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Edu-Law Newsletter —

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Decision requiring IBI therapy in schools reversed

On July 7, 2006, the Ontario Court of Appeal (the "Court") released its unanimous decision in *Wynberg v. Ontario*, [2006] O.J. No. 2732 (C.A.), overturning the lower court decision and allowing the Government of Ontario's appeal. Claims had been brought on behalf of 35 infant plaintiffs and their families for a declaration that their human rights pursuant to the *Canadian Charter of Rights and Freedoms* (the "*Charter*") were violated by the 6 years of age cut-off in the Intensive Early Intervention Program (the "IEIP") provided by the Ministry of Community and Social Services and by the failure of the Ministry of Education to provide Intensive Behavioural Intervention ("IBI") in public schools to school-aged children with autism.

The plaintiffs were successful at trial. The trial judge found that: (1) Ontario had violated the equality rights of the infant plaintiffs on the basis of age because of the upper age limit of the IEIP; (2) Ontario had violated the equality rights of the infant plaintiffs on the basis of disability by failing to provide a special education program for them consistent with the IEIP guidelines; and (3) Ontario failed to justify the age discrimination violation under s. 1 of the *Charter*. (Ontario did not attempt to do so with respect to the claim for discrimination on the ground of disability.) The trial judge awarded declaratory relief and damages. (See "IBI Therapy to be funded by Government", Edu-Law Newsletter, June 2005, Vol. 3, Issue 2).

The Court of Appeal overturned each of these findings.

The Court first considered discrimination on the basis of age. The Court held that in comparing the treatment of autistic children aged 2 to 5 with autistic children aged 6 and over; there was differential treatment by the government on the basis of age, but that the differential treatment was not discriminatory. The Court found that while all autistic children historically suffered disadvantage and stereotypes because of their disability, autistic children over six years of age had not historically suffered such disadvantage because of their age. Rather, the evidence indicated that prior to the implementation of the IEIP, autistic children aged 2 to 5 had been disadvantaged because there were no government programs available to them until they attained the age of 6 and could enter the education system. The Court concluded that the focus of the IEIP program on children aged 2 to 5 did not give the impression that children aged 6 and up were "irredeemable" nor did it offend their human dignity.

The Court held that the IEIP was an ameliorative program that was targeted at the children while they were of an age described as a "window of opportunity" and when they were not required to be enrolled in a school. Moreover, the Court held that IBI consistent with the IEIP Guidelines did not correspond with "the needs, capacities and circumstances of the claimants" (para. 60) and was not appropriate in the school setting.

Next, the Court considered the trial judge's finding that the claimants had been discriminated against on the basis of disability because the Minister of Education had failed to ensure they received an IBI program consistent with the IEIP Guidelines. The trial judge held this was a denial of the claimants' entitlement to appropriate special

education programs and services without payment of fees pursuant to section 8(3) of the *Education Act*, as well as a violation of their right to equality.

The Court was very critical of the trial judge's findings, particularly that: IBI was the only scientifically proven and effective intervention for children with autism; IBI benefited children with autism over age 6; the Ministry had constructed a "policy barrier" to the use of IBI in schools; and that interventions available to pupils in Ontario schools were not sufficiently effective to constitute "appropriate" special education services pursuant to s. 8(3) of the *Education Act* and that only IBI was appropriate.

The Court held that the proper comparator groups were exceptional pupils in the communications category and exceptional pupils in the physical category, but held that due to the circumstances of the trial, the evidentiary record addressing the situations of the comparator groups was very limited.

The Court found that the claimants were unable to establish differential treatment or a denial of equal benefit of the law because they had been unable to demonstrate that IBI consistent with the IEIP Guidelines could be delivered in schools. The Court noted that there were a number of "core elements" of the IEIP that would have to be changed in order for an equivalent program to be delivered in the public education system.

The Court further held that there was no evidentiary basis for the trial judge's implicit finding that IBI was the only appropriate special education service or program for autistic children and that this conclusion was a "palpable and overriding error" (para. 131).

The Court noted that while the trial judge had recognized that other interventions were being provided in Ontario, the trial judge had (presumably erroneously) deemed them to be inappropriate.

