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Education Law Newsletter

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Transfer for Safety Reasons Upheld

The jurisdiction of a principal to transfer a student to another school after a suspension has been imposed, based on concerns for the safety of other students was recently examined by the Ontario Divisional Court in ***K.B.(by his litigation guardian R.N.) and T.M (by his litigation guardian P.A.) v. Toronto District School Board*, [2008] O.J. No. 475 (Div. Ct.) (Swinton)**.

In December 2005, an incident occurred at Emery Collegiate ("Emery") involving five students, including the Applicants. The Applicants are both African-Canadian males who received their secondary school education at Emery Collegiate. One of the students, E.F., advised the Vice-Principal that he had been assaulted by K.B. and T.M. (the

Applicants), in addition to two other students, A.B. and C.D. E.F. stated that he had been thrown into the window of a school door. The Vice-Principal stated that E.F. wanted the police to be involved.

The Principal reviewed a videotape that showed four students, who appeared to be K.B. and T.M. (the Applicants), A.B. and C.D., following E.F. down a hallway. E.F. was approached by the other students; however, the actual assault was off camera. E.F. was later seen running away from the group. The Principal concluded that the videotape affirmed E.F's account of the incident.

K.B. and T.M. (the Applicants) were brought to the Principal's office, where they remained for approximately four hours. The Vice-Principal advised that he had been told by police not to call the students' parents. Later that afternoon, the students were informed that they were being charged with assault under the *Youth Criminal Justice Act* S.C. 2002, c. 1. K.B. was also charged with threatening death and threatening bodily harm at a pizza store a few days earlier. The Principal contacted the parents of the five students after the students had left the school with the police.

The Principal interviewed E.F. to obtain his account of the December 1, 2005 incident as well as a prior incident at a pizza store, and the reasons why he was afraid for his safety. The December 1, 2005 incident, E.F stated that T.M. slapped him and E.F punched him back. T.M. pushed E.F's head into the wired glass of the window of an interior door, breaking the glass. At the pizza store, K.B. told E.F. he was going to get his cousins to come with a gun and shoot E.F., and then K.B. threw pizza in E.F.'s face. Concerned about E.F.'s safety, the Principal drove him home that and day and told him not to return to school the following day.

During the week following the December 1, 2005 incident, the Vice-Principal interviewed two other students who corroborated E.F.'s account of the pizza store incident. The Principal scheduled meetings with the families of the students to discuss the incident and to hear various students' side of the story. The Applicants' lawyers had advised them not to provide statements. The Principal informed them that he had to make a decision based on the information he had.

The Principal conducted a review of all the facts and circumstances surrounding the December 1, 2005 incident, the information provided by E.F., the accounts by the Vice-Principal and the School Safety Monitor, each student's Ontario Student Record, as well as the evidence found on the school video surveillance. He concluded that because K.B. and T.M. (the Applicants) were significantly involved in the assault at the school, as well as possibly involved in a previous confrontation with E.F. at the pizza store, a suspension was appropriate.

In addition to the suspension decision, the Principal decided to transfer the students to another school in the interests of school safety at Emery Collegiate. He feared that the Applicants' return to school would result in future confrontations between E.F. or the two other witnesses. The Principal informed the Applicants' families of his decision to suspend and transfer K.B. and T.M. (the Applicants). The Principal later provided written reasons for the transfers, at the request of the Applicants' counsel.

Counsel for K.B. advised the Board that K.B. was appealing his suspension on the basis of a breach of natural justice and

on the basis that the suspension had a racially discriminatory impact, was excessively harsh and contravened his rights under the *Education Act*, R.S.O. c. E.2 ("*Act*"), the *Ontario Human Rights Code*, R.S.O. 1990 c. H.19, the *Canadian Charter of Rights and Freedoms* ("*Charter"*) and the *Youth Criminal Justice Act*. The other three students also sought a review of their suspensions.

The applicants' mothers were asked by the Safe Schools Administrator for the Board to contact the office to arrange for the transfer of the applicants to new schools following their suspensions. The Principal made arrangements for the Applicants to continue their work and write their exams from Emery until the end of the semester.

