



Education Law eBulletin

A newsletter for educators.

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labour relations

Educational assistants as essential employees

On September 30, 2004, the Supreme Court of Canada dismissed an application for leave to appeal in *Canadian Union of Public Employees, Loc. 2745 v. New Brunswick (Board of Management)*. This case considered section 43.1 of New Brunswick's *Public Service Labour Relations Act* that requires the parties to a collective agreement to reach an agreement as to, *inter alia*, what positions in the bargaining unit are or will be necessary in the interest of the health, safety or security of the public. (In the event that no agreement can be reached, s. 43.1(5) mandates that the Board is to determine the issue following a hearing.)

The employer applied for the designation of 640 Teachers' Assistants employed in the public schools as "essential" employees pursuant to s. 43.1 of the Act. The bargaining unit represented by CUPE was described as "...all employees in the Stenographic, Typing, Clerical and Regulatory and Office Equipment Operation Group..." Of the 2345 employees in the bargaining unit, 1454 persons were classified as Teachers' Assistants and 39 others were classified as Student Attendants. The Board was called upon to consider two past conflicting decisions that considered s. 43.1 of the Act.

The Board found that no legislation existed requiring that a school must be closed if a strike of CUPE Local 2745 was in progress. Therefore, if schools were to remain open, all students had the right to attend and s. 43.1 provides "an avenue to the employer to ensure that the health, safety or security issues affecting exceptional children are satisfied while they are in attendance at school." Failure to designate the employees as essential would result in discrimination against the exceptional students. This decision resulted in the designation of 640 employees as essential.

On judicial review, the Court overturned the Board's decision holding that it was patently unreasonable on the grounds that the services were provided for the purpose of furthering education and, since providing education was not essential, the support services could not be deemed to be essential. The judge further held that since it was the employer's decision to keep the schools open during a strike by the union, it was the employer who would be discriminating against the exceptional students.

On further appeal, the Court of Appeal restored the Board's findings. Significantly, the Court of Appeal noted that the Board ought not to be bound by its own previous decisions as it needs "to be responsive to the public interest in a constantly changing environment." Additionally, the Court of Appeal analyzed the wording of s. 43.1, "services provided by the bargaining unit", and found it could be interpreted in two ways: the first being the services provided by the bargaining unit as a whole, and the second being the services directed to the health, safety or security of the public. The Board had examined the specific services provided by certain members of bargaining unit, while the reviewing judge had focused globally examining all the services provided in connection with the education system. The Court of Appeal held that since s. 43.1 was subject to an interpretation that would allow for two possible conclusions, the Board had the right to choose the one it preferred.

❄️ ❄️ HAVE A WONDERFUL 2005!

case law

Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology *Ontario Superior Court of Justice (Divisional Court)*

The Court held that a Board of Arbitration, established to make rulings in relation to a collective bargaining agreement, has the jurisdiction to award aggravated and punitive damages arising from the unjust termination of an employee under the collective agreement.

Ontario Secondary School Teachers' Federation v. Thames Valley District School Board *Ontario Superior Court of Justice*

The Court held that judicial review determinations should be based upon the record of the proceedings before the Board of Arbitration, and that no affidavit evidence to augment the record should be admitted.

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

Interpretation of the listed “offences” in the *Safe Schools Act*

The *Safe Schools Act*, which amended the *Education Act*, set out a list of “offences” for which a student can be suspended or expelled. One of the problems with the Act’s provisions is the lack of guidance as to how these listed “offences” should be interpreted and applied. We are often asked by administrators whether the definitions of certain of these “offences” are the same as the definitions used in the criminal context (for example: “weapon” or “robbery”). Administrators should take care not to confuse criminal offences with the listed discipline “offences”. First, the related criminal offences may include certain elements which must be proved which are not applicable in the education context. Secondly, administrators must be aware that the standard of proof in the criminal context is the very high standard of “beyond a reasonable doubt”, whereas in the student discipline context, an administrator need only meet the lower standard of “on a balance of probabilities” by establishing that it is more probable than not that a certain act took place.

As for the interpretation of the listed “offences”, administrators can look to school board policies and procedures, the school board’s protocol with police, the *Ontario Code of Conduct*, as well as other Ministry of Education documents such as Policy/Procedural Memoranda, for guidance. In our opinion, a broad and liberal interpretation should be given to the definitions of the listed “offences”. That being said, however, administrators must exercise their discretion in a fair and appropriate manner when considering student discipline. An administrator is required to consider the whole history and circumstances of a student, including any mitigating factors as set out in the regulations, prior to imposing discipline. Further, administrators must carefully follow the procedures set out in the *Education Act* and related documentation when dealing with disciplinary decisions.



upcoming conference



A unique one-day course is being held on Thursday, February 24, 2005 in Toronto, Ontario providing education professionals and lawyers with a valuable opportunity to discuss key practical and legal issues in special education. The *Advanced Analysis of Legal Issues in Special Education* course will be chaired by Robert G. Keel. Presenters include: J. Paul R. Howard, Brenda J. Bowlby, Martha M. Mackinnon, Robert G. Keel, and Nadya Tymochenko. The course will focus on the most difficult issues in special education today. The interactive presentation style and comprehensive depth of coverage will provide a unique opportunity for persons working in education to gain insight into the most difficult challenges in special education. Participants will benefit from the insights of experts who confront these issues on a daily basis, and will take away information that can be readily implemented by them in schools, boards, and other educational environments. For more information, please contact the Osgoode Hall Law School - Professional Development Program at: 416.597.9724 or 1.888.923.3394, e-mail: pdp@osgoode.yorku.ca, or visit: www.law.yorku.ca/pdp/cle

new legislation

The Legislative Assembly of Ontario has announced that its Standing Committee on Social Policy will be holding public hearings in respect of Bill 118, the proposed *Accessibility for Ontarians with Disabilities Act, 2004*, between January 31 and February 7, 2005. Bill 118 was introduced in the Legislature in October 2004. The purpose of the new legislation is to develop, implement and enforce accessibility standards in order to achieve, by 2025, total accessibility for persons with disabilities with respect to services, goods, facilities, accommodation, employment, buildings, and premises. Interested parties who wish to comment on the Bill may send written submissions to the Clerk of the Standing Committee by Tuesday, February 8, 2005. For more information on Bill 118 and how it affects institutions and employers in both the public and private sectors, or for information regarding the Standing Committee hearings, please feel free to contact Paul Howard at our Windsor office (519-969-9844) or Jennifer Trépanier at our Toronto office (416-214-5202).

workplace health and safety

We continue to receive inquiries from an earlier eBulletin regarding the expansion of criminal liability to organizations as a result of last year’s amendments to the Criminal Code of Canada. These federal amendments were contained in Bill C-45 and increase the potential for criminal sanctions where serious health and safety violations have occurred. Please note that these Criminal Code amendments do not replace the duties and penalties found in the *Occupational Health and Safety Act*, a provincial statute for which the Ministry of Labour is responsible. We recommend that organizations familiarize themselves with the provisions of Bill C-45 and implement necessary measures to ensure compliance. As a first step, organizations may wish to conduct a complete and comprehensive review of their health and safety workplace policies. If you require information or legal advice on a specific matter of interest, please contact Brian Nolan at our Windsor office.

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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