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**CAUGHT BETWEEN SYSTEMS:
OVERCOMING LEGAL BARRIERS TO USING RESTORATIVE PRACTICES
IN SCHOOLS WHEN YOUTH FACE RELATED CRIMINAL CHARGES**

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(i) Introductory Comments

(ii) Understanding the Legal Framework

- Importance of a working knowledge of the law
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 - *Youth Criminal Justice Act* – federal legislation
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- *Walsh v. Buchanan*, [1995] O.J. No. 64 (Ontario Court of Justice – General Division, Hamilton, Ontario)
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 - Minutes of Settlement (confidentiality clauses)
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- Concerns about use of restorative practices in inappropriate situations
 - very serious offences, power imbalances, manipulation / strategic use, capacity issues (students with special needs)

(iv) Q & A / Discussion

APPENDIX A

Excerpts from *Education Act, R.S.O. 1990, c. E.2*

306.(1) A principal shall consider whether to suspend a pupil if he or she believes that the pupil has engaged in any of the following activities while at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school climate:

1. Uttering a threat to inflict serious bodily harm on another person.
2. Possessing alcohol or illegal drugs.
3. Being under the influence of alcohol.
4. Swearing at a teacher or at another person in a position of authority.
5. Committing an act of vandalism that causes extensive damage to school property at the pupil's school or to property located on the premises of the pupil's school.
6. Bullying.
7. Any other activity that is an activity for which a principal may suspend a pupil under a policy of the board.

...

310.(1) A principal shall suspend a pupil if he or she believes that the pupil engaged in any of the following activities while at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school climate:

1. Possessing a weapon, including possessing a firearm.
2. Using a weapon to cause or to threaten bodily harm to another person.
3. Committing physical assault on another person that causes bodily harm requiring treatment by a medical practitioner.
4. Committing sexual assault.
5. Trafficking in weapons or in illegal drugs.
6. Committing robbery.
7. Giving alcohol to a minor.
8. Any other activity that, under a policy of the board, is an activity for which a principal must suspend a pupil and, therefore in accordance with this Part, conduct an investigation to determine whether to recommend to the board that the pupil be expelled.

APPENDIX B

Excerpt from *Behaviour, Discipline and Safety of Pupils*, O. Reg. 472/07, pursuant to the *Education Act*.

2. For the purposes of subsections 306(2), 306(4), 310(3), 311.1(4) and clauses 311.3(7)(b) and 311.4(2)(b) of the Act, the following mitigating factors shall be taken into account:

1. The pupil does not have the ability to control his or her behaviour.
2. The pupil does not have the ability to understand the foreseeable consequences of his or her behaviour.
3. The pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person.

3. For the purposes of subsections 306(2), 306(4), 310(3), 311.1(4) and clauses 311.3(7)(b) and 311.4(2)(b) of the Act, the following other factors shall be taken into account if they would mitigate the seriousness of the activity for which the pupil may be or is being suspended or expelled:

1. The pupil's history.
2. Whether a progressive discipline approach has been used with the pupil.
3. Whether the activity for which the pupil may be or is being suspended or expelled was related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment.
4. How the suspension or expulsion would affect the pupil's ongoing education.
5. The age of the pupil.
6. In the case of a pupil for whom an individual education plan has been developed,
 - i. whether the behaviour was a manifestation of a disability identified in the pupil's individual education plan,
 - ii. whether appropriate individualized accommodation has been provided, and
 - iii. whether the suspension or expulsion is likely to result in an aggravation or worsening of the pupil's behaviour or conduct.

APPENDIX C

Excerpts from PPM 145

“Promoting and Supporting Positive Student Behaviour

...

A comprehensive approach, aimed at all members of the school community, fosters efforts to ensure that schools are safe and welcoming environments for everyone and are effective in leading to systemic changes that will benefit all students and the broader community. This approach is valuable in addressing such issues as racism, intolerance based on religion or disability, homophobia, and gender-based violence.

A positive “school climate is a crucial component of prevention; it may be defined as the sum total of all of the personal relationships within a school. When these relationships are founded in mutual acceptance and inclusion, and modelled by all, a culture of respect becomes the norm.”

A positive climate exists when all members of the school community feel safe, comfortable, and accepted” (pages 2-3).

...

“Policy Components

The following components must be incorporated as part of each school board’s progressive discipline policy.

...

- The goal of the policy is to support a safe learning and teaching environment in which every student can reach his or her potential.
- ...
- Progressive discipline is an approach that makes use of a continuum of prevention programs, interventions, supports, and consequences, building upon strategies that promote positive behaviours.
- The range of interventions, supports, and consequences used by the board and all schools must be clear and developmentally appropriate, and must include learning opportunities for students in order to reinforce positive behaviours and help students make good choices” (pages 5-6, emphasis added).

APPENDIX D

Excerpt from *Myers (Next friend of) v. Peel County Board of Education et al.*, [1981] S.C.J. No. 61:

“The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful or prudent parent, described in Williams v. Eady [(1893), 10 T.L.R. It has, no doubt, become somewhat qualified in modern times because of the greater variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment than formerly: see McKay et al. v. The Board of the Govan School Unit No. 29 of Saskatchewan et al. [[1968] S.C.R. 589], but with the qualification expressed in the McKay case as noted by Carrothers J.A. in Thornton, supra, it remains the appropriate standard for such cases. It is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and the degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent parent-standard to the conduct of the school authority in the circumstances” (emphasis added).

APPENDIX E

Excerpt from *Walsh v. Buchanan*, [1995] O.J. No. 64, at paras. 114-116:

“In considering the liability of Vice-Principal Cooke in respect of the incidents in the gym, I specifically find that Cooke knew that both players had been penalized, probably for rough play and then were ejected for pushing and shoving. Both Cooke and Watson knew that they were good students with good records. There was very little time left until the first class. The “brush-up” incident deserved a reprimand which was given, but no more was required. At that point, it was not reasonably foreseeable that a major fight would break out.

