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Capsle

Canadian Association for the Practical Study of Law in Education

COMMENTS

COMMENTS REGARDING STRIP SEARCHES LEAD TO MINISTER'S RESIGNATION

On February 25, 2015 embattled Québec Education Minister Yves Bolduc resigned his seat in the National Assembly, thus signaling his departure from Cabinet. Bolduc's decision to leave provincial politics arose in large measure from comments made February 17th, in which he indicated that strip searches in high schools were permissible, provided they followed established guidelines, and were conducted in a respectful manner.

The comments stemmed from an incident that occurred on February 12th involving a fifteen year old female student at Neufchâtel High School in Québec City, and reported in the Journal de Montréal. According to the student, she was strip searched because school officials had suspicions she was trafficking in drugs. The student recounted how she was led to a room in the school, where a female staff member held a blanket in front of her while she removed her clothing, including underwear. The clothing was then searched by the principal, which ultimately did not result in the discovery of any illegal substances. The De la Capitale School Board, which exercises jurisdiction over the school in this case, did not dispute the version of events provided by the student. According to the Board, officials have a responsibility to ensure schools are safe and healthy learning environments. They further noted that a 2010 Government document[1] (prepared with the assistance of the Sûreté du Québec) allowed, within certain parameters, the search of a student's person if a school rule had been violated, and it was believed that evidence could be uncovered by means of such a search.

Certainly, the issue of searches within the school context is a complex issue. The *Charter of Rights and Freedoms*[2] in section 8 states that "[e]*veryone has the right to be secure against unreasonable search or seizure*." Further, as the Supreme Court of Canada pointed out in *R. v. M. (M.R.)*, although there does exist a reasonable expectation of privacy, this expectation can be diminished in certain circumstances. For example, the Court observed that there is a lesser degree of privacy afforded a student in school.[3] At the heart of this issue is the attempt to strike a balance between an individual's privacy, or what Stewart J. termed the "…*right to be let alone*"[4] and, as Dickson J. remarked in *Hunter v. Southam*, the detection and prevention of crime.[5]

The Supreme Court of Canada has stated that "…*a…lenient and flexible approach should be taken to searches conducted by teachers and principals.*"[6] Although this may allow for warrantless searches by school officials, it is important to recognize - as the United States Supreme Court declared in *New Jersey v. T.L.O.* - that such searches must meet a twofold inquiry.[7] First, the search must be justified at its inception, which essentially means that there were sufficient grounds for conducting the search. And second, the search must be reasonable in scope and not excessively intrusive, taking into account the seriousness of the infraction itself, as well as the age and sex of the student.

The second criterion established by the United States Supreme Court in *T.L.O.* is particularly relevant to the current case involving a student at another Quebec secondary schoo. That is, was the strip search reasonable in scope, given the facts of the case? In *R. v. M. (M.R.)* the Supreme Court of Canada held that "…*the extent of the search will vary with the gravity of the infraction that is suspected.*"[8] For instance, thorough and extensive searches might well be required if a student was in possession of a weapon that could endanger public safety. However, a similarly thorough and extensive search for minor offences involving a violation of school rules may not be justified.

Possession and or trafficking of narcotics is a serious matter, and school officials have a statutory duty to maintain order. However, strip searches of this nature, if they are to be conducted, are clearly best left to the police.

Since this incident came to light, a Provincial cabinet minister has resigned amid a firestorm of controversy. As well, the student in question reportedly has been suspended and transferred to another school, with no specifics provided by the Board. Further, the family is threatening to initiate legal action, with both sides contesting whether or not the student was provided

an opportunity to call her home prior to the search. While this situation remains fluid, Premier Philippe Couillard did announce recently that there would be no more strip searches in Québec schools unless deemed necessary by the police. Perhaps had school officials called the police in the first place, this matter might have been entirely avoided.

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1. *Présence policière dans les établissements d'enseignement*. (2010). Québec, Canada: Ministère de l'Éducation, du Loisir et du Sport.
2. *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.
3. *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at 25.
4. *Katz v. United States* 389 U.S. 347 (1967), at 350.
5. *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at 167.
6/ *Supra* note 3, at 32.
7. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
8. *Supra* note 3, at 35.

PRESIDENT'S MESSAGE

I believe that 2015 may well be remembered as the year of the Supreme Court (SCC). Recent decisions of the SCC can only be described as ground-breaking, and for some breath-taking, figuratively and literally. If you are among one of at least three groups of people in Canada who have a keen interest in the topics for discussion, 2015 has been rivetting.

The first group would be members of police organizations in Canada, particularly the Royal Canadian Mounted Police (RCMP). The Supreme Court of Canada says the Mounties have the right to engage in meaningful collective bargaining, but the Court has not explicitly stated that they have the right to form a union. The Supreme Court said excluding the Mounties from collective bargaining violates their Charter right to freedom of association, but it does not dictate a specific labour relations model that should be applied to the RCMP. The landmark 6-1 ruling[1] gives the federal government a year to create a new labour relations scheme, setting the stage for talks among RCMP members, Commissioner Bob Paulson and the Public Safety Minister.

The second rather large group would be unions. On January 30, 2015 the Supreme Court of Canada struck down as unconstitutional a controversial Saskatchewan law that restricts who can strike -- upholding the right to strike for public sector workers.[2] Speaking on behalf of the three high court judges who ruled in favor of the Saskatchewan Federation of Labour appeal, Justice Rosalie Abella said that:

> "The right to strike is not merely derivative of collective bargaining; it is an indispensable component of that right."[3]

The headnote summarizes the SCC majority as saying in this case:

> "Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. This crucial role in collective bargaining is why the right to strike is constitutionally protected by s. 2(d)".

These first two rulings are likely to have significant implications on collective bargaining in the public sector, including educators. The Supreme Court has made it clear that collective bargaining rights and, seemingly, the right to strike, have Charter protection under section 2(d). I doubt if we have heard the last word on this, more cases are pending, and appeals are/will happen. Stay tuned…

The third case would be of interest to anyone who has an interest in assisted suicide. In a unanimous 9-0 decision returned on Friday, February 6, 2015, the SCC struck down as unconstitutional the nation's contentious century-old law against assisted suicide. The historic ruling opens the door to physician-assisted suicide for consenting, severely ill adults who want to control the method, timing and circumstances of their death.[4] The high court ruled that the Criminal Code provision against aiding and abetting someone to commit suicide deprives people suffering from grievous and irremediable medical conditions the right to life, liberty and security of the person as guaranteed under the Charter.[5]

The ruling limits physician-assisted suicides to "a competent adult person who clearly consents to the termination of life and has a grievous and irremediable medical condition, including an illness, disease or disability, which causes enduring

suffering that is intolerable to the individual in the circumstances of his or her condition."[6]

While it is a greater stretch to see how this might impact on CAPSLE members, comments from Andrew Coyne in the *National Post* prior to the decision of the Court causes a pause for me as an educator. Coyne argues that the restrictions suggested as guidelines for implementing the practice have tremendous potential for being eroded. He poses an interesting question.

> "That is the implication of erasing the line between suicide and assisted suicide. When we say the former right is of "no use" to certain people, we are saying the mere absence of legal restraint is insufficient. We are not merely upholding their freedom to choose that option. We are saying that option should in fact be made available to them. We are not just establishing a right to what was previously forbidden: we are changing how we think of the act itself — of suicide, from a tragedy to a benefit, a release from suffering; of assisting suicide, from a crime into a service. We are asserting that helping people in pain to end their lives — killing them, to be more direct — is a positive good, which it is the state's obligation not merely to tolerate, but to facilitate."[7]

And he goes further:

> "Indeed, if the case for assisted suicide is not rooted in personal freedom but quality of life concerns, it is impossible to see how any of the purported restrictions could remain. Are we really prepared to condemn a child to unbearable suffering, when we would not an adult? Are the mentally incompetent any less entitled to such relief, merely because they are incapable of giving consent?"[8]

Could those who work in the public education system ever find themselves in a position where they would be required to testify about a student and their potential right to assisted suicide? Does anyone reading this feel as uncomfortable with this line of thinking as I am?

