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Education Law Newsletter

— March 2018 —

IN THIS ISSUE —

Inclusive and non-discriminatory education programs outweigh religious accommodation

In *E.T. v. Hamilton-Wentworth District School Board* (2017 ONCA 893), the Ontario Court of Appeal dismissed an appeal brought by E.T. (a father of two primary school-aged children), alleging violation of his right to freedom of religion. The trial judge's decision was discussed in the March 2017 Education Law Newsletter.

E.T. advised the Hamilton-Wentworth District School Board (the "board") that his religious beliefs required him to shelter his children from "false teachings." E.T. asked the board to provide him with advance notice anytime his children would be involved in or exposed to activities or instruction on a list of matters including: "instruction in sex education" and "discussion or portrayals of homosexual/ bisexual conduct and relationships and/or transgenderism as natural, healthy or acceptable". E.T. required advance notice so that he could decide whether or not to withdraw his children from those classes or activities.

The board offered to exempt E.T.'s children from the human development and sexual health segment of the curriculum. However, the

board denied E.T.'s request for advance notice on the following grounds:

(1) given the integrated nature of its program and the generality of the items on his list, it was neither practical nor possible to comply with his request; and

(2) the board's policy of providing an inclusive and non-discriminatory program would be undermined if E.T.'s children were required to leave the classroom every time one of these topics came up for discussion.

E.T. brought an application seeking declaratory relief. He asserted that his parental authority over the education of his children had been denied and that his right to freedom of religion was violated by the board's failure to accommodate his request. He also asserted a claim of religious discrimination and a violation of the *Education Act* (R.S.O. 1990, c. E.2). The trial judge dismissed E.T.'s application.

E.T. appealed the decision, arguing that the application judge erred in refusing his request for advance notification. His central submission on appeal was that his and his children's freedom of religion had been violated. The Court of Appeal dismissed E.T.'s appeal.

Justice Sharpe, in his concurring judgement, found that E.T. had failed to establish an interference or violation of his religious freedom. Justice Sharpe accepted that E.T.'s belief that he has an obligation to keep his children from being exposed to "false teachings" was sincere. However, he noted that an infringement on the right to religious freedom cannot be established without objective proof of a substantial interference with the observance of the practice. E.T. had failed to provide proof of a single instance of interference.

Justice Sharpe noted that exposing students who are attending non-denominational public schools to ideas that may challenge or contradict their parent's sincerely-held religious beliefs does not amount to an infringement of religious freedom. Lastly, Justice Sharpe concluded that, even if an interference was proved, the board's decision to deny the requested accommodation was reasonable and proportionate in light of its statutory mandate to promote equity and inclusive education (found at section 169.1 of the *Education Act*).

The majority wrote a concurring judgment and dismissed the appeal on the ground that E.T. had failed to prove substantial interference with his freedom of religion. The majority noted that freedom of religion will not necessarily be violated when a child is exposed to ideas that contradict those of the parent. Some kinds of "cognitive dissonance" can be acceptable. Acceptability will depend on the purpose and effect of the challenged education program and the age of the children involved. If the purpose of the challenged educational program is to undermine religious beliefs, then the program and any decisions made to implement it will violate the right to freedom of religion. E.T. did not establish that the board's decision to refuse accommodation or implement section 169.1 of the *Education Act* was undermining his ability to transmit the precepts of his religion. E.T. also failed to provide evidence that his children had experienced negative teacher value judgments of the sort he feared (i.e. active endorsement of policy materials by teachers).

This decision affirms that boards must make decisions which are reasonable and proportionate in light of their mandate to promote equality and inclusive education. Exposing children to ideas that may challenge or contradict their parent's sincerely-held religious beliefs will not amount to a *Charter* violation. However, a Province's educational requirements cannot be administered in a manner that unreasonably infringes on the right of the parents to teach their children in accordance with their religious convictions. ■

Funding of non-Catholic students in Catholic schools held to be unconstitutional in Saskatchewan

In *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212* (2017 SKQB 109), the Court of Queen's Bench for Saskatchewan ruled that the funding of non-Catholic students in Catholic schools violated section 2(a) (freedom of religion) and 15 (equality) of the *Charter*. Legislative provisions allowing such funding, in Saskatchewan, were considered to be of no force and effect.

