



IN THE MATTER OF the *Education Act*, R.S.O. 1990, c.E.2, as amended, ss. 57(3),
IN THE MATTER OF *Ontario Regulation 181/98*,
AND IN THE MATTER OF the minor child born 1994

BETWEEN

Ms. L. S., Appellant

-and-

Halton District School Board, Respondent

Parties:

LS

Appellant

JS

Advocate for the Appellant

Ms. N. Tymochenko

Counsel for the Halton District School Board,
Respondent

Tribunal Members:

Ms. Marilyn Thain

Chair

Ms. Derryn Gill

Member

Mr. Jim McCaughey

Member

Introduction

Ms. L. S. appealed to the Ontario Special Education (English) Tribunal regarding the identification and special education placement of her child, an exceptional pupil. The appellant is being represented by an advocate on the appeal.

Form 1: Notice of Appeal was signed by the appellant on May 31, 2005.

A pre-hearing teleconference was held June 10, 2005, to set the dates for the Tribunal hearing and the dates for disclosure of evidence.

Since August 23, 2005, the advocate, has refused to comply with the disclosure schedule set on June 10, 2005. He has challenged the Tribunal's right to hold the pre-hearing teleconference and called into question the schedule that was set.

In the interest of expediting this hearing, and in accordance with the rules of natural justice and procedural fairness, the Tribunal is issuing its decision on how the hearing will proceed.

Legal Framework

The Tribunal's authority is set out in section 57 of the *Education Act*, R.S.O. 1990, c. E.2, and the regulations made there under. The Tribunal's procedures are governed by the *Statutory Powers Procedure Act*, and the general rules of natural justice and procedural fairness applicable to administrative tribunals.

- ***Statutory Powers Procedure Act, R.S.O. 1990, c. S.22***

Subsection 5.3 (1): Pre-hearing conferences — If the tribunal's rules made under section 25.1 deal with pre-hearing conferences, the tribunal may direct the parties to participate in a pre-hearing conference to consider,

- (a) the settlement of any or all of the issues;
- (b) the simplification of the issues;
- (c) facts or evidence that may be agreed upon;
- (d) the dates by which any steps in the proceeding are to be taken or begun;
- (e) the estimated duration of the hearing; and
- (f) any other matter that may assist in the just and most expeditious disposition of the proceeding.

Subsection 5.4 (1): Disclosure — If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

- (a) the exchange of documents;
- (b) the oral or written examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) any other form of disclosure.

Section 21: Adjournments – A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

- ***Education Act, R.S.O. 1990, c. E.2***

Subsection 57 (3): Right of appeal – Where a parent or guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may appeal to a Special Education Tribunal for a hearing in respect of the identification or placement.

History of Events

Since the Notice of Appeal, May 31, 2005, a number of events have occurred. They are as follows:

1. June 10, 2005

On June 10, 2005 a pre-hearing teleconference was held with the appellant, her advocate, counsel for the Halton District School Board (HDSB) and the Chair of the Tribunal.

At that time, the Ontario Special Education (English) Tribunal did not have Rules of Procedure in place allowing it to order attendance at pre-hearing conferences or to order disclosure. The scheduling of a pre-hearing conference is consistent with the Ontario Special Education (English) Tribunal's past practices. The purpose of the pre-hearing conference is to ensure that the hearing of the appeal proceeds expeditiously and fairly.

At this meeting, dates for the disclosure of evidence were set as follows:

- Disclosure by the advocate – August 23, 2005
- Disclosure by Ms. Tymochenko – September 6, 2005

Dates for the hearing were set as follows:

- The week of September 19, 2005 and the week of September 26, 2005, if required

No one refused to attend the teleconference, and no one objected to the scheduling that was set. It was reasonable for the Chair of the Tribunal to assume that the schedule set at that meeting would be adhered to.

2. August 23, 2005

On the date set for disclosure by the appellant, correspondence was received from the advocate stating that he would not be providing the Tribunal or the HDSB with the witness list, expert reports or documents that he intended to

submit into evidence. He also indicated that he would be providing, in due course, a list of witnesses that would require summonses.

3. August 26, 2005

Correspondence was received from Ms. Tymochenko stating that the HDSB would not be able to comply with its requirements for disclosure until such time as the appellant's disclosure was provided.