The Court concluded at paragraph 137, "*[T]he respondents are not able to demonstrate the first part of the comparison necessary to show that the claimants have been subjected to differential treatment under s.8(3) of the Act. They have not established that the failure to provide intensive behavioural intervention consistent with the IEIP constitutes the Minister's failure to ensure the availability of appropriate special education programs and services.* ***They have not shown that the intervention claimed can be provided within the public school system or that it is the only appropriate special education program or service for exceptional pupils with their particular disability."*** (emphasis added)

The trial judge had also not made an express finding that the comparator groups did have appropriate programs and services in the public school system. The Court found that even if it were to assume that the comparator groups did receive appropriate programs and services, the claimants had still been unable to establish that they did not receive appropriate services because they had not established that IBI was the only appropriate service.

The Court held that although its finding of differential treatment was sufficient to dispose of the claim, if it had wanted to continue with the discrimination analysis it would be unable to because the evidentiary record respecting the comparator groups was so poor. The Court concluded its discrimination analysis by explaining the limited jurisdiction of the courts with respect to imposing positive obligations and policy decisions on government.

Although the Court did not find discrimination, it did complete the discrimination analysis. **The Court concluded that even if there had been discrimination, it would have been reasonably justified and that the Court would have shown deference to the difficult policy decisions regarding scarce resources made by the Legislature.**

The Court also dismissed the claims of the adult claimants, as well as the claims with respect to the right to life, liberty and security of the person. With respect to the parents, the Court held that there was no mandatory requirement for children to attend the public school system, and that parents were therefore not compelled to have their children participate in programming if they felt it was harmful to them.

The Court set aside the relief ordered by the lower court, noting that the trial judge had erred by awarding declaratory relief and pecuniary damages, the general rule being that the latter were only available in cases where conduct had been clearly wrong, in bad faith, or an abuse of power and not where the application or enactment of a law was found to be unconstitutional.

At writing, it is not known whether the plaintiffs will seek leave to appeal the Court of Appeal decision to the Supreme Court of Canada.

It should be noted that just prior to the release of the decision, the Government announced a policy change, eliminating the age restriction for IEIP. ☐

Decision of Special Education Tribunal upheld

In *Ismail v. Toronto District School Board*, [2006] O.J. No. 2470 (Div. Ct.), a panel of the Divisional Court dismissed an application brought by the mother of an exceptional student for judicial review of a decision of the Special Education Tribunal in which the decision of an IPRC to place the student in a special education classroom for half days, and in an integrated class setting with assistance for the remainder of the day, had been upheld.

To determine the standard of review, the Court considered the four contextual factors: whether there was a privative clause or a statutory right of appeal, the expertise of the tribunal relative to that of the reviewing court on the questions at issue, the purpose of the legislation and the particular provision, and the nature of the question at issue. The Court then applied the factors to the facts at hand: there was a privative clause in the *Education Act*; the Tribunal had greater expertise on the subject matter than the Court; the issue before the Tribunal was one of mixed fact and law; and the purpose of the legislative scheme was to ensure that students identified as exceptional were given placements to "enable the appropriate special education programs and services to be provided to them" (para. 41).

The Court concluded that the appropriate standard of review was that of reasonableness *simpliciter*.

The Court held that a Tribunal's decision would only be considered unreasonable if the analysis in its reasons could not reasonably have lead to the conclusion reached based on the evidence before it and where the reasons could not stand up to a "somewhat probing" examination. The decision would stand even provided that the explanation was tenable.

The Court noted that the test in determining the placement of an exceptional student was whether the placement was in the best interests of the child. The Court concluded that the Tribunal's order had been reasonable.

The Court also determined that the Tribunal had not violated section 8(3) of the *Education Act*, and that the section did not impose any additional obligations on the Tribunal than its obligation to consider the appropriateness of placements wherein special education programs and services would be delivered.

Further the Court held that the Tribunal and Board had not violated their obligations under section 17 (presumption of integration) of Regulation 181/98, as the Board had considered whether a placement in a regular class would meet the student's needs and had considered the parent's preference in doing so. The Board had amended its original recommendation of a full-time placement in the special education class to a half-day in a self-contained class and a half-day in a regular class. The Tribunal found that a full time placement in a regular class with one-to-one support, which the parent desired, would not be in the student's best interest.

