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Education Law Newsletter

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Court of Appeal emphasizes best interests of child when denying parent access to information

In *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)* (2018 ONCA 559), the Ontario Court of Appeal (Court) held that a parent's freedom of information request does not affect litigation records with the Office of the Children's Lawyer (Children's Lawyer) for a child-client, even when the documents are not protected by solicitor-client privilege.

A father requested access to child-client information from the Ministry of Attorney General of Ontario (MAG) pursuant to the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) in the Children's Lawyer's litigation files. The father sought litigation files containing both privileged and non-privileged reports pertaining to his children and all materials filed with the Court, such as psychological and educational reports and transcripts. MAG denied the father's request and agreed with the Children's Lawyer, who claimed that the material was not subject to *FIPPA* because the child-client relationship

involved private litigation, which was considered independent legal representation, separate from the father's and MAG's 'custody or control'.

The father appealed MAG's decision. Accordingly, the Ontario Information Privacy Commissioner (IPC) and, subsequently, the Divisional Court held that MAG has 'custody or control' over the requested records because the Children's Lawyer is a branch of MAG and, therefore, the Children's Lawyer was incorrect in denying the litigation materials because *FIPPA* applied. The Divisional Court established reasonableness as the appropriate standard of review and concluded that the IPC's decision was reasonable. The Divisional Court held that the Children's Lawyer was not stipulated under provisions of those institutions to be exempt from freedom of information rights.

The Court of Appeal quashed the decision of the IPC and Divisional Court, and held that the Children's Lawyer is separate from MAG in relation to their representation of children, therefore MAG did not have 'custody or control' of the requested materials.

In making their decision, the Court of Appeal focused on the best interests of the child, the voice of the child, the role of the Children's Lawyer, and the fact that confidentiality is broader than solicitor-client privilege.

The Court's decision emphasized that the best interests of the child is of paramount importance, requiring heightened protections under the law. The Children's Lawyer has a fiduciary duty to the child they represent, which demands "undivided loyalty, good faith and attention to the child's interests, to the exclusion of other interests" (para. 69) including the interests of the parents, the Crown and of MAG. The Court found that the IPC and Divisional Court had failed to consider the best interests of the child in coming to their decisions. The Court stated that to rule otherwise and permit a third party to access confidential material belonging to a child would not only negatively affect the child's interest, but would also impact proceedings before the court, cause damage to the child whom would no longer be meaningfully represented and seriously undermine the Children's Lawyer role as an advocate for the child.

This case clarifies that the best interests of the child is of paramount importance to the client-child relationship with the Children's Lawyer, which goes beyond solicitor-client privilege. This is especially important to the proper functioning of the legal system as well as ensuring that the Children's Lawyer can appropriately advocate for the child-client while at the same time maintaining a confidential and loyal relationship. ■

School Boards must be cautious when disclosing students' personal information

In the cases of *Toronto District School Board (Re)* (2018 OIPC No. 85), and *Hamilton-Wentworth District School Board (Re)* (2018 OIPC No. 100), the Information and Privacy Commissioner (IPC) heard individual complaints alleging two school boards breached privacy legislation when students' personal information was disclosed to third-party photography vendors for picture day. In both cases, the IPC provided helpful recommendations to ensure that school boards abide by privacy legislation by appropriately disclosing students' personal information to other parties.

In both cases, parents of children (the complainants) attending schools within the Toronto District School Board (TDSB) and the Hamilton-Wentworth District School Board (HWDSB) argued that the boards' disclosure of student information to the photography vendors breached the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*). TDSB's disclosure of students' personal information included the students' names, ages, student

numbers, homerooms and grades, and HWDSB's disclosure included the students' first and last names. The complainants argued that the boards did not collect, disclose and use student information and photographs according to *MFIPPA*. The complainants also claimed that the boards did not properly notify parents that their children's personal information would be disclosed and used by the photography vendors.

In general, the boards submitted that the collection, use and disclosure of students' personal information and photographs is essential and necessary for administrative purposes, such as student safety, student identification and school security.

The IPC must consider the following in order to determine whether a school board breached *MFIPPA*.

1. Is the information at issue "personal information" as defined by ss. 2(1) of *MFIPPA* as "recorded information about an identifiable individual"?

2. Is the board's collection and use of student photographs authorized under ss. 28(2), which sets out the circumstances under which personal information may be collected by an institution, and s. 31, which permits use of information "for the purpose for which it was obtained", respectively?

3. Did the board provide a 'Notice of Collection' as required under ss. 29(2) of the *MFIPPA*?

4. Was the disclosure of the personal information by the board to the vendor consistent with the purposes for which it was obtained in accordance with s. 32 of *MFIPPA*?

5. Did the board's service agreement with the vendor include adequate provisions with respect to the protection of students' personal information?

The IPC accepted TDSB's and HWDSB's claim that the collection and use of student photographs is essential for important administrative purposes, such as identifying students and maintaining records for the safety of students and staff.