And now for something completely different. In the Fall of 2014 we conducted a survey of CAPSLE members. Over 100 people responded to the survey and the Executive and Board are already implementing some changes in light of the results. We found out things like:

- What attracts people to CAPSLE
- How our performance is rated with regard to publications, the Newsletters
- Perception of balance between Employer and Association/Union
- Increasing membership
- How to improve the conference experience.

The full survey results will be made available at the CAPSLE conference in Kelowna, indeed part of the opening will be a review of the highlights from the survey.

A big thank you goes out to all those who took the time to complete the survey! It is much appreciated.

Finally, I could not end my message without calling attention to the up-coming conference in beautiful Kelowna in April. One of the responses to the survey has already resulted in an effort by the planning committee to provide some attractions for those who arrive early. On Saturday April 25 there are two events planned:

- Private Westside Bench Winery Bus Tour, 12:30 to 4:45 PM
- Golfing at the Pinnacle, 1:00 to 5:00 PM

In both cases a minimum number of people are required to commit and pay by March 29. If you have not received this information please check the web site for information. I hope to see you on the wine tour!

And of course there is the conference itself. Hosted at the luxurious Delta Grand Okanagan Resort the program put together by Sue Ferguson and her Committee looks fantastic! Over two and one half days attendees will be treated to outstanding plenaries (British Columbia Supreme Court Justice Wendy Harris, First Nations Education Committee member Tyrone McNeil). Panels on FOIPOP re student issues and the always popular cross country legal panel will attract interest. And, as always, there are a plethora of wonderful breakout sessions with a number of your favorites presenting again on topics such as:

- The digital world in school
- Professional misconduct
- Mental health
- Accommodation
- Copyright
- Problem parents
- Confidentiality and the student counsellor.

These are just to name a few. Please join me in BC in April for what I am positive will be another outstanding professional experience! And I haven't even mentioned the impressive planned social events like the Presidents Reception at the Laurel Packing House and the fabulous host banquet!

I hope to see you there.

Myles Ellis
CAPSLE President

1. *Mounted Police Association of Ontario v. Canada (Attorney General)* 2015 SCC 1 (CanLII).
2. *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4 (CanLII).
3. *Ibid*., para. 3.
4. *Carter v. Canada (Attorney General)* 2015 SCC 5 (CanLII).
5. *Ibid*., para. 66.
6. *Ibid*., para. 127.
7. Andrew Coyne, "With Assisted Suicide what begins in compassion seems to end in eugenics" *National Post*, December 8, 2014.
8. *Ibid*.

IS A TEACHER INJURED WHILE PLAYING ON BUMPER CARS ON A SCHOOL TRIP ENTITLED TO 'INJURY ON DUTY' BENEFITS?

That question was decided in a recent arbitration in Halifax involving "F.", a longtime teacher with the Halifax Regional School Board. F eventually got much of the 'Injury on Duty' leave she had claimed, but not before she used up her sick leave and endured months of referrals to specialists and an independent examination.

The Incident

In May of 2012, F was one of two teachers who accompanied her school band on a trip through rural Nova Scotia. After their last concert, the group went to the Crystal Palace Amusement Park in Moncton. The students talked F into getting in a bumper car. It didn't go well. At first, the students surrounded F with their cars and took turns keeping her from breaking free. When space opened up, F shot backwards, out of the group and into the wall of the enclosure.

F felt the impact in her neck and head right away. She got off the ride and ignored the students' invitation to join them on the climbing wall. She drank coffee while the students finished out the evening and returned to their hotel.

F's headaches started the next day. She slept on the bus ride home. That was a Friday. On Saturday, she felt worse and went to the Emergency Department of the hospital, complaining of headache and neck pain. Over the next three days, she went to her family doctor and returned to the Emergency Department with the same complaints, neck pain and severe headaches. F returned to work at the start of the week but only lasted a day before she went on sick leave.

Next, F made a claim for 'Injury on Duty' leave and she went on sick leave while the claim was being processed. The School Board eventually denied the claim. The Union filed a grievance.

F missed the rest of the school year and the whole of the 2012 – 2013 school year. She went to six different specialists, a holistic physiotherapist and her family doctor, but her headaches persisted. F did not return to work until September of 2013 and claimed she should receive 'Injury on Duty' benefits for her entire absence. The Employer claimed she was not entitled to any 'Injury on Duty' leave.

The Issues

The case broke down into three issues: was F performing the duties of a teacher when the incident on the bumper car occurred; was she injured; and did her injury cause her to miss the time she claimed?

The first question was answered easily. At first, the School Board claimed that riding a bumper car was not among the duties of a teacher and that F assumed a personal risk when she got on the ride. The Department of Education, which actually defended the grievance, dropped that position, no doubt because of the impact it would have on the willingness of any teacher to engage with students outside the classroom.

The question of causation was more complicated. First, the Employer argued that it was simply not plausible that someone could be so seriously injured on a padded bumper car that they would miss more than a year of work. Second, the Grievor had a history of neck pain and tension headaches brought on by stress in her personal and professional life.

The Union and the Employer called expert medical evidence. The Union's expert said F had suffered a neck injury that caused headaches that became chronic. The Employer's expert testified the possibility of injury on a bumper car was so remote that the most likely explanation for F's headaches, if they existed at all, was the stress brought on by her dispute with her employer.

The Decision

Arbitrator Jan McKenzie, Q.C. found that F had been hurt on the bumper car, most likely in a whiplash type of injury which also caused her headaches. There was no other reason for her to seek immediate medical attention and endure two visits to the Emergency Department.

Arbitrator McKenzie discounted the significance of F's pre-existing tension headaches and neck pain and relied on previous awards which found that the issue in an 'Injury on Duty' case was not whether an ordinary person would be injured in the circumstances, but whether the Grievor was, in fact, injured.

However, Arbitrator McKenzie found that at some point, F's headaches were more likely caused by the ongoing stress of her dispute with the School Board then by the original injury. She awarded F 'Injury on Duty' benefits from the beginning of her absence in June of 2012 until the end of November 2012, and returned the sick leave she used during that period.

Conclusion

The case of F shows that 'Injury on Duty' benefits for a teacher can be justified in a broad range of circumstances that extend well beyond the classroom. However, causation will always be an issue. Proving the injury is not enough. Evidence must establish that the injury was the primary cause of the absence for the entire period for which the benefits are claimed.

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Le Programme d'insertion professionnelle du nouveau personnel enseignant: les nouveaux enseignants doivent y participer activement

L'affaire *Ontario English Catholic Teachers' Association (OECTA) and Dufferin Peel Catholic District School Board, (Dufferin Peel)*[1] nous donne l'occasion d'examiner l'évaluation qu'un arbitre peut appliquer au Programme d'insertion professionnelle du nouveau personnel enseignant (le « PIPNPE »).

Historique du PIPNPE

Le PIPNPE a été institué par la législature ontarienne en 2006. Ce programme sert à l'apprentissage continu des nouveaux enseignants ontariens après que ces derniers ont complété leur formation théorique et leur stage pratique.