The Court rejected the appellant's argument that section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* had not been applied, noting that the important question was whether the decision had been consistent with *Charter* principles, which the Court found it was. The Court concluded that "*the Tribunal recognized that for [the student], total integration would work to his disadvantage, because he needed the special education recommended by those responsible for his placement. The Tribunal's decision recognized [the student] as a special person with special needs*" (para. 56).

The Divisional Court accorded the Tribunal with a measure of deference and confirmed that the best interests of the child test is the appropriate test to be met with respect to special education decisions. ☐

Claim by employee will not go to Supreme Court

The final attempt to revisit the issues has been barred as the Supreme Court of Canada denied the application for leave to appeal in *Heald v. Toronto District School Board*, [2006] O.J. No. 478. The Supreme Court dismissed the application without reasons, further affirming the trial judge's decision that the appellant had failed to establish any cause of action. The Court of Appeal decision was reviewed in "Court of Appeal confirms dismissal of claim by employee", Edu-Law Newsletter, June 2006, Vol. 4, Issue 2.

The appellant teacher made several claims against the respondent School Board relating to a fire that occurred at Downsview Public Elementary School in 1994. The teacher opposed students' return to classrooms the morning after an overnight fire, which he argued was an inappropriate risk to the students' health and safety. He alleged that raising his concerns resulted in defamation and harassment by the School Board. The trial judge found there was no basis to find liability against the Board, and the Court of Appeal upheld the findings. The Supreme Court's denial of the application ends any further legal proceedings on a matter that was already protracted. ☐

Judicial Review of limited expulsion dismissed

In *S.J. v. Toronto Catholic District School Board*, [2006] O.J. No. 2878, the Divisional Court dismissed the application for judicial review of a school board's decision to place a student on limited expulsion. The application was brought by the mother, S.J., on behalf of her 11-year-old son, A.A., following the denial of her appeal to the Toronto Catholic District School Board. The Complainant alleged a denial of procedural fairness, as well as an infringement of her son's security and liberty rights under s. 7 of the *Charter*.

In 2002, A.A., then a grade six student, brought a knife consisting of a double-edged blade inside a silver pen, to Sacred Heart Catholic School. At recess, he took the knife into the school yard where it was alleged that he threatened one or more fellow students with the knife. Two students reported the incident to a teacher who advised the school principal. Upon hearing of the incident, the principal conferred with the two yard-duty teachers, and later interviewed A.A. about the existence of the knife.

The principal consulted with his superintendent and the police since a weapon was involved. Throughout his inquiry, the principal communicated with the Complainant, S.J., advising her that her son would likely be facing a limited expulsion. At the conclusion of his inquiry, the principal documented his decision that a limited expulsion, rather than a referral to the Board for its determination, was appropriate. The Board supported the principal's decision concluding that all relevant factors were considered in arriving at his decision. The Complainant applied for judicial review to quash the limited expulsion.

In determining the appropriate standard of review, the Court applied the pragmatic and functional approach established by the Supreme Court of Canada. In so doing, the Court found that a high degree of deference was appropriate when considering the Board's decision due to its specialized knowledge in the area of education, the strong privative clause provided in the *Education Act*, and the specific authority granted by regulation to the Board to develop policies dealing with the suspension and expulsion of students.

Finding the standard of review to be patent unreasonableness, the Court dismissed the application stating that the principal's inquiry was fair, reasoned and appropriate. The Court held that the Respondents acted in good faith at all times in accordance with the principles of fundamental justice and procedural fairness. "*The Board's actions were taken in fulfillment of their duties and responsibilities under the Act to maintain order and discipline, and to ensure that the school was kept safe and secure for all its students*".

With respect to the issue of procedural fairness, the Court concluded that no denial of fairness occurred. The Complainant was provided adequate notice of the hearing, was permitted to make arguments, and a written decision was rendered. The Court did find the Board's Reasons lacking in substance, providing only that "the principal considered all appropriate factors". Although dangerously close to inadequate, the Court determined that, since the material filed by the Complainant presented a full appeal, there was no reason to return the matter to the Board.