I specifically find that Cooke’s conclusion that there would be no further violence was in fact correct, at that point in time. In support of that I have considered and accepted the following:

Buchanan went to the cafeteria, studied up for his History test at 8:55, went to pay a teacher for a shirt, got a pop, disposed of his hockey stick, and went off to his History classroom;

Walsh watched the rest of the game, changed, and went to his locker to get his books to go to the same History test;

There were only a few minutes left before that test was due to commence;

That test had some importance to Buchanan. He was applying for football scholarships in Canada and the U.S., and every available mark was important;

Both boys knew that fighting was against the school’s rules and that a suspension would result if there was a fight in school;

Any suspension would obviously impair Buchanan’s chances for a football scholarship and Walsh’s chances to pass his year;

Both boys knew there were teachers in the classrooms just off the hallway, and so any fight would unquestionably be detected and punished;

It is for that reason that students who want to fight will normally “take it outside”;

Buchanan had no idea where Walsh’s locker was. He was on his way to History;

It was pure unfortunate coincidence that Walsh's locker was right outside the History classroom;

It was therefore pure chance that the two boys came together that morning in the hallway;

If they had not, then in a school of 1100 students, it could have been a considerable time until the two of them met again;

Buchanan was carrying his books and gym bag as he approached Walsh;

The eyewitness accounts of the hallway incident do not suggest a premeditated assault. Instead, it started in conversation, which escalated to threats and counterthreats, shove and countershove, punch and counterpunch, and a brawl;

Walsh, an adult at the time of the incident, testified that he never intended to fight;

Buchanan, likewise an adult, testified that he never intended to fight;

Cooke concluded, based on his first-hand observations, that the incident was over. This itself is evidence that it was over. Cooke had all the advantages of being present that no one else can ever have. Likewise, he knew the boys, their character and their reputations for responsibility. He had years of experience. In my view, his assessment of the situation and conclusion should not be lightly dismissed and I have not.

I find as a fact that the hallway fight was not a premeditated assault, and rather the result of mutual misperceptions of the situation, and that therefore Cooke was correct in his assessment the situation downstairs as it then existed. **But for fresh and unforeseeable coincidences, there was not going to be any fight"** (emphasis added).

APPENDIX F

Excerpts from the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as it will read on June 15, 2010, when the Bill 168 amendments come into effect:

1.(1) In this Act, . . .

“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.

. . .

Part V – Right to Refuse or to Stop Work where Health or Safety in Danger

43.(1) This section does not apply to a worker described in subsection (2),

(a) when a circumstance described in clause (3) (a), (b), (b.1) or (c) is inherent in the worker’s work or is a normal condition of the worker’s employment; or

(b) when the worker’s refusal to work would directly endanger the life, health or safety of another person.

(2) . . .

(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

(a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;

(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; or

(b.1) workplace violence is likely to endanger himself or herself; or

(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to

work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

Note:

Pursuant to section 2(3)(a) of the current *Occupational Health and Safety Act*, except as prescribed, the *Act* does not apply to a teacher as defined in the *Education Act*. However, section 1 of *Teachers*, R.R.O. 1990, Regulation 857, makes the *Act* apply to teachers in manner that is consistent with the *Education Act*. However, section 3.3 of Regulation 857 excludes teachers from the right of refusal provisions under Part V and section 43 of the *Act* “. . . where the circumstances are such that the life, health or safety of a pupil is in imminent jeopardy.” These provisions working together would allow a teacher to refuse work where the teacher has reason to believe that workplace violence is likely to endanger him or herself, provided that the teacher’s students are in a position of safety.

APPENDIX G

Apology Act, 2009, S.O. 2009, c.3

No Amendments.

Definition

1. In this Act,

“apology” means an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate. 2009, c. 3, s. 1.

Effect of apology on liability

2. (1) An apology made by or on behalf of a person in connection with any matter,

- (a) does not, in law, constitute an express or implied admission of fault or liability by the person in connection with that matter;
- (b) does not, despite any wording to the contrary in any contract of insurance or indemnity and despite any other Act or law, void, impair or otherwise affect any insurance or indemnity coverage for any person in connection with that matter; and
- (c) shall not be taken into account in any determination of fault or liability in connection with that matter. 2009, c. 3, s. 2 (1).

Exception

(2) Clauses (1) (a) and (c) do not apply for the purposes of proceedings under the *Provincial Offences Act*. 2009, c. 3, s. 2 (2).

Evidence of apology not admissible

(3) Despite any other Act or law, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any civil proceeding, administrative proceeding or arbitration as evidence of the fault or liability of any person in connection with that matter. 2009, c. 3, s. 2 (3).

Exception

(4) However, if a person makes an apology while testifying at a civil proceeding, including while testifying at an out of court examination in the context of the civil proceeding, at an administrative proceeding or at an arbitration, this section does not apply to the apology for the purposes of that proceeding or arbitration. 2009, c. 3, s. 2 (4).

Criminal or provincial offence proceeding or conviction

3. Nothing in this Act affects,

- (a) the admissibility of any evidence in,
 - (i) a criminal proceeding, including a prosecution for perjury, or
 - (ii) a proceeding under the *Provincial Offences Act*, or
- (b) the use that may be made in the proceedings referred to in subsection 2 (3) of a conviction for a criminal or provincial offence. 2009, c. 3, s. 3.

Acknowledgment, *Limitations Act, 2002*

4. For the purposes of section 13 of the *Limitations Act, 2002*, nothing in this Act,

- (a) affects whether an apology constitutes an acknowledgment of liability; or
- (b) prevents an apology from being admitted in evidence. 2009, c. 3, s. 4.

5. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 2009, c. 3, s. 5.

6. OMITTED (ENACTS SHORT TITLE OF THIS ACT). 2009, c. 3, s. 6.

APPENDIX H

Excerpt from the *Canada Evidence Act*, R.S., c. E-10, s. 1.

PART I

Application

Application

2. This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

R.S., c. E-10, s. 2.

Witnesses

...

Incriminating questions

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not admissible against witness

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

R.S., 1985, c. C-5, s. 5; 1997, c. 18, s. 116.

APPENDIX I

Excerpts from Ontario's *Evidence Act*, R.S.O. 1990, c. E.23

Definitions

1. In this Act,

"action" includes an issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario; ("action")

"court" includes a judge, arbitrator, umpire, commissioner, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence; ("tribunal")

"spouse" means a spouse as defined in section 1 of the *Family Law Act*. ("conjoint") R.S.O. 1990, c. E.23, s. 1; 2005, c. 5, s. 25 (1).

Application of Act

2. This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction. R.S.O. 1990, c. E.23, s. 2.

...

Witness not excused from answering questions tending to criminate

9. (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (1).

Answer not to be used in evidence against witness

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (2).

APPENDIX J

Excerpts from the *Youth Criminal Justice Act*, 2002, c. 1 Y-1.5

[Assented to February 19, 2002]

An Act in respect of criminal justice for young persons and to amend and repeal other Acts

Preamble

WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;

WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;

WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;

AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

...

