



Education Law eBulletin

A newsletter for educators.

November 2002

current issues

Special Education - *Auton*

thank you! The positive responses and feedback respecting our inaugural issue of the Shibley Righton LLP Education Law eBulletin indicate that it has been well-received. We welcome your comments and suggestions. If you find this eBulletin useful, please forward it to your colleagues.

In the case *Auton v. British Columbia*

(*Attorney General*), the parents of four autistic children sought funding from the government for an early intensive behavioural intervention (EIBI) treatment for their children. The Crown appealed from an earlier decision which had directed it to fund EIBI for children with autism or autism spectrum disorder (ASD), and to pay the parents of the four children \$20,000 each in damages; the four children and their parents cross-appealed arguing that the remedies granted were inadequate.

The treatment in question required a substantial number of hours per week in one-on-one behavioural therapy, and cost between \$45,000 and \$60,000 per year per child. The Ministry of Health did not provide any treatment for autism; the Ministry of Children and Families offered programs and services such as respite and home-care and parental counselling generally, with the exception of one program which "attempted to treat the condition of autism" but could not be described as approaching intensive applied behavioural analysis (ABA).

The Court of Appeal noted that autistic children "are not eligible for educational services provided under the *School Act* until they are of school age, reached long after the onset of autism or ASD".

In respect of whether or not the failure to fund EIBI violated the s. 15(1) Charter rights (providing for equality before and under the law) of the four children at issue, the Court held that the denial of therapy for autism directly differentiated between the four children at issue and those in comparator groups - other children and adults with a mental disability. And that the differential treatment was on the enumerated grounds of age and mental disability. The Court concluded that the violations were not reasonable and demonstrably justified under s. 1 of the Charter. In discussing the overall objectives of health care, the Court stated: "... accepting that the legislative scheme does not prohibit such treatment but rather establishes an administrative framework which did not provide for the treatment, the impugned measure of denying funding or effective treatment for autism or ASD is not a government objective. Rather it is a manifestation of the administration of the current scheme and the ranking in priority given to treatment for these autistic children or, perhaps, the overlooking of their dominant health care need entirely."

The majority of the Court of Appeal held that since the failure to fund EIBI did not deny life, liberty or security of the person, a violation of s. 7 of the Charter was not established.

While the parents sought an order that the treatment for their children not be discontinued at age 6, the Court of Appeal majority refused to make such an order. It also refrained from commenting on appropriate programming once the children reached school age, stating: "While I accept that the efficacy of treatment is unlikely to end at the crisp attainment of school age, issues of funding programs for children of school age may involve additional considerations not before the Court, either in evidence or submissions. As the duration of treatment is not amenable, in my view, to a broad direction applicable to all autistic children, I would direct that disputes concerning the duration of treatment should be decided through an appropriate dispute resolution process, or in the absence of such a process, in proceedings before the Supreme Court of British Columbia."

The Court of Appeal ordered that the four children at issue were each entitled to government funded treatment in the nature of that which they had been receiving, if such treatment would still be of use to them; and that the funding should continue until the medical view is that no further significant benefit in alleviating the autistic condition can reasonably be expected from a continuation of the treatment. As well, the Court of Appeal upheld the award to each of the parents of the four children of the "symbolic" sum of \$20,000 for monetary damages.

In light of the publicity surrounding the *Auton* decision, it is possible that school boards will be approached by parents requesting the provision of EIBI treatment to their children based on the Court of Appeal's ruling. However, in our view, the decision, set in the medical context and dealing with the funding of treatment for a complex neurological condition, can be distinguished from the education context. Notably, the Court of Appeal declined to address the issue of funding of EIBI treatment to children of school age, recognizing that this may involve considerations not addressed before the court. Further, the evidence in *Auton* indicated that the window of opportunity for treatment of autistic children was primarily before the age of six in any event, which would mean that the demand for this treatment would be prevalent in the pre-kindergarten years, but less substantial after this time.

It is not yet known whether the Crown will appeal the decision of the Court of Appeal.

