大成DENTONS

Cristina Wendel
Partner
cristina.wendel@dentons.com
D +1 780 423 7353

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB, Canada T5J 3V5

dentons.com

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EMAIL: DEAN@ACSTA.AB.CA

PRIVATE AND CONFIDENTIAL

Alberta Catholic School Trustees
Suite 205, 9940 106 Street
Edmonton, AB T5K 2N2

Re: Denominational Rights and Health and Welfare Benefits

Introduction and Issues

You have asked us to provide an opinion regarding how denominational rights impact an employee's right to access health and welfare benefits (hereinafter referred to as "benefits"). This also gives rise to the perhaps larger question of how to address circumstances where a Catholic School Board ("Board" or "Boards") learns, by virtue of an employee's application for benefits, that the employee may not be living a lifestyle in accordance with the teachings of the Catholic Church.

Brief Conclusions

Our research did not reveal any cases to date that have considered the question of an employee's entitlement to benefits in the context of denominational rights. We do not anticipate that a Board will be able to successfully establish that employee access to benefits is part of the package of rights associated with denominational school rights so as to attach constitutional protection to a Board's decision to refuse to provide an employee who is not living a Catholic lifestyle (or the employee's spouse/partner or dependents) with access to benefits. Absent constitutional protection, a Board's treatment of benefits must be considered in accordance with human rights and Charter protections, and where there is *prima facie* discrimination in administration of benefits, we expect that the individual human rights and Charter rights will prevail.

The concept of denominational rights and the Board's right to terminate or discipline teachers or staff for denominational cause has been the subject of previous opinions from our office. The case law is well established that because of the important role that teachers play in Catholic schools and their influence over students, Boards do have the constitutionally protected right to terminate a teacher's employment for denominational cause. The question of whether this right expands to other employees is less clear. That will depend on the nature of the employee's position and the extent to which the employee in question is an inherent part of fulfilling the Catholic nature of the school. Typically, the greater the connection to students, the stronger the argument that the concept of denominational cause should apply to the employee.

Aside from the constitutional issues, to the extent there is nothing to the contrary in the terms of the applicable collective agreement, as a general rule, Boards should refrain from becoming involved in the

administration of benefits. Further, Boards would not be entitled to use information collected in the context of the administration of benefits for the purposes of discipline. Doing so would be contrary to the requirements of the *Freedom of Information and Protection of Privacy Act* (Alberta) (FOIP). However, possession of the information could nevertheless be used against a Board to form the basis of a human rights complaint should the Board discipline the employee, even if the discipline is for unrelated reasons.

In addition, while general questions of the administration of benefits are likely not arbitrable in this case, the Board risks making it an arbitrable issue should it become involved in the administration of benefits.

Analysis

Summary of key principles regarding denominational rights and denominational cause

Section 93 of the *Constitution Act, 1867* and section 17 of the *Alberta Act, 1905*, establish the constitutional right to establish separate schools in Alberta. Section 29 of the Charter reaffirms and continues the constitutional rights granted to denominational schools, giving those rights precedence over the individual rights protected by other provisions of the Charter. In addition, these constitutional rights render inapplicable any rights granted by the *Alberta Human Rights Act* to the extent that such rights conflict with the constitutional rights of a separate school board. However, any limitations on the individual rights granted by the Charter or the human rights legislation can only be permitted in cases where a dismissal or termination of employment is based on a bona fide denominational cause.[1]

The courts have determined that the constitutionally protected right to establish separate schools includes the right to maintain the denominational character of the school which in turn, includes the right to dismiss teachers for denominational cause[2]. In arriving at this conclusion, the courts considered the rights that were available to separate schools as of 1867. Since school boards could dismiss for cause, then in the case of a denominational school, "cause" will include denominational cause. Serious departures from denominational standards by a teacher could not be isolated from his or her teaching duties.[3]

In *Ontario English Catholic Teachers' Association v. Dufferin-Peel Roman Catholic Separate School Board* (1999), the Ontario Court of Appeal stated at para. 24:

> In other words one of the means of ensuring the denominational status of education is through the power to hire teachers. In this regard, see the reasons of this Court in *Daly v. Ontario (Attorney General)*, released concurrently with these reasons. The constitutional protection in s. 93(1) applies to the power to hire teachers and, inferentially, the power to promote teachers to the extent that such power is related to maintaining the denominational character of Catholic schools and education. The power to promote teachers has been entrenched only in so far as this power is necessary to maintain the denominational status of education. While the right and privilege of Catholics to a denominational education in s. 93 obviously includes the means and framework in which the right is exercised, the means to achieve that end are not themselves constitutionally guaranteed. Gonthier J. made this clear when he stated in *Reference re Roman Catholic Separate High Schools Funding, supra* at 541-542 and at 579:

1 *Casagrande v. Hinton Roman Catholic Separate School District No. 155*, 1987 ABQB at paras. 34-35.
2 *Casagrande* at para. 24.
3 *Re Essex County Roman Catholic Separate School Board and Porter*, 1978 ONCA, at 257-58.

