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Education Law Newsletter

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Bullying Case Awards Plaintiff One Million in Damages

In *Cox v. State of New South Wales*, [2007] NSWSC 471, the 18-year-old plaintiff, Cox, sued the state government of New South Wales for damages, alleging that the state, through the school authority, had breached the duty of care it owed to him by failing to or by taking inadequate steps to prevent and/or protect him from an older student repeatedly bullying and harassing him. As a result, Cox alleged that he had suffered severe and ongoing emotional, psychological and psychiatric injury.

Cox alleged that when he was a primary student, aged six and seven years, he was subject to harassment and bullying by an older student, including physical

assault, resulting in marks on his neck from strangling, the loss of a lower tooth and a split lip, and red welts across the back of his body. There was a suggestion that the older student had been identified as having Attention Deficit Disorder. His mother reported these incidents to the school, however, the bullying and harassment continued. She also communicated her concerns to representatives from the Department of Education, one of whom communicated to her on two occasions that "bullying builds character".

Cox began to suffer from anxiety, including the fear of public toilets, insecurity, nightmares and headaches, the development of a stutter, and a deterioration in his school work. His mother took him to see several doctors. He was eventually withdrawn from school in September of 1995 and did not return to school until 1996. He was successful in completing primary school. Cox, however, had significant trouble transitioning to high school because his anxiety returned. He had significant attendance problems and in time stopped attending and instead undertook distance education, however, his enrolment was discontinued due to poor application to the task.

He was subsequently diagnosed with several psychiatric conditions, namely Depression Anxiety Disorder, Separation Anxiety Disorder, and Post Traumatic Stress Disorder, all of which were unlikely to subside. He was unemployable and received a disability pension.

Evidence was provided by his mother, because he did not have any recollection of the events in question.

The Court noted that the school authorities owed a duty of care to Cox to take reasonable measures to prevent injury that was reasonably foreseeable. The Court held, at paragraph 85, that "*this was not an isolated incident, which occurred unexpectedly, and which the school could not reasonably be expected to have foreseen. This conduct was conduct which was not only foreseeable, but of which the school had actual and repeated notice. As a consequence, it was necessary that the school take greater than normal steps to eliminate the bullying in this case. This was not a case of attempting to prevent something which may or may not have occurred; what was called for were steps that would eradicate a known course of conduct.*" **The Court recognized that if the older student did have or was suspected of having Attention Deficit Disorder that the Board had the difficult task of balancing its duty to him with its duty to Cox, and that discipline may therefore have been inappropriate.** The Court concluded at paragraph 93, however, that, "*the fact is that the defendant made no attempt to explain the conduct of the school authorities or to show that they acted reasonably in all of the circumstances. And the evidence establishes to my satisfaction that the school's responses to Mrs. Cox's repeated reports was dismally inadequate. The staff made no attempt to deal with a serious problem. In ignoring the behaviour of [the older student] they grossly failed in their duty to the plaintiff.*" The Court concluded that the school authorities failed to discharge their duty of care to the plaintiff.

Cox was then required to show that the failure of the school authorities to discharge the duty of care caused his psychiatric condition and disability; in other words, that, but for one or more of the incidents in 1994 and 1995, he would

not have the psychiatric conditions and disability. **After considering the expert testimony of several doctors, and weighing environmental and genetic factors, the Court concluded that the negligence need not be the sole cause of the harm, and that the breach of the duty of care was a necessary condition of the occurrence of the psychiatric conditions and disability.**

The Court awarded damages of approximately $1 million to the plaintiff for non-economic and economic losses.

This decision is significant not only for the quantum of damages awarded, but also for the precedent it creates in cases where a student is bullied by another student who might have special needs that make addressing the inappropriate conduct more challenging. Certainly, this case highlights the importance of ensuring bullying behaviour is dealt with immediately using research-based practises. We would also comment that the incidents of bullying occurred in 1994 and 1995, and more than 12 years of awareness and understanding of the impact of bullying has occurred in the intervening time frame.

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US Right to Free Speech Not Absolute in School Setting

In *Morse et al. v. Frederick*, 75 U.S.L.W. 4487 (U.S. 25 June, 2007), the majority of the Supreme Court of the United States held that a principal had not violated the United States Constitution First Amendment right to freedom of speech when she suspended a student for holding up a banner during a school event.

