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EDUCATION LAW NEWSLETTER

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Arbitrator Rules Boards Not Required to Schedule ECEs to Be Present for Full Length of Instructional Day

In a decision under the central dispute process released on October 13, 2017, arbitrator Russell Goodfellow ruled that the *Education Act* (the "Act") and its regulations do not require school boards to schedule early childhood educators ("ECEs") to be present in a full day kindergarten ("FDK") classroom for the full length of the "instructional program" in each school day.

The Goodfellow decision departs from a prior award that arose from a local grievance involving the Windsor-Essex Catholic District School Board. In that case, arbitrator Surdykowski held that "the ECE must be in the classroom (or teaching area) with the teacher for every minute of every instructional day" and that "ECE breaks [could not] be scheduled or taken during instructional time…" The Surdykowski decision is the subject of a judicial review; however, that judicial review was adjourned pending the disposition of the central grievance by arbitrator Goodfellow.

Unlike the Surdykowski decision, the Goodfellow decision arose from the central dispute resolution process set out in the *School Boards Collective Bargaining Act, 2014,* and so will directly impact all 29 Catholic school boards represented by the Ontario Catholic School Trustees' Association ("OCSTA"). Further, as an interpretation of the *Education Act* and not a specific collective agreement, the decision may have an effect on the other 43 school boards in the province of Ontario.

BACKGROUND

The Ontario English Catholic Teachers' Association ("OECTA") initiated a central grievance in relation to the FDK program. Under the central dispute resolution process in the collective agreement, the Crown is also a party to the proceeding.

The *Education Act* was amended in 2010 to require boards to phase in full-day kindergarten from 2011 to 2015. One of the requirements of the phase-in of FDK was that at least one position in each junior kindergarten ("JK") and kindergarten ("K") class of 16 students or more was to be designated as requiring a properly qualified ECE in addition to the teacher assigned to teach. The FDK program would also provide for 300 minutes of instructional time per day.

OCSTA argued that ECEs are required to co-operate and co-ordinate with teachers with respect to various classroom matters.

Some school boards, including the Ottawa Catholic District School Board (the "Board") from which the central grievance arose, were scheduling ECEs' contractual breaks during instructional time, leaving the teacher to supervise the students alone for up to 60 minutes per day. During students' recess and lunch breaks, the ECE would supervise the students.

OECTA grieved this scheduling practice, arguing that the Act, regulations, and certain policies, guidelines, and contextual materials required both the teacher and the ECE to be present in the classroom for the entire 300 minutes of instructional time.

OECTA took the position that the scheduling practice was precluded by the Act and regulations. OCSTA and the Crown took the position that the scheduling practice was lawful. BLG represented OCSTA in this hearing.

SUBMISSIONS OF THE PARTIES

OECTA's primary argument was that in reading the Act, regulations, and additional materials in context, it was apparent that that ECE-teacher team was the "functional equivalent" of the teacher acting alone in an older grade. OECTA argued that this "functional equivalence" meant that the Board was not truly providing the required 300 minutes of "instruction" if either the teacher or ECE were not present in the classroom for any part of the 300 minutes. Put another way, OECTA's position was that the statutory obligation to deliver a 300-minute FDK instructional program requires school boards to schedule both a teacher and an ECE to be present in the classroom for the full 300 minutes. Drawing from case law that established a teacher must be present in an older grade for classroom time to count as instruction, OECTA argued that the same standard should apply to the ECE-teacher team.

In response, OCSTA argued that there had been no breach of the Act or its regulations. Rather, the Act confirms that in an FDK classroom, teachers are required to instruct, while ECEs are required to co-operate and co-ordinate with teachers with respect to various classroom matters. OCSTA's position is summarized as follows:

> The plain and ordinary meaning of the words in the *Education Act* is clear, not ambiguous, and does not preclude the practice of scheduling ECE breaks during instructional time, without a replacement ECE. The Board's duty is simply to appoint an ECE to a designated position in a JK or K class. The ECE's duty is to co-operate and co-ordinate with teachers with respect to various classroom matters, but does not require the ECE to be in the classroom at all times during the instructional day or tied to the hip of the teacher. Further, the presence of the ECE does not detract from the teacher's duty to instruct and thus is not required for purposes of the Board's duty to provide the minimum period of the instructional program.

OCSTA also emphasized that in the absence of a statutory prohibition otherwise, school boards were free to schedule ECE breaks at times that were pedagogically supported. It may be preferable, for

example, to schedule an ECE break during quiet time, rather than during lunch time or recess when students are busy learning through exploratory play. Although ECEs and teachers work as a team, the ECE-teacher team is not the "functional equivalent" of a teacher in an older grade.

The Crown's submissions complemented those of OCSTA. The Crown asserted that OECTA was reading unsupported requirements into the Act regarding the implementation of the FDK program. The Crown also confirmed that the intention of the legislative amendments that introduced the FDK program was to provide school boards with as much flexibility as possible with respect to its implementation. OECTA's rigid interpretation was not consistent with that intent.

DECISION AND ANALYSIS

Arbitrator Goodfellow "agree[d] with the OCSTA that there is nothing [in the legislation] that suggests that the Board would be in violation of its duty to provide a minimum period of instruction simply because the ECE was taking a break without a replacement." In this regard, the arbitrator ruled that the grievance was dismissed.

As the party asserting a legislative requirement or prohibition, OECTA bore the onus of proving it – but, in the arbitrator's view, had failed to do so. The arbitrator held that the requirement asserted by OECTA is not set out expressly in the Act or regulations. Arbitrator Goodfellow stated:

> Recognizing that delivery of the 300-minute instructional program requires the constant scheduled presence of "teachers", I cannot find the same to be true for ECEs. The Act does not say it, the Regulations do not say it, it does not appear in any policy or guideline, and it is not a feature of any of the materials to which OECTA refers as "context", even assuming I was able to consider them.

