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Education Law Newsletter

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Recent Developments in Autism Litigation

A recent decision by the Ontario Court of Appeal (the "Court") in *Sagharian (Litigation guardian of)* v. *Ontario (Minister of Education)*, [2008] O.J. No. 2009 at 1 (C.A.) [hereinafter *Sagharian*] focused on how children with autism and their parents pleaded claims in their class action suit. The Court's decision is not fatal to all of the claims of children with autism and their parents. However, the Court was clear that future claims must be pleaded more precisely, and with more factual basis, for a chance of success.

On May 23, 2008, the Court released its unanimous decision. The appeal was from a decision regarding a motion to

strike the appellants' statement of claim in a proposed class proceeding that challenged the provision of autism and education services to children with autism. There was also a cross-appeal from the decision of the motion judge before the Court.

The appellants were autistic children and their parents. There were two different respondents in the case. One respondent was Her Majesty the Queen in Right of Ontario as represented by the Minister of Education and the Minister of Children and Youth Services ("Ontario"). The other respondents were a group of seven named school boards, including York Region District School Board, York Catholic District School Board, Peel District School Board, Dufferin-Peel Catholic District School Board, Toronto District School Board, Toronto Catholic District School Board, and Durham District School Board (the "school boards"). Because Ontario cross-appealed the decision of the motion judge, the appellants on the appeal (children with autism and their parents) were also respondents on the cross-appeal, and the respondents on the appeal (Ontario and the school boards) were also appellants on the cross-appeal.

The court allowed the appeal and cross-appeal in part.

The originating action was a statement of claim filed by autistic children and their parents and issued under the *Class Proceedings Act*, on April 5, 2005. The plaintiffs (the appellants in *Sagharian*) sought to represent a class of similarly situated persons. The statement of claim was amended on April 25, 2006 and again on August 8, 2006, after decisions from other cases brought by autistic children and their families were released.

Ontario requested an order striking the plaintiffs' statement of claim and dismissing the action against Ontario, and the school boards moved to strike seven paragraphs of the statement of claim.

Only specific aspects of the appellants' claims and the motion judge's decision were before the Court of Appeal.

Appeal from the Pleadings Motion

A brief synopsis of the grounds for the appeal and cross-appeal, and of the Court's decision on the appeal and cross-appeal will provide a framework for understanding the different issues the Court considered and determined.

The motion judge struck a number of the appellants' causes of action. However, the appellants did not appeal all aspects of the motion judge's decision. Specifically, they appealed the motion judge's decision to strike their claims for negligence, breach of fiduciary duty, breach of s. 7 of the *Charter* (Right to Life, Liberty and Security of the Person), and the claim for *Charter* damages.

The appellants also argued that their claims against the school boards should not have been struck because on the motion, the school boards did not seek to have the claims against them struck in their entirety. Rather, the school boards only sought to strike certain paragraphs in the statement of claim.

Ontario cross-appealed the motion judge's refusal to strike the appellants' s. 15(1) *Charter* claims (Equality Rights) of discrimination on the bases of age and disability. The school boards did not file

a separate cross-appeal from Ontario's cross-appeal.

Synopsis of the Decision of the Court of Appeal

The appeal was dismissed in part. The Court upheld the motion judge's decision that there were no causes of action for negligence, breach of fiduciary duty, or for a s. 7 *Charter* breach (Right to Life, Liberty and Security of the Person).

The Court varied the motion judge's order and struck, without leave to amend, the appellant's s. 15(1) (Equality Rights) *Charter* claim based on age discrimination. The Court struck in its entirety, with leave to amend, the appellants' s. 15(1) (Equality Rights) *Charter* claim based on disability discrimination. In conjunction with its decision on the s. 15(1) claim related to disability discrimination, the Court also struck the appellants' s. 1 *Charter* claim (Reasonable and Justifiable Limits) with leave to amend.

The claim for *Charter* damages based on government negligence was struck with leave to amend to plead concisely the basis for the remedy sought, and the Court granted the appellants leave to amend their claim in negligence against the school boards regarding the operation of programs.

The cross-appeal was allowed in part. The Court struck the age-based discrimination claim from the statement of claim **without leave to amend**. As indicated above, the disability-based discrimination claims were also struck, but with leave to amend.