The student was standing outside his high school in Juneau, Alaska, to watch the torchbearers in the Olympic Torch Relay pass by on their way to the Olympic games in Salt Lake City, Utah. This was a school-sanctioned and supervised event. The student was standing on the street opposite the school when he, along with some others, unfurled a 14-foot banner with the words "BONG HiTS 4 JESUS" written on it as the torchbearers and accompanying media passed by. The principal directed the students to take the banner down, and all but the respondent student complied. The principal confiscated the banner and subsequently suspended the student for 10 days.

On appeal to the Juneau School District Superintendent, the suspension was upheld on the ground that the sign promoted drug use, but the suspension was shortened to time already served (8 days). The student then unsuccessfully appealed to the District Court alleging that his First Amendment rights had been violated. The District Court granted summary judgment to the School District and principal, concluding that the principal had reasonably interpreted the banner to promote illegal drug use and that the message was in direct contravention of Board policies with respect to preventing the use of illegal drugs. This decision was subsequently reversed by the United States Court of Appeals for the Ninth Circuit, which held that the school had punished the student without demonstrating that his speech gave rise to a "risk of substantial disruption" and that the principal's actions were in violation of the student's First Amendment right to freedom of speech and could give rise to civil suit against her.

On appeal to the highest court, the Supreme Court held that the student was at school when the incident occurred, as he

was at a school-sanctioned and supervised event, that the words on the banner could be interpreted as advocating the use of illegal drugs, and that it was constitutional for a principal to restrict student speech at a school event when the speech could reasonably be viewed as promoting illegal drug use.

The Supreme Court reviewed some of the principles of law with respect to freedom of speech in the school context. Firstly, student expression may be suppressed where school officials reasonably conclude that the expression will "*materially and substantially disrupt the work and discipline of the school*." Secondly, student expression may be subject to editorial control where the expression is part of a school-sponsored activity and where the school officials actions are "*reasonably related to legitimate pedagogical concerns*". Finally, the constitutional rights of students in school are not the same as the constitutional rights of adults in other settings and are indeed circumscribed due to the "*special characteristics of the school environment*". The Court concluded that "*[t]he 'special characteristics of the school environment,'…and the governmental interest in stopping drug abuse – reflected in the policies of Congress and myriad school boards, including JDHS – allow schools to restrict student expression that they reasonably regard as promoting illegal drug use*".

The Court concluded its judgment with a strong endorsement of the principal's actions in this case:

School principals have a difficult job, and a vitally important one. When [the student] suddenly and unexpectedly unfurled his banner, [the principal] had to decide to act – or not act – on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to the students in her charge, including [the respondent student], about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The Court was very clear in denying the full right to speech during a supervised school activity. Not unlike yelling "fire!" in a crowded theatre, certain student communications, if left unchecked, will undermine the effect that educators have.

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Parent and Advocate Guilty of Defamation

In *Ottawa-Carleton District School Board v. Scharf*, [2007] O.J. No. 3030 (Sup. Ct.), the Court held both a student's mother and the advocate assisting her liable for damages with respect to defamatory comments published on their website about a principal and a superintendent of the Board.

One of the defendants in this case, Ms. Paquin, was the parent of a student of the Board with special needs. Her co-defendant, Ms. Scharf, was an advocate who had been assisting with interactions with the Board. The plaintiffs, Wilson and Neill, were employees of the Board. Wilson was the principal of the elementary school the student attended, and Neill was the superintendent of instruction responsible for the school.

The Court noted that the dispute between the family and the Board

regarding the student's placement, program and services was lengthy. A central issue in the dispute was with respect to whether the student should participate in a French Immersion program.

On December 8, 2004, the Identification, Placement and Review Committee placed the student in an age appropriate (grade 6) English program rather than in the grade 1 French Immersion class the parent wanted.

Subsequently, the defendants posted on a website a "News Release" that contained the following four statements: (1) Wilson and Neill had refused the student a French Immersion placement with supports and services in violation of a court order and a motion for contempt of court was being sought against them; (2) the school was unsafe for the student because Wilson had used excessive force against her; (3) Wilson was under criminal investigation by the Ottawa police; and (4) Neill had agreed to resume support and services for Nicole in French Immersion, as a result of the contempt motion being filed. The Court noted that the reason for issuing the "News Release" appeared to be in order to intimidate the principal and superintendent into acceding to the demand that the student continue in the French Immersion program.