In 2003, the Yorkdale School Division decided to close the community school in Theodore, Saskatchewan that served kindergarten to grade eight (8) students. After several unsuccessful efforts to keep the school open, a minority group of Roman Catholics, using the provisions of the *Education Act, 1995* (SS 1995, c E-0.2), successfully petitioned the Minister of Education to form the Theodore Roman Catholic School Division.

The plaintiff, Good Spirit School Division No. 204 ("GSSD"), subsequently brought a *Charter* application alleging that the government's funding of Catholic schools for non-Catholic students was a violation of section 2(a) and section 15 of the *Charter*. GSSD sought a declaration that the legislative provisions which implemented the funding regime at issue were unconstitutional.

At first, the court had to decide whether Catholic schools have a constitutional right to receive funding for non-Catholic students.

GSSD argued that the 1901 Ordinances did not provide Catholic schools a right to receive such funding. GSSD stated that funding non-Catholic students does not honour the purpose of Catholic schools – to protect Catholic traditions when Catholics are the minority in a school attendance area. GSSD further argued that a different purpose is now being served by Catholic schools: Catholic schools have become an alternate school system. Non-Catholic parents are choosing to send their children to Catholic schools because they feel that they are superior to the public system or because of the faith dimension.

The defendants argued that the funding at issue is constitutionally protected under section 93(1) of the *Constitution Act, 1867* and section 17(2) of the *Saskatchewan Act*. After considering the various arguments, the court held that the 1901 Ordinances did not include a right or privilege for Catholic schools to receive funding for non-Catholic students. The court further noted that although public schools and separate schools must be funded without discrimination, section 17(2) does not guarantee that Catholic schools are automatically entitled to equal funding to public schools with disregard to the faith-affiliation of students enrolled.

The court then had to decide whether the government funding at issue infringed sections 2(a) and/or 15 of the *Charter*. The court found that section 2(a) was infringed because the duty of state neutrality was breached. The court stated that when public funds are used to promote the interests of Catholic faith by enabling it to disseminate its teachings to non-Catholic students in a manner denied to other religious groups, the state has infringed its duty of religious neutrality.

The court found a violation of section 15 on the basis that:

(1) when the state violated its duty of religious neutrality, they automatically created a distinction based on the enumerated ground of religion; and

(2) the funding created a discriminatory impact.

The court noted the discriminatory impact as follows:

(1) other faith-based schools, which must charge tuition, are less able to attract non-adherents;

(2) due to a lack of funding, other faith-based schools do not enjoy the same benefits that Catholic schools do; and

(3) funding schools of one faith at public expense but disallowing others implies a message that some faiths are more valued than others.

The court found that the *Charter* violations were not justified under section 1. The legislative provisions providing funding grants to separate schools for students not of the minority faith, in Saskatchewan, were considered of no force and effect.

The defendants have appealed the decision of the Court of Queen's Bench for Saskatchewan. The Saskatchewan government has also introduced legislation to invoke the notwithstanding clause of the *Charter*.

Although this decision is not binding in Ontario, the final outcome could significantly impact education funding nationally. Boards should keep a close eye on this case as it proceeds through the courts. ■

CFSRB finds exclusion is expulsion

DN v. Toronto District School Board (EA s. 311.7), (2017 CFSRB 27), deals with the exclusion of a student.

In June of 2017, DN (the "student") was refused admission to his school pursuant to section 265(1)(m) of the *Education Act* due to an ongoing police investigation relating to allegations of sexual assault. In June and August of 2017, the student's mother was contacted by the Safe and Caring Schools Program to discuss the program and enrollment. The parents refused to enroll the student in the program, and appealed the principal's refusal to admit the student.