4. August 26, 2005

The Tribunal responded in writing to both parties specifically dealing with the advocate's decision not to disclose documents on the agreed date. The Tribunal indicated that the Rules of Procedure would be in place on September 01, 2005 and that the Tribunal would order disclosure at that time.

5. August 29, 2005

Correspondence was received from Ms. Tymochenko requesting an adjournment of the hearing scheduled to begin September 19, 2005.

Ms. Tymochenko indicated that the HDSB would not be able to comply with its disclosure timeline and would not be prepared to proceed on September 19, 2005 as previously arranged.

Ms. Tymochenko stated the HDSB intended to bring a preliminary motion regarding jurisdiction.

6. August 31, 2005

The advocate raised the following preliminary issues in his correspondence dated August 31, 2005:

- That the Chair of the Tribunal be removed and the panel be reduced to a panel of two to hear the Appeal;
- That the Rules of Procedure for the Tribunal not be used for this Appeal;
- That the preliminary motion by counsel for the HDSB to hear jurisdiction, be denied;
- That the preliminary motion by counsel for the HDSB to have an adjournment of the proceeding be denied.

7. September 7, 2005

The Tribunal responded in writing to both parties indicating the need to set aside September 19, 2005 to hear the preliminary issues raised by the advocate's correspondence dated August 31, 2005.

8. September 8, 2005

Correspondence was received from Ms. Tymochenko requesting:

- a copy of the Rules of Procedure for the Special Education Tribunal;
- direction concerning whether the Tribunal intended to proceed with the merits of the Appeal during the weeks of September 19, 2005 and September 26, 2005; and
- when the preliminary motion on jurisdiction would be heard.

9. September 9, 2005

Correspondence was received from Ms. Tymochenko stating consent to a hearing on September 19, 2005 to address the issues and allegations raised by the advocate in his correspondence of August 31, 2005. She indicated that if the entire substantive appeal is not adjourned for the purpose of providing disclosure, and the parties are obliged to begin the hearing on the substantive issues without disclosure, it will be necessary for the Board to request an adjournment following the Appellant's evidence.

10. September 9, 2005

Correspondence received from the advocate requested confirmation that the hearing will commence on September 19, 2005 as originally scheduled. He stated that the entire Tribunal must be held on consecutive days without interruption or adjournment.

He indicated that a response by the HDSB to his correspondence of August 31, 2005 is not relevant in this matter and that he fails to understand how this is open for a debate between the parties.

He stated that all aspects of this hearing should be held open to the public.

Issues and Reasons

1. **Disclosure**

A pre-hearing conference is a meeting between the Chair of the Tribunal and the parties in an attempt to ensure that the hearing will run smoothly. The Tribunal recognizes that the effectiveness and efficiency of the hearing significantly depends on what occurs before the hearing commences.

Subsection 25 (1) gives the Tribunal the authority to order a pre-hearing conference if the Tribunal's rules address pre-hearing conferences. However, no order was made as both parties agreed to participate in the conference. The decision to conduct a pre-hearing conference is consistent with the Ontario Special Education (English) Tribunal's past practices.

No one refused to attend the teleconference and no one objected to the scheduled dates for the exchange of disclosure, and the hearing on the merits. It is therefore understood when dates are set collaboratively that each party is in agreement. This process has worked successfully in the past and should continue to do so in the future.

Parties need to share the information that they are going to be relying on as evidence, as this helps the case to move forward in a smooth and efficient manner. When disclosure doesn't happen, it interrupts this process and causes an undue waste of time and resources. Lack of disclosure in advance of a hearing can also affect the fairness of the hearing.

The advocate stated in his letter dated August 23, 2005 that he would not be providing the Tribunal or the HDSB with the witness list, expert reports or documents that he intended to submit into evidence. He did indicate that he would be providing, in due course, a list of witnesses that would require summonses.

Ms. Tymochenko in her response dated August 26, 2005, stated that the HDSB would not be able to comply with its disclosure requirements until such time as the Appellant's disclosure was provided.

Ms. Tymochenko's letter of August 29, 2005 indicated that she would not be prepared to proceed on September 19, 2005, without prior disclosure.

In Ms. Tymochenko's letter dated September 9, 2005, she stated that she was surprised with the advocate's refusal to provide disclosure on August 23, 2005.

The advocate's letter dated September 9, 2005 indicated that if the Tribunal were to adjourn after the Appellant's case, it would provide HDSB with disclosure and the playing field would not be level. He saw this as a clear attempt by counsel of the HDSB to circumvent the SPPA.

