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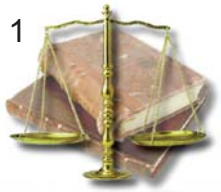

COMMENTS

NOVA SCOTIA'S CYBER-SAFETY ACT

On August 6, 2013 the Nova Scotia *Cyber-safety Act* [the Act] was proclaimed. This legislation represents significant steps by Nova Scotia to address online bullying and, in the legislation's words, "provide safer communities." In doing so, Nova Scotia serves as an innovator in provincial legislation for combating cyber-bullying and other provinces will likely look to its successes and failures for guidance.

Background

Recently, the Government of Nova Scotia has been under pressure to address youth safety, bullying and the dangers of social media. This pressure was ignited by the suicide of high school student Rehtaeh Parsons, 17, on April 4, 2013. Ms. Parsons' family attributed her suicide to what was described publicly as several years of cyber-bullying after an alleged sexual assault when she was 15. Ms. Parsons' story brought media attention to issues such as cyber-bullying and the ways in which bullying behaviour has evolved through social media. The public responded by demanding greater action from police and government to help youth deal with cyber-bullying.

On April 25, 2013, less than a month after Ms. Parsons' death, the Government of Nova Scotia introduced legislation in response to cyber-bullying.

The *Cyber-safety Act*

The Act is a multi-faceted attempt to make it easier for individuals to report bullying and to give the courts increased authority to protect victims of cyber-bullying. The main provisions of the Act are as follows:

1. Greater powers and responsibilities to principals and school boards through amendments to the *Education Act*.
2. Parental responsibility for cyber-bullying in some circumstances;
3. Creation of a cyber-investigative unit;
4. Victims of cyber-bullying may apply for a protection order from the court, and
5. New statutory tort of cyber-bullying which permits individuals to sue for damages or obtain an injunction.

Definition of Cyber-Bullying

The Act provides a broad definition of cyber-bullying that includes both adults and minors (less than 19 years of age). The Act defines cyber-bullying as:

> [A]ny electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way.

Greater Powers and Responsibilities of Educators

The Act grants school principals the power to discipline students for bullying that occurs both on and off school property. For example, a principal may suspend a student who engages in disruptive behaviour on property adjacent to the school or on a school bus. If a student engages in disruptive behaviour off school property that "significantly disrupts the learning climate at school," a principal may also suspend the student. The suspension may not exceed five days. In addition, school boards are required by the Act to cooperate with government agencies, such as Nova Scotia's new cyber-bullying investigative unit Cyber SCAN (discussed below), to promote a safe learning environment.

Parental Responsibility

Furthermore, parents who do not prevent their minor children from engaging in cyber-bullying are deemed by the new legislation to engage in cyber-bullying. Where a minor engages in cyber-bullying, and a parent (a) knows of the activity; (b) knows or ought reasonably to expect the activity to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation; and (c) fails to take steps to prevent the activity from continuing, the parent is deemed to have engaged in cyber-bullying. As such, they may be found civilly liable for the damages caused by their minor children.

Cyber-Investigative Unit

The Act establishes Cyber SCAN, an investigative unit within the Nova Scotia Justice Department charged with responding to complaints of cyber-bullying and negotiating resolutions between bullies and victims. Cyber SCAN is the first investigative body of its kind in Canada. Although it has no authority to make orders, the unit's director was granted discretion to take any action that he or she considers appropriate, including the power to request an internet service provider discontinue service to an Internet Protocol address. The Director of the unit may also apply to the court for a protective order.

Protective Order

The Act also permits a victim, who has already made a complaint to Cyber SCAN, to file an application with the court for a protective order. Interestingly, the application may be made without notice to the respondent (bully) and the application may identify the respondent by Internet Protocol address if his or her identity is unknown. If the court is satisfied the respondent engaged in cyber-bullying and the bullying is likely to continue in the future, it may make a protection order. A justice may make any order he or she considers necessary for the protection of the bullying victim, including prohibiting the bully from contacting the victim or restricting the bully's use of electronic communication.

