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Canadian Association for the Practical Study of Law in Education

COMMENTS

THE HUMAN RIGHTS TRIBUNAL OF ALBERTA HOLDS SCHOOL BOARD LIABLE FOR WORKPLACE DISCRIMINATION BY A STUDENT

After being harassed by a student over the course of two years, an Edmonton teacher filed a human rights complaint against the School Board. The teacher alleged that the School Board discriminated against her in the form of workplace harassment by not taking the necessary steps to try to end the ongoing harassment. The Human Rights Tribunal of Alberta upheld the teacher's complaint in part, finding that the School Board should have responded more effectively to eliminate the contravention. The teacher was awarded $7,500 in general damages.

The Incidents

In *Malko-Monterrosa v. Conseil Scolaire Centre-Nord*, Ms. Vienna Mako-Monterrosa ("VM"), a grade 8 teacher at a francophone school in Edmonton, was subjected to a series of extremely negative incidents. Most often, these incidents were attributed to one of her students, S. In November 2007, considered to be the beginning of the harassment, VM received prank calls to her personal number. The caller would disconnect as soon as VM would answer. VM reported these incidents to the school administration, which resulted in S receiving a one-day suspension from school. During the 2008-2009 academic year, the situation between VM and S escalated. VM began receiving threatening Facebook messages and e-mails sent under different aliases. The content included lewd terms referring to VM as a "sexy bitch" and "whore" as well as threatening remarks, such as "... would be a lot better if you just died" and "go to hell". Having been made aware of the situation, the school administration responded in various ways including: meeting with S and her parents; forbidding S from contacting VM outside of the school; daily supervision of S by the vice principal, and a referral to the school counsellor. VM nevertheless continued to receive threatening messages, which resulted in S being suspended from school for a longer period of five days. On the recommendation of the principal, in February 2009, the School Board ultimately decided to expel S for the remainder of the school year in order to ensure VM's safety. S was therefore transferred to a second school where VM's mother was the receptionist. The expulsion came with conditions, which, if violated, would result in S being transferred to a third school in St. Albert.

During S's expulsion, VM continued to receive threatening messages. The situation culminated in a handwritten letter being slipped under VM's classroom door in April 2009, written by S and some of her former classmates. It included 22 itemized racist insults aimed directly at VM. These actions were a clear contravention of the conditions attached to the expulsion. However, due to S's fragile nature and her "need to belong", the School Board decided to suspend her for 3 days instead of transferring her to a third school. Indeed, her academic performance and overall behaviour had improved since arriving at this school.

Soon after her suspension, S sent an e-mail to two of her former classmates in which she accused VM of sexually assaulting her. The alarming nature of the message prompted a police investigation, which revealed that the accusations were without merit. S also delivered a handwritten note to VM's mother, which was not opened. Consequently VM asked the School Board to issue a cease and desist letter. Assuming the letter was of a threatening nature, the School Board issued a cease and desist letter to S's parents at the end of April.

It was soon discovered that the letter delivered to VM's mother was not a threat; rather, it was an apology letter written by S. The School Board decided to revoke the cease and desist letter and informed VM that she could contact the police, get a peace bond, or seek legal counsel in the matter. VM initiated steps to obtain a peace bond in June 2009 and S was transferred out of the School Board's district.

In June 2009, VM then brought a human rights complaint to the Alberta Human Rights Commission alleging discrimination. This complaint was heard before Human Rights Tribunal of Alberta ("Tribunal") and a decision was released in July 2014.

The Arguments

VM, a Canadian of Mexican descent, presented arguments to the Tribunal based on two grounds. First, she

alleged that the employer discriminated in the form of workplace harassment in contravention of s. 7(1) of the *Alberta Human Rights Act* ("Act"). VM argued that S's actions constituted discriminatory workplace harassment for which the School Board was liable. Second, VM alleged that the School Board discriminated against her on the grounds of race and colour in that, had she been French Canadian, they would have taken stronger action to prevent the harassment.

S. 7(1) of the Act reads as follows:

> 7(1) No employer shall
>
> (b) discriminate against any person with regard to employment or any term or condition of employment,because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

The School Board acknowledged the seriousness of the incidents; however, it contended that it had responded appropriately and, therefore, it should not be held liable for discrimination in the form of workplace harassment.

The Decision

When addressing the claim, the Tribunal first considered the issue of whether the School Board had discriminated against VM in the form of workplace harassment. The Tribunal Chair set out the legal test for workplace harassment in the context of a human rights complaint: "unwelcome conduct related to prohibited grounds of discrimination that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment." Applying the test to the facts in this case, and taking into consideration all the incidents that occurred between November 2007 and April 2009, the Tribunal established that there was a prima facie case of workplace discrimination, noting:

> "I am of the view that the incidents complained of in this case, particularly from November 2008 onward, are of a magnitude that is manifestly greater than mere bad behaviour. There is no question that the acts were unwelcome, that they were based on prohibited grounds, and that they detrimentally affected [VM]'s work environment. The content of the repeated incidents directed at [VM] establishes a pattern of harassment on prohibited grounds and constitutes a prima facie case of discrimination perpetrated by S."

