September 2014, Volume 24, No. 1

Capsle Canadian Association for the Practical Study of Law in Education

COMMENTS

NOVA SCOTIA COURT FINDS TEACHER WITH MENTAL ILLNESS POSES SAFETY RISK TO STUDENTS[1]

(Editor's Note: This article is a follow-up to a previous article in our September 2013 CAPSLE Comments.)

Nova Scotia Court of Appeal has upheld a decision to terminate a high school teacher with bipolar disorder following the discovery of inappropriate e-mails to a student.

The Facts

The Appellant was a high school teacher with the Halifax Regional School Board for over fifteen years with no prior disciplinary incidents. His employment was terminated after inappropriate e-mails between he and a grade ten student were discovered in 2008. In the e-mails, the Appellant made the following comments:

- A recommendation that the student kill her parents, including using a chainsaw while they slept.
- A reference to travelling to British Columbia to "rescue" her from her parents.
- A recommendation for her to purge food.
- Regular comparisons of his desire to leave his wife for another woman and her need to leave her parents.
- Derogatory names directed at the student's parents; (father called a "child beater" who he threatens to beat up; mother referred to as "cow woman", "nuts" and "a dolt").
- Criticisms of the therapy her parents had arranged for her.
- An invitation to "drive to...and watch the ocean".
- Thoughts regarding picking her up out of town for lunch at an inn and then "get her good coffee and sit in the park and you can read and I'll strum an acoustic before we go home."

After the discovery of the e-mails, the Appellant went on sick leave and was later diagnosed with bipolar disorder type II, a mental illness that includes cyclic "high" and "low" moods. His psychiatrist was of the opinion that the Appellant was suffering from a hypomanic episode during the summer of 2008 that impacted his judgement and was directly related to his engaging in the inappropriate communications with the student during that time. Evidence was presented that it was probable that the Appellant would have recurrences of hypomania, and that there was no sure way of detecting the onset of a hypomanic period. The psychiatrist was of the view that the Appellant could return to the classroom as long as his mood and blood levels are monitored for potential warning signs that would indicate an onset of hypomania.

The Appellant was formally terminated in 2010 on the basis that he knew what he was doing was wrong, or in the alternative, if his judgment was impaired by his disability and he was non-culpable, the potential risk to vulnerable students was significant. The School Board concluded that they could not provide him with adequate supervision, and accommodating his disability would constitute undue hardship.

The Argument

The Appellant challenged his termination in front of an Appeal Board. He asserted that the reviewing judge erred in regard to the interpretation and application of the Bona Fide Occupational Requirement under the *Human Rights Act*[2] and related jurisprudence, and that the School Board did not canvass all reasonable possibilities to accommodate his disability. He also argued that the standard of review on Appeal should be correctness and not reasonableness.

The Decision

The Board found that while the Appellant's conduct was not culpable, requiring the School Board to reinstate him would constitute undue hardship because it would be impractical for the principal to monitor him, especially in the summertime when school is not in session.

Both the Supreme Court of Nova Scotia and the Court of Appeal upheld the Appeal Board's decision. Justice Scanlan for the Court of Appeal agreed with the Supreme Court that the appropriate standard of review is reasonableness, and that the safety risk to vulnerable students was too high considering the likelihood of recurrence. Justice Scanlan also considered the case law on undue hardship, and noted that Justice Sopinka for the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*[3] held that what will constitute reasonable measures to accommodate will vary in the circumstances of the case, and the search for accommodation is a multi-party inquiry.

The Court of Appeal was satisfied that the School Board discharged its burden to establish on a balance of probabilities that a serious or unacceptable risk to student safety would arise from the Appellant's continued employment as a teacher. In canvassing possible accommodations, the Court of Appeal noted that School Board included the Appellant and the Teacher's Union in the discussion of possible ways to monitor the Appellant's condition, and that they did not engage in a blanket refusal to accommodate him or suggest that it would not be possible for persons with mental illnesses to be employed as teachers.