The allegation of an infringement of A.A.'s security and liberty rights was dismissed as the Court found there was no evidence of any deprivation sufficient to engage the *Charter*. Finding the actions taken by the school in accordance with the principles of fundamental justice, the Court found the expulsion of the student could be upheld as a reasonable limit under s. 1. The decision of the Board received significant deference by the Court which is consistent with the treatment courts have historically accorded to school boards. □

Complaint of sexual discrimination denied

The British Columbia Human Rights Tribunal in *C. v. Board of Trustees of School District No. 8, [2006] B.C.H.R.T.D. No. 385*, recently dismissed the Complaint launched by a mother, on behalf of the her eight year old daughter, alleging sexual discrimination by the Board. The Board denied any discrimination occurred, and requested the dismissal of the Complaint pursuant to s. 27(1)(b)(c) and (d) of the *Code* (which provides for a Complaint to be dismissed if the Complaint does not violate the *Code* or does not further the purposes of the *Code*). The Tribunal agreed with the Board's reasoning, concluding that the Board acted responsibly and promptly in responding to the situation and balanced the competing interests of all involved.

The incident arose on a school bus where the Complainant alleged that her daughter, T, was subjected to unwanted behaviour by a 12-year old boy. Specifically, the Complaint alleged that the boy made a sexually suggestive gesture towards T, and then laughed. The mother contacted the bus coordinator and reported the incident requesting that the boy be suspended from the bus. The bus coordinator informed the principal of the boy's school as he attended a different school than the alleged victim.

The principal of the boy's school phoned the Complainant to confirm the circumstances of the incident. The principal advised her that he met with the boy, contacted his parents, and additionally was sending a letter home to his parents detailing the incident. Unsatisfied with the principal's actions, the Complainant demanded that the boy be suspended from the bus.

The Complainant's demands resulted in a further investigation by the Board, who later affirmed the principal's actions as fair and appropriate in the circumstances. An investigation was conducted by a clinical psychologist, Dr. Johnston, and included interviews with the alleged victim as well as students who may have witnessed the incident. The Board determined that a conversation with the boy's parents, followed by a formal letter stating that any further inappropriate behaviour would result in stricter discipline including the boy's bus privileges being taken away, was a suitable resolution. In fact, following this incident, the boy did lose his bus privileges as a result of unrelated disruptive behaviour on the bus.

In determining what was appropriate in the circumstances, the Board considered that the boy was a special needs student with behaviour and emotional problems, as well as the fact that prior to this incident, he never had any issues of a sexually suggestive nature. Central to the Board's decision was the impact that removing bus privileges would potentially have on the boy's right to attend school. The Board recognized that the boy lived in an isolated area which provided little social interaction as well as increased difficulty accessing educational facilities.

The Tribunal held that although the outcome was not what the Complainant would have desired, it was a suitable response to her concerns as well as the interests of all involved. The respondents were successful in proving the Complaint would not further the purposes of the *Code*, and as such, the Complaint was dismissed pursuant to s. 27(1)(d) of the *Code*.

The balanced approach taken by the School and Board, given the perpetrator's special needs, was also an appropriate way to try and prevent a Complaint by the perpetrator. ☐

Human Rights Tribunal rules sisters can play on boys' team

In *Amy Pasternak and Jesse Pasternak v. Manitoba High Schools Athletic Association Inc.*, Manitoba Human Rights Adjudication, File Nos. 04 EN 433 and 04 EN 434 (M. Lynne Harrison, Adjudicator), the Complainants filed a Complaint pursuant to the Manitoba *Human Rights Code* against the Manitoba High Schools Athletic Association ("MHSAA") alleging that they had been subject to differential treatment on the ground of gender, resulting in discrimination, when the MHSAA refused to allow them to play for their secondary school boy's hockey team.

MHSAA was a non-profit corporation that regulated athletics programs in Manitoba, including policy considerations, and provincial, and the co-ordination and organization of between secondary schools competition.