The plaintiffs claimed that the statements contained in the "News Release" were defamatory and sought damages pursuant to the *Libel and Slander Act*. The Court evaluated the evidence and found that Wilson had never used excessive force with Nicole, and that he had also never been under criminal investigation. The Court noted that, although Paquin had previously brought a contempt motion against the plaintiffs, her motion had been dismissed by the Court on the basis that there was no Court Order in existence. In sum, the Court was satisfied that all four statements under consideration were false and clearly defamatory to both the plaintiffs.

The Court considered the harm that the defamation had caused the plaintiffs and stressed that the attacks on the plaintiffs went to the *"core of their professional reputations"* (para 28). Ultimately, the Court held Paquin and Scharf jointly and severally liable for general damages of $15,000 for each of the plaintiffs. The Court also ordered the defendants to issue a public retraction of the "News Release" as well as a public apology to Wilson and Neill in the Ottawa Sun and the Ottawa Citizen newspapers.

The final issue the Court addressed was the counterclaim that had been brought by Paquin. Paquin alleged that the Board had made a contract with her guaranteeing the student a placement in a French Immersion program at a specific school with all necessary supports and services. She sought damages from the Board for breach of contract and an order requiring the Board to provide the French Immersion placement.

The Court found that there was absolutely no evidence to support a finding that a contract was made between Paquin and the Board. In dismissing the counterclaim, the Court stated that the Board did not have authority to enter such a contract with a parent.

Unfortunately, the world wide web assists parental harassers to defame their targets by creating an unregulated forum with access to the public. Parents and others need to understand that freedom of expression does not include defamatory statements.

No Constitutional Right to be a Trustee

The issue before the Supreme Court of Canada in *Baier v. Alberta*, [2007] S.C.J. No.31, was whether the amended school trustee qualification provisions of the *Local Authorities Election Act*, R.S.A. 2000, c. L-21, in Alberta were contrary to the constitutional rights of equality and freedom of expression, as embodied in the *Charter of Rights and Freedoms.*

Amendments to the *Local Authorities Election Act* limited the ability of school board employees to run for election and serve as trustees on any school board in the province. Previously, school board employees had only been restricted from running and serving as trustees on the school board by which they were employed. Pursuant to the amendments, in order to be eligible for nomination as a candidate, a school board employee would be required to take a leave of absence. If the person were elected as a school trustee, then he or she would be deemed to have resigned from his/her position of employment with the school board. At the time of the amendments, three appellants were teachers who also served as school trustees on school boards that did not employ them and the fourth appellant was a teacher who intended to run for election on a school board.

The Supreme Court was split in its analysis. A majority of the justices determined that the amendments did not violate the *Charter*, in two concurring decisions, with one justice dissenting. The Reasons for the majority concurring opinion, are detailed below (the minority held that the right to freedom of expression was not engaged at all).

With respect to the right to freedom of expression, the majority held that seeking election to and serving as a school trustee were expressive activities and therefore engaged the constitutional right to freedom of expression. The majority of the Court described the claim as asking the Court to constitutionalize the legislation the way it existed prior to the amendments, which limited the appellants' access to trusteeship.

The majority noted that the existence of school boards is not constitutionally protected and that voting and candidacy rights with respect to school boards are similarly not constitutionally protected. Further, school trusteeship is not a protected freedom.

The majority held that school trusteeship was a platform for expression and that the legislation affected school board employees' access to that platform. The content, however, of expression with respect to educational matters was not impacted by the legislation. At paragraph 48 the Court concluded that,

"… the appellants have not established that their practical exclusion from school trusteeship substantially interferes with their ability to express themselves on matters relating to the education system. The LAEA Amendments may deprive them of one particular means of expression, but it has not been demonstrated that absent inclusion in this statutory scheme, they are unable to express themselves on education issues".

Similarly, the Court concluded that the appellants' equality rights had not been violated since school employees, as a group, were not typically subject to discrimination.

This Supreme Court decision clarifies that a right to expression does not

guarantee that right in every forum, provided there are forums available to a particular person. Therefore, while a teacher may not act as a trustee to express his or her opinion, s/he may make speeches, write articles or discuss the issues of importance, as s/he sees fit. In Ontario, the provisions restricting employees from acting as trustees was upheld by the Ontario Court of Appeal. This is the first Supreme Court of Canada decision regarding this issue.

