

Health and Safety: The Intersection of Perspectives on What Makes a School Safe
The Rocky Road Ahead: Balancing Competing Interests
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Introduction

The issue of school safety has garnered considerable media and legislative attention in recent years. Reports of violence, weapons, harassment, and bullying in schools have prompted the Ontario Government to enact two amendments to the *Education Act*. Bill 212 was passed on June 4, 2007 and introduced various changes to the process and theory behind the suspension and expulsion of students. Bill 157 came into effect on February 1, 2010 and imposed procedures for reporting incidents of student anti-social behaviour and expanded the grounds which can lead to student suspension or expulsion. These legislative initiatives were discussed in more detail in previous CAPSLE papers³.

The underlying premise for both these initiatives was a growing public concern for student safety and recognition that safe schools are a precondition to student learning and development. Incidents of fatal stabbing and shooting of young adolescents in or near Toronto area schools have been widely reported. Lately, parents have been resorting to lawsuits in small claims courts against school boards when their children have been bullied

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³ See CAPSLE publications: Victoria Reaume & Janina Fogels, "From 'Zero Tolerance' to Progressive Discipline: Ontario's Bill 212," (Paper presented to CAPSLE, 2008), and Sarah A Colman & Allyson L. Otten "Taking Harassment to a New Level: How the Law May Alter the Landscape of the District School Board Employment Context" (Presented to CAPSLE 2006)

by other students and school boards have failed to act.⁴ At the same time, parents of students who present with behavioural issues which can lead to physical injury are enforcing their right to access publicly funded education through human rights challenges.

The Ontario government's "Safe Schools" initiatives have concentrated on student safety, not on the safety of teachers or other educational workers in the system. The network of legislative provisions designed to increase student safety is now joined by a corresponding emphasis on worker safety. On April 20, 2009, the Ontario Government introduced Bill 168, *An Act to amend the Occupational Health and Safety Act (Violence and Harassment in the Workplace)*⁵ The final version of the Bill received Royal Assent on December 15, 2009 and the new obligations under it will be in effect on **June 15, 2010**. This initiative will bring sweeping changes to workplaces across Ontario, as new and expansive measures are now required to protect workers from violence and harassment in the workplace.

In essence, the Bill 168 amendments address the issue of workers' exposure to "hazardous people" in the workplace. In the education setting, these hazards present themselves in three main ways: through co-workers and other adults interacting with the school setting; through the deliberate acts of students; and through the sometimes violent conduct of students which may be beyond their control.

The Bill 168 amendments to the *Occupational Health and Safety Act* ("OHS") will affect the operation of Ontario schools, since the OHS applies to educational personnel, including teachers.⁶

⁴ Law Times March 29, 2010 Article by Michael McKiernan (Waterloo Catholic District School Board)

⁵ S.O. 2009 C.23

⁶ See s. 3(3)(a) of OHS which states: (3) Except as is prescribed and subject to the conditions and limitations prescribed, this Act or a Part thereof does not apply to,
(a) a person who is employed as a teacher as defined in the Education Act; or
(b) a person who is employed as a member or teaching assistant of the academic staff of a university or a related institution, but see also OHS Regulation 857 which states that the Act does apply to teachers with certain limitations relating to the right to refuse unsafe work where the circumstances are such that the life, health or safety of a pupil is in imminent jeopardy. R.R.O. 1990, Reg. 857, s. 3.

Narrow OHSa protection prior to Bill 168

Bill 168 introduces a number of provisions designed to address deficiencies in the existing *OHSa* regime in protecting workers from violent or harassing people. The existing *OHSa* explicitly protects workers from hazardous equipment, machines, or devices with a focus on the physical conditions of the workplace. Over the years, several noteworthy legal challenges sought to extend the *OHSa* protection to cover "hazardous people" who were violent or harassing. They were largely unsuccessful. One of the earliest cases, *Meridian Magnesium Products Ltd.*,⁷ confronted the issue of whether sexual harassment in the workplace was covered by the *OHSa*. The Ontario Labour Relations Board (OLRB) pointed out that the *OHSa* did not explicitly focus on "dangerous people," as "hazards." Instead, the *OHSa* prohibits workers from operating machinery or devices or working in a manner that might endanger the worker or other workers, or from engaging in pranks, or "rough and boisterous conduct".⁸ Subsequent cases⁹ arose in the context of reprisal allegations and work refusals. In these instances, the OLRB has either deferred to other specific statutes such as the Ontario *Human Rights Code*, or has been careful to conclude that the *OHSa* provisions fell somewhat short of providing full protection from the risks posed by hazardous people in the workplace.

