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EDUCATION LAW NEWSLETTER

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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, snow plow operations, and corrections work, sparking 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 warrant 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 in 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.

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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" legislations are 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 for 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; and 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 violated the *Charter* by denying the RCMP officers the right to unionize.[1]

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 between 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[2], and the Elementary Teachers' Federation of Ontario ("*ETFO*") announced a strike vote in December 2014[3]. 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.

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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

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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>.

against the *Putting Students First Act, 2012* (the "*PSFA*") by the *OSSTF* and the *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.[4] 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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[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>.

Employers and service providers have a duty to accommodate individuals because of needs related to their gender identity or gender expression to the point of undue hardship.

ACCOMMODATING TRANSGENDER STUDENTS IN YOUR SCHOOL

Many individuals experience discrimination, harassment and even violence as a result of having a gender identity which differs from their biological sex. On April 14, 2014, the Ontario Human Rights Commission released its *Policy on preventing discrimination because of gender identity and gender expression* (the "Policy"). The Policy is aimed promoting recognition of the inherent dignity and worth of trans people, providing equal rights and opportunities without discrimination or harassment on the basis of gender identity and gender expression, and creating a climate of understanding and mutual respect. It provides a comprehensive guideline to employers and service providers for accommodating trans people, assisting them with understanding and satisfying their responsibilities under the Ontario *Human Rights Code,* R.S.O. 1990, c. H.19 (the "*Code*") as it pertains to individuals' gender identity and gender expression.

BASIC OBLIGATIONS UNDER THE *HUMAN RIGHTS CODE*

Under sections 1 to 5 of the *Code,* every person is protected from discrimination and harassment because of gender identity and gender expression in employment, housing, facilities and services, contracts, and membership in unions, trade or professional associations.

Gender expression and gender identity are not defined in the *Code* itself; however, the Policy defines these terms as follows:

> **Gender identity** is each person's internal and individual experience of gender. It is their sense of being a woman, a man, both, neither or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person's sexual orientation.
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> **Gender expression** is how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender.

The Policy further provides a definition of "trans or transgender": "an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical norms." People who identify as transgender, a trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, and/or gender non-conforming are some of the individuals included in this umbrella.

Pursuant to the *Code,* employers and unions, housing and service providers have a duty to accommodate individuals requiring accommodation because of needs related to their gender identity or gender expression, to the point of undue hardship.

ACCOMMODATION HIGHLIGHTS

In accommodating the needs of individuals because of their gender identity and/or gender expression, organizations should be mindful of the overarching principles of accommodation: respect for dignity, individualization, integration and full participation. According to the Policy, "the most appropriate accommodation will be the one that best respects dignity, meets individual needs, and promotes inclusion and full participation".

The Policy offers detailed guidelines on how an individual's needs related to gender identity and/or gender expression can be appropriately accommodated. Some instructional highlights from the Policy are as follows:

- Everyone has the right to define their own gender identity. Trans people should be recognized and treated as the gender they live in, whether or not they have undergone sex reassignment surgery, and regardless of whether their identifying documents reflect their gender identity and/or gender expression.
- Trans people can have their names or sex designations changed on identity documents or other records. A person's self-identified gender should be accepted in good faith, even if identity documents do not match their lived gender. A person's request to change records and self-identification is usually enough. If an organization requires further proof of gender, it will have to demonstrate that the criteria is legitimate, and that there was undue hardship in complying with the individual's request without it.
- People should have access to facilities and services based on their lived gender identity.
- Dress code policies should be flexible and inclusive. Trans people should not be prevented from dressing according to their lived or expressed gender identity. Legitimate dress code requirements (e.g. safety gear) should not negatively affect trans people, must be reasonably necessary and should not be based solely on gender stereotypes.
- Organizations should review their rules, practices, policies and facilities, and make

Everyone has the right to define their own gender identity.

changes as necessary to remove any barriers and avoid negative effects on trans people. Policies and practices should be inclusive of everyone.

- When engaging in the accommodation process, everyone involved should be cooperative and respectful of privacy. Only the necessary information should be exchanged and it must be kept confidential to the extent possible.

Organizations are encouraged to read and become familiar with the Policy, as well as the applicable *Code* provisions, in order to fully understand their obligations in respect of accommodating trans people.

WHAT CAN SCHOOL BOARDS DO TO MEET THESE OBLIGATIONS?