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Language Rights Require Access to Special Education

In *Dauphinee (Litigation Guardian of) v. Conseil Scolaire Acadien Provincial*, [2007] N.S.J. No. 330, the parents of a student with special needs sued the Conseil Scolaire Acadien Provincial and the Nova Scotia Department of Education for breaches of their minority language rights guaranteed by section 23 of the *Charter of Rights and Freedoms*, namely they alleged that the Conseil had failed to offer "Tuition Agreements" for its students with special needs attending private English schools and that the Department had failed to include students and schools of the Conseil in its new regulatory scheme for "Tuition Support".

The minor plaintiff, Samuel, attended a school of the Conseil. The Conseil was the school board that operated all French schools in the province. At the end of his grade six year, following a suspension from April of 1999 to the end of the school year, Samuel was diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. He continued to have behavioural difficulties resulting in discipline through the 1999-2000 school year and in the beginning of the 2000-2001 school year. In November of the 2000-2001 school year, his parents and the school began to develop an Individualized Program Plan ("IPP") for Samuel, pursuant to Department and Conseil policies and procedures. However, Samuel's parents were not satisfied with the process or the results of the IPP and withdrew Samuel from the school and enrolled him at a private English school in November, 2000. There were no equivalent French private schools, and the tuition at the school was $7,000.00 per year. Samuel's parents requested that the Conseil enter into a tuition agreement with them to assist in paying for the services provided by the private school.

The Nova Scotia *Education Act* contained a provision that permitted school boards to enter into tuition agreements and the Department had provided a guideline with respect to tuition agreements for students with special needs, which included an apparent direction to school boards to develop policies for the purchase of educational services.

Samuel's parents' request for a Tuition Agreement was rejected by the Conseil, which indicated that it did not reimburse tuition fees. That decision was upheld by the Superintendent on review. An Appeal Committee was subsequently struck that, following a hearing, determined that proper procedure had not been followed with respect to either the IPP or the Tuition Agreement. The Committee made several recommendations, including that Samuel return to the Conseil to continue the planning process to create a program. Following the Committee's decision, the Conseil paid $7,500.00 directly to the private school, the school put a transition

plan in place for Samuel to return and created an IPP with the input of the parents. The parents were not, however, satisfied with the IPP, and requested further tuition to maintain Samuel at the private school. The Conseil rejected the request for additional funding and noted that it had fulfilled all the recommendations of the Appeal Committee. The parents did not access the appeal procedures with respect to the IPP. Samuel did not return as a student to the Conseil.

Two years following the hearing, the Department approved funding of Tuition Agreements for students with special needs enrolled in the private school that Samuel attended. Samuel's parents applied and received funding. Samuel graduated that year.

The Court found that there were not a sufficient number of students with special needs at the Conseil to warrant the establishment of additional schools to provide French-first educational services.

The Court determined that the issue before it was whether the appellants' equality or equivalency rights guaranteed by section 23 of the *Charter* had been violated. The Court concluded that the failure of the Conseil to allow tuition agreements or to have a policy in place to provide for tuition agreements did not violate section 23 since the majority of school boards in the province also did not have such policies. The Conseil students were, therefore, in the same position as the majority of English speaking students in the province.

The Court held, however, that the Department had violated the equality or equivalency rights of the Conseil students, as it had overlooked their needs when it designated three English-speaking private schools as approved institutions for Tuition Agreements. The Court suggested that the Department should have investigated services that could assist Conseil students, including the potential designation of programs in New Brunswick or Quebec, in order to accommodate the students. The Court noted that geographic distance should not have been a limit in designating such a program, as many parts of the province were distant from the three approved English private schools. In addition, designations in other provinces would have been cost neutral since the stipend would be the same for all schools.

The Court awarded the plaintiffs additional tuition monies for the period during which the IPP was being finalized, amounting to $10,000.00.

Minority language rights include rights for children with special needs, and while providing services might be difficult where there are very few children with similar needs, this does not absolve the government from complying with its duty. In Ontario there is no option for a school board to purchase services from a private school; however, agreements between school boards is possible.

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Legal Fees Subject to Disclosure

In *Ontario (M.A.G.) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Sup. Ct.), the Court dismissed two applications brought by the Ministry of the Attorney General for judicial review of decisions of the Information and Privacy Commissioner of Ontario.

The Information and Privacy Commissioner's decisions ordered the Attorney General to disclose the total dollar figures spent on the provision of legal services to the Ministry of Health and Long-Term Care and the Ministry of Education in respect to two cases concerning the province's provision of services to children with autism. The parties requesting the disclosure of this information argued that the cost of litigation was a matter of public interest, because the money spent should have been spent on providing services to children with autism. The Attorney General asserted that the legal bills were subject to solicitor-client privilege, and thus should not be disclosed.

