SUPREME COURT OF YUKON

Citation: *GX v Yukon (Government of)*, 2024 YKSC 13

Date: 20240327
S.C. No. 22-A0097
Registry: Whitehorse

BETWEEN:

GX, by their Guardian ad litem, YY and
TA by their Guardian ad litem BB in a representative capacity on behalf of all students and former students of Jack Hulland Elementary School who were subject to holds and restraints and/or who were locked in a room and/or placed in seclusion between January 1, 2002 and June 30, 2022

PLAINTIFFS

AND

Government of Yukon, Department of Education
Jack Hulland Elementary School Council of Attendance Area #22

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs	James R. Tucker, Luke Faught, Stephanie Dragoman, Joe Fiorante, David G.A. Jones and Naomi J. Kovak
Counsel for the Defendants, Government of Yukon, Department of Education	I.H. Fraser and Lesley Banton

REASONS FOR DECISION

Introduction

[1] This is an application for disclosure of information brought by the plaintiffs in the class action that was certified against the Department of Education, Government of Yukon, on behalf of students and former students of Jack Hulland Elementary School

("JHES") who were subject to holds and restraints and/or locked in a room and/or placed in seclusion between January 1, 2007 and June 30, 2022.

Issues

[2] The plaintiffs seek disclosure first, of the names and contact information of the students who attended JHES during the relevant time period and may be included in the class. Second, the plaintiffs seek disclosure of the full student records of all students who were subject to holds and restraints and/or locked in a room and/or placed in seclusion during the relevant time period.

Background

[3] There is no class action legislation in the Yukon. This action was commenced under the representative action Rule 5(11) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules*"). The *Rules* apply to the procedures to be followed in this application.

[4] Rule 25 requires each party to disclose all documents relating to any matter in issue in an action that are or have been in the possession, control or power of a party to the action, and to produce for inspection those documents not subject to a claim of privilege.

[5] The plaintiffs claim the Yukon government allowed the practices of holds and restraints, and of putting students in a locked room and/or in seclusion, to continue during the relevant period, contrary to the duty of care and applicable standard of care and to the fiduciary obligations owed to the students. The absence of Yukon government oversight of JHES practices, including JHES's failure to develop and/or ensure implementation of appropriate policies and procedures contributed to the

breaches. The common issues certified by this Court in *GX v Yukon (Government of)*, 2023 YKSC 51, dated September 6, 2023 included whether the defendant owed a duty of care and fiduciary obligations to the plaintiffs, whether the defendant breached those duties, and whether the defendant was vicariously liable for the conduct of the JHES staff. The allegations require at the common issues trial a consideration of whether the institutional policies, procedures and practices, or their absence, created a risk of harm or failed to prevent, reduce or control the risk of harm to the students.

[6] The class action was also certified against the JHES School Council of Attendance Area #22, for the purpose of settlement with the Council. The time period in that certification was slightly different: the starting date was January 1, 2002, not 2007.

[7] At the time of hearing of this application, documentary discovery was in progress. The Yukon government had not yet provided its list of documents but expected to do so within a week to 10 days of the hearing. The issues in this application arose from correspondence between counsel for the parties about the timing of documentary disclosure. In that context, the Yukon government advised that s. 20 of the *Education Act*, RSY 2002, c 61 (the "*Act*"), prevented it from producing student records in the absence of written consent from the student (if over age 16) or parent. Counsel for the Yukon government advised in his letter that the definition of student record is broad and "appear[s] to cover all documents recording any of the interactions between any student and any staff member."

[8] Student record is defined in the *Act* as:

> … a record of information in written or electronic form pertaining to a student but does not include a record prepared by a person if that person is the only person who will have access to that record.

[9] Section 20 of the *Act* states:

> 20 Student records
>
> (1) Every school administration shall establish and maintain a student record for each student enrolled in its school in accordance with the guidelines established by the Minister.
>
> (2) The parents of a student, a student who is 16 years of age or older, or both the parents and the student, may examine and copy the record of the student.
>
> (3) Subject to subsection (2), a student's record is privileged for the information and use of school and departmental officials as required for the improvement of instruction of the student and is not available to any other person without the written permission of the parent or, if the student is 16 years of age or older, the student.
>
> (4) Persons who contribute information to a student record are exempt from any liability with respect to the provision of that information if those persons, in providing the information, acted in good faith, acted within the scope of their duties and responsibilities, and did not act negligently.
>
> (5) If, on examining a student record, a person is of the opinion that the student record contains inaccurate or incomplete information, that person may request the school administration to rectify the record.
>
> (6) Any dispute arising under subsection (5) may be referred to the superintendent or director who shall review the request and provide direction to the school administration.
>
> (7) Any dispute that is not resolved in accordance with subsection (6) may be appealed within 14 days of the direction of the superintendent or director to the Education Appeal Tribunal.
>
> (8) Any person who discloses information from a student record in contravention of subsection (3) is guilty of an offence and liable to a fine of not more than $200.