Because many of the messages contained insults and innuendos based on race, colour, gender and ancestry the behaviours fell within the purview of prohibited grounds under s. 7(1) of the Act. The School Board did not contest the seriousness or the nature of the incidents; therefore, the Tribunal confirmed that S had discriminated against VM.

In order for VM to succeed in her claim, however, the Tribunal also had to determine whether the School Board could be held liable for S's actions. She was, after all, a third party to the employer-employee relationship. In other words, the Tribunal analyzed whether the "employer discriminated in contravention of s. 7(1) of the Act, failing in its obligation to provide a workplace free of discrimination." Citing case law from several Canadian jurisdictions, she established that the Act must be interpreted in a broad and purposive manner, permitting the duty of an employer in Alberta to extend to provide "a workplace free of discrimination from third parties who are not employees."

Many factors, including the student-teacher relationship, resulted in the Tribunal's finding that the School Board was liable for S's actions. Moreover, the School Board was best positioned to take effective remedial action. It had "authority over S to whom it was required to deliver an education program (...) and failed to respond as fully as it should have to S's harassment of [VM]." Although the Tribunal recognized the School Board's efforts to prevent the harassment, it characterized them as "piecemeal", stating:

> "[T]he actions of the [School Board] fell short of addressing the conduct in an effective and well-coordinated way. Additional actions might have been implemented earlier to put greater distance between the complainant and S, to avoid putting S in direct contact with another of the [VM]'s family members. ... S's conduct and the harassment (...) were being dealt with transaction by transaction rather than being viewed in the context of the increasing number and severity of incidents."

It is nevertheless interesting to note that the School Board's efforts in response appear to have impacted the award of damages, set at only $7,500. The Tribunal stated

that, but for the School Board's efforts to end the contravention the "award of damages would have been (...) higher."

The second discrimination issue, concerning the School Board's failure to provide adequate support due to the fact that she was of Mexican ancestry, was dismissed due to a lack of evidence.

The Impact

In sum, the Tribunal allowed the complaint in part, concluding that the School Board was liable for the student's discriminatory harassment in the workplace.

More generally, this decision confirms that an employer in Alberta can be held liable for harassment committed by a third party in the workplace, but only if the employer has authority over both the employee's workplace and the third party. It is consistent with case law in other jurisdictions such as Ontario, Manitoba, Saskatchewan and British Columbia.

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1. 2014 AHRC 5 (CanLII).
2. Ibid., para. 81.
3. Ibid., para. 83.
4. Ibid., para. 86.
5. Ibid., para. 87.
6. Ibid., para. 91.
7. Ibid., para. 92.

PRESIDENT'S MESSAGE

Memories of the sunny days and mild weather in Kelowna, BC – when faced with the traditional late and meandering entry of spring in St. John's, NL – make me nostalgic, already, for the beautiful setting and engaging content of the 26th annual CAPSLE Conference. The venue and surrounding area could not have been more inviting – as a first-time visitor to the area I was once again amazed by what our country has to offer, and grateful to be able to be there among colleagues and friends for such a worthwhile professional learning opportunity. In addition to the picturesque location, the program for this year's Conference was excellent, covering so many of the topics and issues in education law that are relevant and timely for CAPSLE members, while providing time for Conference attendees and presenters to interact both socially and professionally – the kind of networking and sharing opportunities that are an invaluable feature of the CAPSLE community.

On behalf of CAPSLE, I would like to thank chairperson Sue Ferguson and all the members of the Conference organizing committee for their hard-work in planning and putting-off such an outstanding event in the heart of British Columbia's wine country. It can be risky to veer off the beaten path, but in doing so we also open the door to new issues, ideas and people. The range and caliber of speakers and the quality of presentations in Kelowna certainly shows that CAPSLE continues to attract presenters with a wealth of knowledge and diverse perspectives on important education law topics. CAPSLE extends a sincere thanks to all of these presenters and to Conference sponsors, all of whom have given freely of their time and resources – contributions which were critical to ensuring the success of this year's Conference.

A number of comments received through the Conference evaluation forms reveal that, like me, many participants are already looking forward to next year. I am happy to be able to report that next year's organizing committee, co-chaired by CAPSLE Board members Judith Parisien and Maria Gergin, is already well on the way towards planning the 2016 CAPSLE Conference in the home of next year's Stanley Cup champion team (personal bias acknowledged) … Toronto, Ontario. The Conference will take place May 1-3, 2016 and, aside from the obvious draw of the Maple Leafs, Conference attendees will be able to experience the new Delta Toronto Hotel, situated in the fresh and exciting SoCo (Southcore) neighbourhood, close to many popular downtown attractions. So, mark the date, spread the word, and consider submitting a proposal to present a paper at the Toronto Conference – the official Call for Papers is included with this newsletter.

