Education Law Newsletter

Spring 2019

Supreme Court of Canada Finds Teacher Guilty of Voyeurism for Camera Pen Recordings

This decision confirms that privacy rights exist on a spectrum and must be balanced in view of all applicable circumstances. Students in schools are entitled to a reasonable expectation of privacy.

In the Fall 2018 Education Law Newsletter, we reported on the Ontario Court of Appeal decision in *R. v. Jarvis*. In that decision, a high school English teacher was acquitted of voyeurism for using a camera pen to surreptitiously film female students' chests. On February 14, 2019, the Supreme Court of Canada unanimously reversed the Ontario Court of Appeal decision and found the teacher guilty of voyeurism. The Supreme Court found that privacy is "not all all-or-nothing concept" and that students in schools are entitled to a reasonable expectation of privacy, free from covert, close-range recordings.

Contents

Background

The accused in *R. v. Jarvis* was an English teacher at a high school in Ontario. He used a camera concealed inside a pen to make 19 surreptitious video recordings of 27 female students and three male students while they were engaged in ordinary school-related activities in common areas of the school. Most of the videos focused on the faces and chests of female students. The students were not aware that they were being recorded by the teacher, nor did they consent to the recordings. A school board policy in effect at the relevant time prohibited this type of conduct.

When the principal discovered the camera and turned it over to police, the teacher was charged with voyeurism. Although he admitted that he had surreptitiously recorded the students, the other two elements of the criminal offence remained in issue at trial: whether the recording was made in circumstances giving rise to a reasonable expectation of privacy, and whether the observation or recording was done for a sexual purpose.

Lower Court Decisions

At trial, Justice Goodman determined that the recordings were made in circumstances that gave rise to a reasonable expectation of privacy. He found, however, that there could be other inferences to be drawn aside from making the recordings for a sexual purpose. The trial judge therefore acquitted the teacher of all charges.

The Ontario Court of Appeal upheld the acquittal, but reversed the lower court's analysis. The majority held that the recordings were made for a sexual purpose but that students do not have a reasonable expectation of privacy at school.

Supreme Court of Canada Decision

The Supreme Court of Canada found that the recording was done for a sexual purpose in circumstances giving rise to a reasonable expectation of privacy. The majority of the Court adopted a non-exhaustive list of relevant considerations in deciding whether students, or any alleged victim of voyeurism, had a reasonable expectation of privacy at the time of the observation or recording.

The factors include:

- the location the person was in when she was observed or recorded;
- the nature of the impugned conduct (whether it consisted of observation or recording);
- awareness of or consent to potential observation or recording;
- the manner in which the observation or recording was done;
- the subject matter or content of the observation or recording;
- any rules, regulations or policies that governed the observation or recording in question;
- the relationship between the person who was observed or recorded and the person who did the observing or recording;
- the purpose for which the observation or recording was done; and
- the personal attributes of the person who was observed or recorded.

Writing for the majority, Chief Justice Wagner stressed that privacy is "not an all-or-nothing-concept" and that "being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording."

Chief Justice Wagner also commented at length on the nature and level of privacy that students can expect at school. He found that "in ordinary circumstances, students in the common areas of a school cannot expect not to be observed by others and may also expect to be subject to certain types of recording". However, he also found that being in a non-private location does not entirely negate a reasonable expectation of privacy: the level of privacy that students can expect at school is lower than can be expected in a fully private space, like a bedroom or a bathroom. Schools, however, are not fully public spaces, and the level of privacy to be expected at school is still higher than would be expected in a fully public space like a sidewalk. The court commented:

> "For one thing, access to schools is usually restricted to certain persons, such as students, teachers, staff and guests… More significantly,

> schools are also subject to formal rules and informal norms of behaviour, including with respect to visual recording, that may not exist in other quasi-public locations."

The teacher had argued that the students could not have had a reasonable expectation not to be recorded, because they knew there were security cameras inside and outside the school. The Supreme Court, however, was unconvinced by this argument, finding that "not all forms of recording are equally intrusive". While students could reasonably expect to be captured incidentally by security cameras in the school, "it does not follow that they would also reasonably expect to be recorded at close range with a hidden camera, let alone by a teacher for the teacher's purely private purposes". The Chief Justice also said that the students in the recordings were young persons with a reasonable expectation that the adults around them would behave prudently. He stated:

> "The fact that all of the students were young persons means that they would have reasonably expected the adults around them to be particularly cautious about not intruding on their privacy, including by not targeting them for visual recording without their permission. Therefore, the fact that all of the students recorded were young persons strengthens the argument that they could reasonably expect not to be recorded in the manner they were."

Chief Justice Wagner also found it relevant that the school in question had policies prohibiting the type of recording taken by the teacher. Although the Chief Justice commented that the absence of such a policy or the presence of a less reasonable policy would not have justified the teacher's behaviour, the presence of such a policy highlighted the wrongful nature of his conduct.

Comment

Like many other organizations, schools and school boards often grapple with the interaction between today's social media and technology age, where educators stand *in loco parentis* and must exercise care to protect students.

R. v. Jarvis confirms that students have a reasonable expectation of privacy at school, even in communal spaces. Although a school is not as private as other places, it is more private than fully public spaces. Privacy rights exist on a spectrum and must be balanced in view of all applicable circumstances. However, Chief Justice Wagner's comments suggest that surreptitious, close-range video recordings of students will never be appropriate, regardless of the body part recorded or the individual doing the recording.

R. v. Jarvis also confirms that surreptitious recordings of students by teachers that are sexual in nature may incur not only employment-related and licensing penalties from the Ontario College of Teachers, but also criminal consequences for the teachers involved.