[10] Thus the *Act* creates a statutory prohibition and privilege over student records, limiting their disclosure to anyone without written permission of the parent or student (if

over 16 years of age) except for the information and use of school and departmental officials as required **for the improvement of instruction of the student.** The prohibition and privilege exist for the benefit of the student and their parents, and access by the school and departmental officials is limited temporally and functionally. For example, the officials have no access to the record of a student who is no longer in the Yukon school system, because they are no longer involved in the instruction of the student.

[11] Each incident of holds, restraints, locking students in a room or putting them in seclusion was to have been documented in a form called a Workplace Risk Assessment ("WRA") or a Non-Violent Crisis Intervention ("NVCI") report.

Position of the Parties

[12] The Yukon government stated it was important to separate the consideration of the plaintiffs' two requests. Although the names and contact information of the students and former students are part of the student records and are technically subject to s. 20, the Yukon government allowed for the possibility that if a contact list external to the records were found, it could be disclosed. At the time of hearing, no such list could be found but a thorough search had not yet been completed and attempts were continuing.

[13] The Yukon government noted the statutory regime applicable to student records contains a prohibition and a privilege. Access to the student record may only occur by school and departmental officials for their information and use as required for the improvement of instruction of the student (the privilege), or by the student if over 16 years of age, their parents, or an investigator authorized under s. 199 of the *Act*.

[14] In interpreting the definition of student records, the Yukon government noted that their functionality should be a guide. Information in the records could be gathered for a variety of purposes. Student records can exist as originals in physical files, as copies in other files, or in files that are not labelled or considered student records, or electronically. Under the statutory definition, Yukon government said all of these would be considered a student record. Just because a document is not in a physical file marked student record, does not mean it is not part of a student record.

[15] Yukon government argued the plaintiffs' request for disclosure of student records for all potential class members was premature: at the time of hearing, the opt-out date for potential class members to participate in the class action had not yet passed and as a result the class membership was uncertain, and class counsel could not be representing people for the purpose of documentary disclosure who had not yet confirmed their participation in the action; there was no need for individual student records for the common issues trial; and renewing the plaintiffs' request at oral discovery was preferable because the precise information being sought and reasons why would be clear. Even after the opt-out period has expired, written consents were required from each individual student or their parent, because of the prohibition in s. 20.

[16] The Yukon government argued further that class counsel could request the information from the RCMP, who obtained a production order for the student records pursuant to s. 487.014 of the *Criminal Code*, RSC, 1985, c C-46, (the "*Criminal Code*"), for the purpose of investigating criminal offences. The plaintiffs' failure to exhaust alternative ways of obtaining the information made their application premature.

[17] The plaintiffs advised the Court that their class representatives had provided written consent to obtain student records on behalf of the class members. Once notice of the class action has been provided and the opt-out date has passed (which is the case at the time of writing), counsels' representation of the class will be confirmed. The plaintiffs argued that the solicitor-client relationship existing between class counsel and class members provides class counsel with implicit authorization to obtain the student records despite the fact they are subject to a statutory privilege. Further protections of privacy and confidentiality exist in the form of an undertaking by class counsel not to disclose a student's record to any student or class member other than the student to whom they belong, and through the implied undertaking rule applicable in all litigation matters.

[18] The plaintiffs argued that the Yukon government's interpretation of the definition of student record is too broad. Student names and contact information exist outside the student records and are not subject to the s. 20 privilege, following the analysis in *Robinson v Northmount School for Boys*, 2014 ONSC 2603 ("*Robinson"*). The WRA and NVCI reports should not be included in the student record as it is defined in the statute, according to the plaintiffs. The plaintiffs argued that to prevent the plaintiffs from accessing the student records is to defeat the purposes of the *Act* of protecting students and their interests (see ss. 2(1), 4, 10, 11 and 34 of the *Act*).