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on the labour front

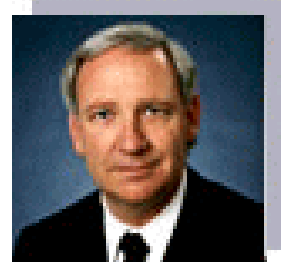
School Boards as Non-Construction Employers

Shibley Righton LLP's Brian P. Nolan successfully represented the Windsor-Essex Catholic District School Board in its application before the Ontario Labour Relations Board to be declared a non-construction employer pursuant to recent amendments to the *Labour Relations Act*.

The Labour Board released its decision on October 17, 2002. It is the first decision involving a school board or public sector institution. It means that the school board is no longer certified as an employer in the construction industry, no longer bound by the provincial trade agreements and free to contract and sub-contract construction work to non-union bidders. The decision is relevant to all school boards, hospitals and other institutions.

In February, 2001, the Windsor-Essex Catholic District School Board brought an application for a declaration that it was a non-construction employer pursuant to s. 126 of the Ontario Labour Relations Act, which reads as follows: "non-construction employer" means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person. The Board had been certified as an employer in the construction industry in September 2000, prior to the amendment to the Act. The Board sought a declaration under s. 127(2) of the Act that the trade union no longer represented its employees in the construction industry.

The union took the position that the school board did do work in the construction industry, that it did so in the expectation of receiving grants (New Pupil Place Grants, school renewal grants, etc.) and Education Development Charge monies, which it submitted was compensation, to carry out capital construction, and it received those monies from an "unrelated person", namely the Ministry of Education. Surprisingly, when called to give evidence, the Ministry spokesperson testified that the Ministry was an unrelated person vis-a-vis school boards, notwithstanding the current funding and governance regime.



Counsel for the school board was successful in arguing that, on the evidence, the Windsor-Essex Catholic District School Board was only undertaking construction activity for itself and its own benefit, and that NPP Grants and similar revenues are not compensation, and therefore the school board was a non-construction employer under the definition. The OLRB accepted the argument on behalf of the school board on these two points and therefore did not have to decide whether the Ministry was a related person under the Act. What is significant for school boards is the clarity with which the Vice-Chair wrote on the central issue: "It is my view that, when read as a whole, the language of the definition of non-construction employer does not exclude employers who undertake construction activity for their own benefit using funds that they may not have generated themselves in circumstances where the giver of the funds does not benefit from the construction work. In such instances, the employers do work in the construction industry and expect funding but the funding they receive is not payment for having performed the work and is thus not compensation."

The decision does leave open questions where, on the facts, school boards do construction as joint venturers with community agencies which contribute to the construction costs, or build daycare facilities for daycare providers and receive compensation for doing so, or provide the repair work on such facilities and bill the outside agency the cost of such repair (construction work as defined in the Act and Labour Board jurisprudence).

These issues and the "non-related" person issue, may be addressed in a pending decision in a companion action involving another school board. In any event, it is clear that school boards should be careful to consider the labour relations implications when they enter into arrangements with municipalities, agencies, daycare providers or other third parties that involve construction, maintenance and repair. This is especially important given that school boards, when entering into construction arrangements, may make themselves vulnerable to being classified as a "construction employer". Consequently, appropriate legal advice should be sought when making such arrangements.

As a result of the WECDSB decision, the International Union of Carpenters and Joiners has indicated it will challenge the constitutionality of the definition of "non-construction employer" in the *Education Act*. We do not expect such a challenge, if it proceeds, to be successful.

case law

Fogal v. Regina School Division No. 4 *Saskatchewan Court of Queen's Bench*

The Court upheld a decision of the Information and Privacy Commissioner which denied a teacher access to school board records containing views or opinions about the teacher upon which the board relied in support of placing the teacher on an extensive performance evaluation process, based on an exception to the applicable privacy legislation.

Olar v. Laurentian University *Ontario Court of Appeal*

The Court overturned the dismissal of an action of a former student of the University who alleged misrepresentation in respect of his ability to complete his degree after transferring out of the University's engineering program, and remitted the plaintiff's motion for an order certifying the action as a class proceeding.

