

THE CHARTER CHALLENGE LE DÉFI DE LA CHARTE

Ontario Justice Education Network
Réseau ontarien d'éducation juridique

CASE SCENARIO SPRING 2009

FREEMAN FRACAS

-V.-

THE CENTRAL REGIONAL SCHOOL BOARD

SUPERIOR COURT OF JUSTICE

BETWEEN:

FREEMAN FRACAS

(Applicant)

- and -

THE CENTRAL REGIONAL SCHOOL BOARD

(Respondent)

REASONS FOR JUDGMENT

GRUFF J.:

1. This is an application for a permanent injunction against the Central Regional School Board (hereinafter the School Board), brought on behalf of Freeman Fracas (hereinafter Fracas), a Grade 12 student at Mountainview Collegiate Institute. Mr. Fracas is seeking an injunction against the School Board enforcing one aspect of its Code of Conduct and a declaration that the Code of Conduct, and section 306(1) of the *Education Act* violates his *Charter* rights.
2. This matter arose when the student posted statements and pictures on his personal Facebook page which were deemed offensive to a teacher and insulting to that person. It is necessary to give some background to the application. I have had before me the benefit of testimony from the school principal, a teacher, Fracas, his parents, and several students. I will not refer to their evidence in any great detail, but I have fully considered it in coming to my conclusions.
3. Fracas has attended Mountainview Collegiate since Grade 9. He is presently in Grade 12. He has been an average student, maintaining an overall average of 62 to 66% in grades 9 to 11. During that time, he has gained a reputation amongst some teachers as a “loudmouth” due to boisterous behaviour in class. He will interrupt teachers or call out comments (seldom are

these comments correct answers to questions asked) during lessons. He seeks to be the focus of attention. One of his teachers stated that when Fracas has been told to be quiet or pay attention, he acts hard done by. On the other hand, several students have stated that Fracas is more of a class wit than a disruption, often being quite funny in his comments. They have described him as “all talk” and not one to actually do anything wrong. He was described as a person who, while sometimes was a “bit of a pain to teachers,” would recognize if he had crossed a line between tolerable and unacceptable behaviour. If that line was crossed, he would back down.

4. Fracas maintains a Facebook page. This has been explained to me as an electronic social networking tool. People who have these pages can post comments, pictures, carry on conversations and so on. Facebook is not something that is in any way maintained by the Central Regional School Board nor is it funded by them. It is a personal, if I can use the term, “electronic diary”, of the subscriber. It is also not possible for just anyone to gain entry to another’s Facebook page. In order to do so, the person wishing to gain access must request it from the page holder. I understand this to be a “friend” request made to the holder of the page. The holder then accepts or denies “friend” status to the seeker. If status is denied, then the seeker has no ability to find out what the page holder has posted. If status is granted, then the seeker becomes a “friend” and can gain access to whichever parts of the page that the page holder has authorized. Fracas has never denied anyone “friend” status and described his privacy settings as very liberal.
5. Unhappy differences have arisen between Fracas and his mathematics teacher, Benjamin Massolano (hereinafter Massolano). This teacher has a reputation for running a very orderly, some might say overly strict, class. He has little patience for student hijinks and expects his students to have completed their work and act properly in class. He is described as a “hard marker”, but one who is dedicated to teaching. Fracas is far from his favourite student. Fracas is receiving failing grades in math, although in his prior years he has received slightly better than 60%.

6. Shortly after Fracas' history class covered the second World War, Fracas started referring to Massolano as "Benito Mussolini", the dictator of Italy before and during the war until he was overthrown and executed (his body was hung upside down outside a gas station in Milan). Needless to say, Massolano, who is of Italian descent, was less than pleased with these comments.
7. Matters between these people came to a head when during a class, Fracas, in response to a query from the teacher, stated "well, I really do not know, Benito, oops, I mean Mr. Mussolini". Massolano yelled "just get out of my sight, you god damned moron" and one student stated that the teacher looked "like he was going to take Freeman's head off". Fracas left the class as ordered and went to the principal's office.
8. He was told by the principal to apologize formally to Massolano. When he went home he posted a comment on his Facebook page which read, in part, "Mussolini was being a total A-hole today. He tossed me out for talking in class. I don't know why the school has jerk offs like him around". A picture of Mussolini in Milan was also posted and tagged with Mr. Massolano's name. The school vice- principal learned of the Facebook posting, called Fracas to his office, suspended him for 7 days for a breach of the Code of Conduct.
9. The vice-principal suspended Fracas as his actions were a violation of the Code of Conduct, and of s. 306 of the *Education Act* of Ontario which states:

306.(1) A principal shall consider whether to 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:

...

6. Bullying.

7. Any other activity that is an activity for which a principal may suspend a pupil under a policy of the board.

Education Act, R.S.O. 1990, CHAPTER E.2

10. The School Board has adopted a policy on School Codes of Conduct that addresses what

was described to me as cyber-bullying. The policy reads:

Under Board policy, a principal may 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:

...

