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Canadian Association for the Practical Study of Law in Education

COMMENTS

SASKATCHEWAN COURT RULES ON SEPARATE SCHOOL FUNDING ISSUE

Writing in 1992, John W. Burton noted the combination of religion and politics generates heated debate and discussion. If education is added to the mix, what often results is a "concoction of extreme volatility."[1] A recent case in Saskatchewan appears to encompass each of the aforementioned elements, those being religion, politics, and education, thus adding credence to Burton's observation.

In *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan*[2], Justice Donald Layh of the Court of Queen's Bench for Saskatchewan, in a written ruling dated April 20, 2017, found that the Province does not have the right to fund non-Catholic students attending Catholic separate schools.

As a means of providing some context, the genesis for this case began in 2003, when the Yorkdale School Division opted to close the public kindergarten to grade 8 school in Theodore. Students who had attended this school would, as a consequence of the closure, be bussed to a neighbouring public school 17 kilometres away. After trying unsuccessfully to save the school in Theodore, a group of parents, using the provisions of the *Education Act*[3], petitioned the Minister of Education to establish the Theodore Roman Catholic School Division (now Christ the Teacher Roman Catholic Separate School Division No. 212). After some negotiation, the newly-created separate School Division purchased the former public school building and opened St. Theodore Roman Catholic School. When St. Theodore opened in 2003, only 13 of the 42 students enrolled were Roman Catholic (approximately 31%). Since that time, the percentage of Catholic students has ranged from a low of 23% to a high of 39%. In 2005, the Public Board (now Good Spirit School Division No. 204) filed a legal complaint against what is now Christ the Teacher Roman Catholic Separate School Division No. 212 and the Saskatchewan Government. It was argued that the newly-created Roman Catholic School Division in Theodore did not meet the criteria of a separate school, established to serve those of the minority faith. Rather, in an attempt to circumvent school closure, the Roman Catholic School Division was in effect operating a public school. As such, the public board maintained that providing per-student grants to Catholic boards for non-Catholic students was not constitutionally protected, and was a violation of the *Charter of Rights and Freedoms*. Since this complaint was filed in 2005, an unfolding legal saga has ensued.

Through an examination of the facts surrounding this case, it is clear that section 93 of the *Constitution*[4] affords denominational protection for both Roman Catholic and Protestant minority populations to establish and operate their own school system. Further, section 29 of the *Charter of Rights and Freedoms*[5] stipulates that constitutionally-protected denominational rights are not abrogated or derogated by the *Charter*. The first question to be addressed in the current litigation was whether or not government funding of non-Catholic students enrolled in separate schools was constitutionally-protected under section 93 of the Constitution. Further, if this funding was not constitutionally-protected, did it infringe ss. 2(a) and 15 of the *Charter*?

Regarding the first question, Justice Layh found that the Constitution "…does not provide a constitutional right to separate schools in Saskatchewan to receive provincial government funding respecting non-minority faith students because funding respecting non-minority faith students is not a denominational right of separate schools."[6] Justice Layh also noted that section 17(2) of the *Saskatchewan Act*, "…which provides constitutional protection against discrimination in the distribution of moneys payable to any class of school, only protects separate schools to the extent they admit students of the minority faith."[7]

Turning to the question of whether the funding of non-Catholic students attending separate schools was a violation of the *Charter*, Justice Layh found in the affirmative, ruling that the funding was a breach of "…*the state's duty of religious neutrality under s. 2(a)*"[8] and also in opposition to the equality rights under section 15(1) of the *Charter*. In Justice Layh's determination, neither *Charter* violation could be justified under section 1 (reasonable limits).

At the time of this writing, the Saskatchewan Catholic School Boards' Association has announced that an appeal will be filed on behalf of Christ the Teacher Roman Catholic Separate School Division No. 212. This appeal has the support of all Catholic boards in the Province. In addition, Premier Brad Wall plans to invoke the notwithstanding clause (section 33) of the *Charter* to override the Court's decision.

