**CITATION:** *Kawartha Pine Ridge District School Board* v. *Grant*, 2010 ONSC 1205
**DIVISIONAL COURT FILE NO.:** 284/09
**DATE:** 20100302

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**DAMBROT, SWINTON AND SACHS JJ.**

**BETWEEN:**

KAWARTHA PINE RIDGE DISTRICT SCHOOL BOARD

Applicant

**- and –**

JEAN GRANT and CHILD AND FAMILY SERVICES REVIEW BOARD

Respondents

**- and –**

JUSTICE FOR CHILDREN AND YOUTH

Intervenor

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**REASONS FOR JUDGMENT**

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**SWINTON J.**

**Released:** March 2, 2010

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**DAMBROT, SWINTON and SACHS JJ.**

| | |
|---|---|
| **BETWEEN:** | |
| KAWARTHA PINE RIDGE DISTRICT SCHOOL BOARD<br>Applicant | *Paul Howard and Gaynor Roger*, for the Applicant |
| **– and –** | |
| JEAN GRANT AND THE CHILD AND FAMILY SERVICES REVIEW BOARD | *Christopher Spear*, for the Respondent Jean Grant |
| | *Judie Im*, for the Respondent Board |
| Respondents | |
| **-and -** | |
| JUSTICE FOR CHILDREN AND YOUTH | *Martha MacKinnon and Andrea Luey*, for the Intervenor |
| Intervenor | **HEARD at Toronto:** February 10, 2010 |

**SWINTON J.:**

**Overview**

[1] Kawartha Pine Ridge District School Board (the "School Board") applies for judicial review of the March 23, 2009 decision of the Child and Family Services Review Board ("the Tribunal") in which the Tribunal quashed the decision of the School Board expelling a student, reinstated the student to his school, and ordered that any record of the expulsion be expunged.

[2] There are three issues in this application: whether this Court should refuse to determine the application on the grounds of mootness, the appropriate standard of review and whether the Board's expulsion decision should be set aside.

**Background**

[3] On November 10, 2008, the Vice-Principal of Peterborough Collegiate and Vocational School ("PCVS") interviewed Q, a 17 year old Grade 12 student, about his marijuana use off school property. The Head of Guidance was also present. Q admitted to smoking marijuana and sharing it with some friends, including students from PCVS, during a period of six weeks.

[4] On November 11, 2008, PCVS suspended Q pursuant to s. 310(1) of the *Education Act*, R.S.O. 1990, c. E.2 ("the Act"), as amended, which provides:

> A principal shall suspend a pupil if he or she believes that the pupil has engaged in any of the following activities while at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school climate:
>
> 1. Possessing a weapon, including possessing a firearm.
>
> 2. Using a weapon to cause or to threaten bodily harm to another person.
>
> 3. Committing physical assault on another person that causes bodily harm requiring treatment by a medical practitioner.
>
> 4. Committing sexual assault.
>
> 5. Trafficking in weapons or in illegal drugs.
>
> 6. Committing robbery.
>
> 7. Giving alcohol to a minor.
>
> 8. Any other activity that, under a policy of a board, is an activity for which a principal must suspend a pupil and, therefore in accordance with this Part, conduct an investigation to determine whether to recommend to the board that the pupil be expelled.

[5] At least one of three preconditions must apply for the principal to suspend under s. 310(1): the pupil must have engaged in the activity at school, at a school-related activity or in circumstances where engaging in the activity "will have an impact on the school climate". The principal of PCVS determined that Q's marijuana use would have an impact on the school climate, and therefore, she ordered suspension.

[6] Following suspension, the principal was required by s. 311.1(1) of the Act to conduct an investigation to determine whether to recommend to the School Board that Q be expelled:

> When a pupil is suspended under section 310, the principal shall conduct an investigation to determine whether to recommend to the board that the pupil be expelled.