MHSAA had eligibility requirements for schools to participate, and one of the requirements was that if no girls' team existed then a girl could try out for the boys' team. But, in circumstances where both boys' and girls' teams existed the students would play for the team constituted of their respective

gender. The goal of this requirement was "*to provide equal opportunities for athletes*." MHSAA also had a Gender Equity Policy, which stated in part, "*MHSAA encourages student-athletes to participate on same-sex teams where both the boys program and the girls program are equitable in terms of coaching, funding, practice time, facility access etc*."

There were boys' and girls' programs in hockey, although the rules for each were different with respect to body contact.

The Complainants were experienced hockey players and were found to be "*competitive in terms of skill, conditioning, and general hockey knowledge*."

The Complainants sought to try-out for the boys' team at their high school, but were denied the opportunity by MHSAA because a girls' team had been put in place that year at their school. The school appealed MHSAA's decision with the support of the manager of the boys' hockey team, the principal, and the president of the Winnipeg High School Hockey League. The appeal was denied. The Complainant's mother then appealed individually to MHSAA, however, no reply was forthcoming.

It was acknowledged that there was no guarantee that the Complainants would make the team if they were allowed to try-out.

The Complainants continued to try-out, however, on the last day of try-outs they were told they would not be allowed to play pursuant to the MHSAA rules. They were very upset. They chose not to play for the girls' team.

The Complainants tried out the following year also, however MHSAA advised the team that they would not be able to insure them or the team if the Complainants played, as they were not eligible to play. The team and school were unable to locate private insurance and so the Complainants were again not allowed to play on the team.

The Arbitrator found, in a very short analysis, that the Complainants had made out a *prima facie* case of discrimination, as they had been subjected to differential treatment on the basis of their gender. In making this finding, the Arbitrator held that it was unnecessary to apply the *Law* test to determine whether there was a *prima facie* case of discrimination pursuant to the Manitoba *Human Rights Code*, specifically that the analysis with respect to dignity was not necessary.

The Arbitrator used the test set out by the Supreme Court of Canada in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* ["*Grismer*"], [1999] 3 S.C.R. 868, to determine whether the Respondent had established a reasonable justification for the discrimination, on a balance of probabilities. The standard at issue was subjected to the following stages of analysis: (1) whether the standard was adopted for a purpose or goal rationally connected to the function being performed; (2) whether the standard was adopted in good faith in the belief that it was necessary to accomplish its purpose or goal; and (3) whether the standard was reasonably necessary to accomplish its goal, in that the respondent could not accommodate female persons without incurring undue hardship.

In applying the test, the Arbitrator found that the provision of equal opportunities to athletes was a valid general purpose of the standard and that it was rationally connected to the function MHSAA performed. The Arbitrator found that the second stage of the test was also met: the standard was adopted in good faith and in the belief that it was necessary to accomplish the stated goal. There had been no intention of discriminating against the Complainants. The Arbitrator found, however, that MHSAA failed on the third stage of the test. The Arbitrator held that the girls' and boys' teams were not equally resourced in the broad sense and that the Complainants were denied the opportunity to play and compete at their own level, as the girls' program was a developmental team with a skill level much lower than that of the boys' team. The Arbitrator held that it was irrelevant whether the Complainants would have made the team; rather, the issue was that they were not given the opportunity to be considered for the team. The Arbitrator rejected arguments that the Complainants would have been leaders on the girls' team and would have been able to help other girls on the team learn how to play:

"I do not believe that it would be considered acceptable to force a boy to play for a lower calibre team on the basis that he could help less skilled players to play better. Similarly, it is not acceptable to force a girl to play for a lower calibre team on the basis that she can help others to play better."

The Arbitrator pointed out the discrepancy between the rule in MHSAA's Gender Equity Policy that students should be encouraged to play on their gender's same-sex team *where the programs are equitable* and the rule in its Rules and Regulations that girls must play on the girls' team *where one exists*. The Arbitrator was critical of the lack of a clear appeal process for individual athletes as well as the lack of specificity with regard to exceptions that might apply in the case of a school appealing a rule.

The Arbitrator found that both the rule and MHSAA's refusal to make an exception were contrary to the Gender Equity Policy and could not be justified.

The Arbitrator rejected the argument that there were alternatives available to the Complainants, namely to play in other leagues where they could play on boys' teams, that they could transfer to a school that did not have a girls' team, and that as girls they had opportunities available to them that were not available to boys, for example the option to play minor hockey and high school hockey simultaneously, which boys were not allowed to do.

