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FALL 2018

EDUCATION LAW NEWSLETTER

ONTARIO GOVERNMENT EXTENDS CONSULTATION BEYOND SEX EDUCATION

Premier Doug Ford's campaign promise that he would consult widely on rewriting the controversial sex-education curriculum has been expanded into a broad review of the province's education system.

On August 22, 2018, the Conservative government announced that it was "respecting parents by holding unprecedented consultation into education reform."[1]

Starting in September, the province-wide public consultations are to include an online survey, telephone town halls in every region of Ontario, and a submission platform that will allow interested individuals and groups to present detailed proposals to the Ministry of Education.[2]

The scope of the consultation will include:

- How to improve student performance in the STEM disciplines of science, technology, engineering and math;
- How schools are preparing students with in-demand job skills, whether it be by exposing them to opportunities in the skilled trades or giving them the opportunity to improve their skills in increasingly important fields like coding;

[1] Caroline Alphonso and Justine Giovannetti, "Ford extends education consultation beyond sex ed; Ontario will seek input on Math, legal cannabis, standardized testing and cellphone bans in schools', *The Globe and Mail,* August 23, 2018, online at https://www.theglobeandmail.com/canada/article-ontario-government-says-it-will-discipline-teachers-who-dont-follow/.

[2] Office of the Premier, "Ontario Government for the People Respecting Parents by Holding Unprecedented Consultation into Education Reform", News Release, August 22, 2018, online: https://news.ontario.ca/opo/en/2018/08/ontarios-government-for-the-people-respecting-parents-by-holding-unprecedented-consultation-into-education-reform..html.

1
Ontario Government Extends Consultation Beyond Sex Education
Eric M. Roher

5
Recent Changes to Path to Cannabis Legalization
Kate Dearden

7
New Legislation Provides for Strict and Fast Responses to Professional Misconduct by Teachers
Maciej Lipinski

9
Executive Salaries Frozen Effective August 13, 2018
Maddie Axelrod

12
Application of School Board's Fresh Start Policy Upheld by Court
Bethan Dinning

15
Police Record Checks Legislation to Come into Force Effective November 1, 2018
Maddie Axelrod

16
Teacher with Camera Pen Acquitted of Voyeurism
Erica Sanderson

19
Case Law Foreshadows Enhanced Protection Against Search and Seizure of Devices
Eric M. Roher
Elizabeth Creelman

- What more can be done to ensure students graduate with important life skills like financial literacy;
- How to build a new age-appropriate health and physical education curriculum that includes subjects like mental health, sex-ed, and legalization of cannabis;
- What measures can be taken to improve standardized testing; and
- What steps schools should take to ban cellphone use in the classroom.

Elementary teachers are required to abandon the curriculum introduced by the Liberal government in 2015, which has been largely supported by educators and health groups, and revert back to old lesson plans.

"Make no mistake, if we find somebody failing to do their job, we will act." Premier Ford

On August 22, the Ministry of Education issued a revised interim health and physical education curriculum for Grades 1 to 8, which was used in the province between 1998 and 2014. High school students, however, will be taught the 2015 curriculum which was introduced by the Liberal government to address current issues, such as same-sex marriage, gender expression and cyberbullying.[3]

The Conservative government also unveiled a website called Fortheparents.ca that is "designed to give parents a portal to provide feedback about concerns related to the curriculum."

In the event that parents believe that a teacher is deliberately ignoring the curriculum, they are advised to contact the Ontario College of Teachers' Investigations and Hearings Department or file a complaint online.[4]

"We expect our teachers, principals and school board officials to fulfill their obligations to parents and children when it comes to what our students learn in the classroom", said Premier Ford. "We will not tolerate anybody using our children as pawns for grandstanding and political games. And, make no mistake, if we find somebody failing to do their job, we will act."[5]

To ensure that the rights of parents are respected throughout, the government will also begin drafting a Ministry of Education Parents' Bill of Rights. Parents will be asked what elements they want to see in the Bill of Rights as part of the province-wide consultation.

In addition, the Minister of Education announced that she would use her authority under the *Ontario College of Teachers Act* to strike a Public Interest Committee that will help inform the creation of the Parents' Bill of Rights. The Public Interest Committee will also ensure that curriculum-based misconduct issues are fairly dealt with at the college.[6]

Commentators criticized the creation of a "snitch line" as an attack against teachers. On social media, some critics called it a "witch hunt to scare teachers into compliance with the curriculum rollback."[7]

On Twitter, Sam Hammond, president of the Elementary Teachers' Federation of Ontario (ETFO), which represents 83,000 public school

[3] Isabel Teotonio, "Outrage over Ford's sex-ed 'snitch-line': New hotline to report teachers who defy lesson rollback called 'shameful'", *Toronto Star,* August 23, 2018, online at https://www.thestar.com/news/queenspark/2018/08/22/educators-slam-fords-snitch-line-for-teachers-who-defy-sex-ed-rollback.html.

[4] Office of the Premier, "Consultation into Education Reform", Backgrounder, August 22, 2018, online at https://news.ontario.ca/opo/en/2018/08/consultation-into-education-reform.html.

[5] Office of the Premier, *op. cit.,* footnote 2.

[6] Office of the Premier, *op. cit.,* footnote 4.

[7] Teotonio, *op. cit.,* footnote 3.

teachers, wrote, "Doug Ford & the Minister of Ed calling on parents to file complaints against Teachers. Unprecedented, outrageous, and shameful! This is a blatant attack on the professionalism… of teachers."

In a statement, Hammond said the government is "manufacturing a crisis", rather than tackling real issues, such as the underfunding of schools.

"Teachers, education professionals and principals have regular communication and relationships with parents and students that have worked well," he said. "Having a Ministry of Education 'snitch line' that bypasses the systems already in place to deal with issues at the school level will prohibit parents and educators from addressing classroom concerns constructively, as we've seen from social media, anonymous portals and comment threads are toxic and counter-productive to improving any situation, in this case school culture."[8]

On September 4, 2018, ETFO launched a legal challenge against the government's decision to replace the 2015 sexual-education curriculum. ETFO stated that it is seeking an injunction to keep the 2015 curriculum in place and to stop the implementation of the government's "snitch line".