La Loi sur l'éducation et les règlements y afférents prévoient généralement que les directrices et directeurs d'école ont la charge d'évaluer l'apprentissage et le perfectionnement professionnel du nouveau personnel enseignant en observant notamment les huit (8) compétences ci-dessous[2]:

Les nouveaux enseignants :

a) se préoccupent du bien-être et du développement de tous les élèves,
b) font preuve de dévouement en matière d'enseignement et favorisent l'apprentissage et le rendement des élèves,
c) traitent les élèves équitablement et avec justice et respect,
d) assurent un milieu d'apprentissage qui encourage les élèves à résoudre des problèmes, à prendre des décisions, à apprendre la vie durant et à devenir des membres à part entière au sein de la société en évolution,
e) connaissent la matière à enseigner, le programme d'études de l'Ontario et la législation liée à l'éducation,
f) appliquent leurs connaissances professionnelles ainsi que leur compréhension des élèves, du programme d'études, de la législation, des méthodes d'enseignement et des stratégies de gestion de la salle de classe pour favoriser l'apprentissage et le rendement des élèves,
g) communiquent efficacement avec les élèves, les parents et les collègues,
h) effectuent une évaluation continue du cheminement des élèves, évaluent leur rendement et communiquent régulièrement les résultats aux élèves et aux parents.

La législation n'établit toutefois pas de critères particuliers à remplir afin de recevoir une note satisfaisante aux fins du PIPNPE ni ne fournit quelconque direction concernant lesquelles des huit compétences ont le plus d'importance.

L'historique d'emploi du plaignant

Monsieur Stanley Gonsalves enseignait au sein du Dufferin Peel Catholic District School Board depuis septembre 2006. À la suite de deux évaluations insatisfaisantes, le plaignant a rapidement été mis en suivi.

Comme exigé par la législation, la direction d'école a dressé un plan d'amélioration qui tenait compte des observations de l'enseignant et qui exposait les mesures que le plaignant devait prendre pour améliorer son rendement. En 2008, à la suite d'une troisième évaluation insatisfaisante dans le cadre du PIPNPE, le Conseil scolaire a mis fin à l'emploi du plaignant.

Deux griefs devant l'arbitre

L'arbitre Carrier a dû se prononcer sur deux griefs distincts dans cette affaire. Plus particulièrement, il devait déterminer :

1. si la troisième évaluation insatisfaisante du plaignant était arbitraire ou injuste; et
2. si le congédiement de M. Gonsalves dans le cadre PIPNPE était arbitraire et sans motif valable.

a. La position du Conseil scolaire

Dans cette affaire, le Conseil scolaire a avancé que la compétence de l'arbitre d'examiner la décision du Conseil de mettre fin à l'emploi du plaignant était circonscrite par la Loi sur l'éducation. Selon l'employeur, sa décision en matière de congédiement n'était pas assujettie à la norme de motif valable dans la convention collective entre les parties. Le Conseil scolaire prétendait plutôt que l'alinéa 277.40.4(3) de la Loi sur l'éducation, qui exige que le Conseil mette fin à l'emploi d'un enseignant qui n'exerce pas ses fonctions de manière satisfaisante, a préséance sur la disposition de la convention collective qui limite les droits de gestion de l'employeur à un congédiement pour motif valable.

Le Conseil a soulevé que l'article 277.41 de Loi sur l'éducation prévoit qu'une convention collective conclue entre un conseil et un syndicat :

> « … peut contenir une disposition sur le règlement, par voie de décision arbitrale définitive et sans interruption de travail, de tous les différends entre les parties que soulèvent l'interprétation, l'application, l'administration ou une prétendue violation de la présente partie ou des règlements pris, des lignes directrices données et des règles ou des politiques établies en application de celle-ci, y compris la question de savoir s'il y a matière à arbitrage. »

Or, il n'existait aucune disposition dans la convention collective entre les parties qui prévoyait que les conflits entre les parties en matière de congédiement en vertu de la partie X.2 de la Loi sur l'éducation puissent être tranchés par décision arbitrale.

Le Conseil a allégué que s'il était du ressort de l'arbitre de se prononcer sur la décision relative au congédiement, la portée de sa compétence se limitait à déterminer si cette décision était de bonne foi, non arbitraire et non discriminatoire.

Dans l'alternative, si la compétence de l'arbitre n'était pas circonscrite par la législation, la disposition concernant le « motif valable » de la convention collective devait être considérée, auquel cas cette clause devait être assujettie à une norme moins onéreuse dans le cas d'un congédiement d'un nouvel enseignant que dans le cas d'un enseignant chevronné.

Selon le Conseil, peu importe le test préconisé par l'arbitre, il en demeurait que l'évaluation insatisfaisante du plaignant effectuée par la direction de l'école était juste et appropriée en l'espèce.

b. La position syndicale (« l'Association »)

L'Association a soutenu que la Loi sur l'éducation, et plus particulièrement l'article 277.41, devait être lue conjointement avec les dispositions de la convention collective et qu'une telle analyse permet à un arbitre de trancher la question du congédiement du plaignant.

L'Association a donc allégué que puisque les dispositions de la convention collective étaient applicables en l'espèce, il n'était pas suffisant d'examiner la décision du Conseil de procéder au congédiement de M. Gonsalves en fonction du critère de bonne foi et du caractère arbitraire ou discriminatoire. Un motif valable demeurait essentiel avant de procéder à un congédiement.

En ce qui a trait à la norme applicable au principe de motif valable pour le nouveau personnel enseignant, l'Association a soutenu que cette norme ne pouvait s'assimiler à la norme applicable à d'autres employés en stage probatoire dans d'autres types d'emplois. En effet, l'arbitre devait évaluer les conclusions du Conseil sur les huit compétences du PIPNPE en fonction du critère de la décision correcte et non en fonction du critère de la décision raisonnable.

De plus, l'Association a affirmé que les conclusions de la direction d'école sur le rendement insatisfaisant du plaignant n'étaient pas plausibles en l'espèce puisque la direction avait tiré des conclusions défavorables du plaignant sans avoir l'ensemble de la preuve à sa disposition et sans avoir offert au plaignant l'occasion de répondre à ses conclusions préliminaires.

La décision de l'arbitre Carrier

a) La compétence de l'arbitre

L'arbitre a conclu qu'il avait la compétence de se prononcer sur le congédiement d'un nouvel enseignant en vertu de la partie X.01 de la Loi sur l'éducation. Selon l'arbitre, la législation n'est pas suffisamment explicite pour priver tous les enseignant(e)s, chevronné(e)s ou non, d'un droit substantif aussi important que celui exigeant un motif valable pour justifier un congédiement en vertu de la convention collective.[3]

b) La norme de contrôle appropriée

Rappelons que le Conseil était de l'avis que l'arbitre devait appliquer une norme de contrôle limitée en ce qui a trait à un congédiement d'un nouvel enseignant, et considérer avec toute déférence la décision du Conseil à cet égard. De son côté, l'Association était de l'avis que la norme plus élevée de la décision correcte devait être appliquée à la décision en l'espèce.

Ultimement, l'arbitre Carrier a donné raison au Conseil en se basant sur l'intention législative derrière le PIPNPE. Puisque la législature ontarienne a mis entre les mains et au bon jugement des directrices et directeurs d'école l'évaluation de la performance des nouveaux enseignants, l'arbitre Carrier confirme que l'évaluation des enseignants par les directions d'écoles comporte une dimension subjective plutôt qu'objective comme le prétendait l'Association : « It is [the principal's] subjective opinion upon which the legislature seeks to rely ». En arrivant à cette conclusion, l'arbitre Carrier a souligné que bien que la législation énumère les compétences devant être évaluées, elle n'établit aucun critère particulier devant être rempli sous le PIPNPE. L'évaluation du rendement des enseignants repose sur le « jugement, la discrétion et la sagesse » des directrices et des directeurs d'école.[4] Le critère applicable n'est donc pas celui de la décision correcte, mais plutôt celui de la décision raisonnable.