As this ruling will undoubtedly cause, in Justice Layh's words, "…*significant repercussions*…"[9], the decision is stayed until June 30, 2018. Moving forward, it will be interesting to see if this decision survives in light of either a legal challenge or the invocation of section 33. If it does survive, what will be the impact on the Saskatchewan education system? One can speculate if any reverberations will be felt in Ontario and Alberta, where denominational school boards remain as a constituent feature of the educational landscape. Regardless of the outcome, it does seem that Burton was correct in his assertion that religion, politics and education can be a most volatile mix.

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1. J.W. Burton (1992). Legal status of religion in Canadian schools. In W.F. Foster (Ed.), *Education & law: A plea for partnership*. Proceedings of the Annual Conference of the Canadian Association for the Practical Study of Law in Education, 202-214.
2. 2017 SKQB 109.
3. SS 1995, c E-0.2.
4. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No. 5.
5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
6. *Supra Note* 2, at 228-229.
7. *Supra Note* 2, at 229.
8. *Supra Note* 2, at 229.
9. *Supra Note* 2, at 230.

PRESIDENT'S MESSAGE

Greetings from Regina, Saskatchewan! As CAPSLE's 29th President, I am delighted to share the President's Message with you for inclusion in this edition of CAPSLE Comments.

It is an honour and privilege to serve in this role alongside CAPSLE's long-serving and distinguished secretary, Lori Pollock, and its dedicated and hard-working Board of Directors. The volunteer work we do on your behalf is important because we all believe in the raison d'être of CAPSLE. We provide a unique national forum to promote applied education law in Canada and we engage a diverse group of stakeholders: educators, school leaders, teacher unions/federations/associations, lawyers, Ministry of Education personnel, academics, trustees, students, and others.

First, I would like to express my deep appreciation to the Saskatchewan Organizing Committee for planning and hosting our 2017 Conference in Saskatoon entitled, In the Land of Living Skies: Expanding Horizons in Education and the Law. The Committee did an excellent job and worked extremely hard over an extended period of time to put on a first-rate Conference. Committee members included: Al Boutin, Nora Findlay, Geraldine Knudsen, Krista Lenius, Lori Pollock, Kevin Schmidt, Trevor Smith, Linda Stanviloff (co-chair), Terry Stanviloff, Jaime Valentine, and myself (co-chair). With our focus on inclusion, diversity, human rights, and partnerships, we offered engaging and relevant concurrent sessions, three dynamic and interactive panels, and two outstanding keynotes

from Judge David Arnot (Chief Commissioner of the Saskatchewan Human Rights Commission) and Chief Darcy Bear (Whitecap Dakota First Nation).

A common thread running through the Conference highlighted the continuing need for innovative structures, caring partnerships, and vibrant practices, which create inclusive classrooms and school communities. As our speakers reminded us, these spaces must remain open to all our students, and especially those on the margins such as Indigenous and Métis students, immigrants and newcomers to Canada, transgender students, and those struggling with mental health challenges. The Sheraton Cavalier did a wonderful job hosting our Conference and our beautiful venue on the banks of the South Saskatchewan provided easy access to the river and its kilometers of attractive trails, various restaurants, and the downtown. Our Sunday and Monday evening socials at The Top of the Inn showcased delightful music from local high school students (jazz) and the Chickadees. A good time was had by all in attendance!

Nous étions très fiers d'accueillir nos délégués à Saskatoon. Au niveau du développement professionnel, le programme fut très riche, intéressant et des plus pertinents. Les sujets portaient, entre autres, sur l'inclusion, la diversité, les droits de la personne et le partenariat. Nous espérons que vous avez profité de l'occasion pour faire du réseautage, revoir vos collègues et vos amis et établir de nouveaux liens personnels et professionnels. Je tiens à remercier le comité d'organisation qui a fait un travail spectaculaire pour vous recevoir. L'hôtel Sheraton Cavalier a également fait sa part pour un accueil des plus chaleureux. Bravo!