Moreover, the Court was satisfied that School Board's decision was not based on a standard of absolute safety for students. Their decision was based on the reality that the nature and content of the e-mails revealed how far the Appellant had gone in his communications with one young and vulnerable student, which was a direct breach of his duties under the *Education Act*.[4]

What this Means for Accommodating Teachers with a Mental Illness

In this case, the Nova Scotia Court of Appeal recognized that the employer's duty to accommodate mental illness and disability has limits as set out in the *Human Rights Act*, s. 6(f)(ia). The Court also commented on the fact that what is considered reasonable accommodation will depend on the nature and context of the case, and noted how important it is for the School Board to protect vulnerable students in situations where there is a likelihood of reoccurrence.

This case does not mean that mental illnesses such as bipolar type II disorder can never be accommodated in the school system. However, it does suggest that in situations with vulnerable persons, the level of acceptable risk of harm to those persons may be extremely low. This is especially the case where there is an uncertainty of detecting symptoms of a recurrence, and the employee is in a position of trust where there was a previous serious misuse of authority.

Emily Savage, Student at Law
McInnes Cooper
Halifax, Nova Scotia

1. *Flinn v Halifax Regional School Board*, 2014 NSCA 64.
2. R.S.N.S. 1989, c. 214.
3. [1992] 2 S.C.R. 970.
4. S.N.S. 2995-96, c.1.

PRESIDENT'S MESSAGE

I am writing this President's Message during the latter days of July. The message is intended for the September issue, which means that it will likely be in September when you get a chance to read this with the new school year underway.

I should be thinking about the start of the new school year, about the exhilaration that comes from new beginnings, new friends and colleagues, new challenges. I should be writing of the seasonal change that brings crispness in the air, portending end of summer, the simple joys and promise of the September Equinox. But my thoughts aren't there yet.

My thoughts are in Gaza, as casualties pile up, including children. My thoughts are in the Eastern Ukraine, in the refrigerated rail cars holding the innocent bodies, a number of them children, from flight MH17 (and a seemingly cursed airline) that was shot out of the sky. My thoughts are with the thousands of children and youth along the Mexican/U.S. border, either in detention camps or in hiding, waiting for hope, and an opportunity. My thoughts are with the still captured girls in Nigeria, who simply wanted to go to school until Boko Haram intervened....So many who will not be in a classroom this September.

To think that these topics from outside of CAPSLE do not impact on CAPSLE would be naive. International events can significantly impact on countries, particularly their economic bottom lines should international market investors become skittish. The world economy is still recoiling from the fiscal crisis, which was driven by globalization, casino capitalism, secretive offshore financial havens, and, generally, greed. Austerity budgets have become the norm, with their implicit and explicit impact on public education. And as the tax base we rely on to fund public education continues to shrink there are those in this country who still seem to be doing okay. In a

very recent report from the Organization for Economic Cooperation and Development (OECD) it is projected that by the year 2060, the most rapid growth in income inequality will have occurred in three countries, the United States, Hungary and Canada.

But wait, it's September! School doors open and joyous crowds of students explode into the open, laughing, yelling, running to a bus, a parent's car, or along the sidewalk with friends. Meanwhile exhausted teachers and administrators exhale, relieved at having survived the first day and yet somehow buoyed by the promise.

Board personnel tinker with schedules, timetables in efforts to make an incredibly complex system run smoothly. Ministry staff contemplates the Next Big Thing to be implemented this year. Teacher organizations welcome new teachers and strategize about member engagement. University staff crosses their fingers in the hopes that Frosh week activities will not result in an embarrassing national media event. Legal firms anticipate expected rulings from Federal, Provincial, Territorial courts, Arbitrations and Human Rights Commissions, considering the potential of new decisions and new cases. And all of them wonder where has the summer gone?

Speaking more specifically about the operations of CAPSLE let me take this opportunity to point out two things:

- The CAPSLE Board has mandated that a survey of members will occur this year. You can expect a short survey later this fall that will ask you what you like about CAPSLE and what we can do better. We encourage you to assist us in this endeavor.
- Don't forget our next AGM in beautiful Kelowna. The planning by Sue Ferguson and her committee is well in place, and I am sure she and her colleagues are waiting with anticipation to see what challenging/interesting topics will be submitted for session considerations. It's never too early to plan, so save the date, April 26-28, 2015 at the Delta Grand Okanagan in beautiful British Columbia.

Now take a deep breath, steady the hands, and focus your vision; the 2014-2015 school year beckons.