Despite these narrow rulings, educational personnel including teachers have increasingly resorted to work refusals where they perceive there to be real risks of physical harm, largely in the context of special needs students whose conduct involves physical violence. Under the *OHSa* regime Ministry of Labour investigators have taken a broad and purposive approach to protecting workers faced with such physical harm under s. 43 of the Act. Their Orders have required school boards to develop safety plans; provide training, or to take other steps to protect educational personnel's physical safety.

⁷ [1996] OLRB Rep. November/December 964 [*"Meridian"*]

⁸ S. 28 of the *OHSa*, R.S.O. 1990 CHAPTER O.1

⁹ *Lyndhurst Hospital*, [1997] OLRB Rep. July/August 616; *Barnmaid's Arms* [1995] OLRB Rep. March 229; and *Ministry of Correctional Services* 2002 CanLII 29722 (OL.R.B.)

Under the current regime, teachers can exercise the right of work refusal and remove themselves from the workplace, except where the circumstances are such that the life, health or safety of a pupil is in imminent jeopardy.¹⁰ Similarly, other workers cannot exercise work refusals when the worker's refusal to work would directly endanger the life, health or safety of another person when they work in special institutions listed in the *OHSA*.¹¹ Other authors have noted the contradictions in the hierarchy of legal rights relating to work refusals, and have called for legislative change which would narrow the rights of educational personnel to refuse unsafe work¹² due to the inherent danger of the work. However, teachers, educational personnel and other workers have long called for greater *OHSA* protection, especially with respect to harassment and all forms of violence in the workplace.

The Ontario government's response follows other provincial regimes which aim to increase, not decrease, safety protection from violent or harassing people. Quebec passed legislation in 2004 to amend its *Act Respecting Labour Standards*¹³ and Saskatchewan followed suit in 2007 and amended its *Occupational Health and Safety Act*¹⁴ to protect against harassment. In Bill 168, Ontario seeks to extend the ambit of its legislative amendments beyond harassment to protect workers from domestic violence following them into the workplace. It is noteworthy that the Ontario law appears to follow in Quebec and Saskatchewan's footsteps to ensure protection from harassment including psychological harassment. But, Ontario's law places a clear focus on physical violence, the threat of physical violence and the need for comprehensive employer responses to all types of physical violence in the workplace.

¹⁰ See footnote 6 *supra*.

¹¹ S. 43 *OHSA*, *supra* note 8

¹² "Competing Rights: Bill 168 and the Human Rights Code," Bowers, G. LSUC Continuing Legal Education, March 12, 2010, at page 4-5;

¹³ R.S.Q. c. N-1.1

¹⁴ S.S. 1993, c. O-1.1

Bill 168 Provisions

Definitions of Workplace Violence and Harassment

The *OHSA* incorporates an expansive interpretation of what constitutes a workplace. S.1 of the Act defines a “workplace” as any land, premises, location or thing at, upon, in or near which a worker works. Essentially, if a worker is being paid to be at or near a location, it is a workplace.¹⁵

Bill 168 amends s.1 of the *OHSA* by including definitions of “workplace violence” and “workplace harassment.” The Bill defines these terms in the following manner:

“workplace harassment” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome;

“workplace violence” means,

(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

(c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.¹⁶

Clearly, the definition of “workplace harassment” is very broad. The term is much more encompassing than “harassment” as defined in the *Human Rights Code*, since it is not

¹⁵ Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (March, 2010), online: http://www.labour.gov.on.ca/english/hs/pdf/wpvh_gl.pdf

¹⁶ Bill 168, *An Act to amend the Occupational Health and Safety Act*, *supra* note 5

grounds-based. This means that “workplace harassment” under Bill 168 can include conduct that is not related to a prohibited ground of discrimination such as age, ethnicity, religion, sex, etc. This definition will likely capture bullying and cyberbullying, which are of particular concern to teachers, and other types of psychological harassment. According to a recent College of Teachers members’ survey, 84 per cent of teachers report having been the subject of cyberbullying.¹⁷ To this extent, Bill 168 meshes with the Bill 157 amendments which impose sanctions on students for engaging in bullying, including cyberbullying. Read together, Bill 168 and Bill 157 provide dual mechanisms for enforcing protections and prohibitions against this type of destructive behaviour, whether originating with students or other people in the workplace.

However, the definition of workplace harassment is not included in the definition of workplace violence. Workplace violence does not require that a person have the capacity, or appreciate, that their actions could cause physical harm, but it does require the exercise of physical force, physical injury, or threats of physical harm¹⁸. This creates different employer obligations under the Act when harassment, including psychological harassment, is the safety concern, as opposed to risk or threat of physical injury.

