



## Education Law eBulletin

A newsletter for educators.

September 2005

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

Alan Wolfish, Q.C.  
alan.wolfish@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

Byrdena M. MacNeil  
byrdena.macneil@shibleyrighton.com

Jennifer E. Trépanier  
jennifer.trepanier@shibleyrighton.com

Bryce Chandler  
bryce.chandler@shibleyrighton.com

Welcome to a new  
school year!

### in the courts

#### Freedom of expression in the classroom

In recent months, the courts have issued a number of important decisions concerning the issue of freedom of expression in the classroom.

First, in *Kempling v. British Columbia College of Teachers* (2005 BCCA 327), the British Columbia Court of Appeal has seemingly expanded teachers' liability for off-duty opinions. A B.C. teacher was cited for professional misconduct stemming from letters he wrote to his local newspaper. In his writings, the teacher expressed his views on homosexuality, analogising homosexuality with immorality, abnormality, perversion and promiscuity. The teacher was handed a one-month suspension after a disciplinary committee found the letters to be discriminatory. While the Court of Appeal accepted that the editorials contained political elements and, at times, a reasoned discourse, it held that the writings "crossed the line of reasoned debate into discriminatory rhetoric" by relying upon stereotypical notions of homosexuality, thereby ignoring the inherent dignity of the individual - a central concept to a functioning democracy. The Court noted that the situation differed from the Supreme Court of Canada decision *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 in which a teacher's anti-Semitic opinions were found to have created a poisoned school environment. In *Kempling*, although there was no evidence of actual harm to students caused by the teacher's editorials or a resulting "poisoned school environment", the Appellate Court held that the disciplinary panel could rely on the inference of harm as opposed to the actual harm identified in *Ross*. The Court held that the teacher's conduct was harmful to the school system *per se*, both because of its discriminatory content and because the teacher explicitly linked what he wrote to his role as a teacher and counsellor. By upholding the discipline imposed by the College of Teachers, the Court of Appeal arguably expanded teachers' liability for voicing their opinions in public from speech that creates a poisoned school environment to speech that may potentially harm students or the reputation of a school system.

Meanwhile, in *Morin v. Reg. Admin. Unit #3* (2005 PESCAD 14), the Prince Edward Island Court of Appeal increased a damages award where school administrators unduly restricted a teacher's freedom of expression by prohibiting the teacher from continuing an assignment that included showing a video about religion and its importance to different people. The teacher was placed on non-disciplinary leave for the remainder of the year, and was subsequently not rehired at the school the following year. In increasing the damages award, the Court held that although control of a school and its curriculum rests with the principal, this does not eliminate teachers' free expression rights. The Court found that the restriction of expression was done to avoid controversy and not for the alleged purpose of creating an appropriate learning environment for the students as the subject-matter of the video and assignment was clearly age-appropriate. The Court held that the school administration's actions not only suppressed the appellant's right to free speech, it also resulted in the appellant's lost employment for the next year, and damages were increased accordingly.

Finally, in *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation* (2005 BCCA 393), the British Columbia Court of Appeal examined teachers' freedom of speech rights with respect to "time and place" arguments. In 2002, shortly before a full stoppage of work, the British Columbia Legislature imposed a new collective agreement by enacting the *Education Services Collective Agreement Act*, and shortly thereafter amended the *School Act* by removing class size and composition from the collective agreement and the scope of collective bargaining. In response, the BCTF launched a number of initiatives, one of which included sending teachers information cards to be completed detailing the number of pupils in the classroom and handed to parents during parent-teacher interviews. Disputes arose when administrators in several school districts removed flyers critical of the government's actions from bulletin boards and directed teachers not to discuss class size issues or hand out BCTF materials to parents during parent-teacher interviews. After reviewing and upholding the arbitrator's findings that the *Charter* did apply to the school boards, and that the political nature of the expression was protected by s. 2 of the *Charter*, the main issue before the Court was whether the directives issued by the boards of education were justified pursuant to s. 1 of the *Charter*.

