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Education Law Newsletter

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IN THIS ISSUE —

Human Rights Tribunal and Special Education Tribunal share jurisdiction over special education

An interesting jurisdictional issue was recently considered by the Human Rights Tribunal of Ontario in *Sigrist (litigation guardian of) v. London Catholic District School Board,* [2010] O.H.R.T.D. No. 1021. Specifically, the Tribunal considered whether or not the Special Education Tribunal established under the *Education Act* had exclusive jurisdiction over matters relating to the identification, placement and accommodation of students with special needs, and whether or not the human rights proceeding should be dismissed for mootness in light of the age and grade level of the two students.

The application alleged that two students with special needs were not appropriately accommodated while attending the

respondent school board. The Ontario Human Rights Commission was also a party to the proceedings. The respondent school board sought to dismiss the proceedings on the basis that the SET had the exclusive jurisdiction to deal with issues regarding the sufficiency of programs and services provided to the students.

The Tribunal reviewed the scheme under the *Education Act* and Regulation 181/98: Identification and Placement of Exceptional Pupils, regarding the provision of special education programs and services for students with special needs, including the Identification, Placement and Review Committee's process for identifying a child as exceptional and determining the proper placement for the student; the annual review of the student's identification and placement; and the dispute resolution processes available to school boards and parents.

With respect to dispute resolution processes, the Tribunal noted that the *Act* and Regulation 181/98 provided for a two-step appeal process: first, to a Special Education Appeal Board where recommendations would be made to the school board regarding identification and placement; and second, to the SET, which renders a final and binding decision with respect to identification and/or placement. In considering an appeal, the SET hears and considers lay and expert evidence on the exceptionality, the steps taken by the school board as well as the approach supported by the student's parents. The Tribunal acknowledged that in adjudicating these complex cases, extensive knowledge, sensitivity to and understanding of students with special needs as well as knowledge of teaching and learning strategies is required.

Given the detailed legislative framework provided under the *Act*, the Tribunal analyzed whether or not the Legislature intended to confer exclusive jurisdiction to the SET such that the Tribunal would have no jurisdiction to deal with special education matters. Acknowledging the comprehensive scheme under the *Act* to address the identification and placement of students with special needs, the Tribunal noted the somewhat contrasting objective arising under the *Code* in relation to the general right of an individual to equal treatment without discrimination in respect of goods, services and facilities, including educational services.

The Commission argued that the essential character of the dispute in the instant case was an allegation of failure to accommodate arising from the *Code*. Further, it added that the SET did not have jurisdiction under the *Act* to consider whether a school board sufficiently accommodated a student to the point of undue hardship, as required by the *Code*.

The Tribunal disagreed with the Commission's submissions, confirming that even where an issue of undue hardship does arise before the SET, as an administrative body it has the legal authority and obligation to apply the *Code* to the issues before it. "*In my view, the legislative scheme under the Education Act itself is an embodiment of the duty to accommodate under the Code. This scheme recognizes that students with disabilities have special needs for educational programs and services, and establishes a process with involvement of the child, parents and educators to determine the appropriate accommodations required, with the SET functioning as a final arbiter of any disputes on these issues*." (para. 45)

The Tribunal then turned its examination to the availability of remedies from each body concluding that the SET scheme is remedial in nature; however, in contrast to the Tribunal, it does not have the authority to award compensatory damages or public interest remedies.

Finding this factor inconclusive on the issue as a whole, the Tribunal reviewed SET jurisprudence for further clarification. The Tribunal followed SET decisions on jurisdiction highlighting that "*in order for the SET to consider itself to have jurisdiction in a particular case, there must be a live dispute regarding the formal placement decision for the child*" (para.52).

Applying this rule to the case at bar effectively concluded the examination, as the students' parents and the respondent school board were in agreement on the issue of the student's formal placement. The Tribunal determined that there remained a live issue as to whether the students' needs were accommodated while they were registered students such that a hearing by the Tribunal was appropriate.

