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Education Law Newsletter

— March 2010 —

IN THIS ISSUE —

Divisional Court provides guidance on interpretation of discipline provisions of Education Act

In *Kawartha Pine Ridge District School Board v. Grant et al.*, (unreported, 2010, Div. Ct.), the Divisional Court considered the application of the discipline provisions of the *Education Act*. A secondary school principal suspended and subsequently recommended for expulsion a Grade 12 student who had admitted to using marijuana and sharing it with friends off school premises. The principal determined that the student's behaviour contravened the discipline provisions of the *Education Act* and would have an impact on the school climate. The student was subsequently expelled by the School Board.

The student appealed the decision of the School Board to the Child and Family Services Review Board, which quashed the decision of the School Board to expel the student, reinstated the student to school, and expunged the student's record. The School Board sought judicial review before the Divisional Court of only the CFSRB's decision to quash the expulsion, because the latter two rulings were moot, as the student had graduated. The Divisional Court upheld the decision of the CFSRB.

The issues before the Court were: (1) whether the application was moot; (2) what the appropriate standard of review of the CFSRB's decision ought to be; and, (3) whether the decision of the School Board to expel the student should be set aside.

The Court did not make any findings with respect to the investigation by the principal or the proceedings before the School Board; however, the Court did note that the letter sent to the student informing him of the decision to expel him did not include the reason for the expulsion, as required by the *Education Act*.

With respect to mootness, the Court exercised its discretion to hear the application although the student had already graduated, because the Court's guidance might avoid future litigation.

The Court applied a reasonable standard to its review of the CFSRB decision.

While the School Board challenged the CFSRB procedure of hearing the case *de novo*, rather than as a review of the School Board's decision to expel the student, the Court held that the School Board should have raised its objection prior to the hearing, and that not having done so amounted to a waiver of any objection to that procedure. The Court also noted that, given the wording of the *Education Act*, the CFSRB had discretion to decide its process.

In addition, the Court held that there were good reasons to hold a hearing *de novo*, because the School Board had not given any reasons for its decision to impose an expulsion that could be reviewed, the School Board did not provide a full evidentiary record to the CFSRB, and there was no record of the proceedings before the School Board. The Court also noted the importance of the decision to the student and his parents, which attracted a high level of procedural fairness.

The Court then considered whether the CFSRB's decision had been reasonable. The School Board argued that the CFSRB had misinterpreted section 310(1), which requires a principal to suspend a student when the principal believes the student has trafficked illegal drugs having an impact on the school climate. The School Board argued that because suspension decisions were based on the principal's belief, the Tribunal should have accepted the principal's belief about the impact of the student's actions on the school climate. The Court rejected the School Board's argument. The Court found that the intention of the legislation was to have the School Board make the decision as to whether or not to expel a student, and that the decision by the School Board was then reviewable by the CFSRB. The Court described the role of the CFSRB thus:

"[t]he Act does not require the Tribunal to defer to the principal's beliefs. It must decide, on the evidence before it

(including the evidence of the principal) whether the student is engaging in a prohibited activity that has an impact on the school climate and, given the circumstances of the particular student, is deserving of expulsion.

The Tribunal held that there must be a nexus between the student's activity and the school climate before expulsion can be justified. In my view, that is a reasonable, indeed a correct interpretation of the words of the Act."

The Court reviewed the evidence that had been before the CFSRB with respect to the question of nexus between the conduct and the school climate and concluded that the decision of the CFSRB had been reasonable. The Court found that the School Board had not proven that the student's behaviour would negatively impact the school climate.

The Court reviewed several findings of the CFSRB that are noteworthy for administrators. The CFSRB had rejected the evidence of the vice-principal, because the vice principal's evidence was based on an interview of the student, which did not take the student's communication disability into account. The CFSRB also rejected the hearsay evidence of the vice-principal as it related to three student-witnesses who had identified the student as having bought and sold drugs, because the student-witnesses were not identified by name or called as witnesses. The CFSRB also found that the School Board could not assume that, because a student engaged in illegal drug or alcohol activity off school premises, the activity would also occur in or impact the school environment. The CFSRB held that there must be specific evidence of the student's activities impacting the school climate. Further, the CFSRB had considered the time-limited nature of the student's drug use and clean disciplinary record to determine that there was a remote likelihood of future impact on the school climate.

Costs of the application were awarded to the respondent parent in the amount of $3,000.00.