Cathy Abraham, president of the Ontario Public School Boards' Association, and Beverley Eckensweiler, president of the Ontario Catholic School Trustees' Association, confirmed that there is already a good process in place for parents to make complaints. First, parents speak with the teacher, then the school principal and then the school board official. If the issue has not been addressed, then the complaints go to the Ontario College of Teachers.[9]

In response to this new government initiative, the Canadian Civil Liberties Association has commenced a legal action against the Ontario government in an attempt to stop what it calls "discriminatory" changes to the sex-education curriculum for elementary students.[10]

The association, which filed its claim on August 23, 2018, is seeking a court order as early in the school year as possible to maintain the previous sex-education curriculum until a new one can be developed through public consultation.

The court challenge is the second attempt to find a legal mechanism to stop the Conservative government from dropping the 2015 curriculum. Representing an 11-year-old transgender girl, Toronto lawyer Marcus McCann filed a complaint in early August, 2018 under Ontario *Human Rights Code.*

"The 2015 curriculum included information about her identity and her body," Mr. McCann said in an e-mail to *The Globe and Mail*, referring to the 11-year-old, "and that's now been removed. That's a breach of the code, because her non-trans peers will still get access to information about *their* identities and *their* bodies."[11]

On September 17, 2018, a second human rights case was launched against the Ontario government by two transgender teenagers regarding the use of an outdated sex-education curriculum. The two students, aged 15, alleged

Commentators criticized the creation of a "snitch line" as an attack against teachers.

[8] Teotonio, *op. cit.*, footnote 3.

[9] Teotonio, *op. cit.*, footnote 3.

[10] Sean Fine and Caroline Alphonso, "Civil liberties group mounts legal challenge to Ford's sex-ed overhaul", *The Globe and Mail,* August 23, 2018, online at https://www.theglobeandmail.com/canada/article-civil-liberties-group-mounts-legal-challenge-to-fords-sex-ed-overhaul/.

[11] *Ibid.*

Polls have consistently shown that more Ontarians support the 2015 curriculum than oppose it.

that using a 1998 curriculum which does not implicitly refer to LGBTQ youth means that teens like them are no longer reflected in the classroom. The students argued that this change could lead to an unwelcoming, even “hostile”, school environment. One of the students named Ryan stated, “In my mind, the most important thing is the lack of inclusion.”

In a letter to teachers on August 24, 2018, John Malloy, the director of education of the Toronto District School Board, said that the TDSB will continue to support teachers through the tumultuous changes in Ontario’s education system. He stated that many important topics are still addressed in the interim sex education curriculum issued by the Conservative government.[12]

In an interview with the *Globe and Mail*, Mr. Malloy said that the wording in the interim document may differ from the 2015 curriculum, but some important topics are generally covered as “prompts”, references that support teachers in providing fact-based answers to students.[13] TDSB staff are reviewing curriculum documents and organizing resources “as an attempt to take the ‘guess work’ out of determining what can be taught and when.”[14]

Mr. Malloy said that while the Ministry of Education “has the right to set the curriculum for Ontario students”, educators are responsible for how it is taught.[15]

Polls have consistently shown that more Ontarians support the 2015 curriculum than oppose it. Commentators have been critical that the ministry has announced no timeline for introducing a suitable replacement. Some critics have indicated that the Minister of Education should have found ways to preserve useful parts of the 2015 curriculum until her promised consultation has been completed. The question arises as to whether the Ontario government has made an already controversial issue more divisive.

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[12] Caroline Alphonso, “Toronto board marshalling resources from teachers under new sex-ed curriculum”, *The Globe and Mail,* August 24, 2018, online at https://www.theglobeandmail.com/canada/article-toronto-board-marshalling-resources-for-teachers-under-new-sex-ed/.

[13] *Ibid.*

[14] The Canadian Press, “Head of Toronto school board reassures teachers on interim sex-ed curriculum’”, August 25, 2018, online at https://ca.news.yahoo.com/head-toronto-school-board-reassures-220016577.html.

[15] *Ibid.*

RECENT CHANGES TO PATH TO CANNABIS LEGALIZATION

There have been significant changes over the past several months to the path for legalizing recreational cannabis in Canada. The federal government's hallmark legislation, the *Cannabis Act,* will decriminalize recreational cannabis use by Canadian adults and implement new measures for detection of drug-impaired drivers and drug trafficking that falls outside the lawful retail models set by each province.

Although the *Cannabis Act* was passed by the House of Commons on November 27, 2017, it was not passed by the Senate until June 19, 2018 following lengthy policy debates. As a result, the *Cannabis Act* was finally given Royal Assent on June 21, 2018. The prime minister announced in question period on June 20, 2018 that the *Cannabis Act* will come into force on October 17, 2018.

In the meantime, the Ontario government has been preparing for the legalization of cannabis. On December 12, 2017, the previous government passed legislation which will give effect to the federal *Cannabis Act.* The *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017* was passed by the previous Ontario government and was intended to implement a significant number of changes to the use, sale and regulation of cannabis in Ontario.

While the new provincial government proclaimed most of the *Cannabis Act, 2017* into force effective October 17, 2018, they have also announced two major shifts to Ontario's cannabis framework:

1. Private retail sales model for cannabis

The previous government had planned to implement a retail model similar to the Liquor Control Board of Ontario called the Ontario Cannabis Stores (the OCS). However, on August 13, 2018, the new government announced that it would introduce a model for the sale of cannabis that includes an online retail channel by the OCS as of October 17, 2018, and a private retail sales model for licensed retailers by April 1, 2019.

The government has indicated that it will immediately begin consultations before launching its private retail sales model by the April 1, 2019 target date. The consultation process will apparently include consultations with municipalities, Indigenous communities, police and the cannabis industry association, as well as "other key stakeholders". School boards have not been specifically identified as parties to be consulted, and the extent to which they will be asked to participate is unknown.

It has also been announced that municipalities will be given a short period of time to opt out of cannabis retailers within their boundaries. More information on opting out has yet to be provided. What also remains unclear is whether cannabis retailers will be restricted in their proximity to schools.

2. *Smoke-Free Ontario Act, 2017* has been paused

The *Smoke-Free Ontario Act, 2017* was set to come into force on July 1, 2018. On June

The *Cannabis Act* will come into force on October 17, 2018.

The new government announced that it would introduce a model for the sale of cannabis that includes an online retail channel and a private retail sales model.

29, 2018, the new government revoked the proclamation and effectively hit "pause" on the new legislation. As a result, the new rules that would restrict vaping and provide clarity on consumption of medical cannabis have not come into force. The previous legislation, the *Smoke-Free Ontario Act, 2006* and the *Electronic Cigarettes Act* remain in effect.

MEDICAL CANNABIS USERS REMAIN REGULATED

The current medical access regime will remain in place for medical cannabis users. The federal *Access to Cannabis for Medical Purposes Regulations* (ACMPR) allows possession of cannabis for medical purposes if obtained:

i. from a licensed producer;
ii. from a health care practitioner in the course of treatment for a medical condition; or
iii. from a hospital.