The Context of the Case

Autism-directed services, the subject matter of the appellants' statement of claim, is a complex topic. The Court of Appeal noted that the issues before the Court were further complicated by the content and structure of the appellants' statement of claim. For the sake of simplicity and clarity, here is how the Court described the background of the case:

"Three acronyms are used to describe autism-directed services. Applied Behaviour Analysis (ABA), which is the broadest of the terms, is an autism treatment based on behaviour modification. It includes Intensive Behavioural Intervention (IBI). The Intensive Early Intervention Program (IEIP) is a program that reflects IBI treatment, but it is specifically designed by Ontario for two to five-year-old children. While the appellants' statement of claim addresses the IEIP, it also refers to ABA and IBI. This makes it difficult to know what the appellants are actually seeking.

The task faced by the motion judge was further complicated by the content and structure of the appellants' statement of claim. In part, the motion judge attributed the difficulties with the pleading to its layered amendments, which attempted to respond to the release of decisions from this court such as Wynberg v. Ontario (2006), 82 O.R. (3d) 561, leave to appeal refused, [2006] S.C.C.A. No. 441, Eliopoulos v. Ontario (2006), 82 O.R. (3d) 321, leave to appeal refused, [2006] S.C.C.A. No. 514, and A.L. v. Ontario (2006), 83 O.R. (3d) 512, leave to appeal refused, [2007] S.C.C.A. No. 36. However, the motion judge

accurately observed at para. 7 that the amended amended statement of claim amounted to an 'attempt to simultaneously bombard all targets from all angles with every available piece of ammunition.' The problem is exacerbated on appeal because the appellants advised that they would further amend the pleading to delete all paragraphs relevant to the public misfeasance claim that was struck by the motion judge. Since they have not yet done so, it continues to be difficult to correlate the appellants' allegations of fact with their proposed causes of action. This was, and remains, a major problem affecting any determination of the viability of the appellants' claims.

However, the appellants' claims appear to focus on alleged deficiencies in the respondents' provision of services for school-age children with autism, including the provision of, or denial of, ABA by Ontario and, in particular, the respondents refusal to provide ABA in public schools. The appellants do not define with any clarity what they mean by ABA. They argue that a refusal to provide the appellants with ABA in public schools amounts to a 'policy of mutual exclusivity', which they say means that the representative children, who are eligible for both the IEIP and public education, are not being accommodated in a manner that allows them to take advantage of their entitlement to public education. The appellants also challenge the historical restriction of the IEIP to children under age six, although that age restriction was lifted in 2005. They also challenge the IEIP's limited budget and its waiting list."

The Court noted that the motion judge's decision to strike out some claims and to allow others was based primarily on his interpretation of the *Wynberg* case, which had been decided by the Court of Appeal in 2006. The motion judge had to determine whether the decision in *Wynberg* disposed of the issues in the appellants' statement of claim.

Wynberg was an action against Ontario that was brought by other parents of children with autism. At paragraph 8 of *Sagharian*, the Court summarized its earlier decision in *Wynberg*: "*The issue in Wynberg was whether any differential treatment constituted discrimination on the basis of age and disability in violation of the Charter. This Court allowed an appeal from the trial judge's decision and dismissed the Wynberg claim in its entirety."*

The Court concluded in *Wynberg* that:

- the IEIP could not be harmonized with the public education system;
- there was no evidence to support a finding that IEIP was the only appropriate program for students with autism;
- there was no evidence to support a finding that appropriate programs had been made available to comparable groups of students with other disabilities; and
- the IEIP program for younger children was a targeted ameliorative program that did not demean the human dignity of the older children.

Appellants' S. 15(1) Charter (Equality Rights) Claims

The primary focus of oral argument before the Court was on the s. 15(1) equality claims under the *Charter*. Section 15(1) of the *Charter* states:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The appellants claimed discrimination under s. 15(1) on the basis of age and on the basis of disability.

Age-based Discrimination

As pointed out earlier, the appellants' statement of claim was challenged on the pleadings motion for being too vague and lacking in precision. The motion judge noted that "*essentially the same alleged breach based on age discrimination was in issue in Wynberg except that the focus of the complaints was confined to access to IEIP exclusively, rather than to IEIP as a form of ABA.*" Ultimately, the motion judge did not strike this claim from the statement of claim.

On appeal, the Court based its decision on this issue on the fact that it had already determined in *Wynberg* that the government did not violate the s. 15(1) equality rights of children with autism on the basis of age. The Court disagreed with the motion judge's finding that the appellants' statement of claim contained facts that were sufficiently different from the facts in *Wynberg* to support a different finding than *Wynberg*.

The Court relied on two other factors. First, that in *Wynberg*, the Court had held that any s. 15(1) age discrimination was justified under s. 1 of the *Charter* (Reasonable and Justifiable Limits). And secondly, that the age limit had been removed in 2005, so the issue of age-discrimination was moot.