Statutory Tort

The Act states that cyber-bullying is a tort. As such, the Act grants the courts authority to award damages to a plaintiff, issue an injunction, and make any other order the court considers just and reasonable. Further, the parent of a cyber-bully who is a minor is jointly and severally liable for any damages awarded to the plaintiff. The parent may only escape liability if it can be demonstrated that he or she exercised reasonable supervision of the cyber-bully and made reasonable efforts to discourage the child from engaging in cyber-bullying.

Reaction to the Act

The Act has faced several criticisms. First, critics argue that the Act's definition of cyber-bullying is too broad and will enable individuals to bring applications before the court for "hurt feelings." Second, media have questioned the application process established by the Act whereby individuals can bring applications for protective orders without notifying the respondent. Third, concerns have been raised regarding whether the legislation violates an individual's *Charter of Rights and Freedoms* guarantee of freedom of expression.

Criticism of the Act focuses on doing more to protect victims of cyber-bullying. For instance, critics note that existing *Criminal Code* provisions, such as anti-harassment provisions, are rarely invoked and provide little protection. However, critics have questioned if the Act has gone too far.

The Nova Scotia legislation has also ignited interest from other provinces. Alberta's Associate Minister of Family and Community Safety, Sandra Jansen, has expressed interest in studying the Act. In addition, Alberta's Wild Rose party has indicated it will introduce a private member's bill in the Fall similar to the one in force in Nova Scotia. However, whether other provinces follow in Nova Scotia's footsteps may have to wait until the effectiveness of the Act can be assessed both by governments and perhaps in the courts.

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1. *Cyber Safety Act*, SNS 2013,c 2, at s 2.
2. *Ibid*. at s. 26.
3. *Ibid.* at s. 25.
4. *Ibid*. at s. 33.
5. *Ibid*. at s. 5(1).
6. *Ibid*. at s. 5(3).
7. *Ibid*. at s. 8.
8. *Ibid*. at s. 21.
9. "Legislators should ask if Nova Scotia's aggresive Cyber-saftey Act is work the price", The Globe and Mail (May 6, 2013). Online: <http://www.theglobeandmail.com /commentary/editorials/legislators-should-ask-if-nova-scotias-aggresive-cyber-safety-act-is-worth-the-price/article11738974/>.
10. James Wood, "Alberta minister to examine Nova Scotia's Cyber Safety Act", Calgary Herald (August 9, 2013). Online: <http://www/calgaryherald.com/news/alberta/Alberta+minister+examine+Nova+Scotia+Cyber+Safety/8766879/story.html>

PRESIDENT'S MESSAGE

September has always been one of my favourite months of the year. As an education lawyer, I am fortunate enough to be able to share in the renewed energy and excitement that comes with the beginning of each school year. This is also the time of year that we start to consider our proposals for the next CAPSLE conference.

In considering my own proposal for the 2014 Conference in Charlottetown, I spent some time reviewing previous conference proceedings. In doing so, it struck me that whether the issue was one of access to an educational program or the protection of the rights of the professionals that work with students, the root of each topic really was ensuring that school is a positive experience for students and that education is provided in an environment that respects and protects the value of each and every child.

However, in order to achieve that outcome, we must be willing and able to talk about the issues that can interfere with or impact a child's educational experience. I commend the members of CAPSLE for never being afraid to talk about the difficult or challenging issues that face students and schools. Presentations and panels at CAPSLE included issues such as student rights, cyber bullying and civil liability matters long before those conversations were part of the normal discourse in the education community at large. Our members put these issues on the table for discussion every year and in doing so open a conversation each year that hopefully carries on when you return to your own organizations. In my own experience, I was deeply moved by the plenary session presented by Sheldon Kennedy at our Winnipeg Conference this year. His honest and courageous account renewed a conversation in my office around the issue of educating all adults in schools about bullying, abuse prevention and appropriate boundaries in order to protect children in every aspect of their educational experience.

In closing, when considering your proposal for Charlottetown or preparing for professional development within your own organization, I encourage you to continue to discuss the tough issues that face our education system. I look forward to continuing the conversation with you in Charlottetown.

Best wishes for the 2013/2014 school year.

