September 2017, Volume 27, No. 1

Capsle Canadian Association for the Practical Study of Law in Education

COMMENTS

NEW REGIME FOR MARIJUANA WILL IMPACT CANADIAN SCHOOLS

On April 13, 2017, the Federal Government introduced legislation, Bill C-45, which will provide legal access to marijuana[1] and control and regulate its production, distribution and sale. Currently, the *Controlled Drugs and Substances Act* makes it a criminal offence to produce, buy, sell, possess or traffic in cannabis, except where access to cannabis is permitted for medical purposes. Bill C-45, the *Cannabis Act*, would create new rules for the production, distribution, sale and possession of cannabis in Canada. Bill C-45, if passed, will come into force no later than July 1, 2018. Until then, all laws respecting cannabis remain in effect. Also introduced on April 13, 2017 was Bill C-46, an act that would amend the *Criminal Code* to include new provisions that address drug-impaired driving.

On the one hand, the new regime for cannabis under Bill C-45 will create legal access to cannabis for Canadian adults outside the medical context. This represents a major shift in the criminal law in Canada. On the other hand, Bill C-45 is supposed to strictly regulate the supply of cannabis and keep it out of the hands of Canadian youth. Critics of Bill C-45 have commented that the message youth may take from Bill C-45 is that smoking cannabis is normal, and not harmful, and thus cannabis use among Canadian youth could rise.[2] The current level of cannabis use among Canadian youth is quite high, notwithstanding its status as an illegal drug. For example, a recent study by the Propel Centre for Population Health at the University of Waterloo found that one in five students reported trying cannabis, and one in ten reported use in the last 30 days.[3]

The following activities would be legal if Bill C-45 is passed:[4]

- Adults age 18 or older may legally[5]:
    - Possess up to 30 grams of dried cannabis or equivalent in public;
    - Share up to 30 grams of dried cannabis with other adults;
    - Purchase dried or fresh cannabis and cannabis oil from a provincially-regulated retailer, or an online federally licenced producer;
    - Grow up to four (4) cannabis plants of up to 1-metre in height, per residence, for personal use from a licensed seeds or seedlings supplier;
    - Make products at home using legal cannabis such as food and drinks;
    - Other edible cannabis products may be made available after the Government develops regulations for their production and sale.

- Youth under age 18 would not face criminal prosecution for possessing or distributing up to 5 grams of dried cannabis or its equivalent, although the provinces could introduce a regulatory ticketing system for such activity;[6]

The following are additional highlights from Bill C-45:

- Provinces will have the authority to prohibit possession of any amount of cannabis by youth, permitting police to seize any cannabis;

- Youth under age 18 who contravene the *Cannabis Act* will be prosecuted under the *Youth Criminal Justice Act*;
- New criminal offences, with maximum penalties of 14 years in jail, for giving or selling cannabis to youth and for using a youth to commit a cannabis-related offence;
- Prohibitions on packaging and products that are appealing to youth;
- Prohibitions on promotion activity, including in a manner that is appealing to youth, or presenting cannabis in a manner that is associated with "*glamour, recreation, excitement, vitality, risk or daring*".

Medical use of cannabis will continue to be regulated under the *Access to Cannabis for Medical Purposes Regulations*. Currently there are 43 licensed producers that deliver legal cannabis through the mail to any Canadian with a valid medical prescription.

What happens next?

The provincial governments are responsible for much of the practical implementation of the *Cannabis Act* such as licensing the distribution and retail sale, and related compliance, and consequential updates to public smoking, zoning, and traffic safety laws. It is therefore not yet known, for example, where Canadian adults will be able to purchase cannabis. (Editor's Note: On September 8, 2017, the Ontario Government announced that the Province will sell marijuana in as many as 150 outlets to be operated by the Liquor Control Board of Ontario).

Until Bill C-45 is passed, the current laws remain in effect. This means that the storefront dispensaries that have been operating in plain sight are not operating legally. Many have been subject to raids by police and have been closed.[7] Until Bill C-45 is passed and comes into force, the only lawful way to purchase and use cannabis is under the *Access to Cannabis for Medical Purposes Regulations*.

What effect will the new rules have on Canadian schools?

Although Canadian schools have contended with cannabis for decades, the Federal Government's new regime for regulating cannabis will introduce new challenges. In one regard, cannabis has been an illegal drug under the *Controlled Drugs and Substances Act* for years, thus it is being treated very strictly by school administrators. For example, paragraph 310(1) of the *Ontario Education Act* lists trafficking in illegal drugs as an activity leading to suspension.