En ce qui concerne la distinction entre la norme applicable aux enseignants chevronnés et au nouveau personnel enseignant, l'arbitre Carrier s'est appuyé sur la décision de l'arbitre Picher dans *Toronto District School Board and OSSTF District 12*[5]. Selon l'arbitre Carrier, cette décision confirme que : 1) la norme de contrôle du « motif valable » s'applique aux congédiements des enseignants qui émanent de la Loi sur l'éducation, mais doit refléter la législation en matière d'évaluation du rendement des enseignants, 2) les évaluations de rendement devraient être raisonnables à la lumière des faits en l'espèce, et 3) une note « insatisfaisante » ne doit pas être attribuée de façon discriminatoire ou de mauvaise foi. Toutefois, bien que l'arbitre ait conclu que les dispositions législatives sur les évaluations de rendement des enseignants chevronnés et du nouveau personnel enseignant étaient suffisamment semblables pour justifier que la norme de contrôle du « motif valable » soit appropriée pour les évaluations découlant du PIPNPE, l'arbitre a ajouté que cette norme doit être moins onéreuse dans le cadre du congédiement d'un nouvel enseignant.[6]

c) L'évaluation de rendement insatisfaisante est raisonnable et correcte

L'arbitre Carrier a revu la preuve présentée devant lui et a formulé un jugement sévère concernant les efforts quasi non existants de M. Gonsalves d'achever le PIPNPE avec succès.

L'arbitre a conclu que peu importe la norme de contrôle préconisée, à son avis, l'attribution d'une note insatisfaisante par la direction d'école en l'espèce était non seulement raisonnable, mais aussi correcte. Il n'était donc pas nécessaire de s'ingérer dans la décision de la direction.

En effet, l'arbitre Carrier a affirmé que les conclusions de la direction d'école selon lesquelles le plaignant ne remplissait pas plusieurs compétences professionnelles du PIPNPE étaient correctes. Notamment, il a répété que le PIPNPE n'établissait pas un nombre minimal de critères qu'un(e) enseignant(e) doit combler, mais a souligné que l'échec dans plusieurs compétences vitales devait être considéré comme fatal à l'obtention d'un résultat satisfaisant.[7]

L'arbitre Carrier a indiqué que la valeur du présent grief ne devait pas être estimée comme si l'on était en présence d'une mesure disciplinaire, mais bien en présence d'une évaluation du rendement d'un employé. En l'espèce, la décision de recommander le congédiement de M. Gonsalves n'avait pas été prise de manière arbitraire, discriminatoire ou de mauvaise foi et était en conformité avec la législation ontarienne sur le sujet et la convention collective entre les parties.

d) Les conclusions de l'arbitre

La décision de l'arbitre Carrier a imposé une grande responsabilité au nouveau personnel enseignant en matière de leur participation active et de leurs efforts pour satisfaire aux exigences de la profession. Les observations suivantes émanant de la preuve présentée devant l'arbitre sont d'un intérêt particulier :

· Le plaignant avait à sa disposition tous les outils nécessaires pour réussir, mais a omis d'en prendre avantage.
· M. Gonsalves avait eu l'occasion d'acquérir des connaissances au sujet du PIPNPE, car il y avait déjà participé à deux reprises, à savoir

durant les deux premières évaluations de son rendement. Le plaignant comprenait donc, ou aurait dû comprendre, que sa carrière reposait sur sa prochaine évaluation de rendement.

· De plus, M. Gonsalves avait eu à sa disposition un plan d'amélioration élaboré conjointement avec sa direction d'école. Néanmoins, le plaignant n'avait pas été en mesure de fournir une copie de son plan d'amélioration à son mentor dans le cadre de sa troisième évaluation de rendement et n'avait pas, non plus, été en mesure d'en fournir une copie à l'audience du grief.

· Le plaignant avait refusé d'estimer l'importance ou de bien saisir la valeur des commentaires négatifs concernant ses habiletés à enseigner, tels qu'exprimés par ses directions d'écoles. En effet, M. Gonsalves avait démontré un manque de respect pour ses évaluations de rendement antérieures et pour le plan d'amélioration qu'il avait lui-même élaboré avec la direction d'école.

· M. Gonsalves avait avoué ne pas avoir consulté les matériaux du PIPNPE qu'on lui avait remis dans le cadre du processus d'évaluation et qui étaient disponibles en ligne sur les sites web du ministère de l'Éducation et du Conseil.

· Le plaignant avait omis de remettre son formulaire de stratégie individuelle et n'avait jamais demandé de participer aux sessions de formation étant à sa disposition, mise à part une séance d'appui par son mentor. L'arbitre a donc conclu que l'absence d'amélioration dans le rendement du plaignant n'était pas surprenante. Étant donné les circonstances, il était peu probable que toute occasion additionnelle d'améliorer son rendement soit utile.

· La direction d'école, qui avait procédé à l'observation du rendement de M. Gonsalves en salle de classe, était mieux placée pour évaluer le comportement des élèves lors de la leçon du plaignant puisque ce dernier, en tant qu'enseignant, présentait sa leçon et était donc sans doute occupé à écrire des explications au tableau plutôt qu'à observer ses élèves.

· M. Gonsalves avait omis d'accepter ou de donner suite aux recommandations et aux offres d'appui présentées par sa direction d'école.

L'arbitre Carrier a également souligné que, contrairement aux allégations d'harcèlement à l'encontre de la direction d'école, il n'y avait aucune preuve d'un quelconque préjugé contre le plaignant et que la directrice d'école avait suffisamment d'expérience en matière d'évaluation de rendement des nouveaux enseignants sous le PIPNPE, entre autres, en raison de son expérience comme enseignante ayant été évaluée dans le passé.

Enfin, bien que l'arbitre a accepté qu'il soit utile de recevoir les témoignages des collègues du plaignant, il a soulevé plusieurs difficultés inhérentes à se fier à de tels témoignages pour miner l'évaluation de la direction d'école. Par exemple :

· ni les collègues ni le mentor du plaignant n'avaient connaissance des évaluations insatisfaisantes antérieures de M. Gonsalves ou du contenu de son plan d'amélioration;

· les collègues en salle de classe lors de la présentation d'une leçon par M. Gonsalves avaient effectué une évaluation superficielle du plaignant, à savoir que leur évaluation était plutôt formative, sans barème de comparaison;

· les collègues avaient des liens d'amitié avec le plaignant; par conséquent, le fait qu'ils se portent volontairement à un témoignage favorable du plaignant n'était pas surprenant;

· aucun des collègues n'était présent durant les évaluations informelles ou formelles par la direction d'école;

· le Conseil avait l'obligation statutaire de considérer les évaluations de rendement effectuées par les directions d'écoles ou les autres personnes autorisées à le faire dans le cadre du PIPNPE; et

· à titre de membre de l'Association, les enseignants sont mis en garde d'éviter d'évaluer des collègues de manière à contribuer de façon négative à une évaluation de rendement d'un de leur collègue.

L'arbitre a donc accordé peu de poids aux témoignages des collègues du plaignant.

En somme, le grief a été rejeté et le congédiement confirmé.

En survol

La décision de l'arbitre Carrier est particulièrement intéressante puisqu'elle met en lumière les responsabilités des nouveaux enseignants participants au PIPNPE et celles des directrices ou des directeurs d'école dans un tel processus.

L'arbitre Carrier souligne que « Front and centre, the responsibility for his own success or failure lay with Mr. Gonsalves and only Mr. Gonsalves. [The principal's] responsibility was to oversee, observe and make suggestions to assist Mr. Gonsalves along the path to success. » L'arbitre conclut donc que la responsabilité première en matière du PIPNPE appartient au nouvel enseignant et non à la direction d'école. Bien que les directions d'écoles doivent appuyer les nouveaux enseignants, ces derniers doivent démontrer qu'ils ont agi de manière diligente et qu'ils ont pris toutes les actions nécessaires afin d'assurer leur succès.

