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Canadian Association for the Practical Study of Law in Education

COMMENTS

INFORUM

INTERIM INJUNCTION GRANTED IN SASKATCHEWAN MINORITY LANGUAGE CHARTER CASE CONSEIL SCOLAIRE FRANSASKOIS v. THE GOVERNMENT OF SASKATCHEWAN[1]

Nature of the Dispute and Wording of s.23

In *Conseil Scolaire Fransaskois* v. *the Government of Saskatchewan* (2011), the Conseil Scolaire Fransaskois ("CSF"), l'Association des Parents Fransaskois Inc., Yvan Lebel, and Élizabeth Perreault (the Plaintiffs/the Applicants) brought an action again the Government of Saskatchewan (the Defendant/the Respondent) for declaratory orders and permanent injunctive relief requiring the Defendant to provide sufficient funding to the Province's Francophone minority language school system. The Plaintiffs claimed that their school system had been chronically underfunded since its creation in 1995.

In the interim, the Applicants filed an application seeking an interlocutory mandatory injunction to order the Respondent to immediately provide extra funding to the CSF to meet an anticipated 2.3 million dollar shortfall in its 2011-2012 budget. They also sought funding to cover a newly negotiated local bargaining agreement, to provide staffing for an anticipated student enrolment in the fall of 2011, and to establish a reserve to cover urgent but unforeseen expenditures in the next budget year.

The Plaintiffs claimed that the Government of Saskatchewan had failed to meet its obligations under s. 23 of the *Canadian Charter of Rights and Freedoms*, which provides for minority language educational rights. They alleged the Government had not furnished the CSF with sufficient financial resources to do the job it is mandated to do under the *Charter*. Section 23 of the Charter reads:

(1) Citizens of Canada

> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

> (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
> (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

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PRESIDENT'S MESSAGE

At CAPSLE, we are fond of repeating that we represent and embrace all perspectives in education. The 2012 CAPSLE Conference in Ottawa is now less than two months away. Your volunteer Planning Committee has been very hard at work planning the Conference. April 29 to May 1, 2012 will be days packed with content and fun activities. The Conference Program reflects the diversity of issues in education and the different perspectives within CAPSLE. Just some of the topics that will be presented in the 35 concurrent sessions include: collective bargaining in the public sector; supporting students mental health; freedom of speech for teachers; human rights obligations in the delivery of education services; and social media as an education tool.

Another thing we are fond of repeating at CAPSLE is that our Conference provides a national forum for educators and lawyers from across the country to meet and exchange ideas and views. Part of that exchange involves learning from different experiences in different provinces. Again, the Conference Program provides an opportunity to learn from different experiences in different provinces. Thus, the concurrent sessions include presentations on: the creation of student ombudsman in Quebec; working during a work-to-rule in British Columbia; and a review of 50 plus years of decisions from the Alberta Teachers' Association Professional Conduct Committee.

Since CAPSLE's inception, we have promoted the study and consideration of issues in First Nations education. We are repeating that focus again in Ottawa. Our first plenary session on April 29th (the first day of the Conference) features Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society of Canada and Charlie Angus, Member of Parliament for Timmins- James Bay, who will present on the topic: *Striving for Justice and Fairness in First Nations Education.*

We also like to repeat things in French that were first presented in English and repeat those sessions in English that were first presented in French. As always, but perhaps most appropriate since we will be in Ottawa, we have a number of bilingual presentations planned, including sessions on staff misconduct investigations, teacher performance evaluations, freedom of expression and the above-mentioned human rights obligations in the delivery of education services.

Not to be too repetitive, but as always, Conference participants will get breakfast, lunch and dinner – although not in that order and not on the same day. There will be ample opportunity to socialize with old friends and make new ones. We are repeating the President's Reception on Sunday evening and the gala dinner at the brand new Ottawa Congress Centre on Monday. In addition, the Conference Planning Committee has organized tours of the Supreme Court of Canada and ghost tours at night, which I am assured, are tours of actual haunted places in Ottawa and not a search for the Liberal Party of Canada.

At CAPSLE, we like to repeat ourselves because the issues, friendships and learning that occur at our Conference are worth repeating. The CAPSLE Conference is, without a doubt, the premier education law conference in Canada. The fact that this is our 23rd annual conference is a testament to that fact. See you all in Ottawa!