In closing, I would like to say a special word of thanks to departing CAPSLE Board members, Past President Page Kendall, and Directors Sue Ferguson, Shaun McCormack and Kerry Richarson – your contributions have been vital to all that CAPSLE does. I also extend a warm welcome to new Board members Cory Schoffer, Jerome Delaney and David Mushens – I look forward to working with you over the next year.

I wish everyone a warm and relaxing summer – see you in Toronto!

Stefanie Tuff
CAPSLE President

TEACHER REINSTATED AFTER ALLEGATIONS OF SEXUAL ABUSE

On December 19, 2014, Arbitrator Lorne Slotnick reinstated a York Region teacher who had been criminally charged with sexually assaulting a student. In *Re York Region District School Board and ETFO* [A.R.] (2014), 121 CLAS 305, Arbitrator Slotnick considered the interaction between criminal and labour arbitration proceedings. Arbitrator Slotnick concluded there was insufficient evidence to establish sexual misconduct. The grievance was allowed and the teacher was reinstated.

Factual Background

During the 1994-1995 school year, teacher A.R. was working at a public school in the Scarborough Board of Education, and he taught a grade 8 student named Michael. When Michael's father became ill, his mother asked A.R. to keep a close eye on Michael. The two formed a close relationship, which extended to tutoring at Michael's home and attending his hockey games. Mr. A.R. maintained a friendly relationship with the family after that year, eventually coaching volleyball with Michael's older sister and asking Michael's two sisters to house-sit while he was on vacation.

In 2010, Michael told his family - and then the police - that. A.R. had sexually abused him during his grade 8 year, 16 years earlier. He alleged that A.R. had kissed him on the cheek and mouth, held hands with him, told him he loved him, and masturbated him. A.R. denied the allegations.

A.R. was charged with five counts each of sexual assault and sexual interference. He was ultimately acquitted of all charges. The Trial Judge preferred Michael's evidence to A.R.'s, finding him to be a more believable witness who he strongly suspected was telling the truth; however, the Judge was still left with a reasonable doubt of A.R.'s guilt. Because the criminal burden of proof had not been established, he dismissed the charges.

While the criminal proceeding was underway, the York Region District School Board (by then A.R.'s employer) transferred A.R. to another position that did not involve interaction with minors, and then transferred him to home duties. Once A.R. was acquitted, the Board undertook its own investigation. Relying on the different standard of proof required in the civil context, the Board concluded that the evidence showed, on a balance of probabilities, that A.R. had engaged in grooming behaviour, established an inappropriate personal relationship with a student, and touched the student in an intimate and sexual manner.

The Board terminated A.R.'s employment, and he grieved the termination.

Evidence at the Arbitration

The focus of Arbitrator Slotnick's decision was the testimony of the various witnesses he heard over the course of the arbitration. While noting that the case did not turn on credibility, the Arbitrator did need to carefully examine many of the details raised by the key witnesses in order to determine if just cause existed for A.R.'s termination.

Arbitrator Slotnick noted that there were a number of inconsistencies in Michael's testimony, including the number of times, the locations, or the time and date that certain acts occurred. Michael also failed to remember details of many incidents he alleged had occurred, and Arbitrator Slotnick found that some of his allegations were too vague or simply implausible. Further, a comparison of Michael's testimony with that of his sister and mother indicated that not all the family members remembered things in the same way, or at all. In some instances, Michael's testimony at the arbitration was compared and found to be inconsistent with his testimony at the criminal proceeding.

Another former student, Daniel, testified that A.R. had behaved inappropriately towards him during the 1990s. Arbitrator Slotnick noted that A.R. had replied to Daniel's testimony by stating that certain allegations – such as kissing on the cheek – were "not his practice". In contrast, he had outright denied the allegations made by Michael. Further, Arbitrator Slotnick made note of the fact that Daniel was the only person who came forward after police requested information about A.R.; since A.R. had been teaching for over 20 years, Daniel's solitary appearance was significant.

The Arbitrator also noted A.R.'s ongoing relationship with the family:

> [A.R.'s] continuing friendship with the family long after he had any regular contact with [Michael] also casts some doubt on the likelihood that he engaged in sexual abuse. Had he been guilty of sexual abuse, one might have expected him to cut off relations with the family… as his continued friendship might prompt [Michael] to reveal what had occurred; instead, he continued the

> friendship, which in my view is more consistent with [A.R.'s] evidence that none of his activities with Michael were sexual.

Similarly, Arbitrator Slotnick questioned why Michael's sister would continue her relationship with A.R. if she had, as she testified, seen something of concern.

While some of the inconsistencies could be explained by the passage of time or suppression of negative memories, Arbitrator Slotnick concluded there were too many holes in Michael's story. Although he noted that there is only one civil standard of proof – a balance of probabilities – Arbitrator Slotnick held that an allegation of sexual misconduct does require clear, cogent, and convincing evidence.