Proper Jurisdiction to Transfer

The Applicants submitted that the Principal had no jurisdiction to deny them access to Emery or to transfer them, alleging that having invoked a disciplinary process, the Principal had no authority to use other provisions of the *Education Act* to remove them from school. The Respondent, however, argued that the Principal had the power to deny access to a student pursuant to section 305 (access to school premises) as well as the inherent authority to transfer a student who has been denied access to a school for safety reasons.

The Court reviewed s. 305 of the *Education Act*, as well as its accompanying regulation, O. Reg. 474/00, determining that the Principal denied the applicants access to Emery under the combined effect of s. 305 of the *Act*, and s. 3(1) of the Regulation. In determining whether a student should be denied access, the Court concluded that the Principal must consider the best interests of all the students in the school, not just the best interests of the Applicants. The Court reaffirmed that the actions of the Principal were *bona fide*, and held that in the circumstances of this case, the Principal had the power to deny access to Emery and to transfer the Applicants.

Procedural fairness provided

With respect to the issue of whether or not the Principal acted fairly in coming to his decision to transfer the students, the Applicants alleged that the Principal failed to conduct a thorough and unbiased investigation of the incident before contacting police; failed to notify the parents of the allegations against the Applicants until much later in the afternoon; and failed to give disclosure of the witness statements. The Court rejected these allegations finding them irrelevant to the determination of whether the Applicants were denied procedural fairness when the Principal decided to transfer them. The Court held that procedural fairness required an opportunity to respond to the allegations made. The Court found that the Principal conducted an investigation and invited the Applicants to provide their side of the story prior to making his decision. The Applicants, on the advice of counsel, chose not to speak. Their omission, the Court stated, did not undermine the fairness of the procedures that led to the decision.

Moreover, the Principal provided notice, as well as adequate reasons for the transfer when requested.

Charter claims unsupported

The Applicants submitted that the Principal's decision to transfer the students from Emery and the process by which the decision was reached infringed their rights to liberty and security of the person, as

well as their equality rights under s. 7 and s. 15 of the *Canadian Charter of Rights and Freedoms* respectively. The Applicants alleged that the right to liberty protects a student's right to make decisions with his/her parents, including a decision about whether to continue his/her education at the current school and his or her right not to be banned from that school. The Court dismissed the allegations finding that the applicants failed to show that their right to liberty or to security of the person or was infringed.

With respect to the s. 15 equality claim, the Applicants submitted that the failure of the Principal to consider the role of society and its impact on young, male African-Canadian students when making his decision to transfer and deny access was discriminatory and contrary to the guarantee of equality in s. 15 of the *Charter*. Again the Court dismissed the allegations finding a lack of evidentiary basis to support the claim.

This decision supports the right of school boards to determine which school a student attends and to impose a transfer to another school provided that the decision to transfer a student is made for proper reasons.

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Use of Force for Correction Upheld

The application of reasonable force on teenagers has been recently examined by the Ontario Superior Court of Justice in ***R. v. Swan* (13 March 2008), Toronto 0215/07 (ON S.C.)**.

The Appellant sought an acquittal from a conviction on one count of assault committed against his teenage daughter contrary to s. 266 of the *Criminal Code*, R.S.C. 1985, c. C.46 (assault provisions). The Appellant relied on s. 43 of the *Code* in defence of the charge claiming parental use of reasonable force to correct his child. Section 43 of the *Criminal Code* provides: "*Correction of child by force*: *Every school teacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, who is under his care, if the force does not exceed what is reasonable under the circumstances*."

In this case the father was convicted of assaulting his, then, fifteen year old daughter. She was rebellious, defiant, not attending school, made poor choices regarding her social crowd and at times exhibited behaviour consistent with drug use. The father's actions consisted of taking physical control of his daughter, and placing her in his truck to take her home from a house party.

In reviewing his defence, the Court highlighted the importance of analyzing each case on its own facts to determine reasonableness both objectively and subjectively. Some of the factors considered by the Court included: the age and character of the child; the nature of the issue calling for correction; the circumstances and gravity of the correction, and the likely effect that the punishment had on the child. Central to the reasonableness of the punishment, the Court stated, was a determination of whether or not the child was capable of benefiting from the correction.

The Court was clear to outline that s. 43 did not justify acts of force against a child that were motivated by anger or animated by frustration.