In September 2017, the principal of the school advised the student's mother that the refusal to admit was rescinded, and that a 20-school-day suspension dated September 2017 had been issued. The reason given for the suspension was sexual assault. The Toronto District School Board (the "board") did not proceed with the parents' appeal of the refusal to admit because it had been rescinded.

The parents filed an expulsion appeal with the Child and Family Services Review Board ("CFSRB"). The board argued that it had not made a formal decision to expel the student and, as such, there was no expulsion to appeal. The parents argued that the student had been expelled in effect. The parents submitted that, because the principal did not have authority to exclude the student under *Regulation 474/00* (amended by *Regulation 471/07*), the student was suspended in June 2017. They further argued that since more than 20 school days had passed since the suspension, the board could not now expel the student.

The issue in this case was whether the student had been effectively expelled and, if so, whether the CFSRB had jurisdiction to hear the appeal of the expulsion. The CFSRB held that the student had been effectively expelled by the board, and that it had jurisdiction to hear an appeal of the expulsion (although there had not been a hearing to expel the student before a trustee discipline committee).

The CFSRB noted that, under section 265(1)(m) of the *Education Act*, a refusal to admit is a power given to a principal to refuse admission to the principal's school only. In this case, the refusal to admit was not limited to the student's school; the student was prohibited from attending any school of the board. The CFSRB held that refusing admission to all schools was in fact an expulsion by the board.

The incident which gave rise to the refusal to admit in June 2017 was an incident for which a mandatory suspension was required under s. 310 of the *Education Act*. The CFSRB found that the student was suspended from school in June 2017. However, since the suspension was longer than 20 school days, it was to be considered an expulsion and the CFSRB therefore found jurisdiction.

For these reasons, the CFSRB found that the student was not refused admission nor was he suspended. The student was effectively expelled. He was expelled by the respondent when it:

(a) did not locate another school for him to attend after it refused admission to his school;

(b) refused to admit the student to any other school; and

(c) directed him to a program for suspended and expelled students.

This case is instructive to school boards as it demonstrates the willingness of the CFSRB to take a broad view of its own jurisdiction. Boards should seek legal advice when issuing exclusions. ■

City's refusal to ban peanuts upheld

In *F.T. v. Hamilton (City)* (2018 HRTO 165), the Human Rights Tribunal of Ontario ruled that the City of Hamilton did not discriminate against F.T. (the "applicant") when it failed to accede to her father's request to ban the sale of peanuts and products containing peanuts at City-owned recreational facilities.

F.T.'s father (the "litigation guardian") made a request to the City of Hamilton to ban the sale of peanut products at City facilities to accommodate his daughter's peanut allergy. F.T.'s father alleged that F.T. could not attend City facilities where peanut products were sold. After consulting various professionals, the City denied the request.

Subsequently, F.T.'s father brought an application alleging discrimination with respect to services because of disability on behalf of F.T. F.T.'s father alleged that, by not acceding to his request, the City discriminated against his daughter, as it failed to accommodate her. Although no medical evidence was presented, the parties agreed that F.T. had a peanut allergy.

The Tribunal dismissed the Application on the ground that the applicant had failed to establish discrimination. However, the Tribunal still considered whether the City had met its duty to accommodate in the event that it erred in its conclusion.

The Tribunal first considered whether the City's alleged actions had the effect of imposing a burden, obligation or disadvantage on the applicant due to her disability. F.T.'s father submitted that the disadvantage his daughter faced was being excluded from attending events at City facilities where peanut products are sold. The Tribunal was not persuaded that the applicant was unable to attend events at City facilities where peanut products are sold because:

(1) the applicant confirmed that she attended other places where peanut products are consumed (i.e. her home, grandparents' home, grocery stores, movie theatres, and restaurants); and

(2) there was no medical evidence stating a need for her to have peanut products barred from being sold at City facilities.

The Tribunal then considered whether the sale of peanut products amounts to constructive discrimination on the basis that it creates an enhanced risk of an anaphylactic reaction for the applicant. The Tribunal concluded that the applicant had not established "that any risk she may face at the [C]ity's recreational facilities,

taking proper avoidance measures and carrying her epi-pen, excludes or restricts her from participation in events at those facilities".