L'affaire Dufferin Peel clarifie aussi qu'une déférence doit être accordée à l'évaluation effectuée par les directrices ou les directeurs d'école, car ils ont été identifiés par la législature comme les experts en matière d'évaluation du rendement des enseignants. Enfin, l'affaire en l'espèce fait valoir qu'une norme de contrôle moins onéreuse doit être utilisée dans le cadre d'une recommandation de congédiement en vertu du PIPNPE que dans le cadre d'un congédiement d'un enseignant chevronné.

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1. 2014 CanLII 76885 (ONLA).
2. Règl. de l'Ont. 264/06, art. 4, ann. 2.
3. *Supra* note 1, page 9.
4. *Ibid*., page 11.
5. [2011] CanLII 50235.
6. *Supra* note 1, page 13.
7. *Supra* note 1, page 41.

TEACHER AWARDED DAMAGES FOR DEFAMATORY STATEMENTS MADE AGAINST HER

Summary

In *Jacqueline Catherine May v Rebecca Elizabeth Guzzo*[1] a teacher was awarded damages for defamatory statements made against her. Ms. Guzzo, the Defendant, made the statements to the principal at the school where Ms. May was a teacher. Ms. Guzzo alleged that Ms. May was involved in criminal activity, including drug use and permitting minors to smoke marijuana at her home. Due to the seriousness of the defamatory remarks, the fact that they were made to the principal of the school, and the fact that Ms. Guzzo refused to retract her remarks, the Court awarded Ms. May $10,000 in general damages.

Facts

Ms. May was a teacher employed by the Brant Haldimand Norfolk Catholic District School Board. Her son, Mr. Bastarache, was involved in a common law relationship with Ms. Guzzo and had twin boys. Ms. Guzzo and Mr. Bastarache were involved in an acrimonious litigation proceeding for custody of their children.

Ms. May provided an affidavit in support of her son's application for custody in which she stated that she had witnessed her son experience emotional and mental abuse at the hands of Ms. Guzzo. Her affidavit also stated that she had "*...seen Ms. Guzzo use marijuana on a regular basis, allegedly for pain management*".2

A month after Ms. May provided her affidavit to the court, Ms. Guzzo called Ms. May's principal and reported her concern about Ms. May's drug use and the fact that she had witnessed minors smoking marijuana in her home but failed to report the incident. The principal did not accept Ms. Guzzo's statements as being valid but she did advise that a report would have to be placed in Ms. May's personnel file.

Ms. May asked Ms. Guzzo to retract her statements but the Defendant refused. In fact, Ms. Guzzo's response to the request threatened further contact with the principal "*…I will be calling with the boy who was here when you were smoking with us to have him give a statement*…."[3]

The Court's Decision

Ms. May brought a civil suit against Ms. Guzzo seeking damages for the defamatory remarks made. Ms. May denied the validity of the statements made by Ms. Guzzo. She acknowledged that her principal was not accepting of Ms. Guzzo's remarks but stated her concern that the defamatory remarks were made in her workplace and that a report was placed in her file.

Ms. May's evidence was the Ms. Guzzo was manipulative and believed that Ms. Guzzo's motive for making the statements was to intimidate her in connection with the ongoing child custody litigation. Ms. May also provided further evidence of other defamatory remarks made by Ms. Guzzo in the context of the custody litigation. For example, Ms. Guzzo alleged that parents of students in her class had made threatening calls to the school principal about Ms. May's inappropriate conduct.

The suit was undefended by Ms. Guzzo as she was noted in default. As a result, the Defendant was deemed to have admitted to the truth of all the facts stated in Ms.

May's claim. The case proceeded to trial for an assessment of damages.

In its assessment of damages, the court outlined that factors established by case law which must be considered, including:

> (a) the plaintiff's position and standing in the community;
> (b) the nature and seriousness of the defamatory statements;
> (c) the mode and extent of publication;
> (d) the absence or refusal of a retraction or apology;
> (e) the possible effects of the statements upon the plaintiff's life; and
> (f) the motivation and conduct of the defendant.[4]

The Court also referred to section 16 of the *Libel and Slander Act*, which states that "*…slander affecting professional reputation does not require a plaintiff to prove special damages*".[5]

Applying these factors to the case, the Court considered the facts that: the defamatory remarks made were alleging criminal activity; that the remarks were made to Ms. May's employer; that they were made with malice; and that Ms. Guzzo refused to retract the remarks. Consequently, the Court awarded Ms. May general damages in the amount of $10,000. Punitive damages were not awarded.

Take-away

An important take-away from this case is to keep meticulous records of everything when facing a situation where defamatory remarks are being made. In Ms. May's case, she had written evidence that she had requested a retraction from Ms. Guzzo and that it had been refused. In the end, the Court put great weight on Ms. Guzzo's refusal to retract the defamatory remarks and factored it into the decision to award damages.

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1. 2013 ONSC 3332.
2. Ibid at 4.
3. Supra note 1 at 8.
4. Supra note 1 at 19.
5. Supra note 1 at 20.

TO PAY OR NOT TO PAY

A very interesting award of interest to both employers and employee arose out of two grievances filed August 29th, 2013 around the suspension of a teacher without pay pending a criminal charge of Sexual Assault causing Bodily harm.

The Grievor was a 41-year old high school physical education teacher with 12 years of seniority at St. James-Assiniboia School Division. The Grievor had a consistently positive record of performance evaluations. He taught grades 9 to 12 with students ranging from 13 to 19 years of age. He had never been disciplined and his workplace conduct had never been the subject of adverse comment. On August 1, 2013, the Grievor was charged with Sexual Assault Causing Bodily Harm arising from an incident on June 8, 2013. The complainant is "X" (name redacted for privacy), a 35-year old female Educational Assistant employed by the Division at a different school. After being charged, the Grievor was released by police on a promise to appear in court. He pleaded not guilty and his case was pending at the time of the award.

When the Division learned about the criminal charge, it suspended the Grievor without pay pending resolution of the allegations in court. Grievances were filed. The issue in the grievance arbitration was whether the suspension should stand, and if so, whether it should be a paid or unpaid suspension.

The following overview summary is based on the Division's investigation and police records, not direct evidence, since neither the Grievor nor X testified at the arbitration hearing. Police interviewed X and the Grievor on June 8, 2013, the day of the incident, but only X gave a statement. The Grievor was legally entitled to remain silent. X and the Grievor were interviewed by the Division in August 2013 after the Grievor had been charged. Both provided statements to Human Resources at that time. It is common ground that the Grievor is legally presumed to be innocent.

The Grievor and X had a prior sexual encounter at her apartment that both described as consensual. He said it occurred in March 2012. She said it was in 2009. Both indicated it was for sex only. They were never in a relationship together but at times were friendly and flirtatious.

On June 8, 2013, just after 1:00 am, the Grievor arrived unannounced at X's door with the intent to have sex again. The lights were out and she was fast asleep. She awoke and let him in, still wearing her nightgown. He made clear his wish to have sex and

she refused from the outset. The accounts thereafter diverge. In his prepared written statement provided to the Division, the Grievor said he soon realized there would be no sex and quickly left the apartment, feeling embarrassed and ashamed. The Division said that under questioning, he admitted touching X's chest and grabbing her by the wrists, pulling her towards him. By contrast, X told police and the Division that the Grievor knocked her down on the couch, grabbed her wrists, held her down, reached under her nightgown, kissed her thigh and tried to have oral sex. He used graphic sexual language throughout the encounter. X said to the police that when she threatened to kick him in the groin, he stood up, apologized and left. X was re-interviewed by the Division in February 2014 to follow up on information provided by the Association. Her version of events was not fully consistent across the three statements that she provided over this eight-month period but she did not waver from her complaint that she had been sexually touched by the Grievor without her consent.