Following a review of the father's actions, as well as the "unruly" pattern of his daughter's behaviour, the Court

concluded that the force used by the father was "by way of correction" and the acquittal was granted.

The decision of the Superior Court is consistent with the Supreme Court of Canada's decision upholding the constitutionality of s. 43. When used for the purpose of correction and not out of anger or frustration, force against a child or teen may be acceptable.

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Transportation Decision Overturned by Court

In ***Czerwinski v. Mulaner,*** **[2007] A.J. No. 1005 (A.B.Q.B.) (Hart)**, the decision by the Board of Trustees of Foothills School Division No. 38 to change its transportation policies was challenged by the Applicants, parents of children attending school within the Division. The Applicants alleged that the Board erred in the manner in which it arrived at its decision, failing to act in accordance with its own established practices, policies and procedures and sought judicial review on the grounds of procedural fairness.

Prior to June 7, 2006 the Foothills School Division's transportation policies addressed: (i) the distance students might be expected to walk to and from school bus pickup points, and (ii) the "grandfathering" of "school of choice" families. The Board's written policy on "grandfathering" allowed for the transportation of out-of-boundary students at no additional cost where numbers were feasible; and when not, parents were responsible for transportation - either by connecting with an existing route and paying a transportation fee, or by driving the student to and from school.

The Division's transportation policies were of particular importance to parents of students at the Red Deer Lake School because their school's boundaries had been changed. Rather than sending those affected by the change to a different school, the Foothills School Division implemented a practice allowing out-of-boundary students to continue to attend the Red Deer Lake School, their "school of choice", and receive bussing at no additional cost. Thus, notwithstanding the written transportation policy, the Division had in practical terms made an exception with regard to the bussing arrangements for the out-of-boundary students at the Red Deer Lake School.

In the spring of 2005, a notice was sent by the Board to parents in the Foothills School Division indicating that the School Division was planning to change its transportation policies. A meeting was held on June 1, 2005 where two parents representing the Red Deer Lake School Council made a presentation to the Board in response to the proposed bussing changes in an attempt to offer alternative bussing solutions. The Board did not make a decision at that meeting and the Board Chair provided assurances that further consultation and input from school councils would be sought prior to a final decision on the matter.

On June 7, 2006, without further consultation with parents or school councils, the Board approved changes to its bussing practices extending the potential distance between bus pickup points from a 400 to 800 metre limit, as well as requiring all students who attended out-of-boundary schools to meet busses within the newly established bus routes at a fee.

On October 4, 2006 the Red Deer Lake School parents made a second attempt to discuss the policy change, in hopes of reversing the Board's decision. The Board indicated that it would not table the matter for discussion.

The Board argued that a duty of procedural fairness did not arise in the circumstances, due primarily to the fact that the change to its transportation policies was an exercise of its legislative, policy-making function requiring no duty of procedural fairness or natural justice. Further, they argued that the change failed to affect the interests of an individual because it was a general policy that essentially impacted on every student and their parents. Lastly, the Board alleged that if some minimal duty of fairness applied, it fulfilled this requirement by meeting with parents for consultation at the June 1, 2005 and October 4, 2006 meetings.

The Court considered the nature of the decision and the statutory provisions, the importance of the decision to the affected individuals, the legitimate expectations of the parties challenging the decision, as well as the deference owed to the Board and the manner in which it makes its decisions. The Court agreed that, generally, considerable deference must be paid to the Board and the manner in which it exercises its legislative functions. Reviewing the Board's written policies relating to policy development and decision-making, the Court noted that, although they included collaborating, consulting and informing parents in the decision-making process, the Board retained the right to '*develop, amend and approve any necessary policy at any time*'.

Notwithstanding the above noted factors, the Court concluded that the Board failed to provide a sufficient level of procedural protection to the Applicants. The decision to change transportation policies, although somewhat general in application, clearly impacted certain individuals more directly than others. Specifically, those parents of students who attended the Red Deer Lake School or those who had to accommodate for the increase in walking distances between bus pickup points were clearly more directly affected.

The Court stressed that the Board's failure to follow through on the representation made by the Chair at a June 1, 2005 meeting constituted the breach of the duty of fairness. Moreover, the Court found that the Board's minimal discussion with the parents after the decision was made did not satisfy the Board's obligation to engage in some consultation with school councils prior to making the decision. The Court overturned the Board's decision.