Robert W. Weir
CAPSLE President

... Inforum continued

The Issues

In hearing the Application, the Saskatchewan's Court of Queen's Bench identified two issues to be addressed. First, the Court had to determine the proper test to apply in deciding whether it should grant an interlocutory order of mandamus in these circumstances. Second, assuming that the test for mandatory interim relief could be met, the Court had to ascertain, what amounts, if any, the government should pay.

Relevant Supreme Court of Canada Jurisprudence

Before responding to the two issues, the Court reviewed, in a cursory fashion, how the s. 23 right to minority language education had evolved since the *Charter* came into effect in 1982. Reference was made to two important Supreme Court of Canada ("SCC") decisions: *Mahe* v. *Alberta* (1990) and *Arsenault-Cameron v. Prince Edward Island* (2000). While referring to the SCC's seminal decision in *Mahe* v. *Alberta* (1990),

Justice Chicoine described the purpose of s. 23, (as previously articulated by the late Chief Justice Dickson), as follows:

> The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.[2]

The Court also noted that s. 23 was "*remedial in nature, designed to correct historical situations where Anglophone and Francophone linguistic minorities were repressed as far as language of instruction in schools was concerned*." In addition, and while drawing on the late Chief Justice's reasoning again, Chicoine J. highlighted the importance of culture with respect to the s. 23 guarantee:

> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication; it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.[3]

Ten years later, in the case of *Arsenault-Cameron v. Prince Edward Island*, the SCC examined the purpose of s. 23 of the *Charter* in the context of an application by a group of francophone parents from the region of Summerside. They sought to have a school facility provided for the education of their children in their own community, rather than bussing the children 30 to 45 minutes each way to a French school in another region. Once again, the Court noted the remedial nature of the s. 23 right and the relationship between language and culture. The Court quoted the following passage from *Arseneau-Cameron*:

> Section 23 imposes a constitutional duty on the province to provide official minority language education to children of s. 23 parents where the numbers warrant. In *Mahe* … this Court affirmed that language rights cannot be separated from a concern for the culture associated with the language and that s. 23 was designed to correct, on a national scale, the historically progressive erosion of official language groups and to give effect to the equal partnership of the two official language groups in the context of education;...Section 23 therefore mandates that provincial governments do whatever is practically possible to preserve and promote minority language education.[4]

Budgetary Considerations

The Court then relied heavily on the affidavit evidence of M. Bernard Roy (the CSF's Director of Education), to illuminate the budgetary realities facing the Province's francophone School Board. Prior to 2002, the basis for financing of the Fransaskois schools was equivalent to that provided to the Anglophone public and separate school systems, being the "*Foundation Operating Grant*". This system was based on a cost per pupil formula and it was supplemented by various sums for educational, administrative, or governance factors as well as transportation and school facility operations. For a number of years, the CSF covered budget deficits by using funds which came from the Federal Government and other sources. In 2002, the Government acknowledged that the CSF's operating budget was underfinanced and it introduced a "francophone factor" which increased the operating grant by eight percent.

By 2003, the CSF had used up most of its reserves to make up its budgetary shortfalls. In 2004, it had commenced a court action against the Government to address what it considered to be chronic underfunding. The action was settled by way of a 1.3 million dollar annual increase in funding. The "francophone factor" was arbitrarily increased to 33 percent, but underfunding persisted due in part to cancellation of other programs which formerly made up part of the foundation operating grant. By February of 2009, the CSF was again threatening to bring a court action to resolve the underfunding issue. However, the matter was resolved when the Government provided a further 4.4 million dollar as part of its transition plan relating to its takeover of property taxation from the public and separate school systems and its stated intention to re-vamp the education financing formulas. With these funds, the CSF was able to balance its 2008-2009 budget and the amount remaining was placed in reserve.