For these reasons, the Court held that the age-discrimination claim had no chance of success and **should have been struck in its entirety from the appellants' statement of claim without leave to amend**.

Disability Discrimination

The Court found that the motion judge had accepted that the appellants' statement of claim alleged: "*. . . a s. 15(1) breach by the respondents based on their failure to provide children with autism aged six and over with special education programs and services appropriate to their needs when such programs or services are provided for exceptional children with other disabilities and a failure to permit children with autism to receive ABA in publicly funded schools.*"

The Court noted that the motion judge held, correctly, that unless the appellants based their claim on different facts from those in *Wynberg*, he was bound by the decision in *Wynberg* that a claim of disability discrimination under s. 15(1) (Equality Rights) had not been made out. The motion judge found that the appellants' allegations were "*substantially different from those in Wynberg*."

In addition to different facts, another difference from *Wynberg* was that the appellants based the disability aspect of their equality claim on the respondents' duty to accommodate rather than on a statutory duty to provide service, which was alleged in *Wynberg*. In addition, the case before the Court was also different from *Wynberg* because the appellants named the School Boards as parties.

The Court found that "*the motion judge read the appellants' statement of claim extremely generously*" and noted that "*it is far from clear that the appellants can plead a disability claim that is compellingly different from that already determined in Wynberg*." However, (and this is important), the Court did find that it was possible for the appellants to base a claim on the respondents' duty, and subsequent failure, to accommodate children with autism. The Court noted that the appropriate comparator group for this claim would be other children with disabilities in the communication category, including children who are deaf, blind or deaf/blind.

Of particular interest, the Court made the following statement regarding the requirements for the appellants to make a viable s. 15(1) (Equality Rights) claim based on failure to accommodate:

"To succeed in creating a viable claim, the appellants would have to plead that the claimed and defined benefit is an appropriate accommodation and that it could be delivered in the public school system. It would be necessary to demonstrate that children with autism do not receive appropriate accommodation for their education and that the claimed benefit is an appropriate accommodation for school-age children with autism. See Wynberg, paras. 122-137. In addition, the appellants must prove that the comparator group does receive appropriate accommodation that is available to all members of the group. It may be that the appellants can plead, for example, that all persons in the comparator group have a process available to determine their accommodation, while the appellants do not have such a process available because the respondents have effectively denied them the benefit they are seeking."

The Court also pointed out that absence of precision will be fatal to the appellants' claim. With respect to the benefit that the appellants sought, the Court noted:

"Here, the appellants have variously described the benefit as ABA, or some form of ABA, access to IBI, appropriate educational services or by ill-defined expressions such as, education services from which they can benefit to the same extent as can children without disabilities. This language not only lacks the necessary precision to allow the respondents to craft a defence, it is inadequate for the purposes of defining the remedy sought."

In the end, the Court struck in its entirety, with leave to amend, the section 15(1) *Charter* claim (Equality Rights) alleging discrimination on the basis of disability.

S. 1 of the *Charter* (Reasonable and Justifiable Limits)

The appellants' s. 1 *Charter* claim alleged that the respondents' s. 15(1) *Charter* breaches are not reasonable and justifiable limits of the appellants'

equality rights. Specifically, the appellants alleged that "*there are no pressing and substantial objectives that are rationally connected to the chosen limits, and that the breaches are broad and arbitrary and not proportional or minimal in their harmful effects*." The motion judge found that the appellants' s. 1 *Charter* claim was material and sufficient, and did not strike the claim. However, on appeal, the Court held that the appellants' s. 1 claim may need to be restructured in accordance with any amendments to their s. 15(1) claim related to disability discrimination. As a result, the Court struck the s. 1 claim, with leave to amend.

Claim for *Charter* Damages

The appellants also claimed damages on the basis that, because the government did not make public services available, the appellants were required to pay for private autism services. The motion judge struck the claim for *Charter* damages

On appeal, the Court struck the claim for *Charter* damages based on government negligence, with leave to amend to plead concisely the basis for the remedy sought.

Negligence, Breach of Fiduciary Duty, Breach of s. 7 (Life, Liberty and Security) of the *Charter*

The Court upheld the motion judge's decision that there was no cause of action for negligence, breach of fiduciary duty or a s. 7 (Right to Life, Liberty and Security of the Person) *Charter* breach. However, the Court did give the appellants leave to amend their claim in negligence against the school boards regarding the operation of programs.

In Conclusion

Although the Court gave leave to the appellants to amend some of their claims, the Court pointed out that the claims, as amended, may be subject to further challenges. The stakes are high for all parties in these autism cases. The Court's decision in *Sagharian* is unlikely to be the end of the court challenges to obtain more public funding and resources for children with autism and their families.