Schools and school boards should consider adopting and regularly reviewing privacy policies and codes of conduct to prohibit this type of behaviour and set out rules regarding the appropriate use of technology at school.

Maddie Axelrod
416.367.6168
maxelrod@blg.com

Elizabeth Creelman
Student-at-law
ecreelman@blg.com

Ontario Government Announces Increase to High School Class Size, Modified Sex-Ed and Math Curricula

The planned changes include an increase in class sizes, modifications to the sex-ed and math curricula and restriction of cell phone use in classrooms.

On March 15, 2019, Education Minister Lisa Thompson announced plans to increase class size for high school and some elementary grades, part of a sweeping change to the province's education system that will include modifications to the sex-education curriculum and a "back-to-basics" approach to math.[1]

The minister indicated that over the next four years the average class size would increase by one student in grades 4 to 8, and from 22 to 28 students in high school. These remarks immediately set the stage for a confrontation with the relevant teachers' unions. Harvey Bishof, the president of the Ontario Secondary School Teachers' Federation (OSSTF), said that the change would provoke "massive resistance".[2]

Mr. Bishof indicated that the class size increases would mean a reduction of more than 20 per cent of teaching positions in high schools. He said that increasing class sizes would mean schools would have a difficult time offering as many specialized classes, such as technology studies, that require smaller classes of students. He predicted that classes in core subjects, such as math, could grow to as high as 40 students.

The Ontario English Catholic Teachers' Association (OECTA) said that the class increases from grades 4 through to high school would result in the loss of 5,000 teaching positions in its schools. Liz Stuart, the president of OECTA, stated that her union will "use all means" to fight the changes. Ms. Stuart said that "there is no doubt that increasing class sizes will make Ontario's intermediate and high school classrooms more crowded, more chaotic and less productive".[3]

Sam Hammond, the president of the Elementary Teachers' Federation of Ontario (ETFO), said that while he appreciates that the government listened to concerns about class sizes in the primary grades, he's "very disappointed" with what is planned. "We've already said that we are absolutely opposed to that, and we'll do whatever we need to defend class size averages that are reasonable, from kindergarten to grade 12".[4]

At the news conference announcing the new changes, the minister asserted that "Not one teacher, not one, will lose their job because of our class size strategy".[5] The minister stated that the reductions will take place over four years. She indicated that the changes will come through retirements, resignations and other attrition. Asked about the resistance from the teachers' unions to class size increases, the minister said that Ontario has one of the lowest student-teacher ratios among provinces that have restrictions on class sizes, and the increase would align it with other jurisdictions.

Over the last number of months, the government has held a series of consultations both with education stakeholders and the broader public on a range of issues from class sizes in primary and staffing in full-day kindergarten to a cellphone ban in classrooms and rewriting the controversial sex-ed curriculum.

Minister Thompson confirmed that the government will not change class sizes in kindergarten, nor will it remove the cap of 23 students in grades 1 to 3.

1 Nancy Naylor, *New Vision for Education* (Ontario Ministry of Education, 2019:B08 memo, March 15, 2019), at: https://efis.fma.csc.gov.on.ca/faab/Memos/B2019/B08_EN.pdf.
2 Caroline Alphonso, "Ford government to increase class sizes, modify sex-ed and math curricula", *The Globe and Mail*, March 15, 2019, online at: https://www.theglobeandmail.com/canada/article-ontario-announces-that-high-school-class-sizes-will-increase-sex-ed/
3 *Ibid*.
4 Kristin Rushowy, "Ford Government announces hikes to high school class size, but no changes to kindergarten", *The Toronto Star*, March 15, 2019, online at: https://www.thestar.com/politics/provincial/2019/03/15/ford-government-announces-hikes-to-high-school-class-sizes-but-no-changes-to-kindergarten.html
5 Caroline Alphonso, *op. cit*. at footnote 2.

Under the ministry's plan, the average class size requirements in secondary schools would be adjusted from 22 to 28 students. The ministry takes the view that this change in class size aligns with secondary class sizes in other provinces across Canada. School boards would be required to maintain a board-wide average class size of 28 or less and the funded average class size would be increased to 28 to support this change.[6]

In a memorandum issued by Nancy Naylor, the Deputy Minister of Education, to the Directors of Education on March 15, 2019, she indicated that although these are "proposed changes" for the 2019-20 school year, the "government looks forward to the continued consultation with education partners to help shape the government's plans". Ms. Naylor stated that the consultation period will continue until May 31, 2019. She committed that to provide families, staff and school boards with certainty on the government's direction, it will move forward on next steps, including any required legislation, in time for the next school year.[7]

Notwithstanding the commitment to continue to consult with families, staff and school boards, the intent of the ministry's announcement was to provide school boards with information to build their budgets and staffing models for the 2019/2020 school year.

The concern arises that fewer teachers will mean reduced options for students and less adults in the schools to supervise.[8] The government has spent a lot of time talking about preparing students for the future, however, fewer teachers will result in larger classes, fewer courses and loss of expertise in our schools. This reduction of teachers in secondary schools will likely lead to a loss of programs that have smaller class sizes that serve specialized students.[9]

The government also announced that it would ban cellphones in classrooms unless certain exceptions apply. Use of personal mobile devices during instructional time will be permitted under the following circumstances:

- for educational purposes, as directed by the teacher;
- for health and medical purposes; or
- to support special education needs.

The ministry stated that school boards and stakeholders will be consulted to ensure students and parents are clear on the new guidelines.[10]

The government also announced a new four-year math strategy to ensure students have a strong understanding of math fundamentals and how to apply them. The plan is to phase in a new math curriculum that moves away from the current approach known as discovery math. The ministry states that new strategy will:

- improve student performance in math;
- help students solve everyday math problems; and
- increase students' employability into the jobs of tomorrow.

