LEADERSHIP UPDATE

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THE "TEACHERS' DEFENCE": Section 43 in the Modern World

—Brian A Vail, QC, Field LLP

An increasing number of teachers are being criminally charged with assault in Alberta. Sometimes these allegations are exaggerated or maliciously brought by students or parents to advance a hidden agenda. In many of these cases, it is not disputed that the teacher had some physical contact with the child.

Not all physical contact by a teacher with a child is unjustified or criminal. Teachers charged with assault have the same defences available to them as anybody else, including self-defence, defence of others, etc. However, teachers and parents have an additional defence— s. 43 of the *Criminal Code*[1], the so-called "parent and teacher defence." It is the most important justification for a teacher's application of force to a student. The question for the criminal court in most assault cases is whether or not s. 43 applies to exonerate the teacher.

Physical contact of various types is common between teachers and students in modern schools. Teachers who wish to remain employed and stay out of the criminal justice system need to understand the difference between acceptable and unacceptable contact. It is important for teachers in the trenches to understand how the offence of assault is defined and the limits of the s. 43 defence.

The following will summarize how the modern concept of s. 43 has developed over time.

Assault

Common assault is defined in s. 265 of the *Criminal Code*. There are three ways in which assault can be committed.

The most common involves the physical application of force[2], the elements of which are

1. the application of force to another person, directly or indirectly;
2. without that person's consent.

The application of force must be intentional. Accidentally bumping into someone does not count. However, the motive behind the touching is irrelevant. If the application of force in question was intended, it does not matter how well intentioned a teacher may have been in applying it.

The degree of force applied does not matter. **Any** touching, however minor, is sufficient, including taking a child by the arm or patting a student on the back.

The consent of the person touched can be expressed or implied. For example, it is implied that hockey players consent to body checks during a game and, in some cases, even those beyond the rules of the game. However, in teacher–student situations, a child's consent is usually absent. Students are not generally willing to be led to the office for discipline.

A second way of committing common assault is by attempting or threatening, by an act or gesture, to apply force to another person if that person believes, on reasonable grounds,

1. R.S.C. 1985, c. C-46
2. *Criminal Code*, s. 265(a)

Your present circumstances don't determine where you can go; they merely determine where you start.

—Nido Qubein, author, educator, philanthropist

that the toucher has the ability to carry out the application of force.[3] It is extremely rare for a teacher to be charged with assault in the absence of actual physical contact, but it has happened in Alberta in the recent past.[4]

For the sake of completeness, I note that a third way of committing assault is to openly wear or carry a weapon (real or imitation) while accosting or impeding another person, or by begging.

There are aggravated forms of assault, which can involve more serious penalties. They all involve the elements of common assault plus additional factors. These include assault with a weapon,[5] aggravated assault[6] (which is assault plus wounding, maiming, disfiguring or endangering the life of the victim) and sexual assault[7] (assault with a sexual element[8]).

Thus, every time a teacher takes a student by the hand or arm, pushes or physically directs a student, or has any other form of intentional contact, an assault is established. In the majority of cases when a teacher intentionally contacts a student, s. 43 is the only thing standing between that teacher and a criminal conviction.

The development of the modern s. 43

Section 43, as it currently reads, provides as follows:

> **Correction of child by force**
> 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.
> R.S., c. C-34, s. 43.

The parent-and-teacher defence has been part of Canadian criminal law since 1892:[9]

> Section 43 was first codified into our criminal law in 1892 and is based on English common law. In addition to permitting parents and teachers to "correct" children, the English common law also allowed the use of corporal punishment by husbands against wives, by employers against adult servants, and by masters against apprentices. By the time of codification of the criminal law in 1892, the right to use corporal punishment on wives and servants was no longer legally justified. However, the right of masters to use corporal punishment against apprentices remained in the *Criminal Code* until 1955. The corporal punishment of criminals, by whipping, was permitted up until 1972. [footnotes omitted]