A medical examination of X three days after the incident reported right thumb and wrist hyper-extension injury, left wrist strain and lower back strain. X wore wrist splints for several weeks after the incident.

On the night of the incident, X told police she did not want to see the Grievor charged criminally. She only wanted him spoken to and she wanted him to leave her alone. Two months later, after receiving a Crown opinion, police laid a charge against the Grievor and urged X to inform her employer. On August 14, 2013 she contacted her union president and subsequently reported the encounter to the Division. Until that point, the Division had no knowledge of the incident or the charge.

On August 29, 2013, the Board of Trustees suspended the Grievor without pay pending resolution of the charge against him (Ex. 2). In the suspension letter, the Division wrote as follows:"*While the charge against you is pending the Division will consider any further information or developments material thereto*." Subsequently, in response to the Association's request, the following reasons were provided (Ex. 4, dated September 11, 2013):

> [The Grievor's] alleged and admitted actions are antithetical to the image the Division strives to foster and the message it strives to send to the public in order to foster confidence in the public school system. In the Division's view, [the Grievor's] presence in the workplace in light of the alleged sexual assault creates a serious risk to the Division's reputation and its ability to assign and administer its workforce in a safe working environment.
>
> The Division also considers [the Grievor's] ability to fulfill the duties and responsibilities of a high school teacher significantly compromised by the fact that he may have committed the sexual assault he is accused of.

The Association and the Grievor each filed grievances on September 23, 2013. In his personal grievance (Ex. 5), the Grievor asked that the Division rescind his suspension, with or without pay, and remove all references to it from his personnel file. He also sought full compensation. The Association grievance (Ex. 6) requested the same relief. Certain other matters raised in the grievances have since been resolved. The Board of Trustees considered and denied the grievances on October 22, 2013 without further reasons. During the arbitration a variety of cases were studied, the full award can be found at:http://www.mbschoolboards.ca/documents/arbitrationAwards/St%20James%20Assiniboia%20Suspension%20Award%20Jun%2027%202014.pdf

The Division took the position that suspension without pay was fully justified, even without accepting the full scope of X's allegations, given the inculpatory statements by the Grievor himself when interviewed by Human Resources in August 2013.

The Division said it acted to protect public confidence in the school system but also to ensure the safety and well being of both female staff and students. In its view, each part of the Jockey Club test[1] was met - serious and immediate risk to employer concerns, harm to reputation, impact on other employees, grievor inability to perform his job, investigation to the best of the Division's ability on an ongoing basis, consideration of an alternate assignment and openness to review new circumstances as they arose. The Division asserted a uniform past practice to suspend without pay pending criminal charges.

In response, the Association denied there was any demonstrated risk to staff or students. On an informed and fair minded view, there was no risk of reputational harm to the Division.

The Association attacked X's version of the incident as inconsistent and unreliable. It maintained that the Division should have investigated as weaknesses emerged in the complainant's story over time. In the Association's position, even if had been initially justified, the suspension should have been rescinded subsequently, by February 2014 at the latest. Finally the Association said that the Grievor could have been accommodated with an alternate assignment that would have met any perceived

safety or reputational concerns, but the Division never gave genuine consideration to mitigating its risk in this manner. At a minimum, the Union argued, any suspension that might be justified should be with pay. Finally, there was no established past practice to suspend teachers without pay, said the Association.

Based on the summary of facts above, the Arbitrator upheld the suspension but also ruled that the Grievor was entitled to pay pending the disposition of the criminal charge against him.

This award is the first such award in Manitoba which would support a suspension with pay when a teacher is charged criminally.

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1. Ontario Jockey Club v. S.E.I.U. Local 528 (1977) 17 L.A.C. (2d) 176 is a leading arbitral authority on suspension pending the outcome in criminal proceedings listing the principles listed in the article to guide the decisions on this issue

NEW ONTARIO EMPLOYMENT STANDARDS ACT, 2000 AMENDMENTS EXPAND SCHOOL BOARDS' OBLIGATIONS

In 2014, the Ontario *Employment Standards Act, 2000*, S.O. 2000 C. 41 (the "ESA"), which applies to most employees of all provincially-regulated employers in the Province, including Ontario school boards, received some significant amendments. The most notable changes came in the form of three new leaves of absence, for which employees with specified length of service are eligible. Some of these leaves are similar to leaves already available to employees in a number of other Canadian provinces. Additionally, the most recent amendments include eliminating the current $10,000 cap on orders to pay wages, and applying a new two-year extended time limit on most wage claims that may be made under the ESA. As a whole, the amendments will serve to expand employees' statutory rights, necessitating school boards to quickly become informed with respect to the ways in which the new amendments may impact on their workplace, and take proactive steps to update policies and assess compliance in the context of applicable collective agreements.

The New Leaves of Absence

Effective October 29, 2014, school boards must make available to employees the following leaves of absence:

Family Caregiver Leave

All employees, regardless of length of service, will be entitled to up to eight (8) weeks of unpaid Family Caregiver Leave in each calendar year to care for an ill relative. The weeks of leave must be taken in full weeks, but do not have to be taken consecutively or in a single block. There is no minimum service requirement for eligibility to take Family Caregiver Leave, or pro-rating for part years.

An employee may take Family Caregiver Leave if caring for or supporting the following specified relatives:

- The employee's spouse.
- A parent of the employee or the employee's spouse.
- A child of the employee or the employee's spouse.
- A grandparent or grandchild of the employee or the employee's spouse.
- The spouse of a child of the employee.
- The employee's brother or sister.
- A relative of the employee who is dependent on the employee for care or assistance.

The scope of this leave also includes step-children, step-parents and foster children.

Employees are eligible for Family Caregiver Leave if they have a certificate from a "qualified health practitioner" stating that the specified relative has a "serious medical condition". The term "serious medical condition" is not defined in the ESA, except that it can be chronic or episodic.

The ESA defines "qualified health practitioner" as:

> a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided.

This means an employee could provide a certificate obtained outside Ontario, which could present challenges for school boards in terms of verifying the certificate.

Employees who wish to take leave must advise the school board in writing that they wish to take Family Caregiver Leave. An employee may take the leave before providing notice, and then advise the employer "as soon as

possible". Employees must provide a copy of the certificate "as soon as possible", upon request from the employer. As such, in practical terms, a school board may not deny or penalize an eligible employee for failing to provide it with notice or medical evidence prior to taking the leave.

Notably, Family Caregiver Leave is available in addition to Family Medical Leave, which employees were already entitled to under the ESA. The main difference between the two leaves is the types of relatives and nature of medical condition to which each is applicable. Under certain circumstances, an employee could qualify for both Family Medical Leave and Family Caregiver Leave, with respect to an ill relative.

Critically Ill Child Care Leave

Employees with at least six consecutive months of service may qualify for up to 37 weeks of unpaid Critically Ill Child Care Leave. Upon request from the employer, an employee must provide a copy of a certificate from a "qualified health practitioner" (defined in the same way as under Family Caregiver Leave) that states:

a) The child is critically ill and requires care or support of one or more parents and
b) The period during which the child requires care or support.

The child must be under 18 years of age. The ESA defines "critically ill" as "…a child whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury." The terms "baseline state of health" and "significantly changed" are not defined, and it remains to be seen how they will be applied in Ontario.

The employee notice requirements are similar to those for Family Caregiver Leave, i.e. providing the employer with notice and a copy of the certificate upon request "as soon as possible." Additionally, the employee must provide a "written plan" that indicates the weeks in which he or she will take the leave. As such, a school board may not deny or penalize an eligible employee for failing to provide it with notice or medical evidence prior to taking the leave.

