



Education Law eBulletin

A newsletter for educators

MARCH 2007

SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group:

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Diane M. Abbey
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Jennifer E. Trépanier
jennifer.trepanier@shibleyrighton.com

Gaynor Roger
gaynor.roger@shibleyrighton.com

Bryce Chandler
bryce.chandler@shibleyrighton.com

Divisional Court Orders College of Teachers to Return School Board's Solicitor-Client Privileged Documents

In a very recent decision of the Ontario Divisional Court, released January 30, 2007, the Court ordered the Ontario College of Teachers to return certain documents that were protected by solicitor-client privilege and had been inadvertently disclosed to College investigators by School Board administrative staff.

Allegations of sexual misconduct had been made against a male teacher employed by the School Board. When the allegations first came to light, the School Board began to keep a file of documents concerning the teacher. Board staff deposited all documents concerning the teacher into a binder kept for that purpose. Included in the documents retained in the binder were correspondence and legal opinions prepared by the Board's solicitors for use in giving legal advice to the school board in connection with the teacher, who was ultimately dismissed by the Board.

The School Board had reported the allegations to the College of Teachers, which commenced an investigation of the matter, and ultimately referred the case to the Discipline Committee of the College. In the course of the investigation, College investigators contacted the School Board and demanded production of all of its files. At one point, the investigator specifically requested that the Board produce all documents, including "lawyer notes and reports of interviews." In response to the College investigators, an administrative assistant at the Board delivered a copy of the binder to the College, which included ten documents that were protected by solicitor-client privilege. The evidence was clear that the assistant did not appreciate that the documents were privileged and confidential, and that had the assistant known the documents were privileged, they never would have been forwarded to the College. However, the assistant believed that the College's demands were lawful and that the Board was mandated to produce the documents to the College investigators.

When the inadvertent disclosure came to light, the Board's solicitors contacted legal counsel for the College, but they refused to return the privileged documents. The Board then moved for an order from the Discipline Committee of the College requiring the College's investigator and counsel to return the documents. When the Discipline Committee refused and ordered the disclosure of the documents to the teacher, the Board applied to the Divisional Court for judicial review of the Discipline Committee's decision. Paul Howard of Shibley Righton LLP represented the School Board at the Divisional Court hearing.

Our arguments on behalf of the School Board were successful, and the Divisional Court set aside the decision of the Discipline Committee and ordered the College prosecutors to return all copies of the documents to Shibley Righton LLP. In granting the order, the Divisional Court held that solicitor-client privilege is a fundamental and substantive rule of law and ought not to be lightly set aside. The privilege belongs to the client and can only be waived by the client, that is, the School Board, and not through the inadvertence and honest mistake of an employee of the Board who did not have authority to waive the privilege. The Court found that neither the prosecution nor the teacher would be prejudiced by the return of the documents because all of the facts found within the contents of the documents were otherwise available, and the inadvertent disclosure had been made to the College investigators only, and not the Discipline Committee itself, i.e., the tribunal hearing the teacher's case.

The decision underscores the sanctity of the solicitor-client privilege in law. It also serves to remind us that it is important to review correspondence and other board documents whenever they are being sent to third parties, and that it is appropriate to take such care even in the face of "exuberant" demands by College investigators.

York Region District School Board v. Ontario College of Teachers, [2007] O.J. No. 286 (Div. Ct.)

Leave to Appeal of Knife-Carrying Student Refused

In February 12, 2007, the Ontario Court of Appeal issued its leave to appeal decision in *S.J. v. Toronto Catholic District School Board*, refusing to hear an appeal from the Ontario Divisional Court regarding the limited expulsion of a student who brought a knife to school.

In April 2002, a student brought a knife consisting of a double-edged blade inside a silver pen to school. At recess, he took the knife into the schoolyard where it was alleged that he threatened one or more fellow students with it. After an inquiry, the school principal imposed a limited expulsion on the student of one year. S.J., the student's mother, appealed the principal's decision to the Toronto Catholic District School Board pursuant to the *Education Act*. The appeal was heard by a committee of school board trustees, who denied the appeal. The parent then applied to the Ontario Divisional Court for judicial review of the principal's decision to impose a limited expulsion and the school board's decision to dismiss the parent's expulsion appeal.

Shibley Righton LLP represented the school principal on the expulsion appeal before the board trustees, and again before the Divisional Court. Tom McRae of our firm appeared at the hearing before the Court to make oral argument on behalf of the school principal.

As we reported in the August 2006 edition of our Education Law eBulletin, on July 17, 2006, the Ontario Divisional Court unanimously dismissed the parent's application for judicial review. In the course of its decision, the Court revised s. 309(7) of the *Education Act* and the principal's authority to impose a limited expulsion. Prior to imposing the limited expulsion in this case, the principal conducted a thorough investigation of the incident, which included talking to all the students involved (including those subsequently proposed by the parent), and putting the allegations to the students in order to obtain a response. In addition, the principal spoke with the parent several times and kept her informed of the progress of his inquiry. He reviewed the student's documented history of behavioural problems. He canvassed the mitigating factors set out Regulation 37/01 and determined there were no mitigating factors in this case. He took into account the fact that it was common knowledge that the student had brought a knife to school.

The Divisional Court began its analysis by determining what "standard of review" should be applied to judicial review of the educators' decision to impose discipline on students under the Safe Schools provisions of the *Education Act*. The Divisional Court ruled that in reviewing discipline provisions under the *Education Act*, the "patently unreasonable" test should be applied, which is the most stringent standard of review, requiring the most deference to the decisions of educators. The Court held that :

Second, in making its decision, we find the Board to have functioned in an area where its expertise was engaged. ... we find the Board to possess certain specialized knowledge in the area of education which requires a degree of deference. That knowledge persuades us and that the Board's expertise in this area is greater than that of the court. The specific issues were the appropriateness of [the school principal's] enquiry and of the suspension [*sic*] imposed. These are matters that directly relate to the Board's expertise, particularly the matter of penalty.

The Court found that the principal's enquiry was "scrupulously fair, reasoned and appropriate". Accordingly, the Court held that it was appropriate to defer to the decision made by the educators, and the application for judicial review was therefore dismissed.

The Divisional Court also dealt with the parent's challenge to the sufficiency of the reasons given by the school board. Although the Court found that the reasons were sufficient in this case, the Court held that school boards should be made aware of the importance of giving adequate reasons in any of their decisions. The Court indicated that an administrative decision-maker must give reasons that set out its findings of fact and the principal evidence upon which those findings are based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

The parent then sought leave to appeal the decision of the Divisional Court to the Ontario Court of Appeal. As indicated, on February 12, 2007, the Court of Appeal denied leave to appeal, the effect of which is to uphold the decision of the Divisional Court. One of the lessons that may be learned from the case is that as long as administrative decision-makers in school boards continue to follow proper procedures and make well informed decisions supported by adequate reasons, the Courts will be willing to recognize that significant deference to be paid to such decisions of school boards, which have both the authority and the expertise to make decisions concerning the rights of students under the *Education Act*.

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

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.