The Tribunal noted that no professional allergy organization recommends food bans as a measure to avoid anaphylactic reactions, though some support such a ban in limited settings such as daycares and kindergarten. Studies show that food bans may increase the risk of anaphylactic reactions, due to "engendering a false sense of security leading to lax avoidance practices and/or a reluctance or delay in using epi-pens due to a mistaken belief that the allergen cannot have been ingested". The Tribunal noted that it was possible that an individual could touch peanuts with his or her hand, put that hand to his or her mouth and experience an anaphylactic shock. However, this risk was considered hypothetical or speculative and unlikely to occur in reality.

Although the Tribunal found no discriminatory conduct, it still conducted an analysis of the duty to accommodate. The litigation guardian alleged that in order to accommodate his daughter, it was necessary to ban the sale of peanut products at all City facilities. The Tribunal was not persuaded by this argument because the applicant attended other places where peanut products were present and there was no medical evidence stating the necessity for such an accommodation. The Tribunal further noted that the accommodation request was too broad, would not reduce the likelihood of his daughter experiencing an anaphylactic reaction at a City facility and, that accommodation requests cannot be founded on hypothetical or speculative risks. Lastly, the Tribunal noted that the City facilities had reasonable alternate accommodation options in place. For example, their policies allow people with allergies to call guest services, indicate where they will be sitting, and housekeeping and First Aid staff are alerted accordingly.

This case serves as an important reminder that food bans are not always the most effective measure to avoid anaphylactic reactions in schools. Education and avoidance practices are key. The principles in this case are clearly applicable to schools. Boards should review their policies and procedures relating to anaphylactic reactions. ■

SCC rules on the expectation of privacy in electronic communications

In both *R. v. Marakah* (2017 SCC 59) and *R. v. Jones* (2017 SCC 60), the Supreme Court of Canada ("SCC") dealt with the admissibility of electronic text messages into evidence. In both cases, the SCC held that, depending on the circumstances, senders of text messages may have a reasonable expectation of privacy.

In *Marakah*, the police obtained warrants to search the home of the appellant, Marakah, and his accomplice, Winchester. The police seized Marakah's Blackberry and Winchester's iPhone, and found incriminating text messages. At trial, Marakah argued that the text messages should not be admitted against him as they were obtained in violation of his section 8 *Charter* rights. He successfully argued against the admission of the text messages found on his phone. However, the trial judge concluded that Marakah had no standing to argue against the admission of the text messages recovered from Winchester's iPhone. The majority of the Court of Appeal agreed with the trial judge.

The issue before the SCC was whether an accused has standing to challenge the search and seizure of text message conversations stored on another person's cellular phone. The majority noted that, depending on the totality of the circumstances, text messages that have been sent and received may in some cases be protected under section 8 of the *Charter*.

While the cases primarily involve criminal law, the finding could impact on student discipline cases.

The majority held that, in order to claim s. 8 protection, claimants must establish that:

(1) they had a direct interest in the subject matter;

(2) they had a subjective expectation of privacy in the subject matter; and

(3) their subjective expectation of privacy was objectively reasonable.

The court will consider the following factors in determining whether the expectation of privacy was reasonable:

(1) the place where the search was conducted;

(2) the private nature of the subject matter; and

(3) the control over the subject matter.

Although all factors must be considered, no one factor is dispositive of the issue.

The majority concluded that Marakah had standing to challenge the admission of the text messages. The subject matter of the search was identified as Marakah's electronic conversation with Winchester. The court held that:

(1) Marakah had a direct interest in the subject matter as he was a participant in the electronic conversation and the author of the messages that the Crown sought to admit;

(2) he had a subjective expectation of privacy as he testified that he asked Winchester to delete the text messages several times; and

(3) his expectation of privacy was reasonable and supported by all three factors noted above.

