Risk Management in Canadian Education

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Consulting Editor: Justice Marvin A. Zuker, Ontario Court of Justice

VOLUME 12, NUMBER 2 Cited as 12 R.M.C.E. NOVEMBER/DECEMBER 2011

• CURE FOR THE HANGOVER: CRIMINAL INVESTIGATION ISSUES FOR TEACHERS AND SCHOOL DISTRICTS — PART 1•

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I INTRODUCTION

I have been defending teachers charged with various criminal offences for 28 years. In this article, I will discuss considerations that apply to teachers and school districts in situations where a teacher is accused of criminal misconduct and cleared, either by way of the police or Crown deciding not to lay a charge or by way of an acquittal after a trial. While defending teachers is similar, in many ways, to defending others with respect to various criminal charges, the scenario facing criminal defence counsel for a teacher differs from that presented by the "standard criminal file" in a general criminal practice in many respects.

In particular, criminal defence counsel can be unfamiliar with the impact of a criminal charge on a teacher's life in general. They can be unaware of the consequences of a criminal allegation to the education system or the potential reaction of that education system to it. In the average criminal case, defence counsel is not significantly involved in interfacing with an accused's employer throughout the process, other than to collect evidence for the defence case. Unfortunately, this can result in steps being taken or a strategy being adopted in the defence of a teacher that are unnecessarily incompatible with the teacher's case in other arenas, especially with respect to employment issues.

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In association with:
Catholic Principals' Council of Ontario

RISK MANAGEMENT IN CANADIAN EDUCATION

Risk Management in Canadian Education is published four times during the school year by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ontario L3T 3W8.

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ISBN: 0-433-43063-0 **ISSN: 1496-1431**
ISBN: 0-433-44395-2 (Print & PDF)
ISBN: 0-433-44702-8 (PDF)

Subscription rates: $135 per year (Print or PDF)
$205 per year (Print & PDF)

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While my goal is to end up with an analysis of the situation once the teacher has been cleared or acquitted, a full understanding of that situation requires a discussion of the criminal justice process (and the related consequences to teachers and school districts) leading up to that point.

II. TEACHER CRIMINAL DEFENCE RETAINERS

A. Introduction

The standard scenario involves a teacher being accused of a criminal offence in relation to his or her teaching duties. Such retainers have much in common with standard criminal defence matters.

However, there are a number of factors that make teacher files unique and different from the run-of-the-mill criminal file. The fact situations involve factors unique to teacher situations. The more the defence counsel is aware of these factors, the more effective counsel will be in presenting a defence. This affects both the issues of guilt/innocence and sentence. In particular, there is one defence that is unique to a teacher or parent criminal case — the application of s. 43 of the *Criminal Code of Canada.*[1] Defence counsel is also usually more directly involved in the multi-front war facing an accused teacher than is true in the standard criminal case where counsel's retainer is essentially restricted to the conduct of the criminal proceedings.

B. Similarities with the Standard Criminal Defence Retainer

The elements of the offence charged are the same for any criminal accused, teacher or non-teacher. The burden of proof is on the Crown to prove *each and every* element of the offence beyond a reasonable doubt. Defences available to a non-teacher accused are available to teachers, such as self-defence.[2] Also available to teachers are the defence of property (personal or

real), including dwellings[3] and prevention of an assault.[4]

In passing, I note that a common misunderstanding held by civil practitioners, including those who represent school districts, is that self-defence is not available to an accused who strikes the first blow. In fact, the majority of self-defence cases involve an accused who did strike the first blow. By definition, the accused finds him or herself in a situation where he or she must strike to prevent death or bodily harm occurring to him or her. In these situations, if the accused had failed to strike first, he or she would have ended up being the victim (injured or deceased) and the other party would have become the accused in a criminal proceeding.

In addition, criminal procedure, as set out in the *Criminal Code* or other statute is the same for all accused.

C. The Differences

The differences between a teacher criminal defence file and a standard criminal defence file can be summarized as follows:

1. Defence counsel is faced with a multi-front war, involving more than merely the defence of the criminal proceeding;
2. The factual context of an offence alleged to have been committed in a school environment is unique in many ways;
3. The availability of the "teacher/parent defence" pursuant to s. 43 of the *Criminal Code*;
4. Funding of the defence and/or pursuit of remedies where the teacher is exonerated; and
5. The teacher's transition back into the school environment after verdict.

I will discuss each of these in turn.

1. The Multi-Front War

(A) Introduction

A teacher accused of a criminal allegation is looking at four types of consequences that might flow therefrom:

1. Criminal investigation and possibly prosecution.
2. Civil action for damages.
3. Employment issues.
4. Professional misconduct investigation and possibly proceedings.

Defence counsel must take care to ensure that positions or steps taken on one front do not work to the teacher's disadvantage on any other front. Failing that, the strategy should prioritize which fronts are more important when faced with having to choose amongst options that do not work in the teacher's favour on all fronts, and to minimize the damage done to the teacher's position in those other fronts. Although many accused persons might face a similar multi-faceted set of potential consequences when investigated or charged with a criminal offence, in the standard criminal defence retainer, counsel is usually only directly involved in the criminal investigation or proceedings and the other fronts are left to the accused (perhaps with other counsel) to deal with.

(B) Criminal Investigation/Proceedings

Of course, defence counsel must assist the accused teacher through all of the stages of the criminal investigation and any proceedings that result therefrom. Defence counsel has a large role to play before a decision is made by the police or Crown as to whether or not to lay a charge. I generally have to advise the accused as

to whether or not to submit to a police interview and to accompany the teacher at the police interview, if possible. Defence counsel can also become proactive in identifying and gathering the evidence at a very early stage. This can include the retainer of a private investigator to go out and locate, then interview, witnesses. The information gathered can assist counsel in advising the teacher on other issues, such as whether or not to submit to a police interview and in dealing with the employer school district. It can also provide potential ammunition for counsel to use in attempting to persuade the authorities to close the file without laying charges.

In teacher cases, defence counsel usually has significant opportunity to interact with police and/or the Crown before a charge is laid. We can sometimes persuade them that there is no criminal case against the teacher. In the more minor cases, the authorities can be persuaded that the matter is more appropriately left to be dealt with at the school or school district level without having to become a criminal prosecution.

Defence counsel is also called upon to advise the teacher, if charged, on a number of issues including election (*i.e.*, mode of trial), plea, defence strategy and sentencing. We then go on to prepare for and run preliminary inquiries, trials and appeals.

Once the criminal aspect of the matter is concluded, by way of a police decision not to charge or an acquittal, counsel can assist a teacher in considering remedies against other parties (which is discussed in more depth below).

In my opinion, the criminal front is the most important of all. Where the strategy called for in the defence of the criminal matter is inconsistent with that on any of the other fronts, the considerations relating to the criminal case are trump.

It is only in the context of the criminal case that an accused can be jailed or given a criminal record. Logically, it is better to be an unemployed teacher on the street than an unemployed teacher behind bars.

