SHIBLEY RIGHTON LLP
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Education Law eBulletin

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❖ All the best in 2004! ❖

occupational health and safety

Asbestos in our schools - the "hidden cost"

A recent decision of the Ontario Court of Justice may have raised the stakes and thereby caused renewed attention to contraventions of the provisions of the *Occupational Health and Safety Act* ("OHSA") as they relate to the presence of asbestos in construction projects.

TWS Developments Inc., a North York construction development company, was fined $100,000 on October 16, 2003 for a violation of the OHSA in connection with the discovery of asbestos at a Toronto office building which it owned that was being converted into residential condominiums. The Ministry of Labour visited the construction project as a result of an anonymous complaint of asbestos on the site. The asbestos was apparently discovered by a worker who was removing a ceiling at the building. The project's constructor immediately stopped worked and called in an engineering firm which confirmed the presence of the asbestos. The asbestos was removed by an environmental company. Upon investigation by the Ministry of Labour, it was found that the owner of the office building, TWS Developments, had not notified the constructor of the presence of asbestos prior to the signing of the contract for the renovation and conversion of the building, despite being aware of the asbestos at the time of signing the contract.

TWS Developments was found guilty, as an owner, of contravening section 30 of the OHSA which provides in part as follows:

> s.30 (1) **Duty of project owners** - *Before beginning a project*, the owner shall determine whether any designated substances are present at the project site and shall prepare a list of all designated substances that are present at the site.
>
> (2) **Tenders** - If any work on a project is tendered, the person issuing the tenders shall include, *as part of the tendering information*, a copy of the list referred to in subsection (1).
>
> (3) **Idem** - An owner *shall* ensure that a prospective constructor of a project on the owner's property has received a copy of the list referred to in subsection (1) *before entering into a binding contract* with the constructor. [Emphasis added.]

Asbestos is a designated substance. In addition to the fine of $100,000, a surcharge of 25% is levied on all fines over $1,000 pursuant to section 60.1 of the *Provincial Offences Act*. This effectively raised TWS Developments's fine to $125,000.

This case has increased significance not only due to the amount of the fine imposed but also due to the fact that there appeared to be no specific injury to an individual(s). This may indicate that, even in the absence of a specific damage assessment capable of being immediately measured, the possibility of potential damage based on the seriousness of the hazard will lead a court to impose substantial fines based on the fundamental sentencing principle of deterrence. Indications are that even first time offences may be treated more seriously than in the past.

It is important to be aware that pursuant to section 66 of the OHSA, although a corporation may face a maximum fine of $500,000, an individual may also be charged and upon conviction face a maximum fine of $25,000, imprisonment for a term of not more than 12 months, or both. Now add the 25% surcharge to those figures. Furthermore, and of particular significance, it may be no defence to assign blame to your employee, architect or engineer. Section 66(4) of the OHSA provides that "...any act or neglect on the part of any manager, agent, representative, officer, director or supervisor of the accused, whether a corporation or not, shall be the act or neglect of the accused".

Given the age of a significant number of schools and various board facilities throughout the Province, the fact that many contain asbestos and are in need of constant repairs, upgrades and additions, it is recommended that school boards review all contracts and potential projects to ensure, as an owner, that there has been compliance with section 30 of the OHSA. Written procedures must be reviewed and, if necessary, amended to ensure that a binding contract is not entered into with a contractor until there is compliance. Only in this way can the pitfalls of a contravention of the legislation and the associated "hidden cost" be avoided.

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education governance

Summit on Education Governance

On January 8 and 9, 2004, The Learning Partnership, a not-for-profit organization dedicated to strengthening public education in Canada, held its first Summit on Education Governance. The two day Summit took place in Toronto at the Ontario College of Teachers and attracted over 220 participants. John P. Bell and Alan Wolfish, Q.C., of our firm, were on the Summit's Planning Committee.

Earlier the same week, *The Globe and Mail* published an article written by The Honourable William G. Davis, a former Premier of Ontario, in which he addressed the critical governance issue of who should be in charge of our children's education. In that article, the former Premier demonstrated the need for a new approach to overseeing education and offered an alternative approach to governance. He concluded with the hope that the Summit on Education Governance would be a catalyst for change.

The Summit was an outstanding success. Many wide-ranging and diverse views were presented. There appeared to be strong consensual support for the comments of The Honourable Gerard Kennedy, Ontario's Minister of Education, that his government will not micro-manage public schools and will not prescribe and demand "tons of paperwork". The Minister further stated that the Liberal government has a bias toward local government and wants to re-establish "an environment of respect" within the field of education. At this point, it is unclear what education Bills the government will be introducing in the Spring Legislative Session. For example, will the role of principals be redefined? Can we expect amendments to "Division D - Supervision of Boards' Financial Affairs" of the *Education Act*?

Our firm congratulates The Learning Partnership on its achievement and looks forward to the next Summit on Education Governance.

reminder

A one-day seminar on "Sexual Misconduct in Education" is being held in Toronto on February 6, 2004. The seminar features a series of sessions to help administrators and teachers understand the best ways to identify, investigate and ultimately to prevent the occurrence of abuse and sexual misconduct. Members of our Education and Public Law Group will be among the seminar presenters. The seminar is part of the LexisNexis Seminar Series. For more information, a brochure for the seminar is found at: http://www.lexisnexis.ca/documents/SexualMiscinEduBroc.pdf

case law

Chartrand v. Pine Creek First Nation
Manitoba Court of Queen's Bench
The Court held that the Pine Creek First Nation and its Education Authority had not established an emergency which justified the layoff of the Education Director and, therefore, had breached her employment contract.

G.E. v. Alberta (Child Welfare Appeal Panel)
Alberta Court of Queen's Bench
The Court held that the Child Welfare Appeal Panel had jurisdiction to hear an appeal regarding the Director's decision to deny financial assistance to a parent of autistic children. The Panel had earlier ruled that jurisdiction over the issue was under the *Schools Act*.

George Brown College v. OPSEU
Ontario Court of Appeal
The Court of Appeal held that a Workload Resolution Arbitrator did not have jurisdiction to arbitrate workload disputes commenced by the Union and that the Arbitrator's finding of jurisdiction was patently unreasonable. The collective agreement clearly specified that only individual teachers were allowed to initiate workload grievances to the Arbitrator.

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

safe schools

Zero-tolerance still requires procedural fairness

In *Gianfrancesco v. Junior Academy Inc.*, an appeal by the private school from a lower court decision which found that the school owed a duty of procedural fairness to a pupil when imposing an expulsion in accordance with its zero-tolerance policy, was dismissed by the Ontario Superior Court of Justice (Divisional Court). The principal had expelled an eight year-old pupil after she threatened to stab a classmate. The expulsion was imposed under the school's zero-tolerance policy, which followed the recommendations of the Ontario Schools Code of Conduct, but was made without notice to the parents or an opportunity for them to speak to a lesser penalty.

Although the expulsion and suspension procedures of the *Education Act* do not apply to private schools, the principle of procedural fairness is imported into matters of discipline by virtue of the contract of instruction existing between the school and the pupil's parents. When the school's principal contemplated the drastic punishment of expulsion, principles of natural justice became relevant. The principal could not act arbitrarily or unfairly and, thus, was required to provide the parents with adequate notice so that they could attend a hearing. The interview between the principal and the pupil, who was eight years old and had learning disabilities, did not constitute a proper "hearing".

The Divisional Court upheld the trial decision to award damages amounting to one year's tuition to the family, as the expulsion was a fundamental breach of procedural fairness which amounted to a breach of the contract between the family and the school to provide the student with a full year of education.

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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