The new curriculum will emphasize basic concepts and skills contributing to students' future success and be accompanied by parent and teacher resources. The first elements of the new curriculum will be available in September 2019.[11]

The minister also indicated that the province would implement a new "age-appropriate" sex-ed curriculum.

Students will learn the proper names of body parts in grade 1, as they did under the previous 2015 curriculum introduced by the Liberal government. Students will also begin to learn about positive body images in grades 2 and 3, family and healthy relationships in grade 2 and consent and online safety in grades 2 and 3.

In the new curriculum, students will not learn about gender identity and gender expression until grade 8. In the 2015 curriculum, students were taught those topics in grade 6.

In grades 7 to 8, students will begin to learn about important topics such as sexting, contraception, tolerance and respect, intercourse and sexually transmitted infections.

6 *New Vision for Education, op. cit*. at footnote 1, at p. 2.
7 *Ibid*. at p. 2.
8 Paul Hunter, "Ontario's plan to raise class sizes will lead to loss of 800 public high school teaching jobs in Toronto, TDSB documents shows", *The Toronto Star*, March 17, 2019, online at: https://www.thestar.com/yourtoronto/education/2019/03/17/ontarios-plan-to-raise-class-sizes-will-lead-to-loss-of-800-public-high-school-teaching-jobs-in-toronto-tdsb-document-shows.html
9 *Ibid*.
10 *New Vision for Education, op. cit*. at footnote 1, at pp 5-6.
11 *Ibid*., at p. 6.

The ministry has indicated that to ensure parents are respected, it would provide an "opt-out" policy so parents would be able to exempt their children from sexual-health education.[12] The government is still working through the process on how this opt-out would work. The ministry is also proposing to provide an opportunity for families to use educational materials online to teach the subject at home.

The ministry has stated that starting in the 2020/2021 school year, it will centralize the delivery of e-learning courses to allow students greater access to programming and educational opportunities. The e-learning classes will be even larger than 28, with an average class size of 35.[13]

Secondary students will take a minimum of four e-learning credits out of the 30 credits needed to fulfill the requirements for achieving an Ontario Secondary School Diploma. In this regard, students will be required to take one credit per year online, with exemptions for some students on an individualized basis.[14]

The Conservative government is still in the process of trying to reduce the deficit that it estimates at $14.5 billion, though the Financial Accountability Officer indicates that it is closer to $12 billion. With the government's inaugural budget being introduced in early April 2019 and teachers' contracts due to expire at the end of August 2019, some stakeholders worry that further reductions are coming in the education sector.

Eric M. Roher
416.367.6004
eroher@blg.com

12 *Ibid*., at p. 8.
13 *Ibid*., at p. 3.
14 *Ibid*., at p. 3.

Municipal Conflict of Interest Changes Now in Effect

The new requirements are intended to promote greater public transparency in the disclosure of school board trustees' conflicts of interest, including through reduced penalties for trustees acting in good faith in the interest of such transparency.

The long-anticipated changes to the *Municipal Conflict of Interest Act* came into effect on March 1, 2019. The *Modernizing Ontario's Legislation Act, 2016*, also known as Bill 68, passed third reading and received Royal Assent in Ontario's Legislature on May 30, 2017. Bill 68 amended 16 pieces of legislation at that time and included changes to the *Municipal Act, 2001* and the *City of Toronto Act, 2006* that required municipalities to begin to appoint Integrity Commissioners. Bill 68 also made important amendments to the *Municipal Conflict of Interest Act*, but these latter amendments were not scheduled to come into effect until a much later date. The new legislation has introduced significant changes to the conflict of interest regime that applies to elected officials, such as school board trustees.

Legislation Overview

The *Municipal Conflict of Interest Act* is legislation that operates alongside school board codes of conduct. Its provisions govern the determination of when a trustee has entered a conflict of interest, and set out the legal recusal requirements and potential repercussions that apply if a conflict arises. The basic definition of a conflict of interest remains unchanged by the amendments under Bill 68. It remains the case that a conflict of interest arises where a trustee has a *pecuniary interest* in a matter that is before the board of trustees and that interest is *not remote*.

Under the *Municipal Conflict of Interest Act*, a pecuniary interest that gives rise to a conflict may take one of three forms:

1. A *direct pecuniary interest*, which arises from the trustee themselves having a monetary or economic interest in a matter.
2. An *indirect pecuniary interest*, which arises from the trustee being a shareholder, owner, part-owner, director, officer, or member of a corporation or body having a monetary or economic interest in a matter.
3. A *deemed pecuniary interest*, which arises when the parent, spouse or child of the trustee has a direct or indirect pecuniary interest that is known to the trustee.

The standard for finding a conflict of interest is strict in most cases. As noted by Ontario's Divisional Court in *Re Moll and Fisher*:[1]

> "Trustees, like Caesar's wife, must be, and appear to be, beyond temptation and reproach."

As the court went on to state in that decision, the *Municipal Conflict of Interest Act* "enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty".[2]

Where a trustee has any pecuniary interest in a matter to be discussed by the board of trustees, the *Municipal Conflict of Interest Act* enumerates mandatory measures to be taken by the trustee to recuse themselves. For example, trustees having a conflict of interest are required to disclose their interest prior to any consideration of the matter at a meeting, not take part in any discussion or vote concerning any question in respect of the matter, not attempt to influence such voting, and, in the special case of an *in camera* meeting, to leave the room where the meeting is held for the duration of the consideration.