The Information and Privacy Commissioner had found that lawyer's bills of account are *prima facie* protected by privilege, but stressed that this presumption had been rebutted in these instances because the disclosure would not violate solicitor-client confidentiality by revealing privileged communications.

The Court held that the Information and Privacy Commissioner was correct in the determination that the disclosure would not violate privileged communications because only the total fees would be disclosed.

School boards may also be required to disclose the quantum of legal expenses pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*.

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School Closing Does Not Require Full Disclosure

In *Cook v. Coquitlam School District No. 43*, [2007] B.C.J. No. 1801 (Sup. Ct.), the Court dismissed a petition to set aside a bylaw passed by the Board of School Trustees of School District No. 43 to close the school attended by the children of the petitioners.

The petitioners were parents of students attending College Park Elementary School located within Coquitlam School District No. 43. In response to significant declining enrolment in the district, on November 28, 2006, the Board passed a motion to consider closing eight district schools, including College Park, effective June 30, 2007. Parents were informed that the Board would make a decision on the proposed closures at the February 27, 2007 board meeting. The district superintendent also sent a letter to the parents informing them of the various aspects of the public consultation process that would take place prior to the board meeting.

On January 15, 2007, College Park parents had a consultation meeting with district officials, which included an opportunity for parents to voice concerns and ask questions. Parents were also advised that they could submit written questions and that answers would be provided at or before the next consultation meeting scheduled for February 7, 2007. On January 30th, the Board produced and distributed a document that addressed the frequently asked questions of affected parties at College Park and also made available documents that parents had requested to see. Finally, parents were

able to make presentations to all of the trustees at two public meetings that were held in the last week of February. The trustees ultimately voted on February 27th to close College Park and this decision was formalized in a bylaw made pursuant to the *School Act.*

Throughout the public consultation process, College Park parents expressed concern about Seaview Elementary School, the catchment school available for displaced College Park students. Seaview was scheduled to receive a seismic upgrade and there was a presence of asbestos in the school. At both the January 15th and February 7th consultation meetings, College Park parents articulated their concerns about health and safety issues associated with asbestos and the impending seismic upgrade. The Board assured parents in the January 30th document that the seismic upgrade would be done in a manner that addressed any health and safety issues.

The petitioners argued in Court that the Board had breached its duty of procedural fairness to them during the course of the consultation process regarding the closure of the school. The basis for their claim was that, despite their requests, the Board never provided them with a copy of the Seaview Feasibility Report. This report contained confirmation of the presence of asbestos in Seaview, and the parents asserted that this non-disclosure impaired their ability to develop and present their viewpoint on health and safety concerns associated with Seaview.

The Court began its decision by recognizing that school closings are inherently political decisions that should not be second-guessed by courts. The only concern of the Court was to ensure that the process taken to reach the decision to close College Park was fundamentally fair. The Court noted that reasonable disclosure is a central component of procedural fairness, however, it stressed that ***"reasonable disclosure is not necessarily synonymous with full disclosure"*** (para. 51). The Court found that school boards must simply provide sufficient disclosure to enable the people affected to offer their input on the real issues being considered.

The Court found that the central issues relevant to the Board's decision whether to close the school, were related to declining enrolments, enrolment forecasts and Ministry funding formulas. The Court found that the Board provided the petitioners with all relevant documents on these key matters and the Seaview Feasibility Report, in the view of the Court, was at best, peripherally relevant to the decision to close the school. The Court noted that, although it may have been marginally helpful to the petitioners to have had the report, they had been able to adequately present arguments related to health concerns from the seismic upgrade without the report.

The Court held that the Board did not breach its duty of procedural fairness by failing to provide the petitioners with the Seaview Feasibility Report. Thus, the school closure process involving College Park was found to have been a fundamentally fair process, and the Court stated that it was not its place to say whether the decision reached at the end of the process was or was not correct.

While school boards must provide significant information to parents in order to ensure that the process is transparent, school closings do not require that every document be shared. The standard identified by the Court is any document relevant to the decision-making process.

Professional Development Corner

Keel Cottrelle LLP
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"Educational Leadership Today and Tomorrow:
The Law as Friend or Foe"
Halifax - April 20-22, 2008

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