DECLARATION OF PRINCIPLE

Policy for Canada with respect to young persons

3. (1) The following principles apply in this Act:

(a) the youth criminal justice system is intended to

(i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,

(ii) rehabilitate young persons who commit offences and reintegrate them into society, and

(iii) ensure that a young person is subject to meaningful consequences for his or her offence

in order to promote the long-term protection of the public;

(b) the criminal justice system for young persons must be separate from that of adults and emphasize the following:

(i) rehabilitation and reintegration,

- (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
 - (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
 - (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
 - (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;
- (c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
- (i) reinforce respect for societal values,
 - (ii) encourage the repair of harm done to victims and the community,
 - (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
 - (iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and
- (d) special considerations apply in respect of proceedings against young persons and, in particular,
- (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
 - (ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
 - (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
 - (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

Act to be liberally construed

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

PART 1

EXTRAJUDICIAL MEASURES

PRINCIPLES AND OBJECTIVES

Declaration of principles

4. The following principles apply in this Part in addition to the principles set out in section 3:

(a) extrajudicial measures are often the most appropriate and effective way to address youth crime;

(b) extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour;

(c) extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence; and

(d) extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a young person who

(i) has previously been dealt with by the use of extrajudicial measures, or

(ii) has previously been found guilty of an offence.

Objectives

5. Extrajudicial measures should be designed to

(a) provide an effective and timely response to offending behaviour outside the bounds of judicial measures;

(b) encourage young persons to acknowledge and repair the harm caused to the victim and the community;

(c) encourage families of young persons — including extended families where appropriate — and the community to become involved in the design and implementation of those measures;

(d) provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation; and

(e) respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence.

WARNINGS, CAUTIONS AND REFERRALS

Warnings, cautions and referrals

6. (1) A police officer shall, before starting judicial proceedings or taking any other measures under this Act against a young person alleged to have committed an offence, consider whether it would be sufficient, having regard to the principles set out in section 4, to take no further action, warn the young person, administer a caution, if a program has been established under section 7, or, with the consent of the young person, refer the young person to a program or agency in the community that may assist the young person not to commit offences.

Saving

(2) The failure of a police officer to consider the options set out in subsection (1) does not invalidate any subsequent charges against the young person for the offence.

Police cautions

7. The Attorney General, or any other minister designated by the lieutenant governor of a province, may establish a program authorizing the police to administer cautions to young persons instead of starting judicial proceedings under this Act.

Crown cautions

8. The Attorney General may establish a program authorizing prosecutors to administer cautions to young persons instead of starting or continuing judicial proceedings under this Act.

Evidence of measures is inadmissible

9. Evidence that a young person has received a warning, caution or referral mentioned in section 6, 7 or 8 or that a police officer has taken no further action in respect of an offence, and evidence of the offence, is inadmissible for the purpose of proving prior offending behaviour in any proceedings before a youth justice court in respect of the young person.

EXTRAJUDICIAL SANCTIONS

Extrajudicial sanctions

10. (1) An extrajudicial sanction may be used to deal with a young person alleged to have committed an offence only if the young person cannot be adequately dealt with by a warning, caution or referral mentioned in section 6, 7 or 8 because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances.

Conditions

(2) An extrajudicial sanction may be used only if

(a) it is part of a program of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the lieutenant governor in council of the province;

(b) the person who is considering whether to use the extrajudicial sanction is satisfied that it would be appropriate, having regard to the needs of the young person and the interests of society;

(c) the young person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;

(d) the young person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;

(e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;

(f) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and

(g) the prosecution of the offence is not in any way barred at law.

Restriction on use

(3) An extrajudicial sanction may not be used in respect of a young person who

(a) denies participation or involvement in the commission of the offence; or

(b) expresses the wish to have the charge dealt with by a youth justice court.

Admissions not admissible in evidence

(4) Any admission, confession or statement accepting responsibility for a given act or omission that is made by a young person as a condition of being dealt with by extrajudicial measures is inadmissible in evidence against any young person in civil or criminal proceedings.

No bar to judicial proceedings

(5) The use of an extrajudicial sanction in respect of a young person alleged to have committed an offence is not a bar to judicial proceedings under this Act, but if a charge is laid against the young person in respect of the offence,

(a) the youth justice court shall dismiss the charge if it is satisfied on a balance of probabilities that the young person has totally complied with the terms and conditions of the extrajudicial sanction; and

(b) the youth justice court may dismiss the charge if it is satisfied on a balance of probabilities that the young person has partially complied with the terms and conditions of the extrajudicial sanction and if, in the opinion of the court, prosecution of the charge would be unfair having regard to the circumstances and the young person's performance with respect to the extrajudicial sanction.

Laying of information, etc.

(6) Subject to subsection (5) and section 24 (private prosecutions only with consent of Attorney General), nothing in this section shall be construed as preventing any person from laying an information or indictment, obtaining the issue or confirmation of any process or proceeding with the prosecution of any offence in accordance with law.

Notice to parent

11. If a young person is dealt with by an extrajudicial sanction, the person who administers the program under which the sanction is used shall inform a parent of the young person of the sanction.

Victim's right to information

12. If a young person is dealt with by an extrajudicial sanction, a police officer, the Attorney General, the provincial director or any organization established by a province to provide assistance to victims shall, on request, inform the victim of the identity of the young person and how the offence has been dealt with.

PART 2 ORGANIZATION OF YOUTH CRIMINAL JUSTICE SYSTEM

...

YOUTH JUSTICE COMMITTEES

Youth justice committees

18. (1) The Attorney General of Canada or a province or any other minister that the lieutenant governor in council of the province may designate may establish one or more committees of citizens, to be known as youth justice committees, to assist in any aspect of the administration of this Act or in any programs or services for young persons.

Role of committee

(2) The functions of a youth justice committee may include the following:

(a) in the case of a young person alleged to have committed an offence,

(i) giving advice on the appropriate extrajudicial measure to be used in respect of the young person,

(ii) supporting any victim of the alleged offence by soliciting his or her concerns and facilitating the reconciliation of the victim and the young person,

(iii) ensuring that community support is available to the young person by arranging for the use of services from within the community, and enlisting members of the community to provide short-term mentoring and supervision, and

(iv) when the young person is also being dealt with by a child protection agency or a community group, helping to coordinate the interaction of the agency or group with the youth criminal justice system;

(b) advising the federal and provincial governments on whether the provisions of this Act that grant rights to young persons, or provide for the protection of young persons, are being complied with;

(c) advising the federal and provincial governments on policies and procedures related to the youth criminal justice system;

(d) providing information to the public in respect of this Act and the youth criminal justice system;

(e) acting as a conference; and

(f) any other functions assigned by the person who establishes the committee.

