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Education Law Newsletter

— March 2009 —

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Human Rights Tribunal Issues Seminal Decision on Evidentiary Issues

The Ontario Human Rights Tribunal (the "Tribunal") issued an Interim Decision on five issues in *Persaud v. Toronto District School Board*, [2008] O.H.R.T.D. No. 90 ("*Persaud*"). The Complainant, Andrew Persaud, filed a complaint against the Toronto District School Board (the "Board") alleging discrimination on the basis of race arising from discipline related to alleged plagiarism and other issues when he was a student at Vaughan Road Academy ("VRA"). The parties to the complaint are the Complainant, represented by his own counsel; the Ontario Human Rights Commission (the "Commission"); and the Respondent Board.

The five issues addressed by the Interim Decision were: (1) objections to documents by the parties; (2) the Commission's proposed expert evidence by Dr. Frances Henry on race theory and analysis; (3) the Respondent Board's proposed evidence by a former Principal from VRA; (4) whether the Board's proposed evidence by two police officers would be barred by the provisions of the *Youth Criminal Justice Act ("YCJA")*; and (5) the Board's request for a sealing order and a publication ban.

Documents

The Tribunal made a number of rulings regarding documents to be relied on during the proceeding. The Tribunal struck specific documents from the parties' briefs based on its earlier decision that events prior to the Complainant's attendance at VRA were not relevant to the matters at issue in the proceeding. The Tribunal reserved its decision on the issue of admissibility of the forensic report of a proposed expert witness, pending hearing evidence from a Chemistry teacher to be called by the Board, and also noted the Commission's objection to the proposed evidence.

In response to the Commission's objection to specific documents in the Board's brief, the Board agreed not to enter some of these documents at this stage of the proceeding so the Tribunal found it not necessary to rule on admissibility. However, the Tribunal did rule that the Board could not admit into evidence the Commission's section 36 Case Analysis Report, its Amended Report, or the Board's responses to these Reports, although they could be considered if there was a motion for costs later in the proceedings.

Expert Evidence

The Commission sought to introduce the expert evidence of Dr. Frances Henry. The Tribunal found that Dr. Henry was a renowned scholar in the areas of race theory and analysis, and that he would be qualified as an expert witness. However, the Tribunal found that Dr. Henry's proposed evidence would not be relevant, because Dr. Henry's evidence would be focussed largely on the experiences of Black students and anti-Black racism, but the Complainant had already testified that he did not self-identify as a "Black" student, but rather as a "Guyanese Indian" of "brown" skin colour.

The Tribunal did not accept the Commission's submissions that "*the experience of an individual that self-identifies as brown is similar to that of a student who self-identifies as black*" and that "*to make such a colour based distinction can be characterised as Colourism, which is a key component in defining a racist dynamic*" (para. 11). The Tribunal held that the Commission had provided no support for these submissions, even including the anticipated evidence of Dr. Henry that was submitted to the Tribunal. In addition, the Tribunal noted that the Commission's submissions on this point were inconsistent with the Commission's own Policy and Guidelines on Racism and Racial Discrimination.

With respect to the "necessary" prong of the expert evidence test, the Tribunal found that when Dr. Henry's evidence was stripped of its focus on Black students, it would provide information on the basic concepts and dynamics of racism, which were not necessary to assist the Tribunal as the trier of fact. While the Tribunal declined to hear expert evidence from Dr. Henry, the Tribunal allowed either the Commission or Complainant to submit any relevant materials on race analysis or racism in education, other than case law, legal articles or literature, for the Tribunal's consideration prior to the close of their case.

Board Witness

The Board proposed to call as a witness the former Principal of VRA, who was at the school in the two years preceding the matters at issue in the proceeding. The Board sought to call this witness to testify about certain issues related to the Complainant, including the admitted plagiarism of a Geography assignment, as well as interactions with his mother, and the former Principal's opinions about the Complainant and his mother that were formed as a result. The former Principal would also give evidence about the distribution of master keys during the years when she was Principal. The Tribunal found none of this proposed evidence to be relevant to determine the matters at issue in the current proceeding. As a result, the Tribunal declined to hear evidence from the former Principal.