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Human Rights Tribunal Prevents re-Litigation of Issues

On September 2, 2008, the Ontario Human Rights Tribunal (the "Tribunal") released an interim decision on a preliminary objection raised by the Toronto District School Board (the "Board") in the human rights case, *Campbell v. Toronto District School Board*, [2008] O.H.R.T.D. No. 60, 2008 HRTO 62 [*Campbell* cited to O.H.R.T.D.] ("*Campbell*"). As this was only an interim decision, *Campbell* is still before the Tribunal.

The *Campbell* complaint alleges that the Board discriminated against a student with autism spectrum disorder on the basis of disability by failing to provide appropriate accommodations in the delivery of education services to the student.

The Identification, Placement and Review Committee (the "IPRC") had identified the student's exceptionalities

as autism and developmental disability, and had determined that the student's placement should be a special education class. The student's parent appealed to the Special Education Tribunal ("SET") the IPRC's decision regarding placement. The parent also filed a complaint with the Human Rights Commission (the "Commission").

Over six days in May-July, 2006, the SET held a hearing to determine the appeal. On September 5, 2006, the SET's decision confirmed the student's placement in a self-contained special education class and directed specific measures to be included as part of the placement.

In May 2007, the Commission referred the complaint against the Board to the Human Rights Tribunal for a hearing. The Board raised a preliminary objection to some of the Commission's pleadings. The motion was heard in June 2008. Over the Summer, 2008, the Tribunal requested submissions on the application of s. 45.1 in the new Part IV of the *Code*. The Board argued that the Commission was precluded from raising issues or contradicting findings of fact that had been determined by the SET and made submissions pursuant to section 45.1 of the *Code*, which states:

"The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application."

The Tribunal based its decision primarily on the abuse of process doctrine and held it would not be fair to permit the re-litigation of issues that had been determined by the SET. The Tribunal found that section 45.1 of the *Code* was "*an additional basis for precluding the Commission and the complainant from re-litigating issues that were the subject of findings by the SET*" (para. 70).

The Tribunal held that the abuse of process doctrine applied to the facts in the present case and pointed out the Tribunal has a duty to ensure the integrity of the adjudicative process.

The Tribunal relied on its earlier decision in *Snow and Ontario Human Rights Commission v. Honda of Canada Manufacturing*, 2007 HRTO 45 (CanLII) for a list of factors that have been used by human rights adjudicators to determine whether it would be an abuse of process to decide issues that have already been determined in another forum:

- the wording of the other statute;
- the purpose of the other legislation;
- the availability of an appeal in the other proceedings;
- the safeguards available to the parties in the other administrative procedure;
- the expertise of the decision-maker in the other proceeding;
- the circumstances giving rise to the prior administrative proceedings;
- the issues decided in the other proceedings;
- the human rights principles applied in the other proceedings;
- whether fresh evidence is available which was not available in the earlier proceeding;

- whether the earlier action was tainted by fraud, dishonesty or unfairness of any kind; and
- any potential injustice.

The Tribunal found that on balance the abuse of process doctrine should be applied to prevent re-litigation of the issues and facts that the SET had dealt with. In its Reasons, the Tribunal made the following findings regarding the mandate of the SET:

"I am satisfied that the general question before the SET is the same as that before this Tribunal: what accommodations are required in order for the complainant to have access to education services. Further, I am satisfied that the mandate of the SET is not limited to a decision about whether to place a student in a regular class or special education class, but includes a consideration of the programs and services required to achieve appropriate accommodation. In fulfilling this mandate, the SET is making decisions about matters addressed by the Code. Further, on my review of the statutory scheme of special education and decisions of the SET, I see no reason to view its directions as non-binding, insofar as it makes directions about specific programs and services." (para. 48).

The Tribunal also relied on the Supreme Court's decision in *Eaton v. Brant County Board of Education*, 1997 CanLII 366, to find that the SET's analysis regarding placement and appropriate accommodation is based on the standard of "*best interests of the child*", and is consistent with the equality rights of special education students under section 15(1) of the *Canadian Charter of Rights and Freedoms*.

The Tribunal concluded that relitigation of the facts would be unfair and would place the Tribunal in the position of being an appellate body with respect to the decision of a different expert Tribunal.

The Tribunal noted that section 45.1 of the *Code* expresses a legislative intent to avoid duplication of proceedings and held that section 45.1 of the *Code* applied to the present case.

As a result of the Tribunal's findings, it struck a number of paragraphs from the Commission's pleadings. The remainder of the Commission and complainant's allegations against the Board are still before the Tribunal at this time.