Individuals who claim to be medical cannabis users must show supporting documents to police on demand. It is also reasonable for schools to request such documents in connection with the duty to accommodate a student or staff disability.

IMPAIRMENT STILL NOT ACCEPTABLE AT SCHOOL OR WORK

Educators and employers can continue to take the position that impairment at school or in the workplace is not acceptable. The legal access regime described above does not provide anyone in Ontario with a legal right to consume or possess cannabis on school premises, or to be impaired at school without any recourse to the school or employer. If a student or an employee is a medical cannabis user, the matter will be treated like any other accommodation of a disability. Smoking and vaping will be subject to applicable legislation.

The Ontario government has advised school boards in a memo from the deputy minister of education dated May 8, 2018 that it will provide funding allocations and resources to support training and education about cannabis. In this memo, and earlier communications from the Ministry of Education, the government has been clear that non-medical cannabis use by students on school grounds and during school-related activities could lead to suspension. *The Education Act* and provincial Code of Conduct will be amended effective October 17, 2018 to reflect the consequences for non-medical cannabis use and other cannabis related infractions such as sharing cannabis with other youth under age 19.

Although the *Cannabis Act, 2017* permits ticketing of youth and confiscation of cannabis, there has been little information from the province on whether they intend to act on these new powers. Accordingly, school boards should continue to liaise with local authorities to determine the scope of police involvement in an investigation related to unlawful youth consumption and possession of cannabis.

We will continue to monitor the federal and provincial governments' evolving efforts to provide adults with legal access to cannabis and the impact on school boards.

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NEW LEGISLATION PROVIDES FOR STRICT AND FAST RESPONSES TO PROFESSIONAL MISCONDUCT BY TEACHERS

As one of the final acts of Ontario's outgoing provincial government, *An Act to implement Budget measures and to enact and amend various statutes* ("Bill 31") was introduced on March 28, 2018, and rapidly progressed to Royal Assent on May 8, 2018.

Among the various pieces of legislation affected by Bill 31 was the *Ontario College of Teachers Act, 1996* (the Act), particularly its provisions dealing with repercussions for professional misconduct by teachers; including sexual abuse of students and prohibited acts involving child pornography. Broadly speaking, these amendments result in a wider range of misconduct being captured by the Act and for more significant sanctions for these acts, while also providing for remedial measures designed to assist and support pupils who are survivors of such misconduct.

These changes follow other recent amendments to the Act that previously came into force on December 5, 2016 with the passage of the *Protecting Students Act, 2016* (also known as "Bill 37"). Those changes had removed the discretion previously afforded to the Ontario College of Teachers (the College) in determining whether to revoke a member's teaching certificate for professional misconduct and whether to publish Discipline Committee decisions finding the College's members guilty of misconduct. The changes under Bill 37 made the revocation of teaching certificates for misconduct and the publication of such decisions mandatory.

The College has long-established processes for addressing professional misconduct by teachers who are members of the College. Under the Act's Regulation 437/97, professional misconduct by a teacher includes acts such as providing false information to the College regarding one's qualifications, releasing students' information without authorization, and various acts of abuse toward students including verbal, physical, psychological, emotional, and sexual. Where a complaint of professional misconduct is made against a teacher who is a member of the College, pertinent material concerning the complaint is gathered and investigated by a College Investigation Committee. In circumstances where the matter is not resolved informally, the Investigation Committee conducts an extensive investigation and a Discipline Committee may be convened to hold a public hearing and determine whether the accused member is guilty of professional misconduct. On average, approximately 90 College members face such a public hearing in any given year.[1]

The amendments under Bill 31 come into force in two phases: (i) a series of amendments to the Act that came into force as of May 8, 2018; and (ii) further amendments to the Act that have been

These amendments provide for more significant sanctions to be imposed.

[1] Ontario College of Teachers, Complaints and Discipline, online: https://www.oct.ca/public/complaints-and-discipline.

passed, but will not come into force until a later date yet to be proclaimed.

The amendments that fall under the first phase and are already in force include:

- The Council, which is the College's governing body, or its Executive Committee may now *immediately* – and without a hearing – impose an interim suspension on the teaching certificate of any member where a complaint of professional misconduct is referred by an Investigation Committee *and* the Council or Executive Committee is of the opinion that the member's actions or conduct will likely expose a student to harm or injury. Such an interim suspension would remain in effect for the duration of the corresponding investigation into the misconduct complaint;
- Mandatory revocation of a member's teaching certificate now applies where an Investigation Committee finds the member guilty of various acts of professional misconduct involving the sexual abuse of students or prohibited acts involving child pornography; and
- A wider range of acts of professional misconduct (including touching of a sexual nature) will now fall into the category of sexual abuse giving rise to such a mandatory revocation of a member's teaching certificate.

Teachers found guilty of acts of professional misconduct involving the sexual abuse of students and prohibited acts involving child pornography would, however, continue to be able to apply for re-certification following five years after the revocation of their certificate – as this feature of the Act remains unchanged by Bill 31.

Additional changes to the Act that fall under the second phase noted above, and which will come into force on a future date to be determined, include:

- The College will be required to establish a program to fund therapy and counselling for students who are survivors of sexual abuse by teachers, or survivors of acts of misconduct involving child pornography by teachers;
- Where a member has been found guilty by the College's Discipline Committee of misconduct involving sexual abuse or prohibited acts involving child pornography toward students, the College may order the member to reimburse the costs of any therapy and counselling required to be provided as a result of such acts; and
- A College Investigation Committee may require members to submit to mental and physical examinations, on penalty of suspension for refusal, where the Investigation Committee has reason to believe that the member is incapacitated.

These further measures, which attempt to balance discipline of teachers with efforts to support survivors of such misconduct, address BLG's previous commentary regarding Bill 37's more punishment-focused approach. Such commentary was previously set out in our **January 2017 bulletin** and in oral submissions made before the Ontario legislature's Standing Committee on Finance and Economic Affairs by the author in fall 2016. The new supports built into the Act by Bill 31 are therefore welcome developments toward ensuring that survivors of abuse are considered as part of the College's response to such misconduct.

The College will be required to establish a program to fund therapy and counselling for students who are survivors of sexual abuse by teachers.