Defence counsel, in general, are often questioned about how they can "defend the guilty". Sometimes the accused teacher is guilty of the offence charged (or a lesser and included offence) and sometimes he or she is innocent. Either way, defence counsel is ethically allowed, indeed obliged, to zealously represent the accused.[5] The Law Society of Alberta is currently in the process of replacing the current *Code of Professional Conduct* with a Code adapted from one drafted by the Federation of Law Societies of Canada, Rule 4.01(1) of which carries forward this principle and reads as follows:

> ***4.01 (1)*** *When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.*[6]

The Commentary to Rule 4.01(1) goes on to provide as follows:

> *. . . In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. . . .*
>
> *The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.*
>
> *The lawyer should never waive or abandon the client's rights, such as an available defence under a statute of limitations, without the client's informed consent.*

> ***Duty as Defence Counsel*** *- When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.*
>
> *Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.*

Thus, even in cases where the accused admits guilt to counsel, there are many ways in which counsel can meaningfully represent and assist the accused — the lawyer is not required to speak to sentence or end the retainer.[7]

As the commentary notes, if the accused has made admissions to defence counsel, including an admission of guilt, counsel's options regarding the defence are limited so as to preclude the calling of an affirmative defence that is inconsistent with the client's admissions. Counsel cannot suggest that somebody else committed the offence, but can still argue that the Crown has not proven its case beyond a reasonable doubt on the reliable evidence. Defence counsel can still question the court's jurisdiction, challenge the admissibility and reliability of the Crown's evidence and raise any available Charter or technical defences. As A.M. Cooper notes, there are two bases upon which criminal defence counsel can continue to represent an accused who is known to be guilty, beyond merely assisting on sentencing issues.[8]

First, defence counsel have a recognized role in the system. It is not their place to prosecute or judge the client — that is up to the Crown prosecutor and judge (or jury), respectively. When one defends the guilty one is defending the system, *i.e.*, the time-honoured principle that the accused is entitled to be acquitted unless the prosecution can prove the accused's guilt beyond a reasonable doubt, on admissible evidence, before a court of competent jurisdiction.

Second, defence counsel are bound by legal and ethical boundaries (noted above) in carrying out their duties. In addition to the prohibition from leading evidence to contradict the client's admissions noted above, Rule 4.02 of the *Code of Conduct*[9] (about to be promulgated in Alberta) provides that, *inter alia*, defence counsel must not:

1. abuse the tribunal's process with cases brought purely out of malice or to injure the other party.
2. knowingly assist or permit a client to do anything dishonest or dishonourable.
3. knowingly attempt to deceive a tribunal, lead or rely on false evidence, misstate facts or law, suppress what *ought to be* disclosed, assist in fraud or criminal conduct.
4. deliberately refrain from putting *binding* legal authority that is *directly on point* before the tribunal (even if the other side missed it).

5. dissuade a witness from giving evidence or to be absent.
6. *needlessly* abuse, hector or harass a witness.
7. when acting for a complainant, attempt to gain the client a benefit by threatening criminal proceedings or to seek withdrawal/dismissal of a charge.

In addition, counsel is bound by ethical rules regarding the handling of evidence per Rule 4.01(9):

> ***4.01 (9)*** *A lawyer must not counsel or participate in:*
>
> *(a) the obtaining of evidence or information by illegal means;*
> *(b) the falsification of evidence;*
> *(c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value; or*
> *(d) the concealment of property having potential evidentiary value in a criminal proceeding.*

The bottom line is that when the client has admitted guilt to counsel, counsel is left to a defence restricted to "you allege, you prove", Charter defences, technical defences (such as to jurisdiction) and arguments with respect to the admissibility of evidence.

(C) Civil Actions for Damages

Criminal offences often involve conduct and consequences thereof which give rise to potential liability for damages in civil court. For example, the teacher can be sued by the complainant for damages for assault and battery.

Where the accused is found guilty, he or she *may* be limited or even completely unable to defend allegations of fact in a related civil case. Section 26 of the *Alberta Evidence Act*[10] provides that a finding of guilt and/or a conviction in a criminal case are admissible in a related civil case to prove that the defendant committed the elements of the offence. The conviction is to be given whatever weight the civil judge considers appropriate. The law is that while a criminal conviction is *conclusive* evidence of the teacher's guilt in the civil proceedings, it is entitled to very heavy weight where all of the evidence that bears on the civil liability issues was called (or could have been called) in the criminal case.[11] This does not apply where new evidence comes to light that was not available during the criminal case or where the elements of the offence charged do not cover all of the elements of the tort alleged in the civil case. These principles are based on the theory that the finding of guilt in the criminal case amounts to a finding that every element of the offence has been established beyond a reasonable doubt, which is more than enough to satisfy the civil burden of proof on a plaintiff to prove the case on the balance of probabilities. Attempting to relitigate the issues in the civil case can be seen as an abuse of the civil court's process. This is a recognition that an acquittal does not amount to a finding of "innocence" but merely a finding that all elements of the criminal case have been proven beyond a reasonable doubt.

That said, in some cases, a civil judge may give a criminal or quasi-criminal conviction little or no weight. Examples are where the criminal offence was a minor one or where the accused was not represented by counsel or where it was reasonable in the circumstances for the accused to plead guilty of something to avoid the cost of a legal defence (not to mention the time or trouble involved) to respond to the case in criminal court.[12] For example, a major car accident involving serious injuries and property damage may result in one of the drivers being charged with a minor traffic offence, such as the failure to set out appropriate flares around a disabled vehicle. A civil judge might consider it reason-

able for that driver to have pled guilty and paid a fine of a few hundred dollars with respect to that offence, as opposed to hiring counsel (for far more money) and attending at least two court dates (sometimes in a remote part of the province) to defend the traffic charge. In such cases, civil judges, being human, have a tendency to want to decide things for themselves after investing the time and effort of hearing days or weeks of evidence in a civil case. The civil court may also give little or no weight to a criminal conviction where the elements of the offence charge do not completely overlap or cover the elements that the plaintiff has to prove in the civil case.[13]

On the other hand, an acquittal in the criminal case does not assist the accused in a related civil case, legally speaking. Indeed, the fact of the acquittal may not even be admissible evidence in the civil case.[14] However, in *practical* terms, an acquittal is not *totally* valueless to the accused in the civil case. The fact that there was no conviction allows the accused to defend liability on all issues in the civil case. The acquittal can also cause a complainant to think twice about pursuing a civil remedy. Finally, it is difficult (if not impossible) to prevent the civil judge from learning of the acquittal (as it may play a role in the narrative of events necessary for the court to consider) and an acquittal cannot but prejudice the mind of the civil judge in favour of the defendant.

Although a civil case for damages may be available, it must be remembered that not every complainant is "in it for the money", *i.e.*, pursuing some financial or civil gain. In my experience, such a motive usually plays no part in a complainant making the allegations in the first place. Where the teacher is not guilty of the allegations, the complainant's motivations for making a false accusation are usually different (*e.g.*, revenge, rehabilitation of the reputation, the desire for positive attention or sympathy, *etc.*).

Indeed, it is common for a student to make allegations about a teacher in hopes of seeing a teacher embarrassed or even fired, without even appreciating the seriousness with which adults will treat the matter and without fully appreciating the firestorm that they may be igniting. I have been involved in many cases where student complainants have been genuinely taken by surprise when a remark made to a parent results in the involvement of police, lawyers and courts. Unfortunately, once children feel that they have committed to the lie in the first place, they feel unable to recant once the matter "goes viral" and becomes a full-blown criminal case.

That said, during the course of the criminal proceeding, the prospect of a civil claim (and financial reward) often comes to the attention of the complainant and, indeed, may ultimately assume a priority for them over time. Friends or family often suggest the possibility of a civil action as events play out.

Sometimes, the option of a civil case is discarded by the complainant and his or her family if a teacher is ultimately found guilty in criminal proceedings. To the extent that they were after a "pound of flesh", they are sometimes satisfied with the conviction and resultant career loss in disgrace suffered by the teacher. However, sometimes the fact of a conviction seems to encourage complainants to seek a civil penalty. Even then, complainants in such cases are often prepared to accept a settlement for less than what the claim is worth because (especially in sexual cases) much of what they are looking for is a recognition that they have been done wrong and some closure.