The IPC found, however, that TDSB breached MFIPPA's Notice of Collection requirement by failing to provide any notice explaining its authority to collect the photographs, and the primary purpose(s) for which the photographs are intended to be used, or any contact information. In respect of HWDSB, the IPC concluded that the implementation of school calendars, informational pamphlets and a document named "How we Collect, Use and Disclose Your Personal Information" were all sufficient measures to meet the prescribed notice requirements. A Notice of Collection should describe details such as why information is collected, the administrative purpose for the collection and the vendor contact information.

To determine whether the disclosure requirements are met under MFIPPA, the IPC not only looks at the reasons for the disclosure, but also the complainants' reasonable expectation that the students' personal information would be disclosed to allow vendors to offer parents the opportunity to purchase their children's photographs. The IPC stated that, although TDSB's disclosure of a student's personal information aligned with the purpose for which it was obtained, TDSB could have minimized the information disclosed to the vendor and still satisfied the school's administrative obligations. The IPC concluded that HWDSB met the disclosure requirements but recommended HWDSB provide parents/guardians with the opportunity to withdraw from the vendors' marketing endeavours or uses unrelated to the board's administrative purposes.

Additionally, the IPC held that TDSB's Service Agreement with the vendor failed to include sufficient provisions, such as addressing the security or retention of students' personal information when disclosing it to third-parties. HWDSB's retention practices met the

requirements of protecting students' personal information under MFIPPA.

School boards must be cautious when disclosing students' personal information to photography and other third-party vendors. These two cases demonstrate the recommended steps boards should take in order to ensure they are not breaching privacy legislation. At the same time, boards should minimize the information they disclose to vendors and ensure parents/guardians are notified about the use, collection and disclosure of their child's information. ■

IPC refuses request for Principal's notes and threat assessment documents

In *Re Toronto Catholic District School Board* (2018 CanLII 61891), the appellant was a former student of a school under the jurisdiction of the Toronto Catholic District School Board (Board). The appellant had made a request to the Board under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for the release of records relating to an investigation of an incident involving the appellant. At issue was the Board's decision not to release the Principal's handwritten notes regarding the investigation and a threat assessment package created during the investigation. The Board exercised the discretion under ss. 38(a) of *MFIPPA* in conjunction with s. 13 to refuse the release of the documents because the release of the information could reasonably be expected to seriously threaten the safety or health of an individual. The adjudicator partially upheld the Board's decision by releasing parts of the documents that contained the personal information of the appellant, but did not contain information that risked the health or safety of another individual(s).

Under s. 13 of *MFIPPA*, the party refusing to release the information has the onus of demonstrating that the release of documents would result in a risk of harm to an individual that is well beyond a mere possibility of harm and more than speculative. Two groups of individuals in this case were determined to be at risk of harm by the appellant, being the staff and the students. An important note is that an individual is not confined to an "identified individual", but can include any member of an identifiable group or organization.

In coming to the decision, the adjudicator considered the history of the appellant. Past acts of aggression by the appellant against both staff and students were significant factors in assessing the risk of harm. The adjudicator referenced the documents at issue in making the findings, but did not provide specifics, because doing so would reveal the contents of the records. Furthermore, the adjudicator looked at incidents that showed a general proclivity to violence, even though the incidents were not directed against any particular person or group. The adjudicator refused to consider the fact that past students have threatened board employees for participating in the threat assessment process. The assessment of whether disclosure of information would result in harm is highly context-specific. The issue is whether this specific student and the release of these specific documents would result in a sufficient risk of harm.

The exemption at s. 38(a) in conjunction with s. 13 is discretionary. On appeal, the adjudicator may find that the institution erred in exercising the discretion if it did so in bad faith, did so for an improper purpose, took into account irrelevant considerations, or failed to take into account relevant considerations.

Relevant considerations may include the following:

"1. The purposes of *MFFIPA* including the principles that:

(a) information should be available to the public;

(b) individuals should have a right of access to their own personal information;

(c) exemptions from the right of access should be limited and specific; and

(d) the privacy of individuals should be protected.

2. The wording of the exemption and the interests it seeks to protect.

3. Whether the requester is seeking his or her own personal information.

4. Whether the requester has a sympathetic or compelling need to receive the information.

5. Whether the requester is an individual or an organization.

6. The relationship between the requester and any affected persons.

7. Whether disclosure will increase public confidence in the operation of the institution.

8. The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

9. The age of the information.

10. The historic practice of the institution with respect to similar information." (para. 43)

The IPC held that "not all of those listed considerations will necessarily be relevant, and unlisted considerations may be relevant."

The adjudicator found that the Board took into consideration both the appellant's right of access to his own personal information, but also the safety interests of other individuals.

The final order called for the release of certain sections of the documents that contained the personal information of the appellant, while withholding other parts based on the finding that the release would be inflammatory for the appellant and would result in a risk of harm for students and teachers involved that went beyond a mere possibility.

Boards should be mindful of the important caveat for health and safety-related information when addressing access to personal information requests. ■

IPC upholds School Board's decision to deny access to information that is subject to solicitor-client privilege

In *District School Board of Niagara (Re)* 2018 CanLII 27873 (ON IPC), the adjudicator held that a school board lawfully refused an information request by a community member. The adjudicator concluded that the communication between the school board and external legal counsel was subject to solicitor-client privilege and that the school board appropriately applied their discretion to refuse access, despite their 'bottom line' disclosure to the public.