As highlighted by reports such as the recently released *Prevention and Response: Recommendations for Independent School Leaders from the Independent School Task Force on Educator Sexual Misconduct* published by the National Association of Independent Schools in the United States, misconduct by teachers involving the sexual abuse of students unfortunately remains a common occurrence, especially where school systems are not prepared to deal quickly with complaints of such

misconduct. As evidenced by published research cited in that report, false reports of educator sexual misconduct are rare. Rather, it is more common for children to *minimize* or *dismiss* abuse or misconduct that they have actually experienced rather than exaggerate or fabricate such experiences.

The new measures already brought into force by Bill 31 and the further measures yet to come into force provide the College with important additional tools to respond quickly and strictly against professional misconduct by teachers while providing survivors with the tools needed to recover from such incidents of abuse. If effective in achieving these goals, Bill 31 will help to ensure that Ontario's schools provide the care and safety that all pupils are entitled to expect.

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EXECUTIVE SALARIES FROZEN EFFECTIVE AUGUST 13, 2018

On August 13, 2018, the Ontario government filed Regulation 406/18, and revoked Regulation 304/16, under the *Broader Public Sector Executive Compensation Act, 2014* (the BPSECA). This latest change reverses two years of hard work to implement new compensation programs, and institutes a strict compensation freeze similar to prior legislation.

All school boards are restricted from providing executive compensation increases until the government completes a regulatory review of the compensation program by June 7, 2019.

BACKGROUND

Since 2010, Ontario's broader public sector was subject to a freeze on executive compensation, which applied to directors of education, supervisory officers, and other executives at school boards. The restraint provisions in the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* and then in the *Broader Public Sector Accountability Act, 2010* operated to effectively prohibit increases to compensation for school board executives except in limited circumstances. The general approach was to refrain from providing executives with salary increases, and to provide salaries to new hires that were equal to or less than those provided to the prior incumbents. This legislation has significantly affected the past earnings and future pensions for these essential senior administrators.

In 2014, after the provincial budget was balanced, the Ontario government began the process of developing public sector compensation frameworks to ensure a consistent approach to executive compensation. The BPSECA, and Regulation 304/16, issued on September 6, 2016 (the Old Regulation), replaced the prior compensation freezes with a more nuanced and balanced approach to executive compensation in the broader public sector.

In compliance with the BPSECA and the Old Regulation, the four school board trustee associations[1] worked together with Mercer (Canada) Limited, an independent consulting firm specializing in executive compensation, and the Council for Ontario Directors of Education to collaboratively develop a comprehensive proposed Executive Compensation Program to be used across the province. School boards also worked with their trustee associations, Mercer, and legal counsel to answer many complex questions as the new executive compensation programs were developed and implemented.

In accordance with the BPSECA and the Old Regulation, school boards submitted their own executive compensation programs to the Ministry of Education by September 29, 2017. Following initial approval from the mnistry with respect to the comparator organizations and proposed rate of increase for the compensation envelope, school boards then posted their executive compensation programs on their websites for thirty days of public consultation. After incorporating relevant public comments, school boards submitted their executive compensation programs to the Ministry of Education for final approval.

The salary provided to each executive must be less than or equal to the amount provided to the person occupying that position effective August 13, 2018.

Following tireless work for over a year and a half, all 72 school boards in the province ultimately succeeded in having their executive compensation programs finalized and posted by February 28, 2018. The salary increases found in those programs were to be applied retroactively to September 1, 2017.

NEW REGULATION

On August 13, 2018, the Ontario government set aside the work of school boards to develop executive compensation programs, and imposed a single framework across the broader public sector. All designated employers in the broader public sector, including school boards, are restricted from providing executive compensation increases as of August 13, 2018 until the government completes a regulatory review of the compensation program by June 7, 2019.

The Ontario government filed Regulation 406/18 (the New Regulation) and revoked the Old Regulation on August 13, 2018. The New Regulation replaces the more complex executive compensation programs with simple restraint measures similar to those under the earlier legislation. All executive compensation programs developed under the Old Regulation are now null and void to the extent that they provide for compensation increases that are inconsistent with the New Regulation.

The New Regulation revokes the executive compensation programs – including the comparator-based individual pay caps and incrementally increasing pay envelope – and replaces the framework with the following key provisions, effective as of August 13, 2018:

- The **salary** provided to each designated executive position must be less than or equal to the amount provided to the person occupying that position on the effective date of August 13, 2018 or, if the position is vacant on that date, the amount provided to the most recent incumbent. "Salary" means the salary actually being earned by the executive, and not any raises that would have happened after that date nor any other amount in the position's salary range.
- A school board's "**performance-related pay envelope**" must be less than or equal to the total performance-related pay disbursed to designated executives during the most recent pay year before the effective date, and must be reduced or increased on a pro-rated basis when executive positions are vacated, eliminated, filled, or created. If the school

[1] The Ontario Catholic School Trustees' Association, the Ontario Public School Boards' Association, the Association des conseils scolaires des écoles publiques de l'Ontario and the Association franco-ontarienne des conseils scolaires catholiques.

board did not provide any performance-related pay in the 2016-2017 school year, its performance-related pay envelope will be zero and it will not be permitted to introduce performance-related pay at this time.

- School boards may not provide any new **other element of compensation** (such as car allowances or lieu payments) for a designated executive position after August 13, 2018. Additionally, other elements of compensation are capped at what they were on August 13, 2018 and may not be increased. However, it is not considered an "increase" if a benefits plan is amended for "all or most of the employees of the employer", or if there is an increased cost for providing the same benefits.
- Among other restraints, **newly-hired executives** must be paid the same or lower salary as the prior incumbent, and the new hire may not be provided with other elements of compensation beyond those provided to the prior incumbent.
- For **newly-created positions** where there was no prior incumbent, compensation is limited to that provided to the "most similar position at the designated employer".
- The **prohibitions** on certain elements of compensation from the Old Regulation remain in place. School boards may not provide designated executives with the following:
  - Payments or other benefits provided in lieu of perquisites;
  - Signing bonuses;
  - Retention bonuses;
  - Cash housing allowances;
  - Insured benefits not generally provided to non-executive managers;
  - Termination pay, including pay in lieu of notice of termination and severance pay, in excess of 24 months' base salary;
  - Termination pay that is payable in the event of termination for cause;
  - Paid administrative leave, with limited exception for certain executives at colleges or universities; and
  - Payments in lieu of administrative leave.

The government's August 13, 2018 memorandum to broader public sector employers noted that the government may request school boards to report on compliance with the New Regulation.

The government has committed to reviewing the New Regulation by June 7, 2019 and will evaluate the its effectiveness in furthering the purpose of the BPSECA. Additionally, the government's August 13, 2018 memorandum also stated that "opportunities will be available for [employers], other stakeholders and interested parties to provide input as part of this review."