Trans youth are especially vulnerable to bullying and harassment by their peers.

The Policy indicates that trans youth are especially vulnerable to bullying and harassment by their peers, citing the following statistics from a Canadian Survey conducted by the Egale Canada Human Rights Trust:

- 78% of trans students feel unsafe in their schools;
- 74% of trans youth had been verbally harassed because of their gender identity;
- 49% had experienced sexual harassment in school because of their gender identity;
- 37% had been physically harassed or assaulted because of their gender identity.

In addition to their obligations under the *Code*, school boards are required under the *Education Act,* R.S.O. 1990, c. E.2 to develop and implement equity and inclusive education policies which address discrimination and harassment on the basis of all *Code* protected grounds, including gender identity and gender expression.

Ultimately, school boards have an obligation to take steps to prevent and respond to discrimination and harassment in their schools because of a student's gender identity and/or gender expression.

In an effort to mitigate the risk of a human rights complaint and to ensure their schools provide an inclusive and respectful environment for all students and employees, school boards should develop best practices for interacting with, accommodating and protecting trans individuals from discrimination and harassment. In addition to those highlights noted above, some recommended best practices are as follows:

- When accommodating students or employees because of gender identity and/or gender expression, school boards should consider not only the logistics of an accommodation, but also what is sensitive in the circumstances given the individual's feelings and unique vulnerabilities.
- Think ahead. What challenges might the school and/or the trans individual face in the accommodation process? The potential challenges associated with a particular accommodation should not necessarily modify the accommodation; however, school boards and school administrators should be prepared to address and respond to possible challenges so that the accommodated individual feels protected and comfortable at school/work.
- Work together. The accommodation process should involve the student (or the employee), the parents or guardians, the principal, the student's teacher and, depending on the resources available at a given school, the school social worker, and the school psychologist. If possible, and if the student or employee is agreeable, the school may want to consult with another member of the trans community to gain an understanding of experiences associated with gender transitioning.
- Be considerate of the student or employee's desire for privacy. Share information relating to the individual's gender transition and/or identity only with those people who are on a need-to-know basis and only to the extent required to implement accommodation, unless otherwise given authority to share information by the individual.

- School boards should conduct a review of their policies and practices for inclusion of gender identity and gender expression considerations. In reviewing current practices and developing policies on gender identity and gender expression, school boards should involve consultants in the trans community to the extent possible.
- Raise awareness. School boards should train employees on and introduce students to gender expression and gender identity issues.

The ultimate goal is providing a learning and working environment for students and employees that is respectful and free of discrimination and harassment. Becoming aware of gender identity and gender expression issues, and raising awareness through policy development and training, will bring school boards one step closer to achieving this goal.

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ARBITRATOR RULES THAT BENEFITS PROVIDED UNDER A COLLECTIVE AGREEMENT FOR POST-AGE 65 RETIREES ARE PERMISSIBLE UNDER THE *EDUCATION ACT*

The arbitrator noted the supremacy of statutory terms over collective agreement provisions.

On July 29, 2014, the Ontario arbitration decision of *Greater Essex County District School Board and CUPE, Local 27* (*Retiree Benefits*), held that a collective agreement which mandated the school board to provide benefits to retired employees over the age of 65 was permissible under subsections 177(3) and (4) of the *Education Act.*

BACKGROUND

The terms of the collective agreement between CUPE, Local 27 (the "Union") and the Greater Essex County District School Board (the "Board") provided that the Board would pay the full cost of premiums for retirees over the age of 65 in certain benefit plans. At the insistence of the Ministry of Education (the "Ministry"), the Board informed the Union that it would no longer pay retiree benefits past the age of 65. The Ministry and Board relied on subsections 177(3) and (4) of the Ontario *Education Act:*

177 (3) If a person retires from employment with a board before he or she reaches 65 years of age, the board may retain the person in a group established for the purpose of a contract referred to in clause (1) (a) until the person reaches 65 years of age.

(4) If a person is retained in a group under subsection (3), the premium required to be paid to maintain the person's participation in the contract may be paid, in whole or in part, by the person or by the board.

The Union filed a grievance, asserting that the Board was in contravention of the collective agreement in denying benefits to post-age 65 retirees. At issue before Thomas Kuttner, the arbitrator, was whether subsections 177(3) and (4) of the *Education Act* prohibit a school board from retaining a post-age 65 retiree in a health benefit plan provided under the terms of a collective agreement.