1 *Re Moll and Fisher*, 1979 CarswellOnt 575 (Div Ct).
2 *Ibid*.

Impact on School Boards

While the amendments that came into force on March 1, 2019 will not change the *Municipal Conflict of Interest Act's* strict standard or its recusal requirements, school boards are required to adopt new procedures to administer these requirements and trustees who violate these standards will also be subject to new consequences.

In brief, the changes that came into effect on March 1st include the following:

- Trustees who declare a conflict of interest are now required to file a written statement with the secretary of the school board disclosing the trustee's interest. This written statement must include a description of the general nature of the conflict of interest.
- In turn, the school board is required to maintain a registry where copies of such written statements may be accessed by members of the public.
- Any member of the public, in reviewing the information in the school board's public registry or from any other sources, is entitled to make an application to a court to determine whether any trustee has acted contrary to the *Municipal Conflict of Interest Act*. This is a departure from the legislation's previous provisions extending this right to only an individual who qualified as an *elector* of the trustee in question.
- Where an application is made to a court alleging that a trustee has violated the *Municipal Conflict of Interest Act*, the court will now have discretion to consider whether the trustee took reasonable measures to prevent the contravention, including considering whether the trustee consulted with an Integrity Commissioner. This amends the previous regime which called for courts to strictly consider contraventions as a "yes-no" issue without considering mitigating factors in cases where trustees acting in good faith may have nevertheless crossed the line.
- In line with the new discretion to take trustees' reasonable measures into account, courts will also have a new authority to impose a range of penalties for contraventions of the *Municipal Conflict of Interest Act*. This range of penalties runs from lesser penalties such as a reprimand and suspension of remuneration, to more significant penalties such as declaring the trustee's seat vacant, disqualifying the trustee from running for re-election for up to seven years, and ordering financial restitution where the trustee has made a financial gain as a result of their contravention. Under the previous regime, only the more significant of these penalties were available and were applied to any circumstance where a trustee had violated the *Municipal Conflict of Interest Act*, regardless of any mitigating factors.

These new requirements are intended to promote greater public transparency in the disclosure of trustees' conflicts of interest, including through reduced penalties for trustees acting in good faith in the interest of such transparency. While it remains to be seen how courts will apply their new discretion under the *Municipal Conflict of Interest Act*, advice from legal counsel and Integrity Commissioners will take on new importance in helping protect trustees against the Act's most severe penalties.

Comment

To be prepared, school boards will need to adopt new processes, including considering how their registry of conflict disclosures will be maintained and how the public will be provided with access to these materials. School boards will also need clarity on how to access advice and guidance from an Integrity Commissioner if one is retained by their school board. Advanced planning and clear policies are key for ensuring that trustee conflicts are dealt with consistently, effectively and transparently in accordance with the laws that came into force on March 1st.

Maciej Lipinski
416.367.6555
mlipinski@blg.com

Arbitrator Rules Requirement for Updated Pastoral Reference Was Reasonable to Ensure Catholicity of Education

This decision affirms the denominational rights of Catholic school boards to impose conditions and requirements of employment relating to practicing the Catholic faith.

In a decision dated September 24, 2018, Arbitrator Brian Etherington ruled that Durham Catholic District School Board (Board) was permitted by law to impose a requirement for an updated pastoral reference for curriculum chair postings. Arbitrator Etherington decided, however, that the Board violated the collective agreement requirement to consult with the Ontario English Catholic Teachers' Association (Union) before altering the terms of the applicable Administrative Procedure on hiring curriculum chairs. The particular provision required the Board to engage in "significant consultation" with the Union on the administrative procedure and not to alter the policy prior to concluding the consultation.

Background

The grievance was initially filed by the Union in 2012. The Union alleged that a job posting for an interim curriculum chair position in Canadian and World Studies at a secondary school of the Board violated the collective agreement provision and Board policy for appointing curriculum chairs, and the Ontario *Human Rights Code* (Code), by requiring an updated pastoral reference. The Union further alleged that this requirement was a change in long-standing practice, but this estoppel argument was abandoned at the arbitration hearing.

The Administrative Procedures in dispute concerned applications for curriculum chair positions. These Administrative Procedures were amended over time to include a requirement that the applicant be a practicing Catholic committed to upholding the Catholic philosophy within the school community, and an express requirement for pastoral references from any short-listed candidates. The Union alleged that the Board violated the collective agreement by failing to consult before making amendments to the Administrative Procedures policies. As noted, Arbitrator Etherington upheld this aspect of the grievance and concluded that the Board altered the Administrative Procedure before commencing meaningful consultation with the Union.

Human Rights Code

The interesting aspect of this decision is the discussion of denominational rights of school boards and the preference that can be given to practicing Catholics in promotions. The Arbitrator noted that the Board and the Union agreed on the law concerning denominational rights under section 93 of the *Constitution Act, 1867* and the Ontario *Human Rights Code* provisions on discrimination on the basis of religion in employment.

Section 93 of the *Constitution Act, 1867* sets out the rights of each province to make laws relating to education, subject to the proviso that they cannot prejudicially affect any right or privilege with respect to denominational schools. As noted by the Arbitrator,[1] to engage s. 93(1) of the *Constitution Act 1867*, the following factors have to be established:

(a) there must be a right or privilege affecting a denominational school;

(b) enjoyed by a particular class of persons;

(c) by law;

(d) in effect at the time of the Union;

(e) and which is prejudicially affected.

1 Unpublished Decision, pp 117-118.

There has been extensive judicial consideration of the denominational rights of Catholic school boards in Ontario and how the section 93 guarantee is translated into the power to hire teachers and impose religious qualifications for employment or promotion. The Ontario Court of Appeal has confirmed in several decisions that Ontario Catholic school boards have the right to prefer practicing Catholics when making employment decisions relating to teachers.