Police Evidence

The Police evidence relates to the issue in the Complaint of a master key, which was found in the possession of a student on the Yearbook Committee in the 2004-2005 school year. The Tribunal was required to rule on the issue of whether evidence given by the police regarding their involvement with the Complainant's brother at the school involving the master key issue would be in violation of the *YCJA*.

A master key was found in the possession of a student on the Yearbook Committee in the 2004-05 school year. There was no dispute that this student obtained the key from the Complainant's brother. There was also no dispute that, after the Complainant's brother was questioned by school administrators, he was also questioned by two police officers at the school.

During the Commission's examination-in-chief of the Complainant's brother, counsel for the Complainant raised an objection that evidence of the brother's involvement with the police was being given in violation of the *YCJA*. Because the Complainant's brother was 18 years old (and therefore an adult) when testifying, the Tribunal held that pursuant to s. 110(3) of the *YCJA*, he could choose to publish any information that would identify him as having been dealt with under the *YCJA*. However, because the Board intended to call the two police officers to testify in response to the Complainant's brother's evidence and allegations of racial discrimination, the Tribunal invited Complainant's counsel to make submissions as to whether this proposed evidence would be in violation of the *YCJA*. Complainant's counsel took the position that the police officers' proposed evidence would violate the *YCJA*, and that an order from a Youth Court Judge was required for the Board to put this evidence before the Tribunal. The Board took the position that there would be no violation of the *YCJA*.

The Tribunal's analysis of the issue was based on: section 110(1) prohibiting publication of a young person if it would identify him/her being dealt with under the *YCJA*; 110(3) allowing a person 18 or older to cause information identifying him or her being dealt with under the *YCJA* to be published; and, s. 188(1) restricting access to a record identifying a young person dealt with pursuant to the *YCJA*.

The Tribunal expressed doubt that the proposed evidence of the police officers fell under the scope of the *YCJA*, since the Complainant's brother had never been charged under the Act. However, without making a finding on this issue, the Tribunal held that, as an adult, the Complainant's brother could cause the information about his dealings with the police to be published. By testifying about these dealings and putting them in issue in the case before the Tribunal, he had caused to be published any

relevant evidence required for the Board to respond to the allegations. The Tribunal also rejected the argument of Complainant's counsel that s. 110(3) of the *YCJA* restricts publication of information to just a young person's name or identity. The Tribunal noted that no authority was cited for that proposition.

Publication Ban

The Board sought a publication ban and order sealing the record related to any evidence regarding academic or discipline information related to students other than the Complainant. The Complainant was not included in the Board's request because, as a separate party to the proceeding, he could seek such an order on his own behalf, which he chose not to do.

The Tribunal considered the Board's request in light of s. 266 of the *Education Act*, which attaches statutory privilege to the information contained in a student's Ontario Student Record ("OSR"); the privacy of "personal information" under the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*"); and, the Tribunal's discretionary power under s. 9 of the *Statutory Powers Procedure Act* ("*SPPA*"), which allows a Tribunal to hold a hearing in the absence of the public.

The Tribunal dismissed the Board's request. The Tribunal noted that much of the evidence that had already been submitted regarding the academic achievements of other students had been anonymized, as appropriate. The Tribunal found no compelling reason to override the fundamental principle of holding an open hearing or to justify the issuance of a sealing order or a publication ban. The Tribunal noted that other measures were available to the Tribunal to protect students' privacy interests, such as avoiding the use of students' names where practicable. However, in an abundance of caution, the Tribunal also gave the Board an opportunity to identify any documents submitted into evidence that formed part of an OSR, not the OSR of the Complainant, to enable the Tribunal to re-consider the Board's request in a specific circumstance.

General Comments

Of particular significance in this case are the decisions relating to expert evidence and the *YCJA*. While the circumstances of each case are different, this decision does provide some insight into issues of admissibility and confidentiality.

It should also be noted that the Tribunal will control the procedure and evidentiary issues at human rights hearings.

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Trustee Removed for Conflict of Interest

In *Baillargeon v. Carroll*, [2009] O.J. No. 502 (S.C.J.), the Court examined conflicts of interest of school board trustees contrary to section 5(1)(b) and (c) of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 (the "*MCIA*").

