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Canadian Association for the Practical Study of Law in Education

COMMENTS

FEDERAL CYBERBULLYING LAW WOULD EXPAND POLICE POWERS

Bill C-13, introduced by Federal Justice Minister Peter MacKay on November 20, 2013, would make transmitting intimate images of a person without their knowledge or consent a crime.

Bill C-13, also known as the Protecting Canadians from Online Crime Act, was developed as a legislative response to the tragic deaths of certain Canadian youth, such as Rehtaeh Parsons and Amanda Todd, who endured months of online bullying and harassment.

Should this new federal cyberbullying Bill become law, distributing "intimate images" without consent would be punishable with up to five years in jail.

Bill C-13 would amend the Criminal Code to include a new offence of non-consensual distribution of intimate images as well as complementary amendments to authorize the removal of such images from the internet. The Bill also provides for the forfeiture of property used in the commission of the offence. In addition, the Bill provides for a recognizance order to be issued to prevent the distribution of such images. Furthermore, the Bill gives a court authority to restrict the use of a computer or the internet by a convicted offender.

In the legislation, the term "intimate image" is defined, among other things, as a visual recording of a person made by any means including a photographic, film or video recording "in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity."

The proposed law would also allow a judge to issue a peace bond limiting access to computers to anyone believed to be a risk to commit a new offence. Computers and cell phones could be seized from an individual convicted of a cyberbullying offence.

In addition, the bill "streamlines" the process of obtaining warrants to intercept private communications, enables the tracking of individuals and transactions if a crime is suspected, and expands police wiretapping powers from telephone data to all types of telecommunications.

The Bill goes well beyond cyberbullying to give police enhanced investigative tools to tackle a wide range of crimes, including terrorism, organized crime, theft of cable, fraud and hacking.

Despite the wide-ranging subject matter, Justice Minister MacKay maintained that the new legislation is not an omnibus bill, but targeted and specific in nature.[1]

When asked specifically what organized crime or terrorism had to do with cyberbullying, MacKay said that it is a crime that "really knows no borders."[2]

"Canadians rightfully expect to be protected from criminals, including those online and we're taking action today to prevent cyberbullying", MacKay told reporters in Ottawa.[3]

> "Our government will continue to work toward other updates of our criminal justice system . . . to ensure that we're holding violent offenders accountable and championing the rights of victims, wherever and whenever we can."[4]

Some legal experts support the increased attention given to online bullying and harassment, but they say the new bill is too blunt an instrument, especially where the bully is under 18. They contend that Bill C-13 contains a narrow definition of cyberbullying, but does not address the underlying misogyny and homophobia that inspires so much of the online teasing. Jane Bailey, a law professor at the University of Ottawa, said "I would hate for the public to be misled into thinking that this is what will deal with cyberbullying, because I think it's [only] a partial approach."[5]

Professor Bailey stated that the problem with the bill is that it focuses on criminal and punitive measures instead of the attitudes and actions of cyberbullies themselves.[6]

Shaheen Shariff, a professor at McGill University, said that legislators need to have a better understanding of how people, and especially teenagers, view and use social media sites, such as Facebook.[7]

Prof. Shariff said that not all sexually suggestive images are posted without consent or with malicious intent. She asserted that there needs to be

an acknowledgement that sexually provocative language that can seem derogatory and hurtful is often used affectionately between friends, or in hopes in getting admiration from peers. Prof Shariff stated that legislators need to have a "better understanding of how young people are thinking these days." She said, "This has become simply part of their communication, especially when they're teenagers."[8]

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1. A. Boutilier, "Cyberbullying law would expand police powers", *Toronto Star* (November 21, 2013), at p.A3.
2. Ibid.
3. Ibid.
4. Ibid.
5. A. Mayer, "Cyberbullying Bill won't stop online taunts, critics say" (November 27, 2013) at http://www.cbc.ca/news/technology/cyberbullying-bil-won-t-stop-online-taunts-critics-say-1.2440785.
6. Ibid.
7. Ibid.
8. Ibid.

