SHIBLEY RIGHTON LLP
Barristers and Solicitors

Education Law eBulletin

A newsletter for educators. **June 2005**

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in the courts

"Lawful custody" and school attendance rights

In the recent case, *Chou v. Chou*, the aunt of a 13-year old girl named Valerie applied to the Ontario Superior Court of Justice - Family Court for "lawful custody" of the girl in order that she would qualify as a resident pupil and then could register with the York Region District School Board without payment of tuition fees. Valerie was born in Canada but lived with her parents in Hong Kong until two weeks prior to the bringing of the application. Her parents sent her back to Canada to live with her aunt and to receive her education. Valerie's aunt tried to register Valerie in a school operated by the York Region school board. The board took the position that Valerie was not a resident of its area because both of her parents were living in Hong Kong and required a non resident pupil tuition fee of $6,214 plus an administrative charge before allowing Valerie to attend one of its schools. However, the board advised the aunt that if she obtained a court order for custody of Valerie, the board would admit her to school free of charge as then she would qualify as a resident pupil. Valerie's parents consented to the custody application and the board did not take a position on whether a custody order should be granted. The aunt also applied for a mandatory order requiring the board to admit Valerie to school without charging a non resident fee; the board opposed that application.

The Court dismissed the custody application as it held that the motive and purpose behind the application were not to secure an order in furtherance of Valerie's best interests, and that a transfer of full custodial authority was not intended. The parents had signed a joint custody agreement with the aunt. The true intention of the agreement was to permit Valerie to live with her aunt and allow her aunt to manage the day to day decisions in Valerie's life. The Court found that had the school board not demanded a tuition fee, the aunt never would have gone to court for a custody order.

Section 33(1) of the *Education Act* provides, generally, that a person attaining the age of six years is qualified to be a resident pupil if the person resides in the school section and the person's parent or guardian resides in the school section. Section 1(1) of the Act defines "guardian" as meaning "a person who has lawful custody of a child, other than the parent of the child". The Court considered the expression "lawful custody" as opposed to the term "custody" and concluded as follows:

> "... Custody can be conferred only by birth, court order or one of the agreements authorized by law to confer custody ... However, I do agree that a custodial parent can transfer some of the incidents of custody, such as physical care and control, actual residence and daily discipline authority. It is done every day, without court order or agreement in writing. There are probably other incidents of custody that a parent could transfer as well.
>
> ... Here the parents have authorized the residence of the child in the care and control of her aunt, for purposes much less important and less stringently regulated than an adoption. It seems to me the situation in this case would fall within the ordinary meaning of the words 'lawful custody'. Anyone would say that the aunt's physical custody of Valerie was lawful. Anyone would say that Valerie's residence with the aunt was lawful, that her being subject to her aunt's house rules and discipline regime was lawful. If you asked anyone whether the aunt has lawful custody of Valerie, the answer would be yes, because Valerie lives with her aunt with the express written permission of her parents, and that amounts to lawful custody. There is nothing in the attendance rights provisions themselves or the surrounding provisions in the *Education Act* that prevents the words 'person who has lawful custody of a child' from having this plain and ordinary meaning."

The Court held that, on the facts of this case, wherein Valerie had been sent to live with and be subject to the day to day care and control of her aunt, with her parents' express agreement, reduced to writing, the aunt had "lawful custody" of Valerie as used in the definition of "guardian" in section 1(1) of the Act. Accordingly, the Court held that the school board had not interpreted the attendance provisions of the *Education Act* correctly. Valerie qualified as a resident pupil entitled to attend school without payment of a fee. A mandatory order was issued by the Court requiring the board to register Valerie as a resident pupil.

reminder

School Principals Summit on July 6th

Paul Howard and Sheila MacKinnon of Shibley Righton LLP will be speaking at the "School Principals Summit" conference presented by LexisNexis on July 6, 2005, at the Holiday Inn on King in Toronto. The Summit is an intensive one-day conference that will provide answers to some of the most problematic concerns currently facing principals and other educational officers. The conference will involve interactive sessions focussing on "nuts and bolts" answers to difficult questions. Participants can register online at www.lexisnexis.ca or by calling 1-800-668-6481 or (905) 479-2665. If you call LexisNexis Customer Service when registering and tell them you were referred by Paul Howard or Sheila MacKinnon, you will receive 20% off the registration fee.

legislation

New law waives school fees

The Ontario government recently passed new legislation (Bill 194) removing restrictions for approximately 250 immigrant children by eliminating the requirement that they pay fees to attend school. The legislation serves to expand the list of exemptions in the *Education Act* allowing children of certain classes of temporary residents in Canada to attend school in Ontario without paying fees. New exemptions include: children whose parents have applied for permanent residence status to Citizenship and Immigration Canada and plan to stay in the country; and children whose parents are studying at a publicly funded Ontario university or college. Previously, the Act required school boards to charge fees - which can be $7,000 to $10,000 annually per child - for temporary residents. Boards will now be able to claim funding for these students under the Grants for Student Needs.

private schools

ARI insurance can increase course/tuition revenue

Accounts Receivable Insurance (ARI) is available to foreign exporters of goods *and services*, through Export Development Canada (EDC). Many private educational institutions provide an export service and do not realize they are exporters, and ARI offers huge opportunities for marketing to an increasingly foreign client base. The obvious policy behind ARI insurance is that it incites Canadian businesses to attract foreign export revenues, by mitigating the risk of doing business with other countries. Specifically, ARI covers non-payment by foreign buyers due to commercial and political risks, such as: failure to pay; bankruptcy or insolvency; refusal to accept the goods; cancellation of the contract; war, revolution, or insurrection; cancellation of import or export permits; and currency transfer. An ARI policy can cover an institution's foreign receivables to the extent that transactions are "business to business". Although an insurance product and not debt or equity financing, ARI allows a service provider in Canada to leverage this insurance policy against a larger line of credit with the bank. In short, receivables (up to 90% of your receivables) become "government backed", giving lenders greater assurance that a client (e.g., an educational institution) will meet its financial obligations to the lender.

EDC has credit information on over 15 million companies in over 25 countries, that private businesses do not have. Such information is extremely valuable when doing business with foreigners. EDC will complete a credit check on your foreign buyer or, depending on the transaction size, you can complete the credit check yourself. ARI policies are easy to administer. EDC also boasts an excellent record when it comes to paying claims and paying them quickly.

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caselaw

Purssell v. Coast Mountains School District No. 82
B.C. Supreme Court
The Court upheld the decision of the Coast Mountains School District No. 82 to implement a four-day school week finding that the board had met the standard of procedural fairness in its public consultative process before approving the shortened school calendar.

Re Avon-Maitland District School Board and Elementary Teachers' Federation of Ontario
Ontario: P.C. Picher
An arbitrator held that under the collective agreement a teacher on maternity leave was entitled to receive a six-week income top-up to her Employment Insurance benefits despite the fact that the top-up period fell within the non-teaching summer months when the teacher would not ordinarily receive a salary.

Gosselin (Tutor of) v. Quebec (Attorney General)
Supreme Court of Canada
The SCC upheld an enactment of the Quebec legislature that precludes the children of French-speaking parents from attending publically-funded English schools.

Solski (Tutor of) v. Quebec (Attorney General)
Supreme Court of Canada
In a challenge to the exceptions under which a child may attend public English language schools in Quebec, the SCC upheld the applicable legislative provision, but only if the exceptions are applied qualitatively, and not quantitatively.

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

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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