The Arbitrator's Decision

Arbitrator Slotnick concluded that Michael's evidence was not sufficiently clear, cogent, and convincing for a finding that sexual abuse occurred on the balance of probabilities. While noting that "common sense demands a high standard of behaviour from teachers… as does the Education Act," this could not address the problems raised by the fact that the allegations were historical. Arbitrator Slotnick stated:

> I have little doubt that [Michael] sincerely believes he was sexually abused by. [A.R]. But memory is fallible. The issue is not the sincerity of the witness but the reliability of his evidence. A witness who sincerely believes he is truthfully recounting events from long ago may still be entirely or partly wrong. As the criminal trial judge said…"the influences upon the life of a witness over the course of many years also make it difficult to fairly assess an apparent lack of motive to fabricate."

Arbitrator Slotnick also noted that much of the close relationship between Michael and A.R. could be attributed to the request that A.R. keep a close eye on a student whose father had fallen ill. He concluded that, essentially, A.R. had simply done what was asked of him. While Arbitrator Slotnick did "not fault the school board official for their actions", since the "board must be seen to be doing its utmost to protect students", he nonetheless concluded that the evidence after an eight-day hearing with thorough examinations did not establish the allegations to the standard required.

Because the employer had not proven its claim that A.R. had engaged in sexually inappropriate behaviour with a student, the grievance was allowed and A.R. was ordered to be reinstated with full compensation.

Implications

An allegation of sexual assault is very serious and can end a teacher's career. On the other hand, the importance of protecting students from such conduct cannot be understated. Careful management of a sexual assault allegation is crucial for a school board, and Arbitrator Slotnick's decision emphasizes that evidence will be closely scrutinized before a termination decision is upheld or overturned.

The decision also sheds light on the interaction between criminal and civil proceedings. Employer investigations may reach a different conclusion because of the different standard of proof, as the York Region District School Board did in this case. However, even on a civil balance of probabilities test, there must be clear, cogent, and convincing evidence to support a termination.

Finally, this case reflects some of the issues that may arise when a teacher and student form a close relationship outside of the classroom. While often a positive experience, lines may be blurred and the teacher and school may be put at risk for future claims of abuse.

School boards should implement and diligently enforce policies to ensure appropriate teacher-student relationships, as well as adhere to their statutory reporting duties. The Ontario College of Teachers professional advisory on Professional Misconduct Related to Sexual Abuse and Sexual Misconduct identifies the legal, ethical, and professional parameters governing teacher behaviour and aims to prevent sexual abuse of students. School boards are required to report to the College of Teachers whenever a teacher is charged with a sexual offence; has engaged in conduct that the board believes the College should review; or has been terminated, had their duties restricted, or resigned during an investigation for reasons related to professional misconduct.

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CAPSLE's 27th Annual Conference - Delta Toronto Hotel

CASL STANDARD EMAIL CHECKLIST

Canada's Anti Spam Legislation (CASL)

As of July 1st 2014, CASL prohibits persons (individuals, corporations, and other identified entities including school boards) from sending a Commercial Electronic Message (CEM) unless:

- the recipient of the CEM has given Consent (s. 6 (1) (a));
- the CEM contains the required Contact Information; and
- there is a simple Unsubscribe Mechanism. (s. 6 (1) (2))

CASL sets out some situations where consent can be implied. However, it may be difficult to record and retrieve proof of implied consent. Therefore, the preferred approach is to obtain Express Consent from the person who is the recipient of the CEM.

Express Consent Requirements

A request for express consent must:

- identify the purpose or purposes for which the consent is being sought;
- include the required contact information for the sender of the CEM; and
- include the required unsubscribe mechanism. (s. 10 (1))

NOTE: If you do not have consent, you cannot send an email to request consent. This type of email is classified as a CEM and is prohibited. (s. 1 (3))

Contact Information Requirements

If you send a CEM, the CEM must include:

- your personal name and your business name, if different from your personal name;
- your mailing address; and
- either your telephone number providing access to an agent or a voice messaging system;
- your email address; or
- your web address. (s. 6 (2); Regulation 2013-36, s. 2).

A CEM on behalf of another person (individual, corporation, school board) must include:

- the standard contact information, as set out above, for the person on whose behalf you are sending the CEM, and
- a statement indicating which person is sending the CEM and which person on whose behalf the CEM is sent. (s. 6 (2); Regulation 2013-36, s. 2).

The contact information in a CEM must enable the recipient to readily contact the sender and must remain valid for a minimum of 60 days after the CEM has been sent. (s. 6 (3))

If it is not practicable to include the contact information and the unsubscribe mechanism in the CEM, that information may be posted on a web page with a link to the web page in the CEM.

Unsubscribe Mechanism Requirements

The required unsubscribe mechanism in a Commercial Electronic Message (CEM) must:

a) enable the recipient of a CEM to indicate, at no cost, their wish to no longer receive any commercial electronic messages from the sender of the CEM, using
   i) the same electronic means by which the message was sent, or
   ii) if using those means is not practicable, any other electronic means to indicate the wish; and
b) specify an electronic address, or link to a page on the World Wide Web that can be accessed through a web browser, to which the indication may be sent. (s. 11 (1)).