The Toronto Catholic District School Board (the "Board") had been running a deficit contrary to the *Education Act*, R.S.O. 1990, c. E.2, and was required to eliminate the deficit by the end of the 2008-2009 fiscal year. The staff proposed elementary teacher layoffs. At the time, Trustee Carroll's daughter was an elementary school teacher employed by the Board. Given her seniority, the proposed layoff could affect the Trustee's daughter. In addition, the Trustee's son had recently commenced employment with the Board as an occasional teacher.

Two legal opinions with respect to the potential conflict of interest were sought and provided. The first opinion recommended that any trustee who had family members employed by the Board as teachers and/or support staff should refrain from participating in budget discussions that could lead to a reduction in the number of

teaching and/or support staff positions, and s/he should declare a potential conflict pursuant to the *MCIA*. Further clarification was then sought and the second opinion provided that, if the budget were separated into components, the Trustee could vote on the items that were not a potential conflict of interest.

This advice was not taken by the Trustee. The Court found that the Trustee violated section 5 of the *MCIA* when he participated in the discussion about and voted on a motion proposing no teacher layoffs, made following a presentation by the union president.

In the same meeting, the Trustee proposed and participated in a discussion surrounding a budget item that would result in a portion of the deficit being carried forward and no teacher layoffs resulting because of program cuts. The Court stated that it was not relevant that the Trustee thought that the motion would not have affected his daughter who he thought would have already been laid off due to declining enrolment. As well, after an amendment was proposed specifying that there be no teacher layoffs, the Trustee identified the amendment as a "friendly amendment". The Court found that this identification would be interpreted by fellow trustees as the Trustee adopting and implicitly supporting the amendment.

The Trustee sent an email to the Director of Education of the Board, copied to all the trustees, asking whether teachers who had received layoff notices could be assigned to long-term occasional positions. The email also urged that retired teachers not be given these positions. The Court found that the Trustee took this position despite knowing that such a policy had the potential to benefit both his daughter and his son, and that the email could influence others on a matter in which the Trustee had a conflict of interest.

At another meeting, the Trustee introduced a motion to reopen the budget discussions, the Trustee also introduced a motion that the Board stop hiring retired teachers for long-term occasional positions and only hire new teachers for these positions. At the same meeting, the Trustee also introduced a motion that the Board adopt a policy requiring the Board to pay for the defence of a trustee charged with conflict of interest under the *MCIA*.

The Court held that the defences of inadvertence and error in judgment did not apply. Inadvertence requires that the breach be linked to an oversight of fact or law. Recklessness or turning a blind eye to the conflict is not an oversight. The Trustee's awareness of his conflict of interest resulting from the legal advice communicated precluded the defence of inadvertence.

In finding that the defence of error in judgment did not apply, the Court considered the experience of the Trustee. The Trustee had been a member of the Board for 5 years and had a long record in public service. For the defence to apply, the Trustee must have acted in good faith and with a complete lack of deceit or collusion. That the Trustee was aware of the conflict of interest and chose to participate in several discussions in which a conflict was present militated against a finding of good faith. The Court found that the Trustee chose to disregard the advice provided to him and, as such, the defence of error in judgment was not available.

The Court found that the conflicts of interest were serious and indefensible. Pursuant to section 10(1)(a) of the *MCIA*, the Trustee's seat was declared vacant.

It would appear that efforts were made to educate the members of the Board regarding their responsibility to declare a conflict of interest. This case serves as a further example of the care that must be taken by trustees when considering such issues.

This case received considerable attention in the media. One of the concerns expressed by parents and ratepayers was that the *MCIA* requires enforcement by an individual, such as a parent or ratepayer, which raises considerable concern with respect to the cost of such applications to the Court. This issue has always existed, but the costs associated with an application to the Court have increased significantly over time. The Government has given no indication of changing the *MCIA* to provide for a less costly alternative process.

No Psychological Damage Found in Discipline Case

In *Moore v. Hatch House Montessori School*, [2008] O.J. No. 3654 (S.C.J.), the Court examined the standard of care required of a teacher when dealing with a student who is creating a potentially dangerous situation.