DECISION

Arbitrator Kuttner concluded that subsections 177(3) and (4) of the *Education Act* are permissive. Accordingly, the terms of the collective agreement providing for retirement benefits to be paid by the Board for retirees over the age of 65 were enforceable.

Arbitrator Kuttner began his analysis by noting the supremacy of statutory terms over collective agreement provisions. If he found the legislation to be prohibitive, then the impugned term of the collective agreement would be unenforceable. He determined that the interpretative methodology to be applied in the collective bargaining context is,

> A nuanced contextual inquiry, sensitive to the socio-economic and labour relations context in which the controverted provisions operate and to collective bargaining as a *Charter* value….

A statute must clearly prohibit the parties from entering into an agreement before the court should declare the agreement illegal.

Arbitrator Kuttner sought to harmonize the *Education Act* with the *Labour Relations Act, 1995* (the "*LRA*"). He determined that subsections 58.5(1) and 170(1).18 of the *Education Act* – which state, respectively, that a school board "…has all the powers and shall perform all of the duties" conferred or imposed on it by any Act, and "…do anything that a Board is required to do" under any Act – led to permissive interpretation. The combined effect of these provisions coupled with the *LRA* gave the Board the inherent jurisdiction to provide retirement benefits for persons over the age of 65.

Arbitrator Kuttner also considered the effect of the *Putting Students First Act, 2012* (the "*PSFA*") on the statutory context. The *PSFA* imposed a set of mandatory collective bargaining terms that were incorporated into collective agreements. One of these terms provided that retirees who currently had access to post-retirement benefits continued to be included in their current experience pool. The *PSFA* did not distinguish post-age 65 retirees. Arbitrator Kuttner concluded that since the *PSFA* and the *Education Act* are to be read harmoniously, the fact that post-age 65 retirees were not distinguished from other retirees in the *PSFA* served to strengthen the permissive reading of subsections 177(3) and (4).

Even if he was mistaken, and subsections 177(3) and (4) were prohibitory in their effect, the arbitrator still found that the collective agreement was enforceable based on a close reading of the statute. Subsections 177(3) and (4) only reference post-age 65 retirees retained in groups. Given that the benefits in this case were for health services rather than group contracts, the arbitrator determined that they were not caught by subsections 177(3) and (4).

Finally, Arbitrator Kuttner commented on the process by which the Ministry had precipitated this grievance. He was critical of the Ministry's unilateral prohibitive interpretation of the legislation, stating "[o]urs is not a system of labour relations governed by bureaucratic ukase or governmental diktat". He stated that the proper course would have been for the Ministry to direct the Board to bring a policy grievance, so that the alleged illegality of the impugned provision could be determined in accordance with the *LRA* scheme.

TAKE-AWAY

Arbitrator Kuttner in this case was willing to take a liberal approach to interpreting statutory provisions alleged to alter the terms of a collective agreement. He concluded that the terms of a collective agreement are not to be found unenforceable unless their operation is clearly excluded by the broader statutory context.

As a result, parties should think carefully before concluding that the terms set out in a collective agreement are not enforceable. This case suggests that if a legislative provision is ambiguous and a collective agreement provision is not clearly in conflict with such provision, an arbitrator will likely find the impugned collective agreement provision to be enforceable.

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SUPREME COURT OF CANADA CREATES NEW TEST FOR POLICE TO SEARCH CELL PHONES WITHOUT A WARRANT

On December 11, 2014, the Supreme Court of Canada released *R. v. Fearon*, a decision that addresses when police can search a cell phone in the course of a criminal arrest, without a warrant.[1] Although *Fearon* does not directly address cell phone searches in schools, it provides significant insight into how educators should balance their legal duty to maintain proper order and discipline with the privacy interests of students.

ISSUE BEFORE THE SUPREME COURT

In *Fearon,* the Supreme Court considered whether the existing power for police to search pursuant to a lawful arrest extends to cell phone searches. Police were investigating the armed robbery of a jeweler by two armed men. When Mr. Fearon was arrested and given the usual pat-down search, police found a cell phone. Police searched his cell phone at that time, without a warrant, and found a draft text message referring to jewelry containing the words "we did it" and a photo of a handgun. That handgun was later found in the getaway car, and confirmed as the handgun from the robbery.