PRESIDENT'S MESSAGE

Spring is upon us and that of course means it is almost time for our annual Conference. This year is a particularly special year for CAPSLE as we prepare for our 25th Annual Conference and I cannot think of a better setting to celebrate this momentous occasion than Charlottetown, PEI. The Members of the Conference Planning Committee, under the able direction of the Conference Chair, Shaun MacCormac, have arranged a wonderful program which is sure to stimulate discussion and reflection about the theme of equality as well as related issues currently challenging educators, lawyers and policy makers. Conference participants will have the benefit of speakers from across Canada who bring a wealth of knowledge and diverse perspectives on education law topics.

I also want to take this opportunity to recognize and thank those who served on the Board of Directors this year: Martha Mackinnon, Myles Ellis, Stefanie Tuff, Ian Pickard, Paul Clarke, Cory Schoffer, Sue Ferguson, Janice McCoy, Judith Parisien, Andrew Peters, Shaun MacCormac and Kerry Richardson. CAPSLE has remained a healthy, vibrant and respected organization thanks to the commitment of these individuals.

My best wishes for safe travels to Charlottetown. I look forward to the opportunity to exchange ideas and experiences with you at the conference. This fellowship is the heart of CAPSLE.

Warm regards,

Page Kendall
CAPSLE President

it's not too late ...

EQUALITY in LAW and EDUCATION:
The Small Under the Protection of the Great

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visit our website, www.capsle.ca for updates

AN EDUCATOR'S PRIMER: COPYRIGHT, FAIR DEALING AND THE CLASSROOM

Recent changes to Canada's copyright law have provided many new benefits for teachers and the learning process in the classroom. In June 2012, Parliament passed a new Copyright Act, amending key sections that have noteworthy implications for the education sector. Then on July 12, 2012, a Supreme Court of Canada decision clarified "fair dealing" in an education context. Together, these events have given significant new rights to Canadian educators.

While teachers have new opportunities and latitude to use copyright-protected materials, they must know about the changes in the law. Teachers must know what they can and cannot do with the copyright-protected works of others to remain in compliance with the law.

> *The reverberating caveat for the teaching community is: if you infringe copyright, you, your school, and your school board can be held responsible by the copyright owner for damages.*

Teachers benefit from new and clarified users' rights

One of the key sections in the Copyright Act for educators is the fair dealing provision. This provision permits use of a copyright-protected work without permission from the copyright owner or the payment of copyright royalties, provided the dealing meets two tests. First, the dealing must be for a fair dealing purpose enumerated in the Copyright Act. Second, the dealing must be "fair." When the Copyright Act was recently amended, "education" was added as a new enumerated fair dealing purpose. This means that employees in elementary and secondary schools pass the first test.

To add to this, a Supreme Court of Canada decision in 2012 clarified "fairness" in an education context under the second fair dealing test. Educators may copy "short excerpts" of copyright-protected works for students in their classes without obtaining permission and without paying a copyright royalty. This decision is legal authority for the principle that teachers may copy short excerpts from a copyright-protected work, such as a book or a newspaper, for distribution to students in their classes.

As a consequence of the new law and the Supreme Court decision, many educational uses of copyright-protected works no longer require payment of copyright royalties. However, fair dealing has limits. Fair dealing does not mean that a teacher can make unlimited use of any copyright-protected work without permission or payment. Rather, fair dealing permits the use of "short excerpts" for educational purposes – as clarified by the Supreme Court.

It is important to note that the Supreme Court rendered its decision without defining "short excerpts." Following the Court's decision, a core group of national education associations (which included the Canadian Teachers' Federation, Canadian School Boards Association, Association of Universities and Colleges of Canada, Association of Canadian Community Colleges, and the Council of Ministers of Education, Canada) established and implemented Fair Dealing Guidelines. The purpose of the Guidelines is to explain what teachers may do without copyright permission and, as importantly, to understand when permission is needed to use a copyright-protected work in their classrooms. The Fair Dealing Guidelines are designed to be used as an institutional policy by schools, school boards, colleges, universities, and ministries of education (see CAPSLE article re March 2013) .