IMPLICATIONS

School boards need highly skilled, thoughtful, and engaged leaders to guide their organizations in providing, promoting, and enhancing publicly funded education. Many school boards in the province have faced challenges in recruiting executives, and have faced compensation compression between executives and non-executive managers, including principals. In this regard, a competitive and fair executive compensation program is vital for attracting and retaining talented and innovative leadership required to ensure continued progress in student achievement.

Nevertheless, despite the hard work of school boards across the province, the balanced approach reflected in the Old Regulation, and the public consultation and government approval that was incorporated into the executive compensation programs, school boards will now be subject to a strict freeze on executive compensation. Any planned salary increases for the 2018-2019 school year will not be permitted by the New

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Regulation, nor will increases to other elements of compensation. Whatever compensation directors of education, supervisory officers, and other executives were entitled to receive on August 13, 2018, that is what they – and executives newly hired into similar roles – will receive for the foreseeable future.

School boards are encouraged to participate in the government's upcoming "opportunities … to provide input", and we will provide further detail once available. We will also provide further updates if the New Regulation is amended upon completion of the government's review.

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APPLICATION OF SCHOOL BOARD'S FRESH START POLICY UPHELD BY COURT

The Court concluded that the Board's transfer of a student to a new school was a reasonable exercise of its authority.

In *K.W. v. Toronto Catholic District School Board,* K.W., a Grade 12 student in a school operated by the Toronto Catholic District School Board (the Board), brought an application for judicial review to challenge the decision of the Board to transfer him to a new school at the beginning of the 2017-2018 school year. The Ontario Superior Court of Justice dismissed K.W.'s application and concluded that the transfer was not disciplinary in nature. Rather, the Court held that it was a reasonable exercise of the Board's authority to transfer students.

BACKGROUND

During the 2016-2017 school year, K.W. was in Grade 11. In April of his Grade 11 school year, K.W. was one of three students involved in an assault of M.V., a Grade 10 student at the same school (School 1). The principal of School 1 was advised by police that the perpetrators, including K.W., were not allowed to return to School 1. K.W. was placed on a 20-day administrative suspension so that the principal could complete an investigation. During the investigation, K.W. admitted that he had pushed and shoved M.V. and taken his glasses and thrown them.

After conducting the investigation, including interviewing M.V. and his mother, the principal of School 1 concluded that allowing K.W. to return would pose a risk to the physical and/or mental well-being of M.V. The principal contacted K.W. by

letter advising that the investigation was completed and confirming that the suspension was being reduced to five days in light of K.W.'s insignificant prior disciplinary history. One of the other students involved in the assault was expelled from the Board and the other was expelled from School 1.

In addition, the principal transferred K.W. to another school (School 2), pursuant to the Board's Fresh Start Policy. School 2 was in the same school district and offered the same academic program for K.W.

In the Fresh Start Policy, a "Fresh Start" is defined as follows:

> A Fresh Start is generally defined as a non-voluntary or unusual movement of a student to a new school within the school year or at the end of a semester. Fresh Starts can be considered as a response to TCDSB Victim's Rights Policy (S.S. 13), court conditions imposed by the Criminal Justice System for an incident for which the student was not expelled, or other special circumstances as approved by the superintendent of the student's school.

A Fresh Start is not considered disciplinary and it does not appear on the student's Ontario Student Record. The purpose of the policy is to ensure that students feel safe at school, and that those who are subject to a Fresh Start are provided with a successful transition. The policy sets out mechanisms to implement a Fresh Start.

Also relevant to the transfer of K.W. was the Board's Victim's Rights Policy. It applies where a serious incident causes harm, either physical, emotional or psychological to a student. It requires the school principal to take several steps to ensure the safety and well-being of all students, including separating the victim from those who caused the harm and conducting an investigation.

The Victim's Rights Policy includes the following:

> 7. Whenever a choice must be made as to which of the actual or intended victim, or the student(s) who may have caused the harm, must be transferred, generally (though not always), it will be the student(s) who may have caused harm who will be required to transfer to another school. This transfer is facilitated through the Fresh Start process.

K.W. appealed the transfer. At the appeal hearing, K.W. spoke of the impact of the transfer, particularly on his athletics career and the application of the Ontario Federation of Secondary School Athletic Associations Transfer Policy (the Transfer Policy). The Transfer Policy prohibits schools from including students on their school team rosters who have transferred from another school within the last 12 months. As a result of the Transfer Policy, K.W. was not permitted to be on sports teams at School 2. At the appeal, K.W. also argued that the decision to transfer him was made because he is black.

In his decision to deny the appeal, the superintendent concluded that he would not permit K.W. to return to School 1 as a result of concerns for M.V.'s well-being. In making this decision, he relied on the Board's Fresh Start Policy, the Victims' Rights Policy, and evidence from the principal. Finally, he concluded that there was no evidence that K.W. was given a Fresh Start because he is black.

THE COURT'S DECISION

In his application for judicial review, K.W. raised three legal issues:

1. Whether the Board lacked jurisdiction to impose a non-voluntary school transfer on a student for discipline purposes pursuant to its Fresh Start Policy;
2. Whether K.W. was denied procedural fairness in the appeal process before the superintendent; and

The Board had the authority to adopt the Fresh Start Policy as it was intended to promote the safety and well-being of students.

3. Whether the decision of the superintendent was unreasonable.

K.W. did not advance the argument of racial profiling before the Court, which had been relied on during the appeal before the superintendent.

First, in considering the Board's jurisdiction, the Court reviewed relevant sections of the *Education Act* (the Act) and Policy/Program Memorandum No. 145 (PPM 145). Specifically, the Court relied on subsection 265(1)(m) of the Act, which prescribes the duty of a principal to "refuse to admit to the school or classroom a person whose presence in the school or classroom would, in the principal's judgment, be detrimental to the physical or mental well-being of the pupils". Further, the Court confirmed that PPM 145 contemplates non-disciplinary school transfers to preserve school safety.

The Court concluded as follows:

> We see nothing in the Fresh Start Policy that suggests it was designed to impose non-voluntary transfers for disciplinary reasons. There is nothing in it to suggest that its purpose is disciplinary. The Fresh Start Policy is one of the Board's suite of policies that deal with the management of student behaviour and student relations in the classroom and in schools. It is focused on student achievement and the protection of victims, and is consistent with the policies of the Ministry of Education.