The Decision

The question for the arbitrator in this case was whether the updated pastoral reference requirement was reasonably necessary to ensure the catholicity of the education provided by the Board. The Board relied on cases relating to denominational cause for dismissal in support of its position that a requirement to live in accordance with the tenets of the Catholic faith as a condition of employment is reasonably necessary.

The Union appeared to take the position that an updated pastoral reference is not necessary as a means by which to prove a candidate is a practicing Catholic. Arbitrator Etherington dispensed with that argument by noting that an updated pastoral reference is reasonably reliable because:[2]

> "…The priest is an expert in what it means to be a practicing Catholic and the candidate can choose the priest at their parish. The priest also has an opportunity to observe the candidate in the Church community and provide objective third party evidence of the candidate's participation in the Church community. The evidence of both the employer witnesses and Dr. Trafford showed that many of the questions on the PR form used by the Board would allow the priest to provide evidence of the candidates' participation in the church and the extent to which they are practicing Catholics in their community."

In Arbitrator Etherington's view, it did not make sense to review a pastoral reference provided by a candidate on hiring many years earlier as a reliable indicator of whether a candidate continued to be a practicing Catholic with an active faith commitment.

An interesting argument raised by the Union was the fact that Catholic school boards do not have a uniform practice on religious qualifications for employment or promotion. Arbitrator Etherington reviewed the denominational rights case law and determined that there was no requirement of unanimity or consensus among an entire religious faith in order for beliefs or practices to be protected. In fact, he concluded that insisting on total uniformity or consensus across the province on religious qualifications for employment or promotion before there could be protection under section 93 of the *Constitution* and section 24 of the Code would undermine such protections.

Although Arbitrator Etherington declared that the Board had violated the collective agreement obligation to engage in meaningful consultation prior to altering its Administrative Procedure, he did not order a remedy. The decision provides the parties an opportunity to agree on appropriate remedial measures, none of which have been publicly reported at the time of this writing.

Comment

This decision is yet another in a long line of jurisprudence affirming the denominational rights of Catholic school boards to impose conditions and requirements of employment relating to practicing the Catholic faith. It will be relied upon in the event of any future challenge of an employment decision based on preference for Catholic teachers.

Kate Dearden
416.367.6228
kdearden@blg.com

2 *Ibid*., p. 120.

HRTO Finds Denial of Coverage for Medical Cannabis Under Employer's Benefit Plan Non-Discriminatory

The Human Rights Tribunal of Ontario stated that decisions on what is included in a benefits plan can be based on a number of factors that are unrelated to a claimant's disability.

In a case before the Human Rights Tribunal of Ontario (HRTO), an applicant alleged that an employee benefits administrator's decision to deny her coverage for medically-prescribed cannabis was discriminatory. The Tribunal found that such a denial does not constitute discrimination under the Ontario *Human Rights Code* (Code) when the decision to deny coverage is unrelated to an applicant's disability or another enumerated protected ground.

Background

In the October 2018 decision,[1] the self-represented applicant was a dependant of an employee of the Corporation of the County of Essex (Essex), who relied on medically-prescribed cannabis treatments to control the symptoms of her disability. The Applicant named Green Shield Canada Inc. (Green Shield), a company who contracts with employers such as Essex to administer health and dental care plans for employees, as the respondent.

At issue in the summary hearing was whether the decision to deny the Applicant coverage for her medically-prescribed cannabis was discriminatory, or whether this application had no reasonable prospect of success.

The Applicant believed that her employer (and its benefits plan administrator) had refused to reimburse the costs of her cannabis-related treatment due to an inherent "bias against cannabis use", which resulted in an alleged discrimination in the provision of services on the basis of her disability.[2]

Essex denied any discriminatory action, responding that its decision to deny coverage to the applicant was a technical one that was in no way connected to the applicant's disability. The company explained that its employee benefits plan stipulated that, in order for a drug to be covered, it must have a Drug Identification Number (DIN) assigned by Health Canada. At this point in time, medical cannabis does not have a DIN, and Essex stated that, on this basis alone, it denied coverage. In support of this point, counsel for Essex relied on the Tribunal's decision in *Kueber v. Ontario (Attorney General)*,[3] in which it was held that a decision to deny coverage for the cost of medical marijuana under the Ontario Drug Benefit program because it was not approved by Health Canada was not a breach of the applicant's Code rights, since the decision was not based on any Code-related reason.

The Tribunal's Decision

The HRTO held that Essex's denial of coverage was not discriminatory in nature. In fact, the Tribunal stated that, even if Essex had denied coverage because of a bias against cannabis use, it would not amount to a breach of the Applicant's Code rights. As stated by the Tribunal:

> "The fact that a person who has been prescribed medical cannabis also has a disability does not establish the connection between the decision to deny the coverage and that person's disability. The connection in that instance is between the type of drug and the decision."[4]

1 *Rivard v. Essex (County)*, 2018 HRTO 1535 (Rivard).
2 *Ibid* at para 30.
3 *Kueber v Ontario (Attorney General)*, 2014 HRTO 769 (CanLII) (Kueber).
4 *Ibid.*

In arriving at its decision, the HRTO referred to a case from Nova Scotia, *Canadian Elevator Industry Welfare Trust Fund v. Skinner*,[5] in which an appeal court overturned a 2017 decision which had found that a man had been discriminated against because the union welfare plan refused to cover prescription drugs not approved by Health Canada, including cannabis. In overturning the lower court decision, the Nova Scotia Court of Appeal found that a denial of coverage for a specific drug or medical substance based on a contractual term was not discriminatory, and that such a denial was not automatically made on the basis of an applicant's disability.

