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Public Rights Trump Private Privilege

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Cases Considered:

J.O. v. Strathcona-Tweedsmuir School, 2010 ABQB 559

In December 2006 the Strathcona-Tweedsmuir School expelled J.O. based on allegations that she had been seen having sex with her boyfriend in the women's washroom at the Calgary Golf and Country Club. The allegations were "mistaken" (para. 41). J.O. was rather suffering the predictable consequences of teenage drinking and a long-car ride; she was drunk and sick, and her boyfriend was in the bathroom helping to clean her up.

The allegations were made against J.O. by Mrs. Lougheed, a "senior" member of the Club and the sister-in-law of former Alberta premier Peter Lougheed. She and her daughter and granddaughter had entered the washroom where J.O. was being helped by her boyfriend. The daughter and granddaughter testified at trial that they saw the young woman sitting in front of a young man wearing "formal attire". The young man appeared to be adjusting his clothing, and picked up something from the floor. They did not know what it was. Mrs. Lougheed, who did not testify at the trial, "must have assumed the worst". She went to get the Club manager, and told one of the school chaperones that a young couple in the washroom was "going at it" (para. 12). She later repeated these allegations to the school (para. 16).

On hearing the allegations, Strathcona-Tweedsmuir became concerned because the "school's reputation is on the line" (para. 19, quoting from notes from the school principal). The principal met briefly with J.O. and heard her denial that she and her boyfriend were having sex. The school took the position, however, that the information she gave confirmed "Mrs. Lougheed's story" (para. 20). They took no further investigative measures. Two students came forward and gave information to a guidance counsellor that J.O. was drunk and sick, and was not having sex. However, while that information was passed onto the principal, the students were not contacted.

The school met with J.O.'s parents, who brought a written explanation from J.O. as to what had happened that night. The meeting "did not go well". The decision had already been taken to expel J.O., and the information about the evidence of the other students, and J.O.'s written explanation of what happened, "made no difference" (para. 25).

Strathcona-Tweedsmuir had no written rules setting out a procedure for the expulsion of students.

J.O. and her parents sued Strathcona-Tweedsmuir for breach of contract and defamation. The action in breach of contract was successful, but the action in defamation was not. The action in defamation failed because the statements made by the school were made to the plaintiff J.O., and it was the plaintiff who published them. The action for breach of contract succeeded because in

this instance the contractual duties of Strathcona-Tweedsmuir incorporated a public law obligation of procedural fairness.

While Strathcona-Tweedsmuir is a "private" or "independent" school (which was a subject of debate in the trial), its existence and right to educate students, and to grant high school diplomas, flows from s. 28 of the *School Act*, R.S.A. 2000, c. S-3. It is obligated to comply with the *Private Schools Regulation*, Alta. Reg. 190/2000. Section 21 of the *Private Schools Regulation* requires that private schools "make rules for the discipline of students and for the suspension and expulsion of students that incorporate the principles of fundamental justice".

Strathcona-Tweedsmuir owed J.O. a duty of fairness. It owed the duty pursuant to the legislation, and the decision made by the school was both important to J.O. and one that she legitimately expected would be made fairly. Strathcona-Tweedsmuir had "considerable latitude" with respect to the process to be used; it needed only to "ensure that whatever procedure it chose was fair" (para. 33). In this case the process was not fair. The school had not complied with its obligation to have rules about the circumstances for expulsion. Further, "[n]o one at STS took the time to consider J.'s side of the story" (para. 34). J. was not given notice of the nature of the allegations made against her prior to her meeting with the school. She was not given any meaningful opportunity to respond to those allegations. The school rushed to judgment and was "unduly influenced by [Mrs. Lougheed's] standing at the Calgary Golf and Country Club" (para. 43). It was "motivated … to protect STS' reputation" (para. 45) and sacrificed fairness to J.O. in order to accomplish that goal.

Ultimately, given that J.O. had not done what she was accused of doing, and was not given procedural fairness, her "expulsion was a miscarriage of justice" (para. 45). Strathcona-Tweedsmuir was ordered to refund the tuition paid by J.O.'s parents, and to pay J.O. $40,000 for mental distress.

Comment

Justice A.D. Macleod's carefully reasoned judgment raises two points that are worth noting from a regulatory and administrative law perspective.

First, it emphasizes that public law duties arise whenever a body is fulfilling a public function, whether or not the body itself can be considered to be public or private. This point was made in the opposite sense by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, where the Court held that a public body exercising an essentially private function – contracting with employees – is not subject to public law procedural duties. The rights and obligations of the public body in that instance flow from the private law, not the public law.

Conversely, here, while Strathcona-Tweedsmuir is a fundamentally private body, its statutory rights and obligations make certain of its activities public in nature, and impose public law procedural duties upon it. Those duties end up – in this case – enshrined in contract, but they also exist apart from the contract. When it breached its duties of procedural fairness to J.O. Strathcona-Tweedsmuir opened itself up both to an action for breach of contract and to judicial review for its failure to fulfill its duties owed under public law.

Any entity that exists at the intersection of the private and the public must be cognizant of the point at which its duties shift from the purely private and contractual, to the public or quasi-public, and how that shift alters the obligations that it owes.

Second, in making the decision that it did, Strathcona-Tweedsmuir was expressly animated by its concern for the school's reputation and standing in the community. In making decisions for that purpose, the school was aligned with public regulatory bodies – such as the provincial law societies – that are expressly mandated to regulate to protect the reputation or "standing" of those whom they regulate (e.g., *Legal Profession Act*, R.S.A. 200, c. L-8, s. 49(1)(b)). The school's conduct in this case indicates, though, the real dangers of orientating decisions directly towards the accomplishment of that end.

It seems reasonable to assume that when a decision-maker appropriately sanctions those who have engaged in misconduct it will act to preserve its reputation. However, if it attempts to protect its reputation, and to sanction those who have injured its reputation, it may – as Strathcona-Tweedsmuir did – put undue weight on information provided by the privileged and powerful, and discount the rights and interests of those whom it is purporting to sanction.

To put it slightly differently, it may be empirically correct to observe – as the actors in the Strathcona-Tweedsmuir drama did – that the misplaced disapprobrium of the rich and powerful is more likely to injure your reputation than the justified approval of those without influence (in this case, for example, the other students, J.O. and her parents). However, the good reputation that regulators seek cannot be simply that, whether justly or unjustly, people think well of you. It has to be that you are thought well of because you *deserve* to be thought well of – that is, because you exercised your powers fairly, thoughtfully and appropriately, sanctioning only those who deserved sanction, and treating fairly anyone against whom you purport to exercise authority. The reputational concerns chased by Strathcona-Tweedsmuir were not the ones with which an administrative decision maker is justly concerned.