[7] In the course of that investigation, the principal is required to make all reasonable efforts to speak with the student and his or her parent/guardian, as well as any other person that the principal has reason to believe may have relevant information (s. 311.1(3)). In determining

whether to recommend expulsion, the principal is required to take into account mitigating or other factors prescribed by regulation (s. 311.1(4)).

[8] The prescribed mitigating factors are:

1. the student does not have the ability to control his or her behaviour

2. the student does not have the ability to understand the foreseeable consequences of his or her behaviour

3. the student's continuing presence in the school does not create an unacceptable risk to the safety of any person. (O. Reg. 472/07, s. 2)

[9] The "other factors" to be considered are:

1. the student's history

2. whether a progressive discipline approach has been used with the student

3. whether the activity for which the student may be or is being suspended or expelled was related to any harassment of the student because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment

4. how the suspension or expulsion would affect the student's ongoing education

5. the age of the student

6. in the case of a student for whom an individual education plan ("IEP") has been developed,

a) whether the behaviour was a manifestation of a disability identified in the student's IEP

b) whether appropriate individualized accommodation has been provided, and

c) whether the suspension or expulsion is likely to result in an aggravation or worsening of the student's behaviour or conduct. (O. Reg. 472/07, s. 3)

[10] After the investigation, if the principal decides to recommend expulsion, he or she must prepare an expulsion report containing a summary of his or her findings, a recommendation as to whether the student should be expelled from the school or all board schools, and a recommendation as to the type of program or school that might benefit the student.

[11] After the principal of PCVS recommended expulsion, the expulsion committee of the School Board heard the matter on December 15, 2008. At an expulsion hearing, a school board is required to consider the oral and written submissions of each party. The parties are the principal, the student or his or her parent/guardian and such other persons as are specified by school board policy (Act, s. 311.3(3) and (4)). In coming to a decision, a school board is

required to take into consideration the submissions and views of all parties, any prescribed mitigating or other factors and any party's written response to the expulsion report (s. 311.3(7)).

[12] Q was informed of his expulsion by a letter of December 15, 2008. The letter did not set out any reasons, despite the requirement in s. 311.6(2) that the notice of expulsion include the reason for the expulsion.

**The Tribunal Decision**

[13] Pursuant to s. 311.7(2) of the Act, Q's mother, the respondent Jean Grant, appealed to the Tribunal. The Tribunal proceeded by way of a hearing *de novo* held on March 2 and 9, 2009. It heard testimony from the parties and considered the evidence.

[14] The Tribunal found that the onus lay with the School Board to demonstrate, on a balance of probabilities, that the activities of the pupil will have an impact on the school climate at some point in the future. The School Board must "show a direct and causal link between the pupil's behaviours and a definitive impact on the school climate" (Reasons, para. 11).

[15] While there was evidence of a drug problem at PCVS, the Tribunal found that there was no evidence of a "nexus" between Q's off-school activities and the school climate. Evidence that Q brought marijuana to school, used it at school, or discussed it at school could have established a nexus, but the School Board did not lead any such evidence (Reasons, para. 17). The Tribunal concluded that there was insufficient evidence to establish that Q's activities will impact the school climate at PCVS. Therefore, it quashed the expulsion and reinstated him to his school without determining whether he had actually engaged in trafficking and whether expulsion was an appropriate penalty.

**The Issues in this Application for Judicial Review**

[16] The following issues arise in this application:

1. Should the Court refuse to hear this application for judicial review because of mootness?
2. What is the appropriate standard of review?
3. Did the Tribunal err in conducting a hearing *de novo?*
4. Was the Tribunal's decision reasonable?

**Issue No. 1: Should the Court refuse to hear this application for judicial review because of mootness?**

[17] Q returned to PCVS following the decision of the Tribunal and continued with his studies. Counsel for the respondent informed the Court at the beginning of oral argument that Q completed his high school education in January 2010. As a result, counsel argued that the application for judicial review was moot and should not be heard, as there is no live issue between the parties.

