



Education Law eBulletin

A newsletter for educators.

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college of teachers

When parental rights conflict with teacher obligations

In *Eggertson v. Alberta Teachers' Association*, the Alberta Court of Appeal recently overturned a finding that a teacher was guilty of unprofessional conduct for criticizing her own children's previous teachers during a parent-teacher interview with her children's current teacher. The Court of Appeal found that a strict interpretation of the relevant *Code of Professional Conduct* deprived the teacher of her parental right to fully participate in the education of her children. The Code required a teacher who criticized the professional competence or reputation of another teacher to do so only in confidence to proper officials and only after the other teacher had been informed of the criticism.

The Court of Appeal concluded that although on its face it was clear the teacher had contravened the *Code*, it was unreasonable for the professional conduct committee to adopt a literal interpretation of the professional code thereby depriving the teacher of her parental right (given by statute) to fully participate in her children's education.

The Court noted that the teacher's comments were made on occasions which were exclusively devoted to issues of the educational well-being of her children, and those present at the time shared the teacher's concern for her children's progress. The Court further noted that if it were to deprive the teacher's parental right on the basis that she happened also to be a teacher, this would be a handicap not shared by parents who were not teachers.

professional misconduct

Teaching certificate revoked for personal relationship with student

Recently the Ontario Superior Court of Justice upheld the finding of professional misconduct in respect of a female teacher who engaged in an inappropriate relationship with a fourteen year-old male student. In *Markson v. Ontario College of Teachers*, the relationship involved personal contacts and communications by phone, email, and in writing of a sexually suggestive nature. The conduct continued after the teacher had been warned by the boy's mother, and after the teacher had assured the mother that she would not allow anything inappropriate to happen to her son.

The Ontario College of Teachers' Discipline Committee found the teacher guilty of professional misconduct and revoked her teaching certificate. The teacher was found

dismissal from employment

Court rules on psychiatric examination of teacher

In *British Columbia Teachers' Federation v. Vancouver School District No. 39*, the British Columbia Court of Appeal upheld the dismissal of a teacher who refused to undergo a psychiatric examination required by her school district.

The teacher began showing unusual behaviour and experiencing problems performing her employment duties. As authorized by the province's *School Act*, the school district advised the teacher that she was required to undergo an examination by a psychiatrist and that failure to do so could result in her termination. The teacher grieved the requirement, claiming that it violated her collective agreement and sections 7 and 8 of the *Charter*.

A majority of the Court of Appeal held that the situation did not fall within the parameters of s. 8 of the *Charter*, which provides that everyone has the right to be secure against unreasonable search or seizure. The teacher was simply required to consult with a psychiatrist who would report regarding the mental/emotional condition of the teacher. Moreover, the Board had a "duty to ensure that schools are run in a proper fashion to ensure a positive learning environment". It was not evident to the Court as to how a consultation with a psychiatrist was a "search" or would result in a "seizure". The Court held that the purpose of the examination was remedial and in no sense penal, noting that the only possible consequence was the teacher's loss of employment.

The Court majority further held that the case concerned a particular employment relationship and related health issue and did not "rise to the level" of any interest concerning the life, liberty or security of the person that would invoke the application of s. 7 of the *Charter*.

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professional misconduct, *cont'd.*

to have: failed to maintain the standards of the profession; breached the *Education Act*; engaged in conduct that would reasonably be regarded by members as disgraceful, dishonourable and unprofessional; and engaged in conduct unbecoming of a member. (The teacher was not found to have abused the student physically, sexually, verbally, psychologically or emotionally.)

The Court explained that the standard of review of such decisions is "reasonableness" because the professional peers on the Committee are well-placed to decide these issues. The Court found that the Committee's decision was reasonable. There was no evidence that the Committee applied the evidence in an irrelevant or unnecessary manner, and there was no error in the Committee's decision to admit at the penalty phase expert testimony regarding "grooming".

The Court found that although the Committee did not analyse how it reached its conclusion, and did not expressly refer to the public interest and the extent of risk represented by the teacher, there was ample evidence to support the Committee's decision regarding penalty.

The Court rejected the argument that after the Committee had acquitted the teacher of actual abuse, it could not consider evidence of "grooming" of the student at the penalty stage. The Court explained that grooming includes preparation for abuse, and that grooming was an issue inherent on the facts.

This decision reinforces the high standard of conduct expected of teachers in relation to students. It also confirms that the Ontario College of Teachers is prepared to revoke a teacher's license in cases where there has been no explicit sexual contact with a student.

freedom of information

Personal notes subject to production under freedom of information

In *Re Toronto District School Board* (Ontario Information and Privacy Commission), a parent requested the release of records relating to his child's educational history at the school board pursuant to the Ontario *Municipal Freedom of Information and Protection of Privacy Act* (the "Ontario Act"). The request also included records related to the parents.

One of the issues before the Commissioner was whether the school board was obligated to release the Principal's and teachers' personal notes, which the board had refused to do. The board argued that it did not have "custody or control" of the records, as required by s. 4(1) of the Ontario Act, as the records belonged to the educators who had authored them. The Commissioner disagreed finding that the notes were made by educators and administrators in the student's school, were intended to document the student's progress during the relevant period, and were maintained by board staff on the board's premises. Furthermore, even though the notes were never incorporated into the Ontario Student Record mandated by the *Education Act*, the notes were nevertheless a function of "the Board's mandate and the professional duties of the writers toward the education and social development of the [student]." The Commissioner held that the intention of the records was never for personal use, but rather to act as memory aids to assist in the evaluation and treatment of the student.

The school board has applied for judicial review of this decision. In the interim, educators would do well to consider its import. In the freedom of information context, it may not matter whether an educator's notes were intended to be solely for the educator's own reference. Any document created by an employee of a school board that refers to a student and/or the student's parents may be considered for the purposes of freedom of information legislation to "belong" to the student/parents, not to the educator. In our opinion, educators ought not to be discouraged from making notes in the course of carrying out their professional duties; however, educators may wish to bear in mind when making such notes that these are "records" that could eventually be subject to a freedom of information request.

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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case law

Haché v. Lunenburg County District School Board *Nova Scotia Supreme Court*

The school board dismissed a teacher for six complaints of sexually assaulting students. The board's notice to the teacher, however, included the allegations of five of the students only. The Court found that the failure to give notice of the sixth complaint invalidated the discharge of the teacher by the school board.

Callow v. West Vancouver School District No. 45 *British Columbia Superior Court*

The Court dismissed a plaintiff's action against a school board and the teacher's professional association for conspiring together in terminating his employment. The Court held that the plaintiff, as member of the association, was without standing; and that the matter fell within the jurisdiction of the labour relations board, not the court. The plaintiff was required to obtain leave before instituting any further legal proceedings against the parties.

Daniels v. Annapolis Valley Regional School Board *Nova Scotia Human Rights Board of Inquiry*

The Board of Inquiry found that, in denying a qualified female applicant an interview for the position of maintenance foreman, the school board discriminated against her on the basis of sex, even though there was no evidence of bad faith or that the school board intended to discriminate against her.

Summaries of these cases and others can be found in the *Shibley Righton Education Law NetLetter* published by *Quicklaw*. Visit www.quicklaw.com.