This does not mean that just because a teacher is acquitted or the police decide not to lay a charge in the first place that a complainant (and his or her family) will not resort to a civil action as Plan B. Indeed, to the extent that they were out for revenge or they do not feel that their case has been dealt with satisfactorily, this may be an option that they begin to consider in order to get their "pound of flesh".

However, in many, if not most, teacher cases, a claim for civil damages is not an option seriously considered by the complainant and his or her family. Minor assaults, where a student suffers only minor or transitory harm, do not have the potential for damage awards that justify paying a civil lawyer to accept a case on a contingency fee. A contingency fee of 35% of a few hundred dollars does not generally get a plaintiff's counsel excited about the case.

Complainants in school cases often consider the civil case as the last resort, because it is not a "free" way of attacking the teacher. In the criminal case, employment proceedings or professional misconduct proceedings, the complainant does not have to pay for the services of the prosecutors, investigators or others involved. Their pursuit of the teacher costs them nothing. However, considering a civil case against a teacher will cost them something (in terms of legal fees) and also gives rise to a possibility of having to pay costs to the extent that the teacher wins the civil case or, alternatively, does better in court than a formal offer made to the complainant (but not accepted).[15] The fact is that in many teacher-student situations, where the incidents in question are fairly minor, many complainants and their families do not want to spend, or risk their own money, in pursuit of the teacher.

As far as the teacher's defence counsel is concerned, the possibility of a civil action in the future is an important consideration in making tactical and strategic decisions. Counsel should take care not to advance positions in the criminal case that might support a criminal defence but, at the same time, land the teacher "in the soup" on the civil side, unless absolutely necessary to win the criminal case. For example, a defence based on facts which establish professional misconduct for a teacher, while not amounting to a crime, might win the criminal case. Tendering such facts in the criminal case can only assist the district in attempts to sanction or terminate the teacher, or the Alberta Teachers' Association in investigating or disciplining the teacher.

In any event, defence counsel should make sure that admissions in the criminal case are carefully phrased and put into writing, such as in an Agreed Statement of Facts, for the trial or sentencing. This is an area where defence counsel can be very effective for a teacher who must admit to things in the trial or speak to sentencing. Often a plea bargain is struck whereby the accused agrees to admit only certain offences and to certain facts underlying those offences. Clear, written admissions leave no doubt as to exactly what the teacher admitted to, or was found guilty of, in criminal proceedings. The allegations admitted to are often far less what the complainant alleged, leaving the complainant in the position of having to prove more egregious facts alleged in the companion civil proceeding despite the finding of guilt in criminal court. For example, consider *R. v. Eszczuk.*[16] In that case, the teacher was accused of fairly egregious incidents of fondling female students. In the end, he pleaded guilty to having patted students' backsides *with no sexual intent*, on the

basis of a written Agreed Statement of Facts. He had been an overly-affectionate teacher who did not alter his style in the face of several warnings from administration. To the extent that any complainants seek to make the same allegations in the context of a civil case, they will have to prove any allegations more egregious than what Mr. Eszczuk admitted to on a balance of probabilities.

The potential of a civil case is also of concern to the school district. The reality is that the district will be the main target in any civil action, because of its relatively deep pockets. Acting rationally, the district should avoid doing anything at the outset of an allegation scenario, or throughout the course of the criminal proceedings, that limits or eliminates its options in defending a civil case down the road. For example, for a district to make statements that the teacher is, in fact, guilty may impair, if not eliminate, its ability to argue that the teacher did not "do the deed" in a civil case. This will be discussed in more detail below.

(D) Employment Issues

A teacher's employment with a school district will be negatively impacted by a criminal accusation or charge. As set out in more detail below, such allegations can result in suspension,[17] termination[18] and significant damage to the teacher's reputation. Defence counsel must recognize this from the start and either become involved on the employment front or retain co-counsel to do so.

In such cases, I end up working together with the Alberta Teachers' Association ("ATA"), which appoints a staff officer to oversee the defence. The staff officer authorizes disbursements (such as for private investigators, expert witnesses, *etc*.) and can also provide valuable input into the defence strategy and tactics. ATA staff officers are very experienced with the education environment and have a deep knowledge of all aspects of school environments and cultures, as well as the personalities involved (school administration, district administration, trustees, *etc*.).

Criminal charges against teachers are often treated differently by the authorities, because of the teacher-student relationship involved. Many of the non-sexual assault cases involving teachers generally would not attract police attention, if it were not for the teacher-student relationship.[19]

From the defence prospective, the potential impact of criminal proceedings on a teacher's career must influence the options chosen by the teacher in defending the criminal proceeding.

As is the case for many accused persons, the authorities will often be favourably disposed to consider non-custodial options in the form of a plea bargain with respect to a minor incident. In such cases, the police and/or Crown often look at such options as an "easy way out" whereby they make the complainant happy (because there is an admission of guilt and, therefore, validation for their allegation) while, at the same time, being acceptable to an accused (because it leaves no finding of guilt or criminal record and the defence legal fees involved will be minimal). However, these options are usually not palatable for an accused teacher who wants to retain his or her teaching career.

For example, police and/or Crown prosecutors are often amenable, if not downright eager, to agree to having the allegation deviated out of the criminal justice system into the Alternative Measures Program ("AMP"), provided for by the *Criminal Code*.[20] Under the AMP, the accused must make an informal (and theoretically

confidential) admission of guilt and to certain conditions (which can include doing hours of community service work, undertaking counseling, or even simply paying a small amount to a charity). Once the conditions are fulfilled, the criminal charge is either not laid in the first place or is dropped.

This is not an option for a teacher who wants to consider his or her career. Although the admission of guilt involved is informal, it is usually made known to the complainant (and therefore the school district). The school district is then left dealing with a teacher who has admitted guilt to an offence against a student. This will generally bring the teacher's career to an end.

Another alternative is a discharge (conditional or absolute) pursuant to s. 730 of the *Criminal Code*. Technically, a sentencing can involve up to three steps:

1. A finding of guilt (by plea or judicial decision after trial);
2. The entry of a conviction; and
3. Imposition of sentence.

A discharge brings the process to a halt after the first step, without a conviction ever being entered or a sentence imposed. Thus, the accused ends up without a criminal record, because a "criminal record" is a record of *criminal convictions*.

Again, a teacher's decision to agree to a plea bargain that involves a guilty plea for an offence involving a student is not acceptable to a teacher who wants to remain employed as such. Additionally, most non-sexual assault cases involving teachers are so minor (as far as these crimes go) and the teacher has such a sterling reputation that the worst case scenario upon being found guilty after trial will often be no worse than a discharge, in any event. Thus, a Crown offer to accept a discharge by way of a plea bargain is not really offering much to the teacher. Accordingly, by running a trial in such cases a teacher at least retains the ability to pursue an acquittal, without a significant downside risk of a more serious penalty being imposed even if guilt is found.

(E) Professional Misconduct Investigation/Proceedings

If a teacher resigns or retires, or is suspended or terminated, resulting from "conduct that brings into question the suitability of the teacher to hold a teaching certificate", the school district is legally obliged to report the matter to various authorities.[21] Specifically, the district is obliged to report:

1. to the Registrar at the Department of Learning;
2. to the Alberta Teachers' Association for a professional misconduct investigation pursuant to the *Teaching Profession Act*;[22] and
3. for charter or private schools, a report must be made to the Minister of Learning pursuant to the *Practice Review of Teachers Regulation*.[23]

In addition to cases where the district *must* make these reports, where allegations are made against the teacher or the District and others (including the complainant or his or her family), the District may have the *option* to report. For the district, this can involve situations where reporting is not mandatory under s. 109.1 of the *School Act*, such as where the teacher is accused but does not end up being suspended, terminated and where the teacher does not retire or resign.