He further dismissed OECTA's "functional equivalence" argument, concluding as follows:

> …"functional equivalence" is a theory, described as an inference, chasing a result, that is nowhere provided for. What is needed is not "*functional equivalence*" but legal equivalence – something that would convey a *clear legislative intent* that ECEs and teachers are to be *treated the same* in respect of school boards' 300 minute "instructional program" obligations, and that something is not there.

Arbitrator Goodfellow held that school boards are required to deliver a 300-minute instructional program on each school day at all grade levels, now including JK and K. He stated that delivery of the "instructional program" at other grade levels has been recognized as requiring the continuous scheduled presence of a "teacher". That requirement, however, is tied to the status, qualifications and duties and responsibilities of a "teacher", which include the duty to "teach", to provide "instruction" and to "carry out…the instructional program assigned to the teacher by the principal".

Arbitrator Goodfellow pointed out that these are *not* the duties of an ECE. He stated that the ECE duties, though important, are different. "They are defined as 'cooperating' and 'coordinating' with the 'teacher' with respect to certain matters, which include 'providing education', but which do not include 'teaching', 'instruction' or, indeed, carrying out the 'instructional program'".

He concluded that not only are ECEs not teachers, the two together do not add up to a "teacher" or stand in the shoes of a teacher for the purpose of the 300-minute instructional program.

The arbitrator ruled that the obligations that apply to school boards in respect of teachers and the instructional program have not been made to apply

"Recognizing that delivery of the 300-minute instructional program requires the constant scheduled presence of 'teachers', I cannot find the same to be true for ECEs."

to ECEs and the instructional program. He held that "ECEs and teachers are different statutory creatures with different duties and responsibilities."

He found that teachers are statutorily responsible for instruction while ECEs are not. "In the context of the FDK program, there is simply a new category of educational professional on the scene with whom the teacher is required to coordinate and cooperate, and *vice versa*, in delivering the new educational product."

COMMENT

As a central grievance award, based on interpretation of the Act and regulations, rather than a specific collective agreement, the Goodfellow decision and its reasons may have an impact on school boards throughout the province.

The Goodfellow decision and its reasons may have an impact on school boards throughout the province.

Depending on a school board's individual circumstances – such as whether FDK classes have students of mixed ages, operate bilingually, schedule recess on a staggered basis, or whether adequate replacement supervision is readily available, ECE breaks may be scheduled at a time that is pedagogically and operationally appropriate, provided such breaks are consistent with relevant collective agreements.

We understand that OECTA has made the determination to have this decision judicially reviewed. We will continue to monitor this matter and provide updates as the issue unfolds in Divisional Court.

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Ontario Government Introduces Changes to Executive Compensation in School Boards

In 2014, the Government of Ontario began the process of developing public sector compensation frameworks to ensure a consistent approach to executive compensation. The *Broader Public Sector Executive Compensation Act, 2014* (the "Act") introduced by the Ontario government, applies to all Ontario public sector designated employers, including universities, colleges, hospitals and school boards.

In compliance with the Act and Regulation 304/16 "Executive Compensation Framework" (the "Regulation"), the four trustee associations collaboratively developed a comprehensive proposed executive compensation program to support executive compensation management across the province. This work was completed in consultation with Mercer (Canada) Limited ("Mercer"), an independent consulting firm that specializes in executive compensation.

The introduction of this legislation has led to a number of complex issues. One significant question pertains to the respective roles and responsibilities between the relevant board executives and the board of trustees. Among other things, what is the role of the trustees in approving annual executive compensation for supervisory officers? What are the steps required under the legislation? When will the increases for executives come into effect?

Under earlier legislation, the salaries and other compensation for directors of education, supervisory officers and other designated executives have been frozen since 2010. This legislation, requiring public restraint, has significantly affected the past earnings and future pensions for these important senior administrators.

The proposed executive compensation program developed by the parties is intended to establish a rational compensation approach for executive positions across all Ontario school boards. It recognizes that in the education sector, a fair and responsible executive compensation program is vital for attracting and retaining the innovative leadership required to ensure continued progress in student achievement.

It is also recognizes that there is a need to reduce the compensation compression that exists between executives and principals, as salaries negotiated through collective agreements continued to increase during the compensation freeze, making it difficult to attract individuals to take on executive-level positions.

Mercer reports that during the public sector executive compensation freeze, Canadian salaries typically increased by 2% to 3% annually. Research also indicates that over the past five years, there has been over a 5% change in the consumer price index.

Accordingly, the proposed executive compensation program recognizes that there is a need for internal equity and a common framework across the 72 Ontario school boards.

In applying standards of accountability and complexity, Mercer and other the parties, which included the four trustee associations and the Council of Ontario Directors of Education ("CODE"), developed seven school board levels, with salary ranges for directors, associated directors, and executives (which include supervisory officers) for each level.

The parties recognized the need for individual school boards to have the flexibility and accountability to determine the placement of their specific executives within the base salary range.

The required steps and timelines for this process are set out in the Act, the Regulation, and related directives, letters, and memoranda from the government.[1]

There is a need to reduce the compensation compression that exists between executives and principals.

[1] These additional sources are as follows:

- the Executive Compensation Framework Compliance Report Directive, published on January 23, 2017;
- the Broader Public Sector Executive Compensation Program Directive, issued on June 9, 2017;
- the Broader Public Sector Executive Compensation Guide, updated on June 9, 2017;
- letter from the President of the Treasury Board, Minister Liz Sandals, dated June 9, 2017;
- letter from the Deputy Minister of Education, Bruce Rodrigues, dated June 15, 2017;
- letters from Minister of Education, Mitzie Hunter, to Presidents of School Board Trustee Associations, dated July 24, 2017, August 31, 2017, and September 20, 2017; and
- memorandum from Assistant Deputy Minister of Education, Joshua Paul, to Directors of Education and Senior Business Officials, dated September 20, 2017.