CONFERENCES

Conferences may be convened

19. (1) A youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act.

Mandate of a conference

(2) The mandate of a conference may be, among other things, to give advice on appropriate extrajudicial measures, conditions for judicial interim release, sentences, including the review of sentences, and reintegration plans.

Rules for conferences

(3) The Attorney General or any other minister designated by the lieutenant governor in council of a province may establish rules for the convening and conducting of conferences other than conferences convened or caused to be convened by a youth justice court judge or a justice of the peace.

Rules to apply

(4) In provinces where rules are established under subsection (3), the conferences to which those rules apply must be convened and conducted in accordance with those rules.

APPENDIX K

Apology Act, S.B.C. 2006, c. 19

Assented to May 18, 2006

Definitions

1 In this Act:

"apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate;

"court" includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

Effect of apology on liability

2 (1) An apology made by or on behalf of a person in connection with any matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,

(b) does not constitute a confirmation of a cause of action in relation to that matter for the purposes of section 5 of the *Limitation Act*,

(c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and

(d) must not be taken into account in any determination of fault or liability in connection with that matter.

(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

Commencement

3 This Act comes into force on the date of Royal Assent.

APPENDIX L

Apology Act, S.N.S. 2008, c. 34

1 This Act may be cited as the Apology Act.

2 In this Act,

(a) "apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate;

(b) "court" includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

3 (1) An apology made by or on behalf of a person in connection with any matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter;

(b) does not constitute a confirmation of a cause of action or acknowledgment of a claim in relation to that matter for the purpose of the Limitations of Actions Act;

(c) notwithstanding any wording to the contrary in any contract of insurance or any other enactment or law, does not void, impair or otherwise affect any insurance coverage that is or, but for the apology, would be available to the person in connection with that matter; and

(d) may not be taken into account in any determination of fault or liability in connection with that matter.

(2) Notwithstanding any other enactment or law, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

4 Nothing in this Act affects a prosecution for a contravention of an enactment.

5 (1) The Governor in Council may make regulations

(a) defining any word or expression used but not defined in this Act;

(b) deemed necessary or advisable by the Governor in Council to carry out effectively the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the Regulations Act.

6 This Act comes into force on such day as the Governor in Council orders and declares by proclamation. [*Royal Assent: November 25, 2008 / In force since October 1, 2009*]

Overcoming Legal Barriers to Using Restorative Practices in Ontario Schools

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Ontario's current student discipline framework under the *Education Act*¹ opens the door for the use of restorative practices in response to incidents of student misconduct. However, despite legislative changes brought about by the *Education Amendment Act (Progressive Discipline and School Safety), 2007*², ("Bill 212"), and the accompanying Program/Policy Memoranda ("PPMs") issued by the Ministry of Education, the use of restorative practices in schools is not widespread. Following a brief overview of Ontario's current student discipline framework and a brief introduction to restorative practices, this paper will address a number of the legal barriers that may inhibit the use of restorative practices to address student misconduct, including concerns about liability for allowing a student to remain in or return to a specific school after an incident; the challenges presented by legislated time limits in the disciplinary process; concerns about using restorative practices in inappropriate situations, for example, when there may be power imbalance between the parties involved or for very serious incidents and finally, the challenges resulting from parallel proceedings under the *Education Act* and the *Youth Criminal Justice Act*³, including concerns about what information from a restorative conference might become admissible in other legal proceedings.

At the outset, it is important to be clear that this paper is not an in-depth review of what restorative practices are, or an historical overview of their use, or a review of the pros and cons of using a restorative approach in the education or youth criminal justice context. Many excellent resources already exist on these topics⁴. Rather, this paper relies on existing research and anecdotal evidence showing the positive effects of using restorative practices (such as reducing recidivism, fewer attendance issues, creating a more positive school climate)⁵, and focuses instead on overcoming the practical challenges to using restorative practices in Ontario's student discipline framework.

¹ *Education Act*, R.S.O. 1990, c. E.2 [*Education Act*].

² Bill 212, *Education Amendment Act (Progressive Discipline and School Safety), 2007*, 2nd Sess., 38th Leg., Ontario, 2007 (assented to 4 June 2007) S.O. 2007, c. 14.

³ *Youth Criminal Justice Act*, S.C. 2002, c. 1 [YCJA]. Note that at the time of writing, Bill C-4, *An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts*, 3rd Sess., 40th Parl., 2010, had passed 2nd Reading on 3 May 2010.

⁴ See restorative practices books and websites listed in Bibliography.

⁵ The benefits of using restorative practices can reach beyond reducing incidents of student misconduct. For example, Headteacher Estelle MacDonald from Hull, U.K., describes anecdotally the changes at Collingwood Primary School as a result of using restorative practices: "As we improved relationships the benefits happened quickly: reduced disruption in lessons, reduced lost breaks or privileges, reduced racial incidents, improved attendance both of staff and pupils, improved punctuality and improved family engagement. These results then impacted on even more significant figures relating to pupil progress and attainment. The quality of speaking and listening has improved standards in literacy, and greater pupil and family engagement has improved attendance and achievement, while also

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Current Student Discipline Framework

Effective February 1, 2008, Bill 212 amended the provisions on behaviour, discipline and safety under Part XIII of Ontario's *Education Act*.⁶ Significantly, the amendments replaced the framework of mandatory consequences, which had been introduced by the *Safe Schools Act*⁷ under Ontario's previous Conservative Government, with a discretionary framework. Bill 212 maintained the same lists of inappropriate behaviours which could result in suspension or expulsion respectively, but added "bullying" to the suspension list.⁸ The *Education Act* continues to authorize school boards to add to these lists of inappropriate behaviours in board policies.