The plaintiffs' 3½ year old son, William, was tripping other children and putting wooden blocks in his socks. His teacher attempted to take him to see the principal. The principal was busy and William was left in the adjacent toddler room with instructions that he be taken to see the principal as soon as the opportunity arose. William was returned to his classroom within 5 minutes. The plaintiffs alleged that William was told by the teacher that if he was going to behave like a baby he would be treated like one and that sometimes a little bit of damage does a lot of good. The teacher denied these allegations. The plaintiffs withdrew William from the school and, when the principal resisted getting involved, also withdrew their other son, Ethan.

The Court found that there was no evidence that William had suffered any emotional trauma or upset about being placed in the toddler room as there was no evidence that he had felt humiliated or belittled, that he considered his placement in the toddler room a punishment or embarrassing, or suffered a resultant lowering of self-esteem. Specifically, William had not made mention of the events, of feelings of humiliation, embarrassment or lower self-esteem, or of a desire to leave the school or of any concern of any sort.

With respect to Ethan, the court noted that, while there was reference made to the fact that he was upset that he could no longer attend the school, the decision to remove him was unilaterally made by his parents.

The plaintiffs claimed that the school had been negligent in the discharge of its duties. The Court recognized that the school and teacher owed a duty of care to the students under their care. The teacher had not, however, breached the standard of care, as she did not create a risk of harm. The Court found the actions of the teacher to have been fair, reasoned and appropriate. In response to William's conduct that day, the teacher had conducted herself according to the rights of the other students in his classroom as well as the care and personal safety of William.

With regard to damages suffered by the plaintiff, the Court reiterated that for a psychological disturbance of the plaintiff to be compensable by the defendant the disturbance must rise above the ordinary annoyances, anxieties and fears routinely experienced by people in society. Personal injury deserving of compensation is serious trauma or injury. Minor and transient upsets are not personal injury and, therefore, do not attract damages. The Court found no evidence of psychological damages amounting to personal injury to the children or the parents.

In addition, the damage must be reasonably foreseeable in order for the defendant to be responsible for the plaintiff's injury. The plaintiffs had failed to show that it was reasonably foreseeable that a child of William's age or Ethan's age, of ordinary fortitude, would have suffered personal injury. The plaintiffs had only led evidence of their reaction as parents.

This case highlights the response of Courts to minor and/or trivial complaints. Unfortunately, in some cases, such

precedents do not assist in preventing needless litigation.

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Courts Affirm Principles for Disclosure of Student Records

Requests for the production of school records in civil, administrative and criminal proceedings have recently been considered by the courts in three cases: *Lee v. Toronto District School Board*, [2008] O.J. No. 1759; *R. v. Browne*, [2008] O.J. No. 4932; and *K.F. v. Peel (Regional Municipality) Police Services Board*, [2008] O.J. No. 3178.

In *Lee v. Toronto District School Board* the plaintiff student brought a motion for production of school and police records relating to the defendant, a student. The plaintiff alleged that the school and police records were relevant to the action for assault that occurred on a schoolyard, as the records would prove that the Board, principal, teachers and the defendant's guardian knew of the student's history of violent behaviour and failed to properly supervise the student. The defendant's counsel opposed production of all of the school's records on the ground that they were statutorily privileged records pursuant to section 266 *(*pupil records) of the *Education Act*, and all of the police records on the ground that the police had no right to obtain a statement from the defendant, because they were not investigating an offence.

The Court found that the case law supported the production of educational records, where relevant for the purpose of litigation.

With respect to the police records, the Court applied the common law rule that evidence in civil cases is admissible regardless of how it was obtained, unless obtained in breach of the *Charter of Rights and Freedoms.* Allowing the motion, and ordering production of the school and police records, the Court held that the records were relevant and material to the action, and therefore, no privilege applied. (The Court does not consider the merits of the claim, but only whether the records may be relevant).