For the 2011-2012 school year, the CSF submitted a budget request of 39 million dollars. The Government refused to approve this budget and requested that the CSF submit a balanced budget of 26 million dollars, representing an increase of $640,000.00 over the previous year's contribution from the Government. This would require a cut of $2.3 million dollars from the amount that would be spent in the 2010-2011 school year of 28.3 million dollars. According to Mr. Roy, these cuts would cause irreparable harm to French education, "*especially considering that the current budget of 28.3 million dollars is already inadequate to enable the CSF to meet its constitutional obligations under s. 23 of the Charter.*"[5] The Court described the impact of the cuts as follows:

> In order to achieve a budget cut of 2.3 million dollars, the CSF estimates that it would have to eliminate or reduce a number of teaching and support staff positions and proceed with program cuts that would seriously impair delivery of educational instruction and services to its students including but not limited to: loss of 12.6 teaching position equivalents; loss of a special needs teacher; elimination of the counseling assistance for families where one or more parents do not speak French; elimination of a payroll clerk position; reduction of six teacher aid positions; elimination of its participation in the International Baccalaureate program; curtailment of professional training; reduction in teacher supervision by the director; reduction of human resources recruitment personnel; elimination of a province-wide graduation program; reduction or elimination of video conferencing and distance education programs; provision of French courses to students not registered in Fransaskois schools who wish to graduate with bilingual designation through the Virtual School program; reduction in training for CSF and school council elected representatives; substantial cuts to transportation subsidies and elimination of bussing within cities.[6]

In April 2011, the CSF met with the Saskatchewan Minister of Education and requested approval of a budget for the next school year of 30.4 million dollars. This request was denied and the current legal action was commenced. The CSF claimed that chronic underfunding has not allowed it to fulfill its constitutional mandate as envisaged by s. 23 of the *Charter*.

The CSF sought additional funding to cover:

a) the cost of implementing a new Local Implementation and Negotiations Committees ("LINC") teacher contract that would come into effect on July 1, 2011, resulting in an increased cost of $700,000.00 per year;
b) the anticipated cost of hiring six additional teachers as a result of a probable increase in student enrolment in the fall of 2011 of 75 to 100 students (at a cost of $435,000.00); and
c) monies needed to replenish its reserves to the amount of $500,000 to respond to unforeseen expenses or emergencies that could arise in the next fiscal year. Some of these could include teacher sick leave or hiring of more support staff due to the anticipated enrolment increase. Interest costs on capital projects may also have had to be paid and there was no other source of funding for this expense.

The Granting of an Interlocutory Order of Mandamus

After considering the relevant jurisprudence, the Court concluded that the threshold test for a mandatory injunction in this case involving a *Charter* issue is whether there is "*a serious question to be tried*" and not the "strong *prima facie* case" test (as had been argued for by the Government of Saskatchewan). The Court then proceeded to the application of the threefold test, set out by the Supreme Court of Canada in *RJR-MacDonal Inc. v. Canada (Attorney General)* (1994)[7], to determine whether the applicants were entitled to an interlocutory order of mandamus in this case.

1) Is there a serious issue to be tried?

The Court had little difficulty in concluding that the Applicants had met this prong of the test. The CSF claimed that chronic underfunding had not allowed it to fulfill its constitutional mandate as contemplated under s. 23 of the *Charter*. It also maintained that the s. 23 right to minority language education was not limited to the provision of educational facilities for primary and secondary school instruction in French, but required the Government to provide financial resources to enable it to promote and preserve the culture associated with the language. As Chicoine J. noted:

> The CSF views this as a triple mandate to preserve and promote the French language, to transmit and reinforce the French culture, and to establish a francophone identity within the community it serves. The CSF suggests that there is no logic in tying its funding to a per pupil formula as was done in the past when it is unable to achieve economies of scale available to the public and separate school systems. It has to operate 15 schools in 12 communities spread throughout the province, most of which have enrolments of less than 100 students. The CSF wants public funding for all of its current programs and others which it believes would assist it to attract more students eligible to receive minority language education[8] .

2) Would the applicants suffer irreparable harm?

The Court ruled that given the budget shortfall of 2.3 million dollars (being the difference between the amount to be expended in the 2010-2011 school year of 28.3 million dollars and the amount which the Government had offered for the 2011-2012 school year of 26 million dollars), there "*is a strong likelihood that the applicants will suffer irreparable harm if the CSF is required to makethe budget cuts described by Mr. Roy in his affidavit*".[9] The Court also indicated that the CSF was not seeking a general increase in its operational funding for the next fiscal year but rather a maintaining of the status quo. Justice Chicoine also highlighted the fact that it would take at least a year before the matter proceeded to trial and a decision was rendered. He then added:

> In the mean time, the budgeted shortfall of 2.3 million dollars for the 2011-2012 school year, if allowed, would have a significant impact on the delivery of services to the Fransaskois schools and their students.[10]

3) Which of the parties would suffer greater harm from the granting or refusal of the remedy?