The Arbitrator also rejected the argument that the girls team was an affirmative action program designed to assist those traditionally disadvantaged and that therefore, the exclusion of girls from the boys' team did not constitute discrimination as the exclusion was designed to protect the girls' team. The Arbitrator noted that the fact that the Complainants did not play on the girls' team would not lead to its demise and that the evidence showed that interest in girls' hockey was increasing in any case. The Arbitrator also noted that there was no evidence that a significant number of girls would choose to play on the boys' team if they had the option of playing on a girls' team. The Arbitrator concluded that allowing girls to play on the boys' team would not have a significant adverse effect on the girls' hockey program or on the boys' hockey program.

The Arbitrator also rejected MHSAA's argument that the girls would be "better off" playing in the girls' program.

Having found that MHSAA discriminated against the Complainants, the Arbitrator ordered that: (1) MHSAA remove its requirement that girls try out and play for the girls' hockey team if one existed; (2)it take measures to be determined by agreement with the boys' hockey team coaching staff and the Pasternaks to compensate the Complainants for loss of skills; and (3) it pay each Complainant $3,500.00 for injury to their dignity, feelings and self respect.

Equal access includes not only access to an activity but also access to the same quality of activity, which may require boys' teams to allow access by girls. ☐

Identities protected, despite consent to release

In *K.B. v. Toronto District School Board*, [2006] O.J. No. 1765, an interim order was sought by the respondent school board to continue the sealing of the Court's public record. The application requested that students be referred to in oral argument by fictitious initials; as well the Board requested a ban on the publication of the name or any information that would identify a student.

The case arose in December 2005 when an alleged violent incident took place at Emery Collegiate Institute, resulting in criminal proceedings against four students under the *Youth Criminal Justice Act (YCJA)*. Two of the four students who were alleged victims sought judicial review of the school board's decision to exclude and then transfer them from the school.

Interestingly, in February 1, 2006 the Court's public record of the matter was ordered sealed on the consent of all parties. The order substituted all applicants' names with their respective initials and the entire court record was sealed pending the hearing.

In this motion, however, the parties' positions with respect to privacy had changed significantly. The applicants' involved in the alleged incident chose to waive their rights to privacy and consented to the release of their student record to the public. Additionally, the Toronto Star newspaper was granted full rights as an intervener at the hearing and strongly opposed the sealing of the Court's public record.

The Toronto District School Board argued that the sealing order should be granted in light of the confidentiality provisions of the *Education Act (EA)* pertaining to student records and the restrictions on publication contained in the *YCJA*. Ontario Student Records, known as OSRs, are protected as privileged information for the use of principals and teachers in their instruction of a pupil. The *YCJA* prohibits the publication of the identity of persons charged under the *Act* or victims to *YCJA* offences. These statutory protections strive to safeguard the rights of students in schools and in the general public.

Applying the Supreme Court of Canada test established in two recent cases of *Dagenais/ Mentuck*, the Court found that although the sealing of the information from students' records was justified, a less intrusive alternative was available. The Court rejected the Board's argument that it was necessary to seal the entire court file. The sealing order previously imposed was rescinded, and the court file was to be open to the public subject to the removal of the names of the accused, the victim and the witnesses. The request that no student be referred to in oral argument by name or actual initials was allowed.

The decision of the Court recognizes the importance of protecting youth, even when they have seemingly refused such protection. ☐

Nova Scotia Court of Appeal finds election of Trustee invalid

In *Warrington v. Lunenburg (Municipality)*, [2006] N.S.J. No. 256, the Nova Scotia Court of Appeal reversed the decision of the Nova Scotia Supreme Court regarding a challenge of a Trustee election.

The appellant was the defeated candidate in the election for the African Nova Scotian member of the South Shore Regional School Board. The appellant had unsuccessfully challenged the result of the election before the Nova Scotia Supreme Court on the basis that there had been irregularities in the election process.