The discretionary element of Bill 212 is also found in the requirement for a Principal to consider legislated "other factors" in addition to the existing mitigating factors prior to imposing a suspension on a student or referring a student to an expulsion hearing.⁹

The *Safe Schools Act* had created two different types of expulsions: a "limited expulsion", which resulted in an expulsion from the student's school, or a "full expulsion", which resulted in an expulsion from all schools in the province of Ontario until the student had successfully completed the requirements of a strict discipline program.¹⁰ Bill 212 replaced limited and full expulsions with two expulsion options: **expulsion from a student's school only**, in which case the student is assigned to another

significantly decreasing our level of complaints and conflict in the community.», E. MacDonald, "My Restorative Journey and the Story of Hull, U.K." Plenary Speech, October 22, 2009, World Conference on Restorative Practices, Bethlehem, PA. See also: <http://www.iirp.org/article_detail.php?article_id=NjMz>

6 Bill 212 was the result, in part, of the Ontario Human Rights Commission's human rights complaint against the Ministry of Education alleging that the disciplinary provisions of the *Education Act* brought in by the *Safe Schools Act* were having a disproportionate and discriminatory impact on students from racialized minorities and students with disabilities.

7 *Safe Schools Act, 2000*, S.O. 2000, c. 12 [*Safe Schools Act*]. Note: Despite widespread media and colloquial use of the term "*Safe Schools Act*" to refer to the behaviour, discipline and safety provisions of the *Education Act*, the amendments to Part XIII of *Education Act* by the *Safe Schools Act* have been repealed and replaced by the amendments under Bill 212. All provisions about student discipline are in the *Education Act* and associated regulations. However, even the current Liberal government refers to the current student discipline provisions as the "safe schools provisions" [see PPM 145].

8 *Education Act*, *supra* note 1, s. 306.(1) and s. 310.(1).

9 "Behaviour, Discipline and Safety of Pupils", O. Reg. 472/07 [O.Reg. 472/07], s 2 and 3, list the following mitigating factors and "other factors":

Mitigating Factors:

1. The pupil does not have the ability to control his or her behaviour.
2. The pupil does not have the ability to understand the foreseeable consequences of his or her behaviour.
3. The pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person.

Other Factors:

1. The pupil's history.
2. Whether a progressive discipline approach has been used with the pupil.
3. Whether the activity for which the pupil may be or is being suspended or expelled was related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment.
4. How the suspension or expulsion would affect the pupil's ongoing education.
5. The age of the pupil.
6. In the case of a pupil for whom an individual education plan has been developed,
 - i. whether the behaviour was a manifestation of a disability identified in the pupil's individual education plan,
 - ii. whether appropriate individualized accommodation has been provided, and
 - iii. whether the suspension or expulsion is likely to result in an aggravation or worsening of the pupil's behaviour or conduct.

10 Principals had the authority to impose a limited expulsion on a student, or to refer the student to the Board for an expulsion hearing. A Committee of the Board had the authority to impose either a limited or a full expulsion on a student.

school of the board, or **expulsion from all schools of the board**, in which case the student continues to be a student of the Board¹¹ and is assigned to a program for expelled students¹². Under Bill 212, Principals no longer have the authority to impose an expulsion on a student. Rather, after a Principal concludes an investigation, the Principal may refer the student to a Committee of the Board (“Discipline Committee”) composed of a minimum of three Trustees for an expulsion hearing, with a recommendation for expulsion from the student’s school or from all schools of the Board. The Discipline Committee may impose an expulsion from the student’s school, or from all schools of the Board. The Bill 212 amendments also require the Discipline Committee to take into account the mitigating and other factors when determining whether to impose an expulsion on a student.¹³

There continues to be a right of appeal for suspensions and for expulsions from school only and from all schools of the Board. Bill 212 now allows one day suspensions to be appealed.¹⁴ The right of appeal for any expulsion is now to the Child and Family Services Review Board (“CFSRB”).¹⁵

Although these amendments may appear minor, the approach required of administrators under Bill 212 is a major shift in philosophy. Policy/Program Memorandum 145 – Progressive Discipline and Promoting Positive Student Behaviour, (“PPM 145”),¹⁶ articulates the Ministry of Education’s vision for transforming school cultures and how student discipline is to be approached, with an emphasis on prevention, early interventions, providing supports, and using a model of progressive discipline to address inappropriate student behaviour. The goal is to shift from a framework that is “solely punitive to one that is both corrective and supportive. Schools should utilize a range of interventions, supports, and consequences that are developmentally appropriate and include learning opportunities for reinforcing positive behaviour while helping students to make good choices.”¹⁷

The emphasis of PPM 145 is also on building relationships and a culture of respect in schools to promote and support positive student behaviour. PPM 145 is an attempt to get to the roots of human interactions and to promote positive relationships, rather than just punishing students for misconduct. The revised PPM is also much more explicit about addressing underlying issues related to misconduct between students, such as racism, intolerance based on religion or disability, homophobia and gender-based violence, which impede the development of positive relationships and are the antithesis of respect.¹⁸

¹¹ *Education Act*, *supra* note 1, s. 313(1).

¹² *Ibid.*, s. 311.5(b).

¹³ *Ibid.*, s. 311.4(2)(b).

¹⁴ *Ibid.*, s. 306(4) and 309.

¹⁵ *O. Reg. 472/07*, *supra* note 9, s. 1 and s. 4.

¹⁶ Policy/Program Memorandum 145 – Progressive Discipline and Promoting Positive Student Behaviour (Ontario Ministry of Education, revised October 19, 2009), [PPM 145]. Note that the content of PPM 145 also relates to other Ministry of Education initiatives such as Student Success, Character Education, and the Equity and Inclusive Education Strategy.

¹⁷ PPM 145, *ibid.*, p. 3.

¹⁸ PPM 145, *ibid.*, p. 2-3.

Bill 212 and PPM 145 require Principals, schools and school boards to approach student discipline in a far more holistic way than under the *Safe Schools Act's* mandatory model. This philosophical shift also allows schools to approach incidents of student misconduct in creative and individualized ways, which raises a concern about consistent treatment of students within a school and across a school board for similar incidents of misconduct. However, because the *Education Act* now requires the consideration and application of the mitigating and other factors to every incident, and no two students are identical, clearly the goal of the *Act* is to find an appropriate consequence for an individual student in the specific circumstances, rather than an consistent consequence for all students who have behaved in a similar way. Administrators need resources, training, skills and support to achieve these goals. Restorative practices, which are explained in more detail below, offer a strong model for building more inclusive, participatory school communities, characterized by more respectful relationships, as well as a model for responding to student misconduct.

What are “Restorative Practices”?