5. Aid/incite harmful behaviour;

...

15. Inappropriate use of electronic communications/media; and/or

16. An act considered by the principal to be a breach of the Board's or School's Code of Conduct.

Central Regional School Board. Policy 10.3.2. Adopted June 2008

11. The vice principal also demanded that Fracas remove the offending post from his Facebook site. During his suspension, Fracas was unable to participate in any school extra-curricular activities including the Drama trip to Stratford. The school's discipline of Fracas was done according to the procedures set out in the *Education Act* and Fracas and his parents received appropriate notice of the suspension. No one has argued a breach of the process set out in the *Education Act* in these proceedings before me. Neither did the discipline escalate nor was Fracas expelled. He reported to me that he has not removed the offending post from his Facebook page.
12. Fracas complained to his parents, who are both litigators. They immediately took their son's matter up, as one might expect, and sought a temporary and permanent injunction to reinstate their son to full participation at school and a declaration that s. 306(1) of the *Education Act* and the related Code of Conduct violate the *Charter*. I granted a temporary injunction on the condition that the matter be fully argued before me within two weeks. As a result Fracas returned to school, pending this decision. Counsel have done a commendable job in doing so. It should be noted that as the student is not appealing the suspension decision of the school, but challenging the legislation as violating his *Charter* rights, he has sought relief through the courts rather than rely on the appeal provisions of the *Education Act*. Thus, I have assumed jurisdiction over the matter.

13. I make the following findings necessary to this litigation: Fracas was insulting toward the teacher, as was the teacher toward Fracas. Fracas' comment was more degrading due to the association with a vicious dictator. Massolano was angry. The Facebook entry by Fracas was immature and insulting toward the teacher. It was a breach of the school's Code of Conduct. While Fracas may not have intended to cause harm, he still exposed Massolano to hatred and ridicule. Thus, the vice principal was justified in being concerned about the incident and turning to the Code of Conduct.
14. The question before me is whether the Code of Conduct and the *Education Act* provisions that authorize it violate the *Charter of Rights and Freedoms* to the extent that it authorizes school administrators to discipline a student for postings made on a private Facebook site off of school property and outside of school hours.
15. The Applicant has raised three *Charter* issues related to the factual matters under consideration. If I find that the Applicant's *Charter* claims are merited, then it follows that I must grant an injunction and declaration as sought by the Applicant. The points raised by the Applicant are:
 - a. that the *Charter* applies to the acts of the school principal and he was required to act in accordance with the *Charter* and its guarantees, rather than act as he did;
 - b. the Applicant has freedom of expression in his own Facebook page and to be disciplined in this manner violates s. 2(b) of the *Charter*;
 - c. that s.306(1) of the *Education Act* treats students differently based on age, which is a violation of their s.15 *Charter* right;
16. The Respondent disputes each of these points and adds a claim of its own:
 - d. even if the *Charter* applies to the situation, then the actions of the principal constitute a reasonable limit on the rights of the Applicant, as allowed by s. 1 of the

Charter.

17. For the reasons that follow, I am not granting the permanent injunction and declaration requested by the Applicant. I will now turn to each of these issues.

Application of the *Charter*

18. Section 32 (1) of the *Charter* states:

This *Charter* applies:

to the Parliament and the government of Canada in respect of all matters within the authority of Parliament including matters relating to the Yukon Territory and the Northwest Territories and;

to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Canadian Charter of Rights and Freedoms

19. The Central Regional School Board was created pursuant to the *Education Act* and is thus a creature of statute. The *Education Act* was passed by the government of Ontario and the Code of Conduct is a Policy of the Central Regional School Board. This would, at first blush, make the *Charter* applicable. Historically schools were regarded as a non-government domain, however recent decisions support the interpretation that the *Charter* does apply in schools, albeit to a lesser or more limited degree. It is critical that all *Charter* rights are seen in context. If the Board adopted a policy which actively discriminated against a particular minority, that would obviously be contrary to the *Charter*. Adjudicative decisions which have a major impact on the rights of individuals, such as whether to expel a student, would likely fall under *Charter* protection. This simply reflects the maxim that the greater the impact upon the person, the greater the protections which must be granted. Nonetheless, the practical realities of everyday life in a school must also be recognized. This means that there must be a distinction between adjudicative matters, which have a major impact upon a party, and merely administrative matters which one may encounter on a regular basis and are minor in nature.

20. The principal in this case simply suspended the student and banned him from extra-curricular activities and required him to remove the posting. While extra-curricular activities may be important to student life, they do not form part of the core of school activities (those being education). As well, since the student was merely temporarily suspended, his matter does not have the same effect on the student's future as would an expulsion. The student's comments were clearly offensive. He could have removed the posting and completed his suspension in seven days with minimal impact on his educational progression. Instead, he chose to litigate this issue. He has also taken issue with the requirement that he remove the posting from a site that he considers his private property. He is the one responsible for prolonging the matter, not the school nor the Board.
21. The principal's actions under 306(1) and the Policy fall into the category of minor or procedural matters necessary to maintain school order. In my opinion, they do not attract *Charter* protection. Thus, I find that the *Charter* has no application to a case of this nature.
22. However, if I am wrong in this conclusion, I will examine the other issues raised by the Applicant.