Denying the respondents request to dismiss, the Tribunal considered the issue of mootness. The respondent school board submitted that the two students were no longer registered at the school board, thus any decision would not have any direct impact on the students. The Tribunal referred to the leading case on the issue of mootness wherein it stated, "*If, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.*" (para. 58) The Tribunal reviewed the circumstances of the two students who were no longer registered at the respondent school board. Although no longer students, the issue as to whether their needs were sufficiently accommodated while they were students of the respondent board remained open for consideration as well as the potential for remedies, including a declaration, damages and public interest remedies that could be awarded. As a result, the Tribunal concluded that the respondents' request to dismiss the proceeding for mootness was also denied.

While the SET does hear evidence and does make recommendations regarding programs and services for students with special needs as part of its process for hearing appeals of placement, the *Education Act* does not provide explicit rights to appeal special education programs and services, and for this reason, the Human Rights Tribunal of Ontario retains jurisdiction to hear applications regarding special education programming and services. As a result, school boards may find themselves before both tribunals with respect to the same student and issues.

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Lice treatment not discrimination

The Ontario Human Rights Tribunal recently considered the York Region District School Board's policy and practice regarding children with pediculosis in *C.M. by her Next Friend P.M. v. York Region District School Board*, 2010 HRTO 1494.

The parent of a student applied to the Tribunal after the student was sent home when nits were discovered in her hair. The parent argued that the Board's policy discriminated on the basis of age and perceived disability contrary to the *Human Rights Code*.

The elements of the Board's policy included checks of students' heads by staff, nurses or volunteers and a referral home, if possible, when nits are discovered. Students were not permitted to return without a note from the parent/guardian confirming the nits and lice have been removed. The policy differentiated between elementary and secondary school students. Elementary school principals were encouraged to implement a community volunteer program for head checks, while secondary school students were expected to accept responsibility for their own personal hygiene management.

The Tribunal noted that a purposive interpretation of the rights protected under the *Code* was required since the *Code* does not aim to eliminate all differences, but rather eliminate discrimination. The Tribunal made its decision with the following facts about pediculosis:

(i) lice are small insects that may be present in various parts of the body;

(ii) head lice can spread through close contact and through sharing of clothes and other personal articles;

(iii) head lice are generally considered a nuisance rather than a health problem;

(iv) head lice can live and breed on hair and feed by biting the scalp;

(v) head lice may cause a tickling feeling, itching, irritability and sores on the head caused by scratching;

(vi) they are relatively easily treated with over the counter products and can be removed by hand; and

(vii) pediculosis is common in the Board's elementary schools and rare in secondary schools. This is because, among other things, elementary school students often play closely and share clothes, and this makes head lice more likely to spread. Occasionally secondary students are found to have head lice.

The Tribunal referred to the Supreme Court of Canada's jurisprudence providing the analytical framework for determining when a medical condition or ailment can be considered a disability under the *Code*. The Supreme Court has held that everyday illnesses or normal ailments would not be considered a disability under human rights legislation.

The Tribunal noted that pediculosis occurs very often amongst Ontario children and lasts a short time. The ailment is "*easily treated and removed and [does not] cause significant obstacles to participation in society*" (paragraph 15). On this basis, the Tribunal found that lice and nits were similar to colds, as both were normal ailments that did not fall within the grounds of disability protected by the *Code*. The Tribunal found that both colds and pediculosis are easily spread and the Board's actions were directed at reducing the spread of the ailment, and did not lead to stigma against the treated individual.

The Tribunal disagreed with the parent's argument that the Board's "overreaction" to pediculosis caused lice to fall within the protected grounds of disability under the *Code*. Unlike ailments that create a "negative bias" against the disabled individual, the Tribunal found that pediculosis is a common, short-term and easily treated ailment.

The Tribunal also considered the parent's claim that the policy discriminated on the basis of age based on three grounds: (i) the

absence of student consent for the pediculosis check when the student is under eighteen (18); (ii) the fact that checks are conducted in elementary, but not secondary schools; and (iii) checks are not mandatory for school staff.