> I note that in *G.M.P.S.B., supra*, this Court has already held that rights of ownership, *powers to hire staff* and powers to use material resources are incidental rights that are only protected to the extent that they are necessary to preserve the denomination character of education.

Denominational cause for teachers is premised on the important role teachers play in Catholic schools, as confirmed by the Supreme Court of Canada in *Caldwell v. Stuart* [4], which considered a Board's refusal to renew a teacher's contract because she married a divorced man in a civil ceremony:

> [...] The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school. It is my view that the *Etobicoke* test is thus met and that the requirement of conformance constitutes a *bona fide* qualification in respect of the occupation of a Catholic teacher employed in a Catholic school, the absence of which will deprive her of the protection of s. 8 of the *Human Rights Code.* It will be only in rare circumstances that such a factor as religious conformance can pass the test of *bona fide* qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a *bona fide* qualification.

The analysis is less clear when considering whether a Board has the right to dismiss non-teaching staff for denomination cause as they may lack that unique role recognized by the courts for teachers. That question requires an analysis of whether those rights were available to separate schools as of 1867 as being necessary to preserve the essential and proper denominational character of a Catholic school, and if so, whether the requirement or dismissal is based on a *bona fide* denominational cause. As such, the question must be determined on a case by case basis, considering the employee's position, and how that position contributes to the maintenance of the Catholic philosophy in the school.

Benefits and denominational cause

When assessing whether a certain right associated with Catholic schools is entitled to constitutional protection, the courts will look at whether the right in question was a right available to separate schools in 1867 and whether the conduct goes to the essential denominational nature of the school. The Court in *Hall v. Powers*[5] applied this analysis when determining whether a homosexual student had the right to bring his boyfriend to the school prom and made the following comments:

> The question is this: Does allowing this gay student to attend this Catholic high school prom with a same-sex boyfriend prejudicially affect rights with respect to denominational schools under s. 93(1) of the Constitution Act, 1867?
>
> I find the answer to this question is "no" because, among other reasons, the evidence demonstrates a diversity of opinion within the Catholic community on pastoral care regarding homosexuality, such that it is not clear what conduct is necessary to ensure that rights with respect to denominational schools are not prejudicially affected.

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[4] [1984] 2 SCR 603 at 624-25.
[5] 2002 CanLII 49475 at paras. 44-47.

> In addition, it is my view that Principal Powers' decision was not justified under s. 93, both because the specific right in question was not in effect at the time of Union in 1867 and because, objectively viewed, it cannot be said that the conduct in question in this case goes to the essential denominational nature of the school.
>
> The defendants have not demonstrated to me that the s. 93 protection justifies a s. 15 Charter breach. I am not satisfied that regulation of this particular conduct is necessary for the preservation of the school's denominational nature. I am not satisfied that the right was in effect at the time of Union in 1867.

Applying this analysis to the present case, the question is whether allowing employees who are not living a Catholic lifestyle (for example, living in a common law or same sex relationship) and their families to access benefits prejudicially affects rights with respect to denominational schools under s. 93(1) of the *Constitution Act, 1867*. We anticipate that the answer to this question would also be "no". The administration of, and employees' entitlement to, benefits would not be considered constitutionally protected rights. The concept of benefits is not something that would have been in existence in 1867. Nor is it something that goes to the essential denominational nature of Catholic education. Therefore the administration of and entitlement to benefits would not justify a Charter breach.

The administration of, and employees' entitlement to benefits would also be subject to the protections in the *Alberta Human Rights Act*. Prohibiting employees from accessing benefits if they are not living in accordance with Catholic values would be considered *prima facie* discrimination in cases where the refusal is linked to a protected ground under human rights legislation such as where access to benefits is refused to a common law or same sex spouse. That would constitute discrimination based on family status and/or sexual orientation. In order to defend a complaint of discrimination, the Board would need to establish that requiring employees to follow a Catholic lifestyle in order to access benefits is a *bona fide* occupational requirement (BFOR). The test for establishing a BFOR was set out by the Supreme Court of Canada in 1999 in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (often referred to as the "Meiorin test"). The three part test can be summarized as follows (as taken from the headnote):

> A three-step test should be adopted for determining whether an employer has established, on a balance of probabilities, that a *prima facie* discriminatory standard is a *bona fide* occupational requirement (BFOR). First, the employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose. Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose. Third, the employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The BFOR analysis is somewhat complicated in the present case because access to benefits is premised on the employees' employment. While a Board may be able to establish that requiring an employee to live a Catholic lifestyle is justified for the purposes of employment, it likely would not be able to do so where the question relates not to continued employment, but rather, to access to benefits. Access to benefits does not bring into play the various principles in the denominational cause cases surrounding the

importance of the employee's role in the furthering of Catholic education. As such, we anticipate that a human rights complaint premised on denial of benefits for an employee in a common law or same sex relationship would likely succeed.

Restrictions on a Board's use of information gathered in the administration of benefits

A corollary of the question of the administation of, and access to, benefits is what use, if any, a Board can make of information gathered in the process of signing employees up for benefits or otherwise administering the benefits. Can a Board use this information for the purposes of disciplining employees on the basis that they are not living a Catholic lifestyle?

