



## Education Law eBulletin

A newsletter for educators.

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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

### school boards and construction

#### Constitutionality of *Labour Relations Act* provision exempting non-construction employers from Provincial ICI trade agreements

This is an update to our November 2002 eBulletin regarding school boards as non-construction employers. Readers may recall that on October 17, 2002, the Ontario Labour Relations Board issued an award stating that the Windsor-Essex Catholic District School Board, represented by Shibley Righton's Brian P. Nolan, had met the conditions for a non-construction employer as defined in section 126 of the *Labour Relations Act*. As a non-construction employer, the school board would no longer be bound by the provincial construction agreements with respect to tendering and sub-contracting its construction work. However, the Labour Board did not, at that time, issue a formal declaration giving effect to its decision.

Subsequently, the union filed an application for judicial review of the Labour Board's decision in the Ontario Superior Court of Justice. The union also challenged the constitutionality of the non-construction employer provisions of the *Labour Relations Act* before the Labour Board, alleging that the provisions in question violated the rights of construction workers to freedom of association under the *Canadian Charter of Rights and Freedoms*.

On July 24, 2004, the Labour Board issued a brief decision, with detailed reasons to follow, on the constitutionality of the impugned sections of the *Labour Relations Act*. The Board ruled that ss. 126 and 127 are entirely constitutional and that:

"The 'non-construction employer' provisions of the Act do not deny the Carpenters freedom of association, as it has been defined and interpreted. Therefore, the applicants are entitled to the remedies which flow from the Board's determinations that they are non-construction employers."

Consequently, the Labour Board issued a declaration that the Windsor-Essex Catholic District School Board is a "non-construction" employer, and, as such, is not bound by any collective agreements in the construction agency. Further, just last month, the union gave notice that it was abandoning its application for judicial review of the Labour Board's decisions. The Board's declaration is therefore in full force and effect.

The implications of these developments are significant for school boards. As indicated previously in our November 2002 eBulletin, labour costs of construction under the Provincial ICI agreements may in some cases be 15% to 19% higher than rates not subject to those trade agreements. Therefore, school boards, as well as municipalities and hospitals, may avail themselves of substantial savings by not being required to tender and sub-contract construction to only those construction firms which are signatories to the Provincial trades agreements. This decision is especially critical in light of the current trend in government spending in the public sector.

### safe schools

#### Police drug search at school held unreasonable

The issue of police searches in schools was the subject of a recent case, *R. v. A.M.* Briefly, in November 2002, a search had been conducted at St. Patrick's High School by police officers of the City of Samia Police force and the Ontario Provincial Police. In the course of the search, cannabis marihuana and psilocybin (magic mushrooms) were found in a backpack belonging to A.M., a student at the school. A.M. was subsequently charged with possession of cannabis marihuana for the purpose of trafficking as well as possession of psilocybin. During his criminal trial, A.M.'s legal counsel argued that the search conducted by the police at the school was unreasonable and that the evidence uncovered as a result of the search should be excluded under s. 24(2) of the *Charter*.

As indicated by Youth Court Justice Hornblower, there was little dispute as to the facts and events leading up to A.M.'s arrest. The school principal had issued a standing invitation to the Samia Police Force that if they had drug detector dogs available to conduct a search, they were welcome to come into the school for that purpose. St. Patrick's High School, like innumerable others, has a zero tolerance policy for drugs. Students were made aware of the policy and were also aware that to enforce the policy, the school authorities may resort to the use of police officers with drug detector dogs.

*continued ...*

Welcome back!

## Police drug search, continued

On November 7<sup>th</sup>, 2002, police officers arrived at St. Patrick's High School with their drug detector dog "Chief" and asked to search the school for drugs. The principal gave permission. To further facilitate the search, the principal announced over the school's P.A. that a search was about to be conducted, and directed that students were to remain in the classroom while the search was completed. The search was conducted according to police procedure, following which the police asked the principal if there were any other areas of the school he would like searched. In response, Principal Bristo directed the officers to one of the school gymnasiums. Mr. Morrison, a teacher at the school, accompanied some of the officers and their dog to the gymnasium, but took no active role in the ensuing search. Once in the gymnasium, the drug detector dog acted in accordance with his training and indicated on a back pack. His handler, Constable McCutcheon took that backpack and gave it to another Constable who searched the bag and found the contraband. This backpack belonged to A.M.