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Discrimination Case Quashed by B.C. Court

The British Columbia Supreme Court recently reviewed the decision of the British Columbia Human Rights Tribunal in *Moore* (*Moore* v. *B.C. Ministry of Education, 2nd School District No. 44*, [2005] BCHRT 580).

The Tribunal found that both the Ministry of Education and the School District had discriminated in the provision of programs and services to Moore, who suffers from dyslexia. The Supreme Court quashed the decision as against the Ministry as well as the School District.

The decision was reviewed on the basis of correctness with respect to legal issues and issues of mixed fact and law.

The Court noted that the Tribunal's failure to properly define the subject matter of the claim led to a failure to identify an appropriate comparator group and conduct a proper analysis.

The Tribunal had identified the subject matter of the claim to be education services, while the Court found the proper subject matter of the claim to be special education services provided to special needs students.

The Tribunal also failed to identify a comparator group, finding that it was not required in the circumstances, because the case was regarding access to a benefit. The Tribunal, however, added that, if a comparator group analysis was required, the issue was the quality of the services provided, not whether or not a service had been provided. The Court disagreed with this approach.

The Court commented that the approach the Tribunal had taken was to consider whether or not the services provided to Moore were appropriate in comparison to the level and quality of services that academic experts identified as appropriate for Moore.

The Court found that a comparator was necessary and identified the appropriate comparator group as other students of the District with special needs. However, as a result of the approach taken by the Tribunal, there was little or no evidence of what other students with special needs received, as such there were insufficient facts on the record to conduct the analysis.

The Court held that, "*The Tribunal was not correct in its identification of the service that was customarily available to the public. The service that is customarily available to the public that is the subject matter of this claim is special education services provided to special needs students. This error permeated the whole of the discrimination analysis so that the Tribunal was also incorrect in its selection of the appropriate comparator group. There was insufficient evidence of special needs students other than SLD students, the appropriate comparator group, upon which to base a discrimination analysis.*"

The Court also found that there was insufficient evidence to proceed with a systemic discrimination claim against both the Ministry of Education and the District, stating "*Similarly, there is a paucity of evidence to support systemic discrimination on a comparative analysis to be able to conclude that SLD [severely learning disabled] students were disproportionately impacted*".

It should be noted that in Ontario the *Education Act* requires that an "appropriate" educational program be provided to exceptional pupils. Therefore, in a discrimination case an analysis of the programs and services provided to a student would include the quality of those programs and services, as compared to the quality of a comparator group, perhaps another student at a different school or even school board.

Although not noted by the Court explicitly, as it was not relevant given the other findings, there were many problematic findings of fact made by the

Tribunal, which consisted of comparisons between the services provided to the Complainant, Moore, between the years 1992-1995 (the dates of the alleged discrimination) and the methods and approaches for addressing the needs of student's with learning disabilities that were either accepted by the professional literature after the period of alleged discrimination, or never fully adopted by educators in the province.

The case before the Tribunal was also problematic as a result of the lapse of time between the alleged discrimination and the date of the decision. The decision of the Tribunal was released in December of 2005. Significant changes in education would have taken place in the intervening time frame, which might have given rise to issues regarding the appropriateness of implementing the decision, if it had not been quashed by the Court. Such issues of delay were also a concern in Ontario until recently. It is hoped that the recent changes to Ontario's Human Rights adjudication will assist in ensuring that cases are heard in a timely fashion.

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Dismissal of Human Rights Complaint Upheld

In *Saskatchewan (Human Rights Commission) v. Prince Albert Roman Catholic School Division No. 6,* [2008] S.J. No. 434, the Saskatchewan Court of Queen's Bench upheld a decision of the province's Human Rights Tribunal that dismissed a complaint of discrimination on the basis of disability in the context of a school suspension. The Human Rights Commission ("the Commission") appealed on the grounds that the Tribunal erred in law in its determination that the Commission had failed to establish a *prima facie* case of discrimination in regard to the suspension of Travis Mahussier and that it had also erred in law in its finding that it was unnecessary to examine the School Division's duty to accommodate Travis.

In May 2000, Travis Mahussier, a student at the WFA Turgeon Community School ("the school"), was suspended for using profane language. Travis, born in 1988, had Williams Syndrome. Williams Syndrome is a genetic disorder that affects cognitive development and Travis' abilities at the time of his suspension were similar to those of a child of pre-school age. As part of his Williams Syndrome, Travis also experienced anxiety and verbal communication delays.