In finding that the Applicant's claim had no reasonable prospect of success, the Tribunal stated that "decisions on what is included in a benefits plan can be based on a number of factors that are unrelated to claimant's disability,"[6] and that, as stated in *El Jamal v. Minister of Long-Term Care*,[7] "the purpose of the Code is not to define the appropriate scope of a benefit plan without regard to the underlying purpose of the plan or to require that benefits be made available to individuals simply because they identify with a Code-related factor".

Comment

While societal stigma related to the medical use of cannabis slowly continues to ebb away, this decision from the HRTO, and its corresponding extra-provincial sister decision, indicate that this shift has not impacted the contractual interpretation of employee benefit contracts.

Employers and employees alike should heed this decision when making the choice to turn to cannabis-based medical treatments, as many employers and insurers adhere to Health Canada's strict DIN-based coverage system in constructing their contracts. Some insurers have begun to offer coverage for medical cannabis as a medical service, rather than as a drug benefit, as pressure increases to offer these treatments for ailments such as types of cancer or Crohn's disease. Employees should be sure to assess how their prescribed cannabis treatment will be classified (or excluded) under their benefits plan before committing to a new, costly course of treatment.

Going forward, health practitioners will continue to prescribe cannabis regardless of their patients' coverage options. Employers should monitor Health Canada's classification of cannabis to ensure they stay aware of how the provisions of their employment benefits contracts will be interpreted. While we may see cannabis achieve Health Canada's DIN status in the near future, for now employers and employees should keep in mind that, when it comes to medical benefits coverage in employment contracts, the terms of the contract will reign supreme.

Noah Burshtein
Student-at-law
nburshtein@blg.com

5 *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31.
6 *Rivard, supra* note 1 at para 32.
7 *El Jamal v. Minister of Long-Term Care,* 2011 HRTO 1952 (CanLII).

IPC Releases New Guide to Privacy and Access to Information in Ontario Schools

To properly safeguard the personal information and privacy of students, it is crucial for school board officials and education professionals to understand and comply with their obligations in collecting, accessing, retaining and disclosing students' personal information.

In January 2019, the Information and Privacy Commissioner of Ontario published *A Guide to Privacy and Access to Information in Ontario Schools* (Guide). The Guide contains the following information to assist school board officials and education professionals to be compliant with the applicable privacy legislation in Ontario in protecting students' personal information:

- Types of personal information that can be collected by school boards; and
- When, how, to whom, and to what extent such information may be collected, used, disclosed, retained or corrected.

Specifically, the Guide covers the school board officials' and education professionals' rights and obligations regarding students' personal information in the following seven topics:

1. Collecting personal information
2. Using and disclosing personal information
3. Consent to collect, use and disclose personal information
4. Safeguarding and retaining information
5. Access to information
6. Correction of personal information
7. Special topics

To properly safeguard the personal information and privacy of students, it is crucial for school board officials and educational professionals to understand and comply with their obligations in collecting, accessing, retaining and disclosing students' personal information.

The following are select highlights from the Guide:

Ontario's Legislation on Privacy of and Access to Students' Personal Information

In Ontario, the main legislation regarding the protection of students' personal information in the school system are the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) and the *Education Act.* Depending on the situation and types of personal information involved, other legislation such as the *Personal Health Information Protection Act,* the *Child, Youth and Family Services Act,* and the *Occupational Health and Safety Act* may apply.

School Boards' Collection of Students' Personal Information

The MFIPPA defines personal information as "recorded information about an identifiable individual" and sets out rules regarding collection of personal information. Under the MFIPPA, schools are allowed to collect personal information of students only if the collection is expressly authorized by law or necessary to the proper administration of a lawfully authorized activity.

The *Education Act* sets out rules regarding access to and the collection of information contained specifically in the Ontario Student Record (OSR). The OSR is a record of a student's progress through the school system in Ontario and includes information such as biographical data, names of parents, special health information, report cards and special education records. All public and separate school boards are required to have an OSR for each student and private schools may choose to create OSRs for their students. OSRs must be established and maintained in accordance with the Ministry of Education's *Ontario Student Record (OSR) Guideline, 2000*.

School Boards' Use of Students' Personal Information

According to the MFIPPA, schools may use a student's personal information only under the following conditions:

- with consent;
- for the purpose for which it was collected, or for a consistent purpose; or
- for a purpose for which the information may be disclosed to the school board under the MFIPPA.

Under the *Education Act*, schools' use of the OSR is restricted to the following circumstances:

- by supervisory officers, principals and teachers to improve the instruction and other education of the student;
- to respond to requests from students and parents to correct or remove information from the OSR;
- to allow students and parents to examine the students' OSR;
- for disciplinary proceedings;
- to prepare reports required by the *Education Act*; or
- to prepare a report related to the student's application for education or employment.

School Boards' Disclosure of Students' Personal Information

Under the MFIPPA, students' personal information may be disclosed in some situations, including:

- with consent;
- for the purpose for which the information was obtained, or for a consistent purpose;
- to an officer, employee, consultant, or agent of the institution who needs the information in the performance of their duties;
- for the purpose of complying with law;
- in compelling circumstances affecting health and safety;
- to a law enforcement agency in order to aid in an investigation;
- where the student or his or her parents request access; or
- to notify a student's close relative, friend or spouse about a student's injury, illness or death in order to facilitate or enable contact (the information disclosed must be restricted to the information required to facilitate contact).