At his criminal trial for armed robbery, Mr. Fearon argued the evidence from the cell phone search was inadmissible because police did not have a warrant. Mr. Fearon challenged the cell phone search under section 8 of the *Canadian Charter of Rights and Freedoms,* which provides as follows[2]:

> Everyone has the right to be secure against unreasonable search or seizure.

The trial judge concluded that the photos and text messages were admissible, and Mr. Fearon was convicted. Mr. Fearon's appeal to the Ontario Court of Appeal was dismissed. His appeal to the Supreme Court of Canada was then heard, resulting in the Supreme Court's new test for cell phone searches.

The Supreme Court in *Fearon* was not unanimous in its decision. Four justices, in a majority decision written by Justice Cromwell, created a new test to permit cell phone searches without a warrant. The minority decision, written by Justice Karakatsanis, argued in favour of more restrictive conditions for cell phone searches without a warrant.

On the facts of Mr. Fearon's case, the majority of the Supreme Court decided that the cell phone search did not comply with the new test. However, the Supreme Court further concluded that the police acted reasonably and it was appropriate for public policy reasons to admit the evidence. His conviction was upheld.

NEW TEST FOR CELL PHONE SEARCH

The existing common law framework for lawful search and seizure by police provides that a search incident to arrest must be:

(1) founded on a lawful arrest;

(2) be truly incidental to that arrest;

(3) be conducted reasonably.[3]

The Supreme Court focused its modifications to the existing search framework on whether a cell phone search is "truly incidental" to that arrest. The Supreme Court was wary of a search that was not linked to a valid law enforcement objective; such searches could result in "routine browsing through a cell phone in an unfocussed way."[4]

Investigation of alleged student misconduct increasingly involves searching for evidence on student cell phones and similar devices.

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[1] *R. v. Fearon,* 2014 SCC 77 [*Fearon*].

[2] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] *Fearon,* paragraph 27.

[4] *Fearon,* paragraph 57.

After *Fearon,* the new test for lawful search and seizure of a cell phone by police is:

(1) The arrest was lawful;

(2) The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:

  (a) Protecting the police, the accused, or the public;
  (b) Preserving evidence; or
  (c) Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest.

(3) The nature and the extent of the search are tailored to the purpose of the search; and

(4) The police take detailed notes of what they have examined on the device and how it was searched.[5]

Educators should document how the cell phone search is incidental to a valid objective.

The Supreme Court has limited the circumstances in which a cell phone can be searched without a warrant in three ways. The limitations can be summarized as follows:

(1) A valid law enforcement purpose is one where safety or evidence are at risk. Minor offences will not suffice.

(2) If an investigation will not be stymied or hampered by not searching the cell phone immediately, police should wait for a warrant and act on the evidence at that time. Police will therefore need to consider and document why prompt access was critical to the investigation and law enforcement purpose.

(3) The search must be tailored to the investigation. Random or blanket searches may not satisfy the new test.

SIGNIFICANCE OF THE CASE TO EDUCATORS

Educators have a legal duty to maintain proper order and discipline in the school. This legal duty is established by statutes such as the Ontario *Education Act*.[6] Investigation of alleged student misconduct increasingly involves searching for and reviewing evidence on student cell phones and similar devices.

Canadian courts have not yet directly considered cell phone searches in schools. The Supreme Court's decision in *R. v. M(MR)*[7] remains the leading case on school search and seizure. That case arose in the context of a vice-principal's physical search of a student backpack for marijuana. The Supreme Court in *MRM* recognized that students have a diminished expectation of privacy:

> Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished.[8]

The Supreme Court in *MRM* set a standard for searches by school administrators. Similar to its decision in *Fearon,* the Supreme Court recognized the need to "respond quickly and effectively to problems" and that requiring a warrant would "clearly be impractical and unworkable in the

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[5] *Fearon,* paragraph 83.
[6] RSO 1990, c E.2 at s. 265(1)(a) [*Education Act*].
[7] *R. v. M. (M.R.),* [1998] 3 S.C.R. 393 *[MRM]* at paragraph 33.
[8] *MRM* at paragraph 33.
[9] *MRM* at paragraph 45.

school environment."[9] A search may be undertaken if there are reasonable grounds to believe a school rule has been, or is being violated, and that evidence of the violation will be found on the person searched.[10]

The Supreme Court's decision in *Fearon* reiterates many of these same principles from *MRM*; where *MRM* requires a "reasonable grounds" for a search, *Fearon* requires a "valid objective". *Fearon* provides specific guidance on the extent to which a cell phone can be searched in connection with a valid objective. The search is not meant to be an opportunity to view the entire contents of a cell phone, or to give an investigator unlimited access to social media and programs connected to the phone.