Myles Ellis
CAPSLE President

CHILDCARE OBLIGATIONS FALL WITHIN "FAMILY STATUS" UNDER CANADIAN HUMAN RIGHTS ACT *- FEDERAL COURT OF APPEAL RELEASES* JOHNSTONE *AND* SEELEY *DECISIONS AND CLARIFIES SCOPE OF PROTECTION - PARENTAL OBLIGATION vs. PERSONAL CHOICES*

In the most recent, and perhaps the final chapter of two federal human rights cases dealing with childcare obligations (*Attorney General v. Fiona Ann Johnstone*[1] (Johnstone) and *Canadian National Railway Company v. Denise Seeley*[2] (Seeley), the Federal Court of Appeal ruled that an individual's obligations to provide care to a child fall within the protected ground of "family status" under the *Canadian Human Rights Act*. The Court also clarified the scope of protection and the type of childcare obligations that are contemplated under "family status".

]In both cases, Johnstone and Seeley were the parents of young children who could not find adequate childcare to meet the work demands of their employers. In Johnstone's case, both she and her husband worked for the Canadian Border Services Agency (CBSA) and were required to be available for 24-hour-per-day rotating shifts, making it almost impossible to secure regular childcare. In the case of Seeley, the employer, Canadian National Railway (CNR), required her to relocate from Jasper to Vancouver to cover a labour shortage. The relocation would cause extreme hardship to Seeley due to her parental obligations to her young children.

Johnstone and Seeley both sought and were refused accommodation by their employers and ultimately brought human rights complaints to the Canadian Human Rights Tribunal. In two separate decisions, the Tribunal held that the childcare obligations of a parent fall within the prohibited ground of discrimination of "family status" under the *Canadian Human Rights Act* (the "Act") and that the CBSA and CNR had breached the Act by failing to accommodate the childcare obligations of Johnstone and Seeley. These decisions were upheld on judicial review by the Federal Court. Both employers appealed to the Federal Court of Appeal.

In upholding the lower court and Tribunal decisions, the Federal Court of Appeal was unanimous in confirming that the prohibited ground of discrimination "family status" includes an individual's childcare

obligations. However, the Federal Court of Appeal made significant efforts to define the scope of childcare obligations that are afforded protection under the Act. The Court stated that the types of childcare obligations that would be protected "are those which a parent cannot neglect without engaging his or her legal liability".[3] The protection therefore is limited to what was referred to as "immutable or constructively immutable characteristics"[4], as opposed to personal family choices, such as participation in extra-curricular activities and similar voluntary family activities. The Court noted that this approach avoids trivializing human rights by extending human rights protection to personal choices.

The Federal Court of Appeal was also clear that in cases involving claims of discrimination based on family status, the determination of whether discrimination has occurred will involve a consideration of the efforts the employee took to seek reasonable alternative childcare arrangements. Only where the employee's efforts are reasonable and yet unsuccessful will a *prima facie* case of discrimination be established.[5]

The Federal Court of Appeal went on to clearly set out the elements that an individual alleging discrimination based on family status childcare obligations must establish:

1. That a child is under his or her care and supervision;
2. That the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
3. That he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
4. That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.[6]

In our view

The Federal Court of Appeal's judgments provide additional certainty and clarity in terms of the protection afforded to family status under human rights legislation. Employers can take comfort in the aspect of the ruling that confirms that the types of childcare obligations that must be accommodated are those that are essential and engage the individual's legal responsibility. The protection is not extended to trivial obligations arising from personal family choices. Similarly, the decisions make it clear that the employee must make reasonable attempts to self-accommodate their childcare obligations. The Court in Johnstone specifically commented:

> A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a bona fide childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.[7]

These factors should operate to limit the number of discrimination claims that employers may face. Nevertheless, employers must ensure that they consider employee requests for accommodation for childcare obligations. Employers should look at each request on an individual basis and consider the particular needs of the employee along with the employee's efforts to self-accommodate. Policies that set out the employer's approach to such requests and that contemplate individualized assessments will assist employers in meeting their legal obligations.