FOIP governs the collection and use of personal information, which would include employees' information provided in the course of accessing benefits. While s. 33(c) gives a public body the ability to collect personal information from employees for the purpose of administering benefits, s. 39 contains restrictions and limitations on what use a public body may make of that personal information. One of the limitations applicable in these circumstances, is that FOIP mandates that the Board can only use the employees' personal information it has collected for the purposes of administering the benefit, for the purpose for which it was collected, or for a use consistent with that purpose. Discipline would not be viewed as a purpose consistent with the administration of benefits. Therefore, a Board would not be entitled to use information gathered through the administration of benefits as a basis for discipline against an employee.

In addition to the restrictions from FOIP, we do not recommend using information gathered from the administration of benefits as a basis for discipline. In order to ensure the reasoning for the discipline (i.e. the failure to live a lifestyle in accordance with Catholic teachings) is not diluted, the Board would have to ensure that it took action to issue discipline anytime it learned of an issue through the information relating to benefits. To maintain the strength of the argument about the importance of the Catholicity clause and maintaining a Catholic lifestyle, particularly for teachers, Boards would need to ensure that they acted consistently to issue appropriate discipline whenever they learned that an employee was in breach of those requirements. The more a Board turns a blind eye, the more difficult it will be for a Board to successfully rely on the importance of living a Catholic lifestyle to establish its denominational rights.

Where a Board collects sensitive information about employees in order to administer benefits and learns information revealing that an employee is not living a Catholic lifestyle that the Board would otherwise not have known, it puts the Board in a difficult and virtually untenable position. The Board is prohibited from using the information under FOIP and thus cannot use it as a basis for discipline; yet the information will be in the Board's possession and thus will be deemed to be knowledge possessed by the Board. If the Board subsequently takes disciplinary measures against the employee for reasons entirely unrelated to the potential breaches of the Catholicity requirements, the information may nevertheless still be used to substantiate allegations of discrimination. While we recognize that Boards would presumably want to know when their employees are not living a Catholic lifestyle, where the employer has no reason to believe otherwise, gathering information from the benefits process can give rise to unintended negative consequences and issues.

Arbitrability of benefits issues

Another reason why we suggest that Boards should not become involved in the administration of benefits relates to the potential additional exposure and obligations pursuant to the collective agreement. We note that the benefits issue here stems from a grievance submitted by the Alberta Teachers Association (ATA). The grievance did not purport to allege a breach based on specific conduct, an incident, or a policy. Instead, it was framed based on a hypothetical after the ATA had posed a number of questions regarding benefits and denominational cause which the Board refused to answer. As a matter of labour law, we do not believe this grievance would be considered valid because it is a hypothetical, not grounded in an actual event, incident or established policy. Until there is an event, incident, or policy to be grieved, the grievance will be premature.

The question of benefits may also not be arbitrable by virtue of the terms of the collective agreement. The test as to when an issue regarding benefits may be the subject to a grievance against the employer is well established, and arbitrators typically refer to the following four categories:

(a) The Plan or policy is not mentioned in the collective agreement. In this case a dispute about the plan is not arbitrable.

(b) The collective agreement specifically provides for certain benefits. A dispute will be arbitrable.

(c) The agreement only provides for the payment of premiums by the employer. A dispute is not arbitrable.

(d) Specific plans or policies are incorporated by reference into the agreement. A dispute is arbitrable.

In the present case, Article 11 of the collective agreement states:

> **(1)** The Board shall make available group insurance to its employees, and employee participation shall be a condition of employment.
>
> **(2)** The Board shall subscribe to the insurance policies made available by the Alberta School Employee Benefit Plan (A.S.E.B.P.).

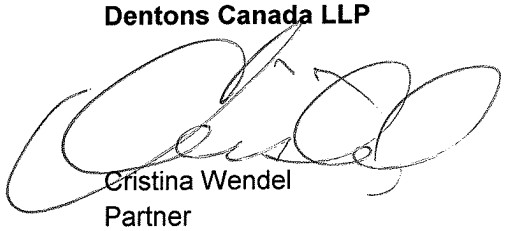
We anticipate that this would fall within category 3 and thus would not properly be the subject of a grievance against the Board. However, should the Board become more involved with the administration of and access to benefits, the Board risks losing this classification and potentially exposing it to further grievances relating to benefits issues, not limited to questions relating to the employee's Catholic lifestyle. The Board then becomes exposed to potential liability to provide the actual benefits.

Conclusion and Next Steps

While a Board may have a relatively strong position in enforcing its right to preferential hiring or denominational cause, particularly relating to teachers, the same cannot be said for questions relating to the administration of, or employee access to, benefits. Those would not be considered constitutionally protected rights. Adding to that the restrictions on use of the information pursuant to FOIP and the potential implications of having the information even if it is not used for denominational cause discipline, we suggest that to the extent possible, Boards should distance themselves from the administration of benefits and leave those issues to the benefits provider/insurer.

Should you have any questions regarding this opinion or wish to discuss further, please do not hesitate to contact me.

Yours truly,
Dentons Canada LLP



Cristina Wendel
Partner

CRCW/as