The Tribunal noted that distinguishing children on the basis of age is, in many circumstances, a legitimate basis of distinction since children are at different developmental stages requiring different levels of care and supervision. Assuming that the limitation of age in section 10 of the *Code* [(18) or over] were struck, the Tribunal held that a purposive and contextual interpretation of discrimination would still be required. This would mean that the Tribunal would take human development into account when interpreting whether discrimination occurred against children.

Applying the Tribunal's view to the different treatment of elementary and secondary school students and staff, the Tribunal referred to the fact that pediculosis is more common in elementary schools and that students in secondary schools and school staff are more attentive to what is in their hair than students in elementary school. This basis for reasoning did not perpetuate stereotypes against elementary school students, nor did it create prejudice against such students.

The Tribunal then analyzed the parent's argument that the absence of student consent to the pediculosis check for those students under eighteen (18) was discriminatory. The Tribunal characterized the issue as not whether parental consent is required, but rather, whether the failure to obtain consent amounted to age discrimination. The Tribunal found that any difference regarding the Board's approach to consent was not related to stereotyping or prejudice. Furthermore, the Tribunal stated that those caring for and supervising children are necessarily engaging in physical interactions that would require consent from an adult. The absence of consent did not give rise to prima facie discrimination under the *Code*.

Using this purposive analysis, the Tribunal held that pediculosis is not a disability or perceived disability within the meaning of the *Code*. Nor did the Board's practice of conducting checks in elementary schools but not secondary schools constitute substantive discrimination on the basis of age.

Lice is an unfortunate nuisance in elementary schools. The Tribunal's recent case confirms that the checks of elementary students and requests for treatment is not discrimination on the basis of age or a perceived disability.

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Difficult relationship not racism

A difficult and strained relationship between a mother and a school was the factual backdrop of a human rights application recently dismissed by the Ontario Human Rights Tribunal, *H.G. v. Ottawa-Carleton District School Board*, [2010] O.H.R.T.D. No. 1317.

The applicant, a Black single mother, alleged that she experienced discrimination because of her race, colour and family status arising out a series of events in relation to her son which occurred during the 2006/2007 and 2007/2008 school years. This application was a transitional file fast-tracked to a hearing in 2010 to allow for an expeditious resolution.

The Tribunal reviewed each allegation and concluded that neither of the respondents engaged in discrimination in violation of Ontario's *Human Rights Code*.

The first allegation related to a meeting attended by the applicant with the principal and the Manager of Safe Schools in November 2006 to address a behaviour plan that was implemented by the previous school. The applicant alleged that her input was ignored and that she did not feel listened to. Upon being questioned by the Tribunal, however, the applicant acknowledged that she did not feel that race was a factor at the meeting and there was no basis to support an allegation of discrimination.

A meeting between the applicant and the principal also occurred in February 2006. The applicant attended the meeting with a consultant and her associate, whom the applicant retained to assist her with her son's behavioural issues at school. The applicant alleged that the principal stated that he was "very uncomfortable" having the applicant and the two other individuals in his office. The applicant alleged that the principal's statement about feeling uncomfortable was related to her race and the race of the two consultants, both of whom were Black. The Applicant did acknowledge, however, that she did not inform the principal in advance of the meeting that she would be attending with two consultants. The principal's evidence suggested that, by the time of the meeting in February 2006, his relationship with the applicant had ceased to be productive. He acknowledged that he was surprised to see three people in attendance at the meeting and felt intimidated by their presence. The principal requested that in the future he be advised in advance if the Applicant was going to bring additional support to a meeting. In the context of this discussion the principal noted that he felt "*unsafe*". The principal defined "unsafe" as a word frequently used in elementary school to refer to feeling physically or emotionally unsafe. The applicant also alleged that during this meeting the principal made a statement about the school feeding her children, which she found offensive. The Tribunal noted the frustration by both parties, and determined that neither the applicant's race nor colour were a factor in the principal's "unsafe" statement or in his reference to the school's provision of food for children attending school.