The Member of Parliament responsible in part for implementing the *Cannabis Act*, Bill Blair, said in an interview with CBC News that the ultimate goal is to give provinces flexibility to prohibit young people from possessing any amount of cannabis, with an option to introduce non-criminal sanctions for having a small amount (i.e. under 5 grams).[8] Health Canada confirms Mr. Blair's view, stating that it is unacceptable and unsafe for youth under 18 to possess or use any amount of cannabis, it is equally unacceptable for the Federal Government to burden individuals with criminal prosecution for possession of very small amounts of cannabis.

We contacted representatives of the Federal Government for comment regarding youth and cannabis under the new *Cannabis Act*. We can advise that at this time, the *Cannabis Act* does not contain an offence for possession and sharing of up to five grams by persons under 18 years of age. This could still change in Parliament. However, as of today's date, the *Cannabis Act* remains silent for possession of cannabis up to five grams by young persons. In the Government's view, the proposed *Cannabis Act* is reflective of a change of attitude of the Canadian people, many of whom agree with legalization of cannabis in some form. However the Federal Government states that it is by no means condoning possession by young people, but has instead chosen to remain silent on it for amounts up to five grams. We are further advised that consultation with the provinces during the drafting of the *Cannabis Act* revealed that some provinces would consider prohibiting possession by youth of small amounts. The Federal Government advises that the legislation was carefully drafted so as to leave it open for the provinces to regulate without the possibility of jurisdictional issues.

The changes resulting from the *Cannabis Act* do not mean, however, that students would have a right to bring up to 5 grams of cannabis to school. It means that the police will not charge such students with a criminal offence that could lead to having a criminal record (although students could be ticketed and have the cannabis confiscated). In our view, preventing students from possessing, using, sharing or selling cannabis at school remains a valid objective for Canadian schools.

Once the full scope of the provincial regulation of cannabis is announced, school boards will need to revise existing policies to ensure consistency with such regulations. For example, school boards are required under s. 29.2 of the Ontario *Education Act* to establish a drug education policy framework and implement a policy on drug education in accordance with that framework. Such policy framework and policy will need to be updated after the passage of the *Cannabis Act* and related provincial regulations.

Medical Access to Cannabis

Legal access to cannabis for medical purposes has been allowed in Canada to varying degrees since 1999. The use of cannabis to treat certain symptoms of illness, such as pain management or neurological disorders, arises in the context of disability management and accommodation. As stated earlier, the current system of providing legal access for medical purposes will remain in place. That system, under the *Access to Cannabis for Medical Purposes Regulations*, consists of federally licensed commercial cannabis producers who are authorized to sell cannabis to individuals with a legal prescription. Such sales are conducted by mail only. At present, there are 43 licensed producers of cannabis in Canada. Individuals may also register with Health Canada to produce a limited amount of cannabis for their own medical purposes.

The *Cannabis Act*, and legal access to cannabis for non-medical use, could have the effect of destigmatizing the use of cannabis for medical purposes. As a result, we could see more individuals with prescriptions for cannabis for medical purposes, which could translate into more employees such as teachers seeking accommodation of a disability. The usual framework that applies to accommodation of a disability, to the point of undue hardship, continues to apply.

The issue of impairment by cannabis is a significant concern, as evidenced by the Government's efforts to create a roadside impairment test that police can use to detect and charge drug-impaired drivers. In the employment context, accommodating employees who are impaired by a medication, especially those in safety sensitive positions such as teachers, could amount to undue hardship. Impairment and accommodation will continue to be part of an individualized assessment in relation to an employee's disability.

In the non-medical context, schools can continue to have zero-tolerance for employees who are impaired at work. Similar to alcohol, cannabis may soon become a legal intoxicant for Canadian adults, but this does not mean a person is entitled to use cannabis at work or be impaired by cannabis while working. However, employers may no longer be able to discipline or dismiss an employee for off-duty conduct that becomes legal after the *Cannabis Act* comes into effect.

A less common scenario is accommodating a disabled student's use of cannabis for medical purposes. The Canadian Pediatric Society has said in several statements that there is insufficient data to support the efficacy or safety of medical cannabis for children, and that smoking cannabis is specifically unacceptable for children.[9] The University of Saskatchewan announced on February 1, 2017 that it would study cannabis oil as a treatment for children with medically intractable epilepsy and associated cognitive decline.[10] On May 24, 2017, CBC News reported on a study from the New England Journal of Medicine which researched the effect of cannabidiol in reducing seizures for children with Dravet syndrome, a rare severe form of epilepsy.[11] Such children were given pharmaceutical grade cannabinoids and medically supervised. The narrow scope of illnesses under review suggests that physicians are unlikely to widely prescribe cannabis to children.