Crime-Related Child Death or Disappearance Leave

Employees with at least six consecutive months of service may qualify for unpaid Crime-Related Child Death or Disappearance Leave. For the purposes of the leave, "crime" means an offence under the Canada Criminal Code, and "child" means under 18 years of age.

An employee can take up to 104 weeks in the event of a crime-related death of employee's child, step-child or foster child. A "crime-related death" means the employee's child, step-child or foster child has died and it is "probable, considering the circumstances, that the child died as a result of a crime."

An employee can take up to 52 weeks in the event of a crime-related disappearance of employee's child, step-child or foster child. A "crime-related disappearance" means the child has disappeared and it is "probable, considering the circumstances, that the child disappeared as a result of a crime."

The leave ends after 104/52 weeks, or the day on which it "no longer seems probable" that the child died or disappeared as the result of a crime.

An employee is not eligible for this type of leave if he or she is charged with a crime or if it is probable, considering the circumstances, that the child was a party to the crime.

Employees must advise the employer in writing that they wish to take the leave and provide a "written plan" that indicates the weeks in which he or she will take the leave. However, an employee may take the leave, and then advise the employer and provide the written plan "as soon as possible".

An employer may require an employee to provide "evidence reasonable in the circumstances" to entitlement to leave. It is not clear what evidence could be requested in these circumstances, and what would be considered "reasonable".

Given the possibility that circumstances (and eligibility under the ESA) may change as police investigate the death or disappearance of the child, school boards may wish to periodically obtain information to confirm an employee's continued eligibility for the leave of absence.

Other amendments

On November 20, 2014, Bill 18, the Stronger *Workplaces for a Stronger Economy Act, 2014* ("Bill 18") received Royal Assent. Bill 18 amends the ESA in the following significant ways:

Removal of $10,000 "Cap" and New Two-Year Complaint Period

Currently, an employment standards officer can issue an order for an employer to pay an employee unpaid wages, up to a maximum of $10,000. Effective February 20, 2015 (and subject to transitional rules), the $10,000 "cap" is removed. Also, the current six-month limitation period for bringing forward a complaint to the Ministry of Labour for non-payment of wages will generally be extended to two years on a going-forward basis.

New Obligations Relating to Assignment Employees

Currently, employers can benefit from the assistance of employees working for temporary help agencies (assignment employees) without assuming statutory liability for unpaid wages. The new amendments brought on by Bill 18 change this situation. Effective November 2015, and subject to transitional rules, if the agency fails to pay an assignment employee for some or all of his/her wages, the temporary help agency's client (the respective employer) will be jointly and severally liable for certain unpaid wages (i.e. regular wages, overtime pay, public holiday pay, and premium pay) of such assignment employees for the relevant pay period. There are also new record keeping requirements regarding assignment employees, including a requirement for clients of temporary help agencies to record the number of hours worked by each assignment employee in each day and each week, and to retain such records for three years.

Compelling Mandatory Self-Audits

Effective May 20, 2015, an employment standards officer will have the power to require an employer to conduct an examination/ self-audit of an employer's records, practices, or both, to determine whether the employer is in compliance with the *Employment Standards Act, 2000* or its regulations. Such employers will be required to conduct the self-audit and report the results to the employment standards officer.

Provision of Informational Poster

Effective May 20, 2015, employers will be required to provide each employee with a copy of the most recent informational poster published by the Minister of Labour, and Ministry-prepared translations of such posters (if any), if requested by the employee.

Minimum Wage Adjustments

The minimum wage will also be adjusted in accordance with an equation that relies on the consumer price index. The Minister of Labour will, no later than April 1 of every year after 2014, publish the minimum wages that are to apply starting on October 1 of that year.

Preparing for the ESA Amendments

On the whole, the ESA amendments will expand school boards' employment-related obligations. This impact may best be mitigated by: becoming informed in a timely manner regarding the ways in which the changes may impact the workplace; reviewing and updating affected policies, such as those with respect to leaves of absence in the context of applicable collective agreements; and performing a voluntary audit of compliance with employment standards well before the changes come into effect.

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1. Bill 18 also contains a number of minor changes to the *Occupational Health and Safety Act*, the *Employment Protection for Foreign Nationals Act (Live-In Caregivers and Others),* 2009, the *Workplace Safety and Insurance Act*, and the *Labour Relations Act, 1995*, which are not of direct relevance to school boards.

SUPREME COURT OF CANADA DECISION ON THE RIGHT TO STRIKE COULD HAVE AN IMPACT ON THE EDUCATION SECTOR

On January 30, 2015, the Supreme Court of Canada issued a landmark decision, holding that the right to strike is constitutionally-protected. This recent decision could have a significant impact on the education sector.

In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, the Supreme Court found that The Public Service Essential Services Act (the "PSESA") (which created an absolute ban on the right to strike for unilaterally designated "essential service employees"), infringed on protected Charter rights.

The PSESA is Saskatchewan's first statutory scheme to limit the ability of public sector employees who perform essential services to strike. It comes on the heels of a recent history of the withdrawal of services by public sector employees in the areas of health care, highway maintenance, snowplow operations, and corrections work. These job actions sparked major concerns about public safety. It prohibits the designated "essential service employees" from participating in any strike action against their employers.

In 2008, the Trial Judge concluded that the prohibition on the right to strike in the PSESA infringes on a fundamental freedom protected by section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter"). Subsequently, the Saskatchewan Court of Appeal unanimously allowed an appeal by the

Government of Saskatchewan, stating that the jurisprudence did not support a ruling that the right to strike is constitutionally protected by section 2(d) of the Charter. Justice Abella, writing for the majority of the Supreme Court (and a former head of the Ontario Labour Relations Board), agreed with the Trial Judge.

The Supreme Court held that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations. The Court also determined that the means chosen by the Saskatchewan Government to meet its objectives were not justified under section 1 of the Charter.

Constitutionalizing the Right to Strike

Relying on history, jurisprudence and Canada's international obligations, the Supreme Court found that the right to strike is an indispensable component of participating meaningfully in the pursuit of collective workplace goals.

The Supreme Court emphasized the importance of the right to strike to promoting equality in the bargaining process. The Supreme Court recognized the deep inequalities that structure the relationship between employers and employees. It is the possibility of strike action that enables vulnerable workers to negotiate with employers on terms of "approximate equality" in the context of a fundamental power imbalance. In the Court's view, resorting to strike action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives. While a strike on its own does not guarantee the resolution of a labour dispute, the Supreme Court stated that strike action has the potential to place pressure on both sides to engage in good faith negotiations.

PSESA is not Justified Under Section 1 of the Charter

The Supreme Court found that, while the maintenance of essential public services is a pressing and substantial objective, the means chosen by the Government in the PSESA are neither minimally impairing nor proportionate. The ban on the right to strike substantially interferes with the rights of public sector employees and cannot be saved by section 1 of the Charter. The Supreme Court held that the PSESA goes beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

First, the PSESA grants unilateral authority to public employers to determine whether and how essential services are to be maintained during a work stoppage without any adequate review mechanism. This authority includes the power to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification, and the essential services to be maintained. Only the number of employees required to work is subject to review by the Saskatchewan Labour Relations Board. Simply, the PSESA has no adequate review mechanism for the determination of the maintenance of essential services during a strike. Also, the PSESA does not tailor an employee's responsibilities during a work stoppage to the performance of essential services alone. The Supreme Court found that requiring employees to perform both essential and non-essential work during a strike undercuts their ability to meaningfully participate in the process of collective bargaining.

In addition, the PSESA lacks access to a meaningful alternative mechanism to resolve bargaining impasses, such as arbitration. In essence, the Supreme Court held that a ban on the right to strike must be accompanied by a meaningful mechanism for dispute resolution by a third party. Quoting the Trial Judge's remarks, it was noted that no other essential services legislation in Canada is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential services employees. In fact, "no strike" legislation is almost always accompanied by an independent dispute resolution process which acts as a "*safety valve against an explosive buildup of unresolved labour relations tensions*".