[19] The plaintiffs further objected to the suggestions that the request for student records was premature or inapplicable: the records may assist with settlement discussions and are relevant for the systemic negligence allegations, not only the individual issues trials.

[20] Finally, class counsel said they should not be required to access documents currently or previously in the possession, control or power of the Yukon government through the RCMP or an outside investigator, given the obligations under the *Rules*.

Analysis

i) Names and contact information of students

[21] The names and contact information of the students and former students of JHES during the relevant time period should be disclosed now for the following reasons.

[22] It is not seriously in dispute that while the names and contact information of the students are included in the student records, as set out in the undated *Information Management Guideline – Managing Student Records*, they also exist outside of the physical or electronic student record. The question is whether the fact that this information is in the student record makes it prohibited or privileged because of s. 20. The decision of the Ontario Superior Court of Justice in *Robinson* provides some help in this analysis.

[23] In *Robinson*, the plaintiff teacher at a private elementary boys' school, was alleged to have assaulted and bullied one student and bullied other students. The plaintiff alleges she was openly identified and defamed in her absence at a meeting of parents and others at the school. When her employment at the school was terminated for breach of confidentiality, she started an action against the school for breach of employment contract, and an action against the parents of the student who alleged she assaulted him, in libel and inducing breach of contract.

[24] Certain questions asked on discovery by the plaintiff in *Robinson* were objected to by the school's representative on the grounds that the answers would breach the privilege attaching to student records. Record was not defined specifically in the Ontario

Education Act, RSO 1990, c E.2. In s. 265(1)(d) it was described as the duty of the principal to "collect information for inclusion in a record in respect of each pupil enrolled in the school in the school and to establish, maintain, retain, transfer and dispose of the record."

[25] The privilege over records was described in the Ontario *Education Act* as:

> 266(2)…privileged for the information and use of supervisory officers and the principal, teachers and designated early childhood educators of the school **for the improvement of instruction and other education of the pupil,** and …
>
> (a) … is not available to any other person; and
>
> (b) … is not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding, except to prove the establishment, maintenance, retention or transfer of the record,
>
> without the written permission of the parent or guardian of the pupil, or where the pupil is an adult, the written permission of the pupil… [emphasis added].

[26] The Court in *Robinson* referenced Perell, Morden, *The Law of Civil Procedure in Ontario*, First Edition, Lexis Nexis Canada Inc. 2010 at 525-526, for its approach to the interpretation of privilege in the context of the Rules of Civil Procedure:

> 13. …
>
> A privilege is a special right, advantage, exemption, immunity, or indulgence granted by the law, and in the context of documentary discovery and of oral examinations is the right to not have disclosed to one's opponent and the adjudicator communications that are relevant to the proof or disproof of a disputed fact. The person with the privilege is relieved or excused from the obligation to disclose the document or communication protected by the privilege …
>
> Because of their interference with the discovery of the truth, the operation of the various privileges is

> carefully scrutinized to ensure that the privilege is not available unless the constituent elements of the particular privilege are satisfied.

[27] Under this interpretation, privilege is to be construed narrowly in the context of a civil action to the extent that it can only operate if all the component parts that make up the privilege are present.

[28] The court in *Robinson* noted the reason for including the name of a student in a student record was to ensure anyone reading the record would know to whom the record referred. Otherwise, its purpose of improving the instruction and education of the student could not be fulfilled. In *Robinson,* a handbook containing the names and addresses of the students at the school was distributed to all students and their families. There was no inherent confidentiality in the names and addresses. The court held that the names of the students, although contained in the student record out of necessity to allow its purpose to be fulfilled, were not privileged when they originate in other documents and are used for other purposes.

[29] Here, although counsel for the Yukon government said at the hearing they had not yet located lists of student names and addresses outside of the student records, they acknowledged they had not completed their search and did not suggest that such lists did not exist.

[30] The plaintiffs attached as exhibits to an affidavit class lists containing student names that were publicly posted at JHES, the JHES Facebook page containing names and photos of student award winners, student photos and names from many other school websites, and student names and photos in school newsletters and year books. These lists and photos were not created for the purposes of improving the instruction of

the students. Their publication and distribution were not confidential. Although these were names and photos without contact information, it is not disputed by the Yukon government that contact information of students and their parents is used by schools for administrative or other reasons not directly connected to improving the instruction of the student.

[31] This supports the conclusion that names and contact information for students are not confidential, and that they are maintained and used for purposes other than what is covered by s. 20. The privilege does not apply.