In light of *MRM* and *Fearon,* educators should consider three points during an investigation that involves a cell phone search:

1. **Valid Objective for the Search.** Educators should document how the cell phone search is incidental to a valid objective. Many examples of "valid objectives" are listed in section 310(1) of the *Education Act*, including possessing a weapon, committing assault, or trafficking in illegal drugs.[11] Further, educators should consider whether an investigation would be "stymied" if the cell phone could not be immediately searched. Preservation of evidence that could identify and prevent harm to the school community would be an example of circumstances when a cell phone should be searched. School administrators may be required to delay the school investigation until the police investigation has concluded.
2. **Search Must be Tailored to the Objective.** The Supreme Court has not sanctioned random or blanket searches of the entire contents of a cell phone. For example, if a student's cell phone has been seized to decide whether it contains a video of an assault, the cell phone search should be limited to videos and reference to assault.
3. **Make "careful records".** The Supreme Court stated that records should "generally include the applications searched, the extent of the search, the time of the search, its purpose and its duration."[12] Educators are already accustomed to making careful records in the course of investigating serious incidents in the school community. Such records should now include details of any cell phone search, and can be later relied upon to prove that a search was "tailored" to a "valid objective".

The Supreme Court has signaled that cell phone searches are a necessary component of protecting the public in today's society, within limits. Where school administrators find it necessary to search a student's cell phone during an investigation, such limits must be respected.

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[10] *MRM* at paragraph 48.
[11] *Education Act,* section 310(1).
[12] *Fearon,* paragraph 82.

NO BREAKS WITHOUT REPLACEMENTS FOR DESIGNATED EARLY CHILDHOOD EDUCATORS

In *Re Windsor-Essex Catholic District School Board and OECTA,* 117 CLAS 246, Arbitrator George Surdykowski allowed an OECTA grievance relating to the Board's practice of scheduling breaks for Early Childhood Educators ("ECEs") during the instructional day. In his award, released on January 17, 2014, Arbitrator Surdykowski interpreted provisions of the *Education Act* and associated Ministry of Education materials that relate to Full-Day Early Learning. He concluded that ECEs may not be scheduled to take breaks during the instructional day "unless appropriate and permissible replacement arrangements are made".

OECTA argued that while ECEs are permitted to take breaks, a qualified replacement must cover their classroom absences.

FACTUAL BACKGROUND

At certain schools in the Windsor-Essex Catholic District School Board (the "Board"), ECEs had breaks scheduled such that they were absent from the classroom during instructional time. There was no replacement ECE provided. When all these breaks were aggregated, the Board's kindergarten and junior kindergarten teachers were obliged to provide a total of 44 minutes of instruction each day (or 13% of the instructional day) without the involvement of an ECE.

The *Education Act* imposes a duty on school boards to designate and appoint ECEs to its full-day junior kindergartens and kindergartens. It also stipulates that an ECE appointed to such a position is in addition to the teacher assigned to teach that class.

Further, the Act provides that the Minister of Education may require school boards to comply with policies and guidelines governing all aspects of the operation of junior kindergarten and kindergarten, including appointment of ECEs. In 2009 and 2010, the Ministry issued a number of documents relating to the Full-Day Early Learning - Kindergarten Program. These materials repeated numerous times that the learning team comprises a teacher and an ECE; that teachers and ECEs are to work together throughout the school day; that teachers and ECEs are to jointly deliver daily classroom activities; and that average child-adult ratios are to be 13:1.

SUBMISSIONS OF THE PARTIES

Both OECTA and the Board framed this issue as one of statutory interpretation.

OECTA referred to the provisions of the *Education Act* and associated Ministry publications to argue that the Early Learning Program ("ELP") requires a full-day program delivered by a team of a teacher and an ECE, who work together in a collaborative and complementary manner. OECTA submitted that the Legislature's intention was clear, and that a Board cannot schedule or permit ECEs to be absent from the class during any part of the regularly scheduled instructional day. Just as a teacher cannot be permitted to be absent and leave the ECE to deliver the ELP alone, OECTA argued, the ECE cannot leave the teacher to manage the classroom alone. While ECEs are permitted to take breaks, a qualified replacement must cover their classroom absences.