Kevin MacNeill& Kecia Podetz
Emond Harnden, LLP
Ottawa, Ontario

1. 2014 FCA 110 (CanLII).
2. 2014 FCA 111 (CanLII).
3. Johnstone, *supra*, at para. 70; *Seeley, supra*, para. 41.
4. *Johnstone, supra*, para. 70; *Seeley, supra*, para. 41.
5. *Johnstone, supra*, para. 88; *Seeley, supra*, para. 42.
6. *Johnstone, supra*, para. 93; *Seeley, supra*, para. 42.
7. *Johnstone, supra*, para. 96.

SAVE THE DATE!

April 26-28, 2015

CAPSLE's 26th Annual Conference - Grand Okanagan Resort, Kelowna, BC

TRUSTEE ELECTION CONTRIBUTIONS AND DISQUALIFYING CONFLICTS OF INTEREST

In British Columbia and across the country, school trustees will face election in the fall. In the run-up to the election, it is important to bear in mind that election campaign contributions have been the basis for claims of disqualifying conflicts of interests. While the case law indicates that a disclosed election campaign donation does not amount to a conflict of interest in and of itself, the donation may be evidence of a conflict which should result in disqualification of the elected official. Much, however, depends on the unique circumstances around the donation, as discussed in further detail below.

What is a Disqualifying Conflict of Interest?

In British Columbia, both the *School Act*, R.S.B.C. 1996, c. 412 and the common law establish rules about conflicts of interest that are applicable to school board trustees. Other provinces have similar legislation with similar requirements.

Under the British Columbia *School Act*, only a "pecuniary interest" is set out as a possible disqualifying conflict of interest in Part 5 (the common law likely supplements this with other grounds for disqualification).

"Pecuniary interest" is defined in section 55 of the *School Act* as meaning "an interest in a matter that could monetarily affect the trustee and includes an indirect pecuniary interest referred to in section 56". Section 56 deals with the trustee's ownership of shares of public and private companies and employment and business relationships (either through partnership, firm membership, or direct employment). Pecuniary interests of the trustee's spouse, child, or parent can also be deemed to be the pecuniary interest of the trustee in certain circumstances (section 57). "Pecuniary interests" are similarly defined across Canada.

If a trustee has a "pecuniary interest" in a matter and is present at a meeting of the board at which the matter is considered, the trustee must disclose the interest and not take part in the discussion or vote on any question in respect of the matter. As well, the trustee must not attempt, whether before, during, or after the meeting, to influence the voting on the question (section 58). A knowing contravention of section 58 can result in the trustee's office being declared vacant or requiring the trustee to make restitution if a benefit is received by the trustee (section 63).

There are certain kinds of "pecuniary interests" that do not require disclosure under section 58, namely a pecuniary interest in any matter that a trustee may have:

(a) by reason of the trustee having a pecuniary interest in the matter which is a pecuniary interest in common with electors generally,
(b) by reason of the trustee being entitled to receive any indemnity, expenses or remuneration payable to one or more trustees in respect of the matter,
(c) by reason only that the trustee is a member of an association incorporated under the *Cooperative Association Act* or a credit union having dealings or contracts in respect of the matter with the board of the school district of which he or she is a trustee, or
(d) by reason only of a pecuniary interest of the trustee that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the trustee (section 59).

If in doubt about whether an interest requires disclosure under section 59, seek legal advice.

Financial Contributions to a Trustee's Election Campaign

There is a wealth of case law on pecuniary interests of trustees, municipal counsellors and alderpersons, especially in the non-election context. In many of these cases, a disqualifying interest has been found to exist. For a recent decision where council members were found to be in a conflict of interest when the council members voted on certain contracts, see *Schlenker v. Torgrimson*, 2013 BCCA 9.

There have only been a handful of cases in which elected officials have faced allegations of undisclosed pecuniary interests when they were called to vote on a matter that involved a person who contributed funds to their election campaign. The leading case law is from British Columbia.

While this issue arises more frequently in the municipal context, it could easily arise for school board trustees given that trustees may accept election campaign donations and, like many municipal officials, can be disqualified from office for the failure to comply with conflict of interest laws.

The principles that arise from election campaign donation cases can be summarized as follows:

- it is important to balance democratic rights to accept election campaign funding with the transparency and integrity duties of elected officials;
- so long as the elected official properly discloses the donation in full compliance with election laws, the donations do not, without more, give rise to a pecuniary interest and disqualification; and
- there is no magic number that a donation must exceed to rise to a pecuniary interest and disqualification.