“Restorative practices” developed from the concept of restorative justice and victim-offender reconciliation programs, which emerged in the 1970s and 1980s in Canada and the United States.¹⁹ Restorative justice has been the hub of New Zealand’s entire youth criminal justice system since 1989.²⁰ In Canada, Nova Scotia’s Department of Justice started to develop a system-wide Restorative Justice Initiative in 1997 to approach to youth and adult crimes.²¹ The phrase “restorative practices” has been adopted by people using restorative justice concepts outside of a criminal justice context (eg. in schools and communities). Because of the connections between restorative practices and restorative justice, and because student misconduct at school may result in contact with the youth criminal justice system, it is helpful to look at the philosophical shift that restorative justice brings to the youth criminal justice system. Nova Scotia’s Department of Justice explains restorative justice as follows:

Restorative justice is a way of thinking about crime and conflict. It challenges us to look at how we think about ourselves as a society, how we respond to crime and how we restore the balance after a crime has been committed. Restorative justice comes in many forms, depending on the circumstances of the case, the point in the system in which a restorative option is invoked, and the traditions and preferences of the communities that adopt restorative alternatives.

In general, all restorative models focus on holding the offender accountable in a more meaningful way, repairing the harm caused by the offence, reintegrating the

19 Bob Costello, Joshua Wachtel & Ted Wachtel, *The Restorative Practices Handbook for Teachers, Disciplinarians and Administrators*, (Canada: IIRP, 2009) p. 7 [RP Handbook]. See also: Howard Zehr, *The Little Book of Restorative Justice*, (U.S.A.: GoodBooks, 2002) p. 42 [Little Book of RJ].

20 Little Book of RJ, *ibid.*, p. 4.

21 Nova Scotia Department of Justice, online: Government of Nova Scotia <<http://gov.ns.ca/just/rj/>> [Nova Scotia DOJ]. Note: The first phase of the pilot project began in four communities in 1999; by November 2001 it was extended to the whole province. See Jennifer Llewellyn, “Restorative Collaboration: The Nova Scotia Restorative Justice Program” (Plenary Speech, 12th IIRP World Conference, Bethlehem, PA, 21 October 2009).

offender into the community, and achieving a sense of healing for both the victim and the community. ...

The real essence of restorative justice is in a face-to-face meeting between the victim, offender and members of the community. During the course of that meeting each party is given an opportunity to tell the story of the crime from their own perspective, and talk about their concerns and feelings. The meeting helps the parties develop an understanding of the crime, of the other parties, and of the steps needed to make amends. The meeting concludes with an agreement outlining how the offender will make reparation. Reparation can include monetary payment, service to the victim, community service or any other measure agreed upon by the parties.²²

The process referred to in the last paragraph above has been adapted for use in non-criminal justice settings, such as schools. It is commonly referred to as a restorative conference and its structure tends to be more formal and scripted than the use of other types of restorative practices, such as circles.²³ There are a range of restorative practices and different organizations have developed different models and terminology²⁴. Some restorative practices, such as regular use of a circle in a classroom, would be used proactively by teachers, without necessarily being attached to a specific incident, to create a greater sense of community and increase mutual respect in a classroom. A circle process could also be used for people to process how they are feeling after an incident, even in situations where the person responsible is never identified.²⁵ Due to space restrictions, this paper refers mainly to the facilitation of a restorative conference in response to student misconduct that may result in an expulsion.

Legal Barriers

At different points during the discipline process, there are opportunities for administrators to use restorative practices in response to student misconduct. For example: when a Principal is determining an appropriate consequence to student misconduct; while a student is serving a suspension and/or attending a long-term suspension program²⁶ or program for expelled students; prior to a student's return from a program to a regular school (especially when the student is returning to the school where the incident occurred); and as a way of resolving an expulsion appeal to the CFSRB. Restorative practices may be used as an alternative to suspensions and expulsions, or in addition to suspension or expulsion. However, when an administrator makes a decision to respond restoratively to student misconduct, the administrator is still acting within a

22 Nova Scotia DOJ, *ibid.* at Restorative Justice Program / Public Education and Research Materials / Executive Summary. See also: Little Book of RJ, *supra* note 19 at 32-33 for the five essential principles of a restorative lens or philosophy.

23 For a description of circle processes, see: Kay Pranis, *Circle Processes: A New/Old Approach to Peacemaking*, (U.S.A.: GoodBooks, 2005) [Circle Processes]; Little Book of RJ, *ibid.* at 50-52; and RP Handbook, *supra* note 19 at 23-33.

24 *Supra*. The International Institute of Restorative Practices provides training internationally to bring restorative practices into schools. Organizations such as Peacebuilders International and Conflict Mediation Services of Downsview provide restorative justice services in coordination with youth criminal courts in Toronto, Ontario, Canada. See Bibliography for websites. See also Little Book of RJ, *ibid.* at 42-57.

25 RP Handbook, *supra* note 19 at 54-55.

26 Note that a long-term suspension is a suspension for 6 – 20 days.

legal framework, which may raise barriers to a restorative approach. The barriers, and possible solutions, are explored below.

Concerns about Liability

Principals are often concerned about the risk of liability for allowing a student to remain at school following an incident of student misconduct, particularly a serious incident. Awareness of potential liability is important. However, concerns about liability need to be balanced with a basic understanding of how liability may be triggered, otherwise, it is too easy for these concerns to be the over-riding factor when making disciplinary decisions in the community setting of a school. The *Youth Criminal Justice Act*, the *Canadian Charter of Rights and Freedoms*,²⁷ Ontario's *Human Rights Code*,²⁸ and the common law all shape the world in which administrative action in schools is judged.

Principals often face difficult situations when a student charged with a serious offence is released and back at school pending trial or other resolution of the charge. Particularly when the incident occurred at school and/or between students, and despite the fundamental principle that a person is innocent until proven guilty of a criminal charge, there can be great pressure from parents, as well as from staff, to remove the accused student from the school community to prevent a similar incident from recurring and to ensure the school is safe.²⁹ In most cases the Court does not conduct risk or threat assessments to determine whether an accused student may pose a danger to the community.³⁰ Given the principles of the *YCJA*³¹ and the legal requirement in Ontario for students to attend school until the age of 18 years³², the expectation is that a student released on conditions pending trial will attend school. Often the conditions explicitly state that a charged student is to attend school.³³ Although Ontario Courts have upheld the right of school boards to exclude a student from school for safety reasons³⁴, or to transfer a student to another school in the board's jurisdiction for safety reasons,³⁵ given the attendance requirements under the *Education Act*, a school board is required to

²⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁸ *Human Rights Code*, R.S.O. 1990, c. H.19.