The next issue raised by the applicant related to comments made at a meeting in June 2007, which was attended by the applicant, two consultants and the principal. At the meeting the student's Ontario Student Record (OSR) was reviewed. At the end of the meeting the student's OSR was missing and the principal wondered whether the applicant, as the last one to leave the meeting, had mistakenly picked up the OSR file. The principal questioned the applicant regarding the OSR and she denied taking it. He then proceeded to ask "*are you sure?*" and she answered "*I answered you the first time, I said no*". The applicant later learned that the secretary had taken the OSR file and put it back. The applicant was upset that she did not receive an apology from the principal for the accusation that she had taken it. Recognizing the underlying lack of trust between the parties which had developed over the course of their dealings, the Tribunal found that the applicant's perception, although understandable, was not an accurate reflection of the situation and was not related to the applicant's race, colour or family status.

At a meeting in September 2007, the applicant met with her son and the principal

about an incident resulting in a suspension. Upon learning that her son had lied to her about his involvement, the applicant became visibly upset. The principal advised the applicant's son that he could always tell the truth and the applicant's son responded: "*I can't tell the truth, she hits me with a belt when I'm bad, that's what she does.*" The principal contacted the Children's Aid Society to file a report of potential physical abuse. Following interviews with both of the applicant's sons, the CAS worker decided to apprehend the children from the applicant and place them in a foster home.

The principal, concerned about the applicant's reaction to the CAS' involvement, and safety of the children, issued a trespass notice to the applicant prohibiting her from attending on school property, which was delivered a day or two following the children's apprehension by CAS. The applicant alleged that her race and colour were factors in the principal's decision to call the CAS as well as the issuance of the trespass notice. The Tribunal found to the contrary on both allegations, concluding that the principal conducted himself in an entirely appropriate manner and that neither the applicant's race, colour, nor family status were factors in how he and the Board responded.

The Applicant further alleged that the trespass notice was not lifted once her son was returned to her care. The principal's evidence suggested that a letter was sent to the applicant requesting that she attend a meeting to discuss a plan to reinstate the applicant's access privileges. The applicant, however, failed to attend the meeting, and as a result, the trespass notice remained in effect.

Two further incidents were raised by the applicant. The first related to cookies sent to school by the applicant to celebrate the birthday of the applicant's other son. The principal received the delivery, but the cookies were not delivered to her son until the end of the school day. In the principal's evidence he acknowledged that he forgot about the cookies, but was not given any specific directions as to a particular delivery time. The Tribunal agreed with the principal's evidence and found no evidence to support the allegations.

Lastly, the applicant alleged that her request that her son be moved to another class, following an incident involving her son and another boy, was denied. The principal's evidence indicated that the classroom teacher's rationale was to have the two students work together following the incident rather than separating them. In accordance with the applicant's request, however, the principal transferred her son. The Tribunal found no basis to sustain any allegations of discrimination arising out of this incident.

This case would under the current process be filed as an Application and likely result in a full hearing, a much more time consuming and expensive process than that used for transitional cases, which have been fast-tracked. Mediation is currently the only other method of attempting resolution early and quickly.

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Public interest override does not override secrecy of closed meetings

In ORDER MO-2499-I; *Toronto Catholic District School Board*, [2010] OIPC No. 46096 (Higgins), and FINAL ORDER MO 2544-F; *Toronto Catholic District School*

Board, [2010] OIPC No. 47726 (Higgins), a member of the media made a request of the Toronto Catholic District School Board for access to information relating to an identified trustee. Specifically, the request was for "[All] documentation regarding any payments or agreements made between TCDSB and the trustee within the past year, including any correspondence between the parties and any motions approved relating to the trustee's departure".

The Board released portions of some records while denying access to the remainder. The Board provided minutes from a Human Resources Program and Religious Affairs Committee meeting that occurred prior to a special meeting called to declare the trustee's seat vacant. The Board relied on exceptions under the *Municipal Freedom of Information and Protection of Privacy Act* to deny access, specifically s. 6(1)(b) (closed meeting) and s.12 (solicitor-client privilege).

The requester appealed the decision.