Two schools in the jurisdiction of the District School Board of Niagara (Board) were consolidated in 2016, and as a result, the Board sought name suggestions, first from the community and subsequently a naming committee. The Board retained external legal counsel, a trademark/copyright lawyer, to conduct a 'knock-out' search to ensure that the shortlisted names would not face any future hurdles. Unsatisfied with both the name and the Board's renaming process of the consolidated school, the appellant, a community member, made a request to the Board pursuant to the *Municipal Freedom of Information ad Protection Act* (Act) to disclose a report prepared by the lawyer regarding the name change. The Board denied the appellant's request relying on the solicitor-client privilege provision under s. 12 of the Act, which provides an institution the discretion to refuse to disclose a record subject to solicitor-client privilege.

The adjudicator held that the communication between the Board and the lawyer was for the

purpose of seeking and receiving legal advice, and therefore amounted to solicitor-client privilege subject to exemption under s. 12 of the Act. The adjudicator also found that the Board correctly exercised its discretion in denying access to the record sought by the appellant.

The appellant claimed that legal advice and recommendations received by the Board were not intended to be confidential as the results were made available to the naming committee, and ultimately 'waived privilege' when this information provided by legal counsel was communicated to others outside the Board. In addition, the appellant argued that the lawyer's report was prepared for public dissemination as the lawyer was acting in a capacity of a consultant more than a lawyer.

The Board submitted that the report prepared by the lawyer provided legal advice requested by the Board which amounted to the lawyer acting in his capacity as a barrister and solicitor. The Board further claimed that they took active measures to ensure the preservation of confidentiality of the record by providing only a 'bottom line' report to the naming committee, and not the entire record.

The adjudicator disagreed with the appellant, and found that the Board did not waive privilege when the Board revealed the "nature and fact of the legal opinion" to non-staff members. The adjudicator affirmed established case law that the disclosure of the 'bottom line' legal advice to the public was required in the interests of transparency in order to keep the public informed on a topic of significance, and did not constitute a waiver of privilege. Accordingly, the adjudicator found that the Board appropriately exercised the discretion to withhold the record under s. 12 by balancing the competing interests of the need to be transparent to the public and maintaining solicitor-client privilege. ■

Boards may impose school transfers for safety purposes, but not as 'disguised discipline'

In *K.W. v. Toronto Catholic District School Board* (2018 ONSC 2794), the Divisional Court dismissed a student's application for judicial review of a decision of the Toronto Catholic District School Board (TCDSB) to transfer him to another school after he assaulted one of his peers.

K.W. was one of three Grade 11 students who assaulted a Grade 10 student by hitting and punching him. When the assaulted Grade 10 student was found by the vice-principal, his clothing was ripped and he was visibly shaken, with scratches and bumps on his body. K.W. also took the victim's glasses and threw them away.

Following the assault, the police advised the school that the perpetrators were not allowed to return to school. The school placed K.W. on a 20-day suspension, during which the principal conducted an investigation. The principal subsequently reduced K.W.'s suspension to five days, but concluded that K.W.'s presence in the school would pose a risk to the physical and/or mental wellbeing of the victim, and decided to transfer K.W. to another school, pursuant to the Board's transfer policies. Of the other two perpetrators, one was expelled from the school, and the other was expelled from the Board.

K.W. appealed the school's decision regarding the transfer, and a hearing was held before a TCDSB Superintendent. The Superintendent, due to a lack of evidentiary support, rejected K.W.'s arguments on procedural unfairness and racial profiling (which alleged that the decision to transfer him had been made because of his skin colour). The TCDSB Superintendent concluded that K.W. could not be permitted to return to his school. In reaching this conclusion, the Superintendent considered the TCDSB's

policies, concerns about the victim, and the impact on K.W. of the transfer (which effectively would prevent him from joining sports teams for the year at a new school).

Consequently, K.W. began attending a new school within the same school district, but brought an application for judicial review of the Superintendent's decision to the Divisional Court, raising three issues.

The first issue considered by the Court was K.W.'s argument that the Board lacks jurisdiction to impose a non-voluntary transfer on a student for discipline purposes pursuant to its transfer policies. K.W. argued that since Part XIII of the *Education Act* contains a comprehensive framework for imposing discipline in the form of suspensions and expulsions, TCDSB had no authority to use its transfer policy once the principal imposed a suspension. The Court rejected this argument, stressing that there were different purposes behind the discipline provisions in Part XIII of the *Education Act* and the Board's transfer policy – the former was disciplinary in nature, while the latter aimed to protect victims. The Court concluded that, pursuant to ss. 169.1 and 265(1)(m) of the *Education Act*, the Board had authority to develop transfer policies to promote school safety. Although Ministry of Education policies stated that the "exclusion provision" in ss. 265(1)(m) cannot be used as a form of discipline, there was no evidence that K.W.'s transfer was made for disciplinary purposes. Moreover, previous cases have determined that a student has a right under the *Education Act* to attend a school, but not the right to attend a particular school.