The Copyright Act also provides additional rights to teachers and students to use copyright-protected works for educational purposes without permission and without paying a copyright royalty. Aside from the fair dealing provision, perhaps the greatest change to the law with the passage of the amended Copyright Act is the ability to use publicly available Internet materials for educational purposes.

Educators should be aware that a new Internet amendment in the copyright law permits teachers and students to use publicly-available Internet materials in the process of teaching and learning. Routine classroom uses may be made of publicly available Internet materials, such as incorporating on-line text or images into homework assignments, performing music or plays on-line for peers, exchanging materials with teachers or peers, or reposting a work on a restricted-access course Web site.

There are other important changes to copyright law educators should note. The Copyright Act also permits teachers and students to:

- record news programs or news commentary programs for later viewing by students
- perform audio-visual works in the classroom
- use digital displays such as whiteboards

(subject to the commercial availability rule) in classrooms
- record lessons to be made available for asynchronous viewing by students
- use digital technology to deliver an inter-library loan copy of a copyright-protected work.

These educational users' rights are fully described in a helpful book entitled Copyright Matters! This is a joint publication of the Canadian Teachers' Federation, the Canadian School Boards Association and the Council of Ministers of Education, Canada.

Copyright Matters! provides teachers with user-friendly information on how copyright law relates to the use of resources on and off school premises. Every teacher should have a copy of this reference book.

The book is available from many sources and can be downloaded for free. In fact, both the Fair Dealing Guidelines and Copyright Matters! are available on-line at www.cmec.ca/copyrightinfo.

Teachers must be aware of their limits

While the recent changes to the copyright law provide teachers with new opportunities, they must also be aware of the limits in the law. The Fair Dealing Guidelines are educators' starting point to understanding the limits of the law. They describe a safe harbour, albeit not absolute limits. Copying or communicating a copyright-protected work within the prescribed limits of the Fair Dealing Guidelines will, according to the advice of legal counsel, almost certainly be fair. Within the Guidelines, teachers do not have to seek any further permission and can use copyright-protected works in their lessons. However, any use of copyright-protected works beyond the limits of the Fair Dealing Guidelines is outside the safe harbour. If it is beyond the limits of the Guidelines, the use may or may not be fair.

School principals and teachers are responsible for the educational use of copyright-protected works in compliance with the Copyright Act. If permission from the copyright owner is required, teachers, school principals and school board staff are directly responsible for obtaining permission and paying a transaction fee. If a copyright permission process is not followed, there is a risk that the use is contrary to law, and the use of the works could be copyright infringement.

So, when the intended use exceeds the limits in the Fair Dealing Guidelines, or is not permitted by a users' right in the Copyright Act, teachers should consult the school principal or a designated staff person at the school board office to evaluate whether permission is needed and to obtain permission if necessary. To decide if a use requires copyright permission you need to go through the following steps.

1. Determine if the school, school board or ministry has a licence to use the copyright-protected work.
2. If the school, school board or ministry does not have a licence, apply the Fair Dealing Guidelines to determine if the use is permitted under fair dealing.
3. If the use is not permitted under fair dealing, determine whether any other users' right in the Copyright Act permits the use (refer to Copyright Matters!).
4. If the use is not permitted under a users' right in the Copyright Act, permission to use the copyright-protected works is required. Contact the copyright owner directly or contact the Copyright Clearance Centre: http://www.copyright.com/ (Note that Access Copyright will not provide transactional permission to educational users.)
5. If you are unable to get permission, you cannot use the work.

