



## Education Law eBulletin

A newsletter for educators

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### **Important Reminder Regarding Safe School Legislation**

As reviewed in previous Shibley Righton LLP eBulletins, the Safe Schools Legislation changes take effect February 1, 2008.

As of February 1, 2008, among other requirements, school boards administrators must:

- Provide education programs to students who have been expelled or are on a long-term suspension to allow for an uninterrupted learning environment as well as enable said students to access services such as anger management or career counselling;
- Treat bullying as serious infraction for which suspension must be considered;
- Consider mitigating and other factors before students are suspended or expelled; and
- Review all inappropriate behaviour on a case-by-case basis such that suspension and/or expulsion is not, in most cases, an automatic response. Measures which may be taken by school board administrators, depending on the nature and severity of the infraction, may include meetings with parents, referral to a community agency, suspension or expulsion.

### **Privacy and the Surveillance of Employees**

In 2007, the Office of the Information and Privacy Commissioner of Ontario ("IPC") received a privacy complaint pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the "Act") from an individual regarding the collection of his personal information by a School Board (the "Board"). In this case, the complainant was the spouse of a Board employee who had been injured during the course of her employment. After the Board received information that the employee had engaged in behaviour which conflicted with her claims, the Board began an investigation in respect of an alleged fraudulent claim regarding health benefits.

As part of its investigation, the Board hired a private investigation company to conduct surveillance of the employee. The report provided by the investigation company demonstrates that, during the surveillance, the investigator had recorded the complainant's licence plate and used that information to obtain vehicle registration information. In addition, the investigator videotaped the activities of the complainant in addition to the Board employee. As such, the complainant launched a complaint that the collection of his personal information as an uninvolved third party, including his image as recorded on the videotape evidence and the report prepared by the investigator, was collected contrary to the Act.

In its response, the Board, represented by Sheila MacKinnon of Shibley Righton LLP, took the position that, as the complainant was not the subject of the surveillance, any inclusion of the complainant in documents or videotape was ancillary to the surveillance of the employee. Accordingly, as the investigation was being conducted for legitimate purposes, and the collection was unavoidable, the Board argued that the prior consent from the complainant was not necessary as the records in question should be excluded from the scope of the Act.

In its decision dated August 9, 2007, the IPC investigator dismissed the complaint, finding that the records should be excluded pursuant to s. 52(3)3 of the Act. In arriving at this conclusion, the investigator reviewed the requirements of the Act, including that the Board must demonstrate that:

1. the record was collected, prepared, maintained or used by the institution, or on its behalf;
2. the collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. the meetings, consultations, discussions or communications are about labour relations or to the employment-related matters in which the institution has an interest.

In respect of the first two criteria, the IPC investigator found that the records were collected on behalf of the Board and that the records were used by the Board in discussions and communications with WSIB. With respect to the third criterion, the IPC investigator determined that the process undertaken by the Board was in relation to its employee's claim for benefits arising out of her employment with the Board, and that determining the veracity of an employee's claims of a work-related injury was an employment related matter in which the Board had an interest. The investigator therefore held that the records did fall within the exclusions provided by 52(3) and dismissed the complaint.

Notwithstanding that the complaint was dismissed, the IPC investigator noted that although the collection of the complainant's information was unavoidable in this case, institutions must be extremely careful when engaging in

surveillance of employees to ensure that personal information of third parties is not collected, and that institutions remain responsible for the actions of staff and agents and must ensure that surveillance is conducted in a reasonable and privacy protective manner.

In short, aside of initial labour relations factors that must be considered before surveillance is considered (which are not considered in this article), institutions must ensure that collection of otherwise non-involved individuals must be avoided, or minimized to the extent possible when engaging in such activities. However, in the event that it is unavoidable, the above-mentioned decision appears to demonstrate that collection of incidental information will not be fatal to an investigation, if it was reasonable in the circumstances.

At Shibley Righton LLP, we are always prepared to discuss labour relations and privacy law implications arising from both on-site and off-site employee surveillance.

## Caselaw

The Ontario Court of Appeal dismissed a university student's appeal from a motions judge's decision to strike her statement of claim alleging negligent advice. *Dawson v. University of Toronto*, [2007] O.J. No. 4861.

The Alberta Information and Privacy Commissioner held that disclosure of public information which would not normally offend the Alberta Freedom of Information and Protection of Privacy Act, may be prohibited if such information, together with other personal information could then be used to determine the salary of a university professor. *University of Alberta (Re)*, [2007] A.I.P.C.D. No. 45.

The Supreme Court of Canada granted leave to appeal to hear the issue as to whether adults testifying about historic childhood sexual abuse should have their evidence assessed in the context of their age at the time the sexual assaults took place. *F.H. v. McDougall*, [2007] S.C.C.A. No. 328.

## Creating New Positions – Bargaining Unit or Management Work?

Collective agreements are seldom able to address every issue that may arise during the time in which they are operative; this is especially so in cases involving school boards where government funding may allow for the creation of new positions. At times such as these, questions are often raised regarding whether the work involved falls “belongs” to the bargaining unit.

Arbitration awards have repeatedly held that unions, by virtue of a concluded collective agreement, do not have a property interest in work performed by bargaining unit members. Employers therefore, subject to the specific language of the collective agreement, retain the right to assign or reassign bargaining unit work to non-bargaining unit members. However, arbitrators have generally implied some restrictions on management rights in order to ensure that job classification, seniority, promotion and layoff provisions, as agreed upon by the parties, remain intact. Otherwise, it is argued, employers would be able to erode the bargaining unit simply by reassigning or transferring work. In this respect, the extent to which bargaining unit work may be transferred or reassigned will be determined on a case-by-case basis. Ultimately, a determination will be made by having regard to both the collective agreement and whether the individual is performing a sufficient amount of bargaining unit work such that he or she falls within the ambit of the bargaining unit.

In January 2007, the Divisional Court confirmed an arbitration award on this very issue. In 2001, the Ontario English Catholic Teachers' Association filed two grievances against the Dufferin Peel Catholic District School Board (the “Board”) respecting the appointment of non-bargaining unit members to the positions of Principal of Special Education and Vice-Principal of Special Education.

The issue to be determined by Arbitrator Gerald Charney was whether the Board violated the collective agreement by failing to post the above-mentioned positions. In his award, dated June 12, 2006, Arbitrator Charney held that the two positions were not, in fact, “principal” and “vice-principal” positions within the meaning of the *Act* and therefore held that the Board should have posted them accordingly. Engaging in a substance over form analysis, the arbitrator found that the core functions of the positions in question were not managerial or advisory in nature, and allowed the grievances. The Board subsequently applied for judicial review of this decision.

In confirming the arbitrator's decision, the Court held that the arbitrator properly considered the core functions of the positions in question and made factual findings supported by the evidence. Further, although the individuals in the contested positions were required to engage in performance evaluations, and perform some management-type functions, the Court upheld the arbitrator's findings that these tasks were not core functions or substantial duties of the position at the time of the posting.

Although the arbitrator in the above-mentioned arbitration considered specific language in the *Education Act*, the ultimate decision, which was upheld by the Court, follows a course of reasoning that is applicable to any unionized workplace. In short, employers must review not only the terms of the collective agreement, but also the core functions of new positions when determining whether said positions are, by their nature, management positions, or whether they must be posted pursuant to the collective agreement. It is significant that the position as a whole will be reviewed, and the fact that a position may contain some indices of management function will not necessarily be determinative of this issue.

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

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