I must thank our Past President, Stefanie Tuff, who recently completed nine years of dedicated and indefatigable service on the CAPSLE Board. Her contributions to the Board will be sorely missed. Stefanie's leadership embarked us on the renewal journey in challenging times. Stefanie's commitment to CAPSLE has never wavered. Her positive energy, ability to rally those around her to a common cause, and her sense of humour have all had an important impact on the Board and all those associated with our organization. Thanks Stefanie for being such a great advocate for CAPSLE!

I would also like to highlight the exemplary leadership of our outgoing President, Ian Pickard. Taking the torch from Stefanie, Ian has led us through difficult times by focusing our time and energies on two critical areas: conference attendance and membership/awareness. In 2015, Ian received the Martha Mackinnon Lifetime Membership Award for his lifelong commitment to CAPSLE. This award speaks volumes to the kind of person and leader Ian is. Ian's determination to reinvigorate and reenergize CAPSLE is unshakeable. In addition to his new role as Past President, Ian is serving as co-chair (along with board member Gail Gatchalian) for the upcoming 2018 Halifax CAPSLE Conference to be held during the Spring of 2018. For all you have done, and continue to do, for CAPSLE Ian, we remain eternally grateful. In simple terms, Ian is a hard act to follow!

At our recent Annual General Meeting in Saskatoon, the Board proposed a name change based on a previous survey of CAPSLE members expressing support for a simpler and clearer name. The motion proposed a change from CAPSLE to CELA, the Canadian Education and Law Association. The rationale for the change was for clearer brand recognition. The motion for the name change was narrowly defeated with 65.7% of those voting in favour of it. We fell just three votes short of the 2/3 support of voting members required under our by-laws to change our name. We came so close but we will not be changing our name. We will direct our energies to more pressing matters.

We readily acknowledge that there is more competition from a growing array of conference choices, fewer PD dollars available to potential attendees, and more information about education law on line. Notwithstanding these challenges, CAPLSE continues to offer a fantastic annual conference with an average attendance of 250 plus people these past three years. We have outstanding keynotes, panelists, and excellent concurrent sessions on the most relevant topics in education law. We believe that the annual conference represents significant professional development value for those who attend CAPSLE's annual signature event and those who have yet to attend. Drawing on the renewal and revitalization efforts of our two recent presidents, Stefanie and Ian, the Board will continue to look for innovative, cost-efficient, and strategic ways to ensure our base remains solid and engaged, while reaching out to new audiences in different and creative ways.

While serving as your president, the Board will engage in the following work:

1. Webinar development – If costs and technology allow, we will offer practical education law PD on current and pressing issues through webcasting means to targeted audiences throughout Canada. Our

goal is to build digital learning communities and to network with relevant stakeholders to take CAPSLE's message to diverse communities as a complementary offering to our national conference.

2. Conference attendance – We will continue to examine appropriate measures to attract new attendees to our conference.

3. Membership/Awareness – Work in this area remains outstanding. We will update our web site to make it more attractive and interactive and embrace better communication strategies through social media to get the word out about who we are and what we have to offer. Our ultimate goal is increase conference attendance, membership, and offer on line PD opportunities to targeted stakeholder communities throughout the country.

The Board exists to serve its members and to promote applied education law, which we believe must ultimately serve the public interest. What we do is important because we provide a forum to discuss, and to act upon, matters which relate to how we treat and should treat one another in educational and societal contexts. We care about what we do because questions of fairness, justice, and equity are always at stake.

If you have any thoughts about the President's Message and how we might better serve our members, conference attendees and how we might reach out to those who have yet to engage with us, please email us at info@capsle.ca. We are committed to remaining a vibrant, exciting, and professionally relevant organization.

