



Education Law eBulletin

A newsletter for educators.

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trespass to property



Happy Spring!

All school boards must deal, at one time or another, with an unhappy parent or a person who is less than cordial with school authorities and staff. In extreme cases, school boards may be required to take action to keep that person off school property. As property owners, school boards have all the rights thereof in respect of school sites, including the right to exclude any person from school board property under the *Trespass to Property Act*. There are no grounds required to issue a trespass notice against a person under the Act. Additionally, there is no route of appeal by which a person who has been barred from property may contest a trespass notice. This lack of appeal right was recently the subject of litigation in Windsor.

A notice of application was served upon the Greater Essex County District School Board calling into question the validity of a trespass notice it issued in August of 2002. An application is a summary proceeding in court based on written affidavit evidence and no oral testimony. Applications are primarily used to resolve issues with uncontested facts quickly, with minimal cost. At court, the school board argued that the matter was improperly brought as an application. The judge agreed with the school board and adjourned the application as not being properly before the court. The applicant was given the opportunity to amend the application or, without prejudice, proceed by way of a proper statement of claim. To date, no further proceeding has been brought against the school board.

School administrators should ensure that any measure to exclude a person from school board property is warranted in the circumstances and well documented. This is especially true if the person being prohibited from entry is a parent or employee who would otherwise have a lawful purpose to be on school board property.

In this matter, the Greater Essex County District School Board was represented by Bryce Chandler, a lawyer with Shibley Righton LLP.

in the courts

Vicarious liability

The issue of vicarious liability of employers for the conduct of their employees has increasingly been before the Courts in recent years. Two new decisions consider vicarious liability specifically in relation to school boards.

In the first case, *Doe v. Avalon*, emanating from the Newfoundland Trial Level Court, a plaintiff-student sought damages for sexual misconduct by a teacher. The parties submitted an agreed statement of facts, and asked the Court only to consider the issue of liability, leaving damages to be determined privately. The judge found the school board liable for the teacher's actions because the misconduct occurred in the context of teaching duties, when the student believed himself to be under the control of the teacher. This is the first Canadian decision finding a school board vicariously liable for teacher misconduct (and may yet be appealed to the Newfoundland Court of Appeal). While the threat of future findings against school boards is very real, the narrow fact situation of this case may be distinguishable thereby enabling other school boards to avoid similar decisions.

The second case is a decision from the Supreme Court of Canada, *S.G.H. v. Gorsline*, released in January 2005. In this case, the plaintiff sought damages against a school board alleged to be vicariously liable for the historic sexual abuse of a student. The Supreme Court dismissed an application for leave to appeal an Alberta Court of Appeal decision which upheld the trial level finding that the school board was not liable for out-of-classroom activity over which it had no control. A particularly important finding of the trial judge was that the school board should not be scrutinized according to today's standards for its conduct or reaction twenty years ago. In dismissing the leave to appeal application, the Supreme Court indicated that the Court of Appeal decision did not raise issues warranting further judicial review. This is significant to boards facing lawsuits for historic sexual abuse as awareness of the issue and appropriate policies to protect students have advanced considerably.

private schools

On April 18, 2005, Shibley Righton LLP is presenting a half-day, multi-disciplinary seminar for elementary and secondary private school administrators entitled "Private Schools and the Practical Management of Legal Issues" in Toronto. Topics will include: student suspensions and expulsions, reporting obligations, internal investigations, privacy requirements, working with your board of directors, school polices, and the duty of care. For more information, please contact Educational Seminar Services at (519) 664-3211 or visit www.edseminars.com.

administrative tribunals



Dealing with *Charter* arguments before administrative tribunals

In the fall of 2003, the Supreme Court of Canada released two companion decisions in cases where one of the parties had argued a *Charter* violation before an administrative tribunal: *Nova Scotia (Workers' Compensation Board) v. Martin* and *Paul v. British Columbia (Forest Appeals Commission)*. The question that eventually wound its way to the Supreme Court in each case was who should be deciding on issues respecting constitutional rights: administrative tribunals or the Courts.

The *Charter* protects all people in Canada from a wide range of rights violations and allows each of us to claim rights violations. But to whom do we make those claims? Historically, the Courts have dealt with most *Charter* rights issues. As our society becomes more accustomed to the *Charter*, that situation is changing.

The *Martin* decision effectively relocates *Charter* arguments to the local decision-making level by mandating accessibility in rights adjudication. After *Martin*, it is now possible that *Charter* arguments will be made before all sorts of administrative tribunals, including school boards reviewing student disciplinary decisions, labour arbitration and review boards, tribunals on special education matters, human rights commissions, and innumerable other decision-makers. School administrators may find themselves hearing complicated rights arguments at the initial stages of a dispute. Trustees reviewing an expulsion or suspension decision may be faced with deciding if a principal's actions, authorized by statute, violated the *Charter* rights of a student. Many educators and administrators will find themselves wading into the murky waters of constitutional rights debates without any prior training or expertise.

There are some limits to the effect of tribunal decisions when determining *Charter* issues, however. A decision on a *Charter* right violation made by one panel of a tribunal is not binding, even on other panels of the same tribunal. Further, all such decisions can be appealed to the Courts. Finally, an administrative tribunal does not have the power to declare legislation inoperative.

The responsibility of administrative tribunals to hear and decide *Charter* issues will require rights claimants and decision-makers alike to anticipate constitutional rights arguments, prepare responses, and conduct an analysis of the rights violation and appropriate remedy. Unfortunately, not every claimant or decision-maker will necessarily be equipped with the requisite experience or expertise to satisfactorily undertake such an exercise. Consequently, despite the laudable goal of accessibility, administrative tribunals may appear even more complex and inaccessible to parents, students and educators.

upcoming conference

Insight Information is presenting a conference entitled "Equity, Diversity and Inclusiveness in Education - Building Opportunities for All Children to Succeed" on May 25-26, 2005 at the Courtyard By Marriott in downtown Toronto. This research-based conference programme is designed to provide insights into the latest approaches being developed for improving inclusive education practices for a wide range of diversity factors and outcome goals including academic performance, school learning environment, character development, teacher training and community integration. Insight has assembled a faculty of leading education administrators, researchers, policy-makers and other professionals, including our own J. Paul R. Howard and Sheila MacKinnon, who are tackling these challenges at multiple levels. Speakers will share their expertise and insights on subjects that include:

- Approaches for identifying and addressing special needs
- Strategies for achieving academic and social objectives
- Role of community leaders in advancing inclusive education goals
- Reconciling safety and human rights issues
- The human rights framework – implications for diversity objectives
- Differentiated instruction and standardized assessment
- Diversity factors and instructional design
- Teacher in-service education and differentiation
- Data and information collection for diversity and equity objectives

For further information about the conference, please review Insight's brochure accompanying this eBulletin issue. Insight Information can be contacted at privacy@insightinfo.com or by telephone at 1-866-456-2020 ext.173. When registering mention Shibley Righton LLP, Paul Howard or Sheila MacKinnon and receive 10% off the registration fee.

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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