Purpose of Canada's Anti Spam Legislation (CASL)

The purpose of the new legislation is to regulate unwanted emails (i.e. Spam) that discourage the authorized use of electronic means to carry out commercial activities.

Some of the key terms used in the legislation are as follows:

Person

means an individual, partnership, corporation, organization, association, trustee, administrator, executor, liquidator of a succession, receiver or legal representative. (s. 1 (1))

Commercial Activity

means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, (an expectation of profit is not required) other than any transaction, act or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada. (s. 1 (1))

An Electronic Address

means an address used in connection with the transmission of an electronic message to an electronic mail account; an instant messaging account; a telephone account; or any similar account. (s. 1 (1))

An Electronic Message

means a message sent by any means of telecommunication, including a text, sound, voice or image message. (s. 1 (1))

A Commercial Electronic Message (CEM)

is an electronic message that, having regard to its content, hyperlinks, or contact information it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

- offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- offers to provide a business, investment or gaming opportunity;
- advertises or promotes anything referred to in paragraph (a) or (b); or
- promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so. (s. 1 (2))

NOTE: An electronic message that contains a request for consent to send a message described above is also considered to be a commercial electronic message. (s. 1 (3))

Maximum Penalty

The maximum penalty for a violation is:

- one million dollars ($1,000,000) in the case of an individual, and
- ten million dollars ($10,000,000) in the case of any other person (i.e. a corporation, a school board, etc.). (s. 20 (4))

Examples of Commercial Electronic Messages (CEM's)

The following are some examples of CEM's:

- School Newsletters: if they contain an invitation to participate in a commercial activity (product sales, magazine subscriptions, student photos, milk and pizza sales);
- Emails about fundraisers, if not simply a request for funds;
- Travel opportunities (e.g., Grade 8 trip);
- Communications between staff regarding non-board business (sponsor colleague, attend a home sales party);
- Invitations to respond to Requests for Proposals (RFP's);
- Any fundraising by non-registered charities (Catholic School Councils, Student Councils).

Board Internal and Business Emails

CASL has some exemptions and implied consent provisions for certain Board internal communications and specified Board communications to other businesses which have not been dealt with in this submission.

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SCHOOL STABBING REPORT MAKES 41 RECOMMENDATIONS TO IMPROVE SCHOOL SAFETY

On September 23, 2014, Toronto high school student Hamid Aminzada died after being stabbed at North Albion Collegiate Institute. Police said Hamid was stabbed while trying to intervene in a dispute between two students in the school's hallway. After Hamid's tragic death, the Toronto District School Board (the "Board")

established a steering team (the "Team"), including educators, experts in community engagement and security experts, to conduct an independent review into the circumstances surrounding Hamid's death and to review more generally how the Board can best support the safety of all students and staff, both before and after critical incidents. The Team published its report in March 2015 entitled School Safety and Engaged Communities (the "Report").

Key Facts

The Report summarized the circumstances relating to Hamid Aminzada's death as follows:

- On September 23rd of 2014, at about 12:30 p.m., the lunch hour at North Albion Collegiate Institue (NACI) had just ended and students were beginning to move to their classes.
- On the main floor of the school near the auditorium, two students became involved in an altercation. The suspect of the incident allegedly pulled out a knife and stabbed Hamid Aminzada, a grade 12 full time student at NACI, in the chest despite other students and cameras being present.
- Hamid walked a short distance down the hallway before collapsing where he was attended by several students on the scene. The suspect fled the school while another student ran to the office for help. Two members of the administrative team and several other staff members rushed to the scene.
- Upon receiving notice of the incident, staff called 9.1.1. at 12:40 p.m., and the school was placed in lockdown pursuant to the Ministry of Education's (MOE) and the Toronto District School Board's school safety protocols. Toronto Police Service (TPS), Toronto Fire Service (TFS) and Emergency Medical Services (EMS) responded quickly and attended to Hamid who was transported to hospital where he succumbed to his injuries that afternoon.
- After it was verified that the suspect was no longer in the building, the lockdown at NACI was systematically lifted by the police. Witnesses were secured at the school and interviewed by police. This resulted in the suspect being identified, arrested, charged with Second Degree murder and placed before the courts.

Review Process

The Team consulted over 500 people, held two public community forums and received over 35 written submissions from staff and members of the public. The Team reviewed the facts surrounding the altercation which lead to Hamid's death, including the circumstances relating to the tragic event and the system response. It also reviewed whether effective crisis response procedures were already in place to assist staff in their response and whether, in responding to the incident, there was effective cooperation between Board staff and other stakeholders, such as parents, police, paramedics, the media and other agencies.

Recommendations

Generally, the Team was satisfied with the response to the incident. The Report concluded that those who were present at the school at the time of the incident reported that the crisis was, for the most part, handled well. Staff and Emergency Services responded quickly to attend to Hamid and place the school in "lockdown". Nonetheless, the Team made several recommendations for action in the following four areas:

1. Crisis Response;
2. Caring and Safe Environments;
3. Policies, Procedures and Practices for Safety in Schools; and
4. Community Engagement and Support.