The majority held that it was reasonable to expect electronic conversations to remain private as they are capable of revealing a great deal of personal information. The majority stressed that a person does not lose control of information for the purposes of section 8 simply because another person possesses it or can access it. By sending a text message by way of a private medium to a designated person, Marakah was exercising control over the electronic conversation. Even where technological reality deprives an individual of exclusive control, he or she may expect that information to remain safe from state scrutiny.

The majority went on to state that not all communications occurring through an electronic medium will attract a reasonable expectation of privacy. A different result may occur in cases concerning messages posted on social media, conversations occurring in crowded internet chat rooms, or comments posted on online message boards.

The dissent concluded that Marakah could not have had a reasonable expectation of privacy because he had no control over the text message conversations on Winchester's phone. The dissent stressed that control over the subject matter is a crucial factor in assessing an individual's expectation of privacy.

In the companion case of *Jones*, the appellant, Jones, was convicted of several firearms and drug trafficking offences. His conviction rested on records of text messages seized from a Telus account associated with his co-accused. Prior to the commencement of the trial, Jones sought to exclude the text messages on the basis that obtaining them by means of a production order opposed to a wiretap authorization contravened his section 8 *Charter* right. In the section 8 application, Jones relied on the Crown's allegation that he was the author of the text messages, without admitting as much. The lower courts dismissed the application on the basis that Jones had no standing to challenge the production order under section 8 of the *Charter*.

One of the issues the SCC had to decide was whether the appellant had standing to make a section 8 claim. The SCC applied the totality of circumstances analysis discussed in *Marakah* and concluded that Jones had standing to challenge the production order.

The SCC held that Jones: (1) had a direct interest in the subject matter as the electronic messages were capable of describing aspects of his biographic core; and (2) had a subjective expectation of privacy as text messages are private conversations, and he and his co-accused used third-party names to avoid detection or association with the text messages. The SCC then had to decide whether the sender of a text message has a reasonable expectation of privacy in records of that message stored in the service provider's infrastructure. The SCC concluded that it was reasonable for Jones to expect that the text messages he sent would not be shared by a service provider with any parties other than the intended recipient, notwithstanding that he relinquished direct control over those messages. The absence of a contractual policy, or the fact

that the production order targeted a third party did not deprive him of that protection.

Text messages and emails are becoming the preferred means of communication. Boards should ensure that their privacy policies and search and seizure policies address electronic communications. The policies should address what communications the board can access and the circumstances under which the board can use those communications. ■

Small Claims Court applies tort of intrusion upon seclusion

In *Vanderveen v. Waterbridge Media Inc.* (2017 CanLII 77435), the Ontario Small Claims Court confirmed that Ontario law recognizes the tort of intrusion upon seclusion, and expanded the scope of the right to privacy.

The defendant, Waterbridge Media Inc., received a contract to produce a promotional video for a planned residential condominium project in the Westboro neighbourhood of Ottawa. In October 2015, Ms. Vanderveen (the plaintiff) became aware of the promotional video which depicted her jogging in a public area for two seconds. Ms. Vanderveen was shocked, confused and felt that the video "blasted her image to the world" without her consent. She stated that she felt discomfort and anxiety, as the video depicted her in a way that she did not wish to portray herself publicly. She further testified that she recalled seeing the camera during her run and that she shielded her face in an effort to send the message that she did not wish to have her picture taken. Ms. Vanderveen sent several emails to have the video removed. Eventually, the video was taken down from YouTube and the developer's website.

Ms. Vanderveen brought an action for intrusion upon seclusion/invasion of privacy. The court confirmed that Ontario law recognizes a right to bring a civil action for intrusion upon seclusion. In order to establish this cause of action:

(1) the defendant's conduct must be intentional;

(2) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and

(3) a reasonable person must regard the invasion as highly offensive, causing distress, humiliation or anguish.

The court found that the defendant admitted to intentionally filming the plaintiff and that no legal justification existed. The court further held that a reasonable person would regard the invasion as highly offensive, and that the plaintiff had testified as to the distress, humiliation, or anguish it caused her.

