of the property of the city or local board, the *City of Toronto Act* provides for these meetings to be held *in camera*.

In this Appeal, the Adjudicator agreed with the findings of both Orders, in particular that the protection issue identified in the record must be distinguishable from simply a financial interest in the matters discussed. She also adopted the elements necessary to establish the requirements under section 190(2) of the *City of Toronto Act* – which sets out that the City must establish it owns identified property and that the subject matter being considered in the meeting is security of that property – in relation to section 207(2)(a) of the *Education Act*, specifically referring to the security of the property of the Board. She also considered the legislative intent of section 207 of the *Education Act*, as well as other research publications on the question of open meetings. Upon her review, the Adjudicator contended, analogous to findings in the other reports, that the idea of democracy is better served by openness and transparency. This notion of transparency and accountability was also echoed by the Supreme Court of Canada in *London (City) v RSJ Holdings Inc.* (2007, S.C.C.). In order to foster openness, the Adjudicator agreed with the Adjudicator in Order MO-2683-I that, "security of the property" should be narrowly construed in applying it to the interpretation of that phrase in section 207(2) of the *Education Act.* As such, activities of school boards should be open and transparent to the public, as they fall within the purview of democratic institutions.

This Order confirms the importance of transparency and accountability as tenets of democracy, with respect to access to information, notwithstanding narrow exceptions. Finally, the Order reaffirms that a broad reading of legislation without explicit language provided by parliament would cast the net farther than anticipated. As such, the meaning of "security of property" does not

extend to include merely a review of how the funds have been spent in this case, as the deliberation did not refer to the Board's finances in this context. ■

OIPC finds no tampering of records

In *Order MO-3230* (August, 2015), the issue before the Information and Privacy Commissioner of Ontario (Adjudicator) was whether staff or trustees of the Toronto District School Board tampered with the Board's expense audit documents.

The Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) from a journalist (Requester) seeking access to a report on trustee expenses. Upon receiving the request, the Board's Freedom of Information Coordinator advised the Requester that an extension of the time limit for responding to the request would be sought. A subsequent letter was sent to the Requester to further extend the response time. The FOI Coordinator provided that, while the search for responsive records was complete, affected parties were being given an opportunity to make representations regarding disclosure of the records.

The Requester appealed the Board's second extension, which was resolved when the Board issued an access decision. The Requester then launched an appeal of the Board's access decision.

The issues before the Adjudicator were two-fold: (1) to determine whether the exemptions at s. 7 (advice and recommendations) and s. 14 (personal privacy) of *MFIPPA* applied to the parts of the records withheld by the Board; and, (2) whether Board trustees or staff tampered with documents or attempted to inappropriately influence or interfere with the processing of the Requester's request. During the course of the inquiry, the first issue regarding the exemptions was resolved with the Board agreeing to provide information that was originally redacted under s 7 of *MFIPPA*. Following a review of the revised package, the Requester withdrew her request to access the information withheld pursuant to s. 14 of *MFIPPA*. However, the Requester did maintain her concern with the Board's processing of her FOI request.

As part of its investigation, the IPC office interviewed several Board staff and trustees. Additionally the documents included in email correspondence between staff and trustees who allegedly attempted to influence or interfere with the FOI process were reviewed, as well as internal Board documents related to the audit and FOI processes.

Upon reviewing all the information before it, the Adjudicator found that the issue stemmed from a lack of information pertaining to the request, and the FOI Coordinator's failure to clarify the request early on in the process pursuant to s. 17 of *MFIPPA*. This provision requires both a requester and the government to identify sufficient detail with respect to responsive records to the request. The Adjudicator highlighted the importance of clarity and the Board's responsibility to identify the nature and scope of the request, as staff, trustees and the auditor were confused about which records might be responsive since there were many different versions of the audit reports prepared at various stages. As such, this raised concerns with the release of these documents as there were questions about the accuracy of the information being provided.