The requester revised his request to simply the dollar value of any payout the trustee received. The Board responded that none of the 33 records were responsive. The adjudicator found this response to be unreasonable given the liberal interpretation that institutions are supposed to provide to requests and identified two records responsive to the requester's query. The Board took the view that, if those records were responsive, they were exempt from disclosure due to the closed meeting exception under the *Act*. It should be noted that the adjudicator did not confirm or deny the existence of any pay-out.

The requirements of this exemption are that the board hold an in-camera meeting in accordance with statutory authority, and that disclosure of the record reveal the substance of the deliberations. The adjudicator held that it would be sufficient to exempt the records if they revealed the mere subject of the meeting.

The Board was authorized to hold such a meeting pursuant to subsection 207(2)(b) (closing of certain meetings) of the *Education Act*. The Board took the view that the responsive records would disclose the substance of those meetings, and thus, such records were exempt from disclosure.

The requester unsuccessfully argued that section 16 of the *Act* (public-interest override) applied to preclude the Board from relying on a closed-meeting exemption. However, section 16 expressly identifies the provisions in the *Act* that it can override, and the closed-meeting exemption is not one of the provisions.

The adjudicator noted that while the closed meeting exemption was discretionary and the Board's exercise of discretion could be reviewed by the Information and Privacy Commissioner, the Commissioner could only send the decision back to the Board to reconsider - the Commissioner could not substitute a decision.

The Board argued that it exercised its' discretion reasonably since: the records were of a confidential nature; the Board has a practice of withholding minutes from in-camera meetings; the sensitivity of the issue; the view that the issue is no longer relevant to the public; and, that solicitor-client-privilege existed.

The adjudicator felt the Board's exercise of discretion was inadequate as it failed to consider the transparency purpose of the *Act* and ignored the fact that oftentimes, significant amounts of information is disclosed when a member of public office is

terminated. The adjudicator ordered the Board to re-exercise its' discretion within the coming months.

The Board re-exercised its' discretion; however the Board reached the same conclusion, and provided a report outlining its rationale, which included some confidential portions. On the basis of the report, the adjudicator was satisfied that the Board re-exercised its' discretion in good faith and that the transparency purpose of the *Act* had been considered. The adjudicator upheld the Board's decision.

Protecting the secrecy of closed session meetings is an important responsibility that the Chief Privacy Officer (usually the Director of Education) must exercise. In the present case personal information was also at issue.

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Duty to search for records significant

In *Reconsideration ORDER MO-2543-R; Ottawa-Carleton Catholic School Board*, [2010] O.I.P.C. No. 46097 (Smith), a parent of a special needs student of the Ottawa-Carleton Catholic School Board made a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to:

(a) Any and all documents, in any form, contained in the student's Ontario Student Record;

(b) Any and all digital materials contained in any database or system or stored on any server with regards to the student or the student's family;

(c) Any and all records, notes, communication, letters, emails, minutes or documentation regarding the child by any employee or contractor hired by the Board;

(d) Any and all records, documents, minutes, emails or information maintained by thirteen named individuals that concern or reference the student;

(e) Any and all records regarding special education resources allocated to the student;

(f) Information regarding the resources and allocation of special education services at the student's school;

(g) Information regarding special education requirements in the student's grade; and

(h) Any and all information regarding the criteria used at the school to allocate, distribute, or rationalize special education services, programs and resources.

The Board located responsive records, and issued a decision with respect to certain portions of the records the Board withheld. The parent appealed the decision.

The parent requested a decision on three requested records. The Board denied access to the three records under section 14 (personal privacy) of the *Act* and notified the parent that no records existed regarding the special education budget as the Board did not have a school-based budget. The parent requested that the file move to adjudication on the matters of the reasonableness of the Board's search and the exemptions claimed by the Board. The adjudicator upheld the Board's search for responsive records and ordered that a previously withheld portion of a record be made available to the parent.

The parent was engaged in a concurrent human rights proceeding against the Board.

During these proceedings, the Board provided certain disclosure that it had refused to provide in the information request. The parent provided thirteen such records to the adjudicator arguing that the records were evidence of a fundamental defect in the adjudication process, which would allow the adjudicator to reconsider the previous order.