This decision highlights the need to not only comply with existing processes but also follow through with commitments regarding the process. As well, the decision shows the importance of consultation with school councils and parents.

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Novel Cause of Action Could Lead to Proliferation of Abuse Claims

In ***Proulx v. Pim*, [2008] O.J. No. 225 (Sup. Ct. J.),** the plaintiff sought to add the Toronto District School Board as a defendant in his claim against Pim, who pleaded guilty to charges of sexual assault against Proulx. At the sentencing hearing,

Proulx learned that Pim had been sexually abused by his grade 4 teacher, who was employed by the School Board at the time. A psychiatric report submitted at the hearing indicated that the sexual abuse by the teacher was the likely origin of Pim's sexual assaults on minors.

Proulx's claim against the School Board raised an original question: "*if a plaintiff is a victim of sexual assault by a defendant who himself was a victim of sexual assault while a student, can the plaintiff sue the school board if (i) the defendant student's predatory behaviour was caused by the teacher's assault; and (ii) the board knew [or ought to have known] that (a) the teacher was assaulting his students and (b) the result of sexual assault against a student was that the student victim would become a sexual predator and commit sexual assault against others such as the plaintiff?*" (para. 1)

In allowing Proulx to add the School Board as a defendant, the Court noted that it was not impossible that the claim could succeed. The School Board could be found to owe Proulx a duty of care based on a relationship of proximity. In order to find proximity a trial judge would have to find, based on the evidence, that the School Board knew or ought to have known that the teacher was a paedophile and that the School Board knew that the victims of the teacher would molest other children, such as the plaintiff.

The Court, in addressing the School Board's argument that allowing such a claim would open the School Board to indeterminate liability to an indeterminate class of persons, held that there was only a limited class of victims who could make similar claims against the School Board. Specifically, the potential liability would be limited to situations in which a party could prove that "*(i) [the party] was a member of a class of plaintiffs known to the Board; (ii) the Board knew that the abuse of the plaintiff would occur, and (iii) but for the negligence of the Board and the teacher, the abuse against the plaintiff would not have occurred.*" (para. 75)

The Court limited the claims against the School Board to negligence and vicarious liability, disallowing the claim grounded in fiduciary duty.

While it is yet to be determined whether or not this claim will be a success, its novel nature raises many issues for school boards, not the least of which is how to protect students and identify those who have been abused.

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Court of Appeal Upholds Defamation Claim

In ***Ottawa-Carleton District School Board, Joan Wilson and Michael Neill v. Jane Scharf, Mary Ann Kazmierski and Lorraine Paquin*, [2008] O.J. No. 775 (C.A.),** the Ontario Court of Appeal dismissed the appeal of a parent and an advocate from a decision reported in the September 2007 Education Law Newsletter (Vol. 1, Issue 2), "Parent and Advocate Guilty of Defamation." The Court upheld the decision of the lower Court, which held that the parent and advocate were guilty of defamation and were required to pay each plaintiff $15,000.00 in damages, were to issue a public retraction of their defamatory statements, and were required to post an apology in two local newspapers.

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Trustee Disqualification for Conflict of Interest

In ***Calgary Roman Catholic Separate School District No. 1 v. O'Malley*, [2007] A.J. No. 1065 (Q.B.) (Clark)**, the School District sought removal of a trustee, O'Malley, from the Board of Trustees on the ground that he had "*repeatedly and persistently operated outside the Board's rules and took actions which disgrace and denigrate the office of school trustee*" (para. 1).

The application had previously been decided in favour of the School District by a judge in chambers; however, that decision was overturned on appeal and sent back for a full trial. This was the decision following that full trial.

The respondent O'Malley refused to appear at the trial, so the Court relied on the evidence put forth only by the School District in reaching its decision.

The School District presented evidence about the governance model it had adopted, pursuant to which the Board of Trustees had delegated its management authority to the Chief Superintendent, who, in turn, was accountable to the Board for ensuring that the School District achieved the desired outcomes. The Board of Trustees was therefore charged with focusing on governance matters.

