

Catholic Dimension - Legally Speaking - Spring 2008

Kevin P. Feehan
Dentons Canada LLP

The Santa Claus(e)

In the movie "The Santa Claus(e)", Tim Allen is contractually bound, when he puts on Santa's red suit, to actually become Santa Claus. Likewise, when one accepts employment with a Separate Catholic school board one becomes contractually bound as a teacher, administrator or other leader in Catholic education to carry out such role in the context of the philosophy and theology of the Catholic Church. That is the "Catholicity clause".

ATA v. Grande Prairie RCSSD No. 28.

On January 18, 2007, the Alberta Teachers' Association ("ATA") filed an Originating Notice against four school boards including Grande Prairie Catholic challenging some provisions appearing in teachers' continuing contracts, temporary contracts, probationary contracts and interim contracts, and administrative designations. One of the clauses targeted with respect to Grande Prairie Catholic was the "Catholicity clause". The Alberta Catholic School Trustees' Association ("ACSTA") and Grande Prairie Catholic determined to defend the challenge set out in the fifth order sought in the ATA Originating Notice:

"5. Declaring contrary to sections 2(a) and 15 of the Charter and unenforceable and void for vagueness those terms in the said contracts that impose Catholic doctrinal or other faith requirements in excess of those guaranteed by or under the Constitution of Canada in respect of denominational or separate schools."

The Alberta School Boards' Association continued to represent Grande Prairie Catholic with respect to all other matters raised in the application of the ATA. With respect to the "Catholicity clause" issue, ACSTA and Grande Prairie Catholic took the firm position that the Grande Prairie matter should be severed from the other four matters, at least as it pertained to those clauses. They also took the position that if this matter proceeded further in litigation, it should be converted to a Statement of Claim, and both sides should call extensive evidence with respect to the Catholicity provisions, particularly with respect to the provisions of sections 2(a), 15 and 1 of the Charter. A Consent Order of February 16, 2007 accomplished those goals.

Over the months of March and April, 2007, ACSTA and Grande Prairie Catholic diligently collected the various employment contracts currently being utilized by Catholic schools in Alberta and the Northwest Territories, and provided them, together with a compendium of extracts of current Catholicity clauses, to legal counsel for ATA. In June, 2007 representatives of ACSTA met with representatives of ATA for the purpose of determining whether they could come to a negotiated settlement on an appropriate Catholicity clause for all administration and teacher employment contracts with Catholic School Boards in the Province of Alberta. Their meeting was positive and both parties indicated their willingness to negotiate this matter without the necessity of further litigation.

The Marceau Decision

The ATA challenge to contractual clauses other than the "Catholicity clause" was heard by Justice R.P. Marceau over a three day Special Chambers application and he issued Reasons for Judgment on February 6, 2008.

Justice Marceau addressed the legality of certain provisions appearing in continuing teacher contracts, temporary teacher contracts, probationary teacher contracts, interim teacher contracts, and administrative designations, of the four boards involved.

Justice Marceau addressed the legality of certain provisions appearing in continuing teacher contracts, temporary teacher contracts, probationary teacher contracts, interim teacher contracts, and administrative designations, of the four boards involved. The complaints of the ATA with respect to these contractual provisions were as follows:

- "(a) The Boards, contrary to the School Act, have included a contractual provision in which the teacher agrees that he or she is not entitled to a hearing prior to termination;
- (b) The Boards, contrary to the School Act, have included a contractual provision in which the teacher agrees that certain conduct or certain breaches of contract shall constitute grounds for just termination ...;
- (c) The Boards seek... promise(s of standards of conduct or behaviour) in... (these) contract(s) which (are)... so vague as to be unenforceable;
- (d) The Boards seek agreement from the teacher to refrain from actions or activities which could be considered as acting professionally and within the spirit and letter of the School Act".