Accordingly, the Court concluded that, when read in the context of the Act and PPM 145, the Board had the authority to adopt the Fresh Start Policy as it was intended to promote the safety and well-being of students.

Second, the Court concluded that the Board and the superintendent met its procedural obligations to K.W.–specifically, the superintendent provided K.W., his family, and a community leader the opportunity to present their views with the assistance of a lawyer. The superintendent's task was to gather information from K.W. and the principal and then come to a decision based on the information before him and taking into account relevant policies and legislation.

The Court concluded that the Board and the superintendent met its procedural obligations to the student.

Third, the Court decided that the decision of the superintendent was within a range of possible, acceptable outcomes, given the facts and the law of the case. K.W.'s argument focused on the harshness of the transfer, given the impact on K.W.'s life and athletic aspirations. However, the superintendent had to weigh the impact on M.V., as well as K.W. He had concerns about both the physical and psychological well-being of M.V. if K.W. was present in the school. The Court affirmed that "M.V. was entitled to a safe and comfortable environment in which to pursue his education". The Court concluded that the superintendent reasonably exercised his authority.

COMMENT

The decision in *K.W. v. Toronto Catholic District School Board* confirms the jurisdiction of school boards to implement Fresh Start policies with the goal of ensuring the safety and well-being of students. This is in accordance with school boards' and, in particular, school principals' obligations under the Act and PPM 145 to ensure both the physical and mental safety and well-being of students.

The decision also highlights the importance of providing students and their families with an appeal process for any decisions under Fresh Start policies, as well as underlining certain procedural requirements for school boards to consider, namely that the student should have an opportunity to be heard and provide his/her story. In such circumstances, the transfer of a student under a Fresh Start Policy is a reasonable exercise of a school board's authority.

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POLICE RECORD CHECKS LEGISLATION COMES INTO FORCE NOVEMBER 1, 2018

On December 1, 2015, the Ontario government unanimously enacted the *Police Record Checks Reform Act, 2015* (the Act). Since being passed in 2015, the Act was pending proclamation into law. On April 25, 2018, the Lieutenant Governor issued an Order in Council proclaiming that the Act will come into force on November 1, 2018 — almost three years after being passed.

The Act limits the types of information that police may release in each of three different types of police record checks: (1) criminal record checks, (2) criminal record and judicial matters checks, and (3) vulnerable sector checks (performed when an individual is in a position of trust or authority over vulnerable persons like children or the elderly).

The Act sets out a schedule outlining what type of disclosure is permitted for each type of check. Generally, the most disclosure is permitted for vulnerable sector checks, most commonly used by schools and school boards, while the least disclosure is permitted for standard criminal record checks. Subject to certain temporal and other limits, most "non-conviction information" – meaning discharges, outstanding charges, court orders, and not criminally responsible findings – would be disclosed in a vulnerable sector check, but not for a standard criminal record check. Other non-conviction information may also be disclosed in a vulnerable sector check if it meets the test for "exceptional disclosure", which requires police to consider a number of different factors.

The Act also standardizes the disclosure procedure for each type of check. One significant implication of the Act's disclosure process is that the subject of the check has an opportunity to review the results of a check before it may be disclosed to another person or organization. The results of a check may not be provided to the employer who requested the check unless the individual subject of the check provides his or her written consent after receiving the results.

Along with bringing the Act into force, the government also recently issued four regulations under the Act in order to:

- list the offences to which non-conviction information must relate in order to justify "exceptional disclosure";
- set out provisions for disclosing records under the *Youth Criminal Justice Act*;
- outline the process for requesting reconsideration of disclosure of non-conviction information; and
- provide exemptions for certain types of searches. The exemptions generally relate to licensing applications in sectors such as child and youth care, securities and finance licensing, correctional institutions, police services, and certain public servant roles.

Complete details regarding the provisions of the Act can be found in our **December 2015 bulletin**.

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The most disclosure is permitted for vulnerable sector checks, most commonly used by schools and school boards.

TEACHER WITH CAMERA PEN ACQUITTED OF VOYEURISM

In a recent criminal case in the Ontario Court of Appeal, a teacher was acquitted on a charge of voyeurism under section 162 of the *Criminal Code* despite having surreptitiously recorded 27 female students between ages 14 and 18 at the school where he taught. As detailed below, the majority of the Court of Appeal concluded that the Crown did not prove the element of the voyeurism offence which requires circumstances that give rise to a reasonable expectation of privacy.

The respondent took advantage of his position as a teacher to make surreptitious videos of teenaged female students.

BACKGROUND

In *R. v. Jarvis,* 2017 ONCA 778, the accused was a high school teacher in Ontario. He was observed at school in conversation with a student while holding a pen with a flashing light on the top. The pen was confiscated by the principal and turned over to the police. The police officer conducted a cursory search of the pen, prior to obtaining a search warrant, which revealed a recording of female students with a focus on their breasts and cleavage. After obtaining a warrant, police searched the pen and found 19 videos with 30 different individuals, 27 of whom were female students, at the school.

The teacher was charged with voyeurism under section 162(1)(c) of the *Criminal Code,* which states:

> 162(1) Every one commits an offence who, surreptitiously, observes – including by mechanical or electronic means – or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
>
> (c) the observation or recording is done for a sexual purpose.

The accused conceded that he had made the recordings on his camera pen surreptitiously, and that the students were unaware of the recordings. The trial judge determined that the recordings were made in circumstances that gave rise to a reasonable expectation of privacy; however, he found that there could be other inferences to be drawn aside from making the recordings for a sexual purpose. The trial judge therefore acquitted the accused of all charges.

ISSUES BEFORE THE COURT OF APPEAL

The Crown appealed the acquittal and argued the trial judge had erred by deciding the recordings were not made for a sexual purpose. The accused also argued that the trial judge had erred in admitting the contents of the camera pen because of the warrantless search. He also submitted that the trial judge erred in finding that the circumstances of the recordings gave rise to a reasonable expectation of privacy by the students.