The second issue considered by the Court was K.W.'s argument that he was denied an appropriate degree of procedural fairness. The Court disagreed, noting that there was nothing improper in the way in which the Superintendent conducted the hearing. The Superintendent met his obligation to give K.W. an opportunity to be heard, K.W. was represented by a lawyer, and the Superintendent also heard from K.W.'s family members and a community leader. The Court rejected K.W.'s argument that he did not have proper notice; that there should have been an opportunity to cross-examine the principal; or that there was a reasonable apprehension of bias – there was no evidentiary basis for these allegations.

Lastly, the Court considered whether the decision of the Superintendent was reasonable. The Court concluded that it did fall within a range of possible, acceptable outcomes. The Superintendent gave written reasons for his decision to uphold the transfer, and referenced the Board's policies. He also carefully examined K.W.'s argument about racial profiling (an argument which was not advanced before the Court) before rejecting that argument. It was reasonable for the Superintendent to accept the principal's opinion that K.W.'s presence in the school would pose a risk to the psychological well-being of the victim, and there was no evidence to establish that the transfer was made for disciplinary reasons. Importantly, however, the Court noted that if K.W. had established that the transfer was in fact "disguised discipline", that would likely render the Superintendent's decision unreasonable.

This case confirms that Boards can impose a non-voluntary transfer of a student to another school in order to protect the physical or mental well-being of other pupils. Boards should have clear policies in this regard, and should ensure that these transfer decisions are not imposed as a form of "disguised discipline". ■

Human Rights Tribunal finds School Board does not have service relationship with parent

In *B.B. v. Thames Valley District School Board* (2018 HRTO 443), the Ontario Human Rights Tribunal (Tribunal) found that a school board's alleged failure to accommodate a student did

not constitute discrimination against the student's parent.

B.B. was a student with Autism Spectrum Disorder (ASD) at Thames Valley District School Board (Board). She was represented in this application by her mother as litigation guardian, ("H.B."), who alleged that the Board failed to accommodate B.B.'s disability. H.B. sought to be added as an applicant, arguing that when a child is discriminated against, "it is the parent who suffers the emotional distress caused by the alleged discrimination". (para. 16) H.B. also argued that school boards provide a direct service to parents by "taking over the responsibility of supervising their children while the children are at school." (para. 17) H.B. also referred to s. 12 of the Ontario *Human Rights Code* (*Code*), arguing that the Board discriminated against her personally on the basis of her relationship or association with her disabled daughter.

The Tribunal cited *R.H. v. Kawartha-Pine Ridge District School Board* (2012 HRTO 141) for the principle that, in order for services provided to students to also be considered services provided to parents, there must be more than just a remote benefit to the parent. The fact that parents are relieved of the obligation to provide child care while their children are at school is a remote benefit, not a direct service provided by schools to parents. The adjudicator stated, "I do not agree that providing a safe environment at school for children is a direct service to parents, however important it is for the students". (para. 19)

The Tribunal found that H.B. failed to show that she was personally discriminated against. In particular, she failed to show that she had a *Code*-protected characteristic, that she experienced adverse treatment, and that her protected characteristic was a factor in her adverse treatment. It is not the case that any discrimination against a child is discrimination against the parent. H.B. also failed to provide evidence indicating that she had been adversely treated by the Board due to her relationship or association with her disabled daughter, pursuant to s. 12 of the *Code*.

The Tribunal distinguished the cases of *Contini v. Rainbow District School Board* (2011 HRTO 1340) and *T.B. v. Halton District School Board* (2013 HRTO 1517), where service relationships between parents and school boards were previously found. In those cases, the parents themselves had disabilities that were directly relevant to the matter of transporting their children to school. The Tribunal stated that, while not explicitly mentioned in those cases, the obligation on parents under ss. 21(5) of the *Education Act* to ensure that their children attend school "is relevant to the matter of transportation for students whose parents have a disability being considered a service to parents under the *Code*". (para. 14) Those cases were unique to their particular facts and did not support H.B.'s request to be added as an applicant in the application alleging discrimination against her daughter.

In order to bring an application under the *Code*, the alleged discrimination must occur within a particular "sphere" or "social area". In the context of education, this requires a "service relationship". By finding that parents do not generally have service relationships with the school boards at which their children attend, this case confirms that parents generally cannot claim to have been personally discriminated against due to alleged discrimination against their children. ■

Court of Appeal upholds Trial-level decision on right to minority-language education

In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia* (2018 BCCA 305), the British Columbia Court of Appeal (Court) affirmed the Superior Court's (trial judge) decision to grant partial relief to the plaintiffs in

respect of their claim that the Province of British Columbia (Province) breached the constitutional right to minority-language education.

The plaintiffs in this case were: (1) Conseil scolaire francophone de la Colombie-Britannique (CSF), the British Columbia's francophone school board; (2) parents, who had the right for their children to receive minority language education; and (3) Fédération des parents francophones de Colombie-Britannique (FPFCB), a non-profit organization representing the interests of francophone parents.

At the Superior Court level, the plaintiffs had claimed that the Province breached various systemic rights guaranteed by s. 23 of the *Canadian Charter of Rights and Freedoms* (*Charter*), which provides a right to minority-language education. The plaintiffs argued that the Province's process for funding education, which resulted in underfunding of the French-language system and inadequate facilities for French-language students in seventeen different communities, breached their constitutional right.