The decision of the Court identified reasonableness as the appropriate standard of review to be applied to decisions of the CFSRB, and this will likely be the standard to be applied by courts on future reviews. The decisions of the Court and CFSRB also provide some guidance to administrators with respect to the conduct of investigations involving a student with special needs, and with respect to the type of hearsay evidence that the CFSRB is likely to accept. Finally, the decisions provide guidance for evaluating the nexus of the impugned activity and its impact on the school climate, namely that there must be specific evidence, not a general belief about how the school environment might be impacted.

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Human Rights Tribunal of Ontario finds administrative transfer discriminatory

Following 20 hearing days and the evidence of 29 witnesses, the Human Rights Tribunal of Ontario in *Persaud v. Toronto District School Board*, [2009] O.H.R.T.D. No. 1666, issued a lengthy Decision in October 2009, finding the Toronto District School Board responsible for racial discrimination contrary to sections 1 and 9 of the Ontario *Human Rights Code* in its decision to

administratively transfer the student complainant to another school.

The complaint was filed in 2005 under the old human rights process. The allegations included discrimination on the basis of race, colour, family status, association and reprisal arising from a series of incidents, including alleged plagiarism and cheating and subsequent discipline in the form of a 20-school-day suspension and an administrative transfer from the school. The parties to the complaint were Andrew Persaud, a Grade 11 high school student of Guyanese-Indian decent, the Ontario Human Rights Commission, and the Respondent Board. (For a review of the Interim Decision issued in the Fall of 2008 in this matter, see "Human Rights Tribunal Issues Seminal Decision on Evidentiary Issues", Education Law Newsletter, March 2009).

The Tribunal reviewed the allegations and evidence in great detail and made a series of factual findings. A brief review of the facts is noted below, however reference should be made to the Tribunal's Decision for a comprehensive factual account.

The school maintained an internal master key primarily used by the school's caretakers, which permitted access to all internal doors in the school. Andrew's brother, Raymond, was identified as having provided the key to another student, who used it to access a locked classroom, following which it was confiscated by the school administration.

The key was an unauthorized copy of the master key. Raymond maintained that he did not know that the copied key was a master key. He thought it was a key for the yearbook office. Raymond was given a 3-school-day suspension. No suspension was issued for Andrew despite Raymond's admission that he shared the unauthorized key with him. However, Andrew argued he was prejudged by the school administration based on his brother's behaviour.

The Tribunal reviewed a number of incidents in which Andrew was suspected of plagiarism and cheating. The Tribunal determined that, on a balance of probabilities, Andrew was responsible for all of the incidents of the plagiarism alleged, except for two. Further, the Tribunal concluded that the Board acted reasonably and without discrimination on the basis of race and colour in responding to each incident and issuing an appropriate disciplinary consequence of a mark of zero for the assignment in accordance with school policy.

As a result of the master key incident and the series of incidents of cheating and plagiarism arising later in the school year, the Board suspected that the confiscated key was not the only unauthorized copy made. The Principal wrote to the Superintendent regarding the string of incidents and raised concerns about the security of the school. The Board decided to re-key the entire school, at a cost of approximately $40,000.00, and to retain an external investigator to conduct an investigation into the issues that had arisen at the school.

The investigation began with interviews of the Principal and 23 of the staff and students. The investigator then contacted Andrew's mother to arrange an interview with Andrew and Raymond. A series of unsuccessful attempts were made to contact and meet with them. Despite not having heard from them, the

investigator proceeded to draft a report outlining a record of preliminary conclusions about each issue investigated.

One of the recommendations made in the report, which was accepted and ultimately acted upon by the Board, was that Andrew be moved to another school as a result of the series of incidents of plagiarism and cheating because, "*too many staff are now looking at him with suspicion, disappointment and distrust as a result of the issues that have arisen*". The school was responsible for implementing the next step in the investigation, including an interview with Andrew to allow him an opportunity to respond to the allegations.

Following the interview with Andrew, a letter of suspension was sent to Andrew's mother advising of a 20-school-day suspension based on the complainant's breach, on various occasions, of his position of trust. The Principal also advised that a further Principal's inquiry would be conducted regarding whether a limited expulsion or a referral to the Board for a full expulsion hearing was warranted. The Principal ultimately decided not to impose an expulsion but noted in the Principal's report that the complainant "*violated the trust of students and staff and that it would be detrimental for him to continue at Vaughan Road Academy*". A letter was sent home to Andrew's mother notifying her that there would be no expulsion, but that the 20-school-day suspension was confirmed and that arrangements would be made for an administrative transfer to another school.

Andrew appealed his suspension, which was upheld by the Board.