[32] I disagree with the Yukon government's position that the plaintiffs need to exhaust other avenues before seeking disclosure from the defendant. The requirement of the *Rules* is clear – relevant documents in the current or previous possession, power or control of the defendant must be disclosed subject to privilege. Here, I have found this information is not privileged. The obligation is on the Yukon government to disclose it. Further, the information was disclosed to the RCMP pursuant to a process set out in the *Criminal Code*, by court order, to a specified police officer, for the purpose of investigating criminal offences. The information was disclosed to the investigator from Mitha Law Group pursuant to s. 199 of the *Act*, for the purpose of preparing a report for the Yukon government. For either the RCMP or the investigator to provide this information to the plaintiffs' counsel for use in the civil action would be outside of the limited and specified purpose for which they received it.

[33] For these reasons, I will order the Yukon government to disclose and produce to counsel for the plaintiffs a list of names, last known addresses, last known email addresses, and last known telephone numbers of all students of JHES between

January 1, 2002 and June 30, 2022, and of their parents. This initial date will include the date of the certification of the action against the JHES School Council for settlement purposes.

ii) Disclosure of student records of all students and former students subject to holds, restraints or who were locked in a room or placed in seclusion between January 1, 2002 and June 30, 2022

[34] The plaintiffs' request for an order to produce the student records is premature. Several issues require clarification before any order related to the student records' disclosure can be made.

[35] The disclosure of the student names and contact information will facilitate the plaintiffs' ability to obtain information about the class members. The plaintiffs' class counsel conceded that once they have located class members, obtaining written permission for disclosure of the student records should be straightforward. If this is successful, there will be no need for an order to produce the student records.

[36] In the event that written permission is required to be provided, I agree with the Yukon government that there is no implied authority on class counsel through the consent provided by class representatives for disclosure of all student records of all class members. Even after the opt-out period has expired and with the added protection of privacy and confidentiality through the notice to class members that the student records belonging to them would be kept confidential, disclosure to counsel and no one else does not over-ride the prohibition in s. 20, assuming the information sought to be disclosed is subject to the prohibition. A solicitor-client privileged relationship does not automatically entitle the solicitor to all personal information of the client without

permission. The context and applicable statutory regime must be examined in each case.

[37] If written permission from the students, former students or parents is not obtained, further inquiries may be necessary. The plaintiffs' focus in the litigation appears to be on the WRAs and the NVCIs. The affidavit of David Downing, policy analyst with the Department of Education, Government of Yukon, states that the WRAs and NVCIs are to be placed in the student yellow file, part of the student record. There is affidavit evidence filed in this application that some WRAs and NCVIs were found in a filing cabinet in the JHES principal's office, some in a filing cabinet in a vacant office at JHES, and more still in a storage room at JHES.

[38] The Yukon government argued regardless of their location, they are student records because they record an interaction between the student and the school. While the broad definition of student record as a "record of information in written or electronic form pertaining to a student" may be sufficient to encompass these forms, further consideration of this point may be necessary. For example, if the requested WRAs or NCVIs are in a file that contains information that is clearly not part of a student record, does this mean that the WRAs and NCVIs are student records? If the information sought is determined not to be a student record, then does the prohibition in s. 20 apply and is there a need for an order for disclosure? The answer to these questions will be deferred until necessary.

[39] Plaintiffs' class counsel argued even if the WRAs and NVCIs are part of the student records, the privilege in s. 20(3) is inapplicable because they are not for the information and use of school officials as required for the improvement of instruction of

the student. This argument on the issue of whether the general prohibition in s. 20 is sufficient to prevent disclosure in the absence of written permission (*Richard v HMTQ*, 2008 BCSC 1275; *Warning (Litigation Guardian of) v Toronto District School Board*, 2018 ONSC 253) or whether the privilege modifies the general prohibition will be deferred to a time when it may be necessary to consider.

Conclusion

[40] This case is at an early stage of the discovery process. The disclosure of the names and contact information of students and former students during the relevant period will be useful at this stage of the proceeding in order to help with the class membership as well as to obtain consent for further disclosure where necessary.

[41] The request for disclosure of student records is premature at this time for the reasons explained. The interpretation of s. 20, its interaction with the *Rules* and general principles of disclosure and privilege and prohibitory statutory language may need to be considered further at a later date, if written permission from class members is unable to be obtained.

[42] Costs in the cause.

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DUNCAN C.J.