However, it remains possible that a student would request accommodation of a disability by asking for permission to take cannabis-related substances at school. The legal issues around accommodation would continue to apply. Educators must confirm a student's medical needs and confirm that the use is lawful (e.g. obtain a copy of a prescription or other evidence of compliance with the *Access to Cannabis for Medical Purposes Regulations*),

assess when and how the medication is to be administered, and safeguard a student's personal health information. The issue of impairment should also be monitored, and reduced as much as possible, given the need for students to have a safe and healthy learning environment.

There have been few reported cases dealing with accommodating student use of cannabis for medical reasons. In one example at the post-secondary level, the British Columbia Human Rights Tribunal dismissed a claim of discrimination by a Fine Arts student who advised his university that he was smoking cannabis to manage pain from osteoarthritis.[12] The University requested medical information to confirm there was no risk of impairment. This was particularly important given the requirement to use heavy equipment in one of his visual arts courses. The University was ultimately found to have presented the student with reasonable accommodation options for completing his coursework without using the heavy equipment. For his part, the student did not participate in the accommodation process because he refused to provide the necessary medical information. The case was dismissed.

Summary

The changes to Canada's treatment of cannabis will have profound effects on Canadian society, and in Canadian schools. On the one hand, the message to adults is that possession and use of cannabis for non-medical and medical purposes is acceptable within the restrictions set out by the federal and provincial governments. On the other hand, the intended message to youth is that cannabis is harmful, but the *Cannabis Act* presently does not contain an offence for possession and sharing of up to five grams. Educators will remain responsible for educating students about the harms of cannabis, and keeping it out of schools.

Kate Dearden
Borden Ladner Gervais LLP
Toronto, Ontario

1. Referred to hereinafter by its formal name, cannabis. Editor's Note: Bill C-45 passed 2nd Reading in Parliament on June 8, 2017 and has been referred to the Standing Committee on Health (with a scheduled first meeting in this regard to be held September 19, 2017). Bill C-46 passed 2nd Reading on May 31, 2017 and is presently being reviewed by the Standing Committee on Justice and Human Rights.
2. See for example Kelly Grant, "What Canada's Doctors are Concerned about with Marijuana Legalization", The Globe and Mail (12 April 2017), online: <https://www.theglobeandmail.com/news/national/what-canadas-doctors-are-concerned-about-ahead-of-marijuana-legalization/article34694165/>
3. "As Many Teens Smoke Tobacco as Smoke Pot, Study Finds", CBC News (9 May 2017), online: <http://www.cbc.ca/news/canada/kitchener-waterloo/teen-tobacco-marijuana-pot-use-study-university-waterloo-1.4106369>
4. Health Canada, Media Release, "Backgrounder: Legalizing and Strictly Regulating Cannabis: The Facts" (April 2017), online: <https://www.canada.ca/en/health-canada/news/2017/04/backgrounder_legalizingandstrictlyregulatingcannabisthefacts.html>
5. Provinces will be responsible for setting access and may, at their option, set access at an age higher than age 18.
6. Bill C-45, Cannabis Act, 1st Sess, 42nd Parl, 2017, s. 8(1)(c) and s. 9(1)(b)(i)
7. See for example Member of Parliament William Blair quoted by Kirsty Kirkup, "Ottawa Wants Young Teens to Avoid Criminal Record for Pot Possession", CBC News (17 April 2017), online: <http://www.cbc.ca/news/politics/teens-marijuana-cannabis-pot-criminal-record-1.4073148>
See for example Sammy Hudes, "Toronto Police Raid 4 Marijuana Dispensaries", The Toronto Star (29 March 2017), online: <https://www.thestar.com/news/crime/2017/03/29/toronto-police-raid-four-pot-dispensaries-tuesday.html>
8. Kirsty Kirkup, "Ottawa Wants Young Teens to Avoid Criminal Record for Pot Possession", CBC News (17 April 2017), online: <http://www.cbc.ca/news/politics/teens-marijuana-cannabis-pot-criminal-record-1.4073148>
9. See for example Canadian Pediatric Society, Position Statement, "Is the Medical Use of Cannabis a Therapeutic

Option for Children?" (5 Feb 2016), online: <http://www.cps.ca/en/documents/position/medical-use-of-cannabis> and Canadian Pediatric Society, Position Statement, "Cannabis and Canada's Children and Youth" (24 Nov 2016), online: <http://www.cps.ca/en/documents/position/cannabis-children-and-youth>

10. University of Saskatchewan, Media Release, "U Of S Launches Study of Cannabis Treatment for Childhood Epilepsy" (1 Feb 2017), online: <https://news.usask.ca/media-release-pages/2017/u-of-s-launches-study-of-cannabis-treatment-for-childhood-epilepsy.php>

11. Amina Zafar, "Cannabidiol Reduces Seizures in Kids With Severe Form of Epilepsy, Trial Shows", CBC News (24 May 2017), online: <http://www.cbc.ca/news/health/dravet-syndrome-epilepsy-cbd-1.4130180>

12. *Dean v. University of Victoria and Another*, 2012 BCHRT 71

PRESIDENT'S MESSAGE

Autumn greetings. I hope this finds you well and enjoying the last few weeks of warm weather. I trust that the holidays have offered a break from the routine, a chance to unwind and, the occasion to enjoy the company of family and friends. As we head into the fall season, new opportunities and challenges lie ahead for our organization.