Following the Tribunal's extensive analysis of the facts, the Tribunal referred to human rights jurisprudence and the Commission's Policy and Guidelines on Racism and Racial Discrimination, highlighting that "*one of the indicia of racial discrimination is expressed to be 'disproportionate blame for an incident'*." The Tribunal found that, although there were a series of appropriate disciplinary consequences for the complainant's misconduct, in which race and colour were found not to play a role, the degree of distress and disappointment of school staff and the subsequent administrative transfer was disproportionate and an over-reaction. The Tribunal noted that "*this kind of disproportionate demonization and othering is indicative of the more common and subtle form of racism, and forms the basis upon which I find that the complainant's race and colour were a factor in the decision to remove him from the school.*"

The Tribunal concluded that the decision to forbid Andrew from returning to the school and to require him to transfer to another school was based, in part, on his race; and that his race and colour also played a role in the failure to consult with Andrew and his mother prior to the decision being made. Additionally, the Tribunal concluded that the complainant posed no threat to the physical safety of any staff or student, and that the Board failed to take other progressive measures, including better supervision, before considering an administrative transfer. In making the finding of discrimination, the Tribunal noted that "*racism is often not conscious, intentional or overt, and more commonly emanates from a subconscious level*". All other aspects of the Complaint were dismissed and the parties were

directed to file materials with respect to the remedies sought.

The evidence heard by the Tribunal suggested that staff and administration had become frustrated with the numerous issues arising from the student's behaviour. Had time been taken to discuss a fresh start at another neighbourhood school, it is possible that the complaint and finding of discrimination might have been avoided.

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Reasonable search reviewed by Nova Scotia Court

A student's right against unreasonable search and seizure at school was the focus of a recent decision of the Nova Scotia Provincial Court in *R. v. D.B.M.*, [2009] N.S.J. No. 424. The accused student brought an application to exclude evidence to be used against him in criminal proceedings for possession of a substance contrary to the *Controlled Drugs and Substances Act*, alleging that it was obtained in violation of his Section 8 right under the *Canadian Charter of Rights and Freedoms* against unreasonable search and seizure.

The accused high school student and another student were observed at an area adjacent to the school property, known as the "pit", where smokers frequented. The vice-principal approached the two students and spoke to them about going to class. The students appeared to head toward the school. But, shortly thereafter the vice-principal returned to the office and observed the same two students on the video surveillance camera back at the "pit".

The vice-principal and a colleague went out to the area again. Both students responded by running into the wooded area beyond the "pit" and appeared to be hiding from school administration. The vice-principal called for both students to attend at the office. The accused complied while the other student remained hiding. Once in the vice-principal's office, the accused was questioned and searched revealing a 10 gram bag of a substance alleged to be marijuana.

The school administrators were generally suspicious of the accused as they had received information from other students in the past about his involvement with drugs. Drugs were also a known problem at the school and the "pit" was an area where drugs were allegedly bought and sold.

The Court reviewed the leading Supreme Court of Canada decision in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, wherein the Supreme Court stated that "*a student attending a school has a reasonable expectation of privacy with respect to his person and with respect to items carried on his person….A search of a student by a school official is justified when there are reasonable grounds to believe that a school rule has been or is being violated and that evidence of that violation will be found in either the location or on the person to be searched.*"

Applying the law relating to unreasonable search and seizure to the case at bar, the Court found that the "pit" was an area contiguous to the school and a known gathering place for students. While the Court acknowledged that it was not

technically part of the school's property, it was an area so closely connected to the school that it was considered to be part of the school. Further, the Court added that the expectation of privacy was diminished because the search took place in the broader school environment and in the context of school authorities acting on a concern.

With respect to whether or not the administrators had reasonable grounds to search, the Court found that the vice-principals' general suspicions regarding the accused were not sufficient to justify a search. The vice-principals had a mere "hunch" that something was 'just not right', but did not have information about the breach of a school rule. The Court found that "*the belief that something might be wrong, while an example of the valuable in this case perhaps even valid intuition, does not equate to the standard of reasonable belief or reasonable suspicion*".

Although finding that the search breached the accused student's right against unreasonable search and seizure under s. 8 of the *Charter*, the Court found the evidence was admissible as it was found to not bring the administration of justice into disrepute. The breach was viewed not as deliberate, but rather as committed by school administrators acting in good faith and undertaken reasonably. Dismissing the application, the Court weighed the long term effects of excluding highly reliable evidence, the seriousness of the offence, as well as the impact on the Charter-protected interests of the accused, finding in favour of admitting the evidence.

Arguably, previous suspensions for possession or the fragrance of marijuana on the accused would have been sufficient to make the search justifiable.

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Failure to report a suspicion of child abuse not a continuing offence

In *Ontario v. Newton-Thompson et al.*, (2009), 97 O.R. (3d) 112, the Ontario Court of Appeal held that the failure to report a suspicion of harm to a child forthwith pursuant to section 72(1) of the *Child and Family Services Act* is not a continuing offence and therefore, administrators could not be charged with a failure to report months after the statutory limitation period.