The wording of the section has not been altered over time as it relates to teachers, though its interpretation and application have radically changed, along with society's values. The concept that sparing the rod spoils the child has been around since the Bible was written.[10] As late as 1994, between 70 and 75 per cent of Canadian parents admitted to using physical punishment with their children.[11]

However, there can be no doubt that the attitude of Canadian society to the application of corrective force to children has been changing dramatically in recent years. When I went to school starting in the early 1960s, most Alberta school districts expressly allowed corporal punishment, including the infamous strap. Various forms of corrective physical force by parents and teachers were approved of and held by the courts to be protected by s. 43, including slapping faces,[12] strapping bare buttocks with a belt leaving welts[13] and even tying up disobedient children.[14] Meanwhile, the opinion that the application of physical force to correct children should be prohibited has been gaining strength.

The matter came to a head in Canada in the first part of this century, culminating in the Supreme Court of Canada's decision in ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General.)***[15] A children's rights group, the Canadian Foundation for Children, Youth and the Law (CFYL), challenged the constitutionality of s. 43 in court.

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3. *Criminal Code*, s. 265(b)
4. ***R. v. Rasmussen***; unreported, 24 June 2004, Docket No. 031476344P101001-003 (Alta. P.C.)
5. *Criminal Code*, s. 267
6. *Criminal Code*, s. 268
7. *Criminal Code*, s. 271
8. ***R. v. Chase*** [1987] s S.C.R. 293
9. S D Greene (1999) ***Criminal Law Quarterly***, 288
10. Proverbs 13:24, 22:15, 23:13-14 and 29:15
11. S D Greene (1999) ***Criminal Law Quarterly*** 288, citing P Newal paper at the Conference on Children and the European Union, Stockholm, April 1994
12. ***R. v. Wood*** (1995), 176 A.R. 223 (Alta PC); ***R v B(J)*** [2000] A.J. No. 1685 (Alta PC)
13. ***R. v. DuPerron*** (1984) 16 C.C.C. (3rd) 453 (Sask CA)
14. ***R. v. Levesque***, 2011 ABQB 822
15. 2004 SCC 4

They argued that s. 43 should be stricken down entirely as offending the Canadian Charter of Rights and Freedoms.[16] The CFYL tendered the opinions of a plethora of experts to the effect that physical discipline of children is ineffective, even harmful or abusive. In defending s. 43, the federal government decided not to challenge those expert opinions but argued that s. 43 was constitutional, properly interpreted and applied.

The Supreme Court held that s. 43 is constitutional but laid down the modern legal rules for its application, based on what the Court found to be the current "social consensus."[17] The Court rejected the CFYL's argument that s. 43 is unnecessary because police and prosecutors could be trusted to exercise their discretion not to prosecute minor corrective contacts between teachers and parents and children.[18] I can assure you that s. 43 is still necessary because police and prosecutors do not always exercise that discretion. I have had to defend teachers on assault charges for the most minor physical contacts, both before and after the CFYL case was decided.

Of note, the Supreme Court held that s. 43 no longer protects teachers in employing corporal punishment and defined the limits of force teachers can apply to direct or correct a child (falling short of corporal punishment). Much of the case law prior to the CFYL case has been relegated to the dustbin of history.

Part 2 to follow in the next issue of *Leadership Update*.

16. Sections 7, 12 and 15
17. at ¶¶38, 46
18. at ¶¶59-62, 68

Q & A

GORDON THOMAS
Executive Secretary

Q: What is an assignable time or instructional time clause and what are the implications of these things for my school?

A: An instructional time clause or assignable time clause limits teachers' time in the class or limits time spent in performing assignable duties. These limits allow teachers to put more time and effort into their other professional duties: lesson preparation; student assessment; researching classroom resources; meeting with parents, colleagues and service providers; and preparing class materials and learning assessments/rubrics. Beyond these professional duties, many teachers still like to volunteer their skills and valuable time to build relationships with students through extracurricular activities such as athletics and fine arts, during lunchtime or after school.