I thank those who came to Saskatoon. I am delighted that Halifax will host our 2018 conference, A Bridge over Troubled Waters. It will be wonderful to see you there. Spread the word and attend our signature event with a friend, colleague, and lots of enthusiasm!

A la prochaine . . .

Paul Clarke
CAPSLE President

SEX CRIMES IN THE SCHOOL ENVIRONMENT

With the advent of more sophisticated methods of data sharing, the popularity of technology among children and youth and the sexualized nature of today's society, comes greater risk of sexual exploitation, particularly in school environments. Recent, highly-publicized cases involving sex crimes engaged in by both students and teachers have brought this issue to the forefront.

Students

In March 2017, six (6) male students from Bridgewater, Nova Scotia pleaded guilty to charges of publication of intimate images without consent pursuant to section 162.1 of the *Criminal Code*[1] following the distribution of intimate images of at least twenty (20) female students. The males, ages 15 to 18, were all minors at the time of the offence. The males encouraged the victims to send intimate photos through Snapchat, some reassuring the victims that the photos would not be shared. The intimate photos obtained by the males were distributed without consent, through data sharing and storage platform, Dropbox, after information regarding the existence of the photos circulated within a Facebook group.

Section 162.1 of the *Criminal Code* is a relatively new provision stemming from the enactment of the *Protecting Canadians from Online Crime Act*[2]. These amendments came into force in March 2015 in response to the tragic death of high school student, Raetah Parsons, who was taken off life support following the circulation of sexually explicit photos. Section 162.1 prohibits the publication or distribution of intimate images without consent:

Publication, etc., of an intimate image without consent

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) of an offence punishable on summary conviction.

Definition of *intimate image*

(2) In this section, *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Defence

(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.

Question of fact and law, motives

(4) For the purposes of subsection (3),

(a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and

(b) the motives of an accused are irrelevant

The current jurisprudence involving section 162.1 is scant given its relatively recent enactment. Sentencing for the six (6) males will take place in July 2017.

Teachers

Two (2) Nova Scotia teachers, Carolyn Amy Hood and Sarah Allt Harnish, have recently been thrust into the public eye for their engagement in sexual relationships with students.

Ms. Hood was charged with two (2) counts of luring a child, one (1) count of sexual exploitation, one (1) count of sexual assault, one (1) count of sexual interference and one (1) count of invitation to sexual touching following the exchange of sexually explicit text messages, photos, videos and on one occasion, engaging in oral sex.[3] All of the charges arose from Ms. Hood's interaction with two (2) male minors, 15 and 17 at the time of the offences. The victims were both former students of Ms. Hood who had been a sixth grade teacher for nearly eight (8) years before being relieved from her duties. The case proceeded to trial where the Defence took the position that Ms. Hood, who suffers from Bipolar Mood Disorder –Type 1, was not criminally responsible by way of mental disorder, pursuant to section 16 of the *Criminal Code*. In the Court's decision, Judge Del Atwood reviewed the law with respect to the defence of mental disorder and examined the the extensive expert evidence provided by three (3) psychiatrists, two (2) of whom testified on behalf of the Defence and the other on behalf of the Crown. While all three (3) agreed that Ms. Hood suffered from Bipolar Mood Disorder-Type 1. Judge Atwood concluded that the evidence presented by the two (2) experts for the defence - and their conclusions that Ms. Hood was suffering from a mental disorder in accordance with section 16 at the time the offences were committed - were tainted by confirmation bias. Ultimately, the Court found that Ms. Hood had not been suffering from a mental disorder pursuant to section 16 at the time she committed the acts upon which the charges were based.

Judge Atwood then went on to consider whether the prosecution had proved the charges themselves beyond a reasonable doubt. The Court found Ms. Hood guilty of both counts of luring, sexual exploitation and sexual interference but found that she was not guilty of sexual assault or invitation to sexual touching.