Often, the ability to report a teacher to the ATA and the possibility of professional misconduct proceedings is something laypeople, outside of

the education system (such as the complainant and his or her family) are often unaware of. However, if they do become aware of this option, it might be attractive to them. As is the case with a criminal investigation, it makes trouble for the teacher with the potential to negatively impact his or her career while, at the same time, it costs the complainant nothing. This is another "freebie" option with little perceived risk to the complainant of having to pay costs if the allegations should prove unfounded. This fact makes professional misconduct proceedings more attractive to complainants than civil action.

Counsel cannot act for either the ATA or the teacher with respect to professional misconduct investigations or proceedings in addition to representing the teacher in criminal, civil or employment proceedings. That would involve a conflict of interest. However, the teacher's counsel, defending a criminal case and/or an employment case, can write to the ATA in that capacity, and ask for a suspension of the professional misconduct investigation pending the resolution of the criminal case.

2. The Factual Context

School districts have developed rather clear methods of dealing with allegations of criminality against teachers, some of which is mandated by legislation and some of which is essentially tradition. The education system in general, and the district's or school's environment in particular, will have developed an institutional culture. Counsel acting for teachers should be aware of, and experienced in, these cultures, traditions and legal processes.

By contrast, most police and Crown prosecutors have little or no knowledge of these cultures, traditions and the legal backdrop in which schools operate. Many have done very few, if any, school cases. They simply have little or no experience with the educational environment. A growing exception has to do with concept of the school resource officer. Many police forces have appointed uniformed police members who operate in, or liaise with, a school or group of schools as part of their duties. Unlike the mainstream of police members, school resource officers do acquire some experience and knowledge with respect to the educational environment. The police/Crown lack of experience with the educational environment can have both good and bad implications for teachers accused of criminal offences.

This is usually a negative factor at the investigation stage, where allegations are being weighed and charges are being considered. Police tend to be more likely to charge a teacher in a situation where there is not a case, although they will go on to lose the trial when the defence puts in evidence of the facts relating to the school environment. Thus, a teacher can end up being charged, because the police/Crown analysis of the situation is flawed through ignorance of the educational context in which the allegations are made. Although the teacher may thus end up being exonerated at the end of the criminal proceedings, he or she is still put through the horror of having to go through those proceedings.

The police/Crown ignorance of the educational environmental is usually a factor favourable to the accused, once the matter becomes a charge and criminal proceedings are pursued. The Crown often ends up being unaware of, and unprepared to deal with, relevant evidence that disproves the accused's guilt that is known to defence counsel with experience in the educational environment (and with the assistance of the ATA).

A couple examples of police or Crown ignorance of the impact of the school environment have become commonplace: the existence of video surveillance (and recording) of school spaces and the fact that the "scene of the crime" is usually a highly public place.

These days, more and more schools are installing video surveillance cameras in hallways and other high traffic areas. Many of the systems are now digital, allowing video imaging to be stored for months (as opposed to hours or days). If a complaint is brought forward against a teacher promptly enough, digital imaging may be available that exonerates the teacher, but police may lay a charge simply because they are unaware of this possibility. Unfortunately, there has been at least one case where police were aware of digital imaging that exonerated the teacher from the outset, but charged him anyway.[24]

Most alleged teacher assaults occur in very public places, *i.e.*, in hallways or classrooms with dozens of other witnesses present. Even if the allegation is alleged to have occurred between classes without other witnesses actually being present, there is always the possibility that someone could come along at any second (unannounced) and/or the matter may be under review in real time or recorded by video surveillance.

This fact has two aspects:

1. **If an allegation of activity that would constitute an obvious assault or sexual assault is made, the fact that none of the eyewitnesses have seen it is an important fact for the defence.** Unfortunately, police can be a bit ignorant or, worse, disingenuous about this kind of evidence. Police may avoid interviewing any of these witnesses (with the exception of friends of the complainant which he or she brings to the police attention who can be expected to corroborate the complainant's story) so as to avoid burdening themselves with information that helps the accused.

   a) Any such evidence that comes to the attention of the police (whether it helps or hurts the accused's case) must be disclosed to the defence before election and plea.[25]

   b) There have been cases where the police interview witnesses who admit having been present but maintain that they did not see any such assault or sexual assault, but police do not take a recorded statement or disclose this evidence to the defence, as required. Sometimes, if they do disclose the evidence, they do so by merely indicating that the witness "knows nothing about this". This is obviously not the same thing as a witness who says "I was there and I did not see it happen" where the defence is hoping to prove a negative, *i.e.*, that the thing did not happen. The courts have been justifiably critical of this "see no evil, hear no evil" approach.

      i. For example, see *R. v. S. (D.O.)*.[26] The complainant alleged that the accused raped her in a protracted, violent incident in full view of her best friend who was a few feet away. The police telephoned the friend but did not end up taking a statement or interviewing her, nor did they disclose to the defence that they had approached the friend or as to what the friend said. Defence counsel (not being a potted plant) tracked down the

friend and called her as a defence witness at the trial to testify that she remembered seeing no such incident. In the process of acquitting the accused, the court commented critically on the police/prosecution argument to the effect that the friend did not advise police of material evidence that required disclosure because she had, essentially, seen nothing. Noting that many sexual assault cases are credibility contests between the evidence of the complainant and that of the accused, the court held as follows:

> *[22] In many cases of rape (or sexual assault as it is now called), the court is often faced with very little more than the word of the complainant against the word of the accused and credibility of each becomes of critical importance. Even in such situations, however one is not, in the last analysis, faced with having to choose which of two mutually contradictory stories is correct. Obviously if the accused is believed, he must be acquitted; however, even if there is some doubt as to the accused's version, the court must nevertheless acquit if it is not satisfied beyond a reasonable doubt that the crown's version of the facts (or any version of the facts within the wording of the Indictment as originally framed or as amended) is correct: D.W. v. R. (1991) 3 C.R. (4th) 302 (S.C.C.).*[27]

The court noted that the fact that a witness claims not to recall seeing something is not mutual or irrelevant evidence in cases where the witness's inability to recall having seen something that she ought to have recalled is a fact that tends to weigh heavily in favour of the accused:

> *[29] Before leaving W.P.'s evidence I feel I must make some comment on the role of the police investigation with respect to W.P.'s involvement in the case. As indicated, when W.P. was contacted by the police by telephone, she indicated, as she did in court, that she could not recollect seeing any incident of the nature described by C.J. As a consequence, no statement was taken from her; yet her evidence, I have found, was very valuable to a determination of this matter and, specifically, was valuable to the defence.*
>
> *[30] It is perhaps natural, if on questioning, a person says he or she cannot recall an incident, to assume that that person has nothing of value to add to the investigation and to discount that person's further involvement. There is, however, a great danger in this. The effect of being too quick in concluding that because a person cannot recollect anything specifically about a particular incident, the person's evidence is of little value, may be to reject relevant evidence that does not support the Crown's case. The fact that a person does not recollect may of course mean that he or she has forgotten but it could also mean, in circumstances where the witness had an opportunity to observe and would normally be expected to have seen something, that the incident did not happen. The Crown (and I use that term compendiously to include the police) have a duty in investigating an alleged crime, to attempt to uncover all reasonably available evidence that may have the effect of confirming the charge or exonerating the accused. Through the doctrine of disclosure that information then becomes available for the use of the defence and there may even be circumstances, where the Crown ought, in discharge of its duty, to call evidence damaging to its own case as part of the case for the Crown.*
>
> *[31] Where, as here, a lack of recollection occurs in the face of something which as a matter of common experience would likely make a lasting impression on the witness, if*

it in fact occurred, that lack of recollection assumes a greater importance than merely amounting to information from someone who has "nothing to add". Such lack of recollection may well contribute to a reasonable doubt. The accused is entitled to the benefit of that evidence. It is incumbent on the Crown to make that information available to the defence, and in some circumstances, to the court and not merely to discount or dismiss it simply on the assumption that the lack of recollection means that the witness has nothing to add. In my view, the greatest guarantee of an accused person's civil liberties, is not the court, defence counsel or even the Canadian Charter of Rights and Freedoms, but a competent police force dedicated to conducting a thorough investigation with an open mind and with a view to uncovering relevant evidence that bears on the truth or falsity of the allegations facing the accused.

