



# Education Law eBulletin

A newsletter for educators.

March / April 2003

Smile ... Spring is here! Finally.

## current issues

### Ontario school boards successfully fight gas rate increases

The Ontario Public School Boards' Association has successfully intervened in the Enbridge 2003 Rates Case before the Ontario Energy Board, resulting in a rate increase for school boards that is a small fraction of what was proposed by Enbridge, the regulated gas utility serving a large part of Ontario.

The OPSBA intervention, spearheaded by lawyers Jay Shepherd and John Bell of Shibley Righton LLP, commenced in October 2002. It was initiated when OPSBA realized that the impacts on school boards of a previous case (the Union Gas 2003 Rates Case), in which OPSBA was not represented, would be disastrous to some school boards. OPSBA, while appealing the catastrophic decision in the Union Gas case to the provincial cabinet, resolved to take a more active role in the Enbridge case from the start. Going in, OPSBA made clear that it had three goals:

- Resist the planned 14.15% increase in gas distribution rates applicable to school boards.
- Force a review of the structure of rates charged to school boards to address elements that are unfair or inappropriate in those rates.
- Strongly oppose the application of any new rates on a retroactive basis.

In those three goals, it achieved substantial success. There was an extensive written examination process, the filing of evidence from OPSBA experts Don Higgins (President of the Ontario Association of School Business Officials) and Carla Kisko (Superintendent of Business Services and Treasurer, Halton District School Board), and a successful four week multilateral settlement negotiation. In the result, the overall rate increase for the classes in which school boards are placed will be reduced through agreement among the parties from 14% to 6%. In addition, OPSBA engaged in separate, bilateral negotiations with the utility, resulting in a further immediate reduction of about 3%, leaving the increase for school boards at about 3% in 2003.

Key to the bilateral negotiations were two additional and perhaps more important long-term gains. First, Enbridge has accepted in principle the fundamental rate design issues raised by OPSBA, and has agreed to deconstruct and re-design the rates applicable to school boards for future years. A joint working group of OPSBA and Enbridge will be established to carry out this review, targeting a 2004 implementation. Projected savings to school boards could be a further 5-10%. Second, Enbridge will immediately initiate an expansion of their programs to reduce energy costs for school boards, with a view to reaching a target of \$2 million annual savings generated by those programs within the next couple of years.

Given the small increase, and other financial adjustments that will mean that Ontario school boards will not be required to make any catchup payment when the new rates are implemented, OPSBA agreed to retroactive implementation of the 2003 rates without any penalty to the utility. However, all parties agreed with OPSBA that the issue of retroactivity will be debated before the Ontario Energy Board this spring, with application to future rate changes.

Despite the major success OPSBA achieved in its Enbridge intervention, there is still work to be done. Three top priorities: a) a debate, already underway, on recovery by ratepayers of \$20 million or more of alleged collateral profits of the utility in its affiliates; b) resistance to the joint proposal of Enbridge and Union Gas to substantially increase the rates of return to their shareholders; and c) responses to the high gas commodity prices experienced by all consumers in the winter of 2003.

## safe schools

### Safety and special needs - update from the Court of Appeal

The *Bonnah* case, discussed in the December 2002 and January 2003 issues of the eBulletin, was recently decided by the Ontario Court of Appeal. This decision has significant implications regarding safety and special needs pupils.

In *Bonnah*, the father of a special needs pupil sought judicial review of a school board's decision to transfer his son from the program he was attending (an integrated placement in a regular class with special needs supports) to a special needs class at a different school, due to safety concerns. The Ontario Superior Court of Justice upheld the school board's transfer despite the fact that the parents refused to consent to the placement, and had appealed the placement decision (the appeal was outstanding).

Prior to the appeal of the Superior Court decision being heard, the placement appeal was determined, which rendered the issues under appeal "moot". However, rather than decline to hear the appeal, the Court of Appeal exercised its discretion to determine whether the school board had the authority to transfer the pupil to a different school for safety reasons while awaiting an appeal from the placement decision.

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## safe schools, cont'd.

In its decision, the Court of Appeal stressed the importance of maintaining a safe school environment, explaining: "Everyone agrees that schools must strive to create an environment in which all students, including those with exceptional needs, can thrive and achieve their full potential. It is equally clear, however, that if schools are not safe, students cannot achieve that potential." The Court of Appeal found that a principal, and ultimately a board, has the power to exclude an exceptional pupil from school or class for legitimate safety reasons, stating that any other interpretation would "seriously imperil the safety of exceptional pupils and other children". The Court indicated that it further saw no reason to interpret the discipline provisions in the *Education Act* as not applicable to exceptional pupils.