The matter then proceeded to sentencing. Sexual exploitation, luring and sexual interference all carried a one-year mandatory minimum sentence at the time the offences were committed. The Defence launched a *Charter* challenge to the mandatory minimum sentences alleging that the mandatory minimums violated section 12 of the *Charter*[4], freedom from cruel and unusual punishment. At paragraphs 13-14 of the decision, Judge Atwood set out the test applied to determine whether the mandatory minimum in question violated section 12 of the *Charter*:

> [13] A penalty provision in a statute would infringe s. 12 if it were found to be grossly disproportionate to the appropriate punishment, having regard to the seriousness of the offence and the circumstances of the individual offender who is before the court seeking relief from the mandatory sentence; accordingly, such a penalty would violate s. 12 if it were to impose a grossly disproportionate sentence on the individual before the court, or if its reasonably foreseeable applications would impose grossly disproportionate sentences on others.
>
> [14] There is a high threshold that must be surmounted by an applicant before a court might find that a sentence would represent a cruel and unusual punishment. To be grossly disproportionate, a mandatory-minimum sentence must be found to be more than merely excessive: rather, it must be "so excessive as to outrage standards of decency" and be "abhorrent or intolerable" to society.

Judge Atwood considered a number of different factors, specifically noting that Ms. Hood was not "grooming" the individuals, a common feature in child sexual abuse cases, and that the conduct was spontaneous and unplanned, characterizing it as a "reckless adventure". Furthermore, he commented that Ms. Hood had not been the individuals' teacher for a number of years which reduced the level of trust and authority and that her mental illness was a mitigating factor. He ultimately concluded that the mandatory minimums in question were grossly disproportionate, violating section 12 of the Charter and were not saved by section 1.

Judge Atwood then moved on to consider conditional sentences. The Defence sought a conditional sentence of less than two (2) years while the Crown sought four (4) years in jail. After reviewing the case law in light of the circumstances of the case, Judge Atwood made a conditional sentence order of fifteen (15) months with conditions followed by another twenty-four (24) months probation order with conditions. The Crown has appealed this decision and the appeal will be heard by the Nova Scotia Court of Appeal in September 2017.

In light of this appeal, Ms. Harnish's sentencing has been postponed. Ms. Harnish was a junior high teacher in Hubley, Nova Scotia when she was charged and pleaded guilty to with invitation to sexual touching involving a sixteen (16) year old male student. Ms. Harnish's sentencing hearing will take place after the Nova Scotia Court of Appeal hears the Crown's appeal of Ms. Hood's sentencing decision.

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1. R.S., c. C-34, s. 1.
2. R.S., c. C-46
3. See R. v. Hood 2016 NSPC 19 (CanLII).
4. The Constitution Act, 1982, being Schedule B to the Canada Act 1982(UK), 1982, c 11

COMMISSION RELEASES POLICY STATEMENT ON RELIGIOUS ACCOMMODATION IN SCHOOLS

On March 31, 2017, the Ontario Human Rights Commission (the "Commission") released a Policy Statement on Religious Accommodation in Schools (the "Policy Statement") on its website (www.ohrc.on.ca). The Commission had already published a Policy on Religious Accommodation (the "Creed Policy") as part of its statutory mandate to provide guidance to the judicial interpretation of the Ontario *Human Rights Code* (the "*Code*"). The Creed Policy was last updated on September 17, 2015.

The new Policy Statement is the Commission's specific guidance for accommodating religious observances in the school setting. The Commission highlights the importance of schools as a place for healthy discussions about acceptance, as well the educator's role in fostering pluralistic environments that respect human rights.

Educators have a legal obligation under the Code to maintain a school climate that is free from harassment and discrimination. Accommodation is appropriate where it respects a person's dignity, responds to a person's individualized needs, and allows for integration and full participation. Where a student is prevented from observing a religious belief because of a rule or standard, educators have an obligation to accommodate the observance to the point of undue hardship.