The trial judge found the Province had breached s. 23 of the *Charter* and provided some relief to the plaintiffs, including an award for *Charter* damages for the Province's failure to fund transportation costs and a declaration that certain administrative funding procedures of the Province for minority-language education unlawfully infringed their Charter rights. However, the trial judge also concluded that the *Charter* breach was justified in thirteen out of the seventeen communities. In addition, the trial judge refused to order that the Province instantly fund the large number of capital projects requested by CSF because the right-holders were not entitled to the requested facilities "on the grounds of pedagogy and cost."

The plaintiffs appealed the trial judge's decision, challenging the analysis on a variety of grounds. The Province cross appealed the *Charter* damages award ordered by the trial judge regarding the inadequate transportation funding. The Court dismissed the appeal and allowed the cross-appeal.

The central issue determined by the Court was whether the *Charter* requires the Province to instantly allocate upwards of $300 million to provide the educational facilities that the plaintiffs have requested, which is an amount equivalent to the annual funding for all other educational capital projects in British Columbia.

The Court rejected the plaintiffs first ground of appeal, which claimed that the trial judge erred in their analysis by relying too heavily on the circumstances of the majority-language school boards and requiring that French language schools have comparable student admission to English-language schools in the near vicinity, in order to be entitled to a homogenous school. For example, the trial judge found that 115 students did not justify building a homogenous school in Whistler when the smallest comparator school in Whistler was 270 students. The trial judge added that building such a school in Whistler would deprive students from being able to interact with the larger population. Furthermore, the trial judge found that the Province has only permitted the building of a school, similar to the size suggested in Whistler, in areas where the school is in an isolated and remote community and such that a new school is the only realistic way of providing education. The Court found that the plaintiff failed to provide evidence as to the pedagogical appropriateness of building such a small school. The Court further noted that, where it is not practical for the Province to provide "substantively equivalent" instruction and facilities, it is the judge's duty to determine in each case whether the Province is still doing what it can, given the circumstances, to provide minority-language education and remain consistent with the *Charter*.

The plaintiff's also argued that the trial judge erred in her analysis by separately considering the entitlements to both elementary and secondary spaces for K-12 schools in Nanaimo

and Kelowna. The Court rejected the plaintiff's argument and submitted that the trial judge correctly considered the numbers of minority language secondary schools separately because "she focused on the pedagogical and cost appropriateness of offering school programs and facilities that would only be used by secondary students, and where there would not be significant economies of scale from grouping them with elementary students." (Par 158)

The Court further concurred with the trial judge's decision permitting the Province to require CSF to prioritize projects intended to remedy breaches in order to appropriately receive funding. CSF was not only found to lack the institutional competence to manage all the project's requested, but also, the total financial worth of CSF's requested projects in 2013 alone amounted to more than the total capital spending that year amongst all school districts. Requiring CSF to prioritize projects was deemed by the Court to be a fair and rational way to allocate limited funds.

The plaintiffs argued that s. 166.24(1) of the *School Act* violated s. 23 of the *Charter* on the basis that the CSF should be entitled to enroll children of other groups of parents who do not classify within the descriptions of right-holders under s. 23. The Court affirmed the trial judge's decision to deny the claim and stated that entitlement to enrollment is a legitimate exercise of the Province's constitutional authority over education.

In regard to remedies, the Court affirmed the trial judge's decision that *Charter* damages were not "appropriate and just" in this case. However, the Court did find that the trial judge erred in awarding the plaintiffs $6 million in *Charter* damages for inadequate transportation funding. The trial judge's error was due to an incorrect application of the limited immunity the government has against *Charter* damages. The government action had to be "clearly wrong, in bad faith or an abuse of power" for the immunity not to apply. There was no evidence to suggest the Province had acted improperly and therefore, the cross-appeal was allowed and the $6 million award was set aside. ■

No public interest in hateful expression — Defamation lawsuit continues

In *Paramount v. Johnston*, (2018 ONSC 3711), the Superior Court of Justice refused to grant a motion to dismiss, before trial, a defamation lawsuit brought by the owner of a Middle Eastern restaurant against the defendants, who had made hateful comments about the restaurant and about Muslims.

On July 20, 2017, the defendants Ranendra Banerjee (Banerjee) and Kevin Johnston (Johnston) attended an organized protest in front of Paramount Fine Foods, where a fundraiser was being held for Prime Minister Trudeau. During the protest, which was held to voice displeasure about the government's $10.5 million settlement of Omar Khadr's lawsuit, Banerjee and Johnston appeared in videos that were later widely distributed on the internet, including on Johnston's website.

From a total of eight videos, the alleged defamatory statements made by Banerjee arose out of a span of 7.5 seconds in a video in which he made derogatory remarks about the restaurant's patrons and about Muslims, stating that you have to be a "jihadist" and "to have raped your wife at least a few times" to be allowed into the restaurant.