We explore the judicial comments on these principles below.

(a) Important to Balance Democratic Rights with Transparency and Integrity of Elected Officials

In *Guimond v. Vancouver (City)* (1999), 22 B.C.T.C. 109 (S.C.), the petitioners alleged that the Mayor and two counsellors were in a conflict of interest when they voted on a re-zoning application for a company that had made contributions to each of their election campaigns. The contributions represented 0.78%, 1.16% and 0.58% of their respective total campaign contributions. The judge observed that "*at issue is the balancing of the democratic right to support a candidate or party of choice in a municipal election and the importance of transparency and integrity in the carrying out of the duties of public office*". The Court found that the contributions had been disclosed as required by law and that the amounts of contributions were very small. The Court also found that the "saving provisions" (or exception provisions) of the conflict rules applied, as any such pecuniary interest caused by these contributions were sufficiently remote and insignificant to not reasonably be expected to influence the officials in relation to the matter.

(b) Disclosed Donations, Without More, Do Not Give Rise to Disqualifications

In *Ferneley v. Sharp* (1999), 72 B.C.L.R. (3d) 121 (S.C.), a counsellor had voted in favour of proposals put forward by the Canadian Union of Public Employees, a union that was the counsellor's major campaign contributor, contributing $2,500 (75% of her total contributions). The petitioner alleged that the counsellor voted in favour of a compressed work week because of the campaign financing from the Union. The Court observed that counsellors

> …must make their decisions upon what they believe is in the best interests of the municipality and its electors. On the other hand, it is clear that every elector should be eligible to run for office in the municipality regardless or their status, their wealth, or occupation of their spouse. Elections cost money and they are most frequently funded by contributions from friends, family and political or other supporters of the candidate. It is a fact in the real world that contributions are made by those who frequently hope that the candidate, if elected, will think as they do and support those ideals, policies and projects which they support. This is so whether the contributors be trade unions, corporations, institutions, or wealthy individuals.
>
> It is a traditional part of democratic system to permit (with certain limitations) those wishing to run for office to accept campaign donations. There is nothing in the legislation to prohibit it, though the Municipal Act [now the Local Government Act] does require full disclosure of donations beyond a minimal amount.
>
> In summary, the receipt of a donation to a political campaign that has been fully disclosed does not amount to a conflict of interest in and of itself. It can of course be evidence of such a conflict depending on the context of its receipt and the conduct of the recipient. Each case involving issues such as we have here must be decided on its own facts.

The Court found that the respondent fully disclosed the contributions. The Court was "*far from satisfied*" that the counsellor had a direct or indirect pecuniary interest when voting for the proposal of a compressed work week.

In *King v. Nanaimo (City)*, 2001 BCCA 610, rev'g [1999] B.C.J. No. 83 (S.C.), Mr. King failed to file a proper disclosure statement about his campaign finances, including a donation of $1,000 from a property developer (representing 22% of his total campaign finances). He later voted on a proposal made by that property developer, and the petitioner alleged that he was in a conflict of interest when he did so. The trial Court agreed that Mr. King was in a disqualifying conflict of interest. The Court of Appeal disagreed, holding:

> … Nothing in the facts established in this proceeding could justify the conclusion that

> Mr. King had a pecuniary interest, direct or indirect, in any of [the matters voted on]. The mere fact that Northridge made campaign contributions could not, in and of itself, establish any such interest. There could, of course, be circumstances in which the contribution and the "matter" could be so linked as to justify a conclusion that the contribution created a pecuniary interest in the matter. Indeed, the chambers judge took note of an example of such a situation when he said in his reasons:
>
> There is no evidence of a direct pecuniary interest in the sense that he agreed to vote for those projects in return for their campaign contribution of $1,000.
>
> It would not be useful to speculate as to what circumstances could create an indirect pecuniary interest. It is enough to say that the mere fact of the applicant having made a campaign contribution is not enough.