In April of this year, the Board decided to stop publication of *CAPSLE Comments*. We felt that the current format (including overly long articles by today's standards) for getting the word out about recent developments in Education Law and communicating about Board initiatives was no longer suitable to the current digital age in which we live and work. Going forward, we will communicate on a monthly basis in various formats including blogs, tweets, Facebook communications, etc. We will shorten our messages about recent developments in case law and educational law policy by limiting ourselves to 250-300 words. More frequent messaging in smaller bytes will allow us to be more effective and nimble in getting the word out about what is "hot and relevant" for those who have a passion for, and interest in, education law.

As a result, this will be the final edition of *CAPSLE Comments*. First published in September, 1991, our quarterly publication has been around for 26 years. Through the years, our authors and contributors have canvassed numerous topics related to applied education law in Canada. Summaries and thoughtful analyses of relevant case law, legislative and policy developments, and other topics related to education law have found their way into CAPSLE Comments. To all of those who have contributed, we remain eternally grateful.

I would like to express a special thanks to our editor extraordinaire, Rod Flynn. Rod has been with us since 2004. He has worked tirelessly and faithfully as our editor during the past 13 years. Rod has an uncanny ability, as an editor, to keep focused on the big picture to ensure a coherent whole while paying attention to the nitty gritty of proofreading and other details which are a must for any quality publication. He has edited the proceedings of our national conference (in book format), *CAPSLE Comments* (in both paper and e-formats), and offered invaluable advice to the CAPSLE Board while serving our organization. We owe you a great debt of gratitude, Rod, for the exemplary editorial leadership you have provided to CAPSLE over the years. Thank you from the bottom of our hearts for all the hard work and dedication you have shown. We shall miss you dearly.

The Board has recently hired our webmaster, Rob Rankin, to update our website and we plan to have a new, sleeker, and more attractive look by the end of October 2017. A revamped website will be bilingual (English/French), and more interactive. Members will be able to search archived CAPSLE proceedings and conference materials using key words and phrases. Members and newcomers will be able to pay directly on line for memberships, conference registrations and, other CAPSLE services.

I am pleased to announce that the Board will be offering a webinar in the fall using ZOOM technology. The webinar will run for 60 minutes and will be free for the first 100 CAPSLE members who sign up. We will send an email to all current members by October 7 explaining how to sign up for the webinar. Board members, Ian Pickard and Gale Gatchalian (both lawyers and experts in education law representing the management and union sides respectively), will co-present on November 28th on the topic of the Top 10 Issues in Education Law. Board member Charlene Theodore, legal counsel for the Ontario English Catholic Teachers' Association, and Eric Roher (a nationally recognized lawyer specializing in education law) will co-present early in 2018. Charlene and Eric will likewise offer union and management perspectives respectively. The purpose of these inaugural webinars is to

educate our members about the most recent developments in education law and to offer an additional service related to membership. By providing a sophisticated and thoughtful analysis of current issues from practising experts offering both a management and union perspective, we aim to showcase yet another reason why those working at the intersection of education and law should join our organization, link into our webinars, and/or attend our national conference.

Finally, I would like to draw your attention to the 2018 Halifax CAPSLE Conference which runs from Sunday April 29 to Tuesday May 2, 2018. Our co-chairs, Gail Gatchalian and Ian Pickard, have already put together a very strong, promising, and exciting program. Thanks Gail and Ian for your inspiring leadership in this area. Confirmed plenary speakers and panelists, along with links to relevant information about some of the speakers, include:

Theme - **A Bridge over Troubled Waters**

Day 1 – Sunday

Morning - The Honourable Justice Thomas Cromwell, retired justice of the Supreme Court of Canada

Lunch – Truth and Reconciliation in Education and the Law:

(1) Maureen Googoo, journalist and owner/editor of http://kukukwes.com/

(2) Eleanor Bernard, Executive Director of Mi'kmaw Kina'matnewey, the Mi'kmaq School Board, http://kinu.ca/

(3) *** TBA

Day 2 – Monday

Morning – Youth, Education and Criminal Justice

The Honourable Judge Pam Williams, Chief Judge of the Nova Scotia Provincial Court - Mental Health and Opiate Treatment Courts

Robert Wright, Halifax-based Social Worker and Sociologist - cultural assessments in criminal proceedings, http://www.robertswright.ca/