The Commission reminds us that assessing undue hardship includes only three factors: cost; outside sources of funding; and health and safety requirements. It does not include other factors such as third-party preferences. Thus, the preference of anyone who is categorically opposed to any religious practices in schools is not a factor in deciding undue hardship under the *Code*.

Providing Muslim students with a space for Friday prayers is an appropriate accommodation. There is minimal cost or interference with health and safety at the school. Students would otherwise be forced to choose between complying with attendance rules and their religious practice.

As the Commission notes in the Policy Statement, educators should make it clear that accommodating religious practices is not a sponsored activity or an endorsement of any particular religion, but a means of accommodating religious needs. The school environment should remain free of pressure or compulsion in matters of religion.

The Commission ends the Policy Statement by calling on all Ontarians to work towards a vision of society where everyone can fully participate, no matter what their race, ancestry or religious beliefs or practices.

Although the Policy Statement does not mention what prompted the Commission to release a policy statement on the specific issue of religious accommodation in schools, its release coincided with a highly-publicized dispute about Muslim prayers in schools of the Peel District School Board (the "Board").

In March 2017, the media reported extensively on protests against Friday prayers by Muslim students at the Board.[1] The Board had accommodated student prayer requirements for years; however, a recent policy change at the Board allowing students to write their own prayers (rather than choose from a pre-approved bank of written prayers); may have raised the profile of the issue of religious accommodation.[2]

The media reported disruptive behaviour at various Board meetings, including an incident where pages were torn from a Qur'an, and another where participants shouted about Shariah law and Islamic indoctrination of children. Online protest activities included a petition calling accommodation too expensive and amounting to unsolicited exposure to religion.[3]

The Chair of the Board, as well as a local Mayor and the Minister of Education and Minister of Children and Youth Services, all spoke out publicly: condemning the protests as Islamophobic, and confirming the Board's full compliance with its religious accommodation obligations under the *Code*.

On March 22, 2017, the Board released a document titled "Key Facts" on religious accommodation in an effort to respond to the misinformation about religious accommodation. The Chair, Janet McDougald, made a strong statement against the anti-Muslim nature of the protests, which were not opposition to religion in public schools, but opposition to the practices of Islam. The Chair stated:

> We are appalled by the anti-Muslim rhetoric and prejudice we have seen on social media, read in emails, and heard first-hand at our board meetings. It has caused some of our students to feel unsafe, to feel targeted. We must not allow hatred toward any faith group to flourish. We will not stand for that. It is not consistent with our board values, with our role as trustees, or for us as Canadians.[4]

The Minister of Education, Mitzie Hunter, told reporters that " … *there's just no tolerance for discrimination of any sort…We don't tolerate issues of racism and Islamophobia*."[5] The Mayor of Brampton, Linda Jeffrey, published a news release stating her support for the accommodation of Friday prayer, stating that "(l)*etting Muslim students pray for 20 minutes in an empty space with the supervision of volunteer staff does not cause any financial hardship*." She condemned the "*misinformation, fear mongering, and outright falsehoods being spread by some*."[6]

Given that the Policy Statement was released within days of these public comments from the Chair of the Board, the Mayor and several cabinet Ministers, it is reasonable to view it as the Commission's comment on the matter. The Commission condemns the type of religious intolerance directed at the Board, and confirms that the Board acted lawfully and appropriately in accommodating the prayer requirements of its students.

We will continue to monitor the issue of accommodating religious practices in schools, and will provide updates on a regular basis.