The Court was convinced that greater harm would befall the CSF if a mandatory injunction were denied than would befall the Government if the remedy were granted, commenting:

> The simple fact is that for the CSF, a cut of 2.3 million dollars is almost a 10 percent reduction in its operating budget. While the court does not presume that the Government has unlimited financial resources, it has not been suggested by anyone that the Government cannot provide some additional funding until this matter is finally decided.[11]

The Court concluded:

> In essence, the balance of inconvenience favoured the applicants since they "are least able to tolerate the budgetary cutback.[12]

Decision

Having concluded that the three prong test for mandatory interim relief had been satisfied, the Court granted interim relief to the Applicants commencing September 1, 2011 and until such time as the matter is finally determined after trial or until further order, or by agreement of the parties[13]. In this respect, the Court had to determine, what amounts, if any, the Government was required to pay. First, Justice Chicoine held that the Government had to cover the budget shortfall of 2.3 million dollars for the 2011-2012 fiscal period from its general revenue fund by way of equal monthly instalments beginning September 1, 2011. Second, the Court denied the Applicants the $700,000.00 remedy they were seeking to fulfill its obligations under the newly negotiated LINC agreement as well as the $450,000.00 to cover the anticipated cost of hiring more teachers because of an enrolment increase. As the Court J. explained:

> The applicants have however failed to convince me that the cost of implementing the LINC agreement and the cost of hiring new staff to cover a possible enrolment increase should be ordered by way of mandatory injunction. The evidence discloses that the Government has undertaken to review funding requests to cover reasonable expenditures resulting from LINC negotiations undertaken by all of the school divisions within the next few weeks. This process should be allowed to run its course. As regards new staff to cover increased enrolment, this is somewhat speculative and is a matter which should be addressed if and when it happens.[14]

Third, the Court ordered the Government to immediately replenish the CSF's reserves to the amount of $500,000.00, noting that the reserves had been depleted

to meet budget shortfalls over the past two years while the Government and the CSF were in the process of negotiating a new funding agreement. Justice Chicoine refused to attach any conditions to payment of these funds, remarking that the CSF had undertaken to use the monies only for emergencies or unforeseen budgetary circumstances. He suggested that drawing on these funds to cover some of the costs associated with implementing the new LINC agreement or to hire extra staff in the event of a significant enrolment increase was permissible.

Implications

This decision, even though it is limited in scope by its interlocutory nature, has the potential to be an important test case for a new chapter in the book of s. 23 jurisprudence. Counsel for the Government of Saskatchewan characterized the statement of claim as a "*radical and unprecedented interpretation of s. 23 of the Charter*." The Government maintains that non-primary and non-secondary school programming, such as day-care, pre-school, full-time kindergarten, community centers and out-of-school cultural and linguistic services, programming for recruitment, development, enrolment, and integration of non-rights holding families (such as immigrants), are not guaranteed by s. 23. After all, government funding is not unlimited. The Applicants take a contrary position, claiming that the right to minority language education is not strictly limited to the provision of educational facilities for primary and secondary school instruction in French. The Government of Saskatchewan, they claim, must do more by furnishing financial resources to allow the Francophone school board to promote and preserve the culture associated with the language. Without this protection, further assimilation and cultural erosion will ensue. It is no surprise that the Court remarked that:

> ..there is a substantial divide between the parties on these issues and that a trial will be required to determine whether the Government has met its constitutional obligation to provide public funding in a measure which enables the CSF to fulfill its mandate under s. 23 of the Charter.[15]

In the interim, the Saskatchewan Court has made it clear in its order that the funding issue cannot be ignored by the Government should it have any intention of dragging its feet on the file. Justice Chicoine reminded the parties that his order covers only the 2011-2012 fiscal period. In the event that the matter has not proceeded to trial or that no new funding agreement has been reached between the CSF and the Government prior to the commencement of the 2012-2013 fiscal year, then either party will have leave to apply to the court - on 14 days notice - for a review of the Court's order based on circumstances then prevailing. Given the seriousness of the issues and the deep divide between the parties, this case may well be before the courts for many years to come.