The board of trustees is given considerable authority under the legislation to implement the executive compensation process.

The Ontario Ministry of Education (the "Ministry") required that all school boards develop a proposed compensation program to be submitted to the Ministry for review and approval by September 29, 2017.

SALARY AND PERFORMANCE-RELATED PAY ENVELOPE

Amendments to the Regulation made on June 9, 2017 introduced a "salary and performance-related pay envelope". This pay envelope is an overall cap to the amount of salary (and performance-related pay) that the board may provide to all of its designated executives for a given pay year, which is a period of one year in which the board determines the salary and performance-related pay to be paid to its designated executives.

The board may select a maximum rate of increase to that envelope, which must be approved by the Ministry, and must consider only the following factors:

- The financial priorities and the compensation priorities of the Ontario government, as indicated in a number of public sources;
- Recent executive compensation trends in the Canadian public sector and BPS industries in which the board competes for executives;
- A comparison between the proportions of the board's and the comparator organizations' respective operating budgets used for executive pay;
- The effect on attracting and retaining executive talent of the difference between the designated executives' salary and performance-related pay range and that of the positions reporting to them; and
- Any significant expansion in the operations of the board that is not the result of a significant organizational restructuring.

The maximum rate of increase may only be re-determined if a salary and performance pay cap for a designated executive is recalculated, or if the board provides a designated executive with any (permissible) additional element of compensation.

Increases to the salary and performance-related pay envelope are therefore based on the formula P + (P x R), where P is the total salary and performance-related pay that the board provided to all of its designated executives for the previous pay year (annualized for any vacated positions), and is a rate of increase that does not exceed the approved maximum rate of increase to the pay envelope.

The draft compensation program must include two items related to the salary and performance-related pay envelope: (1) the value of P for the previous pay year, and (2) a proposed maximum rate of increase for the salary and performance-related pay envelope.

The increase is not required to be distributed evenly among executives. Actual annual increases paid to each executive may be more or less than the proposed maximum rate of increase, as long as the board maintains the approved increase within the relevant pay envelope and each executive does not exceed his or her maximum salary range.

SALARY AND PERFORMANCE-RELATED PAY CAP

The Regulation also includes a cap on individual designated executives' salary and performance-related pay, which is a second constraint in addition to the salary and performance-related pay envelope, described above. Any increases to compensation are still subject to the executive's individual pay cap. The pay cap is determined based on an analysis of compensation in appropriate comparator organizations, whereby the position's maximum salary and performance-

related pay may not exceed the 50th percentile of the comparator organizations. Mercer conducted this analysis to create the seven school board levels and corresponding salary ranges.

The board of trustees is accountable for determining the appropriate placement of its designated executives within the base salary range. The following criteria will be considered when determining their placement in the base salary range:

- The scope of the executive work, including the accountabilities and complexities of the position;
- External public sector comparators and internal school board comparators; and
- The tenure, experience and other individual characteristics of incumbents.

PROCESS TO FINALIZE THE EXECUTIVE COMPENSATION PROGRAM

The board of trustees is given considerable authority under the legislation to implement and enforce the executive compensation process. It is clear the Ministry may request further information after it reviews the draft compensation program.

The process that school boards are required to follow includes:

1. Following submission of the proposed executive compensation program and the additional data, the board of trustees must provide any further information requested by the Ministry based on its review of the draft compensation program. The Ministry has indicated that the submissions will be carefully assessed for completeness and compliance.
2. The Ministry will also provide feedback to the board, which will primarily focus on the board's proposed maximum rate of increase for its pay envelope. The board must address the government feedback, and obtain confirmation from the Ministry to proceed with public consultation. The Ministry may also direct the board to resubmit a proposed compensation program after addressing comments.
3. The board will notify the Ministry at least two days prior to posting the proposed program for public consultation.
4. The board must post the draft executive compensation program on its public-facing website for at least 30 days, allowing reasonable opportunity for the public to comment. The board should establish a process for collecting, tracking, and retaining comments.
5. The board will address relevant public feedback in its proposed executive compensation program, submit an updated draft of the executive compensation program to the Ministry, and provide a summary of the public feedback received. The summary should include the following:
    a. The total number of comments received;
    b. The number of comments that were generally supportive of the proposed executive compensation program and the number of comments that were not;
    c. The name of any organizations that commented;
    d. A summary of any common themes; and,
    e. If necessary, what the designated employer did to address the feedback.
6. The board must obtain the Ministry's approval of the executive compensation program, including the proposed maximum rate of increase to the compensation envelope.

The board must post the draft executive compensation program on its public website for at least 30 days.

7. The board of trustees will determine whether to adopt the final draft of the executive compensation program.
8. Once approved, the board must post the finalized executive compensation program on its public-facing website.
9. Once posted, the executive compensation program becomes effective.

COMMENT

Across the province, the Ministry will be providing directives to individual boards regarding the status of their proposed executive compensation programs.

Following the September 29, 2017 deadline for the submission of local board executive compensation programs, there has been ongoing dialogue among government, the four trustee associations and CODE, with all parties continuing to support the approved framework.

As a result of the discussions over the past few weeks, the government has signalled a willingness to commit to the following:

- Local executive compensation programs that are approved, finalized and posted by February 28, 2018, will be retroactive to September 1, 2017.
- Boards will receive a written response to their proposed local executive compensation programs by November 3, 2017. Where a proposal is not approved, specific feedback should be provided.
- The government is committed to increasing the funding to the GSN benchmarks by up to 5% for this school year and intend to do so for the following two years as well.