The school provided Travis with his own educational assistant and a time-out room dedicated exclusively to his use. In addition, the school made a special education consultant available to advise and assist in meeting his needs.

At the time of Travis' suspension in May, disagreement existed between his parents and the school with respect to his personal pupil program.

Prior to the May 2000 suspension, Travis had been suspended on two occasions, both in February of 2000. The first suspension was for hitting a vice-principal and the second for using profanity. Throughout February and

March of 2000, Travis spent very little time at school and on days he did attend, he was frequently picked up early by his mother. That Travis' educational program was not working was not in dispute by the parties.

The Nature of the Statutory Appeal and the Standard of Review

Under s. 32(1) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, a statutory right of appeal to the Court of Queen's Bench is available to a party to a proceeding before a human rights tribunal on a question of law.

Upon Travis' suspension in May 2000, his parents argued that the suspension was discriminatory because Travis was being disciplined for behaviour that was a product of his Williams Syndrome disability. The Commission had the onus of establishing *prima facie* discrimination on the balance of probabilities. This required the Commission to prove that Travis had a disability and that his disability was a factor in the school suspension. The Court upheld the Tribunal's assessment that the Commission had not established *prima facie* discrimination.

While it was clear that Travis had a disability, there was no evidence to indicate that using profane language was a symptom of that disability. Rather, the profanity was likely the result of learned behaviour to gain attention or to express frustration. The Court found that children without Williams Syndrome might use profanity for the same reasons.

Suspension was recognized by the Court as a legitimate, even if not ideal, method for the school to address this inappropriate behaviour. Evidence given by the school's principal indicated that he had previously suspended a student for swearing when addressing a teacher. The Court found that the school suspended Travis as it would have any other student who used profanity.

The Commission argued that Travis' suspension was discriminatory because it limited Travis' access to his educational program. The Court was not persuaded by this argument, finding that it was a criticism of suspensions generally.

The lack of evidence that use of profanity was a characteristic of Travis' disability, the power of schools to use suspensions in response to inappropriate behaviour, and the evidence that suspensions were not used in a discriminatory manner, led the Court to conclude that no *prima facie* case of discrimination had been made out by the Commission. As it found no *prima facie* case of discrimination, the Court declined to address whether the School fulfilled its duty to accommodate Travis.

In Ontario the assessment of the Tribunal and the Court would also include the mitigating and other factors, which might be found to mitigate discipline in similar circumstances.

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Saskatchewan School Closure Upheld

The importance of procedural fairness in school closure cases was reiterated by the Saskatchewan Court of Queen's Bench in *Christianson v. Chinook School Division, No. 211*, [2008] S.J. No. 403. The judgment emphasized the

requirement that school boards comply with both statutory obligations and the common law duty of procedural fairness when making the decision to close a school. The *Education Act*, *1995* in Saskatchewan contained specific provisions outlining procedures for boards to follow when making school closure determinations, which were subsequently amended and came into force the day the decision was issued.

The Applicants in *Christianson* were parents of children attending the Climax School in the small community of Climax, located in south western Saskatchewan. The Climax School was part of the Chinook School Division ("the Board"). The Applicants were seeking four remedies: a declaration that the Board breached it duty of procedural fairness; an interlocutory injunction preventing the Board from closing the Climax school; an order quashing the Board's decision to close the school; and an order of *mandamus* directing the Board to review the viability of the school and its decision.

The applicants acknowledged that the Board had complied with the statutory requirements set out in s. 87 (Powers of the Board) of the *Education Act*, but argued that the duty of procedural fairness required the Board to engage in ongoing consultations with the applicants throughout the 2007/2008 academic year. In its judgment, the Court described the wider context in which the school closure decision was made and analyzed the steps taken by the Board to ensure that its process was fair. In the result, the Court dismissed the Application and found that the Board had acted in a procedurally fair manner throughout the school closure determination process.

In January 2006, Saskatchewan's restructuring of its school divisions came into effect, which resulted in the creation of the geographically large Chinook School Division. The new Board developed policies and procedures that were to be applied to school discontinuance (i.e. of specific grades within schools) and closures. These policies were developed after consultation with the public during the spring of 2006 and extensive staff research into the circumstances of each school. The Board developed a Draft Classification Plan, which proposed the use of 15 criteria, including: geography; enrolment; facility usage; and cost per student, to classify schools. From the Classification Plan, the Board developed a School Viability Policy. In December of 2006, the Board heard from individuals in the community, including representatives from Climax.

In January of 2007, the Board applied the Classification Plan and Viability Policy to its schools. Schools classified as "under review" could be subject to grade discontinuance or closure. A motion by the Board to proceed with either option would then activate the statutory obligations of the Board pursuant to s. 87 of the *Education Act*.