In addressing these legal concerns of ATA, the Court made a number of findings of law:

1. The School Act provides a "unique and specialized regime" with respect to the employment, termination or suspension of teachers. Under this regime an action for wrongful dismissal does not lie against the school board, and the mechanism to be followed is set out in the School Act, the collective agreement between the board and the ATA local, the contracts of employment and common law (para. 9);
2. Under the School Act a teacher to be suspended or terminated has a right to written notice of termination, setting out the reasons for termination, a right to a hearing before the board (or before the superintendent if authority is delegated to the Superintendent) and a right to appeal any decision of the board to the Board of Reference (paras. 13-21);
3. A teacher may not be suspended or terminated "without cause" by payment of "reasonable notice of termination" which would otherwise be allowed at common law. A teacher may only be suspended or terminated for "just cause" (paras. 32-39);
4. Even where rights to suspend or terminate a teacher are delegated to the Superintendent, the Superintendent must give notice, reasons and a right to a hearing before the Superintendent. Any clause in the contract to the contrary is ultra vires the School Act (paras. 44-51);
5. Clauses in a contract which attempt to define specific conduct as being "just cause" are attempts to limit the jurisdiction of the Board of Reference and the Courts in determining what is "just cause" for termination. A decision as to what constitutes "just cause" is a finding of fact which cannot be limited in the teachers contract and such limiting clauses are ultra vires the School Act (paras. 53-65);
6. Clauses which require that teachers conduct themselves so as to not bring the Board, District or its representatives or officers into public disrepute or ridicule, and then categorize any conduct that does bring the board into public disrepute or ridicule as "just cause" are again attempting to define what is comprised in "just cause" and may capture conduct which would not be found by the Board of Reference or a Court to be "just cause." Such clauses are ultra vires the School Act (paras. 76-80);
7. Clauses which indicate that a teacher shall not be entitled to a hearing by the Board, or in the case of delegation to the Superintendent, by the Superintendent, are ultra vires the School Act (paras.87-89); and
8. Fixed-term administrative designation contracts also attract the rules of natural justice. The delegation of authority to a Superintendent to terminate a fixed-term administrative designation does not relieve the Superintendent of the duty to give notice, reasons for termination and the right to a hearing before the Superintendent (paras. 90-94).

In light of the extensive cataloguing of Catholicity clauses being used around Alberta and the Northwest Territories, the helpful meetings with ATA conducted in 2007, and the legal reasoning of Justice Marceau issued on February 6, 2008, an optimum "Catholicity clause" has been drafted for further discussion with representatives of ATA. Although not yet at finality, and subject to approval by ATA and the Alberta bishops, that draft clause is set out below.

The Catholicity Clause

"1. As part of the teaching ministry to the students and children of the faith community in each school of the District, the Teacher:

IF CATHOLIC:

- (a) attests that she/he is a practicing Catholic;
- (b) represents that she/he is capable and willing to teach a fully permeated Catholic faith both in and outside of formal religion classes, celebrations and exercises;
- (c) undertakes to follow, both in and out of school, a lifestyle and deportment in harmony with Catholic teaching and

principles which the Teacher understands to include, among other things, participation in the Sacraments of the Church and living in keeping with the principles of the Gospel and teachings of the Catholic Church, as determined by the local bishop;

(d) has or shall provide the District with a testimonial from a priest or member of the pastoral team attesting to her/his faith commitment;

(e) understands and is committed to the responsibility to undertake periodic professional development related to Catholicity and to fully support the spiritual development of students.

IF NOT CATHOLIC:

(a) recognizes that she/he will be teaching in a fully permeated Catholic School setting and is comfortable with and respectful of the teachings and traditions of the Catholic Church;

(b) undertakes not to knowingly speak against or act in a manner to disparage the practices and beliefs of the Catholic Church and agrees to participate as appropriate in religious celebrations and exercises;

(c) undertakes to follow both in and out of school a lifestyle and deportment in harmony with the principles of the Gospel and teachings of the Catholic Church, as determined by the local bishop;

(d) has or shall provide the District with a testimonial from a religious leader of her/his faith attesting to her/his faith commitment; and

(e) understands and is committed to the responsibility to undertake periodic professional development related to Catholicity and to fully support the spiritual development of students.

2. For the purpose of this provision 'Catholic' shall mean 'a baptized member of the Roman Catholic Church, or one of the Eastern Catholic Churches'.

3. The parties further acknowledge and agree that a failure of the Teacher to meet the requirements of Section 1, may lead to disciplinary action, up to and including termination of the Teacher's contract of employment."

Conclusion

It is hoped that by severing the issue of the "Catholicity clause" from the rest of the ATA litigation, and embarking upon the above process, an optimum Catholicity clause that will be acceptable to all parties will be negotiated with a view to incorporation of such a clause into all Catholic school administrative and teaching contracts in the Province of Alberta and the Northwest Territories.