School records were similarly sought in the criminal proceedings of *R. v. Browne*. The accused applicant, charged with one count of sexual assault and one count of touching a child for a sexual purpose, sought production of records in the possession of the Children's Aid Society of Toronto and the Toronto District School Board pursuant to section 278.1 (definition of a "record") of the *Criminal Code*. The accused requested the school records in order to obtain evidence about the student's behaviour. The accused argued that the records were relevant because the student suffered from Attention Deficit/Hyperactivity Disorder and Oppositional Defiance Disorder and had fabricated the allegations against the accused. The accused wanted the school's records to assist in establishing that the student was a "*story teller*".

The Court found that there was no evidence that the records sought had any direct relevance to the question of whether the accused committed the acts alleged against him. As a result, the Court dismissed the application.

In *K.F. v. Peel (Regional Municipality) Police Services Board*, K.F. and the Ontario Human Rights Commission sought an order for disclosure pursuant to Section 115 (police records) of the *Youth Criminal Justice Act* (*YCJA*) of all police records regarding a forced entry and theft that occurred in a school cafeteria. The incident resulted in a school suspension of the student, an arrest by the police while at school, and the application of extrajudicial measures by the police. As a result of the incident, K.F. initiated a human rights complaint alleging racial discrimination.

The applicants sought an order authorizing the disclosure of all police records. Counsel for the Peel Police submitted that although they wished to disclose the records, Section 119(4) (persons having access to records) of the *YCJA* prohibited them from disclosing the police records they retained. They argued that section 119(4) only permitted disclosure of a record kept in respect

of extrajudicial measures to an enumerated list of persons, which did not include the subject of the records, K.F.

Finding this interpretation counterintuitive, the Court stated: "*To turn the concern for privacy, which was used as a shield for the young person, into a sword to be used against him in a way that limits the effectiveness of various protections that are provided to other citizens of this province makes no sense to me*." (para. 15). The Court, pursuant to Section 124 (access to records by young person) of the *YCJA*, ordered that access to the police records be granted to K.F., his counsel, and to all other persons required to have access to ensure a fair resolution of the human rights complaint. The Court also ordered any reference that might identify K.F. or other students to be edited from the police records prior to being released.

These cases highlight the importance of relevance when determining whether or not documents might be admissible in a hearing.

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Court Refuses to Intervene in School Closing

In July 2008, parents of children who attended the Milden Central School (the "Milden School") during the 2007-08 school year applied for an interlocutory injunction to prevent the Board of Education of the Sun West School Division No. 207 of Saskatchewan (the "Board") from acting on a Board resolution, passed on May 6, 2008, to close the Milden School. In August 2008 the Saskatchewan Court of Queen's Bench denied the application for an interlocutory injunction, which meant that the Board could close the Milden School prior to the 2008-2009 school year (*Hanna v. Sun West School Division No. 207*, [2008] S.J. No. 480 (Sask. Q.B.)).

Facts and Arguments

As a result of Saskatchewan's mandatory restructuring of the public education system, the Board was established on January 1, 2006 as a result of the amalgamation of four existing school divisions and part of two other school divisions (the concept and implications of amalgamation are certainly well-known in Ontario). The Board administers approximately 41 schools in its boundaries, including the Milden School. In the Fall of 2006, the Board held a public consultation process regarding issues related to the viability of schools in the Board's jurisdiction. Following this process, in April 2007, the Board adopted a policy entitled the "School Viability Review" and resolved to carry out an annual review of all schools in accordance with the policy. In October 2007, the Board passed a motion to receive, as information, the School Viability Review for the Milden School.

During the 2007-08 school year, the Milden School had 39 students enrolled; enrolment was expected to drop to 36 students for the 2008-09 school year. Low enrolment triggered the Board's review of the Milden School.

On December 18, 2007, the Board passed a motion to consider the Milden School for closure and to hold an electors' meeting on January 15, 2008 at 7 p.m. to inform the electors of the Board's intention to consider the future viability of the Milden School. However, due to a terrible blizzard on January 15, 2008, the Board cancelled the meeting and rescheduled it for February 6, 2008. There was no dispute about the blizzard or any allegation that the Board had cancelled the meeting inappropriately.

The Board advertised the rescheduled meeting by placing an ad in the local newspaper and displaying posters in the school's attendance area. There was some dispute about the exact location and number

of posters. The plaintiffs alleged that the posters appeared approximately one week prior to the meeting of February 6, 2008.