The Board argued that the records complained of were located in a personal file of a principal who had since taken an unpaid leave of absence. The Board was unaware that a file existed, and, in any event, the Board claimed that the parent did not suffer any prejudice. Since the Board was unaware of the documents, the Board contended that it had satisfied its' disclosure obligations.

The adjudicator agreed with the parent and found that a fundamental defect in the initial adjudication process had occurred, because the Board had not sought the records from the principal, and the adjudicator reconsidered his initial order.

The adjudicator found that the Board should have specifically asked the principal whether he had any records in his possession. Based on the evidence, however, there was an insufficient basis to conclude that additional records were in the possession of the former principal, beyond those already disclosed. The Board's search regarding a named teacher who had a copy of a previously undisclosed email was found to be reasonable since the teacher was asked about having possession of any record and denied such possession.

The adjudicator went through the list of recipients of previously undisclosed emails. The adjudicator found that the Board had conducted a reasonable search of the principal, the Superintendent, the Special Education Consultant and the former principal. However, the adjudicator found that the Board had not conducted a reasonable search in reference to two of the recipients: the Vice-Principal of Special Education and a psychologist, as these individuals were not questioned about having records.

The adjudicator ordered the Board to conduct further searches regarding the Vice-Principal of Special Education and the psychologist.

This case illustrates the significant lengths to which institutions must go, particularly when the public seeks records and identifies them broadly or desires a significantly large number of records.

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Prudent parent standard applicable to floor hockey incident

In *Hamilton v. Delta School District No. 37*, [2010] B.C.J. No. 962, the British Columbia Supreme Court considered the liability of a school board arising from a student's injury suffered during physical education. The student's nose was broken after a classmate's floor hockey stick struck her in the face on March 5, 2007. The School District disputed the allegations, arguing that it had not acted negligently and that, if found liable, the student was requesting too much by way of damages.

The Court examined evidence related to the teachers' qualifications, the physical education lesson plan, and the structure of the activity. The teacher had taught physical education for six years. The co-ed class started the floor-hockey "unit" of the

curriculum approximately three to four classes prior to the incident on March 5th.

Prior to the beginning of the hockey-unit, the teacher gathered all of the students to discuss the rules of floor-hockey. This involved going over a handout with the students and later testing them on the material. Prior to the first lesson, the teacher spent time going over the rules; which he briefly repeated, prior to each subsequent lesson.

The main rules were: no high-sticking, no hitting, no body-checking, and no-slashing. Upon seeing a violation of the rules, the teacher would blow the whistle and take whatever action was necessary to ensure safety. The teacher stated that he never needed to remove a student from the game due to dangerous play; however, he was prepared to do so. The student had played floor hockey in the previous school year and had received the same instruction.

On the day of the incident, the student recalled peculiarities with the way the lesson progressed. Some players brought wooden sticks from home – as opposed to the typical plastic school-provided sticks – and the teacher was playing goalie, outfitted in full goalie equipment. There was evidence from one student-witness that play was more aggressive than usual, with one student removing herself from the game. This evidence was contradicted by the teacher and other student-witnesses.

The student was struck in the face as the teacher was following the play. The teacher was not immediately aware of the injury and stopped play after being notified that the student was bleeding. The student went to the change-room with a friend, and then to the medical room where she waited for her mother. The student's mother made an appointment with the principal of the school to discuss her concerns regarding supervision and the escalation of play.

Months following the incident, the student complained about experiencing trouble breathing and had a bump on her nose. The student had nasal reconstructive surgery the following year, which was covered by the B.C. Medical Services Plan. The doctor found that the student's breathing problem was genetic, and that the bump on the student's nose could either be genetic or caused by trauma. The student sought to have the bump removed; however, it was not covered by her medical plan.

The Court measured the School District's actions with those actions expected of a careful or prudent parent.

The Court noted that the student was not a novice floor-hockey player and that she had received playing instruction. The rules were not created arbitrarily, as the teacher used substantially similar rules to those being used by other teachers teaching different grades.