The restaurant and its owner sued for defamation. Banerjee brought a motion for the action against him to be dismissed prior to trial under s. 137.1 of the *Courts of Justice Act*, a provision designed to protect freedom of expression on matters of public interest from lawsuits aimed at silencing such expression, known as Strategic Lawsuits Against Public Participation (SLAPP).

Banerjee submitted that his statements were not defamatory, and that they were not about the restaurant or its owner. He argued that his expression related to the federal government's settlement of the Khadr lawsuit, which is a matter of public interest, and that he should be extended the protection of the anti-SLAPP provision.

The Court ruled that Banerjee did not meet the onus of establishing that his expression related to a matter of public interest; his comments were clearly directed toward the restaurant, and the Khadr settlement was seldom mentioned. To be of public interest, the expression "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached". (para. 33)

The Court concluded that, in this case, while the protest itself could be viewed as something concerning a matter of public interest, Banerjee's comments were not. While declining to decide whether or not Banerjee's statements amounted to hate speech under the *Criminal Code* or human rights legislation, the Court found that his statements involved hallmarks of hate, and went far beyond offensive or hurtful expression. To extend the protection of the anti-SLAPP provision to these kinds of comments by justifying them as a matter of public interest would undermine the purposes of the anti-SLAPP provision.

The Court made it clear that the impugned expression will not be considered a matter of public interest merely because it was uttered in a forum or at an event where matters of public interest are being discussed. Rather, the substance of the expression must be examined, not the setting in which it is made. Moreover, hate communication will not be protected under the anti-SLAPP provision even where it can also be interpreted as addressing a matter of public interest.

This case is instructive as it confirms that hate communication is not considered a matter of public interest for the purposes of serving as a defence under s. 137.1 of the *Courts of Justice Act* to a defamation action, even where the communication took place in a broader forum where matters of public interest were being discussed. This case also serves as a reminder that, in addition to creating potential liability under human rights or criminal legislation, alleged hateful expressions can also be litigated by way of a defamation claim. Further, Johnston has also at times been in conflict with school boards, and this decision confirms the parameters for intervention. ■

SCC confirms decision not to recognize Law School with religious requirements

The SCC recently released its decisions in the companion cases of *Law Society of British Columbia v. Trinity Western University* (2018 SCC 32) and *Trinity Western University v. Law Society of Upper Canada* (2018 SCC 33).

Trinity Western University (TWU), an evangelical Christian post-secondary institution, sought to open a law school that required its students and faculty to adhere to a religious-based Covenant or code of conduct prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman". (*LSBC v. TWU* at para. 1)

At issue in these appeals was a decision of the Law Society of British Columbia (LSBC) to not recognize the proposed law school, and similarly, a decision of the Law Society of Upper Canada (LSUC) now known as the Law Society of Ontario, made through a resolution of its Benchers, to deny accreditation to the proposed law school.

In respect of LSBC, notwithstanding the preliminary approval granted to TWU by the Federation of Law Societies, a referendum had

been held where 5951 LSBC members voted against approving the faculty of law, and 2088 members voted for its approval.

TWU and Mr. Volkenant, a graduate of TWU's undergraduate program who deposed that TWU's proposed law school would have been his top choice, brought an application for judicial review of the LSBC's decision, arguing that it failed to appropriately take into account their freedom of religion under s. 2(a) of the *Charter*, which guarantees freedom of religion conscience. The BC Supreme Court quashed LSBC's decision, and concluded that since LSBC had proceeded by referendum, a balancing of TWU's and Volkenant's s. 2(a) *Charter* rights with the equality rights of current and prospective LSBC members, particularly the LGBTQ community, had not taken place. The BC Court of Appeal dismissed the appeal, affirming the view that the Benchers had improperly fettered their discretion by binding themselves to the referendum results, and that LSBC's decision not to approve the school was unreasonable.

The SCC allowed the appeal, and ruled that LSBC's decision not to recognize the proposed school was reasonable and represented a proportionate balance between the limitation on the *Charter* right at issue and the statutory objectives governing LSBC.

In Ontario, the LSUC Benchers, through a vote, denied accreditation to Trinity Western University. The decision was reviewed by the Divisional Court on a standard of reasonableness, which found that the LSUC had a mandate to regulate the legal profession in the public interest, including in respect of equal access to the profession. The Court found that TWU's right to religious freedom under s. 2(a) of the *Charter* was interfered with; however, the Court applied the test set out in *Doré v. Barreau du Quebec* (2012 SCC 12) and found that the LSUC struck an appropriate balance in looking at TWU's right to religious freedom and the equality rights of the LSUC's future members. Thus, the Court found that LSUC's decision was not unreasonable.

TWU and Mr. Volkenant then unsuccessfully appealed the decision to the Ontario Court of Appeal. Similar to the Divisional Court decision, the appellate court found that the LSUC's decision was reasonable, given the LSUC's mandate to "govern the legal profession in accordance with the public interest and its statutory mandate to promote a diverse profession" (*TWU v. LSUC* at para. 10). The decision reflected a proportionate balancing of the LSUC's statutory interests and TWU's limit on religious freedom.

The SCC first considered whether LSBC and LSUC (Law Societies) were entitled under their enabling statutes to consider TWU's admissions policies, and whether the LSBC was entitled to hold a referendum of its members in deciding whether to approve the proposed law school.