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1. See for example Peter Goffin, "Brampton mayor condemns 'hateful' campaign against Muslim prayer in Peel schools", The Toronto Star (13 March 2017), online: <https://www.thestar.com/news/gta/2017/03/13/brampton-mayor-condemns-hateful-campaign-against-muslim-prayer-in-peel-schools.html>
2. Kate McGillivray, "Pages torn from Qur'an at Peel school board meeting over prayer issue", CBC News (23 March 2017), online: < http://www.cbc.ca/news/canada/toronto/peel-school-board-muslim-prayer-space-1.4038380>
3. Ibid.
4. Peel District School Board, News Release, "Peel board takes on religious accommodation misinformation with Key Facts" (22 March 2017), online: < http://www.peelschools.org/media/newsreleases/Pages/Article.aspx?art-id=1773>
5. Kristin Rushowy, "Muslim prayers in schools get provincial endorsement following intense meeting", The Toronto Star (23 March 2017), online: <https://www.thestar.com/news/queenspark/2017/03/23/muslim-prayers-in-schools-get-provincial-endorsement-following-intense-meeting.html>
6. Office of the Mayor (Brampton), Media Release, "Mayor Jeffrey Supports Religious Accommodation at Peel District School Board" (9 March 2017), online: < http://www.brampton.ca/EN/City-Hall/Mayor-Office/Media/Pages/Media-Release.aspx/89>

Mark your calendars! Canada's leading conference on education law is coming to Halifax in 2018.

Halifax will host the annual conference of the Canadian Association for the Practical Study of Law in Education (CAPSLE) on **April 29 to May 1, 2018,** at the Halifax Marriott Hotel. I am honoured to be Co-Chair of the 2018 Halifax CAPSLE Conference along with CAPSLE Past-President, Ian Pickard of McInnes Cooper.

CAPSLE brings together educators, teacher associations, administrators, education departments and school board personnel, education faculty, and union and management lawyers to discuss and debate current issues in education law. This year's conference held in Saskatoon was a great success, with leading thinkers presenting on topics such as family status accommodation, sexting, medical marijuana in schools, and education self-government.

We are thrilled to announce our confirmed speakers for the 2018 CAPSLE Conference:

- The Honourable Mr. Justice Thomas Cromwell, retired justice of the Supreme Court of Canada, who also sat for many years on the Nova Scotia Court of Appeal, will be our opening keynote speaker.
- The Honourable Chief Judge of the Nova Scotia Provincial Court, Pamela Williams, will talk about the innovative Mental Health and Opiate Treatment Courts in Nova Scotia. You can read about the Opiate Treatment Court here: http://www.cbc.ca/news/canada/nova-scotia/unique-court-offers-lifeline-to-those-facing-agony-of-opioid-addiction-1.3929411
- Robert Wright, Halifax-based Social Worker and Sociologist, will speak about cultural assessments in criminal proceedings. You can read about Robert and the role of cultural assessments in addressing systemic racism in the justice system here: http://www.cbc.ca/news/canada/nova-scotia/cultural-assessments-social-worker-1.3601904
- We will have a panel on the Truth and Reconciliation Commission Recommendations and their implications for education and the law, including journalist Maureen Googoo, the owner/editor of Kukukwes.com
- We will have a panel on the North Preston Land Recovery Initiative, including Angela Simmonds, articling clerk and liaison to the Initiative. You can see Angela talk about the Initiative on the digital documentary here: http://northprestonland.ca/, a project of the Nova Scotia Community College journalism, television and radio students.

I will be speaking about the Nova Scotia Teachers Union s.2(d) *Charter* challenge to Nova Scotia's recent legislation that imposed a collective agreement on teachers and removed their right to strike. Diane MacDonald, legal counsel for the British Columbia Teachers Federation, will join us to provide an update on freedom of association cases after the Supreme Court of Canada decision in BCTF.