Had the teacher played as goaltender and allowed wooden sticks, then the teacher may have breached the standard expected of a careful or prudent parent. However, there was contradictory evidence on this point by a number of student-witnesses and the teacher and the Court accepted the contradictory evidence as more credible than that of the student.

The Court found the incident on March 5, 2007 to involve hard, but clean, participation by the class, which resulted in an accident. The Court refused to hold the teacher to a standard of perfection, but rather reasonableness. On the basis of a reasonably careful or prudent parent, the teacher and the Board did not breach the standard of care. The amount of damages was not discussed due to the finding that the Board was not liable.

It would appear from this case that the standard of care applicable continues to be that of a prudent parent in the case of a usual physical education class. Had the student been playing competitive floor hockey with a school team, the standard might have been elevated to that of a prudent parent with expertise.

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Issue of copyright for educational purposes to be reconsidered by Copyright Board

A decision by the Copyright Board approving a tariff for the use of photocopied excerpts from textbooks in elementary and secondary classrooms was the subject of a recent application for judicial review by all of the provincial and territorial Ministries of Education and all Ontario schools boards in *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (c.o.b. Access Copyright)*, [2010] F.C.J. No. 952 (Fed. Ct.).

The parties had royalty agreements in place from 1999 to 2004 providing for the payment of royalties for the use of published materials, but the agreements did not include royalties based on the number of photocopies made of published materials. The parties agreed to participate in a volume study, which was carried out between February 2005 and March 2006.

As a result of the study, the parties agreed that the majority of the uses of the published materials in the educational context were fair dealing and not subject to royalties. A dispute remained however, with respect to the use of teacher-produced photocopies for classroom instruction. The publishers argued that these copies were not fair dealing and were therefore, subject to royalties. A second issue was also raised as to whether or not the copies qualified under the educational exception provided in Section 29.4 of the *Act*.

Under Section 29 of the *Copyright Act*, people can make use of copyrighted material provided that the use is a permitted enumerated purpose, such as research, private study, criticism or review, and is fair. This practice is known as "fair dealing".

The Copyright Board agreed with the publishers, finding that the copies were distributed to the entire class, not to any one student for private study, and were likely kept by students for the entire school year. Also, the Copyright Board noted that the educators could have purchased copies of the published works for their students as an alternative to photocopying them. The Ministries and school boards disagreed and commenced an application for judicial review of the Copyright Board's ("Board") decision.

In reviewing the Copyright Board's decision, the Court applied the two-step test set out in the leading Supreme Court of Canada decision on the law of fair dealing, to determine whether a given activity qualifies as fair dealing: "*In order to show that a dealing was fair under section 29 of the Copyright Act, a defendant must prove (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.*" (para. 19) In analyzing the second step, the Supreme Court laid out six non-exhaustive factors to assist in the fairness determination: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work" (para. 20)

Reviewing the decision on a reasonableness standard of review, the court analyzed whether the copies, having been made for an allowable purpose, were also made fairly.

The Court refuted the applicant's argument that the Board's interpretation of the *Act* was overly restrictive, noting: "*the essence of the Board's Decision was that when a teacher photocopies copyrighted materials for his or her class, that use cannot be private study*". (para. 37)

Confirming that the Board's decision was a reasonable one, the Court highlighted the various ways that the impugned photocopying was akin to instruction, and not private study, and therefore remunerable. The Board took into consideration whether a student requested copies for him/herself or whether the teacher made the copies on his/her own initiative. The Court agreed that, where the teacher made the decision to make copies, it was entirely legitimate for the Board to conclude that such form of photocopying was likely for the instruction of students, and not private study. Similarly, the Court agreed that it was reasonable for the Board to find that, when a student is assigned materials for reading, it is likely that the purpose of the copying is for classroom instruction and not private study.