Day 3 – Tuesday

Morning – The North Preston Land Recovery Initiative

(1) Angela Simmonds, articling clerk with Nova Scotia Legal Aid and liaison to the Initiative: https://www.dal.ca/faculty/law/news-events/news/2017/05/23/2017_convocation_profile__angela_simmonds.html
http://northprestonland.ca/

(2) *** TBA

Last Panel – Freedom of Association

(1) Diane MacDonald, legal counsel, British Columbia Teachers' Federation

(2) John Craig, Partner, Fasken Martineau

(3) Gail Gatchalian, Partner, Pink Larkin

As you can see from the above, the Halifax program will be excellent both in terms of the content offered and the quality of the speakers. We hope that current members and those interested in education law who have yet to come to CAPSLE will join us for another fantastic national conference.

I invite all of you receiving this message to enthusiastically and energetically get the word out about CAPSLE, the Halifax conference program, and our upcoming fall webinars.

If you have any thoughts about the President's message and how we might better serve our members, conference attendees and how we might reach out to those who have yet to engage with us, please email us at info@capsle.ca.

Enjoy the remainder of the summer and have a great school year!!

Paul Clarke
CAPSLE President

SASKATCHEWAN INVOKES CHARTER CLAUSE OVER CATHOLIC SCHOOL FUNDING

Over a very dramatic two weeks, Catholic schools in Saskatchewan first lost, and then apparently regained, the right to receive funding in respect of non-Catholic students who attend Catholic schools in the Province.

On April 20, 2017, the Saskatchewan Court of Queen's Bench (the "Court") released its decision in *Good Spirit School Division No. 24 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan* ("Good Spirit")[1] in which it held that the Government of Saskatchewan cannot provide funding to Catholic schools in respect of non-Catholic students who attend such schools, because doing so violates the freedom of religion and equality provisions of the *Canadian Charter of Rights and Freedoms* ("Charter").[2]

In an unexpected development, on May 1, 2017, Saskatchewan Premier Brad Wall announced that the Provincial Government would invoke the *Charter*'s "notwithstanding clause" to override the Court's decision.[3] This will be only the fifth use of the notwithstanding clause in the 35 years of the *Charter*'s history, and the first time it has been invoked since 2000.

Despite the Government's use of the override, the Court's decision in *Good Spirit* provides an interesting analysis of denominational rights in Canada, and demonstrates the tension between constitutional protection of separate schools and the interests of non-Catholics.

Denominational Education Rights in Canada

To understand the Court's decision in *Good Spirit*, it is necessary to have a general understanding of denominational rights in Canada.

Roman Catholics and Protestants in Saskatchewan and Alberta, and Roman Catholics in Ontario, have a constitutionally-protected right to religious education under section 93(1) of the *Constitution Act, 1867* (the "*Constitution Act*").[4] This constitutional protection arose out of a historical compromise at Confederation: a province's legislation respecting denominational schools existing at the time of Confederation would be preserved after that province joined Canada.

Only Alberta, Saskatchewan, Newfoundland, Ontario and Quebec had legislation providing for denominational schools at the time they joined Canada. While Newfoundland and Quebec have since abolished denominational rights in their respective provinces through constitutional amendments, separate school rights continue to be litigated in Alberta, Saskatchewan and Ontario.

The Facts in *Good Spirit*

Good Spirit arose out of the operation of an elementary school in the town of Theodore, Saskatchewan. In 2003, the Yorkdale School Division (now the Good Spirit School Division) closed its elementary school in Theodore due to low enrolment, which meant that its 42 students would have to be bussed to the school in a neighbouring community, 17 kilometers away. In response, a local group of Roman Catholics petitioned the Saskatchewan Minister of Education to form a new Catholic school division, which purchased the former school, and operated it as St. Theodore Roman Catholic School.[5] Many non-Catholics in Theodore chose to send their students to the local Catholic school, rather than bus them to the nearest public school. When the school opened in 2003, only 31% of the students were Catholic. At the time of trial, only 35% of the students enrolled were Catholic.[6]

The public Good Spirit School Division brought a lawsuit, challenging the Government's funding of non-minority faith students in Saskatchewan's Catholic schools.[7]

The Court's Analysis

It is well-established that practices that are protected by the denominational rights in section 93 of the *Constitution Act* cannot be challenged under the *Charter* (because one part of the Constitution cannot be used to

attack another part of the Constitution). As a result, the Court in *Good Spirit* first had to determine whether the Province's funding of non-Catholic students attending a separate school was protected by section 93 of the *Constitution Act*. If it was, no *Charter* challenge could be brought.

