SHIBLEY RIGHTON LLP
Barristers and Solicitors

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Safe Schools Settlement with Ministry of Education

In what is being touted by the Ontario Human Rights Commission as a “landmark settlement” between the Commission and the Ministry of Education, the Ministry has agreed to amend the Safe Schools provisions of the *Education Act* to promote compliance with the Ontario *Human Rights Code*.

The settlement arose out of a Commission-initiated complaint under the *Code* that was filed against the Ministry in July 2005, alleging that the application of the Safe Schools legislation and policies were having a discriminatory impact on racialized students and students with disabilities

As a result of the settlement, the Ministry has agreed to initiate or continue developing measures that will promote compliance with the *Human Rights Code*. Specifically, under the minutes of settlement, the Ministry has agreed to:

- continue a comprehensive review of the safe schools provisions of the *Education Act*;
- request amendments to the relevant regulations to include mitigating factors and require principals and school boards to consider mitigating facts prior to suspending or expelling any student. The mitigating factors include:
  - (a) whether racial or other harassment was a factor in the student’s behaviour;
  - (b) whether the principles of progressive discipline have first been attempted;
  - (c) the impact of suspension or expulsion on the student’s continued education;
  - (d) whether the imposition of suspension or expulsion would likely result in an aggravation or worsening of the student’s behaviour or conduct;
  - (e) the age of the student;
  - (f) in the case of a student with a disability, whether the behaviour was a manifestation of the disability and whether appropriate accommodation, based on the principle of individualization, has first been provided; and
  - (g) the safety of other students.
- consider proposing legislative amendments requiring the application of progressive discipline, such as in-school detentions, peer mediation, restorative practice, referrals for consultation, and/or transfer, before use of suspension and expulsion;
- support the efforts of school boards that are prepared to collect data on suspensions and expulsions and their impact on *Code*-protected students through hiring an independent, expert and qualified researcher to work with school boards to develop best practices and data collection methods that are consistent with the Commission’s *Guidelines for Collecting Data on Enumerated Grounds Under the Code*, ensure parent, student and community input into data collection best practices and report back to the Ministry. Upon the completion of the research, the Ministry will re-examine its existing position on race-based data collection;
- request approval for development of a policy regarding alternative education programs for students who are expelled or on long term suspensions (more than five school days);
- invest in resources for teachers and guidance counsellors to inform them of strategies for teaching racialized students;
- provide principals, vice-principals and trustees responsible for expulsion hearings/suspension appeals with training on anti-racism, anti-discrimination, cross-cultural awareness and accommodating students with disabilities as well as training on how to apply discipline in a non-discriminatory manner;
- implement measures for enhanced parental involvement in bullying prevention, safe schools, student behaviour and health;

- hold a provincial Safe Schools Symposium with participation by the Commission following passage of any amendments to the safe schools provisions of the *Education Act*; and
- report back to the Commission on progress at the one-year anniversary date of the Agreement and at one-year intervals until completed.

The terms of the settlement were released on April 13, 2007, and are available on the Commission's website at: http://www.ohrc.on.ca/en/resources/news/edsettlementen

Further Developments Regarding Education and Autism

Wynberg/Deskin Leave to Appeal Refused

April has seen some particularly interesting developments regarding the issues of education and autism. As previously reported in the Shibley Righton e-Bulletin, the *Wynberg* and *Deskin* cases (tried and heard together) involved a constitutional challenge by a number of children of autism and their parents (35 children from 30 families) against the Ontario government's Intensive Education Intervention Program ("IEIP"), which is an intensive behavioural intervention ("IBI") service designed for autistic children aged two to five.

The primary constitutional challenge before the Ontario Superior Court of Justice claimed discrimination on the basis of age and disability, contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*. The trial judge's decision, released in March 30, 2005, held that: (1) the age criterion, which cuts off IBI service at age 6, discriminates against the children on the basis of age; and (2) the government's failure and/or refusal to fund and/or provide IBI and appropriate educational services for the children discriminates against them on the basis of disability.

The Attorney General of Ontario appealed the trial decision, and on July 7, 2006, the Ontario Court of Appeal unanimously allowed the appeal, overturned the trial's decision, and held that the Ontario IEIP program was not discriminatory and did not contravene the *Charter*. Subsequently, the parents sought to appeal the Court of Appeal's decision to the Supreme Court of Canada. In order for a case to be heard by the Supreme Court of Canada, the Supreme Court must grant permission or "leave to appeal", which it grants only where the Court is satisfied that the case involves a significant legal issue of public importance or "is, for any other reason, of such a nature or significance as to warrant decision by" the Court. In short, the case must involve an issue of national significance that goes beyond the immediate interest of the parties to the case.

On Thursday, April 12, 2007, the Supreme Court issued its decision and denied the parents' application for leave to appeal, without costs. The effect is to uphold the Court of Appeal's decision of last July 2006, which found in favour of the Ontario government. Consistent with its practice, the Supreme Court gave no reasons for its decision to deny leave.

Notably, school boards were not made parties to the *Wynberg* case. However, there are approximately 240 discrimination complaints filed against the Ontario government pursuant to the Ontario *Human Rights Code* currently before the Human Rights Tribunal of Ontario involving similar issues, to which a number of school boards were added as parties at the instance of the Tribunal. All of the parties will now reconvene back before the Tribunal, likely at the end of June 2007, to sort out the impact of *Wynberg* decision on the human rights proceedings.

The Sagharian class action

In April 2005, shortly after the release of the trial decision in *Wynberg*, another court action was commenced in the Ontario Superior Court of Justice by a group of families of children with autism. The plaintiffs brought the action pursuant to the *Class Proceedings Act, 1992*, but to date the proceeding has not been certified as a class action.

Prompted by *Wynberg*, the plaintiffs allege that the defendants' failure to provide or to fund Applied Behavioural Analysis (ABA), speech therapy, occupational therapy and other programs and services for the minor plaintiffs constitutes negligence, breach of ss. 7 and 15 of the *Charter*, breach of fiduciary duty, and misfeasance in public office. This claim was different, however, insofar as it included as parties not only the Ontario government but also seven Ontario school boards.

The government and school boards brought motions to strike out the plaintiffs' statement of claim following the Court of Appeal's decision in *Wynberg*, and in a decision released March 12, 2007, the Superior Court allowed the defendants' motions in part and struck out all of the plaintiffs' claims except for the claims for breach of s. 15 of the *Charter*, which are very similar to the claims that were advanced, and ultimately dismissed, in the *Wynberg* case. It remains to be seen whether the plaintiffs will amend their claims and/or proceed with the action. The Court's decision is reported at *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, [2007] O.J. No. 876 (S.C.J.). We will continue to update further developments as they occur.

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

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