School boards need highly skilled, thoughtful and engaged leaders to lead their organizations in providing, promoting, and enhancing publicly funded education. Many school boards in the province have recently faced challenges of recruitment in key executive areas of the organization. In this regard, a competitive and fair executive compensation program is vital for attracting and retaining talented leadership required to ensure student success in our schools.

Local executive compensation programs that are posted by February 28, 2018, will be retroactive to September 1, 2017.

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Tribunal Rules That Requests for Guide Dog in Classroom Must Be Assessed Based on Each Student's Educational Needs

On August 30, 2017, the Human Rights Tribunal for Ontario ("HRTO") released its decision in *J.F. v Waterloo Catholic District School Board,* 2017 HRTO 1121. The HRTO held that the respondent Waterloo Catholic District School Board (the "Board") did not adversely impact the applicant's meaningful access to education by denying a request that his guide dog be permitted to accompany him in class. In making this decision, the HRTO affirmed that disability-related accommodations, such as the use of guide dogs, must be determined based on the particular needs of each student.

BACKGROUND

The human rights complaint was filed by C.F., on behalf of his son, J.F., an elementary school student diagnosed with Autism Spectrum Disorder ("ASD"). In an effort to control J.F.'s emotional outbursts and tendency to bolt from their home, his parents applied and were accepted into the Autism Assistance Guide Dog Program. During the 2014/2015 school year, C.F. made a request to the principal and special education teacher at J.F.'s school that the guide dog be permitted to accompany him in class.

After reviewing the Board's policies, the principal informed C.F. that his son would likely not qualify to have the guide dog attend his classes. Some months later, C.F. followed-up on his request with a formal letter to the superintendent of special education. The superintendent arranged for a case conference between J.F.'s parents and those working with J.F. at the school.

The meeting demonstrated that there was a disconnect between J.F.'s behaviour at home and what he was exhibiting in the classroom. The Board's focus was on J.F.'s classroom behaviour and assessing whether the guide dog's presence at school was necessary for him to access the curriculum. As part of its investigation, the Board arranged for a behavioural team to perform an independent assessment of J.F. in the classroom environment.

In a meeting on March 10, 2016, the Board informed J.F.'s parents that they could not identify any need for the guide dog in the classroom. Both the staff working with J.F. at school and the independent behavioural assessment team observed that "the applicant was experiencing academic success and socializing well". The Board stated that they would continue to provide the supports currently in place to address J.F.'s social skills but the guide dog would not be accommodated.

J.F. and his parents filed an application with the HRTO alleging discrimination on the basis of disability and failure to provide reasonable accommodation.

THE HRTO'S DECISION

The HRTO referred to the Supreme Court of Canada's decision in *Moore v British Columbia (Education),* 2012 SCC 61, which confirmed that

The HRTO dismissed the applicant's allegation that the Board failed to meet its procedural duty to accommodate.

to demonstrate *prima facie* discrimination in the delivery of educational services, the applicant must show:

(a) he has a characteristic protected from discrimination;

(b) he has experienced an adverse impact with respect to the decisions or actions of the respondent in the delivery of education services; and

(c) the protected characteristic was a factor in the adverse impact.

The decision turned on whether the applicant's meaningful access to education was adversely impacted when the Board refused to grant his accommodation request.

School boards must make reasonable efforts to ensure that all students have meaningful access to educational services.

The HRTO dismissed the applicant's allegation that the Board failed to meet its procedural duty to accommodate. The Board took timely and thorough action to investigate J.F.'s needs and behaviours in the classroom. The multiple meetings with J.F.'s parents and the behavioural team's independent assessment were necessary and important steps taken by the Board in fulfilling its procedural duty.

The HRTO also found that the Board had fulfilled its substantive duty to accommodate. The HRTO based this decision on the evidence specific to J.F.'s educational needs in the classroom. While the HRTO accepted evidence presented by the applicant's witnesses that the guide dog has had a positive impact on J.F.'s behaviours, the Board's evidence was preferred because their witnesses' conclusions were based on actual observations of J.F. in the classroom. The Board's evidence demonstrated that J.F. was performing well academically. The "bolting" behaviours identified by his parents were not exhibited at school and J.F.'s safety was not a concern. Further, the Board's witnesses consistently identified that J.F. was challenged by oral and written comprehension and expression, for which the guide dog would not provide assistance.

The HRTO emphasized the reasonableness of the Board's findings by quoting the mandate and purpose of public education as defined in Ontario's *Education Act,* as follows:

> the evidence demonstrates that the supports and strategies that the respondent has provided to accommodate his disability related needs are providing him "the opportunity to realize [his] potential and develop into [a] highly skilled, knowledgeable, caring citizen who contribute[s] to [his] society, a defined purpose of Ontario's *Education Act.*"

In conclusion, the HRTO decided that the Board's refusal to accommodate J.F.'s request that his guide dog accompany him in class did not adversely impact his meaningful access to education.

COMMENT

This decision affirms the principle that school boards must make reasonable efforts to ensure that all students have meaningful access to educational services. This case serves as an example of circumstances where a school board used timely and thorough investigative measures to assess whether a student required a particular accommodation to realize his educational potential. The HRTO confirms that these decisions should be made on an individual case-by-case basis, grounded in evidence specific to the disability-related needs of each student.

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Nova Scotia Introduces New Cyberbullying Legislation

As schools, parents and students continue to struggle against cyberbullying on a daily basis, government and the courts are also responding to an increased demand for protections for victims of cyberbullying. Nova Scotia is the latest Canadian jurisdiction to address cyberbullying issues through new provincial legislation.

In 2013, Nova Scotia became the first province in Canada to implement legislation aimed at protecting victims of cyberbullying when it introduced the *Cyber Safety Act*. However, in December 2015, the Supreme Court of Nova Scotia struck down the legislation stating that it was contrary to the *Canadian Charter of Rights and Freedoms* because it violated protections guaranteeing freedom of expression and an individual's right to life, liberty and security of the person.