The Court first affirmed the principle that sub-section 93(1) of the *Constitution Act* protects only denominational rights that existed when a province joined Confederation. As Catholic schools in Saskatchewan did not have the right to receive public funding in respect of non-Catholic students when Saskatchewan joined Canada in 1901, the Court found that such funding would not relate to a "denominational aspect" of Catholic schools within the scope of the provision.[8]

The Court then considered sub-section 93(3). This section empowers provinces to enact new legislation with respect to separate schools, after joining Confederation. The Court found that, in order to receive constitutional protection under sub-section 93(3), the province's legislation must relate to the "denominational aspect" of separate schools.[9] The Court concluded that educating non-Catholic students could not relate to the "denominational aspects" of a Catholic school. Accordingly, funding for non-Catholic students in Catholic schools provided for in post-1901 legislation in Saskatchewan did not fall within section 93(3) of the *Constitution Act*, and could therefore be challenged under the *Charter*.

The Court then proceeded to consider the *Charter* challenge. In a brief analysis, the Court found that funding for non-Catholic students in Catholic schools was contrary to the principles of freedom of religion and equality protected by sections 2(a) and 15, respectively, of the *Charter*). Specifically, the Court found that:

- It gave an unfair advantage to Catholic schools, by allowing them the opportunity to teach the virtues of their religion to non-members at the expense of the public. [10]
- The same benefit was not extended to other religious schools, who would not receive equivalent public funding in respect of students of other faiths.[11]
- Finally, it provided an advantage to parents of non-Catholic students who were "comfortable" with their children receiving a Catholic education but denied that advantage to those who were not.[12]

The Remedy, the Override, and the Aftermath

Having determined that the funding of non-minority faith students violated the *Charter* and could not be justified, the Court declared that the provisions of the Provincial legislation that granted funding to separate schools respecting students not of the minority faith were of no force and effect.[13] While the Court stayed the declaration until June 30, 2018,[14] as noted above, on May 1, 2017, the Government of Saskatchewan announced it would invoke the notwithstanding clause to override the Court's decision.

Nonetheless, the decision in *Good Spirit* may trigger some questions as to the ability of provincial governments to provide funding in respect of non-Catholic[15] students attending separate schools in Ontario and Alberta. As the Court acknowledged in *Good Spirit*, Canada is becoming a "*complicated mosaic of religious* (and non-religious traditions)"[16], and the boundaries of denominational rights in the country will surely be tested as it continues to change.

However, the Court's decision *Good Spirit* decision is not binding on Courts in Ontario and Alberta, and whether or not a similar challenge could brought in those provinces would depend, in part, upon: (i) the nature of the historical and current separate school funding arrangements in those provinces; and (ii) how the governments of those provinces might attempt to justify the current funding arrangements as accomplishing important objectives (such as efficiencies in the school system and ensuring the availability of Catholic education within reasonable proximity to students' homes); and (iii) whether Ontario courts would find the reasoning of the Saskatchewan Courts to be persuasive. In the event that such a *Charter* challenge was successful, the Governments of Alberta and Ontario could also follow

Saskatchewan's lead and invoke the notwithstanding clause in response, but it is difficult to predict at this time whether they would do so.

Alannah Fotheringham
Borden Ladner Gervais LLP
Toronto, Ontario

1. 2017 SKWB 109 ["Good Spirit"].
2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["Charter"].
3. Government of Saskatchewan, "Government Will Use Notwithstanding Clause to Protect School Choice for Parents and Students" Government of Saskatchewan, 1 May 2017, online: <http://www.saskatchewan.ca/government/news-and-media/2017/may/01/notwithstanding-clause>.
4. *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5. ["Constitution Act"].
5. Good Spirit, supra, at para. 1.
6. Ibid, at para. 2.
7. Ibid, at para. 4.
8. Good Spirit, supra, at para. 188.
9. Ibid, at paras. 189 and 226.
10. Ibid, at para. 397.
11. Ibid, at para. 401 and 441.
12. Ibid, at para. 442. The Court further found that the Charter violations could not be justified under section 1 of the Charter. On the record before it, the Court could not identify a sufficiently pressing objective to justify the Charter breaches, and also found that the funding of non-Catholic students attending separate schools was not rationally connected or proportionate to the aim of ensuring denominational education for Catholic students. cf. paras. 456, 458, and 464.
13. Ibid, at paras. 474-475.
14. Ibid, at para. 476.
15. Or non-Protestant students attending Protestant denominational schools in Alberta.
16. Ibid, at para. 464.