Freedom of Expression

23. S. 2 (b) of the *Charter* guarantees the right to free speech. This must be given the widest protection and includes commercial statements and even repulsive comments, to a degree. But, expression is not unlimited. Even before considering whether a limit on free expression is a reasonable limit under s. 1 of the *Charter*, it must be determined if that particular expression falls within s. 2(b). Expression is protected when it conveys meaning and does so in a non-violent manner. Secondly, one considers if the purpose of the government action is to limit expression, or if the limitations is merely incidental to another goal.
24. Again, we must look at the matter in context. One does not have the right to defame a person. To do so would leave the defamer open to a civil law suit for damages for libel or

slander. One does not have the right to threaten a person, indeed that is a criminal offence. One does not have the right to expose obscene materials to unlimited public viewing. These are examples of how Canada views free expression.

25. In this case the Code of Conduct specifically identifies online communication and prescribes rules regarding cyber-bullying, intentionally limiting expression. Therefore, I find a presumptive breach of section 2(b) has occurred, necessitating a closer look at the school context at the section 1 stage.
26. Fracas does not have to like Massolano; he can think what he will of this teacher. He can complain about the lessons, the marking schemes and so on. He may make private comments to his friends, in a confidential conversation. If Fracas had denigrated his teacher in a public manner and incited and encouraged others to hurt him, Fracas would have gone beyond any protected level of speech. Instead Fracas was “blowing off steam”, engaging in hyperbole and acting as an immature teenager. The fact that he exposed this teacher to public ridicule is in itself not enough to take him outside the protection of s. 2(b).

Equality Rights

27. This issue is somewhat related to *Charter* applicability, but involves an analysis of the protections guaranteed by s. 15. This assumes that the *Charter* does apply to the actions of the school and its employees. In order to determine the level of protections that must be offered, we again must look at *Charter* rights in context.
28. Fracas argues that s. 306 of the *Education Act* authorizes the school to discipline with respect to anything that affects school climate, and that this amounts to regulation of the lives of students that only young people experience. He alleges discrimination based on age.
29. I find that the *Education Act* only applies to students under the age of 19, with few

exceptions, and therefore does treat young people differently than adults. However, a violation of s. 15 requires that the differential treatment affect the dignity of the individual. In this situation I do not accept Fracas' suggestion that the school's discipline of him for the rude comment on this Facebook page has stripped him of his dignity. Quite the contrary, schools are concerned not only with the facts students learn but also with their development into responsible adults. Monitoring their behaviour, even if off of school property likely protects their dignity more than it hurts it. Students are notorious for making bad decisions and I will not accept that the schools' efforts to protect students from harm and from these socially dubious activities affects their dignity. To accept this argument would undervalue the care and concern expressed by teachers and administrators and would not reflect the trust that society has put in schools to look after young people. I find no breach of Fracas' s. 15 rights.

Reasonable Limits

30. I have found that there was a s.2(b) violation, but no s. 15 infringement. I turn therefore to section 1 of the *Charter*, in which the School Board argues that any *Charter* violations are reasonable limitations on students' rights. The School Board argues that even if the Applicant was correct in all his submissions, the need to ensure discipline in the school, promote order and ensure that students respect the dignity of teachers justifies the limitations on the claimed *Charter* protections. I agree.
31. Every modern society has established schools for the education of the young. Proper education is vital for the benefit of society and the individual. For an educational system to function, there must be rules set out. For example, teachers cannot refuse to teach the set curriculum. They cannot set different passing standards than those mandated by the School Board. Similarly, students must conform to certain requirements, such as attending classes, taking examinations, and not interfering with the rights of other students or of teachers. The learning environment is a complex mechanism. It involves ensuring the safety of students and the opportunity of others to learn. It must be recognized that schools struggle

with a multitude of safety issues in schools. Latitude must be given to school administrators to protect children. Parents, and general society expect schools to be a safe place where students can learn free of distractions. In this era of electronic communications, student behaviour does not stop at the schoolyard fence. The *Education Act* recognizes the “school climate” as the purview of school administrators. The government has signalled its expectations that schools discipline students for behaviour that affects school climate. I must respect the government’s decision that schools require this extended reach in order to protect our young people. An occasional comment from the “class clown” may be tolerated, but a threat to school safety that disrupts the learning environment cannot be.

32. While I have found that s. 306(1) of the *Education Act*, and the Code of Conduct adopted pursuant to that section do violate Fracas’ s. 2(b) *Charter* rights, I find that the actions of the principal, and the School Board, are reasonable limits upon the rights of the Applicant, demonstrably justified in a free and democratic society. I find no breach of s. 15 of the *Charter*. The requested declaration and permanent injunction is refused.

■ GRUFF, J.