[32] There is obviously a great danger in merely acting on a complainant's statement and, as long as no-one else specifically contradicts it, proceeding on to court without further investigation to attempt to check out peripheral details. The fact that corroboration has been done away with in most sexual offences as a matter of law does not mean that cross-checking and verification of peripheral details by the investigators of crime can also be done away with.

[33] Although I am not privy to all of the details relating to the contact with W.P. by the police in this case or the reasons why nothing further was done, (which might in the circumstances have made it reasonable for the police to have acted as they did) I am tempted to say that I am left with the nagging feeling that more perhaps could or should have been done in this case.

. . . . .

[35] As I have said, it is fortunate that she was made available to testify. Without further information, it would be inappropriate to make any further comment as to whether in the circumstances it was appropriate that the defence be left to its own devices to conduct its own investigation relative to W.P. or whether more should have been done by the police by way of follow up. My comments should be regarded on a more general level as they relate to the potential dangers inherent in this type of investigation.

c) In such situations, the Crown is forced to argue that there may have been brief moments where a witness is not actually watching or paying attention to the situation, which leads me to a discussion of the second aspect.

2. **It is very unlikely that a criminal would attempt such a thing in a public place, with such a high chance of being caught (quite apart from whether or not the witnesses who were there actually saw what he did for every second of the time).** No criminal can predict with any degree of certainty that a witness would not see it or that the complainant would not cry out or otherwise draw attention to him or herself. For teachers, this fact can be given more prominence because the accused teacher has probably had many opportunities to get this or other complainants alone in a secluded place, where they could attempt such a crime with little or no chance of being caught.

There are many examples in the case law where the court has acquitted a teacher on the basis of the event having happened in a public place.[28]

3. The Section 43 Defence

(A) Introduction

The defence provided by s. 43 of the *Criminal Code* is relatively unique to accused persons who apply force in their capacities as teachers or parents. Section 43 provides as follows:

> ***Protection of Persons in Authority***
> *43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.*

A detailed analysis is beyond the scope of this article, however a few things should be emphasized.

The parameters of the s. 43 defence were recently outlined by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Attorney General In Right of Canada*[29] [*Canadian Foundation*]. The Supreme Court ruled that s. 43 did not offend the Charter in the context of the modern interpretation of that section. The availability of the defence is based on the defence being able to establish two factors:

1. The force must have been administered by way of correction; and
2. The force must have been reasonable in the circumstances.[30]

(B) "By Way of Correction"

For s. 43 to apply, the force must have been administered for the purpose of education, discipline or correction of the student *and* the student must have been capable of benefiting from the correction:

> *[23] I turn first to the requirement that the force be "by way of correction". These words, considered in conjunction with the cases, yield two limitations on the content of the protected sphere of conduct.*
>
> *[24] First, the person applying the force must have intended it to be for educative or corrective purposes: Ogg-Moss [v. The Queen, [1984] 2 S.C.R. 173 (S.C.C.)], supra, p. 193. Accordingly, s. 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child: Ogg-Moss, supra, p. 193.*
>
> *[25] Second, the child must be capable of benefiting from the correction. This requires the capacity to learn and the possibility of successful correction. Force against children under two cannot be corrective, since on the evidence they are incapable of understanding why they are hit (trial decision, (2000), 49 O.R. (3d) 662, at para. 17). A child may also be incapable of learning from the application of force because of disability or some other contextual factor. In these cases, force will not be "corrective" and will not fall within the sphere of immunity provided by s. 43.*[31]

I submit that the fact that a teacher might have been angry or frustrated does not preclude the protection of s. 43, in and of itself. The defence will still be available as long as any anger or frustration was not the sole or primary reason behind the application of the force. The Ontario Court of Appeal (which the Supreme Court of Canada upheld on this point in *Canadian Foundation*) provided as follows:

> *[67] For s. 43 to apply, the force used on a child must be intended for correction: Brisson v. Lafontaine (1864), 8 L.C. Jur. 173 at p. 175. Punishment motivated by anger, or administered with an intent to injure the child, is not for the purpose of correction. As well, the accused must honestly and reasonably believe that the child is guilty of conduct deserving of punishment: Brisson, supra; R. v. Dupperon (1984), 16 C.C.C. (3d) 453, 37 Sask. R. 84 (C.A.). Moreover, the child must be capable of being corrected: Ogg-Moss, supra, at p. 194. Therefore a parent or teacher who applies force on a child who is either too young to appreciate corrective force or mentally handicapped and clearly unable to learn from corrective force is not protected by s. 43.*
>
> *[68] In determining whether the force applied meets the "correction" criterion, courts increasingly have focused on the controlling emotion of the person administering the force: see R. v. L. (V.), [1995] O.J. No. 3346 (Prov. Div.), online: QL. If anger was the motivation, that will weigh against a finding that the purpose of the force was corrective, although the presence of anger does not necessarily preclude such a finding: R. v. J. (O.), [1996] O.J. No. 647 (Prov. Div.), online: QL, per MacDonnell J. Where anger was the overriding motive, then the force should not be regarded as corrective: R. v. Bielenik, [1999] O.J. No. 4104 (C.J.), online: QL, per Hackett J.*[32]

This is only logical. If a student has done something to merit discipline or correction, a parent or teacher will undoubtedly experience some anger or frustration. If a child spills paint on the new living room carpet, one cannot expect a parent to have no emotion in response thereto, but the court can expect that the parent will not be primarily motivated by this anger or frustration in disciplining the child. See also *R. v. Swan.*[33] However, if the teacher's application of force to a student is motivated by anger, the first element of the s. 43 defence ("by way of correction") will not be established and the defence will fail, even in cases where the teacher is directing the student, as opposed to exercising corporal punishment.[34]

(C) "Reasonable in the Circumstances"

In determining what is "reasonable in the circumstances", the Supreme Court looked at social consensus and expert evidence on what constitutes reasonable, corrective discipline.[35] The Court concluded that *corporal punishment* is not reasonable for children under two or over 12 years of age, or where it involves the use of a weapon (such as a belt). Importantly, the Court held that corporal punishment is no longer considered reasonable for teachers, although it may be reasonable for parents.