[18] The School Board and the Intervenor urged the Court to exercise its discretion to hear the application, given the importance of the case to school boards and students throughout the province. Counsel for the School Board stated that the Board was seeking to overturn the

Tribunal's decision finding that the expulsion was not justified, but it was not seeking to overturn the part of the Tribunal's order expunging the expulsion from Q's school record.

[19] A court has discretion to hear a moot proceeding. In *Bonnah v. Ottawa-Carleton District School Board* (2003), 64 O.R. (3d) 454, the Court of Appeal set out the principles that guide a court in determining whether to hear a moot appeal: "the issue that has become moot was fully litigated before the court, is of general importance and is likely to arise in the future either in litigation involving the same parties or different parties" (at para. 16).

[20] The statutory provisions governing expulsion that were before the Tribunal came into effect on February 4, 2008. The proper interpretation of these provisions is of great importance to school boards and students throughout the province. As in *Bonnah*, the court's guidance as to the interpretation of the Act and the degree of deference to be accorded to a decision of the Tribunal will provide guidance to school boards, students and their parents, which may prevent future litigation.

[21] Both the School Board and the Intervenor expressed the concern that expulsion cases will often be moot by the time they reach the courts, given the time required to proceed through the appeal and review process. Counsel for the School Board pointed out that schools usually take a progressive approach to student discipline, and so most expulsions are imposed on students in their last year of secondary school. By the time an application for judicial review reaches the courts, students will often have completed their studies.

[22] Given these circumstances, the Court decided to exercise its discretion to hear the application for judicial review.

**Issue No. 2: What is the appropriate standard of review?**

[23] The standard of review of a decision of the Tribunal reviewing a school board's expulsion decision has never been determined. Therefore, it is necessary to conduct a standard of review analysis, considering the factors set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 62 and 64: the presence or absence of a privative clause, the purpose of the tribunal as determined by interpretation of its enabling legislation, the nature of the question at issue and the expertise of the tribunal.

[24] Section 311.7(5) of the Act provides that a decision of the Tribunal on an appeal from a decision of a school board to expel a student is final. That privative clause suggests deference is due to the Tribunal's decision.

[25] The School Board argued that the privative clause applying to the Tribunal's decision was weakened because there is a second privative clause in s. 311.4(4). That subsection provides that if a school board does not decide to expel a student after an expulsion hearing, the decision is final. In my view, the existence of this other privative clause does not weaken in any way the privative clause that applies to the Tribunal's decision on an expulsion appeal.

[26] The second factor to consider is the purpose of the tribunal. This Tribunal typically deals with matters under the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("CFSA"), such as the removal of Crown wards, complaints against a Children's Aid Society and adoption matters.

However, in 2000, with the enactment of the *Safe Schools Act, 2000*, S.O. 2000, c. 12, the Legislature provided a mechanism to appeal an expulsion decision of a school board. Pursuant to s. 4(1) of O. Reg. 37/01, *Expulsion of a Pupil,* the Tribunal was designated to hear expulsion appeals. More recently, the enactment of s. 311.7(1) of the Act in S.O. 2007, c. 14 and O. Reg. 427/07 have confirmed the Tribunal as the designated body to hear expulsion appeals.

[27] The third factor is the nature of the question before the tribunal. In this case, the Tribunal was required to determine whether expulsion was an appropriate disciplinary response in the circumstances. In order to decide the question, the Tribunal had to interpret provisions of the *Education Act,* including s. 310(1), and to apply the legislative provisions to the facts before it. In determining whether to uphold an expulsion decision, the Tribunal must consider mitigating and other factors prescribed by the regulation. Thus, the determination of the Tribunal, in reviewing the Board's decision, involves questions of mixed fact and law. Therefore, deference is required.

[28] Finally, the expertise of the Tribunal must be considered. Members of the Tribunal are required by the CFSA to possess certain prescribed qualifications, including either a degree, diploma or certificate granted by a post-secondary institution and at least one year's experience working in or volunteering in children's services or social services or at least five years' experience working in or volunteering in children's services or social services (O. Reg. 494/06, s. 23). Thus, there is an expertise in the Tribunal with respect to issues affecting children's interests.