O'Malley had campaigned on the issue of reforming the governance model, with which he disagreed and characterized as a "closed and controlling system". He was critical of the amount of power held by the administration generally, and by the Chief Superintendent in particular.

From November 2004 through February 2005, O'Malley caused a number of problems for the Board. O'Malley (who is described as an "experienced lay litigator") brought a motion to the Board to rescind various Board governance policies, to remove the Chief Superintendent and the Board's negotiating team, which was at the time involved in contract negotiations with the teachers' union, and to replace the negotiating team with a committee of trustees. O'Malley alleged that the concentration of power in the Chief Superintendent was contrary to the *Charter of Rights and Freedoms*, as it applied to the rights and freedoms of the trustees. O'Malley subsequently interfered with the contract talks with the teachers' union by providing confidential information to a representative of the teachers' union. O'Malley also shared his opinions about the contract negotiations with the local newspaper and took out an advertisement in which he "graded" the other trustees, the Chief Superintendent and himself. O'Malley assigned himself an "A" and the others "F"s. Finally, O'Malley improperly attended a Ministerial expulsion appeal, which resulted in an adjournment and therefore, caused the student to be out of school for a longer period of time.

During this time, the Board attempted to address O'Malley's concerns by retaining a lawyer to determine whether the governance policies were contrary to the *Charter* and by creating a Task Force to receive and provide confidential information and advice with respect to legal issues, labour relations, contract negotiations, and the evaluation and the contract of the Chief Superintendent. The Board also passed a motion to retain an independent third party to address the role

of trustees and to determine whether the governance policy ought to be changed. O'Malley subsequently dismissed the reports of the lawyer and the independent third party as "whitewashes".

Also during this period, the Board censured O'Malley on two occasions. The first censure was for improper conduct because O'Malley had interfered with labour negotiations, which adversely affected the negotiating position of the Board, behaved unethically, and made reckless comments damaging the reputation of the District, the Chief Superintendent and the negotiating team. The second censure was for the failure to attend Board meetings and events and for interfering in the Ministerial expulsion appeal.

In February 2005 O'Malley filed a statement of claim against the Board and the Chief Superintendent claiming that the governance policies and administrative guidelines were contrary to the *Charter*.

In March 2005, the Board passed a resolution in which O'Malley was requested to resign from the Board for conflict of interest. O'Malley did not resign.

From April 2005 to October 2005, O'Malley attempted to challenge many Board processes and decisions by various unsuccessful or abandoned applications to the Court.

In October 2005, O'Malley disclosed two confidential legal opinions to the public by attaching them to an affidavit and visited a school unannounced with a reporter and cameraman.

In November 2005, the Board convened a special meeting to pass a motion to commence a legal action against O'Malley in order to have him removed from the Board, since he continued to refuse to resign. O'Malley did not declare a conflict of interest and voted against the motion.

In disqualifying O'Malley from acting as a trustee, the Court made many findings. The Court held that O'Malley had breached the conflict of interest provisions in the Alberta *School Act*, c. S-3, by voting on the motion to bring a legal action against himself. The Court found that O'Malley had a monetary interest in the matter as a legal action against him would expose him to legal costs. The Court held that this conflict was sufficient to disqualify O'Malley from acting as a trustee. The Court stated, *"…I wish to make it clear that it does not matter whether the individual voting on a motion stood to make a profit, whether the amount involved was small or large, or even whether the vote affected the outcome of the motion. As the authorities above make clear, any conflict cannot be tolerated…"* (para. 73).

The Court found that O'Malley's disqualification did not arise inadvertently or because of a *bona fide* error in judgement.

In addition, the Court held that the common law principles of conflict of interest continued to apply to the disqualification of trustees for both pecuniary and non-pecuniary reasons, in these cases where the interest of the trustee in the matter was personal and substantial and where a reasonably well informed person would conclude that that interest might influence the public duty owed by that person. The Court held that O'Malley ought to be disqualified on the common law ground of conflict of interest for voting on the motion to bring a legal action against himself as well as for suing the Board. The Court expanded:

