

School Boards Have a Positive Duty to Protect Gay and Lesbian Students

By Kristopher Wells, University of Alberta

On April 6, 2005 the British Columbia Court of Appeal reaffirmed that publicly-funded schools have a “positive duty” to create school environments that are free from discriminatory harassment based on a student’s actual or perceived sexual orientation.

Background

On June 19, 1996, a Azmi Jurban, a grade 10 student at Handsworth Secondary School in North Vancouver filed a human rights complaint alleging his School Board discriminated against him by failing to protect him on the basis of sexual orientation. The hearing took place in the fall of 2000 and during the summer of 2001. The BC Human Rights Tribunal issued its decision in April 2002. The Tribunal found that Mr. Jurban was repeatedly harassed, taunted with homophobic name calling, and was physically assaulted, including being spit upon, kicked, and punched by other students. The School Board did not dispute this verbal and physical abuse. The Tribunal stated that this harassment began when Mr. Jurban was 13 years old and in grade eight and continued until he graduated from high school. During his grade twelve year, Mr. Jurban’s shirt was lit on fire, his tent urinated on during a school field trip, and students had thrown nails and grapes at him in school. Two students publicly talked about “how funny it would be to dip Mr. Jurban in acid” (para 15). In other instances, students at the school described the common usage of the terms “dork”, “geek”, “gay”, and “faggot” as a “part of the high school vocabulary” that were used as regular insults or put downs (para 20-21).

The school did investigate the incidents targeted against Mr. Jurban and several students were reprimanded and the principal imposed two suspensions. However, the Tribunal found the principal’s strategy of “progressive discipline” had not been effective in stopping the continual harassment. The school was found to be negligent in not changing its strategy to more effectively address the nature of the school’s systemic discriminatory homophobic culture.

The Tribunal held that the School Board ultimately failed in its duty to provide Mr. Jurban with his constitutionally protected right to participate in an educational environment free from discrimination and harassment. While the School Board did take actions to deal directly with specific incidents of harassment when reported, the Tribunal stated that they still had failed in their duty to address the underlying homophobia and heterosexism found in the school and among the actions of students. The Tribunal awarded Mr. Jurban \$4500.00 for injury to his dignity, feelings, and self-respect (para 23). The Tribunal also issued an order for the School Board to cease its contravention of the *BC Human Rights Code* and to take steps to refrain from and to prevent a similar act from reoccurring.

In its decision to uphold the Tribunal’s ruling, the BC Court of Appeal found that a broad approach must be undertaken when considering the special nature of human rights protections. The Court identified the purpose of human rights legislation to “promote and foster human dignity and equality, to prevent discrimination prohibited by the Code, and to

identify and eliminate persistent patterns of inequality” (para 36). The Court found that the “harassment of Mr. Jurban was persistent, homophobic in nature, and negatively affected his full participation in his high school educational experience” (para. 38). It further stated that this homophobic harassment was not unique only to Mr. Jurban’s high school, but was endemic to all schools. The Court deemed the fact that Mr. Jurban was not gay irrelevant.

The Court reaffirmed that discrimination occurs “in terms of distinctions based on personal characteristics attributed to an individual” (para 43). Concomitantly, the Court indicated “the effect of the conduct on the victim is the same as if the person actually had those characteristics” (para 44). The Court found that Mr. Jurban’s harassers created an “environment in which his dignity and full participation in school life was denied because the negative characteristics his harassers associated with homosexuality were attributed to him” (para. 47). The words that Mr. Jurban’s harassers used were neither “benign or irrelevant; rather, the homophobic taunts imported the affront to the equality and human dignity of those that [human rights legislation] seeks to protect” (para 51).

In speaking to the precarious and vulnerable position of lesbian and gay students, the Court referred to the case of *Kempling v. British Columbia College of Teachers* (2004) and stated,

There is a public protection issue here.... [Lesbian and gay students are] generally kept invisible and less likely to come forward with complaints than members of the general public. Realistically, most homosexual students would be most reticent to challenge a teacher or counsellor who is otherwise held in high regard, while placing themselves at risk in disclosing their sexual orientation to the public. (para 53)

In restoring the Tribunal’s original decision, the Court stated, “The goal of a discrimination-free school environment is the ideal against which the School Board’s response to the harassment of Mr. Jurban may be measured” (para 94). Drawing upon the *Ross v. New Brunswick School District No. 15* (1996) decision, from the Supreme Court of Canada, the Court reaffirmed that “a School Board has a duty to maintain a positive school environment for all persons served by it” (para 81). It is simply not enough for a teacher, principal, or School Board to intervene in homophobic discrimination, they also have a positive duty to address the root causes of homophobia and heterosexism in their schools. Anything less will result in a school board being held liable for failing to provide all students with a safe, caring, and discrimination free learning environment.

Implications for Alberta Teachers

In 1998, the Supreme Court of Canada read sexual orientation into the Alberta human rights statute. In 1999, the ATA amended the Code of Professional Conduct to include a student’s actual or perceived sexual orientation as a prohibited ground of discrimination. In 2003, gender identity was added to this list of protections.

All Alberta teachers have a positive responsibility to ensure that gay, lesbian, bisexual, and trans-identified (LGBT) students are protected from discrimination in their schools. In 2005, the ATA, in partnership with The Society for Safe and Caring Schools and Communities, instituted a “Safe Spaces” Initiative, which features a poster, brochure, and sticker that can be used to identify schools and classrooms as safe spaces for LGBT and allied students. The

brochure outlines proactive steps that a school can take to help create safe, caring, and inclusive schools for all students regardless of their perceived or actual sexual orientation or gender identity.

References

- Kempling v. The British Columbia College of Teachers (BCCT)*. 2004 BCSC 133. Retrieved April 7, 2005, from <http://www.courts.gov.bc.ca/Jdb-txt/SC/04/01/2004BCSC0133.htm>
- Ross v. New Brunswick School District No. 15*. 1996 1 S.C.R. 825. Retrieved April 7, 2005, from <http://www.lexum.umontreal.ca/csc-scc/en>
- School District No. 44 (North Vancouver) v. Jurban*. 2005 BCCA 201. Retrieved April 7, 2005, from <http://www.courts.gov.bc.ca/jdb-txt/ca/05/02/2005bccca0201.htm>