In its determination of this question, the Court made some significant findings. It found that school boards, being composed of trustees elected by members of the public, are public bodies that are owed some deference by the

*continued ...*

## in the courts, *continued*

courts: "the Court should require some reasonably compelling proof that the measures chosen by the School Boards are justifiable under s. 1, but the School Boards should not be held to the highest standard". The Court found that the School Boards had a legitimate interest in maintaining public confidence in the public school system and ensuring that parent-teacher interviews met their purpose (reporting on the progress of a child to that child's parent), and that these interests may well justify placing some limit on teachers' freedom of expression if a rational connection existed between the objectives of the public body and the means used to effect them, and if the limits were minimally intrusive on teachers' freedom of expression. The Court held that the directives were rationally connected to the purpose of preventing political activity by teachers that might undermine the public confidence in the public school system and/or interfere with the purpose of parent-teacher interviews. With respect to minimal impairment, the Court stated that "a teacher's right to political expression must be valued and balanced with society's interest in effective parent-teacher interviews and public confidence in the school system". The Court held that "School Boards cannot prevent teachers from expressing opinions just because they step onto school grounds. School grounds are public property where political expression must be valued and given its place." Consequently, the majority of the Court found that the complete prohibition on discussion of class size and composition was unduly restrictive and did not minimally impair teachers' rights.

In dissent, Justice Lowry found that the actions taken by the School Boards fell within the range of reasonably proportionate options, and further that the School Boards' actions were warranted to ensure that school sites are used to ensure students are exposed to different opinions and perspectives and not for the purpose of advancing particular political agendas.

We will bring you updates should these decisions be further appealed. (For a more comprehensive review of *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 and *Morin v. Reg. Admin. Unit #3*, 2005 PESCAD 14, please see the Fall 2005 edition of *Education Canada*, a publication by the Canadian Education Association. The CEA website can be found at: [www.cea-ace.ca](http://www.cea-ace.ca))

### upcoming conference

Lorman Education Services is hosting an upcoming seminar, "Discipline of Students with Special Needs in Ontario", in Toronto on October 5, 2005. The discipline of students with special needs is a major challenge for school administrators and teachers. This workshop will provide the information and skills necessary for effective and appropriate discipline responses and behaviour improvement interventions for special needs students. Presenters include John P. Bell of our Toronto office, and Sheila M. MacKinnon and J. Paul R. Howard of our Windsor office. For more information, please see the attached brochure or visit: [www.lorman.com](http://www.lorman.com)

## legislation

### Amendments to the Copyright Act

In June 2005, federal Bill C-60, an enactment amending the *Copyright Act*, received its First Reading. Among other things, the bill enables educational institutions to use a work, performance or sound recording in a lesson, test or examination; and to record and make that lesson available to students via the Internet. An institution must abide by very strict conditions, however, with respect to what it does with a lesson. For instance, measures must be taken so as to limit access only to students of the course for which the lesson was created; as well, after the course has ended, the institution cannot again communicate the lesson, must destroy any fixation of the lesson within 30 days, must take measures to prevent students from re-using the lesson, and must keep records identifying the lesson and course and dates of fixation and destruction. We will continue to follow the progress of Bill C-60.

## caselaw

### ***Re Windsor Essex Catholic District School Board and Ontario English Catholic Teachers' Association***

Arbitration (Ontario)

An arbitrator had jurisdiction to hear a grievance concerning a reassignment of a teacher to a different grade on the basis of age as it was, in essence, a labour relations dispute with a human rights component.

### ***MacDonald v. University of British Columbia***

British Columbia Court of Appeal

The Appeal Court dismissed an appeal by a group of students who sued the University of British Columbia for breach of contract after a four-fold increase in tuition within a day of their acceptance to the program.

### ***English Montreal School Board C. Boyle***

Court of Appeal - Registry of Montreal

A safeguard order to keep a specific school open for the 2005/2006 school year was overturned as failing to properly balance the convenience for the parties. The Court found that the safeguard order created an imbalance by permitting parents of students at this school to keep the school open simply by alleging that the consultation process was flawed.

*Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit [www.quicklaw.com](http://www.quicklaw.com).*

---

We welcome your comments and questions. Send them, and any updated contact information, to [byrdena.macneil@shibleyrighton.com](mailto:byrdena.macneil@shibleyrighton.com). If you wish to unsubscribe to this eBulletin, please send a blank e-mail to [unsubscribe@shibleyrighton.com](mailto: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.