Page Kendall
CAPSLE President

THE VALUE OF EDUCATION LAW

Today's classroom is one fraught with a variety of legal and quasi-legal issues faced by educators on a daily basis. These issues range from low self-esteem to peer pressures involving drugs and sex, just to mention a few. It has been often stated in the legal literature that today we are living in a highly litigious society. More so than at any other time in our history, citizens are keen on maintaining their individual rights and quite prepared to advocate for those rights if they perceive them to be in danger of being jeopardized. Hence, there is a pronounced need for educators at all levels to be cognizant and knowledgeable of the various aspects of education law.

A study conducted by the author and sponsored by the Faculty of Education at Memorial University of Newfoundland attempted to determine the impact/influences, if any, that education law had on the everyday practice of educators. This article will give a brief overview of that study as well as a summary of the findings from that study.

Specifically, the study involved 73 former students of the author who had taken a course in Education Law, either at the undergraduate or graduate level. The 2 primary research questions were as follows:

1) As a result of having taken a course in Education Law, have there been any positive impacts/influences on your everyday work as an educator? Please list any of those impacts/influences and any practical examples that you might recall.
2) As a result of having taken a course in Education Law, have there been any negative impacts/influences on your everyday work as an educator? Please list any of those impacts/influences and any practical examples that you might recall.

In the data collected from research question 1 above, four major themes were identified:

1. the heightening of awareness, understanding and sensitivity with respect to the various legal issues confronted by educators in today's schools;

2. the facilitation of sound and responsible decision making when dealing with various legal issues in today's schools;
3. the fostering of a certain degree of professionalism; and lastly,
4. the raising of teachers' self-confidence levels.

An analysis of the data collected from research question 2 above yielded these themes:

1. the potential for paranoia;
2. the potential to impede/inhibit teacher risk-taking;
3. the potential to increase teachers' stress levels; and lastly,
4. no negative impacts.

A brief discussion of these themes follows.

Positive Impacts/Influences

Heightening of Awareness, Understanding and Sensitivity

Because teaching is such a complex activity, educators are continually faced with a myriad of challenges. These challenges are primarily rooted in educators' attempts to meet the needs of all students ranging from such psychological needs as ensuring that students are comfortable in their classrooms to more complex needs centered around students' self-esteem and self-worth. It is imperative that teachers exhibit an awareness, understanding and a sensitivity to what is going on with each student and according to survey respondents, an understanding of education law helps to facilitate these dispositions.

Facilitation of Sound and Responsible Decision Making

In their work with students, colleagues and other stakeholders, educators make literally hundreds of decisions on a daily basis. These decisions revolve around student behavioral concerns as well as those related to sound pedagogical practices in the classroom. Often complicated and anything but black and white, these issues result in educators agonizing over what those decisions should be. Survey participants reported that a knowledge of education law provided them with various parameters to help them in the decision-making process.

The Fostering of Professionalism

Professionalism is not only a challenge for beginning educators but also for seasoned practitioners. Struggling to develop that professionalism early in their careers, new educators obviously lack any substantial experience to help them along in that development. Over time they will accumulate that experience but even experienced practitioners struggle with issues of professionalism. One of the tenets of professionalism is the existence of a body of knowledge which facilitates the work of those employed in that profession. Participants perceived education law as an ongoing and active contributor to that knowledge.

The Raising of Teachers' Self-Confidence Levels

Self-confidence is a particular challenge for new educators and because of the ever-developing and expanding curriculum and other related issues, it can also be a concern for more experienced teachers and school administrators. A healthy sense of self-confidence is an absolute necessity for educators if they are to be effective in their daily work with students, colleagues and other stakeholders. This self-confidence emanates from a confidence in one's knowledge and abilities, both which have hopefully been positively impacted by one's pre-service education. It was the perception of participants in this study that having studied education law helped them build such self-confidence.

Negative Impacts/Influences

The Potential for Paranoia

The life of educators is consumed with various school board and ministry of education policies which have the full force of the law. Add to those policies a considerable number of provincial and federal statutes such as the provincial education/schools act, the *Youth Criminal Justice Act*, the *Criminal Code of Canada* and various legal concepts such as the duty to report. With the constant barrage of law-related stories in the media, it is little wonder that educators may be somewhat paranoid about their behaviors and actions, both inside and outside of their school buildings. Knowledge of education law can evoke in educators a paranoia which could possibly serve to stifle their efforts in the classroom. However, overall, participants in this study did feel that a

modicum of paranoia, controlled in a good way, was a positive thing.