Approximately 60 people attended the rescheduled meeting on February 6, 2008. According to the Director of Education, the purpose of the meeting was to inform the electors that the Board was considering closure of the Milden School, or discontinuing one or more grades. On March 12, 2008, the Board held another meeting with electors to hear from interested parties on these issues. Approximately 65 people attended and the Board received nine submissions. The Board informed electors that it would receive submissions until May 2, 2008.

On May 6, 2008, the Board met and passed a motion to close the Milden School effective August 6, 2008. The Chair of the Milden School Community Council was present at this Board meeting. After the motion, the Director arranged a time with the Chair for the Director to meet with the Community Council and parents regarding a transition plan for the 2008-09 school year. The Chair sent a registered letter, dated May 6, 2008, to inform the Community Council of the Board's decision.

The Director made numerous attempts to schedule dates for consultations with the Community Council for transition planning. The Community Council and parents met on June 9, 2008 to discuss transportation and possible attendance areas for students, but did not invite the Board to participate in this meeting. On June 10, 2008, the Chair notified the Board of the schools that the Community Council was requesting for students of the Milden School to attend the following year; as a result, the Board prepared bus routes for students to attend three alternate schools.

A consultation meeting between the Board and the Community Council finally took place on June 19, 2008. One plaintiff (a parent) indicated that she only found out about the meeting the night before and could not attend.

On July 3, 2008, a letter was sent to the Board on behalf of the Community Council and a number of concerned parents requesting that the Board not proceed with the closure of the Milden School. The letter stated that "*the notice requirements have not been met in respect of the proposed closure of Milden Central School*" (para. 15). On July 8, 2008, the Board's solicitor requested particulars of this allegation. The solicitor for the plaintiffs responded on July 9, 2008. The matter could not be resolved and the plaintiffs filed a statement of claim on July 15, 2008. The notice of motion requesting an interlocutory mandatory injunction to prevent the Board from closing the Milden School was filed with a first return date of July 31, 2008. The matter was argued before the Court on July 31, 2008.

The plaintiffs alleged that the Board did not act in good faith throughout the consultation process and decision to close the Milden School. In support of this allegation, the plaintiffs allege that the Board changed the time of the Board meeting on December 18, 2007 from 1 p.m. to 9 a.m. without informing parents. In response, the Board indicated that at the November 2007 Board meeting, the Board decided to hold all of its meetings at 9 a.m. in future, rather than at 1 p.m. However, the Court found that the Board did not inform the Community Council of this change.

The plaintiffs also alleged that teachers and staff of the Milden School were chastised for commenting on the school closure issue and were told not to say anything in opposition to the Board's intention to close the school. The Board denied that teachers were reprimanded for participating in the consultation process. Rather, teachers were

informed of the Saskatchewan Teachers' Federation's policy that governs their members' participation in such processes. Specifically, teachers were advised to respect the role and responsibility of the Board in carrying out statutory requirements.

Finally, the plaintiffs filed a number of affidavits outlining individual students' needs and how students would be impacted by the closure of the Milden School.

Criteria for Mandatory Interlocutory Injunctions

The Court outlined the test for granting a mandatory interlocutory injunction:

"*It is well established that the plaintiffs must satisfy three requirements before a court will exercise its discretion to grant a mandatory interlocutory injunction restraining the Board from proceeding with the closure of the Milden School, until the within action is resolved. The plaintiffs must firstly establish that they have a strong* ***prima facie*** *case. Secondly, the plaintiffs must satisfy the court that, in the event the injunction is not granted, the plaintiffs will suffer irreparable harm. Thirdly, the plaintiffs will ask a court to consider the balance of convenience as between the parties and persuade the court that the balance favours the plaintiffs. . . . it is widely recognized that irreparable harm and balance of convenience factors are closely related*" (para. 22).

Because the injunction was being sought against a public authority and the facts of the matter were not in dispute, the Court held that the appropriate standard to apply to the plaintiffs' case was the standard of a "strong *prima facie* case" (para. 22):

" ... The rationale for requiring the higher standard when seeking an injunction against a public authority is that the public authority represents the public interest, and should not be temporarily prevented from acting unless there is real merit to the claim being advanced." (para. 22).