Cox (Litigation guardian of) v. Marchen *Ontario Superior Court of Justice*

The Court ordered almost \$53,000 in damages against a school board after a student nearly severed her Achilles' tendon when exiting through a door to leave school premises.

R. v. Shearing *Supreme Court of Canada*

The Court dismissed the appeal of six convictions of sexual assault of a cult leader, but remitted one matter back for a re-trial on the basis that the defence should have been permitted to cross-examine the complainant in respect of a journal she possessed at the relevant time period which made no reference to the alleged sexual abuse. The Supreme Court also found that it was appropriate to admit similar fact evidence demonstrating the accused's propensity to groom adolescent girls for sexual gratification by exploiting pseudo-religious elements of his cult.

Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit www.quicklaw.com.

safe schools - lessons learned

Ⓜ In the current safe schools climate, with its emphasis on suspensions and expulsions, schools may be overlooking an alternative vehicle for ensuring the safety of their students and staff - the denial of access provisions found in s. 305 of the *Education Act* (a provision created by the *Safe Schools Act*). By this section and its governing regulation, a principal (or vice-principal or other authorized person) has the power to deny access to persons from school premises where, in the judgment of the principal, the person's "presence is detrimental to the safety or well-being of a person on the premises". The legislation provides that students are persons who can be denied access to the school. Where a person who has been denied access refuses to comply with the decision, he or she is liable to prosecution under the *Provincial Offences Act*. The test for denial of access under s. 305 is similar to that under s. 265(1)(m) of the *Education Act* which also authorizes a principal to refuse access to a person. What is significant, however, is that s. 265(1)(m) provides for a right of appeal to the board in respect of the denial decision while s. 305 does not. As a result, of the two provisions, s. 305 should be considered the preferred avenue for denying access.

Ⓜ A principal is empowered by Regulation 298 to assign duties to his or her vice-principal. As a result, a vice-principal can be delegated the principal's authority to enforce the provisions of the *Safe Schools Act*, including making decisions respecting suspensions, expulsions, and board referrals for expulsion hearings. The principal is strongly advised, however, to record the delegation of authority in writing and in advance, making it clear that the principal's authority is expressly delegated to a specific vice-principal for a specific purpose. In a situation where a decision has been made by a vice-principal without a written delegation in hand, the principal should immediately record the delegation in writing as of the date the vice-principal's decision was made in order to confirm expressly the delegation of authority existing impliedly. It is of course noted that a delegation to a vice-principal of the principal's safe schools powers should be done only in exceptional circumstances where the principal is either unavailable or unable to deal with the matter at hand.

professional regulation

Ontario College of Teachers' Advisory respecting Sexual Abuse and Sexual Misconduct

On September 27, 2002, the Ontario College of Teachers approved a Professional Advisory entitled "Professional Misconduct Related to Sexual Abuse and Sexual Misconduct" which is intended to help teachers identify "the legal, ethical and professional parameters that govern their behaviour and to prevent sexual abuse of students and sexual misconduct". The Advisory sets out legislation governing sexual misconduct, and provides examples of conduct which may be considered by the College to be professional misconduct. The Advisory stems from Justice Robins's Report of 2000 regarding sexual misconduct and the passing of Bill 101, the *Student Protection Act, 2002*.

announcements

Our firm's new website is now up and running! We can be found at www.shibleyrighton.com.

legislation

Ontarians With Disabilities Act, 2001

Effective September 2002, the *Ontarians With Disabilities Act, 2001* (ODA) requires school boards to prepare an annual "Accessibility Plan" to address the removal of "barriers" to persons with disabilities in the

school board's by-laws, policies, programs, practices and services. A barrier is defined as "anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice."

An "Accessibility Plan" involves school boards taking steps to identify, remove and prevent barriers, and reporting on these steps and on the steps the board intends to take in this regard in the upcoming year. The board must take measures to ensure that it assesses proposals for by-laws, policies, programs, practices and services to determine their impact on accessibility for persons with disabilities, and report on these measures. The board must also specify which of the above the Board will be reviewing in the upcoming year to identify barriers.

School boards must consult with disabled individuals when preparing an Accessibility Plan and the plan must be made available to the public. A school board which fails to either prepare a plan or make it public may be liable to a fine of up to \$50,000.00.