Thus, a distinction must be drawn between corporal punishment and physical contact for other purposes. Corporal punishment occurs where the force applied is intended to be the punishment itself, such as a spanking or the strap. However, where the force applied is not intended to be the punishment itself, it is not considered corporal punishment. For example, a teacher may take hold of student to direct him or her to a desk or the office. The Supreme Court held that the application of force to direct a student to a destination for educational or corrective purposes is allowed for teachers.[36] Accordingly, force falling short of corporal punishment is not automatically unreasonable for children two or over 12 years of age. The distinction between corporal punishment and the application of force for other purposes has been recognized in the subsequent case law.[37]

The reasonableness of the physical contact in any given case is to be assessed on an *objective* standard, not the *subjective* view of the complainant, the witnesses, the police, the prosecutor or the judge.[38]

The decision of *Mazur and Brooks*[39] is a case in point. The accuseds were two daycare workers who were charged with assault. The three-year-old complainant had a history of acting out, including screaming, throwing chairs, kicking tables and kicking people. The Director of the daycare had a history of being able to deal with this behavior from him but, on the occasion in question she had stepped out to run an errand. The complainant demanded that his diaper be changed. The accuseds pointed out to him that they were occupied with other children and asked him to wait a moment. He threw a tantrum, throwing chairs around, striking one of the accuseds. The workers told him that if he did not behave he would be taped to his chair. He persisted and they taped him to his chair using one strand of duct tape. He extricated himself. The accuseds did not immediately tape him back into his chair. It was only when he continued to throw chairs around that they again restrained him and taped him more securely to his chair. Shortly thereafter the Director returned and the boy was freed. All in all he had been taped to his chair for a total of approximately three minutes. He was not injured. The Director apparently concluded that in her opinion the use of the tape had been unreasonable.

The court acquitted the accuseds on the basis of s. 43. The court summarized the rules for applying s. 43 as had been laid down in the *Canadian Foundation* case, including the following:

> *(6) It is wrong for law enforcement officers or judges to apply their own subject or apply their own view with respect to what is reasonable under the circumstances.*
>
> *(7) The test is objective. The question must be considered in context in light of the circumstances of the case. . . .*[40]

The court went on to point out that the subjective view of someone does not govern but, rather, it is the objective assessment of all the circumstances that counts:

> *And context is the most important aspect or circumstances. And just to give you an example, if you read in the paper about taping a child to the chair and no one explained what the taping was involved with, people would be quite upset. Was the taping with duct tape around the feet and around the waist and around the upper shoulders in the chair; was it with a piece of string; was a belt used to hold the child in the chair? All those kind of circumstances change the picture we have of confining that child to the chair. And mere taping, by itself, without an explanation of the tape and the usage, et cetera, does not make any sense and gives the wrong impression or may give the wrong impression, depending on the circumstances. So those are important factors and circumstances that have to be considered by the court. [emphasis added]*
>
> *The court, and this is important here, what is reasonable under the circumstances, I am here to determine that in these cases but no one is an expert with respect to what is the best choice. And I appreciated Mr. Lasar's comment here, things probably should have been done different in the circumstances, I am sure they will be different in the future, but all that is going to vary according to the circumstances in which people find themselves.*
>
> *One does not always make the best choice, depending on the circumstances but the test is an objective one and it must be considered in context in light of those circumstances. And those circumstances have been presented in the facts presented to the court. The chaotic background that the workers found themselves, the aspect of throwing of chairs, this was harm potential to other children. The duration for which this took place, the instructions that were given with respect to the individual about what was taking place, the directions that were given and the nature of the taping. All those are important. There are other ones, too, but each of them have to be considered in light of the context.*
>
> *Factors that I have considered in my decision are a number that have been raised by all counsel, whether de minimis is a factor and how much weight should be attached to that; about the corrective aspect of the actions taken; about the criminal sanction that is being called for in these circumstances, an important criminal sanction from everybody's point of view and certainly from the two individuals that face possible criminal conviction and what flows from that. And, most importantly, in my view, Section 43 and the onus that switches to the Crown with respect to, once Section 43 is raised, the aspect of proving this case beyond a reasonable doubt.*[41]

In the New Brunswick Court of Appeal case of *R. v. S. (S.)*,[42] the trial judge was held to have erred in law for, *inter alia*, determining the force in question to have been unreasonable based on the subjective opinion of the Crown witnesses. She was held to have, in effect, improperly delegated her decision to the witnesses based on their subjective opinions. Two witnesses had observed the accused spanking his six-year-old son from across the street. They were so insensed by what they saw that they called police and the father was charged with assault. The Court of Appeal concluded as follows:

> *[43] When the trial judge stated that "no spanking should go on and on to the point that strangers pick up the phone and call the police" I am of the view she applied a subjective standard. Ms. Boldon's decision to pick up the telephone and call the police in those circumstances can be nothing but a subjective one. She would not, at that point, have benefited from all the attributes that convert a subjective decision into an objective one: for example, she would not have considered the appellant's version of the incident, whether the child's buttocks were covered, whether she might be mistaken about whether all slaps were administered to the child and whether her brother's observations and conclusions were identical to her own. If the trial judge applied the correct test when she speculated about what strangers might do, logic would hold that if she had not called the police, the force administered was somehow reasonable. Obviously, some people faced with the same situation as that presented to*

> *Ms. Boldon might have called the police earlier and others might never have called.*
>
> *[44] In this case the trial judge's sole basis for convicting the appellant flowed from the duration of the punishment. In my view she applied a subjective standard by delegating to an onlooker the determination of guilt or innocence.*

4. *Funding of the Defence*

Criminal defences are expensive, especially in sexual cases. Legal bills can run to the tens of thousands of dollars. I find it difficult to look a criminal client in the face and demand payment of such a large sum up front by way of retainer, especially one that appears to be innocent. Additionally, the accused's budget must necessarily restrict the defence strategies and tactics that might otherwise be available. For example, an accused might be forced to elect trial by Provincial Court judge (and forego the very useful tool of preliminary inquiry) because of an inability to pay for proceedings that are tried in Queen's Bench (which can involve both a preliminary inquiry and a trial).

Fortunately, the legal bills of teachers are often covered (one way or another) by their unions or professional associations. In Alberta, the ATA is able to fund a teacher's defence, including the retainer of private investigators and experts. If defence counsel considers a preliminary inquiry to be necessary, an election of trial by Queen's Bench judge alone (or Queen's Bench judge and jury) will be funded. Complainants, police and Crown prosecutors cannot count on a teacher being unable to properly defend him or herself because of budgetary considerations.

5. *Transition after the Verdict*

If the teacher is found guilty, a resignation is often submitted as the school district would likely have good grounds to terminate.

Once a criminal investigation or proceeding against a teacher is concluded in his or her favour, either because the police decide not to lay a charge or the teacher is acquitted after a trial, the teacher's defence counsel can assist the teacher in transitioning back into some semblance of a normal life, as far as possible. Defence counsel must deal with the civil action and, of more interest to us here, in dealing with the teacher's employment status. The teacher will either be returned to the classroom or will reach some sort of settlement with the District.

[*Editor's note*: This article is based on a paper presented at a Lorman Education Services Seminar: ***Teacher Appraisals and Dismissals in Alberta***, Edmonton • 28 April 2011.

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1 R.S.C. 1985, c. C-46.

2 *Ibid.*, ss. 34-35.

3 *Ibid.*, ss. 38-42.

4 *Ibid.*, s. 37.

5 Law Society of Alberta, *Code of Professional Conduct*, Chp. 10, "The Lawyer as Advocate: Statement of Principle".

6 Law Society of Alberta, *Code of Conduct* (Draft, January 21, 2011), expected to be adopted by the Benchers to replace the current *Code of Professional Conduct* in the fall of 2011.

7 M. Proulx & D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001), Chp. 1 "Defending the Guilty", pp. 51 – 53, 74.