The application of the Classification Plan and the Viability Policy led the Board to put Climax School under review. As a result, in January of 2007 the Board decided that it would close Climax School, but no earlier than August of 2007. Community meetings were held in March and April of 2007 and the Climax community was given the opportunity to

make representations to the Board. Low enrolment was a significant factor in the decision to close the school, but members of the community argued that enrolment might increase in the near future. A doctor with 5 children was contemplating moving to Climax and Sun Tech Energy was considering establishing a plant in the community. As a result of the public meetings, the Board decided that it would close the school no earlier than June 2008, thereby providing a window of time to see if enrolment would increase, thus making it viable to keep the school open.

Enrolment did not increase and the Board reconsidered the Climax School closure in April of 2008. The decision to close the school sometime after August 2008 was upheld.

In contemplating whether or not the Board had acted in a procedurally fair manner, the Court outlined the various steps taken by the Board to consult with the public, as well as the requirements of s. 87 of the *Education Act* and the common law duty of procedural fairness as outlined in the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39. In *Baker*, the Supreme Court listed a variety of factors to be considered when making a determination regarding the requirements of the common law duty of procedural fairness, in a particular circumstance. The factors to be considered include: the nature of the decision; the nature of the statutory scheme; the importance of the decision to the individual affected; the legitimate expectations of the party challenging the decision; and the nature of deference to be accorded to the deciding body.

After considering all of these elements, the Court found that procedural fairness was accorded pursuant to s. 87 of the Act and the principles set out in *Baker*. Further, the Court held that the Board demonstrated its open mind when it deferred its decision for one (1) year in order to evaluate any changes to the circumstances of the Climax community and its school.

On the day the Court rendered its judgment in *Christianson*, amendments to s. 87 of the *Education Act* came into effect. While the s. 87 provisions under which the Court made its decision mandated notice to and consultation with the school community, the new provisions provide more detailed legislative requirements. The new provisions outline specific notice periods (s.87.2(1)), require the establishment of school review committees for schools being considered for discontinuance and/or closure (s. 87(4)), and mandate a meeting of electors regarding the consideration of the school closure or discontinuance (s. 87.5(1)). Thus, while the common law duty of procedural fairness remains unchanged for Saskatchewan's future school closure cases, the more stringent statutory requirements require increased diligence on the part of the province's boards in making closure determinations.

Interestingly, the revisions to the school closure process in Saskatchewan are similar to those mandated by the Ministry of Education in Ontario.

Duty of Procedural Fairness Applied to Minister's Decision re: French Immersion Programming

The decision of the Minister of Education of New Brunswick to phase out an Early French Immersion program for Anglophone elementary students was the subject of a recent judicial review in *Small v. New Brunswick (Minister of Education)*, [2008] N.B.J. No. 208.

The application, brought by a number of Anglophone parents of children registered to attend the Early French Immersion ("EFI") program in September 2008, alleged that the Minister's decision infringed their s. 16 (Official Languages), s. 16.1 (English and French Linguistic Communities in New Brunswick) and s. 23 (Minority Language Educational Rights) rights under the *Canadian Charter of Rights and Freedoms* and was contrary to their rights to natural justice and procedural fairness. The Applicants submitted that they had legitimate expectations that the EFI program would not be cancelled before they had a reasonable opportunity to make representations.

The Province responded claiming that its decision to phase out the EFI program was one based on policy and was therefore within the Minister's legislative authority and not subject to the rule of legitimate expectation and could not be judicially reviewed. Further, the Province argued that if the rule of legitimate expectation did apply, the Applicants had been provided a sufficient opportunity to express their views to the commissioners and the Minister.

Finding no legal grounds to challenge the decision based on *Charter* rights, the Court focused its decision on the common law right to natural justice and procedural fairness.

In July 2007, commissioners were appointed to conduct a review of French second-language programming in the province of New Brunswick and to release recommendations in a final report. The Minister of Education issued a statement informing the public that it would respond to the commissioners' recommendations within two months of the report's release, and would "*allow for a full debate and cabinet response*" prior to making any changes in September 2008.

The report was released to the public on February 27, 2008, together with a news release with an invitation for public comment. The invitation for comment requested feedback regarding the review of French second-language programs within the Anglophone school system and the findings and recommendations contained in the commissioners' report. The news release, however, did not identify the two week timeline before the Minister would be making a decision regarding the recommendation to phase-out the EFI program.

A second news release was issued two days later, highlighting the improvements being made to French second-language programs and services, but it also failed to inform the public of

the timeline and decision being made by the Minister regarding the EFI program.