On October 5, 2017, in another effort to implement cyberbullying legislation, Nova Scotia introduced Bill 27, the *Intimate Images and Cyber-protection Act* ("Bill 27"), which would create civil remedies in cases involving cyberbullying and the distribution of intimate images without consent.

Bill 27 has a narrower definition of cyberbullying than the *Cyber Safety Act.* Specifically, it defines cyberbullying as follows:

> "cyber-bullying" means an electronic communication, direct or indirect, that causes or is likely to cause harm to another individual's health or well-being where the person responsible for the communication maliciously intended to cause harm to another individual's health or well-being or was reckless with regard to the risk of harm to another individuals' health or well-being, and may include:
>
> (i) Creating a web page, blog or profile in which the creator assumes the identity of another person,
>
> (ii) Impersonating another person as the author of content or a message,
>
> (iii) Disclosure of sensitive personal facts or breach of confidence,
>
> (iv) Threats, intimidation or menacing conduct,
>
> (v) Communications that are grossly offensive, indecent or obscene,
>
> (vi) Communications that are harassment,
>
> (vii) Making a false allegation,
>
> (viii Communications that incite or encourage another person to commit suicide,
>
> (ix) Communications that denigrate another person because of any prohibited ground of discrimination listed in Section 5 of the *Human Rights Act*, or
>
> (x) Communications that incite or encourage another person to do any of the foregoing.

Bill 27 further confirms that a person depicted in an intimate image does not lose his or her right to privacy where the person provides an image to someone, and the recipient of the image knows or ought to know that the image is not to be distributed to any other person.

Bill 27 would create civil remedies in cases involving cyberbullying and distribution of intimate images without consent.

Under Bill 27, a person, or the parent or guardian of a minor person, may apply to the Supreme Court of Nova Scotia (the "Court") for an order if he or she has been depicted in an intimate image distributed without consent or has been a victim of cyberbullying. Bill 27 would provide the Court with a broad set of remedies. For example, the Court may make an order prohibiting a person from distributing the intimate image, from making communications that are representative of cyberbullying, or from making future contact with the victim or another person. The Court may also order a person to pay general, aggravated or punitive damages to an applicant.

We note that Bill 27 was passed and received Royal Assent on October 26, 2017. We will continue to monitor whether the legislation becomes subject to a similar court challenge as its earlier iteration regarding its compliance with the *Charter of Rights and Freedoms.*

There are a growing number of incidents of cyberbullying involving students across Canada.

Another test of the law's value will be developed through case law. One could reasonably expect that the Court will provide judicial interpretation on both the enforceability and the scope of the legislation. In addition, applications to the Court will provide interpretation of key concepts, such as what constitutes harm to an individual's health and well-being and what may constitute consent to distribute intimate images.

PROSECUTION UNDER THE *CRIMINAL CODE*

There are a growing number of incidents of cyberbullying and distribution of intimate images involving students across Canada. One recent Nova Scotia case has received significant media attention. Between December 1, 2014 and May 12, 2015, six male high school students in Bridgewater, Nova Scotia (the "Youth") uploaded dozens of intimate pictures of female high school students to two online Dropbox accounts. The Youth, all of whom were under 18 years of age at the time the photos were distributed, were charged in July 2016 under federal *Criminal Code* provisions enacted in 2015 that make the non-consensual sharing of intimate images a criminal offence.[1]

In March 2017, the Youth pleaded guilty to sharing intimate images of teenage girls without their consent. At the sentencing hearing in September 2017, the Provincial Court of Nova Scotia gave the Youth conditional discharges, which means they must follow court-imposed conditions for nine months and their youth records will be erased three years from the date they pleaded guilty. The conditions include performing community service and attending counseling. The judge acknowledged at the sentencing hearing that the Youth had made individual expressions of remorse and accepted responsibility for what they did.

The judge took issue, however, with the defence counsels' submissions that the girls should have known that the intimate photos they shared through social media may be saved and/or shared. The judge stated that "Such thinking and such comments hearken back to a time of sexual stereotyping that anyone who has been offended against sexually must have put themselves in that position."[2] In fact, the girls depicted in the photos, who ranged in age from 13 to 17, testified as to the reason and circumstances in which they shared an intimate photo with the Youth, including that they felt pressured by repeated requests and that they were assured the images would not be shared.

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[1] *Criminal Code,* RSC 1985, cC-46, s 162.1.

[2] Aly Thomson, "Nova Scotia teens charges in naked photo ring case handed conditional discharges", *The Globe and Mail* (September 6, 2017), online: https://beta.theglobeandmail.com/news/national/nova-scotia-teens-charged-in-naked-photo-ring-case-handed-conditional-discharges/article36181892/?ref=http://www.theglobeandmail.com&.

The Nova Scotia case was one of the first, and largest, prosecutions involving the *Criminal Code* cyberbullying provisions to date.

COMMENT

The prosecutions under the 2015 cyberbullying amendments to the *Criminal Code* and Bill 27 demonstrate Nova Scotia's commitment to establishing legislative and judicial mechanisms to counter cyberbullying. Bill 27 proposes to provide legal processes and remedies through which victims of cyberbullying may have recourse against cyberbullies. However, it remains to be seen if the *Criminal Code* and/or Bill 27 (if passed) will effectively deter students from cyberbullying and/or distributing intimate photos without consent. Parents, teachers and other members of the school community should continue to educate students about the consequences of cyberbullying and distributing intimate images of others, including the legal risks involved.

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Parents, teachers and others should continue to educate students about the consequences of cyberbullying and distributing intimate images of others.