During the course of the Falconer Inquiry into the shooting death of Jordan Manners, who was a student in a Toronto District School Board secondary school, it came to the attention of the investigators and police that the principal and vice-principal had failed to report a sexual assault that had occurred in the school. The sexual assault was alleged to have taken place in October, 2006 and the matter came to the attention of police on June 28, 2007.

As a result, the principal and vice-principal were charged with failing to report a suspicion of child abuse forthwith, as required by the legislation.

A justice of the peace found, on motion by the accused, that the *CFSA* did not create a continuing offence and so struck the charges as statute barred, because they had been laid outside the six month limitation period mandated by the *Provincial Offences Act*. The Crown

subsequently applied to the Superior Court for an order that they should be permitted to proceed on the basis that the offences in the *CFSA* were continuing offences. The Crown was unsuccessful.

On appeal, the Court of Appeal agreed that the failure to report a suspicion of child abuse did not constitute a continuing offence.

The Court of Appeal found that the important issue was the timeliness of reporting. If the offence were a continuing offence, then professionals might be dissuaded from reporting by the potential of being charged, since reporting late would be an admission of the continuing offence of failing to report. This would not be in the best interests of children.

Interestingly, the Court did not address the issue of whether or not the incident in question should have been reported to the Children's Aid Society rather than to the police. Generally, sexual assaults between minors would be reported to police, not the Children's Aid Society.

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Court of Appeal allows claim of misfeasance in public office resulting from parent exclusion to proceed

Foschia v. Conseil des Écoles Catholique de Langue Française du Centre-Est, [2009] O.J. No. 2536 (C.A.), involved an appeal from an order striking a statement of claim, filed with respect to an exclusion, on the basis that it disclosed no reasonable cause of action.

In this case, the appellant volunteered as a lunch monitor at the school attended by his children. Subsequent to complaints received regarding the appellant's behaviour towards other students, the school suspended the volunteer activities of the appellant and restricted his access to the school property to picking up or dropping off his children. The school subsequently instituted a complete ban on the appellant's access to the school property. As a result, the appellant sued the principal, School Board, trustees and superintendent of the School Board for negligence and misfeasance in public office.

With regards to the negligence claim, the appellant claimed that the Board of Trustees was negligent, as it violated its policies in failing to investigate the appellant's allegations against the Director of Education. In dismissing the appellant's arguments and striking the portions of the statement of claim alleging negligence, the Court of Appeal held that alleging a breach of policy is insufficient. The Court of Appeal held that the appellant had to go further and show that the adoption of the policies gave rise to a positive duty towards the appellant. In this case, the appellant did not make such an allegation. In addition, the Court of Appeal held that the appellant had to establish a positive duty to act, rather than a mere failure to act, as alleged.

With respect to the claim of misfeasance in public office, the appellant alleged that imposing restrictions on his access to the school was unlawful. With respect to this claim, the appellant acknowledged that the *Education Act* and its accompanying regulation, *Access to School Premises*, provided the School

Board with the authority to exclude him for safety and/or security; however, the appellant alleged that the defendants exceeded their authority and acted arbitrarily. In this respect, the Court of Appeal affirmed the reasons of the motions judge, who found nothing in the legislation obliged the principal to accept all volunteers.

The appellant also pled that the defendant's continuing ban on his access to the school property amounted to misfeasance in public office. With regard to this claim, the Court of Appeal held that the motions judge had erred by failing to consider the effect of the continuation of the ban on the appellant. Accordingly, the Court allowed that aspect of the claim to proceed.

Thus, the appellant may continue his claim against the principal with respect to the principal's continuing ban of the appellant from attending on school premises.

This decision provides support for the common practice of principals to include a timeline for a review of a decision to exclude a parent from school property in the letter confirming the terms of exclusion. It is also important that details supporting the safety reasons for the exclusion be communicated in the correspondence communicating the exclusion.

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Personal notes of teacher found to be in custody or under the control of school board

In *ORDER MO-2487; Ottawa-Carleton District School Board*, [2009] O.I.P.C. No. 213 (Hale), the parent of a student of the Ottawa-Carleton District School Board made a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to "*all documents, notes, records, data or other information in the possession of the Board or any of its employees or agents which is not contained in the [student's] Ontario Student Record*", which were related to his child's suspension appeal. The parent also sought an investigation report created by the Board.