[29] Given the privative clause, the designation of the Tribunal to hear expulsion appeals, its experience with matters affecting children's best interests and the nature of the question before it, namely one of mixed fact and law, I conclude that the proper standard of review of the Tribunal's decision is reasonableness.

**Issue No. 3: Did the Tribunal err in conducting a hearing *de novo*?**

[30] The School Board argues that the Tribunal erred in conducting a hearing *de novo*, rather than providing proper deference to the decision of the principal and the School Board.

[31] I note that the expulsion decision under appeal was a decision of the School Board. The principal has the power to suspend a pupil for up to 20 days. However, the decision to expel is made by the School Board, after an investigation by the principal and a recommendation to expel. Therefore, the decision under appeal is that of the School Board, not that of the principal. If deference were owed, it would be to the decision of the School Board.

[32] The School Board argues that the Tribunal should have applied a standard of reasonableness to the School Board's decision, as well as to the principal's recommendation, rather than conduct a new hearing.

[33] The School Board did not raise the issue of the propriety of the hearing before the Tribunal, despite advance notice that the matter would be proceeding by way of hearing *de novo*. Therefore, it should be taken to have waived any objection to the procedure adopted.

[34] In any event, there is no merit to this argument. The Tribunal is mandated to "hear" and "determine" the appeal of an expulsion decision (Act, s. 311.7(3)). The applicable Act and regulation are silent as to the procedure to be followed. Therefore, the Tribunal had the discretion to determine the appropriate procedure to be applied, subject to its obligation of procedural fairness and the requirements of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA"). Pursuant to the Tribunal's *Rules of Procedure*, where the Tribunal is determining whether to confirm an expulsion decision, the proceeding will be a *de novo* hearing (s. 92).

[35] Indeed, in this case, the Tribunal held a hearing *de novo* for very good reasons. First, the School Board decision gave no reasons for the expulsion. Therefore, the Tribunal could not engage in any meaningful review of that decision. It had to proceed with a new hearing and review all the evidence and submissions.

[36] Second, the School Board did not provide the Tribunal with a full evidentiary record on which it could base its decision. There is no record of the School Board's expulsion hearing.

[37] Third, the decision under review – to expel a student from his high school – is one of significant importance to the student and his parents/guardians. Therefore, a high level of procedural fairness is owed to them by the Tribunal. The hearing before the Tribunal was the first full hearing, with the safeguards provided under the *SPPA*, to the respondent Ms. Grant and to Q.

**Issue No. 4: Was the Tribunal's decision reasonable?**

[38] The School Board argues that the Tribunal erred in its interpretation of s. 310(1) of the Act. A principal is required to suspend a student in circumstances where he or she believes the student has engaged in trafficking in illegal drugs "where engaging in the activity will have an impact on the school climate". According to the School Board, since suspension decisions are based on the principal's beliefs, this was an indication that when it came to considering whether to confirm an expulsion decision, the Tribunal was required to accept the principal's beliefs about the impact on school climate.

[39] The argument of the School Board ignores the structure of the Act. Were it correct, there would be no meaningful right of appeal for a student from a decision of the principal that he or she should be removed from the school. Clearly, the Legislature's intention was to confer the decision to expel on the School Board. More importantly, the Legislature intended to make that decision reviewable by the Tribunal. Therefore, the Act does not require the Tribunal to defer to the principal's beliefs. It must decide, on the evidence before it (including the evidence of the principal) whether the student is engaging in a prohibited activity that has an impact on the school climate and, given the circumstances of the particular student, is deserving of expulsion.

[40] The Tribunal held that there must be a nexus between the student's activity and the school climate before expulsion can be justified. In my view, that is a reasonable, indeed a correct interpretation of the words of the Act.