Ontario Government Introduces Cannabis Legislation

On November 1, 2017, the Ontario government introduced Bill 174, the *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017* ("Bill 174"). Bill 174 contains the *Cannabis Act, 2017*, new legislation that will govern the lawful use and retail of "recreational cannabis" in Ontario. As reported in the Summer 2017 edition of the Education Law Newsletter, the federal government's *Cannabis Act*, introduced on April 13, 2017, would provide Canadians with legal access to cannabis by July 1, 2018. However, provincial governments would have to make corresponding legislative and policy changes with respect to cannabis use and retail sales to give real effect to the *Cannabis Act*. Bill 174 is Ontario's response to the legal access regime being put into place by the federal government under the *Cannabis Act*.

CURRENT STATUS OF RECREATIONAL CANNABIS USE AND SALE

Currently, the *Controlled Drugs and Substances Act* makes it a criminal offence to produce, buy, sell, possess or traffic in cannabis, except where access to cannabis is permitted for medical purposes. Bill C-45, the *Cannabis Act*, would create new rules for the production, distribution, sale and possession of cannabis in Canada. Bill C-45, if passed, will come into force no later than July 1, 2018. The *Cannabis Act* passed 2nd Reading in Parliament on June 8, 2017 and was referred to the Standing Committee on Health. The Committee reported to the House of Commons with some proposed minor amendments to the *Cannabis Act* on October 5, 2017.

Also introduced on April 13, 2017 was Bill C-46, an Act that would amend the *Criminal Code* to include new provisions that address drug-impaired driving. Bill C-46 passed 3rd Reading on October 31, 2017 and is presently being considered by the Senate at the 1st Reading stage. Until Bill C-45 and Bill C-46 are passed and come into force, all laws respecting cannabis remain in effect.

ONTARIO'S PROPOSED CANNABIS LEGISLATION

The Ontario government intends to regulate cannabis use and sale through provincial legislation, first and foremost of which is the *Cannabis Act, 2017* introduced on November 1, 2017. The *Cannabis Act, 2017*, if passed, will establish the following rules in Ontario:[1]

1. In Ontario, the minimum age to use, buy, possess and cultivate cannabis will be 19.
2. Cannabis use will be prohibited in public places, workplaces and motor vehicles. This prohibition would include schools.
3. The Liquor Control Board of Ontario will oversee the retail sales of cannabis in Ontario by establishing the Ontario Cannabis Retail Corporation. There will be at least 150 stand-alone retail stores by 2020, and online retail sales from July 2018 onward. All cannabis sold in Ontario will be obtained from the federally licensed commercial cannabis producers who are authorized to sell cannabis to individuals with a legal prescription under the federal *Access to Cannabis for Medical Purposes Regulations*.
4. The illegal cannabis "dispensaries" and "clubs" will not be considered legal retailers and will be subject to new provincial offences and strict penalties.
5. Regulate smoking and vaping through a new *Smoke-Free Ontario Act, 2017*.

The Ontario government has indicated that it intends to regulate youth possession.

YOUTH POSSESSION

The *Cannabis Act* specifically provides that youth under age 18 would not face criminal prosecution for possessing or distributing up to 5 grams of dried cannabis or its equivalent.[2] However, the federal government has effectively decriminalized minor possession by youth, while leaving it open to the provincial governments to regulate youth possession through ticketing and/or confiscation.

Indeed, the Ontario government has indicated that it intends to regulate youth possession.[3] If the *Cannabis Act, 2017* is passed, Ontario youth under age 19 would be prohibited from possessing, consuming, attempting to purchase, purchasing or distributing cannabis. Further, no one under age 19 would be permitted to cultivate, propagate or harvest cannabis (or offer to do any of those activities for others). Police would be permitted to confiscate cannabis in connection with an offence, including any cannabis that is found in the possession of youth under age 19.

Police will also have the authority to refer a potential young offender to an "approved youth education or prevention program". Prosecutors will have a similar authority when exercising their power to stay a provincial offences proceeding or in withdrawing a charge. The *Cannabis Act, 2017* authorizes the Attorney General to approve education or prevention programs and will list such programs on a publicly available website.

WHAT'S NEXT FOR SCHOOLS

The Ontario government has stated that it will be consulting with municipalities to determine appropriate locations for new retail cannabis outlets. There is no indication that they will be consulting specifically with school boards or independent schools.

We confirm that the changes resulting from the *Cannabis Act*, and the new Ontario *Cannabis Act, 2017*, do not give students a right to bring cannabis to school, however small the amount. Both levels of government have signalled the intention not to charge youth with criminal offences, but rather to confiscate cannabis and

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[1] Ontario Government News Release, November 1, 2017:https://news.ontario.ca/mag/en/2017/11/ontario-preparing-for-federal-cannabis-legalization.html.

[2] Bill C-45, *Cannabis Act,* 1st Sess, 42nd Parl, 2017, s. 8(1)(c) and s. 9(1)(b)(i).

[3] Ontario Government Backgrounder "Ontario's Plan to Regulate Legalized Cannabis", September 8, 2017: https://news.ontario.ca/mag/en/2017/09/ontarios-plan-to-regulate-legalized-cannabis.html.

spend money on public education campaigns about harm from cannabis use. We expect further details on the content and providers of any approved youth education or prevention programs.

Schools may continue to have policies that prohibit students and others from possessing, using, sharing or selling cannabis at school.

After the federal and Ontario governments pass their respective legislation and any related regulations, school boards and independent schools will need to revise existing policies and procedures to ensure consistency.

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Tribunal Confirms Parents are Required to Participate in Accommodation Process

INTRODUCTION

On May 3, 2017, the Human Rights Tribunal of Ontario (the "Tribunal") released its decision in *Y.B. v Conseil des écoles publiques de l'Est de l'Ontario.*[1] The Tribunal confirmed that a person seeking accommodation of a disability (or the parents acting on behalf of a child with a disability) must participate in the accommodation process. While schools clearly have an obligation to accommodate students with disabilities, the student and their parents or guardians must cooperate in finding a reasonable solution. In *Y.B. v Conseil*, the Tribunal decided that the parents of Y.B. failed to adequately participate in the accommodation process. Their Tribunal application against the school board was dismissed.