The Board granted partial access to the requested documents. With respect to the records it withheld, the Board relied on the discretionary and mandatory exemptions under the Act as well as the *Act*'s exclusionary provision. In addition, the Board claimed that some of the requested records were not in its custody or under its control. The parent appealed the Board's decision to the Information and Privacy Commissioner of Ontario.

The two issues before the IPC were: (1) whether the Board had custody or control over a teacher's notes and day books; and, (2) whether the parent was entitled to access an investigation report, which the Board argued was excluded from the purview of the legislation and therefore, not accessible.

With respect to the first issue, the Board conceded that the teacher's day

books were in its custody or under its control. Therefore, the IPC only had to determine whether the teacher's notes were in the custody or under the control of the Board. In analyzing the issue of custody or control, the courts and the IPC have utilized a broad and liberal approach. In order to assist in such approach, the IPC has developed a non-exhaustive list of factors to assist in the determination of whether a record is in the custody or under the control of an institution, including:

- *"Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the content of the record relate to the institution's mandate and functions?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *If the record is not in the physical possession of the institution, who has possession of the record, and why?*
- *What are the circumstances surrounding the creation, use and retention of the record?"*

The Board argued that the notes were not in the Board's custody or under its control, because they were the personal property of the individual teacher on the basis that: (a) the Board never had physical possession of the notes; (b) the notes were created by the teacher at her home; (c) the notes were not created pursuant to any statute or Board policy; and, (d) the notes were maintained by the teacher as a personal memory aide. However, the IPC found that the teacher's notes were in the custody or under the control of the Board, The IPC found that the "*the only reason the teacher would be keeping notes would be in her capacity as an education professional to fulfill her responsibilities in the performance of her job.*"

The IPC ordered that the Board provide the parent with the notes and day books maintained by the teacher, as these records were in the custody or under the control of the Board.

The investigation report was found to be related to employment or labour relations and was therefore, excluded from the purview of the legislation and not accessible. Access to the report was denied.

This decision is yet another reminder to administrators and teachers that their notes with respect to the behaviour or actions of students or others in the school are not subject to confidentiality and might be accessed by a parent making an access to information request. Therefore, school board employees should be care to ensure that their notes are professionally written and maintained.

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Corrections to process sufficient to meet procedural fairness requirement for school closure

In *Georgetown (Town) v. Eastern School District*, [2009] P.E.I.J. No. 25 (S.C.), the P.E.I. Supreme Court heard an application for judicial review from Georgetown regarding the process employed by the Eastern School District in closing a school in its jurisdiction.

While Georgetown sought judicial review of the operation and application of the legislative framework regarding the school closure process, the focus of the review was the school district's Permanent School Closure Policy. The application for judicial review raised the following two issues: whether the Policy was law and thereby, subject to judicial review pursuant to the P.E.I. *Judicial Review Act*; and, if not law, whether the proper standard of procedural fairness was accorded to the school closure process.

Prior to coming to its decision, the Court clarified its role on judicial reviews of school closings. Specifically, the Court held that it did not have the authority to decide whether the school in question should have been closed, as that decision rests with the Lieutenant Governor in Counsel pursuant to the *School Act*. Rather, the Court was evaluating the process employed by the school district in making its decision to close Georgetown Elementary School.

With respect to the first issue, the P.E.I. *Judicial Review Act* confers on the Court the power to assess whether or not "*authority conferred on a tribunal by an enactment has been exercised in accordance with the enactment*."

In assessing whether the Policy had "the force of law" or was an "enactment", the parties agreed to employ the 2-part test established by the Supreme Court of Canada. First, the statutory scheme must be found to have the power to create subordinate legislation. If so, the second part of the test is to determine whether or not the policy is mandatory.

Following a review of the *School Act*, the Court found that the Policy was not law and did not have the effect of law, which was also supported by the fact that the Policy did not provide a penalty for non-compliance with its terms. As such, the Policy was an internal document of the School District.

The Court then proceeded to consider whether or not the school district complied with its duty to make the school closing decision in a procedurally fair manner. As the decision to close a school was subject to the prior approval of the Lieutenant Governor in Council, the Court held that the applicable standard of procedural fairness owed by the School District was low.

The Court found that the school district, while implementing its Policy, became aware of deficiencies in the required reports from the Superintendent. Upon becoming aware of these deficiencies, the School District sought further information in order to cure the omissions. The School District released all the relevant information in its possession to the public in a timely manner and allowed for public input. Thus, the Court found that the process followed by the School District exceeded its common law duty of procedural fairness, and the Court dismissed the application for judicial review.

This decision might provide some comfort to school boards in Ontario proceeding with school closure processes that, should an error be discovered, it could be possible, depending upon the error, to correct the error without beginning the entire review process again.

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