Consequently, the Adjudicator made findings of improper handling of the FOI request on the part of the Board. The Adjudicator noted that, while the request may have appeared straightforward when it was first received by the Board's FOI Coordinator, complications arose as time went on, which

should have alerted the FOI Coordinator to obtain further clarification before proceeding. The Adjudicator suggested that the FOI Coordinator could have also provided a summary of the background to the audit process, and the different versions and types of records that were in existence, allowing the Requester to decide for herself which version she was interested in obtaining.

The Adjudicator also investigated the FOI Coordinator's allegations against trustees and staff, and made no finding of tampering with documents or any attempt to inappropriately influence or interfere with the processing of the Requester's FOI request. It was provided that any changes to the individual trustee reports were all submitted well before the FOI request. Furthermore, inquiries made by the trustees into their own audit reports, and the version that was to be sent to the appellant, was not found to support allegations of staff or trustees attempting to subvert the process, tamper with documents, or mislead the appellant.

Another key factor giving rise to the issues at the appeal were a lack of FOI training and knowledge. Upon reviewing the Board's FOI training materials, the Adjudicator made note that the Board's office of the Coordinator failed to follow its own process, since the records were not received or reviewed with the auditor during the prescribed time-frame provided in the training materials. Accordingly, the Adjudicator reiterated the importance of training, knowledge and communication, which ultimately provides for transparency of government action embedded in the core of Canadian democratic values.

This case should serve as a caution for all institutions handling FOI requests, as the law delegates important responsibilities to freedom of information coordinators who must seek clarification should they find a request to be unclear. Failure to take the necessary steps at the outset can result in complex confusion, delays and misunderstandings between parties. The IPC recommended for all public bodies covered by access laws to have procedures in place, ensuring all staff comply with the procedures, as well as providing third-party notice if there may be information related to third-parties in the records requested. ■

Broader wording for use on Motions to Youth Court

In an interim decision related to an application for review of a residential placement, the Child and Family Services Review Board (CFSRB) held that the Youth Court holds exclusive jurisdiction with respect to *YCJA* matters, and parties should avoid drafting requests to the Youth Court that require further vetting by the CFSRB.

At the time of the hearing, in *Applicant v. Society* (2015 CFSRB 33), there was no Youth Court order to permit the CFSRB to properly address the issue of jurisdiction by reviewing the bail condition. However the CFSRB was satisfied that it had jurisdiction to hear the matter, as the placement at the facility was a child welfare placement. It was further provided that the provincial director of youth justice would not have the authority to direct the child's placement even if the bail condition existed.

At the hearing, the CFSRB cautioned counsel and witnesses not to deal with *YCJA* matters as it was not permitted to hear the results of the *YCJA* proceedings or the contents of any bail or probation

conditions without a more broadly worded order. The CFSRB was only privy to the issue of placement in a youth justice detention centre because it was noted in one of the assessments.

The CFSRB and the parties considered a more broadly worded order to be sought in Youth Court so as to not constrain the process before the CFSRB. However, this was not obtained at the second hearing date, but a motion was commenced in Youth Court. The motion contained a request for a *Wagg*-like order, although the CFSRB had advised the parties that such order was unnecessary.

The Youth Court provided a new order which stated that the Society could not gain access to the updated assessment until the CFSRB made an order on a *Wagg* motion with notice to the Attorney General (Civil) and a warning on its file containing two broad terms. The terms permitted the Society to provide to the parties and the CFSRB all information related to any dealings with the applicant, as well as having the Attorney General and Regional Police Service to also provide information requested by the Society. Based on this broadened wording, the CFSRB was able to obtain all the information it required without conducting another *Wagg* motion, which was clarified as not being the appropriate route.

The CFSRB suggested the wording to be used on future motions to Youth Court to avoid delegation of screening to the CFSRB and to allow for broader access to information. It will be up to the Youth Court to determine whether the wording is appropriate in any given case or if individual circumstances require specific wording. ■


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