Many boards are currently adding more instructional days to their calendars, arguing that the additional time is required to cover days lost to weather-related school closures. Other boards argue that more assignable time results in higher diploma and achievement test results. These explanations overlook the fact that it is quality rather than the quantity of time that results in better student learning. To alleviate this problem, boards could choose to stay closer to the 950-hour minimum for Grades 1 through 9, and 1000-hour minimum for Grades 10, 11 and 12. This extra time would give teachers more time to identify and meet each student's needs.

Studies done by ATA locals (Calgary Public and Rocky View) show that teachers are spending between 52 and 55 hours in the areas of instructional time, assignable time and other professional duties. Much of this time is spent on initiatives created by government or local school boards. Many of these initiatives, such as Inclusive Education Planning Tools (IEPTs), consume valuable teacher time that could be spent on planning quality lessons or assessing student learning. This situation does not produce the best conditions for professional practice. Government and school boards need to give teachers the autonomy to act in the best interests of students based on their professional judgment. Eliminating make-work initiatives would allow teachers to focus on what is most important—students.

Many administrators inquire about what duties count as assignable time. Assigned time includes instruction and any other tasks teachers perform at the direction of administrators and/or boards such as supervision, PD and staff meetings. The arbitration process has also identified the following activities as assignable time:

- The 15 minutes before and after school
- The time between warning bell and commencement of class (AM and PM start in junior and senior high schools)
- Class time changes
- Nutrition breaks in junior high

Third reading begins on new *Education Act*

Bill 3 amended with respect to private schools, prohibited activities

by Shelley Svidal, ATA News Staff

Third reading had begun on Bill 3, *Education Act*, before the legislative assembly adjourned its fall sitting November 8 for a constituency week. Sponsored by Minister of Education Jeff Johnson, the bill is intended to replace the *School Act*, which currently guides the governance of education in Alberta.

Debate extended past midnight October 30 when the bill was considered by Committee of the Whole. Government and opposition MLAs tried to amend the bill no fewer than 10 times, but only two amendments received the approval of the house.

The first amendment, put forward by Johnson, allows the minister of education to make regulations regarding private schools, including regulations establishing eligibility criteria for private school operators.

"It's come to my attention that a clause giving the minister authority to make regulations with respect to private schools was mistakenly left out of Bill 3," Johnson said. "I can assure this house that this was an oversight. [The clause] was not meant to be deleted."

The amendment passed handily.

The second amendment, put forward by Wildrose Alliance MLA Heather Forsyth (Calgary-Fish Creek), prohibits individuals from conducting themselves in a manner detrimental to the safe operation of a school. A similar amendment appeared in a 2009 private member's bill sponsored by Forsyth that died on the *Order Paper* when the legislature prorogued.

"This section would include possession of any weapon, since we know that possession of any type of weapon can be dangerous in the context of a school setting. It would also include drug paraphernalia and bullying incidences," Forsyth explained. "The Criminal Code does not cover drug paraphernalia, but the school community is intolerant of any association to drugs or illegal substances for obvious reasons. With this amendment in place it can also make … antibullying legislation provincewide. …The goals are to maintain safety in the school communities and create a meaningful consequence for our troubled youth."

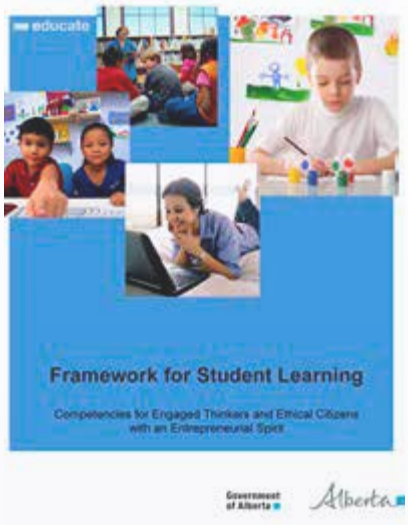
The amendment, which again passed handily, is intended to bridge the gap between the *Education Act* and the Criminal Code. Anyone who engages in a prohibited activity as defined by the act is guilty of an offence and liable to a fine of not more than $1,000.