Notably, the ODA does not require the immediate removal of all barriers. It appears that in the case of barriers requiring substantial cost for removal, it is contemplated that plans will be incorporated over a period of time.

See the following resources provided by the Ministry of Citizenship to assist in the preparation of an Accessibility Plan:

- Links to Disability Organization Websites:
(<http://www.disabilityweblinks.ca/pls/dwl/dl.home>)
- "A Guide to Annual Accessibility Planning under the Ontarians with Disabilities Act, 2001"
(<http://www.gov.on.ca/citizenship/accessibility/english/accessibilityplanning.pdf>)
- "How To Guide to Establishing A Municipal Accessibility Advisory Committee (AAC)"
(<http://www.gov.on.ca/citizenship/accessibility/english/municipalities.htm>)
(NOTE: Although the latter was specifically created for municipalities, it may be of assistance to school boards.)

freedom of information

What is it?

The "Freedom of Information Act" or "FOI" - what is it all about? First, it's a particular law or, to be more exact, two laws, officially titled the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. Both are provincial laws.

You may also have heard of a proposed provincial law, *The Privacy of Personal Information Act*, and a recent federal law, the *Personal Information Protection and Electronic Documents Act*. However, the key law for school boards is the municipal Act, or "MFIPPA" as it is sometimes called.

Most people are familiar with FOI in the context of requests for access to documents, or "records". Access requests to school boards can either come from individuals for documents related to themselves - their own "personal information" - or from individuals seeking other documents kept by the school board. For example, a requester might ask for his or her own school records; on the other hand, an individual with a particular interest may request documents related to that interest. It is important to keep in mind that **a request for certain documents does not necessarily mean that the documents must be or will be released by the school board**. Whether or not the documents will be released depends upon a variety of factors as contained within the legislation.

In addition to access requests, MFIPPA also imposes certain obligations on school boards to protect the privacy of individuals. For example, some forms must have a notice indicating that the information requested is collected for a particular purpose and pursuant to MFIPPA. The provincial office which monitors FOI and privacy issues, the office of the Freedom of Information and Privacy Commissioner, has a process by which individuals can make "privacy complaints" if they feel their privacy has been infringed.

Next time: MFIPPA and "Personal Information" - Not What You Expect

school councils

Liability Concerns

School councils (and parent groups) should be aware that even though insurance coverage maintained by their school boards may cover them as an insured generally under the parameters of the policy, such coverage only applies to Board-approved activities and not to activities undertaken independent of or adverse to the Board. Accordingly, school councils are well-advised to obtain additional independent liability insurance to protect themselves. The Ontario Public School Boards' Association offers a package providing coverage up to \$2 million for third party liability and \$1 million for directors and officers liability for an annual premium of \$100.00 for the 2002/2003 school year.

developments in the lawyer-client relationship

In recent years, preventive law has become a burgeoning area of law. Simply put, preventive law involves the conduct of one's affairs in a legally aware manner so as to anticipate and reduce or avoid legal problems and liability. To that end, the lawyer works in a collaborative manner with his or her client in order to identify, prioritize and address potential liabilities. This endeavour is most successful when the lawyer is involved up-front by the client, before potential problems become real problems.

The participation of legal counsel in a client's preventive law efforts is wide-ranging but frequently will involve rendering legal opinions, giving input into the drafting of policy and procedure, reviewing agreements and contracts before execution, and performing "risk audits"; it will also involve continuing education endeavours for client personnel in respect of duties and liabilities.

Preventive law can prove a powerful tool in assisting school boards in their operations. In seeking legal advice, however, school boards are advised to retain a lawyer who is well-versed in education law since seemingly simple decisions can raise liability issues that may go unrecognized by a non-education law lawyer. For example, cutting lunchroom supervision raises labour as well as *loco parentis* issues; in addition to satisfying legislative requirements, school closings raise duties of procedural fairness; and the creation of school bus routes and drop-off/pick-up sites raises safety and liability concerns that need to be addressed.

We welcome your comments and questions. Send them, and any updated contact information, to byrdena.macneil@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

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