The Court of Appeal was unanimous in its finding that the trial judge had erred when he found that there could have been some other purpose for the recordings. The trial judge had improperly focused on facts such as there being no other pornographic material found in the accused's

possession, the fact that there was no nudity and that the camera pen could not zoom or enhance its focus. Yet he found that the teacher's behaviour was "morally repugnant and professionally objectionable." The Court of Appeal took a clear stance on the sexual purpose of the recordings, with particular emphasis on the fact that the accused is a teacher who took advantage of his position and breached the teacher-student trust relationship:

> [46] The respondent took advantage of his position as a teacher to make surreptitious videos of his teenaged female students. At least five of the videos focused on the cleavage of those female students. He was taking close up, lengthy views of their cleavage from angles both straight on and from above. The trial judge found that while it was most likely that the respondent was photographing female students' cleavage for a sexual purpose, "there may be other inferences". However, he failed to identify any such inference anywhere in his reasons. With respect to the trial judge, there were no other inferences available on this record.
>
> [47] As the trial judge stated, this conduct by the respondent was morally repugnant. That finding is inconsistent with the trial judge's conclusion that the videos might not have been taken for a sexual purpose. The reason the teacher's conduct was morally repugnant was because of the sexual impropriety of taking surreptitious pictures of the breasts of his female students. Had he been taking surreptitious pictures of only their faces, his conduct would have been unacceptable as a breach of the teacher-student trust relationship, but not morally repugnant because of sexual impropriety.

The Court of Appeal was also unanimous in finding that the trial judge did not err in admitting evidence obtained by police without a warrant. Police had breached the accused's rights under section 8 of the *Charter of Rights and Freedoms,* which prohibits unreasonable search and seizure. However, the Court of Appeal agreed with the trial judge's decision to admit the evidence under section 24(2) of the Charter, in part because of the teacher's diminished expectation of privacy regarding the camera pen. As the Court stated, the teacher was using the camera pen at school, where the school board had supervisory jurisdiction over him and had a policy against making recordings. His camera pen was subject to search and seizure by the school board. The public interest factor of determining whether to admit evidence obtained in breach of section 8 also related strongly to the nature of a teacher's position. The Court concluded that the offence involved "multiple breaches of trust by a high school teacher, which heightens the public interest in its prosecution."

However, the Court of Appeal split its decision on the remaining issue. The majority decided that the trial judge had erred in concluding that the recordings were made "in circumstances that give rise to a reasonable expectation of privacy". This is an element of the voyeurism offence in section 162(1)(c), and the teacher was therefore acquitted.

The majority of the Court concluded that the teacher breached his relationship of trust with his students.

The majority of the Court concluded that in certain areas of the school, students do not have an expectation that they will not be observed or watched:

> [104] It is clear that students expect a school to be a protected, safe environment. It should be a place where their physical safety, as well as their personal and sexual integrity is protected. However, the areas of the school where students congregate and where classes are conducted are not areas where people have any expectation that they will not be observed or watched. While access to school property is often restricted, access is granted to students, teachers, other staff, and designated visitors. Those

> who are granted access are not prohibited from looking at anyone in the public areas. Here there were security cameras in many locations inside and outside the school. No one believed they were not being observed and recorded.

The majority of the Court made a distinction between expecting that a teacher will not make a recording for a sexual purpose and the expectation of privacy. The Court decided that the expectation not to be recorded arises from the teacher-student relationship, and not from a privacy expectation.

> [105] Clearly, students expect that a teacher will not secretly observe or record them for a sexual purpose at school. However, that expectation arises from the nature of the required relationship between students and teachers, not from an expectation of privacy. The expectation would also prevail, I would suggest, if a student met a teacher at a mall.

R. v. Jarvis raises important and evolving issues regarding police investigation of electronic recordings.

Ultimately, the majority of the Court of Appeal concluded that the teacher breached his relationship of trust with his students by making surreptitious recordings for a sexual purpose. However, they concluded that the offence of voyeurism required the Crown to prove that the students were in circumstances that gave rise to a reasonable expectation of privacy, and that the trial judge had erred in making that finding.

Justice Huscroft's dissenting reasons state that he saw the issue as a straightforward question: should high school students expect that their personal and sexual integrity will be protected while they are at school? He disagreed with the majority's conclusion that because students are seen at school, they have no reasonable expectation of privacy.

Justice Huscroft came to a conclusion that favours student protection, stating as follows:

> [133] In my view, the students' interest in privacy is entitled to priority over the interests of anyone who would seek to compromise their personal and sexual integrity while they are at school. They have a reasonable expectation of privacy at least to this extent, and that is sufficient to resolve this case.

Justice Huscroft summed up the paradoxical result of the majority's decision:

> The result is the opposite of what one would expect: surreptitious visual recording of high school students for a sexual purpose, while they are at high school, is not illegal.

COMMENT

The decision in *R. v. Jarvis* raises important and evolving issues regarding police investigation of electronic recordings and the burden of proving such offences in the criminal context. The issue will continue to evolve as society is presented with new technology for recording and storing images.

In the employment context, there remains no doubt that the school board could take steps to address the conduct of the teacher in *R. v. Jarvis,* including dismissal for cause and reporting the matter to the Ontario College of Teachers.

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CASE LAW FORESHADOWS ENHANCED PROTECTION AGAINST SEARCH AND SEIZURE OF DEVICES

The roles filled by educators are constantly expanding. Teachers and principals have duties to discipline activities that adversely affect the school climate[1] and they are expected to exercise the care and attention of a reasonably prudent parent in keeping students safe.[2] School officials are increasingly called upon to monitor student conduct to prevent bullying, harassment, and violence. More and more often, the prevention of cyberbullying compels school investigations into students' digital presences.

Meanwhile, students carry an ever-increasing depth of personal data around in their pockets. Constant developments in technology understandably prompt an increased interest for students in the protection of their digital privacy.

The expansive mandate of educators to investigate threats to student safety portends a looming clash between the protection of personal lives of students and the need to ensure a safe and inclusive learning environment. The question emerging for principals, teachers, and students alike is: what are the appropriate parameters of an educator's search of a student device?

SECTION 8 RIGHTS

Section 8 of the *Canadian Charter of Rights and Freedoms* provides for the right to be secure against unreasonable search or seizure.[3] The basis of this constitutional search and seizure law is the concept of a reasonable expectation of privacy. This concept is used in two ways. First, it is used to determine whether the state conduct has interfered with an individual's reasonable expectation of privacy. Second, the concept of the reasonable expectation of privacy is relied on to determine whether a particular search or seizure is reasonable.[4]

Using the reasonable expectation of privacy to assess the reasonableness of a search allows for consideration of the interests at stake in a way that is highly context specific. In schools, the relevant context certainly includes the educator's mandate to ensure the safety of students and to prevent bullying and intimidation, including cyberbullying. The strength of the reasonable expectation model is that it requires explicit consideration of all of the relevant factors. It should be sufficiently flexible to take account of technological change.

Students have a diminished right to privacy while at school.

[1] *Education Act,* RSO 1990, c E2, s 306(1).

[2] *Myers v Peel County Board of Education,* [1981] 2 SCR 21, 1981 CarswellOnt 579 at para 14.