The Court of Appeal found, however, that the school board could not alter the pupil's placement by purporting to transfer the pupil to a different school. The pupil maintained the right to "retain" the current placement pending the placement appeal. At the same time, the Court made it clear that if the pupil was excluded from the school, he or she could not attend in that placement, despite that the placement itself would be "retained". The Court explained that after a pupil is excluded, a school board can offer the parents an alternative placement option which does not create safety concerns. If the parents do not consent, the pupil simply remains out of school.

The Court stressed that school boards should bear in mind the special significance of placement decisions and strive to minimize any interference with such placement, explaining for example that "if safety concerns can be properly addressed by removal from the classroom rather than the school, then the more limited removal must be preferred." School boards must, therefore, carefully assess what steps are necessary to address the safety concerns in order to minimize the impact on the pupil's placement.

The Court also suggested that the legislation should be amended to give the appropriate body (i.e., the Identification and Placement Review Committee) the authority, where necessary, to address safety concerns by interim placement orders which would have effect pending the resolution of a placement appeal.

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## freedom of information

### Privacy and the need for caution when copying third parties

In the recently released decision of the Alberta Information and Privacy Commissioner (the "Commissioner"), *Re Edmonton Public School Schools* (Order F2002-018), the School Board received a written complaint from a parent concerning his or her child. The parent chose to copy the letter to the parent's lawyer, a Member of the Legislative Assembly and two special interest groups. The School Board copied its written response to the same entities. The parent complained to the Commissioner that the School Board had released the child's personal information in contravention of Alberta's *Freedom of Information and Protection of Privacy Act*.

Though the Commissioner found there was no breach of privacy, several of the School Board's arguments were rejected. In particular, the mere copying of the letter to third parties by the parent could not be construed as consent to the School Board's copying of its response to them. Additionally, the Board could not rely on the argument that the personal information had already been revealed by the parent's correspondence, because the Board included additional personal information in its response.

Ultimately, the Commissioner ruled that the School Board had not breached the child's privacy. This determination turned on a particular provision of the Alberta statute which provided that, where specific conditions were in place, it was not an unjustified invasion of privacy to release personal information if the purpose was to subject the School Board's activities to public scrutiny. In our opinion, the Commissioner "stretched" the meaning of the statute in order to find that the School Board had not breached the privacy provisions.

In Ontario, s. 5(1) of the *Municipal Freedom of Information and Privacy Act* has an "override" provision which allows institutions to release records where there are reasonable and probable grounds to believe the record reveals a "grave environmental, health or safety hazard to the public". Section 16 of the Act provides that certain privacy provisions of the Act do not apply where there is a "compelling public interest" that "clearly outweighs" the purpose of the privacy provision. However, the Ontario Act does not have the specific provisions which "sheltered" the School Board in Alberta. It is not clear that the analysis of the Alberta Commissioner would be applicable in Ontario.

The bottom line is to think carefully when copying third parties. There will be circumstances where this is appropriate, but this cannot be assumed without a careful consideration of the situation at hand.

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We welcome your comments and questions. Send them, and any updated contact information, to [byrdena.macneil@shibleyrighton.com](mailto:byrdena.macneil@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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## caselaw

### *Newfoundland and Labrador Teachers' Association v. Avalon East School District No. 10*

*Newfoundland and Labrador Supr.Ct. - T.D.*

The Court overturned an arbitration board's decision which held that a school district had no choice but to breach a collective agreement as a result of amalgamation and that there was no remedy available to the grievors.

### *Ward v. Attorney General of Ontario*

*Ontario Superior Court of Justice*

The Court dismissed an application brought by three trustees of the Toronto District School Board for a declaration that the *Education Act* sections requiring trustees to vote for a balanced budget contravened their right of freedom of expression and right to life, liberty and security of the person contrary to ss. 2(b) and 7 of the *Charter*.

### *R. v. J.C.C.*

*Newfoundland and Labrador Provincial Court*

The Court convicted a young offender of sexual assault and committing an indecent act for his actions on a school bus.

### *Parks v. Vancouver School District No. 39*

*British Columbia Provincial Court*

The Court dismissed an action by an elementary school student seeking damages in negligence against the school board for an injury caused by a high school student skateboarding across the elementary school's playground.

Summaries of these cases and others can be found in the *Shibley Righton Education Law NetLetter* published by Quicklaw. Visit [www.quicklaw.com](http://www.quicklaw.com).