The Board argued that the statutory provisions should be given their plain and ordinary meaning, and that the Ministry documents are extrinsic evidence that should not be used as an interpretive aid. The Board argued that the plain meaning of the legislation does not include "joined at the hip" classroom instruction by teachers and ECEs. Instead, the Board submitted, ECEs are not required to be in the classroom for the entire day, they are entitled to take breaks, and the teacher and ECE do not have to be actively engaged together for every minute of every instructional day.

THE ARBITRATOR'S DECISION

Arbitrator Surdykowski framed his analysis and decision with reference to Driedger's modern rule of statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Under this approach, extrinsic evidence – that is, oral or documentary evidence that is not contained in the body or incorporated into the legislation in issue – may only be referred to if there is genuine ambiguity in the relevant legislation.

Arbitrator Surdykowski found that there was no such ambiguity, but that certain of the Ministry documents were not extrinsic evidence. Because the *Education Act* provides that the Minister may require school boards to comply with policies and guidelines governing appointment of ECEs, the Ministry's ELP document and associated memorandum were incorporated into the legislation and were properly referred to as interpretive aids. There were two other documents raised in argument that the arbitrator found were not covered by this provision, and were treated as extrinsic evidence.

Consulting all the relevant legislative provisions and Ministry publications, Arbitrator Surdykowski concluded that there must be an ECE present at all instructional times. It would be impossible for an ECE to provide education or to observe student development, as required by the *Education Act,* if he or she were not in the classroom. Further, the Ministry's ELP documents require teachers and ECEs to work side by side to deliver the program, which cannot be done if the teacher and the ECE are "not actually side by side and actually working (i.e. not on a break) together in the classroom." Arbitrator Surdykowski equated the duties of teachers to those of ECEs, stating:

> As in the case of teachers, there is nothing in the legislation or the guidelines which specifically states that an ECE must be in the classroom (or teaching area) with the teacher for every minute of every instructional day. However, it cannot be otherwise.

Arbitrator Surdykowski also stated that even if there were ambiguity in the legislative provisions, reference to the additional, extrinsic Ministry documents would lead him to the same conclusion. Those documents specify that the teacher and the ECE will jointly deliver the ELP, and will both be in the classroom for the full instructional period of the school day for that purpose.

While classrooms are required to have a teacher and an ECE, this does not mean that ECEs cannot take breaks during the day. Rather, ECE breaks cannot be scheduled or taken during instructional time unless appropriate and permissible replacement arrangements are made.

IMPLICATIONS

Because this decision was based on an interpretation of the *Education Act* and Ministry materials rather than a specific collective agreement, its rationale is applicable to every school board in Ontario. This may cause some concern, as many schools will likely need to adjust ECE schedules or hire additional ECEs to cover all classroom absences. Even if ECE breaks are scheduled during non-instructional times, such as recess and lunch, schools will need to find additional supervision for students during those times.

The Ministry may choose to revise relevant legislation if it is unsatisfied with the interpretation and application of this award.

In future decisions on this issue, other arbitrators may choose to interpret the legislative provisions and Ministry documents in a different way. For instance, the Ministry's ELP documents were not specifically identified as "policies and guidelines" as referred to in the *Education Act,* so it may be possible to exclude them from consideration when interpreting the statutory provisions. It may also be possible to ascribe a somewhat less stringent meaning to the *Education Act* provisions that require teachers and ECEs to cooperate and coordinate classroom activities; the words in the legislation may support an interpretation that physical classroom presence is not required.

The Ministry may also choose to revise and clarify relevant legislation if it is unsatisfied with the interpretation and application of this award.

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Ms. Guzzo called Ms. May's principal and reported her concerns about Ms. May's alleged drug use.

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. The statements were made by Ms. Guzzo, the defendant, 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 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]

[1] 2013 ONSC 3332.
[2] *Ibid* at 4.

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 alleged 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 she 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 stating 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 her 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 Dependant 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 the 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 judge 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 judge 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.

Keep meticulous records of everything when facing a situation where defamatory remarks are being made.

