



Education Law eBulletin

A newsletter for educators

December 2008

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

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

Bryce Chandler
bryce.chander@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Opening Exercises Included in the Instructional Day

Classroom supervision and the definition of a school's instructional day, if not expressly defined in legislation and collective agreements, can be recurring points of contention between school boards and teachers' associations. Recently, the Manitoba Court of Queen's Bench addressed the scope of the "instructional day" as it related to opening exercises.

In *Winnipeg School Division v. Winnipeg Teachers' Assn. of the Manitoba Teachers' Society*, [2008] M.J. No. 342, the collective agreement between the Winnipeg School Division (the "Division") and the Winnipeg Teachers' Association of the Manitoba Teachers' Society (the "Association") limited the instructional day to five and one-half hours. Traditionally, opening exercises, which included the singing of "O'Canada" and school announcements, occurred at the beginning of the first class. Prior to the first class, however, was a 15 minute period of time during which students arrived at the school and settled in class under the supervision of teachers. This period of time was not considered as being part of the instructional day. The Division subsequently moved the mandatory opening exercises from the time slot at the beginning of the first class to the first 15 minutes of the day. In response, the Association alleged that this change lengthened the instructional day to over the five and one-half hour limit. The Association filed a grievance; the grievance was allowed by the majority of a Board of Arbitration. The Division applied for judicial review of the arbitration award.

At the outset, the Court held that the appropriate standard of review was the more deferential standard of reasonableness. As such, the Court considered whether the arbitration board was reasonable in deciding that opening exercises should be considered as a part of the instructional day. In interpreting the meaning of the "instructional day", the arbitration board reasoned that the dictionary definition of "instruction", in absence of a statutory definition to the contrary, is broad enough to include imparting of knowledge or information; the opening exercises involved imparting of knowledge or information and thus fell under the definition of "instructional day". The Court found that the arbitration board had followed a logical path to its conclusion and thus dismissed the application of the Division.

The initial arbitration award and ensuing judicial review decisions above illustrate that arbitrators and courts seem to be willing to give a broad interpretation to certain terms, including "instruction," especially absent statutory definitions. Such interpretations may result in which unintended consequences not necessarily discussed or considered during the collective bargaining process. School board administrators should therefore keep this in mind when making programming changes or engaging in collective bargaining.

Top Court Rules on Plaintiff Families' Claim in *Sagharian* Class Action

In April 2005, a group of families of children with autism commenced a court action against the Ontario Government and seven Ontario school boards, alleging the defendants' failure to provide or to fund Applied Behaviour Analysis (ABA) and Intensive Behavioural Intervention (IBI) therapy in the public school system, speech therapy, occupational therapy and other programs and services for the minor plaintiffs constitutes negligence, breach of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, breach of fiduciary duty, and misfeasance in public office. In addition to seeking declarations for breach of their constitutional rights, and damages, the parents also sought to enhance current service provided by the province. The plaintiffs brought the action pursuant to the *Class Proceedings Act, 1992* (although to date the proceeding has not been certified as a class action).

Both the defendant Ontario government and defendant school boards brought motions to strike out the plaintiffs' statement of claim. In 2007, the Ontario Superior Court struck out portions of the claim in which the plaintiffs alleged that the defendants were negligent, deliberately misused their offices, and violated their children's s. 7 *Charter* rights to security of the person. The Superior Court allowed the case to proceed solely on the basis that the children's s. 15 *Charter* equality rights had been violated. *Sagharian v. Ontario (Minister of Education)*, 154 C.R.R. (2d) 85.

The parents appealed this ruling to the Ontario Court of Appeal. On May 23, 2008, the Court dismissed the appeal and, in addition, the Court also struck out the plaintiffs' s. 15 *Charter* claims, finding that the issue regarding alleged discrimination had been conclusively determined by virtue of the Ontario Court of Appeal's previous decision in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561, leave to appeal to the Supreme Court of Canada refused, [2006] S.C.C.A. No. 441. In *Wynberg* the Court of Appeal held that that there was differential, but not discriminatory, treatment regarding children with autism over the age of 6 years. The Ontario Government has since abolished the age cut-off.

In dismissing the claims of disability discrimination in the *Sagharian* class action, the Court of Appeal observed that it had already concluded in *Wynberg* that the government's IBI therapy program could not be harmonized with the public education system. The Court observed that "important features of [IBI therapy] – such as the number of hours required, the segregated settings, the variety of delivery sites, and the ranged of skilled personnel needed – did not suite the school environment."

In August 2008, the plaintiffs filed an application with the Supreme Court of Canada for leave to appeal the Court of Appeal's decision. On December 4, 2008, the Supreme Court of Canada rejected the plaintiffs' application for leave to appeal.

The Supreme Court of Canada's refusal to hear the *Sagharian* appeal, when considered in conjunction with the *Wynberg* decision, ought to send a clear message that the courts are unwilling to hold the province and school boards responsible for the provision of IBI therapy and related treatments to children with autism in the public school system. However, it is unlikely that this is the final word regarding this issue. Although the Court of Appeal dismissed the appeal, the plaintiffs' claims were not all struck outright; the Court gave leave to plaintiffs to amend their disability-related claims, thereby providing a possible avenue for further claims.

CASES

The Tax Court of Canada upheld the decision of the Minister of National Revenue by dismissing the school boards' claims for rebate of GST remitted for adult continuing education courses. *North Vancouver School District No. 44 v. Canada*, [2008] T.C.J. No. 354.

The British Columbia Supreme Court awarded \$20,000 in damages to the former head of a private school for wrongful dismissal, and further provided that the plaintiff was entitled to reimbursement for materials she purchased for the school, money she personally loaned the school, and purchases made by the school on her personal line of credit. *Daoust-Savoie v. South Okanagan Montessori School Society*, [2008] B.C.J. No. 1652.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this ebulletin, please send a blank e-mail to 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.