The *Education Act* in Nova Scotia provided for an African Nova Scotian to be elected to each regional school board in the province by either African Nova Scotians or parents of African Nova Scotians. If an elector chose to vote for an African Nova Scotian representative, he or she could not also vote for a non-African Nova Scotian representative. Pursuant to the *Act*, in order to qualify to vote for an African Nova Scotian, the elector was required to request an African Nova Scotian ballot. This request was confirmation that the elector met the requirements of the *Education Act* to vote for an African Nova Scotian Representative.

The trial judge found that, at two polling stations, electors had been given an African Nova Scotian ballot without requesting one and, as a result, the ballots were invalid. This was not disputed before the Court of Appeal.

The *Municipal Election Act* of Nova Scotia also applied to the election of African Nova Scotian members. It permitted a judge to declare an election invalid if it was not conducted in accordance with that *Act*. Pursuant to section 164, however, if the judge determined that the "*election was conducted in accordance with the principles of this Act and that the irregularity, failure, non-compliance or mistake did not affect the result of the election*" then the judge was not required to declare the election invalid. The trial judge found that the election had been conducted in accordance with the principles of the Act and the result of the election had not been affected.

The Court of Appeal held that the trial judge had misapplied section 164 of the *Municipal Election Act*. The Court noted that the trial judge's finding was based on a conclusion that the result of the election would not have changed if there had not been irregularities. The Court held that the trial judge's reasoning rested on the assumption that, to void an election, the challenger was required to establish how each elector voted in order to establish that the challenger would have received the highest number of valid votes but for the irregularities. The Court held that this would mean that the challenger "*would have an onus to establish a recount by affidavits of electors*", thereby making "*it virtually impossible to successfully challenge a deficient election.*" Further, since ballots were secret, each elector would have to waive ballot privilege to swear an affidavit as to how they did or would have voted. Further, the trial judge's finding defeated the purpose of the section, since they were to determine whether an election should be voided and a new election held. If the purpose of the section was to recount the ballots, then there would be no reason to hold a new election. In addition, there were separate sections in the *Act* that would result in a recount of the ballots.

The Court of Appeal reviewed the case law and made several findings of principle with respect to section 164 of the *Municipal Elections Act*. The most significant of these findings were first, the onus to satisfy the judge that section 164 should be used to save the election lay with the party relying on it. Second, in order for section 164 to be used successfully to save the election, both conditions of the provision must be found to exist. If the elector is unable to prove either that the election "*was conducted in accordance with the principles of this Act*" or that the irregularity "*did not effect the result*" then section 164 would not apply. Finally, section 164 required compliance with the principles of the *Act*, *thus* recognizing that technical non-compliance might not suffice to void an election so long as the result was not affected.

In order to determine whether the irregularities were serious enough, the Court noted two relevant principles to guide it. The first principle was that in cases where an irregularity could have affected the result, then it could not be said that there was compliance with the principles of the Legislation. Secondly, where the irregularity involved a significant breach of the statutory requirements, the election could not be said to have been conducted in accordance with the principles of the *Act*, regardless of how or whether the irregularity might have affected the outcome of the election.

After reviewing the case law and resulting principles, the Court of Appeal held that the election could not be saved by section 164. First, there had been widespread irregularities that could have affected the result. Secondly, ignoring the eligibility qualifications, which formed a cornerstone principle of elections legislation, meant that the election had not been conducted in accordance with the legislation. The effect of this error on the result was not immaterial. The Court of Appeal concluded that the trial judge had erred in law in the application of section 164, as the election had not been conducted in accordance with the principles of the *Act* and could not be saved by section 164. □

No reinstatement for Trustee in a conflict of interest

In *Howell v. Grande Yellowhead Regional Division No. 35*, [2006] A.J. No. 619, the Alberta Court of Queen's Bench dismissed the appeal of the applicant, Ms. Howell, for an order reinstating her as a trustee.

Ms. Howell had been a trustee of the respondent Board until she was disqualified by a resolution of the Trustees indicating that she had breached the *School Act*. The Board of Trustees determined that Howell was in a conflict of interest when she voted on a matter for which she had a pecuniary interest. The matter before the Board was a Retirement Incentive Program (the "RIP") of $20,000.00 to be offered to teachers to encourage them to retire. Ms. Howell's spouse, or "adult interdependent partner", was a teacher with the Board who would be eligible for the RIP.