In conclusion, the Supreme Court held that the PSESA impairs the freedom of association much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services.

The PSESA was declared unconstitutional but the declaration of invalidity was suspended for one year. This should provide time to the Saskatchewan Government to review its legislation.

Constitutionality of Amendments to the Certification Process

In the same judgment, the Supreme Court examined whether amendments to the Saskatchewan *Trade Union Act,* which introduced stricter requirements for a union to be certified, are constitutional. The amendments included an increase in the required level of written support for union certification (from 25% to 45%); the elimination of automatic certification with 50% employee written support; a reduction in the period for receiving written support from employees from six months to three; a reduction in the level of advanced written support needed for decertification. These changes also broaden the scope of permissible employer communications to include facts and opinions.

The Supreme Court dismissed the constitutional challenge against these amendments. Although it has long been recognized that the freedom of association protects the right to join associations of the employees' choosing, the amendments do not substantially interfere with that right.

Compared to other Canadian labour relations statutory schemes, these requirements were found not to constitute an excessively difficult threshold such that the employees' right would be substantially interfered with.

In respect of employer communications, the Supreme Court found that permitting an employer to communicate facts and its opinions to its employees is not an unacceptable balance as long as the communication does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes.

Effect of Supreme Court Ruling

This judgment represents continuity in the Supreme Court's reversal of its thirty-year old precedents which had found no constitutional right to collectively bargain or to strike. In January 2015, the Supreme Court ruled that the Federal Government had violated the Charter by denying the RCMP officers the right to unionize.

Notably, a strong dissent by Justices Rothstein and Wagner expressed the view that the Supreme Court should not intrude into the role of policy makers in fundamental matters of labour relations. For the dissenting judges, the constitutionalization of the right to strike upsets the delicate balance that has been struck by legislatures among the interests of employers, employees and the public.

Significance to Education Sector

The Supreme Court's decision may have an impact in ongoing negotiations with education sector unions, particularly in Ontario where the Government passed new legislation, the *School Boards Collective Bargaining Act*, 2014 in April 2014 (the "SBCA"). The SBCA was intended to create the framework for two-tiered bargaining with teacher and other education sector unions in Ontario, with roles for the province, school boards and unions.

The Supreme Court's strong stance against back-to-work legislation enacted by the Saskatchewan Government may impact a possible strike by teacher or other education sector unions in current negotiations. The Ontario Secondary School Teachers' Federation ("OSSTF") publicly announced a strike fund in June 2014, and the Elementary Teachers' Federation of Ontario ("ETFO") announced a strike vote in December 2014. Given the tension in the current bargaining environment, the Ontario Government may soon be facing labour disruption in the education sector, and public pressure to end (or avoid) such disruption.

In order to comply with the Supreme Court's decision and the Charter, any back-to-work legislation would have to be carefully drafted to include a "meaningful dispute resolution mechanism" commonly used in labour relations. There are dispute resolution mechanisms and provisions relating to strikes in the SBCA, however this legislation was drafted before the release of the Supreme Court's decision, and may need to be re-examined.

In addition, the Supreme Court's decision is highly relevant to the ongoing constitutional challenge against the *Putting Students First Act, 2012* (the "PSFA") by OSSTF and ETFO. The PSFA imposed two-year contracts between teacher and other education sector unions and school boards from September 1, 2012 to August 31, 2014, and limited the right to strike. The preamble to the PSFA states that the "public interest" required adopting the contracts and limits on the right to strike on an "exceptional and temporary basis" in order to "encourage responsible bargaining" and to ensure contracts contained "appropriate restraints on compensation." Although the PSFA was repealed on January 23, 2013, it has had significant ongoing effects on collective bargaining and contract provisions.

The teachers' unions assert that the PSFA violates subsection 2(d) of the Charter. The hearing of this Charter challenge by the Ontario Superior Court of Justice was delayed in 2014 pending the decisions of the Supreme Court in the PSESA and RCMP cases. If the Ontario Superior Court decides the PSFA was unconstitutional, it remains to be seen what remedies would be ordered; the collective agreements imposed under the PSFA terminated on August 31, 2014.

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1. 2015 SCC 1
2/ Kate Hammer and Caroline Alphonso, "Ontario teachers to receive three-quarters of pay in case of strike", The Globe and Mail (June 9, 2014).
3. ETFO Bulletin, "ETFO Members Vote 95 Percent in Favour of Central Strike Action", December 9, 2014 online: <http://www.etfo.ca/MediaRoom/MediaReleases.aspx>.
4. OSSTF District 20 Teachers' Bulletin, "Supreme Court Cases Delay OSSTF's Bill 115 Challenge" (March 25, 2014): Online <http://www.osstfd20.ca/PDFs/Newsletters/News-March-2014.pdf>

NOVA SCOTIA BOARD OF INQUIRY FINDS WORKPLACE DISCRIMINATION

Despite the great strides made in reducing prejudice in this country, discrimination remains as a pervasive force in a number of venues, including the workplace. From a policy standpoint, federal involvement in this area is worth noting. As an example, section 15(1) of the *Charter of Rights and Freedoms states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*"[1] Provincial legislation also outlines prohibited modes of discrimination. In Nova Scotia, the *Human Rights Act*[2] stipulates in section 5(1)(d) that employment discrimination based on a number of enumerated grounds, including but not limited to age, race, colour, and physical or mental disability, is illegal.

A recent case in Nova Scotia has served to shed further light on the nature of workplace discrimination. In *Brothers v. Black Educators' Association*[3] a human rights Board of Inquiry, in a decision dated July 29, 2014, found that a former employee of the Association, Rachel Brothers, had been discriminated against based on her colour.

The Black Educators' Association was established in 1969, with the mandate of assisting children and adults from the black community to benefit fully and equitably from the provincial education system in Nova Scotia. Ms. Brothers, who was employed by the Black Educators' Association ("the Association"), was terminated from her position as a Regional Educator in December 2006. The reason given for the termination was financial concerns. In 2008, Brothers filed a complaint, alleging she had been terminated from her position based on age, race, and colour. According to Donald Murray, Chair of the Board of Inquiry, Ms. Brothers (who identified as bi-racial), had been subjected to a toxic work environment based on the colour of her skin. As an example, Ms. Brothers was asked at one point by a fellow staff member if "*she was even Black..*"[4] What is perhaps equally troubling is that many of the staff at the Association failed to disassociate themselves from these comments, and in fact, tried to excuse or contextualize them, or dismiss them as nothing of great concern.

The Board of Inquiry outlined that according to "*colourist thinking*" "*…as a person appears lighter, as she is 'closer' to white, she must therefore be less black*…."[5] Ultimately, the Board of Inquiry found that Ms. Brothers had been undermined by staff who exhibited "*colourist thinking*." Accordingly, she was terminated because she was simply not black enough[6] which the Board ruled was a violation of the Nova Scotia *Human Rights Act*. In the end, Ms. Brothers was awarded $11,000.00 for general damages and loss of income.

Ultimately, this case stands as a stark reminder that despite the enactment of policy at various levels of government, discrimination still exists in Canada. Clearly, discrimination exacts a tremendous toll on those involved, and it seems inevitable that until societal attitudes change, unfortunately, more cases such as this will arise.

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1. 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.
2. Human Rights Act, R.S.N.S. 1989, c.214.
3. Brothers v. Black Educators' Association. (July 29, 2014), CHRR Doc. 14-3080 (Nova Scotia Board of Inquiry).
4. Ibid., at 18.
5. Ibid., at 11.
6. Ibid., at 18.

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