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[3] *Supra* note 1 at 8.
[4] *Supra* note 1 at 19.
[5] *Supra* note 1 at 20.

NEW *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. 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.

All employees will be entitled to up to 8 weeks of unpaid Family Caregiver Leave in each calendar year to care for an ill relative.

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 the 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 the 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."

Employees with at least 6 consecutive months of service may qualify for up to 37 weeks of unpaid Critically Ill Child Care Leave.

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".

Employees with at least 6 consecutive months of service may qualify for unpaid Crime-Related Child Death or Disappearance Leave.

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[1]:

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.

[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.

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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PRACTICE AND PROCESS AROUND RELIGIOUS EXEMPTIONS

Of the 189,842 students in Ontario's Catholic schools, only a handful of requests for exemption from religious education courses or programs have been made.

INTRODUCTION

Central to Catholic education in Ontario is creating and shaping the Catholic identity. The Ontario Catholic School Graduate Expectations are intended to establish a provincial curriculum framework regarding learning expectations which define what all students are expected to know, to do and to value when they graduate from Catholic schools.

In recent months, the media has focused attention on the exemption in the *Education Act* with respect to a program or course of study in religious education. This exemption applies to "Open Access" students only (i.e., "persons who are qualified to be resident pupils in respect of a secondary school operated by a public board who attend a secondary school operated by a Roman Catholic board"). In short, Open Access students are students who attend a Catholic secondary school, but whose parents have been public school supporters.

Of the 189,842 students in Ontario's Catholic schools, we understand that only a handful of requests for exemption from religious education courses or programs have been received.

The relevant provision regarding entitlement to an exemption is subsection 42(13) of the *Education Act.* It provides:

> "[…] no person who is qualified to be a resident pupil in respect of a secondary school operated by a public board who attends a secondary school operated by a Roman Catholic board shall be required to take part in any program or course of study in religious education on written application to the Board of,
>
> (a) the parent or guardian of the person;
>
> (b) in the case of a person who is 16 or 17 years old who has withdrawn from parental control, the person himself or herself;
>
> (c) in the case of a person who is 18 years old or older, the person himself or herself."

It is common practice in Ontario Catholic secondary schools for parents or relevant students to apply for the exemption on an annual basis.

This section sets out the relevant exemption for courses of study or programs in religious education and applies to students who attend Catholic schools but whose parents have been public school supporters.

On rare occasions when Catholic parents make the request for such exemptions, school administrators will make decisions within the context of the *Education Act* which mandates Catholic schools to provide Catholic education for ratepayers who choose Catholic schools for their children.

It should be recognized that religious education courses are part of the course curriculum in Catholic schools. These credit courses teach not only an inclusive world-view perspective on the major world religions, they reinforce social justice teachings that are part of the foundation of a Catholic education. Some of these courses count as social science courses. It should also be noted that religion infuses the curriculum in all areas of study, so any idea that being excused from a religious studies course excuses a student from Catholic content is clearly misinformed. Christian values infuse all of the curriculum.

BEST PRACTICES

The *Education Act* sets out who may apply for the exemption. Under the Act, the exemption is not automatic. A parent of a student, an adult student or a student who is 16 or 17 years old and has withdrawn from parental control can apply for an exemption. It is common practice in Ontario Catholic secondary schools for parents or relevant students to apply for the exemption on an annual basis. The parents or relevant students should be clear regarding what religious education course or activities of a religious nature they are requesting an exemption from. A religious education program may include mass, religious retreat or other activity with a substantial component of ritual and prayer. Catholic school boards across Ontario examine each request for an exemption on a case-by-case basis, taking into consideration the needs and priorities of the student and parents in the context of the requirements set out in the *Education Act.*

When a student or his/her family raise the issue of a possible exemption with school administration, we suggest the following practices:

1. Meet with the student and his or her parents.

It is important to have a discussion with the student and his or her family about the objectives of the school in providing a Catholic education. Prior to this meeting, the educator should obtain certain relevant information, such as:

- Verify the tax status of the student's parents or adult student;
- Review the student's index card;

- Review Ontario Catholic School Graduate Expectations and how they align with 21st Century education priorities;
- Review the student's timetable; and
- Review the student's credit summary.