On March 14, 2008, two weeks after the first public invitation for comment, the Minister decided to accept and implement the recommendations in the report, including the recommendation to phase out the Early French Immersion program.

The Court affirmed the importance of fairness in public decision-making. The Minister's decision in March 2008 was found to be in contravention of the Minister's representation in July 2007 that the decision-making process would "*allow for a full debate*". The Court concluded that the Minister's invitations for public comment did not satisfy the requirements of consultation reflected by his representation nor did they provide sufficient opportunity for debate. The Court noted that the decision was made in approximately two weeks, one of which was the March break school vacation. Finding the decision-making process unfair and unreasonable, the decision was quashed and remitted to the Minister of Education for reconsideration with a direction that any further decision affecting the EFI program should be made in accordance with the principles of fairness and an opportunity for interested citizens to be heard.

The extension of the duty of procedural fairness to policy decisions of the Ministry of Education in New Brunswick is consistent with the approach of Ontario Courts which have consistently held that decisions by school boards effecting rights and privileges of their students will require the school board to provide those effected with the right to be heard before any decision is made.

Court of Appeal Upholds Removal of School Board Members

In *Nova Scotia v. Nova Scotia (Minister of Education),* [2008] N.S.J. No. 285, the Nova Scotia Court of Appeal upheld the decision of the Minister of Education of Nova Scotia to remove the members of the Halifax Regional School Board ("Board") and to replace them with an appointed one-person Board.

Throughout 2005 and 2006, a series of problems plagued the Halifax Regional School Board ultimately resulting in the removal of its thirteen members by the Minister of Education. Issues of conflicts of interest, loss of quorum, breaches of the Board's Code of Ethics and open hostility amongst the members identified a dysfunctional Board.

In response to the considerable negative public feedback, the Minister of Education issued ministerial directives requiring the Board members to participate in training, mediation, and an affirmation of their Code of Ethics. The Minister clarified that the new directives were to be considered part of their performance standards, and that he would exercise his ministerial discretion, including removing their authority, if necessary, to ensure their compliance.

Although it appeared that the directives had inspired the Board to work cooperatively, further instances of dysfunction occurred. In response, the

Minister removed the authority of all of the members and assigned one person to replace the Board, citing the reasons for the removal of the members as the Board's inability to meet its performance standards pursuant to the *Education Act.*

A group of the deposed members applied for judicial review of the Minister's decision. The lower court found no breach of procedural fairness on the Minister's part. The court granted the Minister's decision considerable deference and found that it was not unreasonable in the circumstances. The court rejected the Board's argument that the Minister's decision violated their rights to free speech because the Code of Ethics was applied to comments made outside of Board meetings. The Court found that the Board's Code of Ethics was expansive and should be applied broadly to the members' actions.

The Applicants appealed to the Court of Appeal arguing that the Minister had breached the duty of fairness owed to the Board members; the Code of Ethics could not be applied to conduct outside Board meetings to support their dismissal; and the actions of some Board members could not justify dismissal of the entire Board.

The Court of Appeal reframed the issues focusing primarily on procedural fairness, and the application of the right to free speech protected by s. 2(b) (Freedom of Expression) of the *Charter of Rights and Freedoms*.

With respect to procedural fairness, the Court acknowledged that the Minister owed the appellants a duty to proceed fairly, and held that the lower court correctly determined that the Minister's actions were procedurally fair.

Section 64 of the *Education Act* (Nova Scotia) provides that the Board is accountable to the Minister for the control and management of public schools within its jurisdiction and that it must meet the service and performance standards established by the Minister.

The Court found that the Minister provided fair warning that if the standards were not met, he would invoke his discretionary power, pursuant to s. 68 of the *Act*, to remove their authority. The Board members were asked to affirm their Code of Ethics, which they did, but some Board members breached their duties shortly thereafter.

The Court of Appeal found that removing the authority of all members of the Board in these circumstances was well within a range of reasonable outcomes, and that the decision did not violate the members' rights to free speech. In dismissing the appeal, the Court of Appeal noted, "*simply put, the Minister's decision was, at its core, not about sanctioning Board members. Instead, it was about protecting a quality education for Halifax's school children.*"

The broad language of the *Education Act* in Nova Scotia provided the Minister of Education with significant power to address the dysfunctionality of the Board. In Ontario, such broad discretion does not exist, nor does the *Education Act* identify that Trustees have a duty to the Ministry. The duties of Trustees in Ontario are arguably owed to their electorate, not the Ministry of Education.

Professional Development Corner

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