Clearly though, workplace harassment is now a “hazard” under the *OHSA* and protection from this hazard must be provided. Employers will be liable for their failure to meet the statutory requirements of Bill 168, with respect to their new obligations to formulate policies and review them at least annually. The policies and program must include procedures for reporting incidents of harassment; and investigating and dealing with the issue. However, the work refusal provisions of the Act are stated to apply to “workplace violence”¹⁹ and the risk assessments required under Bill 168 are stated to apply only to workplace violence.²⁰

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Lois Browne, “State of the Teaching Profession 2007,” *Professionally Speaking* (September 2007) online: http://www.oct.ca/publications/professionally_speaking/September_2007/survey.asp

18 *Supra*, note 14.

19 S. 43 OHSA

20 S. 32.0.3

Workplace Violence and Harassment Policies and Implementation

Bill 168 requires employers to create and post written policies to address workplace violence and harassment. The policies should be reviewed as often as necessary, but at least annually.²¹ In addition, school board employers must develop and maintain a program to implement the policies. Both the workplace violence and workplace harassment implementation programs must contain procedures for workers to report incidents of workplace violence and harassment. Both must also set out how the employer will investigate and deal with incidents and complaints of workplace violence and harassment. In addition, the workplace violence implementation program must also provide measures to control risks identified in risk assessments (described below), and outline procedures for summoning immediate assistance when workplace violence occurs or is likely to occur.²² Examples of very basic workplace violence and harassment policies have been provided in a recent Ontario Ministry of Labour publication.²³

Risk Assessments

Bill 168 also mandates that employers assess the risks of workplace violence that may arise from the nature of the workplace, the type of work, or the conditions of work. Such assessments must take into account circumstances that would be common to similar workplaces as well as circumstances unique to the specific workplace. Employers are to report the finding of such assessments to the joint health and safety committee, and they are required to reassess as often as is necessary to ensure the workplace violence policy continues to protect workers.²⁴ Curiously, the requirement for risk assessments applies only to workplace violence and not to workplace harassment.

The requirement that risk assessments consider circumstances in similar workplaces should cause school boards to look to a wide variety of examples in the community, even

²¹ Bill 168, cl.32.0.1

²² Bill 168, cl. 32.0.2, 32.0.6

²³ *Supra*, note 15.

²⁴ Bill 168, cl. 32.0.3

if they have not experienced the type of violence reported in urban schools. One instructive source of such information is the “Falconer Report.”²⁵ prepared by a three-member panel mandated to review incidents of violence that occurred at two specific Greater Toronto Area schools. The report uncovered alarming statistics relating to the prevalence of guns, knives, sexual assaults, and weapons at the two schools.²⁶ In some troubled Toronto schools, this has led to the introduction of surveillance cameras; the assignment of police officers to certain schools and further measures such as electronic access control systems passes. Obviously not all schools require all of these elements but careful consideration should be given to safe access procedures and decisive action taken where community members display troubling behaviour towards school personnel.

Workplace joint health and safety committees are entitled to copies of the risk assessment and it may be wise to include them in performing the risk assessments.

Domestic Violence

The issue of domestic violence has been addressed by Bill 168. The catalyst for this legislative change was the murder of nurse Lori Dupont in her workplace, a hospital in Windsor, Ontario. The perpetrator of this crime was a doctor with privileges at that institution. The incident followed the termination of their relationship and a prolonged period of harassment both on site and off site.

The amendments require that employers take every precaution reasonable in the circumstances to protect workers from incidents of domestic violence that would likely result in physical injury in the workplace. The Bill does not define the term “domestic violence” and, again, emphasis is placed on only physical injury.²⁷ School boards should draft policies, websites, and publicity designed to encourage workers who have experienced domestic violence to report their circumstances to a designated person, so that safety plans can be developed. Such plans should likely involve reporting to the

²⁵ School Community Safety Advisory Panel, *The Road to Health: A Final Report on School Safety* (January 4, 2008), online: <http://www.schoolsafetypanel.com/finalReport.html> [“Falconer Report”].

²⁶ *Falconer Report* (Executive Summary), at 2.

²⁷ Bill 168, cl. 32.0.4.

police any stalking or otherwise problematic behaviour. It is unlikely that a “hands off” approach will be considered reasonable if the employer is made aware of domestic violence which risks spilling over into the workplace.

Disclosure of Information about Persons with Violent History

Another key aspect of Bill 168 is the obligation on employers to provide information, including personal information, to a worker about a person with a history of violent behaviour. This disclosure requirement will be triggered if the worker could be expected to encounter the person in the course of his/her work, and the risk of workplace violence is likely to expose the worker to physical injury. There is a limit on the duty to provide personal information in that the employer is not permitted to disclose more than is reasonably necessary to protect the worker from physical injury.²⁸

This requirement applies to workplace violence, and is limited to instances where there is a risk of physical injury. Nevertheless, it remains a welcomed addition for teachers and educational workers, who have advocated for such a measure for many years.²⁹ In the course of their work, teachers often encounter students with a history of violent or aggressive behaviour, some of whom have been identified as having special needs or behavioural issues. It is now clear that educational personnel have a right to know about the risks of violence posed by certain students³⁰ or others, as does the joint health and safety committee.