There are compelling legal and moral reasons to comply with copyright law. Education departments and ministries, as well as school boards across the country, encourage awareness of and respect for copyright in their education systems. Schools devote resources and strive to be copyright compliant. To comply with the new copyright law, principals and teacher may consider these best practices:

- Schools need to incorporate the Fair Dealing Guidelines into their school practices.
- Teachers need to be aware of and follow the Fair Dealing Guidelines
- Posters containing the Fair Dealing Guidelines should be posted next to copying equipment, such as printing stations, photocopiers and scanners.
- Every teacher should be aware of the users' rights described in Copyright Matters!

Teachers and school staff should know the basics of copyright law; they should set the example with their students.

Learn more about copyright in the classroom

To obtain more information on copyright and education, refer to the Canadian Teachers' Federation Web site @ ctf-fce.ca. There are also excellent copyright reference materials for teachers on the Council of Ministers of Education, Canada (CMEC) Web site. Visit: cmec.ca/copyrightinfo.

Canadian educators have entered a new copyright era that offers latitude and opportunities to develop lesson materials. However, there are important limits that must be respected. Teachers must know both their rights and limits when using the copyright-protected works of others in their classrooms.

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BCTF RULING: BC SUPREME COURT RULES GOVERNMENT FAILED TO "NEGOTIATE IN GOOD FAITH"

In 2002 and 2004, the British Columbia Government enacted legislation that overwrote the Province's bargaining model for teachers and health services employees. These enactments effectively negated specific clauses of these collective agreements. In response, health services workers pursued a constitutional challenge. After defeat in the lower courts, they were ultimately successful in securing a landmark decision from the Supreme Court of Canada [2007 SCC 27, [2007] 2 S.C.R. 391 [Health Services] wherein the union's freedom to associate and collective bargaining rights were held to be constitutionally-protected by the Charter of Rights and Freedoms. In similar vein, teachers also challenged the 2002 and 2004 enactments but that challenge was held in abeyance while the health sector case wound its way through the lower courts to the Supreme Court of Canada. Consequently, it was not until November of 2010 that the teachers' challenge came before Madam Justice Griffin in the British Columbia Supreme Court (the court of first instance).

The British Columbia Teachers' Federation (BCTF) argued the Government's legislation extinguished clauses in a bona fide collective agreement and rendered its ability to bargain teachers' conditions of work impossible going forward: i.e. class size and composition, student-teacher ratios and workload. The Government argued that such concerns were properly determined by policy and not achieved through bargaining. Although the case concluded arguments on November 26, 2010, the parties had to wait until April 13, 2011 for Madam Justice Griffin's ruling that the teachers' had prevailed. The Court granted the government a year to make the legislative changes made necessary by the ruling.

Instead of repealing and replacing the offending laws with substantively different and constitutionally-compliant legislation, the Government instead passed near-identical bills. BCTF returned to the British Supreme Court on 9 September 2013 to argue the government had failed to respect the Court's 2011 ruling. Nineteen days of arguments in this second court appearance concluded November 22, 2013.

On January 27, 2014 Madam Justice Griffin ruled the government had indeed failed to address the repercussions of her April 13, 2011 judgment and that the latest legislation was also unconstitutional. Moreover, as Madam Justice Griffin opined:

> The Court has concluded that the government did not negotiate in good faith with the union after the Bill 28 Decision [April 13, 2011]. One of the problems was that the government representatives were pre-occupied by another strategy. Their strategy was to put such pressure on the union that it would provoke a strike by the union. The government representatives thought this would give government the opportunity to gain political support for imposing legislation on the union….
>
> When legislation is struck down as unconstitutional, it means it was never valid, from the date of its enactment. This means that the legislatively deleted terms in the teachers' collective agreement have been restored retroactively and can also be the subject of future bargaining….
>
> The Court has also concluded that it is appropriate and just to award damages against the government pursuant to s. 24(1) of the Charter. This is in order to provide an effective remedy in relation to the government's unlawful action in extending

the unconstitutional prohibitions on collective bargaining to the end of June 2013. The government must pay the BCTF damages of $2 million.