The Court then shifted its focus to section 29.4 of the *Act* that provides a separate exception for the reproduction of copyrighted work for educational purposes, outside of the "fair dealing" exception. In this instance the Court was asked to review the Board's decision on a question of law, and as such, a standard of correctness was used. The applicants argued that the Board erroneously applied the law in its analysis of whether the works were available in a "medium appropriate for the purpose", and the Court agreed. The Court analyzed a series of possible interpretations used by the Board in giving meaning to section 29.4, and determined that it failed to address an essential issue of defining the words "in a medium appropriate for the purpose" such that it could be correctly applied to the facts of the case. The Court allowed the application in part, and remitted the decision back to the Copyright Board to determine the appropriate meaning and to then correctly apply it to the case at bar.

The case remains pending and could significantly impact the costs of education at both the elementary and secondary level given how photocopies are utilized by teachers and students.

Case Note: Certificate of Eligibility for Instruction in English Suspended

On August 27, 2010, the Quebec Court of Appeal released an interim decision with respect to a request for a suspension of the execution of a Superior Court provisional order, in *Quebec (Attorney General) v. A.D.*, 2010 QCCA 1532.

Ten families sought a Certificate of Eligibility for Instruction in English, which is required to attend a subsidized English high-school. The families were refused a certificate under the amendments to the *Charter of the French Language* and appealed the decision to the Administrative Tribunal of Quebec, but the hearing was suspended due to the fact that the amendments to the *French Charter* were being challenged at the Court of Appeal and Supreme Court. As a result of the challenges to the *French Charter*, the challengers received a constitutional exemption, however, the families at issue were not part of that challenge. The ATQ decided that they could not issue a temporary certificate since the law continued to apply to

everyone who was not privy to the challenge to the *French Charter*.

The Superior Court heard the appeal of the ATQ decision. The Superior Court ordered that the government allow the ten children to attend the subsidized school, despite the fact that the families were refused a certificate. The Superior Court based their decision on the constitutional exemption provided to the challengers of the *French Charter*.

The Court of Appeal granted the Attorney General leave to appeal the Superior Court's ruling. The Court of Appeal enunciated the test guiding a decision to suspend the provisional execution of an appealed decision: (i) the contested ruling is weak; (ii) the provisional execution may cause serious or irreparable harm; and (iii) the balance of convenience should be in favour of the order of protection.

The parents argued that any individuals meeting the criteria set by the Supreme Court with respect to the challenge to the *French Charter* are entitled to the constitutional exemption. The Attorney General argued that only those privy to the Supreme Court ruling were subject to the constitutional exemption.

The Court of Appeal found that the Superior Court erred in its ruling. The Superior Court could not substitute its own decision for that of the ATQ, except in rare urgent situations where an order is needed to avoid serious and irreparable harm. Rather, the Superior Court could only determine whether the ATQ decision was reasonable; if found unreasonable, the Superior Court could refer the matter back to the ATQ for reconsideration. The Court of Appeal found that the test was not satisfied because the families did not provide evidence of irreparable harm resulting from not attending an English school.

The Court of Appeal made note of the fact that some of the families had French names; thus, the decision to go to an English school was their free choice. Under the *French Constitution*, parents who can afford to send their children to unsubsidized private schools are free to do so; thus, no harm was suffered by those families. Other students claimed the harm suffered resulted from changing schools; however, the Court of Appeal determined that mere stress was insufficient harm. Another child had already changed schools for one year, so changing schools could not be irreparable harm for that child. The remaining children started attending an English school in 2007, when it was became known to the parents that the students would not be allowed to go to a subsidized English high-school due to an absence of the required certificate. Thus, those parents also did not satisfy the test for harm.

The Court of Appeal held that the public interest must prevail over the "harm" identified by the families, and that the balance of convenience necessitated that the public interest in maintaining the school system outweighed the private interests (notably, the harm) claimed by the families.

For all of these reasons the Court of Appeal suspended the Superior Court's constitutional exemption allowing the students to attend.

The issue of language rights continues in Quebec, and further decisions are anticipated.

Professional Development Corner

Keel Cottrelle LLP
"Special Education and Student Discipline Session"
The Westin Bristol Place Toronto Airport, Toronto
Friday, October 22, 2010

Osgoode Professional Development
"School Law 2011"
Osgoode Professional Development Centre, Toronto
February 28 - March 1, 2011

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