TWU argued that the Law Societies were entitled only to consider a law school's academic program, rather than its admissions policies, in deciding whether to approve it. The SCC concluded that the Law Societies were entitled to consider an inequitable admissions policy in determining whether to approve the school. The *Legal Profession Act* (*LPA*) and the *Law Society Act (LSA)* require the Benchers to consider the over-arching objective of protecting the public interest in determining the requirements for admission to the profession, including whether to approve a particular law school. Further, LSBC's Benchers were authorized under the *LPA* to proceed by way of a referendum.

The SCC then considered whether the Law Societies' decision to deny approval or accreditation of the school was reasonable. The SCC applied the existing precedential decisions to assess whether the administrative decisions of the Law Societies engaged the *Charter* by limiting *Charter* protection (both rights and values), and whether the decisions reflected a proportionate balance between the *Charter*

protections at play and the relevant statutory objectives.

The SCC concluded that the religious freedom of members of the TWU community is limited by the Law Societies' decisions, noting that it is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(a). The SCC noted that "religious freedom is individual, but also 'profoundly communitarian'." (LSBC v. TWU at para. 64, citing *Alberta v. Hutterian Bretheren of Wilson Colony*, 2009 SCC 37 at para. 89). "Section 2(a) is limited when the claimant demonstrates two things:

1. that he or she sincerely believes in a practice or belief that has a nexus with religion; and

2. that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief" (*Syndicat Northcrest v. Amselem* 2004 SCC 47 at para. 65, as cited in *TWU v. LSBC*, para. 63).

In this case, it was clear that evangelical members of TWU's community sincerely believed that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct would contribute to their spiritual development. This belief, in turn, was supported through the universal adoption of the Covenant.

The three other *Charter* protections potentially applicable in this case were:

- freedom of expression (s. 2(b));
- freedom of association (s. 2(d));
- equality (s. 15).

However, the SCC was of the view that the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis.

In prior cases, the SCC has held that, "where an administrative decision engages a *Charter* protection, the reviewing court should apply 'a robust proportionality analysis consistent with administrative law principles' instead of "a literal s. 1 approach". (*Loyola High School v. Quebec (Attorney General)* 2015 SCC 12 at para. 3, as cited in TWU at LSBC para. 79)

Under the *Doré* framework, an administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate. A reasonableness review should be applied, and deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. For a decision to be proportionate, a reviewing court must be satisfied that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate". (Loyola at para. 39 as cited in TWU at LSBC, para. 80). A decision that has a disproportionate impact on *Charter* rights is not reasonable. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

The SCC considered whether the limitation on the religious freedom of the members of the TWU community was a proportionate one in light of the Law Societies' statutory mandates. In concluding that the Law Societies' decisions amounted to a proportionate balancing and were reasonable, the SCC noted that the Law Societies were faced with only two options – to approve or reject the proposed school. Given the Law Societies' interpretations of their statutory mandates, approving the school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter*

protections more fully in light of the statutory objectives.

The SCC was of the view that the Law Societies' decisions reasonably balanced the severity of the interference with the *Charter* protection against the benefits to their statutory objectives. The Law Societies' decision did not limit religious freedom to a significant extent. The Law Societies did not deny approval to TWU's proposed law school in the abstract; rather, they denied a specific proposal that included the mandatory Covenant. TWU expressed no willingness to compromise on the mandatory nature of the Covenant. The Law Societies' decision does not prohibit any evangelical Christians from adhering to the Covenant or associating with those who do. The limitation is of minor significance because a mandatory covenant is not absolutely required for the religious practice at issue, namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. It only prevents prospective students from studying law in their optimal religious learning environment where everyone has to abide by the Covenant.

With respect to the extent by which Law Societies' decisions furthered their statutory objectives, the SCC was of the view that the decisions significantly advanced those objectives (i.e. - promoting and protecting the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession). The SCC opined that the decisions advanced those objectives by maintaining equal access to and diversity in the legal profession. If the school was approved, its 60 seats would remain effectively closed to most LGBTQ people, and they would have fewer opportunities relative to others. Moreover, the decisions furthered the statutory objective by preventing the risk of significant harm to LGBTQ people who attend TWU's proposed law school, as they would have to sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion. Where a religious practice impacts others, this can be taken into account at the balancing stage. Being required by someone else's religious belief to behave contrary to one's sexual identity offends the public perception that freedom **of** religion includes freedom **from** religion.

There was a dissent in both of the cases by two justices.

The dissenting judges were of the view that the Law Societies' decisions not to accredit or approve TWU's proposed law school was a profound interference with the TWU community's freedom of religion, and that the only defensible decision would have been to approve or accredit the proposed school. Only a decision to approve the school would reflect a proportionate balancing of the *Charter* rights and the statutory objectives which the Law Societies sought to pursue. The dissenting judges were of the view that the only proper purpose of a law faculty approval decision is to ensure the fitness of individual graduates to become members of the legal profession. Moreover, the dissenting judges pointed out that TWU is a private institution that is not subject to the *Charter*, therefore, neither the Covenant nor any other aspect of TWU's admissions policies may be found to be contrary to s. 15 of the *Charter*. The *Charter* binds only state actors, like the Law Societies. The dissenting judges were also of the view that the Constitution may require that the analytical framework established by other cases must be applied.