The Potential to Impede Teacher Risk Taking

The literature on teacher education suggests that educators should be risk takers. In addition to trying innovations in the classroom, teachers are also encouraged to step outside the classroom and involve their students in a variety of field-trip experiences. Because of the widespread media coverage of tragedies involving students across Canada, (e.g., the bus accident involving students in |Bathurst, New Brunswick; ski trip accidents in British Columbia, to mention just a few), educators have become more discerning and more cautious when considering out-of-school experiences This can be seen as a positive development as student safety and security should be of paramount concern. Educators have to make decisions about these activities and these decisions should not be taken lightly. Obviously, there will be times when educators decide not to involve students in certain activities and these decisions will be quite justifiable. Survey respondents perceived that having a knowledge of education law may understandably impede some risk taking, risk taking that may not have been desirable in the first place.

The Potential for Heightened Teacher Stress Levels

Today, stress is indeed an occupational hazard of many professions including the teaching profession. The literature in this area suggests that stress is a fact of life and how we as individuals deal with stress is perhaps more important than the actual stressor itself. Study participants acknowledged that knowledge of education law could well add to teachers' stress levels. However and conversely, a lack of such knowledge could also significantly add to stress levels.

No Negative Impacts

A significant number of respondents stated that they perceived no negative impacts/influences on their daily practice as a result of having studied education law. Rather, they perceived their study of education law as having provided them with valuable information which should enable their positive efforts and interactions with students.

Concluding Comments

At first blush, a typical reaction to the themes listed which come from the positive impacts/influences stated above is that they are all of a commonsense nature. One can make no argument with that perspective, but upon further reflection and perhaps closer scrutiny, one might conclude that common sense is exactly what we want our teachers and school administrators, both new and seasoned, to utilize in their classrooms.

Teachers and school administrators are often involved in the legal system through actions or inactions related to the performance of their duties and they should, as Johnson states, "no longer assume that personal ignorance of acceptable standards of conduct will be overlooked by the courts".[1] Teachers new to the profession obviously lack experience and judgment, and Samuelson [2] contends that a background in education law might help them avoid the bad judgments, indiscretions, and honest mistakes that have the potential to ruin their careers.

With respect to the themes that emanated from the negative impacts/influences suggested by study participants, it is important to acknowledge the use of the word "potential" in three of those four themes. "Potential" is defined by the New Illustrated Webster's Dictionary of the English Language as "anything that may be possible; a possible development". [3] The term conveys a high degree of subjectivity and as can be inferred from the various comments made by the study participants, the degree of that potential is idiosyncratic to the individual educator. In the majority of responses respondents, acknowledged the value of what had been learned in the education law courses in spite of the potentials which were of a negative nature.

The possibility of creating a certain degree of paranoia was obviously a dominant theme in a number of respondents' comments. Considering the nature of the school setting, it is not surprising that fear of negligence and liability can cause educators to become paranoid. Brown offers valuable insight into this concern: "A little fear is perhaps a good thing because it forces us to take a preventative approach. However, an unreasonable or unfounded fear not only creates stress but also results in limitations upon the programs which are conducted in our schools". [4]

Significant throughout many of the responses was the theme "no negative impacts/influences". Ideally, this would be the objective of any education law course at both the undergraduate and graduate levels.

In summary, this article has detailed the results of a study examining the various positive and negative impacts/influences on their practice as perceived by a number of undergraduate and

graduate students after having studied a course in education law. Suffice it to say that those results were predominantly positive with the non-positive impacts/influences bordering primarily on the potential for negative influences/impacts.

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1. J. A. Johnson, *The Foundations of American Education,* 10th ed. (Boston: Allyn and Bacon, 1996) at 285.
2. R. J. Samuelson, "Whitewater: The Law as Pit" *The Washington Post National Weekly,* March 21-27, 1994 at 28.
3. *New Illustrated Webster's Dictionary* (Chicago: Ferguson, 1992) at 759.
4. A. F. Brown, *Legal Handbook for Educators* (Scarborough, ON: Carswell, 1998 at 101.