The Court of Appeal set aside the trial decision and found that Mr. King was not in a conflict of interest. The Court of Appeal refused to deal with the issue of the non-proper disclosure of campaign financing (which the City argued required that he be disqualified under the applicable municipal legislation), since Mr. King's term as alderman had expired, making the issue moot.

(c) No Magic Number which Campaign Contributions Cannot Exceed

In *Highlands Preservation Society v. Highlands (District)*, 2005 BCSC 1743, a corporation contributed $250.00 to each of four counsellors during their election campaigns. Arithmetically, the corporation's contributions amounted to more than 25% of the collective total received by the four counsellors. All these amounts were properly disclosed. The counsellors later voted on a proposal involving the corporation. The petitioner alleged that the counsellors were in a conflict of interest when they voted on the proposal, as they voted in favour as a *quid pro quo* for the financial contributions. In his arguments about disqualification, the petitioner focused on the percentage of the total contributions received by the counsellors, which the Court held was misguided, writing:

> The question is not whether there is a magical number which campaign contributions cannot exceed, but whether there is any evidence of contributions coupled with a promise, implicit or otherwise, to deliver a vote. If the evidence revealed that a counsellor agreed to sell her vote for a campaign contribution of five dollars, the size of the bribe, or the percentage overall contributions, would be superfluous. In such a case, it is the link to dishonest conduct that is reprehensible.
>
> Similarly, if a counsellor happens to receive only one campaign contribution from a single person, it does automatically follow that the counsellor must have agreed to sell his vote in exchange. Absent such an arrangement, the contributor is simply exercising the democratic right to make a campaign contribution to a candidate that she or he chooses to support. There is nothing reprehensible in that so long as the councillor does not agree, implicitly or otherwise, to vote a certain way.

The Court held that the counsellor did not have a pecuniary interest in the matter voted upon.

Contributions Alone Not Enough to Disqualify

The above cases from British Columbia support the rule that campaign contributions are not, in and of themselves, enough to give rise to a disqualifying conflict of interest. However, as with all conflicts of interest, the circumstances surrounding the donation and the conduct of the elected official are important to determine whether there is a pecuniary interest that must be disclosed. With so few cases on this issue, there are many circumstances that might give rise to a disqualifying interest. The case law is clear that, at minimum, trustees will need to consider:

- whether the contribution is really a "bribe" (and so should be rejected); and
- whether the contribution must be disclosed under election laws (and if it must, then how to comply with the disclosure requirements).

Yet, even if a pecuniary interest arises from a given campaign contribution, a disqualification or removal from office does not automatically result. Trustees must carefully consider their obligations under sections 58 and 59 of the *School Act*.

Michelle T. Maniago
Borden Ladner Gervais, LLP
Vancouver, British Columbia

CORONER'S JURY RECOMMENDATIONS INTO DEATH OF JEFFREY BALDWIN

In February 14, 2014, a Coroner's Jury looking into the death of Jeffrey Baldwin, a five-year-old Toronto boy who starved to death in 2002 while in the care of his grandparents, released 103 recommendations. A number of the recommendations made by the jury pertain to ways in which Ontario school boards can work to improve the identification and protection of children who are subjected to abuse and neglect.

In 1998, Jeffrey was taken by the Catholic Children's Aid Society ("CAS") from his teenage parents, both of whom were emotionally volatile, and he and his siblings were placed in the care of their grandparents. Both of Jeffrey's grandparents had previous convictions for child abuse, but those records weren't discovered in the CAS files until after his death in 2002. The family's caseworker testified that she never conducted any record checks on Jeffrey's grandparents, as she perceived them to be reliable and supportive in comparison to Jeffrey's own parents.

In March 2003, Jeffrey's grandparents were arrested and charged with first-degree murder for their role in his death.

The Coroner's Jury's Recommendations

One of the findings of the inquest relating to Jeffrey's case was that his death was the result of systemic failure, rather than the failure of any one party. As such, the jury's recommendations target a number of Ontario ministries, including: the Ministry of Children and Youth Services; Ministry of the Attorney General; the Ministry of Health and Long-term Care; the Ministry of Education; the Information and Privacy Commissioner of Ontario; and various children's aid societies.