²⁹ Note: Bill 168-*Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009, received Royal Assent on December 15, 2009 and came into force on June 15, 2010. It remains to be seen whether school boards will face work refusals from teachers and staff when students who have engaged in more serious types of behaviour are consequenced in such a way that allows the student to remain in the school. The Saskatchewan Court of Appeal Decision in *Kendal v. St. Paul's Roman Catholic Separate School Division No. 20*, [2004] S.J. No. 361 ("Kendal"), considered the competing interests of the school division's duty to provide a teacher with a safe working environment balanced against its duty to provide all students, including those with disabilities, with a program of instruction. Although this case dealt with the behaviour of a student who had special needs that contributed to the behaviour, which is not the same situation as a student without a disability who behaves violently, it may be instructive to see how a Court weighs competing interests and risks.

³⁰ The amount of time or delay to have an assessment completed would be a major concern.

³¹ *YCJA*, *supra* note 3 at *Preamble* and s. 3(1)-(2).

³² *Education Act*, *supra* note 1, s. 21.

³³ *YCJA*, *supra* note 3, s. 55(2)(e).

³⁴ *Bonnah (Litigation guardian of) v. Ottawa-Carleton District School Board*, [2003] O.J. No. 1156 (C.A.) at 32-40. Note that although s. 265(1)(m) of the *Education Act* is still in force, O.Reg. 474/00 (made under s. 305 of the *Education Act*) has been amended and no longer applies to students of a school.

³⁵ *K.B. (Litigation guardian of) v. Toronto District School Board*, [2008] O.J. No. 475 (Sup. Ct.) at 37-54. Note that although the Principal relied on the provisions of O.Reg. 474/00 to transfer the student, and that regulation has since been amended and no longer applies to students of a school, the Court found the school board's power to transfer students in this context was implicit in the powers of a school board (at 48-50).

provide an education for students within its jurisdiction and cannot refuse to admit a student except in very specific circumstances, such as a suspension, an expulsion (in which case the student is assigned to a program run by the Board), or an exclusion from a class or school for safety reasons, based on an exercise of the Principal's discretion under the *Education Act*.³⁶

A closer look at a negligence lawsuit³⁷ and a human rights case that both dealt with repeat incidents of student misconduct at school may assist administrators in developing a more nuanced understanding of what decisions, actions and omissions may attract liability.

*Walsh v. Buchanan*³⁸ is a negligence case involving a claim by a student against a school board, a Vice Principal, two teachers and another student. Walsh and Buchanan were male, 19 year old high school students who got into a fight at an intramural floor hockey game at school before the start of classes. They were ejected from the game by the teacher referee. The Vice Principal was also in the gym and had individual conversations with Walsh and Buchanan about the fight before they left the gym, separately. Mr. Cooke believed that the incident between the students was over. However, despite the Vice Principal's conversations with both students, the two students ended up in a second fight before class. The second fight was more serious and both students threw punches, although Buchanan gained the advantage and punched Walsh several times to the head. The fight was stopped by a teacher who overheard the fight from his classroom and came out into the hallway to stop it. Walsh suffered a broken nose and a chipped tooth, and he was taken to the school nurse. After the school investigation, Buchanan was suspended for a number of days. Buchanan was also charged with assault. Following the incident, Walsh ended up suffering from a severe, long-term reactive depression and post-traumatic stress disorder, and he withdrew from practically all activities of daily living in the year following the incident. As a result, Walsh sued Buchanan, the school board, Vice Principal Cooke, and the two teachers who broke up the two separate fights.³⁹

The Court found that Vice Principal Cooke and the teachers were not liable in negligence. The school board, therefore, was not vicariously liable for the negligence of its employees.⁴⁰ The Court found that after the escalation between Walsh and Buchanan in the second incident, Buchanan "deliberately and violently pursued his attack."⁴¹ Ultimately, the Court apportioned liability between Walsh and Buchanan at 50/50.⁴²

36 *Education Act*, *supra* note 1, s. 265(1) (m): It is the duty of a principal of a school, in addition to the principal's duties as a teacher, subject to an appeal to the board, 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.

37 Although there are many liability cases in the education context related to student transportation, accidents on school trips or in technical classes, there are not that many dealing with liability for damages or injury resulting from the repeat actions of a student with a history of misconduct. The existing cases usually allege negligence based on a failure to provide adequate supervision.

38 *Walsh v. Buchanan*, [1995] O.J. No. 64 (Ont. Gen. Div.) [*Walsh*].

39 *Ibid.* at 1-88.

40 *Ibid.* at 105, 115, 126 and 140-143.

41 *Ibid.* at 88.

42 *Ibid.* at 149.

Civil liability in negligence may arise if injury is caused to another person or damage is caused to property. Three elements must exist to attract legal liability for negligence: the existence of a duty of care, a breach of the standard of care applicable in the circumstances, and damage or injury that is caused by the breach.⁴³

In addition to the duties and responsibilities regarding student safety imposed by the *Education Act* and related Regulations, Principals and teachers have an obligation under the common law to act *in loco parentis*, which means “in the place of a parent”, with respect to students. The Supreme Court of Canada has held that the standard of care to be exercised by school authorities is that of the “careful or prudent parent”⁴⁴, and has also recognized the need for a nuanced application of this standard:

... It is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and the degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent parent-standard to the conduct of the school authority in the circumstances.⁴⁵

In *Walsh v. Buchanan*, the Court reviewed the facts in detail, which is helpful for seeing what factors played into the negligence analysis for each staff member’s and the school board’s actions in the incident.⁴⁶ The Court found that the evidence overwhelmingly showed that the league was in control and not violent.⁴⁷ The Court also found that a reasonably prudent parent would allow participation in this floor hockey league and that, in fact, the parents of the school, including Walsh’s parents, allowed their children to participate.⁴⁸

Based on the teacher referee’s actions during the floor hockey game and the response of the teacher who broke up the second fight, the Court rejected the allegations that the teachers’ responses in the circumstances fell below the duty of care required of them.⁴⁹ The Court also rejected the argument that the Board of Education had failed to provide adequate hallway supervision in the upper hallway where the second incident occurred.⁵⁰ The Court also had to consider whether the Board’s disciplinary approach

43 A. Wayne MacKay & Gregory M. Dickson, *Beyond the “Careful Parent”: Tort Liability in Education* (Canada: Emond Montgomery Publications Limited, 1998) paraphrase at 3 [Careful Parent].