2. Preliminary Motions

Preliminary motions are common to all proceedings. A motion is a request by a person for the Tribunal to make a certain order or give direction. Motions can be brought forth before the hearing begins, on the first day of the hearing, or during the course of the hearing itself. Either party has the right to bring forth a motion.

- a) In the advocate's correspondence dated August 31, 2005, he identified a number of significant issues. The Tribunal cannot proceed until these preliminary issues have been heard. Decisions made on those issues will impact the future of this proceeding. The advocate has the right to be heard and the Respondent has the right to reply to his issues.
- b) Ms. Tymochenko, on behalf of the HDSB, has also indicated in two letters dated August 29, 2005 and September 8, 2005 respectively, that she intends to bring forth a motion regarding the Tribunal's jurisdiction to hear the appeal. She has the right to be heard on this motion and the advocate has the right to reply.
- c) Ms. Tymochenko in a letter dated August 29, 2005, put forth a motion for adjournment. She indicated that because disclosure had been delayed by the advocate, the HDSB would not be able to comply with its disclosure timeline and would not be prepared to proceed on September 19, 2005 as previously arranged.

The advocate's correspondence of August 31, 2005 included a request for the HDSB's motion to adjourn, be declined.

In accordance with section 21 of the SPPA, the Tribunal has the jurisdiction to adjourn hearings where it is necessary to ensure a fair proceeding. The HDSB was proceeding on the basis that there would be joint disclosure, which would be consistent with the schedule set during the conference call on June 10, 2005. The lack of disclosure in advance of the hearing may affect the fairness of the hearing.

A preliminary hearing is distinctly different from a 'conference call' and is part of the standard procedures in the administration of a Tribunal. It is called a preliminary hearing because it deals specifically with issues that need to be resolved prior to the commencement of hearing the substantive issues of the case. Often times the hearing on the merits can follow immediately after the preliminary hearing.

3. Rules of Procedure

The Rules of Procedure for the Ontario Special Education Tribunal were put in place on September 1, 2005. These rules are there to enable the parties to have a fair hearing. The Tribunal is enclosing a copy of the Rules.

The advocate in his correspondence of August 31, 2005 requested that these Rules of Procedure not be followed, as they were not in effect as of the Pre-hearing Conference on June 10, 2005.

Ms. Tymochenko in her letter of August 26, 2005 stated that pursuant to sections 23 and 25.0.1 of the SPPA, the Tribunal may vacate the dates set for the Stone Tribunal and postpone hearing the Appeal until such time as the Tribunal has put in place its Rules, or at the very least interim rules regarding pre-hearings and disclosure.

As with any preliminary issue, Mr. Stone has the right to be heard on this issue and Ms. Tymochenko has the right to reply.

Decision

Consistent with the Tribunal's past practices, the Tribunal is adjourning the hearing on the merits until such time as the preliminary issues brought forward by both parties have been heard.

Therefore two dates, September 19, 2005 and September 26, 2005 will be set to hear the motions.

On September 19, 2005, the Tribunal will hear the outstanding issues brought forward by the advocate in his letter of August 31, 2005 as summarized under History of Events, point six. The advocate will notify the Tribunal and Ms. Tymochenko of any modification of these issues, no later than by the end of business on Thursday, September 15, 2005. Ms. Tymochenko representing the HDSB has the right to reply.

Given the nature of the advocate's issues the Board's motion cannot be heard until the advocate's issues have been determined. Therefore, the hearing for Ms. Tymochenko's motion on jurisdiction will be heard September 26, 2005. There is no provision in the SPPA to allow the advocate to deny the other party the right to have a motion heard. The advocate will have the right to reply.

Arrangements for these hearing dates for the preliminary issues will be made by Mr. Bill Wyman, Secretary to the Tribunal, and he will communicate these with the parties when they are confirmed.

The Tribunal will preserve the dates previously agreed to by the parties for the hearing. These days can be used for a hearing on the merits of the case if the parties resolve some or all of the preliminary issues before September 19, 2005.

Given the likely delay that will occur, should it be necessary to reschedule the hearing on the merits, the Tribunal encourages the parties to speak to one another to resolve as many of these issues as possible.

Ms. Marilyn Thain, Chair

Ms. Derryn Gill, Member

Mr. Jim McCaughey, Member

Ontario Special Education (English) Tribunal
September 13, 2005