Some recommendations are focused on improving record keeping and information sharing among children's aid societies in Ontario, including urging the Government to implement the Child Protection Information Network, a province-wide system accessible by any children's aid society in the province in the next two years. The jury has also recommended that the Ministry of Children and Youth Services conduct and fund a review of all child protection standards, including the provincial kinship service standard.

Recommendations for the Toronto District School Board

The jury has made a number of specific recommendations directed at the Toronto District School Board (the "TDSB"), which are partly the result of evidence presented at the inquest regarding the role the TDSB could have potentially played in Jeffrey's case. Specifically, the jury was presented with evidence that one of Jeffrey's sisters, who had been abused by his grandparents like Jeffrey was, most likely only survived the abuse because she was allowed to go to school, where she was given a small snack every day. The evidence suggested that Jeffrey was not attending school at the time of his death because he was not toilet trained. The jury was also presented with evidence that some of the teachers of Jeffrey's sister were unaware of their duty to report suspected abuse or neglect to children's aid.

In the context of the above-noted evidence, the jury recommended that prior to the start of the 2014-15 academic year, the TDSB review and update its P045 (Dealing With Abuse and Neglect of Students) and PR560 (Operational Procedure – Abuse and Neglect of Students) policies in consultation with Toronto children's aid societies, the Ministry of Children and Youth Services and Ontario Association of Children's Aid Societies.

The jury recommended that the TDSB deliver a directive to principals and staff that where a member of staff suspects that a child may be in need of protection, as defined in the *Child and Family Services Act*, R.S.O. 1990, c. C.11, and current TDSB policies regarding abuse and neglect of students, the staff member has a legal obligation to report directly to a children's aid society. The directive should also confirm that the staff member should not investigate or discuss the concern prior to making the call to the children's aid society. As part of the identification of potential cases of student neglect and abuse, the jury's recommendations encouraged the TDSB to develop attendance alerts for students who are consistently absent or who are absent for prolonged periods of time.

The jury also recommended that the TDSB implement annual training for all its staff, including teachers, administrators, trustees and all office staff and educators, on the duty to report child abuse and neglect, including how to recognize it, report it, and how to manage the consequences of making a report. The TDSB was also encouraged to implement a policy or procedure to take effect in the 2014-5 school year, requiring that a Vulnerable Sector Screening (VSS) be completed for all volunteers, with an updated VSS to be completed by each volunteer no less than every 5 years.

The jury also recommended that the TDSB implement a procedure to address barriers, such as toilet training, faced by children who are eligible to be enrolled

in school but are not yet required to attend, in order to encourage their enrolment in school. The jury recommended that the TDSB liaise with community partners, such as libraries, religious and community centres, and children's aid societies in developing this procedure and addressing barriers.

Recommendations for the Ontario Ministry of Education

The jury made a number of recommendations for the implementation of policies by the Ministry of Education (the "MOE") in order to ensure a uniform approach to dealing with student abuse and neglect across school boards. Most notably, the jury recommended that the MOE review all of the recommendations the jury directed at the TDSB and consider whether they should be applied at other school boards across the province.

The jury recommended that the MOE include definitions of "abuse" and "neglect" in appropriate policies and documents to improve the identification tools provided to educators and staff in its school boards.

Significantly, the jury encouraged the MOE to conduct a review of the Ontario Teacher's College's curriculum and teacher training, to ensure that the College adequately covers training in identifying abuse and neglect in children and the duty to report.

Also significant was the jury's recommendation that the MOE consider incorporating into the Physical and Health Education curriculum the requirement that students from Kindergarten to Grade 12 be educated about neglect in an age-appropriate manner.

The jury also suggested that the MOE play a role in obtaining information about students' guardians and relatives, by incorporating student sibling and family composition information as part of the standard MOE student registration forms.

The Significance of the Jury's Recommendations

The Baldwin inquiry and recommendations confirm that all employees of school boards have a special role and responsibility in the protection of children and students of all ages.

School boards should ensure that all educators and staff receive appropriate and frequent training with respect to school board policies and procedures on the identification and reporting of student abuse and neglect.