In a press conference held in response to the ruling on January 27, 2013, British Columbia Education Minister Peter Fassbender expressed "disappointment" with the judgment saying it did not reflect the Clark Government's priorities of improved student outcomes and stability for the education sector. The Government indicated it might appeal.

On Tuesday February 4, 2014, Fassbender announced the Government considers itself compelled to appeal the British Columbia Supreme Court's decision to the Court of Appeal as the ruling fails to emphasize students' needs. Moreover, the Government sees the ruling as imposing unacceptable limits on its purview over education policy development and implementation. In a recent press release, Minister Fassbender outlined the Government's rationale for the appeal.

> "From a legal perspective, we agree that Canadians have a protected freedom to associate, but we do not agree this gives the BCTF the power to override government's duty to make fiscal and policy decisions in the public interest. Returning to rigid union ratios and formulas will create huge disruptions in our schools and, most importantly, it will prevent districts from providing the kinds of varied supports students actually need."

Premier Clark's Liberals point to an increase of $1 billion in education investment in 2001 despite a decline in enrolment of 9.4%; increased spending on special education, and class sizes of "near historical lows". The Government claims it is seeking flexibility and that returning to "rigid formulas", presumably resulting from the ruling, would threaten the labour stability it seeks on behalf of "students, parents, teachers and communities" that would flow from a 10-year collective agreement. The bottom line is: the Government claims not to be able to afford the additional $1 billion required to implement the ruling.

For its part, BCTF President Jim Iker admits that teachers were "disappointed" by the decision to appeal saying the move announces the Clark Government's belief they it is "above the law". In rejecting the argument that the Government can't afford to comply with the British Columbia Supreme Court's ruling, Iker pointed to the $700 million advanced by the Province for repairs to BC Place. For the BCTF, the unconstitutional BC Government's 13 years of unconstitutional legislation and policy making has resulted in a lost generation of public school students who entered Kindergarten in 2002 and have now graduated grade 12.

"Christy Clark owes all of us, teachers, students and parents an apology… We knew the damage it would do. But government ignored our concerns and an entire generation of students has been shortchanged as a result, and that is shameful."

This dispute, fundamental to the future of public education in British Columbia, is far from over. As MSNBC's Rachel Maddow says, "Watch this space."

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SHOULD I STAY OR SHOULD I GO?

The Seven Oaks Teachers` Association of the Manitoba Teachers' Society, on May 16, 2012 filed a grievance alleging improper denial of leave, contrary to Article 6.05 of the collective agreement, which stated:

> **6.05 Executive Leave**
> A teacher, being a member of the Manitoba Teachers' Society Executive Committee or of the Executive Committee of any branch thereof or any special committee of the Society, or being appointed an official representative or delegate of the Society, or any branch thereof, or being a Society appointee to a committee of the Department of Education, and being authorized by the Executive Committee of the Society to attend a meeting of the Committee of which he or she is a member or to act as a representative or delegate of the Society or any branch of the Society in a matter of Society business requiring absence from school shall have the right to attend such meeting or to act as such representative or delegate and shall be excused from school duties for such purposes on not more than a total of twelve (12) teaching days in any school year, provided that a substitute satisfactory to the Board can be secured and that the cost of providing said substitute is assumed by the Society and shall not be charged upon the Board concerned. No

additional leave of absence shall be taken for the purpose mentioned above, except with the consent and approval of the Board.

Every spring, the Seven Oaks Teachers' Association holds a Long Service Wine and Cheese Reception to recognize retiring members and members with 25 years of service in the Seven Oaks School Division. The event is a well established tradition and attracts wide participation not only from teachers but also administrators, trustees, superintendents and other Division officials. There was no dispute between the parties that the Reception is a necessary and worthwhile event that helps to build camaraderie and goodwill in the Seven Oaks education community. Hotel premises have sometimes been used but on many occasions the Division has consented to the use of school facilities, in which case formal permission has been given for a liquor permit to be obtained by the Association. The 2012 Reception was held at Garden City Collegiate on May 31, 2012 after dismissal of classes.