While the decision is not directly applicable to publicly-funded education, the analysis and application of established principles is such that the decision will be applied in other religious freedom cases. ■

Tribunal confirms meaningful access to education is the test for boards in accommodation

In *J.S. v. Dufferin-Peel Catholic District School Board* (2018 HRTO 1284) the Human Rights Tribunal of Ontario (Tribunal) held that, even though a specific therapy might be beneficial to the student, if it is not necessary for the child to have meaningful access to education, the school is not obligated to provide it.

JS was diagnosed with Autism Spectrum Disorder (ASD) at the age of three (3). The Tribunal found based on the evidence that JS was successful academically and only had a small number of deficits from his ASD. His mother filed an application alleging that JS required Applied Behavioural analysis (ABA) and Intensive Behaviour Intervention (IBI) Therapy in order to have meaningful access to education.

The Tribunal in this case based its reasoning on the Supreme Court of Canada decision *Moore v. British Columbia* (2012 SCC 61) (Moore). The SCC in *Moore* set out a two part test:

1. Has the applicant established a prima facie case of discrimination?
2. If so, can the respondent establish a justification for the breach of the Code.

The Tribunal confirmed that JS had a disability and reasoned that "if the he [could] establish an adverse impact, […] it would be related to his disability" and would amount to discrimination (para. 43). JS claimed that the school's refusal to provide ABA amounted to adverse treatment and that the only way he could have meaningful access to education was with ABA therapy in his classroom.

The Tribunal found that JS's case was distinguishable from *Moore*.

In *Moore*, the applicant suffered from dyslexia and there was clear evidence he required intensive services, which the school had previously provided. The school then cancelled the services for budgetary reasons without providing any replacement.

In this case, several witnesses testified about JS's ABA therapy, but there was not a consensus it was required. In fact, only one of the experts suggested that JS needed this therapy when he entered junior kindergarten, but also said she would leave the intensity of the therapy to a more qualified expert. The more qualified experts who testified both indicated that JS did not need comprehensive ABA at the time he entered junior kindergarten or anytime through his schooling.

The Tribunal emphasized that the obligation of the school board is to provide meaningful access to education, not ABA therapy.

In discussing meaningful access to education, the Tribunal cited s. 169.1 of the *Education Act* as a definition of what is meant by public education. Section 169.1(1) states in part:

169.1 (1) Every board shall,

(a) promote student achievement and well-being;

(a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;

(a.2) promote the prevention of bullying;

(b) ensure effective stewardship of the board's resources;

(c) deliver effective and appropriate education programs to its pupils;

(d) develop and maintain policies and organizational structures that,

(i) promote the goals referred to in clauses (a) to (c), and

(ii) encourage pupils to pursue their educational goals;

(e) monitor and evaluate the effectiveness of policies developed by the board under clause (d) in achieving the board's goals and the efficiency of the implementation of those policies;

(f) develop a multi-year plan aimed at achieving the goals referred to in clauses (a) to (c);

(g) annually review the plan referred to in clause (f) with the board's director of education or the supervisory officer acting as the board's director of education; and

(h) monitor and evaluate the performance of the board's director of education, or the supervisory officer acting as the board's director of education, in meeting,

(i) his or her duties under this Act or any policy, guideline or regulation made under this Act, including duties under the plan referred to in clause (f), and

(ii) any other duties assigned by the board.

The Tribunal noted that it "must make an overall assessment, based on the evidence, as to whether [the] applicant has been given meaningful access to education" (para. 56). To determine this, the Tribunal looked at the applicant's achievement relative to the overall curriculum, as well as JS's specific special education goals set by the school and his parents.

The Tribunal noted it should be mindful of the comment in *Moore* that just "because a student does not succeed, does not mean school board has failed to provide meaningful access to education" (para. 57).

On the evidence, the Tribunal noted that JS entered kindergarten with mild deficits but was able to access the curriculum and had succeeded at school – both socially and academically. The Tribunal emphasized that, while ABA was helpful for JS outside of the classroom, this was not enough to find that the school board had violated the *Code.* The Tribunal referred to the principle of deference to the school board in how it meets its obligation to provide meaningful access to education described in *Moore.*

The Tribunal indicated that each inquiry will be fact specific and that "a school board cannot rely on the fact that it provides some programming to avoid its responsibility to provide effective services" (para. 65). In this case, the Tribunal found that the school board provided a "comprehensive, sophisticated and robust set of programs" (para. 65).

The Tribunal concluded that a school's obligation is to provide meaningful access to education. A school is not required to provide therapeutic services, which, while beneficial, are not required for the student to access education. The Tribunal dismissed the application against the board because the applicant had not made out a case of prima facie discrimination. The application against the Ministry of Education was not decided in this decision and is proceeding at this point.

This case confirms again that school boards are required to provide a meaningful access to education, which may not always align with the preferences of parents and guardians. It also leaves open the door for therapies to be provided where they are necessary to provide a meaningful access to education. ■

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