EMPLOYER OBLIGATIONS IN A HUMAN RIGHTS INVESTIGATION

The Ontario Human Rights Tribunal's decision in the case of *Murchie v. JB's Mongolian Grill* sets out the following six elements of the test used to assess the reasonableness of an employer response to a human rights complaint. These elements had been articulated in an earlier Ontario human rights decision, *Wall v. University of Waterloo* ("Wall"):

1. there must be corporate awareness that the conduct complained of is prohibited;
2. there must be a complaint mechanism in place;
3. the response must be prompt;
4. the matter must be dealt with seriously;
5. the respondent must act so as to provide a healthy environment;
6. the respondent must communicate its actions to the complainant. (para. 167)

The Adjudicator in a (2005) decision, *BL v. Marineland of Canada*, noted that the six criteria of corporate "reasonableness" in Wall had been adopted in previous decisions of the Ontario Boards of Inquiry. In the Marineland decision he set out the following conflated version of the six criteria.

1. Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training:

- Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident?
- Was there a suitable anti-discrimination/harassment policy?
- Was there a proper complaint mechanism in place?
- Was adequate training given to management and employees;

2. Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action:

   - Once an internal complaint was made, did the employer treat it seriously?
   - Did it deal with the matter promptly and sensitively?
   - Did it reasonably investigate and act?

3. Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication:

   - Did the employer provide a reasonable resolution in the circumstances?
   - If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment?
   - Did it communicate its findings and actions to the complainant? (para 59).

While the above three elements are general in nature, their application must retain some flexibility to take into account the unique facts of each case. The standard is one of reasonableness, not correctness or perfection. There may have been several options - all reasonable - open to the employer. The employer need not satisfy each element in every case in order to be judged to have acted reasonably, although that would be the exception rather than the norm. One must look at each element individually and then in the aggregate before passing judgment on whether the employer acted reasonably (para. 60).

The three criteria occur in a logical chronological sequence in relation to an incident or complaint.

- General Pre-Incident Human Rights Obligations;
- Actions in Dealing with the Complaint or Incident; and
- Actions to Resolve the Complaint or Incident.

Hugh H.M. Connelly, B.A., LL.B.
Hugh Connelly LAW
Ottawa, Ontario

1. *Murchie v. JB's Mongolian Grill*, 2006 HRTO 33 (Human Rights Tribunal of Ontario)
2. *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 (Ontario Board of Inquiry)
3. *B.L. v. Marineland of Canada*, 2005 HRTO 30 (Human Rights Tribunal of Ontario)

SEXTING AND THE SCHOOL ADMINISTRATOR

The era of the schoolyard fisticuffs based on a verbal taunt today seem like a quaint anachronism. Speak to any school-based principal or vice principal nowadays and you will surely hear consensus that so much, indeed, the majority, of the conflict issues with which they deal have their origins online. In essence, the smartphone has replaced the fist as the weapon of choice.

While cellular phones began as a classroom annoyance, with students easily and constantly distracted by the buzzing, vibrating communications menace, they have, of course, become so ubiquitous as to have become appendages to many if not most of our students.

They also have brought with them an increasing number of legal issues with which principals and vice principals are facing in their day to day interactions with students. One of the challenging issues relating to technology is finding the line between conduct that has happened off school grounds, beyond the regular confines of the school day, and conduct that has a direct and demonstrable impact on the learning environment and school community.

One of the most difficult and increasingly prevalent of these online legal issues that has found its way to the school is also one that is perhaps the least comfortable with which principals and vice principals must deal: student sexting.

As has been discussed in previous issues of *CAPSLE Comments*, new legislation has been added to the *Criminal Code* to address this seemingly ever increasing phenomenon, particularly as it pertains to young people. The *Protecting Canadians from Online Crime Act* established Section 162.1 in the *Criminal Code*, confirming as a criminal offence everyone,

> "…who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct[1]

On September 6, 2017, the new law completed its first test case, with six students from Bridgewater, Nova Scotia receiving conditional discharges stemming from incidents dating back to 2015.

While the addition to the *Criminal Code* provides society with more appropriate legislation to deal with this increasingly prevalent phenomenon, principals and vice principals remain in the challenging position of having to work with this significant issue and their roles in working within the law and their legal and ethical responsibilities in the schools. It is important to also consider the practical application of this new law for schools and school officials.

Indeed, while the majority of these incidents do not occur on the school grounds proper, it is often easy to draw a clear line between the actions of students in sexting incidents and their impacts on the school community. It is, therefore, appropriate for school officials to intervene and even discipline students when these incidents come to light.

There is often, however, a dearth of consistent protocols or procedures for school officials in how or even when to conduct investigations. Certainly, at the school level, principals and vice principals often take their lead from police agencies. But as schools are often the place of first reporting of sexting incidents, principals, vice principals and other school officials require direction in the appropriate means of handling these delicate situations. Schools have as their primary focus, the protection of students ahead of legally acceptable collection and custody of evidence.

It is not uncommon to hear of a wide variety of procedures followed from province to province, school district to school district, and even school to school within the same district. Anecdotally, we have heard of incidents of well-intentioned school personnel seizing offending pictures, transferring photos to school equipment in order to 'preserve evidence,' or deleting photos in an attempt to stop the spread of the offensive material.