The plaintiffs argued that the Board breached three of the notice requirements of section 87 of *The Education Act, 1995*, S.S. 1995, C.E-0.2, am., ("*The Education Act*"), as well as the consultation requirements under the Board's own policy when it passed the resolution on May 6, 2007 to close the Milden School.

In response, although the Board conceded that it was not in full compliance with the "at least" three month notice provisions, the Board argued that a "slight mistake" should not result in the granting of a mandatory interlocutory injunction. The Board also relied on the Saskatchewan Court of Appeal's decision in *Board of Education of Dysart School Division et al. v. Board of Education of Cupar School Division No. 28* (1997), 148 Sask.R. 41; [1996] S.J. No. 524 (Sask. C.A.) ("*Dysart*"), where the Board breached a statutory notice requirement by sending notice of the closure of a school one day late. The Court of Appeal held:

"*To assume, as this analysis does, that a statutory breach automatically gives rise to an injunction is to dilute the safeguards surrounding the grant of such an extraordinary remedy by a superior court*" (para. 31).

In the present case, the Court found that the Board did not post the required number of posters for notifying electors of the meeting. The Court also found that the Board was two days short of providing the minimum three months' notice required by *The Education Act* for advising electors that closure of a school was being considered. The Board was also two days short of providing the required three months' notice of the school closure. Finally, with respect to the Board's policy, the Court found that the Board was a

few days short of the requirement to receive submissions.

The Court relied on the Court of Appeal's reasoning in *Dysart* and found that, despite the Board's breaches, the plaintiffs were not prejudiced by them. Specifically, the Court noted that attendance at the February 6, 2008 meeting was excellent; that there had been proper notice for the original January meeting, which was cancelled due to weather; that there was no evidence that anyone who wished to make a submission to the Board did not do so as a result of the shortened time limit; and that steps were taken to ensure that adequate arrangements were in place for students to attend alternate schools. The Court noted that there was no evidence that the two days short notice affected parents in planning for closure of the school or for the change of schools in September. As a result, the Court held that the plaintiffs failed to establish a strong *prima facie* case and a mandatory interlocutory injunction was not appropriate in the circumstances.

The Court also dismissed the plaintiffs' claim that there was a lack of procedural fairness in the way the Board conducted this matter. The Court agreed that the Board owed the plaintiffs a duty of procedural fairness, but found no breach of the duty owed.

In the event that the Court was wrong in its conclusion that the plaintiffs did not have a strong *prima facie* case, the Court also found that the plaintiffs failed to meet the requirements under the irreparable harm and balance of convenience prongs of the test for granting a mandatory interlocutory injunction.

The plaintiffs' application for a mandatory interlocutory injunction to compel the Board to continue the operation of the Milden School pending the outcome of trial was dismissed. Costs were not argued and no order was made.

The case emphasizes the importance of the requirements necessary to convince a Court to intervene. Similar principles have been applied in other cases in other Provinces, including Ontario.

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Case Note

***Sagharian v. Ontario (Minister of Education),* [2008] S.C.C.A., no. 350 (SCC).**

The plaintiffs in this case, who wish to proceed as a class action with respect to claims relating to autism, had several paragraphs of their Statement of Claim struck, but leave to amend was provided.

Rather than amending their claim, the plaintiffs appealed the lower court decision to the Ontario Court of Appeal, which upheld the lower court's decision and struck further paragraphs, with leave to amend (see "Recent Developments in Autism Litigation", Education Law Newsletter, Fall, 2008). Again, rather than amending their claim, the plaintiffs sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada, which denied leave.

Based on an article in the Toronto Sun, which appeared on March 19, 2009, it is unknown whether or not the plaintiffs will amend their claim and seek certification as a class action.

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Professional Development Corner

Keel Cottrelle LLP
"Student Discipline (Bill 212) Session"
Toronto Marriott Airport Hotel, Toronto
April 17, 2009

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CAPSLE
"Law in Education: A Tower or a Bridge"
Royal York Hotel, Toronto
April 26-28, 2009

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