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1 2011 SKQB 210 (CanLII).
2 *Ibid*, para. 6.
3 *Ibid*., para. 7.
4 *Ibid*., para. 8.
5 *Ibid*., para. 17.
6 *Ibid*.
7 1994 CanLII 117 (S.C.C.).
8 *Supra*, note 1, para. 35
9 *Ibid*., para. 38.
10 *Ibid*., para. 40
11 *Ibid*., para. 43
12 *Ibid*.
13 *Ibid*., para. 45
14 *Ibid*., para. 46.
15 *Ibid*., para. 37.

HEALTH & SAFETY ISSUES FOR TEACHERS: LOOKING BACK AT KENDAL v. ST. PAUL's ROMAN CATHOLIC SCHOOL DIVISION NO. 20[1]

In this 2003 case from Saskatchewan, special education teacher, Joanne Kendal, sought damages from her employer School Division because of an injury she suffered in 1995 when one of her students struck her in the temple with his fist. The student was described as, "*a strong stocky boy standing about 4'8" tall and weighing in the order of the 80 to 90 pounds*". Suffering from Asperger's syndrome, the student was prone to violent tantrums. During these outbursts, the student would kick, bite, hit, pull hair, scratch,

pinch and even try to strangle others (while teachers and other staff would restrain the student and attempt to calm him down). At the time of the teacher's injury, Ms. Kendal had been basically sitting on the student on the floor for 20 minutes and, believing the student to have calmed down, was releasing him when he suddenly hit her. The teacher experienced headaches and nausea which continued for approximately a month. Ms. Kendal took sick leave and, while able to return to work at her previous .5 FTE position, she testified that her health problems have since precluded her from increasing her FTE.

In her lawsuit, the teacher claimed that her employer was negligent in failing to provide a safe work environment. Ms. Kendal contended that this failure was both negligent and a breach of an implied condition of her employment contract. Specifically, the teacher alleged negligence due to the School Division's failure to:

- properly train staff to deal with special circumstances such as the incident involving the student;
- provide proper communication and support procedures to ensure that the student could be handled safely;
- have the student removed when it was apparent that he could not function safely at the school; and
- provide equipment and facilities necessary to safely handle the student.

Under the provisions of the Saskatchewan *Education Act* and Regulations, the School Division was obligated to provide the student with a program of instruction consistent with his educational needs and abilities. The Regulations also required the School Division to assure that the special services were provided by staff with special training, and that appropriate instructional materials, modified facilities and a reduced pupil teacher ratio were made available.

The school in which the teacher worked had a program in place for special needs students, including learning for students designated as autistic. The school had one special education teaching position which was shared by two teachers each working half-time. There were seven teacher assistants. At that time, there were eight special needs students in the school. The school also had a special needs room available for teachers to work with students outside of the regular classroom. The School Division employed an education consultant who designed and developed programs to meet the needs of each special-needs student. The programs were implemented by a team consisting of the education consultant, the school principal, the classroom teacher, the special-education teacher, teacher assistants and parents. It was the special-education teacher's responsibility to implement the program plan, give support to the classroom teacher, and provide individual instruction. When this student enrolled in the school, the education consultant addressed a staff meeting at the school to educate teachers and other staff about the student and the challenges he would present. The student had a teacher assistant assigned to be with him at all times, both in the school (including the classroom) and outside during recess. The student's aggression and concerns for the safety of others were discussed during the implementation team's meetings and one of the team's goals was to learn to anticipate aggressive outbursts and stop them before they occurred.

At trial, the Court determined that the School Division owed a duty of care to the teacher, and that duty of care was the duty owed by an employer to employees generally: "*a duty to take reasonable care to provide and maintain as safe a workplace as is reasonably possible in all circumstances of the particular case*". It is an employer's duty to guard against exposing employees to unreasonable risk of harm, not to all risk of harm. Thus, the question in this case was, was the risk reasonable? Reasonableness of risk varies with the social value of the endeavour. The second question posed here was: was the value of educating this student worth the risk to others at the school? On this point, the Court concluded:

> "Offering every child the same access to education as every other is a noble goal but not always without risk".[2]

In the end, it is the duty of the plaintiff to establish that a breach in the duty of care occurred. In this case, the Court found that the teacher had failed to prove that such a breach did indeed occur. The Court noted that the student was accepted into the school's program, the risks were recognized and steps were taken to ameliorate them[3]. The student had one-on-one supervision at all times. The teachers had special education training. Outside consultants were available. The school space included a separate classroom for the use of special-needs teachers and students. There were individualized programs of instruction and a reduced pupil teacher ratio all as required by the Saskatchewan *Education Act*. The teacher's case was dismissed with cost awarded to the School Division[4].