"[A]ny reasonable well-informed person acquainted with the facts would inevitably conclude…that Mr. O'Malley, by attacking the validity of core governance policies through the courts, has a personal conflict of interest (both pecuniary and non-pecuniary) that likely would preclude him from bringing an unbiased mind to the performance of his Board responsibilities. Mr. O'Malley attempts to characterize this as a "political dispute". Whatever the characterization, he has demonstrated that he cannot and will not accept the will of the majority of the Board members or recognize the authority of the Chief Superintendent…Moreover, a trustee who chooses personally to engage his own Board in litigation by attacking the Board's core governance policies necessarily places his private interest ahead of his public duty… (para. 104-105)

With respect to O'Malley's breach of his fiduciary duties as a trustee and breach of the Board's Code of Conduct, the Court characterized O'Malley's activities with respect to the Board as *"steadfast refusal to play by the rules"* (109). The Court commented that time, money and resources were wasted in an effort to address and respond to his unethical conduct.

The Court held that the *Charter* had no application to the disqualification of O'Malley pursuant to either the *School Act* or the common law.

O'Malley was disqualified from holding office as a trustee for two years.

This case further illustrates the principle of conflict of interest as it applies to members of school boards.

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Residency Requirement for Trustees Upheld

In ***Maple Ridge School District No. 42 v. Joostema*, [2008] B.C.J. No. 265 (B.C. S.C.)**, the Court found that Ms. Joostema was disqualified from holding office as a trustee for the Board of Education of School District No. 42 (Maple Ridge) in British Columbia because she no longer met the residency requirements of the *School Act*, R.S.B.C. 1976, c. 412.

The qualifications to be a school trustee are governed by the *School Act*. At issue in this case was the requirement that: "*the person must have been a resident of British Columbia, as determined in accordance with section 42, for at least 6 months immediately before the relevant time*". Outlined in Section 42 were four rules for determining residence, and one such rule required that the person could be the resident of only one area at a time for the purposes of the *Act.*

Ms. Joostema moved to her particular electoral district, the Maple Ridge-Pitt Meadows area, in 1969. Ten years later she was elected as a trustee for the Board of Trustees of Maple Ridge School District No. 42 and was re-elected in every election until she retired in 1999. Ms. Joostema served as Chair of the Board for six of the twenty years that she was a trustee. In 2005, she was again elected as a trustee for the Board.

In 2007, Ms. Joostema and her husband sold their home in Maple Ridge-Pitt Meadows and moved to Nova Scotia. The Board then applied to the Court for an order that Ms. Joostema was disqualified from holding office. This was the first opportunity the Court had to review the

residency requirements of the *Act*. The Board argued that, in addition to attending regularly scheduled public meetings, trustees were required to attend additional closed meetings throughout the year as well as approximately four Board work days. Furthermore, the Board explained that trustees were involved in numerous school community events and were invited to countless events in the broader community. The Board also identified that trustees were responsible for representing their constituents and that constituents often approached trustees outside of formal meetings.

In light of this evidence, the Court concluded that the purpose of the residency requirement in the *Act* was to ensure trustees had a physical connection with the schools and the district they serviced in order to fulfill their duties and responsibilities. The Court also found that the requirements of residency for school trustees did not end upon election, but rather continued throughout their term of office.

Although the Court accepted Ms. Joostema's argument that she still had a strong connection to the Maple Ridge-Pitt Meadows district, and that she could continue to make a valuable contribution as a school trustee, the Court noted that all of the factors indicated that Ms. Joostema was no longer a resident of the area. The Court found that Ms. Joostema's primary residence was Nova Scotia and not the Maple Ridge-Pitt Meadows area.

Regardless of Ms. Joostema's past experience as a trustee and history of service to her community, the Court found that she no longer met the residency requirements of the *Act* and therefore did not meet the qualifications that the *Act* required of her and all other trustees. Consequently, the Court disqualified her from holding office as a trustee.

Residency continues to be an important aspect of qualification for Ontario Trustees for reasons similar to those acknowledged by the Court.

Right to Catholic Education to be Heard by Court of Appeal

In ***Yellowknife Public Denominational District Education Authority v. Euchner,* [2008] N.W.T.J. No. 2 (C.A.)** the Catholic School Trustees' Associations of Alberta, Saskatchewan, Ontario and Canada each brought an application seeking intervenor status in an appeal to the Court of Appeal regarding the rights of minority Catholic residents to establish separate schools in the Northwest Territories. All four applicants represented Roman Catholic interests in Catholic education.