Eight other amendments were defeated. The defeated amendments sought to

- ban mandatory school fees (Wildrose Alliance),
- make it easier to establish charter schools (Wildrose Alliance),
- allow teachers to assign zeros for unsubmitted student work (Wildrose Alliance),
- restore references to the *Alberta Human Rights Act* and Charter of Rights and Freedoms (New Democrat),
- strengthen the provisions relating to diversity and respect (Liberal),
- require the minister of education to consult with the public on school closure decisions (New Democrat),
- relieve school boards of the requirement to involve the business community in board matters (New Democrat) and
- make boards responsible for student achievement and student health or well-being (New Democrat).

Framework for Student Learning

Please take the time to review this. It is available online at: http://education.alberta.ca/department/ipr/curriculum.aspx



Supreme Court of Canada Decision Demonstrates the Importance of Workplace Computer Policies

—Terri Susan Zurbrigg and Greg Sim, Field Law

In R. v. Cole, 2012 SCC 53, the majority of the Supreme Court of Canada ruled that it was unconstitutional for the police to search the workplace computer of a high school teacher without a warrant. The Supreme Court held that the school board—Cole's employer—was not so constrained, as it had a statutory duty to maintain a safe school environment, and a reasonable power to seize and search the school-issued laptop based on a reasonable belief that the computer contained compromising photographs of a student.

Cole, a high school teacher, had stored nude photographs of a student on a laptop computer provided to him by the school board. These illicit photographs were discovered by a technician in the course of regular network maintenance. The technician notified the principal, who seized the laptop, and copied the photographs and the temporary Internet files onto separate discs. The principal then gave both the laptop and the discs to the police, who proceeded to search this material without a warrant.

The issue before the Supreme Court was whether Cole's rights under s. 8 of the Charter were breached when the police searched his laptop and the temporary Internet files without a warrant. The legality of the employer's initial search was not at issue, and the Supreme Court expressly stated that it would "leave for another day the finer points of an employer's right to monitor computers issued to employees".

So what does the Cole decision mean for employers? The Supreme Court's finding that the school board's *Policies and Procedures Manual* created a diminished expectation of privacy demonstrates the importance of computer-use policies in the workplace. These policies play a crucial role in establishing "the rules of the game" in terms of an employee's use of, and privacy expectations in, workplace computer technology. Employers can use these policies to communicate their expectations about personal use, and to assert ownership over, as well as their ability to access, any data stored on the technology. These policies can diminish an individual's expectation of privacy in a workplace computer even where some personal use of the workplace computer is permitted. In addition, though Cole did not discuss workplace discipline, workplace computer-use policies can also specify that contravention of the policy will be grounds for discipline up to and including termination. Employers should take steps to ensure that computer-use policies are applied and enforced in a consistent manner in order to preserve their ability to rely on these policies for discipline purposes.

Field Law can assist employers with the preparation of policies relating to the use of computer technology in the workplace.

The above article is reprinted with permission from Field Law. It originally appeared in Workwise*, no 49, October 2012.*

Teacher Growth, Supervision, Evaluation and Practice Review Workshop

You are invited to attend a

Teacher Growth, Supervision, Evaluation and Practice Review workshop
February 4–5, at Barnett House, in Edmonton

The provincial Teacher Growth, Supervision and Evaluation Policy (Policy 2.1.5) deals with accountability and continuous professional growth, and ensures that a teacher's professional practice is under ongoing supervision. The Teacher Growth, Supervision and Evaluation Policy defines the process, and the Teaching Quality Standard defines the competencies for professional practice. This workshop reviews principals' critical role and duties, as outlined in the *School Act* and Policy 2.1.5.

If you would like to attend, please e-mail Marilyn Terlaan, in Member Services, at marilyn.terlaan@ata.ab.ca.

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