Our Association often receives phone calls from special-education teachers or classroom teachers who are dealing with special needs students very much like the one central to this case. Those members are often concerned about their

safety. Unfortunately, in the murky world of occupational health and safety, sometimes very little can be done directly to help those teachers who often find themselves on sick leave because of injury or due to the physical consequences of their stressful work situation. There is also nothing in ATA/ school division collective agreements dealing with workplace safety.

Relying on Kendal as a precedent, a teacher may be unable to succeed in a negligence action in such circumstances, unless the teacher is able to demonstrate that the risk to others presented by the student is unreasonable and that the risk is so great that it outweighs the benefit of educating the student in that particular setting. A teacher may have a case where the risks are not properly identified, communicated or ameliorated, or where the applicable legislation/regulations or school division policy around Individual Program Plans (IPPs) is not being followed. With respect to IPPs, this aspect may lead a teacher to a difficult place however, since it is often the special education teacher who has the responsibility for IPP development and implication. It would be unfortunate for a teacher to be arguing that she or he was injured because of their own practice. This principle applies equally to school based administrators who are often called to assist with violent students.

Alberta Teachers' best protection from such unsafe work places may come from the Alberta Teachers' Association's Code of Professional Conduct. Clause 8 requires teachers to "*protest assignment of duties for which the teacher is not qualified or conditions which make it difficult to render professional service*". Such written protest, when delivered to proper officials, not only may protect teachers from legal and professional repercussions in the event of an injury to a student or other staff member, but it also may serve to document the unreasonable risks of a particular situation in any subsequent litigation with the employer. The Court in Kendal observed that the Plaintiff did not register any such protest nor did any of her colleagues or co-workers.

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1 2003 SKQB 214 (CanLII); affirmed SKCA 86 (CanLII).
2 *Ibid*., para. 23.
3 *Ibid*., para. 24.
4 *Ibid*., para. 27.

GRIEVANCE ARBITRATION AWARD

THE ALBERTA TEACHERS' ASSOCIATION – v- EDMONTON PUBLIC SCHOOL DISTRICT NO 7[1]

In the matter of an individual grievance (M Sebulsky) and policy grievance regarding termination of temporary contracts

Summary of the Issue

This dispute arose when the Alberta Teachers' Association ("the Association") learned that the Edmonton School District No 7 ("the District") was utilizing temporary contracts of employment which stipulated the duration of the contract as commencing on a particular date and ending June 30 ***or*** when a continuing or probationary contract teacher required placement within the District. The effect of this language meant that temporary contract teachers could be terminated without notice. The matter first came to light in 2009 when Robert Bisson of the Association wrote to the District expressing a number of concerns about the wording of these contracts of employment. Since that time, the Association and the District have been unable to resolve the concerns about the wording of the contracts.

In December 2011, the dispute was heard before a grievance arbitration panel.

Association Position

The Association argued that the District had contravened the collective agreement because it failed to provide 30 days of notice as outlined in s. 101 of the Alberta *School Act* ("the Act"). Specifically, s. 101 stipulates:

> **101 (1)** A teacher may be employed by a board under a temporary contract of employment when that teacher is employed for the purpose of replacing a teacher who is absent from the teacher'sduties for a period of 20 or more consecutive teaching days.
> **(2)** A temporary contract of employment entered into under subsection (1) shall
> (a) specify the date on which the teacher commences employment with the board, and
> (b) terminate

(i) on the June 30 next following the commencement date specified in the contract, or
(ii) on a date provided for in the contract, whichever is earlier.

(3) Notwithstanding anything contained in a temporary contract of employment, a party to a temporary contract of employment may terminate that contract by giving 30 days' written notice of the termination to the other party to the contract.

(4) Section 132 does not apply to the termination of a temporary contract of employment under this section.