Crisis Response

The Team supported the response of school staff alongside emergency services personnel. The Team highlighted, however, that there were a number of issues around communication during the school lockdown. In particular, the Report recommended that the Board transition its crisis response teams to Emergency Management Response Teams in order to ensure enhanced emergency management procedures.

The Report also raised concerns regarding long-term support for students and staff to help deal with the emotional impact of the incident and the need for debriefings with feedback from Emergency Services following both drills and actual lockdowns. These recommendations point to the Team's emphasis on the need for the response to such an incident to endure beyond its immediate aftermath and the need to continue to ensure that adequate supports and procedures are in place over the long-term.

Caring and Safe Environments

The Team emphasized that safe schools require more than security cameras. They also require an environment that encourages health and respectful relationships. Students and staff pointed to a greater need for peer mentoring, support for students with mental health issues and extended transitional support for students who are non-discretionary, administrative transfers.

The Report also states that a safe environment is supported by the physical condition in which students learn. The Report concluded that an assessment of repairs and maintenance should be undertaken to ensure that schools, and as a result students, do not feel neglected.

Policies, Procedures and Practices for Safety in Schools

The Team's recommendations in the Report highlight the well-rounded approach that the Team concluded was needed in order to ensure safe, clean, nurturing and stimulating environments for students. The Report also emphasized the need for more traditional security measures to be taken in schools. The Team did not endorse the use of metal detectors. However, the Team did recommend manually locking doors at the start of a school day, instituting electronic access controls, and an ongoing maintenance programs for existing CCTV or DVR surveillance systems.

Notably, the Report recommended the Board should review and revise its Workplace Violence policy, under the Occupational Health and Safety Act, to "clarify the information to be shared about a student or employee who is likely to pose a threat of harm to another student or employee in the workplace". Training on the policy, and supporting procedures on receiving, disseminating and storing such information was also recommended.

The Report highlighted that the Board "is one of the few boards in Ontario that does not have regular supervision duties scheduled into teacher timetables." As such, the Team recommended that supervisory duties be included in the 2015 collective bargaining process with the goal of increasing the supervision duties of secondary school teachers.

Community Engagement and Support

The Report emphasized the need for students, families, schools, social services, and secular and faith based agencies to collaborate to create safe environments for students. The Team encouraged greater collaboration between the Board and community service providers to ensure that limited resources are maximized. This includes collaboration between the Board, the City of Toronto, the Toronto Police Service and the Toronto Youth Equity Strategy.

Conclusion

The recommendations put forth in the Report cover a variety of issues impacting safety in schools in Toronto and across Ontario. The recommendations, if implemented, will affect students, teachers, school administrators and members of the community at large.

Some concerns have been raised in response to the Report, such as the view that the Report did not adequately address the broader systemic issues that contribute to violence in schools or that many of the recommendations have been heard before without being successfully implemented.

In order for the Board to move forward with any recommendations in the Report, further resources and participation of third parties will be necessary. In fact, several of the recommendations cannot be implemented on the initiative of the Board alone. For example, the Report asks for compromises during the 2015 collective bargaining process, cooperation from Emergency Services and collaboration with community agencies. The Report has recommended that an external team conduct an audit of progress on the recommendations after a period of nine to twelve months.

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1. For a complete copy of the Report, please see: http://www.tdsb.on.ca/AboutUs/Accountability/SchoolSafetyandEngagedCommunitiesReport.aspx

CAN A SCHOOL ADMINISTRATOR INSIST ON BREATHALYZER TESTING AS A PRECONDITION TO ADMISSION TO A SCHOOL PROM?

Background

It is probably fair to say that underage drinking is a concern for most high schools in the country, particularly before, during and after school-sponsored events. One Toronto high school attempted to tackle the problem by imposing a mandatory breathalyzer test on all students attempting to enter the Spring 2014 senior prom, which was to be held offsite. Those students who did not pass - or who refused to take the test - would not be admitted to the

dance. The school principal was motivated by what he perceived as a culture of alcohol use at school dances, including excessive use resulting in intoxication, and in the most serious cases, hospitalization, although the evidentiary record did not ultimately support his contention.

Not surprisingly, the move to impose mandatory breathalyzer testing was met by resistance from some members of the student body. They perceived the requirement as "insulting," and as an infringement of their right under s. 8 of the *Canadian Charter of Rights and Freedoms* [the "Charter"] to be free from unreasonable search and seizure. Two students brought an application to the Ontario Superior Court of Justice for a declaration that the mandatory testing as a pre-condition to admission to the prom constituted an infringement of their s. 8 Charter rights, and that it would breach the school board's own policies and procedures. They also sought an order preventing the administration of the breathalyzer testing. While their initial request was for an immediate ruling, it was ultimately agreed that a full record was needed to properly address the issues raised, which would prevent the matter being adjudicated prior to the 2014 prom. However, on a without prejudice basis, it was also agreed between the parties that no breathalyzer testing would take place as a pre-condition to admission to the 2014 prom. Instead, the normal procedures for monitoring and responding to student intoxication that had been used previously were carried out.