In short, while the *Criminal Code* is national in scope, there is wide discrepancy in the extent to which provincial education ministries or individual school districts have established consistent protocols for how best to respond to complaints brought by students or their families of sexting offences by other students. Though school

districts and ministries of education have certainly recognized the seriousness and increased occurrences of sexting incidents, there remains little official direction for school based personnel in what to do when it occurs, not only in the interest of protecting and supporting student victims, but also in supporting police partners in their pursuit of charges when appropriate. In some provinces, no direction whatsoever has been given by ministry officials, leaving it to school districts to develop policy or practice that can vary greatly between neighbouring jurisdictions.

It is this *practical* application of the law that is so increasingly imperative as incidents of unauthorized distribution of intimate images causes social and emotional distress for students in our schools.

For the sake of our students, it is vitally important our schools, districts and provinces develop and communicate consistent practices to guide the practical application of the new law in our schools.

David Mushens
Coquitlam School District
Port Coquitlam, British Columbia

1. *Criminal Code*, 162.1

Education Law: A Bridge Over Troubled Waters

CAPSLE CONFERENCE 2018
Halifax Marriott Harbourfront
Halifax, Nova Scotia
April 29 – May 1, 2018

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FROM THE CAPSLE ARCHIVES (2016, Kelowna, BC)

Complications in the Accommodation of Employees with Mental Illnesses

(Jennifer Devins and Robyn Trask)

Accommodation of Employees with Mental Illnesses

1. Duty to Accommodate

Accommodation:

- is not a free-standing duty;
- arises as part of a defense to discrimination;
- once individual establishes prima facie discrimination, onus shifts to employer to establish defense;
- can apply to all grounds of discrimination, but usually applies to disability;
- requires employer to make changes to workplace or workplace standards that employee cannot meet as a result of disability to accommodate individual's limitations and restrictions so long as the accommodation does not impose undue hardship;
- accommodation process also requires the participation of employee requiring accommodation;
- may also require participation of union and other employees.

When does the Duty to Accommodate arise:

- An employer's duty to accommodate does not arise until it:
  - Receives a reasonable request for accommodation from the employee; or
  - Receives "constructive notice" of the need to accommodate, i.e. "ought to have known"

[There must be a nexus between the disability and the rule, standard, or expectation that the employee cannot meet.]

…

2. Duty to Inquire

…

3. Medical Information

Can an employer ask for medical information?

- Employers are entitled to clear, current, and credible medical information so that they can assess the legitimacy of a leave, administer benefits and consider accommodation.
- But, employers are only entitled to what is REASONABLY NECESSARY to assess the leave or accommodation requested and no more.

Employers are generally <u>not</u> entitled to:

- Specific diagnosis;
- Know the kind of treatment the employee is receiving;
- Require an independent medical examination;
- Know whether there are non-medical barriers to the recovery;
- Secure reports directly from the employee's doctor or access the employee's medical records;
- Contact the employee's physician directly.

What Information Can an Employer Seek?

- Information relating to nature of illness and expected return to work date;
- Additional information depends on the circumstances;
- Why the information is being sought;
- What information the employer already has;
- What information is relevant to the accommodation sought;
- Relevant collective agreement, contractual, or statutory limitations.

Factors relating to What Information Can an Employer Seek?

- Consider why the information is being sought;

- Employers will be entitled to different information at different stages;
- More and different information is relevant to the accommodation process or return to work than to support a request for sick leave;
- Consider what information the employer has already received;
- Tailor further requests for information to any specific insufficiencies in the information;
- Insufficient information does not entitle the employer to make a general request for all medical information.

When is it Appropriate to Seek Further Information?

- An employer may have either the right to seek information or the obligation to do so;
- An obligation may arise where the employer has a duty to inquire;
- A right may arise where the employee has provided incomplete or conflicting medical information.

Right to Seek Further Medical Information

- Where employee claims cannot attend at work, but can participate in other activities;
- Where employee's conduct requires an explanation;
- Where employee provides cryptic or vague medical information.

…

4. Specific Accommodation Requests

…

5. Managing Performance Issues

…

6. Role of the Union

…

Where can I get the rest of this PPT?

The above extracts are part of a PPT presented at the 2015 (Kelowna, BC) CAPSLE Conference. This paper and other are available to CAPSLE Members on the CAPSLE Members Only Web Page. There is also a Master Index of all the Paper and PPT's from the 2011-15 CAPSLE Conferences.

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CONTRIBUTORS TO THIS ISSUE

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

Kate Dearden
Alannah Fotheringham
Hugh H.M. Connelly, B.A., LL.B.
David Mushens

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: capsle.ca