The duty to accommodate is not a one-sided process.

THE DUTY TO ACCOMMODATE STUDENTS WITH DISABILITIES

Section 1 of Ontario's *Human Rights Code* (the "*Code*") states that "[e]very person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of…disability."[2] Subsection 11(2) of the *Code* imposes a duty on service providers, which includes school boards, to accommodate an individual's disability up until the point of undue hardship.[3] Referred to as the "duty to accommodate," this duty is a positive obligation placed on school boards with respect to accommodating students with disabilities.

The duty to accommodate is not a one-sided process. Accommodation also requires the student with a disability and his/her parents or guardians to participate in the process. The following quote from the Tribunal in *Y.B. v Conseil* is instructive:

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1 2017 HRTO 492 [*Y.B. v Conseil*].
2 RSO 1990, c H19.
3 *Ibid.*

> …accommodation is a collaborative process. All parties involved must participate in good faith in the search to find a reasonable solution. While the respondents must show that they attempted to accommodate the applicant's disability, the applicant must also show that he cooperated in that accommodation process.[4]

The duty to accommodate involves both procedural and substantive components. The substantive component involves the type of accommodation provided. The procedural component, which was at issue in *Y.B. v Conseil,* involves taking adequate steps to explore what accommodation is needed and assessing accommodation options.[5] This includes obtaining all relevant information about a disability, if it is readily available.[6] A person seeking accommodation must cooperate in the identification and implementation of reasonable accommodation.[7]

A person seeking accommodation must cooperate in the implementation of reasonable accommodation.

FACTS BEFORE THE TRIBUNAL

In December 2013, Y.B. was suspended from school. He did not return to classes after the holiday break on January 6, 2014. On January 16, Y.B.'s father met with the superintendent to discuss Y.B.'s reintegration into school. The meeting was ultimately not successful.

Following the meeting, there were a number of emails between Y.B.'s parents and the superintendent. On January 18, Y.B.'s parents sent an email to the school saying:

> Because [Y] is sick at present, we are going to take him to a medical appointment and see with his doctor whether he will be able to write his [January] exams at the beginning of the week, and please let us know the suggestion that he write his exams at [another school] and the possibility of sending us his homework.

The superintendent replied on the same day, asking for a medical certificate and offering home instruction if Y.B. was going to be absent for an extended period. A few days later, Y.B.'s father sent the superintendent an email stating that his son's health would be determined by a health professional and that he would advise when he had any news. Much of this email had to do with Y.B.'s suspension. The superintendent responded that same day:

> I hope that your son [Y]'s health has improved. We have not received a medical certificate from you explaining [Y]'s absence. Our offer to accommodate [Y] on a modified timetable for writing his exams is still possible…I would remind you that exams end this Thursday, January 23, 2014, and that [Y] has 4 exams to write…I will await your reply to this offer.

A medical certificate was then sent from Y.B.'s doctor to the school on January 22. On January 28, the superintendent emailed Y.B.'s mother, again offering home instruction to Y.B. Y.B.'s mother responded, saying "He still had to continue his appointments and examinations with the specialists this week, and we will act on their recommendations about his ability to continue his studies or how to continue them. We will contact you when there is news."

There was no communication between the parties until February 26, when Y.B.'s mother wrote to the superintendent inquiring about Y.B.'s exams and course notes for January. On March 3, the superintendent replied to this email. Y.B.'s mother replied"[Y] needs to receive home instruction as soon as possible, even though he is continuing with his medical appointments. Thank you." The Tribunal determined that this was the first time that home instruction was requested by the family.

On March 6, the superintendent replied to the email, making it clear that home instruction was offered:

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4 *Y.B. v Conseil, supra* note 1 at para 61 citing *MacDonald v Cornwall Public Library,* 2011 HRTO 1323 at para 42.

5 *Ibid* at para 62.

6 *Ibid.*

7 *Ibid* at para 64 citing *Central Okanagan School District No. 23 v Renaud,* [1992] 2 SCR 970.

> When the medical certificate was received in January, we offered you home instruction (because of illness) and we received no reply from you. My notes show that the medical certificate is valid until March 7, 2014. If [Y]'s health permits him to return to school at the end of the break, on March 17, a formal meeting should be held between the school principal, yourself, [Y], and myself, before allowing him to return to school.

On March 14, Y.B.'s mother responded:

> We asked you for home instruction for [Y], you completely ignored us, and we are still asking for home instruction. Every day that has gone be when [Y] has not had home instruction is your responsibility and the responsibility of your director of education, who is well aware that you are in a conflict of interest in [Y]'s case, and she is encouraging you to continue ignoring and discriminating. Also, any days in the future too, if [Y] does not return to school, that is your responsibility, we are waiting for a report from his psychologist and that is why we cannot know when he will return to his public school…"

The superintendent made it clear in a subsequent email that home instruction was offered on January 28, 2014 and that a request for home instruction was not received until March 3, two days before March break. A transfer request was then received by Y.B.'s secondary school on April 1, and Y.B was registered in another school board.

ISSUE BEFORE THE TRIBUNAL

The main issue before the Tribunal was whether the school board met its procedural obligations required under its duty to accommodate Y.B. The parents alleged that the school board failed to accommodate Y.B.'s alleged disability from January 6, 2014 until the end of the second semester by not providing him with home schooling. The Tribunal had to determine, based on the evidence, when Y.B.'s parents requested home instruction from the school board, whether the school board satisfied the duty to accommodate, and whether the parents cooperated in the process.