The Case

The case engages the balance of rights and interests at the intersection between personal privacy and health and safety. In theory, the imposition of a blanket requirement for breathalyzer testing before a prom is an obvious way to avoid the risks to health and safety that may accompany underage drinking and intoxication prior to and during such an event. However, there is a price for such a significant impairment of a student's person and bodily integrity. Ultimately, the legal reasoning in this case relates to whether or not that price is too steep given the objective of the testing and the circumstances that prompted it and would have surrounded it. After careful reflection, the Ontario Superior Court found that it was. The blanket testing that was contemplated was deemed to be an unreasonable search and seizure in contravention of s. 8 of the Charter that was not saved under s. 1.

In reaching that decision, the Court (in reasons issue February 23, 2015)[1], concluded that there were 5 key issues at play. Each will be addressed in turn.

1. Whether the Charter Applies to a School Prom

The first question addressed in the reasons for decision is whether or not the Charter applies to school authorities at off-site school events such as a prom. The Court made short work of the response, noting at para. 39 that the school authorities, including the principal whose powers and duties flow from the *Education Act*, "are carrying out a 'quintessentially government function' to which the Charter should apply. The Court determined this to be the case despite the fact that the prom event was to be held offsite because it remained a school sanctioned event over which the principal was attempting to exert his power as a principal.

2. If the Charter Applies, is s. 8 Engaged by a Mandatory Breathalyzer Test?

The second issue addressed by the Court is whether, given that the Charter applies to school authorities at a prom, s. 8 would be engaged if school authorities subject students to a mandatory breathalyzer test. The Court concluded that this question encompassed three sub-issues:

> (i) Do the students consent to a breathalyzer?
> (ii) Do the students have a reasonable expectation of privacy to be protected by section 8?
> (iii) If so, is there a diminished expectation of privacy because of the context of a school prom?

(I) Consent

With respect to the issue of consent, the Court determined that for consent to be valid, the choice to give consent must be "meaningful," in accordance with the standard established by the Supreme Court of Canada in *R. v. Borden*, [1994] 3 S.C.R. 145. On the facts before the Court, although the students retained a choice as to whether or not to attend the prom - and therefore whether or not to take the breathalyzer test - and had the legal capacity to make that choice, it was not a "meaningful" choice because the evidence did not establish that "the students were aware of the nature of the breathalyzer screening to which they were consenting… who would be administering the breathalyzer test, how it would be administered, and what it could reveal" (para. 67). Informed consent was required given the fact that the breathalyzer test entailed a seizure of a bodily sample, which is a significant infringement of one's bodily integrity (para. 69). The Court also concluded that the

students were unlikely to be fully aware of the consequences of consenting to the seizure, which went well beyond the possibility of being denied entry to the prom, and encompassed the full implications that accompany the waiver of a Charter right (para. 72). Perhaps most intriguingly, the Court accepted that the students could not make a meaningful choice when the choice with which they were confronted was between being allowed to attend an event that both parties acknowledged to be a "rite of passage" or "social milestone," and being subject to a seizure of a bodily sample. In light of these findings, the Court concluded consent to the breathalyzer had not been established on a balance of probabilities (paras. 69-75).

As a result of that conclusion, the Court found that s. 8 of the Charter was engaged by the proposed breathalyzer testing. This then required the consideration of the second sub-issue: Did the students have a reasonable expectation of privacy to be protected by s. 8, and if so, is there a diminished expectation of privacy in the context of a school prom?

(ii) Do the students have a reasonable expectation of privacy to be protected by s. 8?

The Court canvassed the prevailing case law that established that the guarantee from unreasonable search and seizure only protects a reasonable expectation (paras 78-80) and concluded that the students did have a reasonable expectation of privacy in the circumstances. The seizure of breath samples held the potential to reveal the students' blood alcohol levels, which in turn would reveal "lifestyle and personal choices of the individual" (para. 85). The Court found that the students have a subjective expectation of privacy in the circumstances that is objectively reasonable, and further, the Court accepted that this expectation did not become unreasonable simply because the proposed infringement was to take place at a school prom.

(iii) Is there a diminished expectation of privacy in the context of a school prom?

With respect to the final sub-issue on this point, the Court accepted that there is a diminished expectation of privacy in a school setting (including a prom) given the over-riding obligation to provide a safe environment and maintain order and discipline in a school community. The Court also accepted that that the role of teachers is such that they must have the power to search. However, that is not an unfettered power: each search must be reasonable in the circumstances (para. 90-91, 95). A diminished expectation of privacy does not alter that reality, and "does not give school personnel authority to over-ride the students' Charter protected right to be free from unreasonable search and seizure" (para. 97).

In sum, the Court concluded that s. 8 was engaged by the proposed testing, which led to an assessment of the standard to apply with respect to breathalyzer testing at a prom.