In tandem with Bill 168, Bill 157 and policy and program memoranda issued by the Ontario Ministry of Education, have created new forms for documenting incidents of a student’s violent behaviour on the students’ Ontario Student Record (“OSR”). This is accomplished

²⁸ Bill 168, cl. 32.0.5 (3), (4)

²⁹ Elementary Teachers’ Federation of Ontario, “Submission of the Elementary Teachers’ Federation of Ontario: Bill 168, Occupational Health and Safety Amendment Act, 2009 (November 2009), online: <http://www.etfo.ca/Publications/BriefstoGovernmentAgencies/Documents/Bill168.pdf> [“*ETFO Bill 168 Submission*”]

³⁰ Bill 168, Ss. 32.05 (2) - (4)

through the use of Safe School Incident Reports.³¹ This form may be insufficient to notify of this risk however as the principal retains a residual discretion not to place the form on the file if “no action is required.” Also, educational personnel other than teachers may not have access to the OSR to obtain this information.³²

School boards have expressed concern that it would be improper to disclose information in the OSR to all workers who may encounter a student with a history of violence, or to use the information in the OSR to label the student as violent.³³ The language in Bill 168 does not define what constitutes a “history of violence” and whether documents created under the *Education Act*, such as OSRs, must be disclosed under the *OHSA*. Further clarification and guidance on these issues is needed, and unless addressed through regulations or policy and program memoranda, will likely be determined through legal action.

The Right to Refuse Unsafe Work

Section 43 of the *OHSA* grants workers the right to refuse unsafe work. Bill 168 amends this provision by adding that workers may refuse to work, or do particular work, “where workplace violence is likely to endanger himself or herself.”³⁴ However, as noted above, teachers may only exercise this work refusal if their students are not in jeopardy.

It is worth noting that like many other portions of Bill 168, the right to refuse work is limited to circumstances of workplace violence and not workplace harassment. The fact that workers are not permitted to refuse work in the face of workplace harassment means that Ministry of Labour inspectors will likely not become involved in investigating and determining whether workplace harassment has occurred. Instead, inspectors’ jurisdiction

³¹ Ministry of Education Policy and Program Memorandum PPM 144 and appendices www.gov.on.ca

³² *Supra* footnote 25

³³ Ontario Public School Boards’ Association, Ontario Catholic School Trustee’s Association, Association des conseils scolaires des écoles publiques de l’Ontario, et. al. “Joint Submission to the Standing Committee on Social Policy” (November 24, 2009), online: <http://www.ocsta.on.ca/resourcesf>

³⁴ Bill 168, cl. 4(2)

appears limited to issuing orders regarding the requisite preparation and posting of policies concerning workplace harassment. The task of determining whether specific incidents of workplace harassment took place will be reserved for the workplace parties themselves.³⁵

What Makes a Safe School?

The introduction of Bill 168 continues a trend of treating violence and bullying as safety issues and “hazards” in the workplace. Ontario employers are now charged with protecting employees from workplace violence and harassment in a manner similar to their obligation to protect against dangerous chemicals and environmental hazards. Such a link between violence/harassment and safety is also apparent in the safe schools amendments to the *Education Act*. The heightened awareness on all types of violence in our schools, including cyberbullying, and harassment are now reflected from the student perspective and from the teacher and educational personnel worker perspective. If students are aware of the consequences of such anti-social behaviour and there are sanctions for it, the risk of violence may be reduced for everyone. Even if the physical violence is unintentional or beyond a student’s control, concrete steps must be taken to notify those likely to be exposed to it and reasonable measures adopted to protect personnel from physical injury.

Conclusion

There is an obvious tension in these legislative initiatives between privacy issues, the human rights and special needs of students; and the protection of workers from violent behaviour which might, in some instances, be beyond a student’s control. The interests of employers, students, the general community, and educational personnel must be carefully balanced to achieve an equitable and reasonable result. It is not yet clear how the proper balance will be struck. At this time, there are only a few short months before Bill 168 becomes law and the requisite policies and procedures and training must be in place. To date, there are few examples available to assist school boards in implementing this dramatic change.

³⁵ Mary Beth Currie, “Workplace Harassment Investigations under the Occupational Health and Safety Act,” (Law Society of Upper Canada, Continuing legal education, March 12, 2010) [unpublished].