The Association argued that the District, by structuring the duration clauses as it did, deprived temporary teachers of their rights to 30 days of paid work - or payment in lieu of work - when their contracts of employment were terminated. The Association contended that the contracts violated articles 5 (Salary) and 12 (Group Insurance) of the collective agreement. Furthermore, the Association argued that s. 101(2) of the collective agreementis clear in that a specific termination date must be identified within the contract in order for a temporary contract to lapse. Counsel advanced the idea that if the termination of a temporary contract was contingent upon the availability of another teacher at an ambiguous point in time, the Act would have been written differently. Finally, the Association pointed out thatthe requirement to provide 30 days of notice to terminate the temporary contract was an obligation on the part of both the teacher and the District. Essentially, the *"District's practice and interpretation turns temporary teachers into 'glorified substitute teachers' without any security of tenure and is to be rejected"* (para 9). It is ultimately unfair to impose a condition of 30 days' notice on one party without expecting the same to apply to the other party.

School Board Position

The District argued that the Act must be read in its entirety in order to come to a proper conclusion as to the interpretation of s. 101. The District pointed out the primary purpose of the Act is to *"deliver education in a way that meets the 'best educational interests of the student'"* (para 10), as outlined in the preamble of the legislation. The implication of this purpose, argued the District, was that the administration of human resources must allow for flexibility and be fiscally efficient. Further, the District urged the panel to consider the common law principle that *"a contract of employment may validly provide for its own termination upon the happening of an event rather than upon a specific calendar date"* (para 12).

Decision

Arbitrator Wallace upheld the grievance. Wallace accepted the Association's argument that s. 101 of the Act is clear in its meaning rejecting the District's assertion there ought to be provision for particular events which would cause the termination of a temporary contract. Wallace noted:

> "To the extent that there is genuine ambiguity in the statute, it is appropriate to consider the broad educational objects of the statute and to prefer interpretations that clearly advance them over interpretations that do not. But we do not consider that we may use broad educational object of the statute to interpret away a legislated rule that is otherwise expressed in clear language (para 22)."

Wallace also noted the provisions of the *Act* which outline the employment of teachers do so in a fashion which indicates *"escalating levels of commitment of the parties to each other"* (para 26). As such it is *"…discordant with the pattern of these sections to create a category of temporary contract that removes a substitute teacher's freedom to leave an assignment and imposes an obligation to give the Employer 30 days notice, while leaving it open to the Employer to terminate the contract without notice so long as an event or condition stated in the contract occurs"* (para 26).

Remedy

The arbitration panel directed the District to bring its temporary contract language into compliance with the *School Act* and retained jurisdictionover the matterfor a period of one year for the implementation of this change.

Update

The District has filed an application for judicial review of this decision seeking to have the decision overturned.

Lisa Everitt
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Edmonton, Alberta

1 *Alberta Teachers Association v Edmonton School District No 7*, 2011 CanLII 85093 (AB GAA)

HUMAN RIGHTS TRIBUNAL FINDS THAT STUDENTS WITH SPECIAL NEEDS ARE ENTITLED TO REASONABLE – NOT PERFECT – ACCOMMODATIONS

Following from an earlier decision[1] in which the Ontario Human Rights Tribunal ("the Tribunal") ruled that it would not second-guess a student's Identification, Placement and Review Committee ("IPRC") placement, this past summer, the Tribunal released another decision regarding the duty to accommodate students with special needs, also involving the Toronto District School Board ("TDSB"): *L.C. v. Toronto District School Board*[2]. In the same vein as the *Schafer* decision, Vice Chair Sherry Liang in *L.C.* held that the issue is not whether the accommodations provided for the child by the board are what the parents wanted, whether they are the ideal accommodations, or whether other accommodations are more appropriate. The issue is simply whether the school board implemented (generally, but not necessarily as recommended by the IPRC or IEP) accommodations that met the student's special needs.

The case involved a complaint under the Ontario Human Rights Code ("the Code") which was filed by J.L.C., on behalf of her son, L.C. L.C. is a person affected by autism spectrum disorder. L.C. attended a special diagnostic class in kindergarten. In that same school year, an Identification Placement Review Committee ("IPRC") twice identified him as "*exceptional*" in many areas. The IPRC determined that L.C. should be placed in a special education class. However, L.C.'s mother wanted L.C. to attend his home school in a regular class with supports. The TDSB agreed.

Over the next few years, successive IPRCs confirmed L.C.'s identification as "exceptional", indicating that he is a person with both a developmental disability and autism. The IPRCs reiterated that L.C. should be placed in a special education program. However, in accordance with his mother's wishes, L.C. remained in a regular class. When the TDSB began to insist that L.C. attend a special education program, J.L.C. appealed the placement decision to the Special Education Appeal Board and then the Special Education Tribunal ("SET"). Pending the outcome of the SET appeal, L.C. remained at his home school in a regular class with supports. (The SET ultimately confirmed the decision of the IPRC to place him in a special education class).