3. What standard applies when reviewing the seizure of breath samples by school officials?

In considered the appropriate standard to apply when reviewing the seizure of breath samples by school officials, the Court found that the critical concern was whether the breathalyzer search was "reasonable." That in turn required assessment of what constitutes a reasonable search in the school context. At paragraph 104, the Court quoted the seminal standard for a reasonable school search as set out in *R. v. M.(R.M).*, *[1998]* 2 S.C.R. 393*, that "[a] search by school officials of a student under their authority may be undertaken if there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched."*

Upon a review of the evidence, the Court concluded that the principal did not have reasonable grounds to believe that there would be drinking before the prom. At best, the Court found, the principal had a suspicion, or an "educated hunch or intuition," and that was not sufficient to meet the threshold for a reasonable search.

4. Is the seizure of breath samples unreasonable and a violation of s. 8?

The Court went on to assess the fourth issue, namely whether the breathalyzer testing would constitute a violation of s. 8 of the Charter. The Court noted that the testing would not be carried out in a sensitive manner. On the contrary, it had the potential to be "humiliating and demeaning" because it entailed having students line up publically to take the test in view of the other students present. In addition, the testing was not minimally intrusive. There were other means available, which had been used in the past, to assess and monitor and address student intoxication at school events. A search of the student's person and seizure of a bodily sample is highly intrusive, and the Court concluded that it was disproportionate to the nature of the suspected problem that it was intended to address (paras. 142-145). The proposed testing therefore was declared in all the circumstances to be a breach of s. 8 of the Charter.

5. Is the violation of s. 8 saved by s. 1 of the Charter?

The finding that the testing would violate s. 8 of the Charter was not conclusive, however. There remained the question of whether the violation of s. 8 was saved by s. 1. Under section 1 of the Charter, an unconstitutional act may nonetheless be saved if it is shown that the limit "can be demonstrably justified in a free and democratic society." To meet that stringent test, the Respondent carried the onus to establish that the objective of the unconstitutional search was "of sufficient importance to warrant overriding a constitutionally protected right or freedom," and that the means chosen are reasonably and demonstrably justified. The latter requirement mandates an assessment of the proportionality of the infringement in relation to the desired objective (paras. 151-152).

In this instance, the Court concluded that the violation of the students' right not to be subjected to unreasonable search and seizure was not saved under s. 1 of the Charter because, in part, there was no "rational connection" between the objective claimed by the principal and the likely outcome of the administration of the test. More particularly, there was no evidence of a major health and safety concern involving the consumption of alcohol in relation to school dances and proms, which was the rationale put forward for the testing by the principal. On the contrary, the evidence disclosed only a small number of alcohol-related incidents at school dances involving only a small number of students. As a result, the Court found that the imposition of mass testing on all students was not rationally connected to the principal's objectives.

In addition, the Court found that the testing was not minimally impairing given that it would interfere with the bodily integrity of the students who took the test. Other less intrusive options were available. Finally, the Court found that the proposed testing was a disproportionate response in light of the evidence.

The Order

In light of its findings and conclusions, the Court granted a declaration as follows:

> (1) The Charter applies to school authorities at off-site school events such as a prom.
> (2) Section 8 is engaged when school authorities subject students to mandatory breathalyzer testing.
> (3) The standard that applies when reviewing the seizure of breath samples by school officials is that articulated in *M.R.M.*: reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched.
> (4) The administering of a mandatory breathalyzer test as a pre-condition to entry at the school prom is inconsistent with the TDSB Code of Conduct, the TDSB Search and Seizure Procedure and the powers of school authorities under the Education Act.
> (5) The seizure of breath samples is unreasonable and a violation of section 8.
> (6) The violation of section 8 is not saved by section 1.
> (para. 166)

Take-aways for School Administrators

Although there is no question that student intoxication during school sponsored events is a serious issue that warrants a reasoned response and intervention, in the absence of clear evidence of a wide-spread problem, and evidence that other less intrusive means of addressing that problem have been attempted without success, it is unlikely that a blanket requirement for breathalyzer testing will meet the standard for a "reasonable" search and seizure under s. 8 of the Charter or that it will meet the requirements of proportionality and minimal intrusion under s. 1 of the Charter.

This case did not close the door on the possibility of testing when there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched. Accordingly, it is possible that some degree of "for cause" testing might pass muster, such as in the case of a student who manifests signs of impairment on arrival at a school function, although in most cases, it is more likely that less intrusive means of addressing alcohol related issues will be available. Even if there is a legal basis for "for cause" breathalyzer testing in a specific set of circumstances, to survive judicial scrutiny, this case suggests that the testing would have to be carried out with a measure of privacy (i.e. likely not in front of other students) and after clear communication to the affected student about the purpose, process and potential consequences of the testing. Even then, the standard will be difficult to meet in the absence of clear and meaningful consent, as long as other less intrusive means of dealing with the problem exist.

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1. *Gillies et. al. v. Toronto District School Board* 2015 ONSC 1038 (CanLII).

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