Under the *Education Act*, written permission from the student's parent, guardian or the adult student is generally required before a school board discloses a student's personal information in the OSR. In the following situations, the OSR may be disclosed without written permission:

- disclosures required by the Ministry of Education or school board;
- disclosures of certain limited information about students to a medical officer of health; or
- access by the student to his or her own records, and by his or her parent or guardian where the student is under 18 years of age.

Under special circumstances, it is mandatory for school boards to disclose students' personal information. Some examples of such circumstances are as follows:

- Disclosing the name, address and telephone number of any student and their parent, and the student's birth date when requested by the local medical officer of health.
- Notifying parents or guardian of involved students if a student has been harmed in an activity that could result in their suspension or expulsion. When notifying the parent or guardian of the harmed student, the principal must only disclose information that is necessary to explain the nature of the activity that resulted in harm to the student, the nature of the harm, the steps taken to protect the student's safety, and the supports that will be provided to the student in response to the harm.
- Disclosure to eligibility review officers, if written demand for production of records is made.
- Reporting to a children's aid society if there is a reasonable ground to believe that a child is in need of protection.
- Providing personal information to the school board's employees if disclosure of information is reasonably necessary in order to protect the employee from physical injury.

- Disclosure of records to the public or affected individuals if there are reasonable and probable grounds to believe that it is in the public interest to do so, and the record reveals a grave environmental, health, or safety hazard to the public. Notice should be given to the individual whose information is to be disclosed only if it is feasible to do so.

While consent is not required in the above circumstances, school boards should provide general information to the school community regarding the requirements for disclosure.

With respect to retention of records, school boards should be aware that the legislation requires personal information be retained for at least one year after use, or for a period set out in a bylaw or school board resolution, whichever is shorter. This requirement does not apply if the student, or their parent or guardian, in the case of a student under age 16, consents to an earlier disposal of the information, or if the information is credit or debit card payment data.

Comment

In addition to the selected highlights above, the Guide provides more details regarding the collection, usage, and disclosure of students' personal information. The Guide also covers useful information for school board officials and education professionals regarding their rights and obligations in retaining, safeguarding, and correcting students' personal information, as well as some nuances regarding various stakeholders' access to students' personal information.

Lastly, the Guide covers special topics including:

- school photographs;
- disclosure to a children's aid society;
- disclosure to police;
- collection, use and disclosure of health information; and
- privacy in the networked classroom and the use of online educational services.

School board officials and education professionals are encouraged to familiarize themselves with the information in the Guide to better understand the rules regarding privacy and access to information of the students' personal information in the school system. The complete Guide can be accessed at https://www.ipc.on.ca/education/.

Sunny Kim
Student-at-law
sunnykim@blg.com

Bill 48 to Unleash Guidelines for Service Animals in Schools

Individual school boards are currently at liberty to develop their own policies and processes for managing service animal requests. The amendments in Bill 48 are intended to provide a uniform approach to the use of service animals in Ontario schools.

On October 25, 2018, the Minister of Education introduced Bill 48, *Safe and Supportive Classrooms Act, 2018*. Most of the media coverage of Bill 48 has focused on the proposed amendments that would expand the definition of sexual abuse and require mandatory revocation of educators' certificates for any acts of sexual abuse.

Bill 48, however, also contains proposed amendments to the *Education Act* that would authorize the Minister of Education to establish policies and guidelines respecting service animals in schools. School boards would be required to follow these guidelines and to create their own policies to support students with special needs who require service animals by September 2019.[1]

Current Uncertainty in the Law

Service dogs are used by both children and adults for many reasons. While some service animals assist blind and visually impaired individuals, other service animals alert people to symptoms of certain medical conditions, provide support to individuals who use wheelchairs, and provide support to people with autism and other mental health related needs. Service dogs can assist students in gaining meaningful access to education.

While the *Accessibility for Ontarians with Disabilities Act, 2005* sets out a framework for the use of service dogs by individuals with disabilities and the *Blind Persons' Rights Act* sets out a framework for the use of guide dogs for individuals who are blind or have low vision, there is currently no legislation in Ontario that addresses the use of service animals in schools.

Individual school boards are currently at liberty to develop their own policies and processes for managing service animal requests; 39 of 72 school boards in Ontario currently have specific policies in place to address service animals in schools. The amendments in Bill 48 are intended to provide a uniform approach to the use of service animals in schools.

Bill 48 is also intended to establish what qualifications, if any, should be required of service dogs in order to ensure their presence in school environments is safe and effective.

Besides the very specific qualifications required for guide dogs outlined in the *Blind Persons' Rights Act*, Ontario has not yet developed criteria for the certification of service dogs used by individuals for reasons other than blindness.[2]

The *Integrated Accessibility Standards* under the *Accessibility for Ontarians with Disabilities Act* states that an animal is considered a "service animal" if (a) it is readily identified as one through a vest or harness, or (b) its owner provides documentation by a health professional conferring their requirement of the animal for reasons relating to a disability.[3] This potentially could result in the presence of untrained animals in classrooms and schoolyards.

While British Columbia, Alberta, and Nova Scotia have all introduced legislation regulating the certification of service dogs, Ontario has yet to follow suit.[4] The only prior attempts to regulate service dogs resulted in two failed private members bills in 2016.[5]

1 Bill 59, *An Act to amend the Civil Code as regards marriage*, 1st Sess, 42nd Parliament, Ontario, 2018 (first reading 25 October 2018).
2 *Blind Persons' Rights Act*, RSO 1990, ch b7; *Guide Dogs*, R.R.O. 1990, reg. 58, s. 1.
3 *Integrated Accessibility Standards*, O Reg 191/11 at s 80.45(4).
4 *Guide Dog and Service Dog Act* [SBC 2015] Chapter 17; *Guide Dog and Service Dog Regulation* B.C. Reg. 223/2015; *Service Dogs Act*, SA 2007, c S-7.5; Service Dogs Qualifications Regulations, Alta Reg 59/2017; *An Act Respecting Service Dogs*, SNS 2016, c 4; *Service Dogs Regulations*, NS Reg 94/2018.
5 Bill 217, *Service Dogs for Persons with Disabilities Act*, 2016; Bill 80, *Ontario Service Dogs Act*, 2016.