8 A.M. Cooper, "The 'Good' Criminal Law Barrister", *Second Colloquim of Legal Profession Presentations* (Ontario Judicial Education Network, March 2004), at p. 3-3.

9 Law Society of Alberta, *Code of Conduct*, (Draft, January 21, 2011), expected to be adopted by the Benchers to replace the current *Code of Professional Conduct* in the fall of 2011.

10 R.S.A. 2000, c. A-18.

11 *Toronto (City) v. C.U.P.E, Local 79*, [2003] S.C.J. No. 64, 2003 S.C.C. 63; *Holt v. MacMaster*, [1993] A.J. No. 501, 140 A.R. 235 (Q.B.); *Cho v. Phimsrath*, [2003] A.J. No. 344, 2003 ABQB 235.

[12] For example, see *Becamon v. Wawanesa Mutual Insurance Co.*, [2009] O.J. No. 478, 2009 ONCA 113.

[13] *Larson v. O'Brien*, [2008] B.C.J. No. 512, 2009 BCPC 82; *P.(A.) v. M.(L.)*, [2010] A.J. No. 625, 2010 ABQB 356.

[14] *Polgrain Estate v. Toronto East General Hospital*, [2008] O.J. No. 2092, 2008 ONCA 427, rev'g [2007] O.J. No. 3791, 87 O.R. (3d) 55 (S.C.J.). To the contrary see *Near North District School Board v. O.S.S.T.F., District 4*, 2006 CarswellOnt 8669 (Ont. Arb. Bd.) and G. Hopkinson, "Can Findings Of Fact From Criminal Acquittals Be Relitigated In Other Forums?" (2008) 18 Educ. & L.J. 91, which, with respect, runs contrary to most of the decided cases.

[15] *Alberta Rules of Court*, Part 4, Subdivision 5.

[16] [2009] A.J. No. 1503, 2009 CarswellAlta 796 (Q.B.).

[17] *School Act*, R.S.A. 2000, c. S-3, s. 105.

[18] *Ibid*., s. 107.

[19] Consider *R. v. Jonkman*, [2010] A.J. No. 898, 2010 ABPC 245 where the substitute teacher took a student by the hand to take him down to the office. The student fell and suffered some bruising to the arms. Such a minor altercation is not likely to attract police attention outside of a teacher-student or parent-child relationship.

[20] *Supra*, note 1, ss. 717-717.4 and 721(3).

[21] *School Act*, s. 109.1, *supra*, note 17.

[22] R.S.A. 2000, c. T-2, s. 24.

[23] Alta. Reg. 11/2010.

[24] *R. v. Dubas*, unreported, September 17, 2010, docket no. 091322875P1 (Alta. P.C.), *per* Fraser P.C.J. Although the accused in that case was resoundingly acquitted, he was still put through the humiliating and lengthy ordeal of criminal proceedings that concluded in a trial.

[25] *R. v. Stinchcombe*, [1991] S.C.J. No. 83, 68 C.C.C. (3d) 1; *R. v. McNeill*, [2009] S.C.J. No. 3, 2009 SCC 3.

[26] [1992] N.J. No. 280, 103 Nfld. & P.E.I.R. 146 (S.C.).

[27] *Ibid*.

[28] *R. v. Laughlin (No. 2)*, [1989] S.J. No. 701 (Q.B.); *R. v. Nawrot*, unreported, October 25, 1989, docket no. C0150104882 (Alta. P.C.), *per* Murray P.C.J.; *R. v. Espinoza*, unreported, December 5, 1989, Action No. 8901-1254/C1 (Alta. Q.B.); *R. v. S. (P.L.)*, [1990] N.J. No. 188 (C.A.), at pp. 9-11; vard [1991] S.C.J. No. 37; *R. v. Nand*, [1989] A.J. No. 508 (C.A.); *R. v. Wright*, [1992] A.J. No. 409 (C.A.); *R. v. Burke*, [1996] S.C.J. No. 27, [1996] 1 S.C.R. 474, at para. 17; *R. v. F. (K.)*, [2007] B.C.J. No. 2295, 2007 BCSC 1505; *R. v. Annett*, [2007] B.C.J. No. 1889 (S.C.); *Ellis v. MacDougall*, [2008] B.C.J. No. 665, 2008 BCSC 463; *R. v. Dubas*, *supra*, note 24; G. Oakes, "Accused Gets Benefit Of Doubt Of Lack Of Teen's Consent To Sex" *The Lawyers Weekly*, vol. 27, no. 23 (19 October 2007).

[29] [2004] S.C.J. No. 6, 2004 SCC 4 [*Canadian Foundation*].

[30] *Ibid*., at paras. 23-25.

[31] *Ibid*.

[32] [2000] O.J. No. 2535 (C.A.).

[33] [2008] O.J. No. 975, 58 C.R. (6th) 126 (S.C.J.).

[34] *R. v. Jonkman*, [2010] A.J. No. 898, 2010 ABPC 245.

[35] *Canadian Foundation for Children, Youth and the Law v. Attorney General in Right of Canada*, *supra*, note 29, at paras. 37-38.

[36] *Ibid*., at para. 40.

[37] *R. v. Swan*, *supra*, note 33, at paras. 15, 18-21 and 23-24; *R. v. Bochar*, [1994] O.J. No. 1153 (P.C.), at para. 25; *R. v. W. (B.W.)*, [2009] A.J. No. 672, 2009 ABPC 145, at paras. 16-17.

[38] *Canadian Foundation*, *supra*, note 29, at para. 40; *R. v. Mazur and Brooks*, unreported August 16, 2011 (Man. P.C.), *per* Guy P.C.J., at p. 3; *R. v. S. (S.)*, [2011] N.B.J. No. 282, 2011 NBCA 75, at paras. 43 – 44.

[39] *Ibid*.

[40] *Ibid.*, at p. 3.

[41] *Ibid.*, at pp. 3 – 4.

[42] *Supra*, note 38.

• SEXTING AND TEENAGERS: OMG, WHAT R U THINKING? •

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Introduction

Sexting is the practice of sending or posting sexually suggestive text messages and images, (including nude or semi-nude photographs), via cellular telephone or over the Internet. Sexting has grown dramatically among young people across North America over the past few years. While sexting can and does occur between people of any age, there is real concern about teenagers who are engaging in this activity.

According to a 2008 study by the National Campaign to Prevent Teen and Unplanned

Pregnancy, 19 per cent of teens between the ages of 13 and 19 have sent or posted nude or semi-nude photos of themselves. Of the 22 per cent of teen girls that reported having done so, 11 per cent of these girls were between the ages of 13 and 16. When asked whether they had seen nude or semi-nude photos that were not intended to be shared with them, 25 per cent of teen girls and 33 per cent of teen boys answered this question affirmatively.

In a Pew Research Center Internet survey conducted in December 2009, 15 per cent of cell-owning teens ages 12-17 said they have received sexually suggestive nude or nearly nude images of someone they know via text messaging on their cell phone. The research indicates that older teens are much more likely to send and receive these images; 8 per cent of 17-year-olds with cell phones have sent a sexually-provocative image by text and 30 per cent have received a nude or nearly nude image on their phone.