We are looking for great speakers for our break-out sessions, so if you have something interesting to say about the practical study of law in education, please get in touch:

Gail Gatchalian ggatchalian@pinklarkin.com Ian Pickard ian.pickard@mcinnescooper.com

ONTARIO DIVISIONAL COURT GRANTS EXCEPTIONAL PUPIL'S JUDICIAL REVIEW APPLICATION FOR SPECIAL DAMAGES TO COVER THE COSTS OF PRIVATE SCHOOLING

In *L.B. v. Toronto District School Board et al*. (March, 2017), the Ontario Divisional Court recently considered an exceptional pupil's judicial review application of a remedial decision of the Human Rights Tribunal of Ontario (and confirmed in a reconsideration decision). In its decision, the Tribunal found that the Toronto District School Board ("School Board") had discriminated against the Applicant, L.B., an exceptional pupil, and awarded general damages in the amount of $35,000 as monetary compensation for injury to his dignity, feelings, and self-respect. However, the Tribunal denied the Applicant's request for special damages to cover the costs of private schooling following his mother's decision to transfer him from the public school system to a private boarding school. The Applicant requested that the Tribunal's decision denying the special damages be quashed and that the School Board be required to pay L.B. special damages to compensate him for the tuition and all other costs for his private school education from April 2013 when he was in Grade 9 to the end of his high school education.

The focus of the application before the Tribunal was the time period from September 2012 to April 2013, when L.B. was 14 years old and a student in Grade 9 at a large, collegiate institute operated by the School Board. Prior to this time, the Applicant had been diagnosed with multiple disabilities, including attention deficit hyperactivity disorder, learning disabilities, and mental health disabilities. The Tribunal found that the School Board did not accommodate the Applicant to the point of undue hardship during the 7 month period from September 2012 to April 2013. He was not seen by any professional staff; he did not have access to all of the supports included in his IEP and his mother was not informed of any potential alternatives to removing him from the collegiate to meet his needs. As a result, L.B.'s mother made the decision to remove him from the school and enrolled him in a private boarding school. Because of this discrimination, the Tribunal awarded general damages of $35,000. However, the Tribunal denied the Applicant's request for special damages covering the costs of L.B.'s private school education from April 2013 to the end of his high school education. The Tribunal held that the option of private schooling was not the only option available to the Applicant to meet his needs.

The Divisional Court reiterated that the remedy of special damages, and specifically the cost of private school education, was recognized by the Supreme Court of Canada in *Moore v. British Columbia (Education)* (2012) where there was a complete refusal by the school board to provide the necessary accommodation services. In this case, however, the School Board did not abandon L.B., although there was a period of time in 2012-2013 when the services were not forthcoming. It was reasonable for the Tribunal to distinguish *Moore* on this basis. Moreover, the Court found that it was reasonable for the Tribunal to conclude that in dealing with a child's education, particularly one with special needs, accommodation is multi-party process. On the one hand, a school board should do all that is within its legislative power to accommodate a student with disabilities to access public education. On the other hand, a parent should not deprive a school board of that opportunity by resorting to a private school education and expect to recover the full costs of doing so. It was also reasonable for the Tribunal to find that there was some obligation on the part of the Applicant's mother, after placing L.B. in a private school, to inquire during her child's education, whether the School Board was in a position to deliver the necessary services. Since L.B.'s mother did not engage with the School Board any further, and provide it with that opportunity after she removed him from the public school system in April 2013, it was not unreasonable to deny her the full costs of a multi-year private school education.

However, the Divisional Court noted that the Tribunal did find that there was a total failure on the part of the School Board to provide support throughout L.B.'s Grade 9 year, notwithstanding that his mother made every effort from the onset of the school year in September 2012 and throughout, to obtain the services that the School Board was capable of providing. In these circumstances, the Court found that one would reasonably expect a parent to act in the best interests of his or her child and L.B.'s mother did just that in enrolling him in a private school. The Court consequently ruled that it was unreasonable for the Tribunal, in such circumstances, to deprive the Applicant's mother of obtaining damages for the costs associated with the private schooling for the balance of the 2012-2013 school year. Therefore, the application for judicial review was granted to the extent that L.B. was entitled to special

damages in respect to the Grade 9 year. The matter was remitted to the Tribunal for the purposes of assessing the quantum of the costs associated with the enrollment of the Applicant in private school for the balance of the 2012-2013 school year.

We will continue to monitor this case and will keep readers informed of future developments.

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