School boards therefore have wide discretion in deciding which dogs are safe to admit into the school environment. The current gap in the law creates uncertainty, not only for parents seeking to acquire a suitable animal for their child with special needs, but also for educators attempting to provide reasonable accommodation of a student with a disability and undue hardship caused by admitting an animal to school.

Contents of Guidelines Unknown

The contents of the proposed guidelines is not presently known. Mr. Toby Barrett, Member of Provincial Parliament for Haldimand-Norfolk, has confirmed that Bill 48 is mainly intended to address service dogs, and not exotic animals like snakes.[6]

According to Minister of Education Lisa Thomson, Bill 48 is intended to introduce consistency across the province as "families of students with special needs deserve a clear and transparent process for requesting that service animals be able to accompany their children, no matter where they live".[7] It is unclear whether the proposed guidelines and policies will address concerns regarding service dog training and certification.

The Ministry should consult with school boards in order to develop guidelines that balance any undue hardship caused by admitting animals into schools with the reasonable accommodation of students with special needs.

As of March 15, 2019, Bill 48 has been sent to third reading. We will continue to monitor the progress of Bill 48 and the development of any guidelines applicable to school boards.

Elizabeth Creelman
Student-at-law
ecreelman@blg.com

6 "Bill 48, *Safe and Supportive Classrooms Act*, 2018", 2nd reading, Parliamentary Debates, (19 November 2018) at 1750 (Mr. Toby Barrett).
7 Ministry of Education, News Release, "Ontario Supporting Students with Special Needs" (30 October 2018), online: https://news.ontario.ca/edu/en/2018/10/ontario-supporting-students-with-special-needs.html

BLG Education Law Group

Leaders

Eric M. Roher | National Leader
416.367.6004 | eroher@blg.com

Mark Phillips | Montréal
514.954.3198 | mphillips@blg.com

Robert Weir | Toronto
416.367.6248 | rweir@blg.com

Yves J. Menard | Ottawa
613.787.3518 | ymenard@blg.com

Laurie Robson | Calgary
403.232.9482 | lrobson@blg.com

Sean Muggah | Vancouver
604.640.4020 | smuggah@blg.com

Montréal

François Longpré
514.954.2543
flongpre@blg.com

Mark Phillips
514.954.3198
mphillips@blg.com

Patrick Trent
514.954.3154
ptrent@blg.com

Ottawa

Yves J. Ménard
613.787.3518
ymenard@blg.com

Sara Lemieux
613.787.3581
slemieux@blg.com

Jessica Sheridan
613.369.4771
jsheridan@blg.com

Toronto

Madlyn Axelrod
416.367.6168
maxelrod@blg.com

Andrew Baker
416.367.6250
abaker@blg.com

S. Margot Blight
416.367.6114
mblight@blg.com

Brennan M. Carroll
416.367.6721
bcarroll@blg.com

Kate Dearden
416.367.6228
kdearden@blg.com

Bethan Dinning
416.367.6226
bdinning@blg.com

Maria Gergin
416.367.6449
mgergin@blg.com

Adam Guy
416.367.6601
aguy@blg.com

Michelle Henry
416.367.6531
mhenry@blg.com

Markus F. Kremer
416.367.6658
mkremer@blg.com

Maciej Lipinski
416.367.6555
mlipinski@blg.com

Natasha Miklaucic
416.367.6233
nmiklaucic@blg.com

J. Pitman Patterson
416.367.6107
ppatterson@blg.com

Victoria Prince
416.367.6648
vprince@blg.com

Eric M. Roher
416.367.6004
eroher@blg.com

Robert Weir
416.367.6248
rweir@blg.com

Stephanie Young
416.367.6032
syoung@blg.com

Vancouver

Sean Muggah
604.640.4020
smuggah@blg.com

Michelle Maniago
604.640.4139
mmaniago@blg.com

Shelley-Mae Mitchell
604.640.4160
smitchell@blg.com

Steve M. Winder
604.640.4118
swinder@blg.com

Calgary
Centennial Place, East Tower
520 3rd Ave S W, Suite 1900
Calgary, AB, Canada T2P 0R3
T 403.232.9500 | F 403.266.1395

Montréal
1000 De La Gauchetière St W, Suite 900
Montréal, QC, Canada H3B 5H4
T 514.879.1212 | F 514.954.1905

Ottawa
World Exchange Plaza
100 Queen St, Suite 1300
Ottawa, ON, Canada K1P 1J9
T 613.237.5160 | F 613.230.8842 (Legal)
F 613.787.3558 (IP) | ipinfo@blg.com (IP)

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide St W, Suite 3400
Toronto, ON, Canada M5H 4E3
T 416.367.6000 | F 416.367.6749

Vancouver
1200 Waterfront Centre
200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744 | F 604.687.1415

BLG Consulting (Beijing) Limited
11A16, East Wing, Hanwei Plaza
No. 7 Guanghua Road, Chaoyang District
Beijing, 100004, P.R. China
T 86 010.8526.1820 | F 86 010.6512.6125

blg.com | Canada's Law Firm

Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.

Borden Ladner Gervais