[3] *Canadian Charter of Rights and Freedoms,* s 7, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[4] The Honourable Thomas A. Cromwell, "Search and Seizure, Schools and the Digital Age," (paper delivered at the Canadian Association for the Practical Study of Law in Education Conference: A Bridge Over Troubled Waters, Halifax, Nova Scotia, April 29, 2018).

Recent developments in the law relating to police searches have developed special rules regarding searches of digital devices.

THE GENERAL "SCHOOL SEARCH" FRAMEWORK

The *Education Act* makes it clear that educators' powers of search and seizure stem directly from their responsibilities to keep students safe and to effectively enforce discipline.[5] Teachers have a duty to maintain discipline and order in the classroom and schoolyard,[6] while principals have a general duty to maintain "proper order and discipline" in schools.[7]

Students have a diminished right to privacy while at school.[8] Because of the need for educators to protect student health-and-safety and to maintain discipline, the law has historically been more permissive of searches by educators than it has been of searches by police. In searches of student property by school officials, there is no requirement for a search warrant; instead, the educator must have reasonable grounds to believe that a school rule or a law has been violated and that the search will provide evidence of the violation.[9]

How does this general school search framework apply to searches of digital devices? The answer will remain unclear until case law emerges to specifically address this issue. However, there is reason to believe that the general principles that have been applied to lockers, knapsacks, and even searches of the person may not be applied without modification to the search of digital devices. Recent developments in the law relating to police searches in criminal investigations have developed special rules in relation to the search of digital devices. These special rules may analogously impact the permissible parameters of educators' searches of student devices.

CASE LAW ON SEARCH OR SEIZURE OF DIGITAL DEVICES

Recent case law from the Supreme Court of Canada has demonstrated that courts will not take privacy interests in digital devices lightly. The Supreme Court has prescribed enhanced protections to digital devices as opposed to other items to be searched.

R v Vu

One example is *R v Vu.*[10] This case concerned the search of a computer found in a house that the police were searching with a search warrant. The issue before the Supreme Court of Canada was whether the search warrant that authorized the search of a location was sufficient to authorize a search of a computer found in that location. The general principles of search law would suggest that the answer should be yes: generally, a warrant to search a location authorizes the search of anything in that location in which the sort of evidence being sought could reasonably be expected to be found. However, in Vu, the Supreme Court unanimously held that this general principle does not apply to computers unless the warrant explicitly so specifies.

In *Vu,* the general rules of search law were modified because of the special privacy issues that present themselves in searches of digital devices. The Court reasoned that "it is difficult to

[5] *Supra* note 1, ss 264-265.

[6] *Ibid,* s 264(1)(e).

[7] *Ibid,* s 654(1)(b).

[8] *R. v. M(MR),* [1998] 3 SCR 393.

[9] It is important to note that this standard only applies to school officials provided that they are not acting as agents for the police. Different and higher standards apply in cases where educators act as police agents, as they do in the case of police searches.

[10] *R v Vu,* 2013 SCC 60.

imagine a more intrusive invasion of privacy than the search of a personal or home computer."[11]

Further, the Court was clear that a computer is not analogous to a filing cabinet or a briefcase and that the nature of the privacy interests at stake in relation to a computer search are a separate animal, saying:

> "Computers potentially give police access to vast amounts of information that users cannot control, that they may not even be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search. These factors, understood in light of the purposes of s. 8 of the *Charter,* call for specific pre-authorization."[12]

R v Fearon

A second example was *R v Fearon.*[13] This case raised the question of whether the police could search a cell phone found on a suspect during a search incident to arrest. Under the general search law, the police can, without a warrant, conduct a search of a person whom they lawfully arrest. This same power also enables warrantless searches of the general area around, as well as the belongings of, a person who has been placed under arrest. The majority of the Supreme Court decided that the power of search incident to arrest included the power to search a cell phone found on the person at the time of arrest. However, the majority imposed a number of special conditions on the exercise of that power, saying:

> "the search of a cell phone has the potential to be a much more significant invasion of privacy than the typical search incident to arrest. As a result, my view is that the general common law framework for searches incident to arrest needs to be modified in the case of cell phone searches incident to arrest. In particular, the law needs to provide the suspect with further protection against the risk of wholesale invasion of privacy which may occur if the search of a cell phone is constrained only by the requirements that the arrest be lawful and that the search be truly incidental to arrest and reasonably conducted."[14]

The majority reasoned that an incidental search of a computer or "smartphone" could be justified where the search is narrowly tailored to the purpose that justified the search, and officers take detailed notes of what they have examined and how the device was searched.[15] According to the majority, officers must also show that there was a legitimate law-enforcement reason to engage in the search in the first place. This may include: (a) protecting the police, the accused, or the public, (b) preserving evidence or (c) searching for evidence where an investigation may be frustrated if evidence is not gathered in a timely manner.[16] In imposing special conditions on digital searches incident to arrest, the Court further recognized the special privacy interests that arise in relation to the search of digital devices.

Vu and *Fearon* arose in the criminal context. However, they raise the question of whether, when educators search a digital device, the relaxed constitutional standards that have been applied to school searches will need some modification to provide enhanced safeguards of student rights.

The law may develop to provide enhanced protection against searches of student devices.

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[11] *Ibid* at para 40.

[12] *Ibid* at para 24.

[13] *R v Fearon,* 2014 SCC 77.

[14] *Ibid* at para 58.

[15] *Ibid* at para 82.

[16] *Ibid* at para 83.

All searches of student devices by educators should be narrowly tailored to the purpose of the search itself.

GUIDELINES FOR EDUCATORS

1. While the law remains undecided, educators should not assume that they are entitled to search students' digital devices in the same manner in which they may search students' lockers or knapsacks. The law may yet develop to provide enhanced protection against searches of student devices, necessitating either heightened search objectives (e.g. health-and-safety) or enhanced evidence if the related student conduct is relatively minor.

2. Searches of student devices will likely be justified in the context of investigations into threats to student health-and-safety. Failure to prevent serious harm to students may open educators to liability from negligence actions if school officials fail to perform their role to the standard of a "reasonably prudent parent." Educators must be able to take proactive measures to guard against ongoing threats of violence and bullying.

3. When searching a student device, educators should keep a record of what was searched, the reason for the search, and the extent to which the device was searched.

4. All searches of student devices by educators should be narrowly tailored to the purpose of the search itself. Fishing expeditions will not be tolerated under section 8 of the Charter, and the depths of digital searches must be proportionate to the severity of the threat.

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