Ms. Howell had consulted with her spouse prior to voting, and he had informed her that he did not intend to opt in to the program. Howell voted on two motions related to the RIP and did not declare a pecuniary interest or explain on the record that her spouse was eligible to retire.

Pursuant to section 83 of the Alberta *School Act*, if a trustee had a pecuniary interest in a matter before the board, he or she is required to: disclose the nature of the interest before any discussion is held, abstain from voting on any question relevant to the matter, abstain from discussing the matter, and leave the room in which the meeting is being held until the voting and discussion regarding the matter is complete. If a trustee fails to follow this process, he or she could become disqualified to remain a trustee and could be required to resign. If the trustee does not voluntarily resign, it is open to the Board to disqualify them. (The Ontario *Municipal Conflict of Interest Act* does not give such power to school Trustees, and requires an application to the Court for any such penalty).

Pursuant to the legislation, a pecuniary interest is an interest that could monetarily effect the person. The pecuniary interest of a spouse is considered to be a pecuniary interest of the person, and a person is deemed to know of the pecuniary interests of his/her spouse. In order to determine whether a person has a pecuniary interest, an objective, reasonable test is to be applied. It is not important whether or how the interest might effect the vote, only that the interest exists.

The Court concluded that Howell had a pecuniary interest when she voted on the motions, as she ought to have known that the RIP could have monetarily effected her spouse, she knew that it was a pecuniary interest, and she had discussed and voted on the subject. It did not matter that she did not believe that she had a pecuniary interest.

The Court did not accept Howell's argument that her interest was so remote or insignificant it did not constitute a pecuniary interest and could not be reasonably regarded as having influenced her. In the alternative, she argued that if she did breach the conflict of interest provisions, the Court should use its discretion to reinstate her. The Court noted that, in order to declare Ms. Howell qualified to act as a trustee, the Court would have to find that she had voted inadvertently or had made an honest error in judgment.

The Court held that it did not matter that Ms. Howell had voted on the RIP in previous years without question from the board as, previous wrongful acts did not provide a "carte blanche" for her to continue to vote on matters in which she had a conflict of interest.

The Court held that the benefit Ms. Howell could receive was not remote, and stated: "*The reason that the Courts consider such a sum to be significant is that the* ***Courts set a high standard of public trust. The public interest must be served with high moral standards****. Not only must public officials not benefit from their decisions, they must not be perceived to benefit from their decisions. The measure of the standard is an objective one. In other words, it is not what the person making the decision thinks or believes that matters – that is a subjective test – but rather what a person in the community would think if they heard that Ms. Howell had voted on a motion under which her partner could benefit. This is the objective standard.*" (emphasis added). The Court also held that the fact that the vote was unanimous and that her vote therefore did not change the outcome was not a consideration.

Ms. Howell's argument that the vote was either inadvertent or a *bona fide* error in judgment also failed. The Court determined that Ms. Howell was not ignorant of the law, having received training on the conflict of interest provisions and having acted as a Mayor for a village in the past. In addition, other trustees presented evidence that they had challenged Ms. Howell with respect to her conflict and only following such challenges would Ms. Howell declare a conflict and leave the meeting. She had also in the past voted on motions in which she clearly had an interest. Furthermore, she had been warned of the conflict in this particular instance. The Court held that "*one cannot claim inadvertence when one has been warned of the conflict*".

The Court found that Howell had breached the conflict of interest requirements of the legislation and had not successfully established a defence. The Court dismissed her appeal, thereby, upholding the decision of the Board to disqualify her as a trustee.

In any matter where a conflict of interest might arise it is advisable to declare the potential conflict, as should have been done in the present case. ☐

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Edu-Law continues to provide "In-House" Negotiation & Mediation Training Programs. Anyone interested in such In-House Programs, or a Program together with a coterminous Board, should contact Edu-Law.

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Osgoode Professional Development Centre:

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February 27, 2007

Osgoode Professional Development Centre:

"Conflict Resolution Workshop for Educators"

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Friday, March 2, 2007

Keel Cottrelle LLP Complimentary Session:

"Special Education"

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