The defendant argued that individuals could be photographed in public places without consent and that obtaining consent in such situations was impractical given the high number of people who would be photographed compared to the greatly reduced number that would appear in the edited final product. The court rejected this argument and held that "the important right to privacy prevails over any non-public interest, commercially motivated and deliberately invasive activity".

On the question of damages, the court confirmed that proof of actual loss is not required in an action for intrusion upon seclusion. The court further noted that the damages for this tort have an upper limit of $20,000. The court awarded $4,000 for breach of privacy and an additional $100 for the appropriation of personality.

This decision demonstrates that the scope of the right to privacy continues to expand. Boards must ensure that they have received the appropriate consent before engaging in any kind of photography or videography of staff or students.■

OIPC reviews and applies various exemptions under MFIPPA

In *Near North District School Board (Re)* (2018 CanLII 4541), the Information and Privacy Commissioner of Ontario ("OIPC") dealt with an

appeal of an access decision made by the Near North District School Board (the "board").

The board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (RSO 1990, c. M.56) (MFIPPA) for records pertaining to the requester's child, created and maintained by ten (10) named individuals and any other board employee during a specified time period. The board located approximately 378 pages of records consisting of screen shots of text messages, emails, reports, meeting notes and other correspondence. The board granted partial access claiming the application of various exemptions. The requester appealed the board's decision.

First, the board claimed the personal privacy exemption under s. 14 of *MFIPPA.* The adjudicator noted that, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed. Certain records or parts of records containing names and personal information of other children, a police officer (who was the subject of a complaint), personal email addresses, personal cellular telephone numbers, staff member names, discussions of the performance of staff, and work schedules of staff members, were exempt under s. 14. However, records which contained opinions of others about the appellant, his child and spouse were not considered personal information of the staff. The opinions were considered personal information of the appellant, his child and spouse and were required to be disclosed.

Second, the board claimed the exemption under s. 38(b) of *MFIPPA*. Generally, individuals have a right of access to their own personal information. Under s. 38(b), "where a record contains personal information of both the requester and another individual, and disclosure of the information would be an unjustified invasion of the other individual's personal privacy, the institution may refuse to disclose that information to the requester". The adjudicator excluded personal information of other individuals on the basis that it was highly sensitive and its disclosure could reasonably be expected to cause significant personal distress to the individuals in question.

Third, the board claimed exclusion of certain records under s. 38(a) of *MFIPPA*. Section 38 provides a number of exemptions from the general right of access to one's personal information. Relying on s. 38(a) in conjunction with s. 7(1), the adjudicator excluded certain records on the basis that they contained advice or recommendations made by staff to a decision-maker. Advice and recommendations were distinguished from factual information, opinions and directives to staff. The adjudicator noted that the purpose of s. 7 is to ensure that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.

Next, the board claimed exclusion of certain records under s. 38(a) in conjunction with s. 8 of *MFIPPA* (law enforcement). The adjudicator noted that the law enforcement exemption must be approached in a sensitive manner. It is not enough for the board to take the position that the harms under s. 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter. The board must provide detailed and convincing evidence about the potential for harm if the record is disclosed. The adjudicator held that, in this instance, the board had failed to provide the required evidence.

Lastly, the board claimed exclusion of certain records under s. 38(a) in conjunction with s. 12 (solicitor-client privilege). Certain records were exempt as they set out the legal advice the board would be seeking, and contained direct communications between a solicitor and the board in which legal advice was sought and received.

This case serves as a refresher about the various exemptions a board may claim under *MFIPPA*. It provides direction in respect of the various exemptions and when they may be utilized. Boards should review this case to ensure that their access decisions comply with *MFIPPA*. ■

Professional Development Corner

May 11, 2018

Keel Cottrelle LLP

Special Education / Student Discipline / School Operations

October 11-12, 2018

Osgoode Law School Professional Development

Advanced Issues in Special Education Law

February 21-22, 2019

Osgoode Law School Professional Development

School Law K-12

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