The two main issues raised were: (i) whether the rights of minority Catholic ratepayers to establish separate schools is constitutionally entrenched in the Northwest Territories, and (ii) whether a provision of the *Northwest Territories Act*, regarding the establishment of schools, was in violation of the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms*.

The Attorney General of the Northwest Territories, acting on behalf of the Respondent, opposed the intervention of all of the Applicants.

The lower Court's decision held that, unlike most other provinces, statutory rights to denominational education in the Northwest Territories have not been constitutionally enshrined, because the

rights do not form any part of the *Constitution of Canada*. The Court held, however, that there was a statutory right granted pursuant to the *Education Act*, for minority Catholic or Protestant taxpayers in the Northwest Territories to petition the Minister to establish a separate school system in their municipality.

In reviewing the statutory provisions, the lower Court noted that the legislation only required that a trustee be a "supporter" of the separate school system. The Court refused to read into the legislation a requirement that such a trustee must be of the Catholic faith. The absence of any such requirement in the legislation, the Court stated, was intentional and not a mere omission.

Following a close examination of the submissions of each applicant, the Court of Appeal granted intervenor status to the Alberta and Saskatchewan Associations, finding that they shared common legislative histories with the Northwest Territories and possessed experience and expertise in constitutional guarantees of Roman Catholic education. Their submissions, however, were limited to addressing only constitutional and *Canadian Charter of Rights and Freedoms* issues.

The applications by Ontario and Canada were dismissed as the Court found that they were not directly affected by the decision, had no unique perspective to offer and their participation would unnecessarily lengthen the appeal process.

We will continue to monitor this case to provide an update. However, we would note that we do not anticipate the outcome of the case to have any direct impact in Ontario, as the right to Catholic education in Ontario is constitutionally entrenched.

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Right to Try Out for Boy's Hockey Team Upheld

In ***Manitoba High Schools Athletic Association Inc. v. Pasternak*, [2008] M.J. No. 10 (Man. Q.B.)**, the Court held that twin sisters, Amy and Jess Pasternak, had been subjected to gender-based discrimination by virtue of a Manitoba High Schools Athletic Association (MHSAA) decision which denied them the opportunity to try out for their high school male hockey team.

The Pasternak twins were experienced hockey players and were used to playing on male teams through the Winnipeg Minor Hockey Association (WMHA) where body checking or full body contact was allowed. The Pasternaks wanted to play hockey for their school because high school hockey had more convenient scheduling than WMHA hockey.

The high school where the twins were students had both a male and a female hockey team; however, the female team was in its first year of existence and was essentially developmental in nature. The Pasternaks wanted to try out for the more challenging and competitive male hockey team as the level of play was more in keeping with their hockey experience.

The MHSAA regulates high school athletic programs in the Province of Manitoba and a MHSAA rule provided that students must play for their respective genders if a school has a boys' and a girls' team. The Pasternaks' high school appealed to the MHSAA for an exception to the rule. The MHSAA denied the appeal and told the Pasternaks that they could not try out for the boy's team and that they would have to play on the girl's

team if they wished to play for their school.

Each of the sisters filed a complaint with the Manitoba Human Rights Commission alleging that the MHSAA's refusal to allow them to try out for the school's boy's hockey team constituted unreasonable discrimination on the basis of sex in violation of s. 13(1) of the province's *Human Rights Code.*

The adjudicator assigned by the Commission held that the MHSAA decision constituted a denial of the Pasternaks' opportunity to try out for the boy's team and, consequently, the twins were denied the chance to be judged on the basis of their personal merit. The MHSAA was ordered to remove the impugned restriction from its rules for the purposes of hockey only and to pay each of the Pasternaks the sum of $3,500 for injury to their dignity, feelings and self-respect.

The MHSAA applied for judicial review of the adjudicator's decision and advanced two main arguments in its application. First, it argued that the adjudicator had not applied the correct legal test in finding that this was a case of *prima facie* discrimination. The MHSAA claimed that the Pasternaks should have been required to demonstrate that their human dignity was violated by the MHSAA's rule that they cannot play on the male hockey team where a female team was available. The Court rejected the MHSAA's argument that the adjudicator made an error of law by failing to apply the human dignity approach. The Court noted that the approach was a legal test designed as a way to analyze constitutional cases involving s. 15 (equality) of the *Charter* (para 64). The Court found that there was no authority binding on the adjudicator to apply the test to the Pasternaks' human rights complaint and thus found that the adjudicator had applied the correct legal test in finding that there was *prima facie* discrimination.

