Case In Point

Are Decisions of Private Schools Subject to Judicial Review? Does it Matter?

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In the recent decision *Setia v. Appleby College*, a student at Appleby College, a private school in Oakville, was expelled "after he admitted to smoking marijuana in a friend's dormitory the night before the final day of his sixth and final year at Appleby College." The boy's mother attempted to contact the principal, but "was told he was too busy to meet with her." An application for judicial review was brought to a—not surprisingly—sympathetic Divisional Court.

However, before it could intervene in the case, the Court had first to satisfy itself whether the decision to expel the student was "an exercise of a statutory power that is subject to judicial review or [was] it an issue to be determined as a matter of private contract." It referred to two earlier decisions involving other private schools, *C.D. (Litigation Guardian of) v. Ridley College* and *W.W. v. Lakefield College School*. Ridley College was incorporated by a special Act of the Legislature under which the principal could "make regulations…for the discipline…of the pupils…and for the conduct and management of the College." Justice Quinn had concluded in *Ridley* that that language was sufficient to constitute a "statutory power of decision."

The Divisional Court followed this reasoning with respect to Appleby where a similar special statute referred to "conferring on its officers…such powers of administration and discipline as it may think necessary." In so doing, however, the Court did not refer to the Court of Appeal's judgment in *Paine v. University of Toronto* (1981) to the effect that "it is not enough that the impugned decision be made in the exercise of a power conferred by or under a statute; it must be made in the exercise of a "statutory power of decision"; and I think that must be a specific power or right to make the very decision in issue."

A different approach was taken by Justice Lauwers in the *Lakefield* case. In a similar "smoking marijuana" case, he emphasized that the "court should not strive to stretch administrative law principles beyond governmental action properly understood" and cited *Dunsmuir* in support of that argument in its dealing with the procedural fairness part of that case. Justice Lauwers distinguished *Ridley* on the basis that in *Lakefield* there was no comparable special statute.

Why does the distinction matter? It will matter as to the remedy available. If, as Justice Lauwers noted, the relationship between a private school and the parents and students is a matter of contract, it is not the job of the court to rewrite the contract: "it is not contrary to public policy, the public interest, illegal or unconscionable for parents to agree that certain automatic penalties will result from certain kinds of misconduct by their children." So the reasonableness analysis in *Dunsmuir* would not normally apply.

However if the issue is one of procedural fairness, the result may be the same. Justice E.M. Macdonald said in *Gianfrancesco*, quoting from an article by David Brown (as he was), "The Court in *Ridley* was right, but for the wrong reason. The rules of fairness should govern student disciplinary matters as a matter of the contract which exists between the school and the student's parents, not because private schools bear some quasi-public character." As Justice Lauwers said, "the rules of fairness that apply in administrative law contexts are ordinarily implied into the contract between the parents and the private school."

The distinction between administrative law and contract law will also be relevant in terms of how to attack the decision. If the allegation is one of a breach of fairness as a matter of contract—here an expulsion—then the remedy may be to seek an interlocutory injunction because to wait for a trial some years later to deal with an expulsion from school would be an empty remedy. Counsel for the parents in *Appleby* didn't have to worry about that because a majority of the Divisional Court quashed the decision to expel their son.