The Tribunal found in favour of the school board, determining that Y.B.'s parents did not request home instruction until March 3 and that the school board had proposed it as a solution on a number of previous occasions.

The school board was found to have met its obligations under the duty to accommodate. The parents of Y.B., however, were found not to have been cooperative. The Tribunal made the following conclusion with respect to the parents' conduct:

[p]arents or legal guardians are not excused from their responsibilities to the accommodation process when they act on behalf of their child. The parents were responsible for the applicant, and had a role to play in the accommodation process. Their refusal to respond to the respondents' communications did not allow the school to determine whether home instruction was the appropriate accommodation in the circumstances. It is because of their failure to cooperate that the Conseil was unable to explore and deliver appropriate accommodation…if the service provider makes a reasonable proposal of a course of action intended to facilitate this process, the applicant has an obligation to participate to the extent necessary.[8]

The school board was found to have met its obligations under the duty to accommodate.

COMMENT

While a school board has a positive obligation to accommodate a student with a disability to the point of undue hardship, the Tribunal's decision in *Y.B. v Conseil* demonstrates that reasonable participation in the accommodation process is required of the student and his/her parents or guardians. When a school board is faced with a difficult and uncooperative party in the accommodation process, offering a reasonable solution can allow the school board to fulfill its procedural obligations under the duty to accommodate.

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[8] *Ibid* at para 86.

New WSIB Policies on Chronic and Traumatic Mental Stress Coming into Effect

On May 17, 2017, the Ontario government passed Bill 127, *Stronger, Healthier Ontario Act (Budget Measures), 2017.* By amending section 13 of the *Workplace Safety and Insurance Act, 1997* (WSIA), Bill 127 provides that workers are entitled to benefits under their insurance plan for chronic and traumatic mental stress arising out of and in the course of employment.

A traumatic event may be a result of a criminal act or a horrific accident.

CHRONIC MENTAL STRESS POLICY

Applying to accidents on or after January 1, 2018, the new WSIB Operational Policy Manual (OPM) document 15-03-14, *Chronic Mental Stress,*[1] entitles a worker to benefits for chronic mental stress arising out of and in the course of the worker's employment. However, a worker is not entitled to benefits for chronic mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker, or to terminate his/her employment.

According to this policy, a worker will generally be entitled to benefits for chronic mental stress if an appropriately diagnosed mental stress injury is caused by a substantial work-related stressor arising out of and in the course of the worker's employment. In order to consider entitlement for chronic mental stress, the WSIB decision-maker must be able to identify the event(s) which are alleged to have caused the chronic mental stress. In the WSIB Work-Related Chronic Mental Stress Policy consultation document, the WSIB provides some illustrative examples of what would and would not qualify for benefits under these new policies. One of the examples given by the WSIB is "a teacher that is the subject of demeaning comments from her vice-principal on a regular basis, quite often in front of her teaching colleagues and develops an anxiety disorder as a result, would likely be entitled to benefits."[2] The teacher in the WSIB example would also have to meet the conditions for WSIB benefits set out above, including the requirement to have a diagnosis from a regulated health professional.

TRAUMATIC MENTAL STRESS POLICY

Applying to accidents on or after January 1, 2018, the new WSIB OPM document 15-03-02, *Traumatic Mental Stress*,[3] entitles a worker to benefits for traumatic mental stress arising out of and in the course of the worker's employment. However, a worker is not entitled to benefits for traumatic mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision

[1] Workplace Safety Insurance Board, "Policy 15-03-14, Chronic Mental Stress", online: <http://www.wsib.on.ca/WSIBPortal/>.

[2] Workplace Safety Insurance Board, "Work-Related Chronic Mental Stress Policy Consultation", online: <http://www.wsib.on.ca/WSIBPortal/, at page 2.

[3] Workplace Safety Insurance Board, "Policy 15-03-02, Traumatic Mental Stress", online: <http://www.wsib.on.ca/WSIBPortal/>.

to change the work to be performed or the working conditions, to discipline the worker, or to terminate the employment.

According to this policy, a worker will generally be entitled to benefits for traumatic mental stress if an appropriately diagnosed mental stress injury is caused by one or more traumatic events arising out of and in the course of the worker's employment. A traumatic event may be a result of a criminal act or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member or others. Traumatic events include, but are not limited to:

- witnessing a fatality or a horrific accident;
- witnessing or being the object of an armed robbery;
- witnessing or being the object of a hostage-taking;
- being the object of physical violence;
- being the object of death threats;
- being the object of threats of physical violence where the worker believes the threats are serious and harmful to self or others (e.g., bomb threats or confronted with a weapon);
- being the object of workplace harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse); and
- being the object of workplace harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment; causing the worker to do something dangerous).

In all traumatic mental stress cases, the WSIB decision-maker must be satisfied, on a balance of probabilities, that the traumatic event(s) or the cumulative effect of a series of traumatic events arose out of and in the course of the worker's employment, and caused, or significantly contributed to, an appropriately diagnosed mental stress injury.

COMMENT

Three conditions need to be met for a person to be entitled to WSIB benefits under these new policies:

1. an appropriate regulated health professional, such as a family physician, provides a diagnosis based on the Diagnostic and Statistical Manual of Mental Disorders (DSM);
2. the person has experienced a substantial work-related stressor(s), such as workplace bullying or harassment; and
3. the work-related stressor(s) was the predominant cause of the appropriately diagnosed mental stress injury.

The legislative changes and WSIB policies come into effect on January 1, 2018. Employees who first seek medical attention or are diagnosed with a work-related chronic mental stress disorder or traumatic mental stress disorder on or after January 1, 2018 may therefore be entitled to benefits under the change in legislation and WSIB policy. We will continue to monitor these legislative changes and the implementation of the WSIB policy in the education sector.

The legislative changes and WSIB policies come into effect on January 1, 2018.

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