The grievor was a Member at Large of the SOTA Executive. Under the SOTA Constitution Members at Large serve on the Member Services Committee and are assigned responsibility to organize the Reception, described as the "June wine and cheese long service, retirement and scholarship reception. In addition to honouring long service, the event is an opportunity for the Association to present scholarships to students who intend to pursue a career in teaching. SOTA also holds a fall Wine and Cheese reception to welcome new teachers and the Member Services Committee is responsible for the fall event as well.

On May 10, 2012, the grievor applied for a half day (afternoon) Executive Leave as follows: "I am setting up for the SOTA Long Service Wine and Cheese at Garden City Collegiate" (Ex. . According to the Association, there is a lengthy and well known past practice whereby its Executive members have been granted leave under the agreement for this purpose. In this case, the request was denied by the grievor's principal and the Assistant Superintendent on May 16.

The Association submitted that the collective agreement is clear and unambiguous. An Executive member is entitled to leave when dealing with Association business that requires absence from school. The grievor's request for leave to set up for the Reception should have been granted. Leave is conditional on the availability of a satisfactory substitute teacher and the Association must cover the cost of the substitute. Neither of these latter requirements were in issue here. In the event of ambiguity being found, the Association argued that past practice should be utilized as an aid to interpretation. The practice reveals the mutual intent of the parties to allow for leaves of this kind.

According to the Superitendent (the superintendent), senior Division officials had little awareness of individual cases unless a Divisional budget was being accessed. In that case, the leave form would come to a Superintendent or designate to be signed off, after which the form was sent to accounting. The Superintendent acknowledged that principals received SOTA requests for leave and approved them routinely. As the Division moved from a paper system to a electronic system, it directed the Association to stop having leaves approved by the principals. In addition, most forms would come in labeled as "union business" and the Division never felt the need to question such leave requests. On this occasion, the form said "to set up for the SOTA wine and cheese".

The local president testified that to her, "it is incomprehensible that the Division would not know time was needed to set up for such professionally organized events, that turned out so well." The wine and cheese was always very high profile. Trustees often commented to her in favourable terms. Everyone knew the reception started at 4 pm. They must have known teachers were working on set-up during the afternoon.

For his part, the Superintendent was adamant that he and the senior administration of the Division did not know. Asked why the Division did not inquire further into SOTA leave requests, he replied, "We are not short of things to do."

The award hinged on whether the leave in fact was required and the board made the decision on this basis. Based on its concern over potential employer interference in SOTA's internal workings, the Association argued for a presumptive entitlement to leave upon request, as long as the activity is reasonable and bona fide SOTA business. The employer should have no discretion to look behind a leave request and decide for itself whether an absence is required. While we have endorsed a broad and liberal approach to the application of the article, the actual words chosen by the parties cannot be ignored. The Board determined that there needed to be an objective requirement for absence, not a subjective one. It is not enough that the Association is engaging in a reasonable and bona fide union activity that in its view requires an absence. There must be an objective requirement for the teacher to be away from his or her classroom.

The board also determined that the fact that the Reception was successfully held without the grievor receiving leave does not decide the issue. The Division cannot render the article nugatory by demanding that any and all SOTA meetings and activities be moved to off hours, simply because it would be theoretically possible to do so. But if the intended activity can clearly be

undertaken outside of school hours, without any jeopardy to the Association's goals and objectives, and without causing inappropriate intrusion by the Division in SOTA's operation, then an absence is not required.

On the evidence, the board determined that the Association did not show that the grievor was required to be absent from school on the afternoon of May 31, 2012 in order to set up for the Reception. Room set-up, food and sound were done by others. Wine and beer could easily be delivered in advance and secured on site, ready for the event. Gifts and other finishing touches generally were done before the final afternoon in any event. If hotel premises had been used, there would have been even less justification for release time. Making these preparations outside of school hours would not involve any jeopardy to SOTA goals and objectives as a union and as such the grievance was denied.

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