HIGHLIGHTS AND LESSONS FROM THE PEPLER AND MILTON EXTERNAL REVIEW OF THE HALIFAX REGIONAL SCHOOL BOARD'S SUPPORT OF REHTAEH PARSONS

The tragic death of Rehtaeh Parsons, on April 2013, the Nova Scotia teenager who took her own life after experiencing cyberbullying continues to attract significant attention from the Nova Scotia Government, the police, school communities, and advocates from across the country. In August 7, 2013, the Nova Scotia Government enacted the *Cyber-Safety Act,* which provides victims of cyberbullying with a number of unprecedented rights and protections. Also in August 2013, police charged two 18-year-old males with child pornography offences relating to Rehtaeh Parsons' alleged cyberbullying.

Notably, the Government of Nova Scotia has also responded to calls for a more detailed inquiry into some of the systemic factors that are believed to be related to the Parsons case. In April 2013, the Government appointed Debra Pepler, a York University professor and psychologist, and Penny Milton, a former deputy minister of the Premier's Advisory Council on Health, Wellbeing and Social Justice in Ontario, to conduct an independent review of the policies and protocols of the Halifax Regional School Board ("HRSB") and associated agencies as they related to Parsons' death.

The Report

On June 14, 2013, Dr. Pepler and Ms. Milton released their review, entitled, "External Review of the Halifax Regional School Board's Support of Rehtaeh Parsons" (the "Report").

The Report reviews Parsons' struggle with mental health issues after an alleged incident involving a number of boys at her school, and her subsequent cyberbullying, in the context of the policies, procedures and support mechanisms that were available at the schools she attended and in her community.

The Report notes that one of the key questions that remains in the aftermath of the Parsons tragedy was why Cole Harbour High School, the school which Parsons was attending at the time of the alleged incident, did not investigate the incident after being made aware of it by police. The police had informed the Cole Harbour principal that some of the boys implicated in the incident were students at Cole Harbour and that Parsons' mother intended to transfer her daughter to Dartmouth High School. The principal was asked to look out for any indications that explicit pictures of Parsons taken during the incident were circulating among students, i.e. the ongoing effects of cyberbullying.

The school, however, took no further action investigating the incident, on the basis that Parsons immediately transferred to another school. Because a police investigation was underway, the school was unsure whether it should take further action because of the criminal investigation.

Notably, the Report does not comment on the appropriateness of the school's approach in the context of the police investigation, but commentators suggest that this remains a live issue.

The Report notes that another key question arising from the Parsons tragedy was whether information regarding the alleged incident and cyberbullying should have been transferred to Dartmouth High School, the school Parsons attended after Cole Harbour. As it was, when Parsons

transferred to Dartmouth, no information about the incident or possible cyberbullying was shared with the principal, and Parsons' records did not include any reference to the incident. It was only after the vice-principal of Prince Andrew High School, the high school Parsons attended after Dartmouth, contacted Cole Harbour to learn more about Parsons, that he was told by the Cole Harbour principal that Parsons had been involved in an incident. As such, Parsons drifted from school to school without any review of the incident or Parsons' need for support.

With respect to the sharing of student information, the Report notes that there is a *"fine balance between respecting privacy and sharing information to facilitate support within the receiving school"*. Again, the Report does not make specific comments with respect to the appropriateness of the approach taken by the HRSB not to transfer information of the incident as Parsons transferred from school to school.

The Report does note, however, that Parsons' sparse attendance limited the application of the HRSB's policies on student support and intervention. As the Report notes, a student's absences may indicate the need for intervention. The authors note that school staff must learn from and be sensitive to the "indicators of crisis" in their day-to-day interaction with students, particularly because a crisis may manifest by disruptive behaviour, but could also be internalized and result in poor attendance.

Ultimately, the Report makes thirteen recommendations, along a number of themes, including, emphasizing prevention, involving youth in decisions, building strong relationships, and focusing on mental health.