In considering the reasonableness of the search, Hornblower J. first considered whether the school authorities were acting as agents of the police, and concluded they were not. Hornblower J. applied the test as set out by the Supreme Court of Canada in *R. v. M.R.M.* recognizing that, although the search occurred on November 7<sup>th</sup> as a result of the police attendance at the school, the search was actually initiated by the standing invitation by the school principal. Hornblower J. then considered that two principles apply to the determination of the reasonableness of a search: the requirement for prior authorization (i.e., a warrant), and that the search be based on reasonable grounds. Although Hornblower J. recognized that the absence of a warrant for a search conducted by school authorities in a school setting does not render the search unreasonable, he held that the search must still be based on reasonable grounds, even in a school setting. In making this determination, he referred to the Supreme Court of Canada's decision in *R. v. M.R.M.*. In *M.R.M.*, Justice Corey stated that teachers and principals must be able to act quickly and should therefore be afforded more leniency when examining the reasonableness of searches conducted by teachers and principals in comparison to police standards. Hornblower J. made note of this, but seemed to place greater emphasis on Justice Corey's following comment that: "The school authorities must have reasonable grounds to believe that there has been a breach of school regulations or discipline and that a search of a student would reveal evidence of that breach."

Citing this passage, Hornblower J. held that the November 7<sup>th</sup> search was conducted without any reasonable grounds. He made this finding notwithstanding that Principal Bristo testified as to his belief in the likelihood of drugs being present in the school on a daily basis. Hornblower J. also dismissed Bristo's evidence regarding expressions of concern made by neighbours of the school and parents regarding their observations that may have given rise to a reasonable belief drugs would be at the school. Hornblower J. held that since there were no such disclosures to the authorities on the day in question, there were no reasonable grounds for the search. Hornblower J. also found that there were, in fact, two searches performed that day. The first being the search conducted by the drug detector dog "Chief" that resulted in the indication of the possibility of drugs in A.M.'s backpack, and the second being the actual search of the backpack performed by Constable Callander. Justice Hornblower concluded that both searches were unreasonable as the reasonable grounds required in *M.R.M.* did not exist in this case to perform either search.

Hornblower J. held that while the offence of trafficking cannabis marihuana is a serious offence, and that it occurred in a school setting was an aggravating factor, the search was "in essence" a police search in the guise of a search by school authorities for which there were no reasonable grounds. Moreover, he determined that to admit the evidence would be to "effectively strip A.M. and any other student in a similar situation of the right to be free from unreasonable search and seizure", thereby "effectively saying that persons in the same situation as A.M. have no rights." For these reasons, Justice Hornblower excluded the evidence of the search pursuant to section 24(2) of the *Charter* as he believed it would bring the administration of justice into disrepute.

## update

In our April 2004 eBulletin issue, we referenced the judgment of The Honourable Mr. Justice O'Driscoll of the Ontario Divisional Court in the case, *Halton District School Board v. Ontario (Special Education (English) Tribunal)*, wherein he granted an application by the school board for an interim order to prohibit the Special Education Tribunal from hearing an appeal brought by parents of a gifted child. In late June 2004, Justice O'Driscoll granted leave to the Canadian Foundation for Children, Youth and the Law to intervene as a friend of the court to assist by way of argument on the issue before the Court: whether the Special Education Tribunal has the jurisdiction to order a placement that is not set out in the Halton District School Board's special education plan. In our April summary of the case, we wrote that the school board's Special Education Plan "had been approved by the Minister of Education". For the reader's clarification, the actual judgment read: "The Plan was forwarded to the Ministry of Education for comments which Ministry provided corrections and qualifications but did not ask the School Board to consider or re-consider the issue of special education program placements at the secondary level." We will continue to follow this case with interest and update our readers accordingly.

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)

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## case law

### *Kendall v. St. Paul's Roman Catholic Separate School Division No. 20* Saskatchewan Court of Appeal

The Court of Appeal upheld a lower court finding that a School Board was not negligent in respect of injury caused to a special needs teacher by a student with a history of violence and aggression.

### *Cabiakman v. Industrial Life Insur. Co.* Supreme Court of Canada

The Supreme Court upheld an employer's decision to suspend an employee charged with attempted extortion, but found that since no exceptional circumstances existed, the employer had no right to suspend the employee without pay for the period prior to the employee's acquittal.

### *Naccarato (Lit. guardian of) v. Ontario* Ontario Superior Court

The Court granted an interlocutory mandatory injunction exempting an autistic child from the age 6 limit for obtaining services in the government's Intensive Early Intervention Program, and reinstating funding for a fixed period of time.

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).