Texting and Teen Social Life

Texting has become a centrepiece in teen social life, and parents, educators and advocates have grown increasingly concerned about the role of cell phones in the sexual lives of teens and young adults. In a March 26, 2011 article in *The New York Times*,[1] Kathy, a 17-year-old female student indicated that at her school, if you like a boy and want to get his attention, "you know what you have to do". Saif, an 18-year-old student, described sexting as a way to express your feelings. He said, "If a guy and a girl are in love, instead of saying it face to face, they can say it through technology."[2]

When asked why do girls sext, Zoe, an 18-year-old student responded, "A freshman girl doesn't consciously want to be a slut but she wants to be liked and she likes attention from the older boys. They'll text her, 'Hey hottie' and it will progress from there."[3]

The world of teenagers is steeped in highly sexualized messages. Hit songs and music videos promote sexting. "Take a dirty picture for me" urge the pop stars Taio Cruz and Kesha in their recent duet "Dirty Picture". They say, "Send the dirty picture to me. Snap."[4]

In a 2010 Super Bowl advertisement for Motorola, the actress Megan Fox takes a cell phone picture of herself in a bubble bath. "I wonder what would happen if I were to send this out?" she muses.[5]

"You can't expect teenagers not to do something they see happening all around them", said Susannah Stern, an associate professor at the University of San Diego who specializes in adolescence and technology.[6]

"They're practicing to be a part of adult culture", Dr. Stern observed. "And in 2011, that is a culture of sexualization and of putting yourself out there to validate who you are and that you matter."[7]

In January, 2009, six teenagers in Greensburg, Pennsylvania, three females and three males (who were all under the age of 18), were charged with child pornography for sending and receiving nude pictures of themselves via cell phone following the discovery of the images by a high school teacher.[8] In March 2009, a 14-year-old Florida boy was charged with transmitting pornography after he sent a photograph of his genitalia to a female classmate. The Florida boy explained that he did it because he was "bored".[9]

In Canada, it is not illegal for two teenagers under 18 to carry naked photographs of one

another, provided that it is for private viewing only. However, when a photograph is distributed, it becomes child pornography. In these circumstances, the charge is against the minor who distributed the photograph and not the minor who created it.

As pointed out by Jan Hoffman in *The New York Times*,[10] researchers have indicated that there may be a double standard between boys and girls. While a boy caught sending out a picture of himself may be regarded as a fool or even a boastful stud, girls, regardless of their bravado, are seen as having loose morals.

Danah Boyd, a senior social media researcher at Microsoft, has stated that photos of girls tend to go viral more often, because boys and girls will circulate girls' photos in part to shame them.[11] When photos go viral, it can have a devastating impact on the identity and reputation of the person. Circumstances when a sext goes viral could result in a deterioration of friendships, shunning, animosity, anger, name-calling and fights. This conduct could cause fear, distress and/or harm to the person's feelings, self-esteem and reputation.

The Role and Responsibility of School Leaders

Questions arise as to the role and responsibility of Ontario schools and school leaders in responding to incidents of sexting. What policies and procedures should be put in place? In circumstances where a student is distributing sexually explicit photos by cell phones to others, at what stage should the school get involved? When and how should school administrators undertake an investigation? What steps can be taken to educate students, their parents and school staff about sexting?

The common law in Canada clearly establishes that school authorities have a special duty of care towards students in their charge. This duty is imposed upon them by the unique nature of their work. The standard of care owed by educators to students is that of a reasonably careful or prudent parent. This includes the duty to protect students from any reasonably foreseeable risk of harm.

The Ontario *Provincial Code of Conduct,* which was issued on October 4, 2007, establishes standards of behaviour on a Province-wide basis. It provides that all members of the school community must treat one another with dignity and respect at all times, and especially when there is a disagreement. Students are required to demonstrate respect for themselves and for others. The safe schools provisions of the *Education Act*, R.S.O. 1990, c. E.2, extend the right to discipline to include actions off school property and outside school activities where the activity has an impact on the school climate.[12]

Under Ministry of Education policy, the term school climate is defined as "… the sum total of all of the personal relationships within a school."[13] In accordance with Ministry policy, a positive climate exists when all members of the school community feel safe, comfortable and accepted.[14]

It is important for schools to educate students, parents and teachers about the seriousness of sexting. In this regard, students should be taught healthy relations strategies and communication skills. In particular, students and parents should recognize that the ease of distribution is so great over the Internet that a young person should assume that the photo or text message will not be seen only by the person he or she is sending it to. A valuable rule of thumb in sending any new media message (which would obviously include sexually explicit text messages or photos) is that "nothing is private". In this regard, students

need to understand that if these images are never created, they can not be distributed. Students should be taught how to manage their electronic reputations.

School boards should consider amending their codes of conduct to address sexting. This behaviour should not be condoned. School administrators should be clear that students should not be sharing or forwarding sexually suggestive nude or nearly nude images to others.

Where a complaint is made to school administration that a student's sexually-explicit photo has been distributed to other students in the school, he/she should conduct an investigation. Such investigation may include:

- meeting with the victim of the sexting incident and his or her parents;
- trying to get as many details as possible;
- exploring the identity of the person who is alleged to have distributed the photo;
- asking the student if he or she knows the identity of other students who received the image;
- determining the history or background of events;
- requesting copies of all relevant e-mails that may be associated with the distribution of the image;
- determining whether this is an isolated incident or an ongoing incident;
- determining whether the victim has any fear coming to school; and
- interviewing other students who may have received the image and interviewing the person who allegedly distributed the image.

At the conclusion of all interviews, the school administrator must come to a conclusion about what actually occurred and who was at fault. As part of investigating an incident of sexting that has taken place off school premises, the school administrator must assess whether there is a sufficient impact on the climate of the school to impose school discipline. The school official will consider whether there is evidence of a disturbance in the school community, the creation of a poisonous environment or conduct harmful to the mental or physical well-being of others.

As noted in a recent article in *Maclean's*, sexting is a reminder of how porous electronic communication can be.[15] Teenagers' casual willingness to provide explicit images of themselves heightens the risk of an incident he/she may regret. Educators should engage students in conversations about sexting. They should encourage students to take a strong stand against this conduct.

In an interview in *The New York Times*, Margarite, a 14-year-old student, who sent a naked photo of herself to a new boyfriend, spoke about her experience.[16] After they broke up, the former boyfriend sent the photo to a Grade 8 girl in her school, who was once a friend of Margarite. The friend then forwarded the photo to a long list of contacts. Margarite indicated that this incident had a devastating impact on her life. Among other things, her grades were in free fall, she felt shunned by an entire group of girls and her social life was deteriorating.[17]

Margarite was asked what advice she would give anyone thinking of sending a nude photo of themselves over the Internet. She replied, "I guess if they are about to send a picture and they have a feeling, like, they're not sure they should, then don't do it at all. I mean, what are you thinking? It's freaking stupid!"[18]

[*Editor's note*: Eric Roher is a Partner and National Leader of the Education Focus Group at Borden Ladner Gervais LLP in Toronto.]

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[1] Jan Hoffman, "What They're Saying about Sexting" *New York Times*, March 26, 2011, <http://www.nytimes.com/2011/03/27/us/27sextingqa nda.html>.

[2] *Ibid.*

[3] *Ibid*.

[4] As quoted in Jan Hoffman, "Poisoned Web: A Girl's New Photo and Altered Lives, *New York Times*, March 26, 2011, <http://www.nytimes.com/2011/03/27/us/ 27sexting.html>.

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

[8] "The Sexting Scare", *Maclean's*, March 12, 2009, <http://www2.macleans.ca/2009/03/12/the-sexting-scare/>.

[9] *Ibid.*

[10] *Supra*, note 4.

[11] *Ibid*.

[12] See ss. 306(1) and 310(1).

[13] Ontario Ministry of Education "Safe Schools" <http://www.edu.gov.on.ca/eng/parents/climate.html>.

[14] *Ibid.*

[15] *Supra* note 8.

[16] *Supra*, note 4.

[17] *Ibid.*

[18] *Ibid*.

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