The MHSAA's second argument was that the adjudicator's finding that the MHSAA had failed to prove, on a balance of probabilities, that the *prima facie* discrimination was unreasonable. MHSAA argued that the purpose of the rule under consideration was to maximize the participation of students in interschool sports programs. The position of MHSAA was that, allowing females to try out for male teams could potentially displace a male on the team, rendering him unable to play elsewhere at a similar competitive level. Finally, the MHSAA argued that a "relaxing" of the rule for boys' hockey would have resulted in a negative impact on the girls' hockey program.

The adjudicator heard expert testimony on behalf of both sides. Ultimately, the adjudicator preferred the evidence that while same-sex sport is good for most girls, it is not good for all, and being forced to play on a lower performing team is not good for students of either gender. The Court agreed with the adjudicator's finding that the MHSAA had failed to prove that there was reasonable justification for their discriminatory rule.

The Court stressed in its decision that the real issue in the case was that the Pasternaks were not provided with an equal opportunity to try out and play for the boy's team. The MHSAA's decision was discriminatory because it denied the twins the opportunity to even be considered for the male hockey team or to be assessed on their personal merits. The Court dismissed the MHSAA's application for judicial review.

This decision highlights the importance of providing equal opportunities to both boys and girls, which includes access to an opportunity of equal quality.

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Counsel Requirement Not Contrary to Charter

In ***Re Weidenfeld*, [2007] O.J. No. 4485 (Sup. Ct. J.) (Bryant J.)**, the applicant Weidenfeld sought a declaration that Rule 7.05(3) of the Rules of Civil Procedure, which required that a litigation guardian for a child or person under disability retain a lawyer, was of no force and effect because it violated s. 2(b) [freedom of expression], s. 7 [life, liberty and security of the person], and s. 15 [discrimination] of the *Charter of Rights and Freedoms*. Weidenfeld had brought a claim against the York Region District School Board, the Minister of Education, and named personal respondents on behalf of his son, a minor. The minor plaintiff claimed that the Board had "*negligently, incompetently, and maliciously failed to implement his individual education program*" and breached the duty of care owed to him as a special needs student. He alleged that the Crown had "*failed to issue specific and effective guidelines to Ontario school boards to address the individual education programs for students requiring special education services.*" (para. 2)

The Court considered the application of each of the named sections of the *Charter* in relation to Weidenfeld's claim. The Court found that the requirement that Weidenfeld in his capacity as litigation guardian have a lawyer did not deprive him of his right to life, liberty or security of the person and that, in any case, the requirement was in accordance with the principles of fundamental justice. The requirement did not interfere with Mr. Weidenfeld's psychological integrity as a parent. The Court noted that the litigation was complex and difficult and that "*notwithstanding the fact that Mr. Weidenfeld believes he is acting and would act in the best interests of his son Joel, the subject litigation requires the careful advice of a lawyer.*" (para. 21)

The Court further held that the Rule did not infringe Mr. Weidenfeld's freedom of expression as he was permitted to act on his own behalf and to act as a witness on behalf of his son. The Court concluded that the expressive activity of representing a person under disability fell outside the scope of the s. 2(b) protection.

With respect to s. 15, the right to be free from discrimination, the Court found that there was no basis for finding a violation of Weidenfeld's human dignity and freedom. Weidenfeld alleged he was subject to discrimination based on receipt of social assistance, however, he had not sought legal assistance from legal aid or a legal clinic, and, in any case, the Rule applied to all persons regardless of their financial position. The Court also held that the age distinction in the Rule between minors and adults did not violate the human dignity or freedom of the minor plaintiff.

The Court dismissed the application.

The Rule requiring that litigation guardians retain counsel for minor applicants protects the rights of minors and assists to ensure that appropriate steps are being taken on behalf of that minor. Given the Court's decision, it will be interesting to see whether Mr. Weidenfeld finds a lawyer and continues the litigation on behalf of his son.

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Education Law Newsletter

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