[41] The School Board took issue with the following sentence in the Tribunal's reasons (at para. 11):

> The onus is on the School Board, on the balance of probabilities, to show a direct and causal link between the pupil's behaviours and a definitive impact on the school climate.

I note that the reasons continue:

> The School Board does not have to show that the impact has occurred, but it must show the activity will have an impact on the school climate in the future.

[42] The Act seeks to protect students and staff of schools from harmful conduct. With the changes to the legislation that came into effect in February 2008, the harmful conduct warranting expulsion includes conduct off the school premises that will have an impact on the school climate. This might include, for example, harming another student on the way home from school or harassment of a student on a social networking web site. However, the legislation is clear – the activity of the student expelled must negatively affect the school climate.

[43] In order to determine whether the School Board had proved that there was a causal link between Q's conduct and the state of the school climate, the Tribunal considered the evidence of the principal, the Head of Guidance, Q and Q's drama teacher. It concluded that there was insufficient evidence to conclude that Q's activities had or would have an impact on the school climate.

[44] The Tribunal accepted Q's evidence that he did not sell drugs for J, the student from whom he bought an ounce of marijuana every two or three weeks over a six week period. It rejected the Vice-Principal's version of events, because it was based on a questionable interview response that had been conducted in a manner that failed to take into account Q's communication disability.

[45] The Tribunal also rejected evidence from the Vice-Principal that three students had identified Q as having bought and sold drugs. Those students were never identified by name nor were they called as witnesses. Therefore, the Tribunal reasonably found this hearsay information unreliable.

[46] The Tribunal concluded that the School Board had failed to prove there was an intersection between Q's activities away from school and the school climate. At paras. 19 and 20, it found:

> [19] The student, J. who sold [Q] the marijuana contacted him at home. There was no evidence linking [Q] and J. to in-school drug activities. The Board heard no evidence of any youth who obtained marijuana from [Q] bringing marijuana to school, using it at school or discussing its exchange while at school. The Board heard no evidence that [Q] or the students he shared marijuana with were in any way connected to the community drug dealers who had attended at school.
>
> [20] Without evidence the Board cannot simply assume that students who engage in an activity off school property, such as drinking or sharing marijuana, will necessarily import aspects of that activity into the school setting. Nor can the Board assume that such off site activities will automatically, by their very existence, worsen a school culture in which drug use is prevalent. The fact that two named students were involved with

> [Q's] off school activities does not in the circumstances, lead to a conclusion that the climate will be impacted.

[47] The Tribunal went on to explain why it rejected the School Board's argument that the overall drug culture at PCVS would be exacerbated by Q's activities. It observed there was no evidence linking Q to drug dealers who have attended the school. It described the evidence as "about general concerns (some of which were speculative beliefs) about the impact of drug use on the school and not about the circumstances surrounding [Q's] activities" (at para. 23).

[48] Finally, the Tribunal noted that Q's drug use was limited in time, his use ceased five months before the Tribunal hearing. Therefore, the likelihood of a definitive future impact was very remote (at para. 24). The Tribunal also commented on Q's clean disciplinary record, and concluded, "The history of this particular student is not suggestive of behavioural issues that would lead to a future impact on the school climate" (at para. 25).

[49] While the School Board argues that the principal's concern about the pervasiveness of drug use at PCVS should have been respected, the Tribunal's task was to weigh the evidence of the principal along with all the other evidence before it.

[50] In my view, the decision of the Tribunal falls within a range of reasonable outcomes. It correctly interpreted the legislation, weighed the evidence and reasonably concluded that the School Board had failed to prove that Q's activity would negatively impact the school climate.

**Conclusion**

[51] For these reasons, I would dismiss the application for judicial review. The Tribunal and Intervenor do not seek costs. Costs of the application are awarded to the respondent, Ms. Grant, fixed at $3,000.00 plus GST. This Court has no authority to award costs at the Tribunal level.

Swinton J.

Dambrot J.

Sachs J.

**Released:** March 2, 2010