The Law Relating to Reporting Suspected or Actual Child Abuse and Neglect

In Ontario, the Child and Family Services Act ("CFSA") places a general duty on people, including any person who performs professional duties with respect to a child, to report the abuse and neglect of a child to a children's aid society. Any member of school staff has a duty to report suspected abuse or neglect "forthwith" once he or she has reasonable grounds to suspect that the child is in need of protection.[1]

Notably, it is not the duty of the teacher or principal to assess the severity of the abuse – it is mandatory for teachers and principals to report any and all cases where there are reasonable grounds to suspect that abuse has occurred, regardless of whether the injury is minimal. It is also not the role of the principal to fully investigate or to confirm whether, in fact, abuse has occurred, subject to the minimal investigation necessary in order for the educator to determine whether reasonable grounds exist to suspect that abuse has occurred. A full-scale investigation should be left to the police and/or children's aid society.

While the duty to report lies with the staff member who formed the suspicion or heard the disclosure[2], he or she may request the principal's or designate's presence while making the report to the children's aid society. Moreover, school board policies require that the principal be informed of the suspected abuse or neglect in writing, regardless of his/her participation in the call to the children's aid society. It must be stressed, however, that the responsibility to report is a personal one and that an educator is not required to wait or obtain the approval of the principal or designate before making a report.[3]

Where a student raises a concern in school regarding possible abuse at home, or where home abuse is suspected on reasonable grounds, the school staff does not have control with respect to the removal of the possible offender. As such, where a teacher or principal decides to take no action, the child may return home to an abusive situation. In this regard, where suspected abuse involves family members or someone in the student's home, it is particularly crucial that the suspected abuse is reported as quickly as possible.

Finally, whenever an educator receives information that causes him or her to consider whether a report should be made to the children's aid society, the school should review its obligations under the relevant police/school board protocol. In general, incidents involving violence or an imminent threat to the safety and security of the school community will also require a police response.

Maria Gergin
Borden, Ladner, Gervais, LLP
Toronto, Ontario

1. CSFA, s.72(1). The categories of what must be reported are set out in the paragraphs to this subsection.
2. *Ibid*., s.72(3)
3. *Ibid*.

CONTRIBUTORS TO THIS ISSUE

A special "thank you" to those who have contributed material for this issue of CAPSLE COMMENTS.
They are:

Emily Savage
Kevin MacNeill and Kecia Podetz
Michelle T. Maniago
Maria Gergin

CONTACT INFORMATION

CAPSLE - Canadian Association for the Practical Study of Law in Education
37 Moultrey Cres.
Georgetown, Ontario
L7G 4N4

phone: (905) 702-1710
fax: (905) 873-0662
email: info@capsle.ca
website: www.capsle.ca

2014-2015 BOARD OF DIRECTORS

President: Myles Ellis
Canadian Teachers' Federation

Treasurer: Ian Pickard
MicInnes Cooper

Vice-President: Stefanie Tuff
Newfoundland & Labrador Teachers' Association

Secretary: Paul Clarke
University of Regina

Past President: Page Kendall

Directors

Sue Ferguson
BC Public School Employers' Association

Shaun MacCormac
PEI Teachers' Federation

Janice McCoy
Ottawa-Carleton District School Board

Kerry Richardson
BC Teachers' Federation

Judith Parisien
Fasken Martineau DuMoulin LLP

Maria Gergin
Borden Ladner Gervais LLP

Andrew Peters
Manitoba Teachers' Society

Judy Begley
Begley Lordon

CAPSLE Comments is published four times a year by the Canadian Association for the Practical Study of Law in Education/L'association canadienne pour l'étude pratique du droit de l'éducation, 37 Moultrey Cres., Georgetown, Ontario L7G 4N4. tel: (905) 702-1710, fax: (905) 873-0662, email: info@capsle.ca, website: www.capsle.ca.

Inquiries and comments concerning CAPSLE Comments should be addressed to Roderick Flynn, CAPSLE, 37 Moultrey Cres., Georgetown, L7G 4N4 or by email at editor@capsle.ca.

Advertising space is available within CAPSLE Comments in business card, quarter-page and half-page sizes. Ads are accepted in both camera-ready or file format. For information pertaining to production deadlines and rates, please contact Lori Pollock, phone (905) 702-1710, fax: (905) 873-0662, email: info@capsle.ca.

General information regarding membership, involvement on CAPSLE committees and/or the CAPSLE Board of Directors is available from your regional director or from CAPSLE's office.