As part of these recommendations, the authors suggest that school boards in particular must:

- promote the core values of safety and respect in order to prevent bullying, cyberbullying, and sexual aggression by revising school codes of conduct to include opportunities for students to learn from their mistakes by way of restorative practices;
- clarify the process relating to student transfers between schools, and determine which student information must be shared between schools;
- survey students about the quality of their relationships within the school community, report the findings in the school boards' accountability reports to the community, and engage and collaborate with parents; and
- promote mental health literacy and intervention among educators and the school community.

The authors of the Report view of adolescent mental health issues as a challenge requiring a collective approach:

> We cannot know whether different interventions by educators could have set Rehtaeh on a successful path towards coping with trauma and continuing her education. We cannot know whether different interventions by health-care clinicians could have helped Rehtaeh effectively address her trauma and the potential of her self-harm. We cannot know whether different interventions by the police officers could have shut down any cyberbullying and protected Rehtaeh from its effects.
>
> We do know that it is very difficult to stabilize and support a youth through a mental health crisis. Rehtaeh Parsons' story is one of too many in Nova Scotia and across Canada involving young people who see no way out of their problems. This is why our emphasis has to be upstream on prevention of bullying, cyberbullying, and sexual assault. The problems belong to all of us. The solutions will take determined and long-term efforts on the part of governments, schools, health care, justice, community agencies, students, parents, media, and all citizens.

While the Report makes a number of general recommendations to promote safety and well-being of students, commentators have noted that the Report does not analyze or comment directly on whether the school board, police and community responses to Parsons' circumstances were in line with policies and procedures, and whether they were appropriate.

Nevertheless, a number of important principles may be taken from the Report, and particularly with respect to school investigations and the sharing of student information in the context of school transfers.

School investigations

Pursuant to the Ontario *Education Act*, regardless of whether charges are laid by the police, a principal is responsible for conducting an investigation independent of the police and taking appropriate disciplinary action. Police conduct their own investigations and make decisions with respect to criminal charges based on their own assessment of the circumstances. As such, the purpose and nature of actions taken by the police under the *Criminal Code* are different from the purpose and nature of actions taken by a school principal.

The *Education Act* also sets out provisions regarding the timing of the principal's investigation: when the police have been contacted, the principal should halt his or her review of the incident until either the police investigation is complete or until such time as the school's investigation will not interfere with the police investigation. Beyond complying with their express statutory duties, principals have a degree of discretion and flexibility in the way in which they conduct their investigations.

Furthermore, under the *Education Act*, a principal is required to suspend a student if he or she believes that a student has engaged in a number of specific activities at school, including bullying, where engaging in the activity will have an impact on the school climate. Specific timelines apply with respect to a principal's decision to expel a suspended student post-investigation. As such, in accordance with the *Provincial Model for a Local Police/School Board Protocol,* police and schools are required to cooperate regarding their separate investigations, and share information about the progress made in each investigation of the student, whenever possible.

Transfers of student information

The record of a student's educational progress through schools in Ontario is kept by way of the Ontario Student Record ("OSR"), which, in addition to report cards, may include "additional information identified as being conducive to the improvement of the instruction of the student".

School boards have discretion with respect to the type of information they deem as being conducive to the improvement of the student, and the purposes for which such information is to be used by schools. As such, a board may develop specific policies mandating the inclusion of any information about a student's involvement in incidents at school, and any specific supports required by a student. Pursuant to the *Ontario Student Record Guideline, 2000* a transferring student's OSR will be sent to their new school upon receipt of an official written request from the school.

The Parsons' tragedy highlights the importance of ensuring the transfer of a student's complete record, and the taking of a proactive approach to becoming informed about the full range of the transferring student's history and support needs.

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NOVA SCOTIA COURT FINDS THAT A MINOR RISK OF REOCCURRENCE CAN CONSTITUTE UNDUE HARDSHIP

A recent decision out of the Supreme Court of Nova Scotia upholds a Board of Appeal finding that a "serious" or "unacceptable" risk is posed when a mental illness has actually manifested itself in a damaging way. An employer in such a situation has no obligation to give an employee a second chance and can justify termination on the basis of a bona fide occupational requirement.