2. Confirm the historical mandate of Catholic schools.

In meetings with students and his/her family, school administrators should confirm that notwithstanding the religious exemption provision in the *Education Act,* the historical mandate of the Catholic school system in Ontario is to model the entire syllabus of the school on the life and teachings of Jesus Christ. School administrators should also confirm that throughout the province, Catholic school boards have been using the Ontario Catholic School Graduate Expectations as a foundation reflective of the vision of all learners and the strong sense of distinctiveness and purposes that is publicly-funded Catholic education.

The school should confirm to each student that its objective, in partnership with family and church, is to provide a Catholic education which develops spiritual, intellectual, aesthetic, emotional, social and physical capabilities of each individual to live fully today and enriching the community.

3. Listen to the student and his or her parents and understand their concerns.

The principal or vice-principal should attempt to understand the student's concerns regarding their participation in a program or course of study in religious education. This will involve having an individual discussion, preferably face-to-face with the student and his or her parents to understand the student's circumstances.

The discussion with parents and the student should be thoughtful and respectful. We suggest that school administrators thank the parents and student for coming and taking the time to meet, as the school explores the reasons for bringing forward this request.

4. Explore options.

Where possible, the principal or vice-principal should examine options for the student in trying to assist the student to take the religious education course or program. In discussing the student's concerns, the educator should explore possible alternatives, such as reviewing the student's timetable, having the student take the religious education course online or arranging for the course to be taken in a different semester or a different method of taking the course.

5. Assess eligibility for the exemption based on each individual case.

Each student situation is different. School administrators are encouraged to assess eligibility for the exemption based on the facts of each individual case. In this regard, educators will need to have information about whether the parents are separate or public school ratepayers, the student's history and relevant credit requirements. As part of the school administrator's discussion with the student and his/her family, the administrator should indicate that notwithstanding the student's ability to apply for an exemption, it is the school's view that all students admitted to the Catholic system will benefit from these values and teachings. School administration may also confirm that it is the school's position that such values and teachings are important in forming students into responsible, reflective and well-rounded citizens.

6. No alteration in the rest of the student's timetable.

In communicating with a student who qualifies for an exemption under subsection 42(13) of the *Education Act,* school administrators should confirm that although the relevant exemption will be granted to this student for a particular school year, there will not be any alteration in the

Where possible, the principal or vice-principal should examine options for the student in trying to assist the student to take the religious education course or program.

religious or moral education that infuses the remainder of the student's timetable and school observances. The student and parent should be cognizant of what other subjects are available during that period.

The principal or vice-principal should indicate to the student and his/her parents that the decision to grant the exemption in a particular case does not change the mission of the Catholic school community, which is, among other things, to enhance one's understanding of Catholic teachings and traditions and incorporate them into a student's daily life.

7. Ensure enrolment forms are clear about the mission and objective of the Catholic school.

The enrolment documents should confirm that a religious and moral education is not one subject among many in the student's timetable, but rather it infuses all classes and activities during the school day.

All prospective students to the school should be made aware that a Catholic school is one in which God and His Life are integrated into the entire curriculum and life of the school. The enrolment documents for Catholic secondary schools should indicate clearly that, subject to the provisions of the *Education Act,* all students in the school will participate in the prayer life and in the liturgical life at the school. The enrolment documents should confirm that a religious and moral education is not one subject among many in the student's timetable, but rather it infuses all classes and activities during the school day.

CONCLUSION

Individual discussions with students and their parents with regards to religious exemptions requires time and effort on the part of school administrators. Educators should come to this meeting prepared with an understanding of the parent's relevant tax status, the student's history and relevant credit requirements. The school administrator needs to understand what religion course or program the student is asking to be exempted from. Significant time is required to listen to and understand an individual student's or parent's concerns about participating in a program or course of study in religious education. In many cases, in working with the student and their family, solutions can be found in trying to understand the concerns and relevant circumstances where adjustments can be discussed such as revising his/her timetable or offering the religion course in an alternative format, including online.

In these meetings, the educator should confirm that in the Catholic school, religion infuses every subject area and all other aspects of life of the school. The school administrator should indicate that it is the school's view that students will benefit from the full and ongoing experience that is Catholic education.

These face-to-face meetings with students and their parents require significant preparation and commitment. The time spent in meeting with individual students and their parents and educating them about the benefits, values and traditions of Catholic education and the importance of Catholic identity in the school system represents a meaningful opportunity to create a "teachable moment" for both the student and his/her parents.

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