Notably, the allegations of discrimination in the complaint covered the period of time that L.C. was in a regular classroom, during which the TDSB believed that he would have been better served in special education program. L.C. alleged that the TDSB's programming and supports during this period fell short of its obligations under the *Code*. His central allegation was that the TDSB failed to provide him with competent, continuous and consistent support from a Special Needs Assistant ("SNA"). He also complained that the TDSB: delayed in obtaining a dedicated computer for him; neglected to properly implement a habit (toilet) training program for him; and deprived him of an academic program by having him spend portions of his school day outside the classroom.

With respect to the SNA issue, L.C.'s IEP indicated that he needed full-time support from an SNA. Throughout his time in a regular class, L.C. was provided with one-on-one SNA support. However, a number of different SNAs worked with him. At times, there was one individual in a full-time SNA position, and at other times there were two SNAs in part-time positions. The change in the SNA complement arose from a maternity leave, surplusing of staff, and staff turnover. In addition, because L.C. required significant assistance with toileting, it took some time to find an SNA willing to work with him on a full-time basis. Vice Chair Liang concluded there was no evidence that any of the SNAs hired to support L.C. lacked any qualifications essential to their positions. Furthermore, she concluded that L.C.'s disabilities did not require that he be provided with a single SNA throughout the school day in order to access his individual programming. In this regard, she made that point that complainants cannot necessarily expect *ideal* accommodations:

> "Although it may be that in an ideal world, a pupil in the complainant's position might have been better of if he had a single SNA throughout the entirety of his school day, I cannot find that not ensuring this amounted to discriminatory treatment under the *Code*. As the Tribunal observed in *Schafer*, the issue is not whether the accommodation provided was the ideal accommodation, or what the parents may have preferred. The issue is whether the respondent failed to reasonably accommodate a disability-related need, denying him the right to equal access to education services."[3]

With respect to the computer issue, Vice Chair Liang noted that an occupational therapist recommended certain computer equipment that would benefit L.C. in the fall of 2003 and the spring of 2004. However, Board did not believe that L.C. required a dedicated computer in order to access the curriculum. Under pressure from J.L.C., the Board ultimately applied for a dedicated computer in April 2005. However, L.C. did not show independent interest in using it

and required assistance for this purpose. Vice Chair Liang concluded that a dedicated computer was not a necessary accommodation, and the purposes for which it was beneficial could be served by other, existing methods.

With respect to habit training, L.C. was not toilet trained and wore pull-up diapers to school. In the latter part of Grade 4, J.L.C. requested that the Board assist with a habit-training program that involved L.C. attending school without a diaper. The evidence revealed that the implementation of this habit-training program was challenging for the SNAs: it required hourly trips up and down stairs to the washroom, help with dressing and undressing, and the time-consuming clean-up of frequent accidents. J.L.C. alleged that the Board did not follow the habit-training program as required. Vice Chair Liang concluded there was no evidence that the school failed to provide L.C. with necessary accommodations in this area, and in fact made "*considerable efforts*" to assist him.

With respect to the amount of time spent that L.C. spent outside of the classroom, Vice Chair Liang noted that L.C. did leave the classroom frequently as part of his habit-training program, and at other times when he was acting out or was overstimulated. However, she concluded that this time away from the classroom was related to L.C.'s own needs, and was not due to a failure to accommodate his disabilities.

In conclusion, the Tribunal observed that the Board put considerable efforts into accommodating L.C. within a regular classroom setting, even while believing that his educational interests would be better served in a special education setting. The Tribunal also noted that, although the accommodations may not have been perfect, they were reasonable and responsive to L.C.'s needs, and that is all the *Code* requires.

Together with the *Schafer* decision, the *L.C.* decision demonstrates that the Tribunal does not hold school boards and educators to a standard of perfection. In order to establish discrimination under the *Code*, the evidence must demonstrate that the accommodations provided to a student were significantly inappropriate or inadequate.

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1 *Schafer v. Toronto District School Board* 2010 HRTO 403 (request for reconsideration denied 2010 HRTO 884).
2 2011 HRTO 1336.
3 *Ibid*., at para. 55.

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