Facts

In *"AA" v. The Halifax Regional School Board,* Justice Boudreau considered the termination of a 17 year employee of the Halifax Regional School Board (the "Board"). During his tenure, the employee had worked as a high school teacher and had received excellent reviews. He had no prior discipline record.

The incident leading up to the termination involved one of the employee's grade 10 female students. In September of 2008, the student's parents discovered email correspondence between the employee and their daughter containing, *inter alia:*

I. a recommendation to kill her parents that included a method to "chainsaw them in their sleep";
ii. a reference to traveling to British Columbia to "rescue" her from her parents;
iii. several references to her weight and recommendations to purge food that had been ingested;
iv. regular comparisons of his desire to leave his wife for another woman and her need to leave her parents;
v. derogatory names directed at her parents;
vi. criticism of the therapy that her parents had arranged for her;
vii. reference to one of her male friends as having a "small penis";
viii. countering an invitation from the student to meet her at McDonalds with an invitation to "drive to … and watch the ocean"; and
ix. a reference to his thinking of picking her up out of town for lunch at an inn and then "get good coffee and sit in the park and you can read and I'll strum an acoustic before we go home".

After being brought to the attention of the School Board, the teacher was asked to a meeting where he initially took the stance that the correspondence was appropriate. Upon being shown the text of the emails, he did admit to their inappropriateness and the next day called in sick and was off work until his termination.

Throughout the fall and winter, the teacher saw a number of psychologists and was diagnosed with bipolar II disorder. He diligently sought and attended treatment.

The email incident occurred while the employee was suffering from an "hypomanic episode." The Union at some point prior to termination, presented the Board with a list of potential warning signs which could evidence the onset of an hypomanic episode. The list included such things as "avoiding the staff room," being "excessively eager," and "talking far too rapidly." In the Spring of 2010, the Board decided to terminate the teacher for "just cause," on the basis that the employee had known what he was doing was wrong but decided to proceed regardless. Alternatively, the Board concluded that even if the teacher had been impaired by his disability, the Board could not accommodate him back into the workplace as he was still at risk of having an hypomanic episode, there was no sure way of detecting such an onset, and the potential damage to students was too significant to ignore. The employee grieved the termination.

The Decision at Arbitration

The employee's termination appeal came before an Appeal Board appointed pursuant to the *Education Act.* Arbitrator Kydd upheld and confirmed the discharge.

Before Arbitrator Kydd, the Union acknowledged that what was contained in the emails was inappropriate, but argued the non-culpability of the employee on the basis that he was undergoing an hypomanic episode. The Board thus had no cause for discharge.

The Union submitted that the Board had discriminated against the teacher on the basis of his mental disability and failed to offer reasonable accommodation. They suggested the following safeguards as "reasonable accommodation:"

1. Monitoring the teacher's blood levels of lithium carbonate and requiring the Mood Disorders Clinic to report significant changes to the school and the teacher's wife;
2. Requiring the teacher's wife to report any symptoms of an hypomanic episode to the

school;

3. Making reinstatement conditional on the teacher's continued compliance with allowing other staff at the school to monitor his behaviour. The list of triggers submitted by the employee included the following:

   i) Avoiding the staff room. Hearing that he is never there.
   ii) Avoiding any casual interaction with the main office.
   iii) Overly detailed questions during staff meetings.
   iv) Excessively early to work/staying too late.
   v) Apparently on "every" committee/ too many to be effective.
   vi) If he seemed excessively focused or worried about a particular class, group of students or a colleague that seems to be having difficulty.
   vii) Making important curriculum or committee decisions immediately/not seeming to need reasonable amount of time to consider all parameters.
   viii) Talking far too rapidly as to be average.
   ix) Hyperactivity: if he is doing several tasks at the same time, never taking lunch or leaving meetings for another or several meetings or several student interruptions.
   x) Hypergraphia: If written responses, reports, or student evaluations seems unnecessarily long or unnecessarily complicated and detailed.
   xi) Signs of sleeping very little: report timestamps/e-mails/ communications at unusual hours. Work done satisfactorily in seemingly too short a time period.

In response, the Board argued that the teacher's misconduct went to the core of his duties as a teacher. Further, since recurrences were expected, even if the risk of an undetected recurrence was small, the resulting harm, if it occurred, was too unacceptable in the school system. All of this, they argued, justified termination.

Arbitrator Kydd, applying the test from *Canada Safeway,* agreed with the Union that during the time of the incident, the teacher's judgment was significantly impaired by his hypomanic condition. The Union was thus successful in establishing a *prima facie* case of discrimination.

As a result, Arbitrator Kydd went on to consider whether the Board had established that the risk that the employee posed to students qualified as a *bona fide* occupational requirement *"(bfor")* justifying termination.

The Board's case for undue hardship hinged to a great extent on whether or not the facts could be distinguished from the British Columbia case *Shuswap Lake General Hospital v. British Columbia Nurses' Union (Lockie Grievance)("Shuswap").*

In *Shuswap,* the grievor was a nurse who also suffered from bipolar disorder. Her eventual termination resulted from an episode she experienced at work which was recognized by her co-workers as manic and intercepted before it manifested in harm to any patients.

Arbitrator Gordon in *Shuswap* found that the Hospital had not established that the nurse posed either a "serious" or "unacceptable" risk to patient safety nor had they established the "impossibility" of reducing any risk through reasonable accommodation.

Thus, unlike in *Shuswap* where no patient had actually been harmed as a result of the employee's mental disability, in this case where a student's safety had actually been compromised, the Board was successful in demonstrating that the employee constituted a "serious" or "unacceptable" risk to students.

The Decision on Appeal to the Supreme Court

At trial, the Union argued that a "zero risk to student safety," standard was contrary to the first two steps of the BFOR analysis laid out by the Supreme Court of Canada in *Meiorin.* It was also their position that the Employer had failed to take due account of available monitoring measures including the measures set out above.

Endorsing the conclusions of Arbitrator Kydd, Justice Boudreau agreed with his analysis and noted that he had correctly weighed the uncertainty of detection against the magnitude of harm that could potentially result from an undetected onset of the hypomania. Justice Boudreau further endorsed Arbitrator Kydd's standard of "reasonable safety" as opposed to "absolute safety or perfection" and his weighing the uncertainty of detection against the magnitude of harm that could be caused if an episode went undetected. As noted by Justice Boudreau, this "was not a theoretical risk, but was grounded in evidence of actual events." In addition:

> "The School Board was required to establish on a balance of probabilities that a serious or unacceptable risk to student safety would arise

> from the applicant's continued employment as a teacher. While the Appeal Board did not use these exact words, it seems to me that is the substance of its conclusion that "the compelling need to have trust in our schools, combined with the serious consequence if another student was drawn into such a relationship, means that the tolerated level of risk must be extremely low, and in this case exceeds that level."

Justice Boudreau also agreed that the proposed monitoring of the employee by other school staff and his wife was impractical and the risk to students was increased because the employee's hypnomania had manifested itself outside of school hours and during the summer months.

Discussion

This case is instructive in illustrating the contextual factors that could justify an employer's termination of an employee whose disability poses a threat to others. First, it evidences that a "serious" or "unacceptable" risk can be established by an employer in a situation where an employee's mental disability has manifested itself in a manner which has caused actual harm.

Second, it supports an employer's argument that its work environment may not contain the implicit safeguards which could decrease the risk posed by an employee's mental disability to an acceptable level. Finally, it cautions employers who seek to terminate an employee based on a perceived threat where that threat has not manifested itself in a harmful way.

Next Steps

The Union has appealed the decision to the Nova Scotia Court of Appeal.

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1. [2013] NSSC 228 [AA].
2. *Ibid*. at para 5.
3. *AA, represented by the Nova Scotia Teachers Union v. Halifax Regional School Board*, unreported decision rendered by William Kydd on September 15, 2010, at para 35.
4. *Ibid*, at para 36.
5. *Ibid*, at paras 83 to 85.
6. *Ibid*. at para 33.
7. *Ibid*. at paras 46 and 47.
8. *Ibid*. at para 73.
9. [2002] B.C.C.A.A.A. No. 21.
10. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee's Union*, [1999] 3 SCR 3; [1999] SCJ No. 46, at para 54.
11. AA, *supra* note 1 at para 87.
12. AA, *supra* note 1 at para 81.

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