44 *Myers (Next friend of) v. Peel County (Board of Education)*, [1981] 2 S.C.R. 21 at p. 31 [Myers].

45 *Ibid.* at p. 32.

46 Due to space constraints, this paper can focus on only a few key points. For more detail, reading the full case is recommended.

47 *Walsh*, *supra* note 38 at 95.

48 *Ibid.* at 96.

49 *Ibid.* at 99-105 and 135-140.

50 *Ibid.* at 127-134. Note the Court’s comments at paragraph 129: “I am aware that in *Toronto Board of Education v Higgs* (1960) 2 D.L.R. (2d) 49, the Supreme Court of Canada held that it is not the duty of the school authorities to keep students under supervision every moment while they are in attendance at

was appropriate and heard expert evidence on this point.⁵¹ The Court reviewed the different expert responses urged upon it and held that there was no guarantee that any of these options would have prevented the second fight.⁵²

The Court rejected the allegations that Vice Principal Cooke failed to follow proper procedure and was negligent on several counts in his response to the incident. Rather, the Court found that “the action and supervision exhibited by Cooke was that which would have been undertaken by any reasonably competent professional seized of the same facts and knowledge and experience as Cooke.”⁵³

The Court specifically considered whether Vice Principal Cooke should have foreseen that the fight in the upstairs hallway would occur and, as a result, whether he should have handled the fight and the “brush up” at the floor hockey game differently. A central concept of the law of negligence is foreseeability; the law expects a reasonable person to be able to predict when his or her actions may create risks that may cause harm to people or property, and to take steps to minimize those risks.⁵⁴ The Court found that the fight in the upstairs hallway was not premeditated and based on the Vice Principal’s observations in the gym and general knowledge of the students, the second fight was not reasonably foreseeable:

In considering the liability of Vice-Principal Cooke in respect of the incidents in the gym, I specifically find that Cooke knew that both players had been penalized, probably for rough play and then were ejected for pushing and shoving. Both Cooke and Watson knew that they were good students with good records. There was very little time left until the first class. The “brush-up” incident deserved a reprimand which was given, but no more was required. At that point, it was not reasonably foreseeable that a major fight would break out.⁵⁵

The Court’s analysis of foreseeability is helpful for administrators trying to manage risk after an incident has occurred. The analysis shows that a number of factors are relevant when deciding how to respond to an incident and determining the likelihood for a second incident to occur. Based on an assessment of the factors, which should include conversations with the students and staff involved if possible, the administrator can decide whether the accused student needs to be removed from the school community due to reasonable safety concerns. A restorative conference may be an effective way to resolve the safety concerns of all involved.

school. This principle was applied in *McCue v. Etobicoke Board of Education* (1982) ILR 92-031 where there was no liability despite temporary lack of supervision in a classroom.”

51 *Ibid.* at 117-126.

52 *Ibid.* at 120.

53 *Ibid.*

54 *Careful Parent*, *supra* note 43, paraphrase of 3.

55 *Walsh*, *supra* note 38 at 114-116.

Walsh v. Buchanan is a helpful reminder that the law on negligence is about the apportionment of risk.⁵⁶ The Court did not expect the floor hockey league to be completely free from risk, and did not require the physical presence of a teacher in the upstairs hallway at all times to find that hallway supervision was adequate in this case. Staff followed the school board's discipline policies and responded to both incidents, which the Court found met the standard of care. Breach of statute, per se, will not necessarily result in a finding that a duty of care exists, or that the standard of care has not been met, but it is important for administrators, teachers and staff to know if statutory duties and board policies exist, because if they do, they will be factored into the negligence analysis.⁵⁷ This case also demonstrates that the facts and staff's rationale for responding in a particular way based on those facts, are highly relevant to any negligence analysis.

In contrast to the positive outcome in *Walsh v. Buchanan* for the school board and its staff, there is also an important human rights case, *North Vancouver School District No. 44 v. Jubran* ("*Jubran*")⁵⁸, where a school board was found liable for its failure to provide an educational environment that was free from discriminatory harassment on the basis of sexual orientation. Although Mr. Jubran did not identify as gay, he was endured homophobic harassment and physical assaults over five years of high school.⁵⁹ The school was aware of the harassment and took several steps over the years to address and stop it, but was unable to do so.⁶⁰ There was no dispute from the school board that Mr. Jubran was verbally and physically abused.⁶¹

The BC Human Rights Tribunal found that the school board failed in its duty to provide Mr. Jubran with an educational environment free from discriminatory conduct, and, as a result, awarded Mr. Jubran damages of \$4,500 for injury to his dignity, feelings and self-respect, and ordered the school board to cease its contravention of the BC *Human Rights Code*.⁶²

The evidence before the Tribunal was clear that Handsworth's administration was actively involved in investigating the incidents brought to their attention and disciplining the students involved. However, although it became clear that the harassment was not stopping, the school did not change its strategy to address the harassment.⁶³

56 *Ibid.* at 90: «It must be remembered that schools are not only about safety they are also about character, school spirit, working as a team, sportsmanship, and competition. Activities such as football, machine shop, and chemistry labs may have inherent dangers. Before summarily banning such activities, one must weigh benefits against risks.»

57 *Careful Parent*, *supra* note 43, paraphrase of 5.

58 *North Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733 (C.A.) [*Jubran*].

59 *Ibid.* at 10.

60 *Ibid.* at 17-19.

61 *Ibid.* at 10.

62 *Human Rights Code*, R.S.B.C. 1996, c. 210. Note: The school district sought judicial review of the BC Human Rights Tribunal decision. The BC Supreme Court reviewed the Tribunal's decision on a correctness standard; it quashed the Tribunal's decision on the basis that it was fatally flawed because Mr. Jubran did not identify as gay, and therefore did not fall within the protections of BC's *Human Rights Code*. Mr. Jubran appealed to the BC Court of Appeal, which reinstated the Tribunal's decision. Mr. Jubran was awarded costs of the appeal and the judicial review proceeding. The school district sought leave to appeal to the Supreme Court of Canada, which was dismissed without reasons, with costs awarded to Mr. Jubran.

63 *Jubran*, *supra* note 58 at 17-19 and 89.

The BC Court of Appeal found that the Tribunal's findings of fact, and the inferences drawn from them, were reasonable. Despite using progressive discipline to respond to the inappropriate behaviour of students, the Tribunal found that the School Board failed to provide resources to the school to address the systemic and underlying discriminatory attitudes related to homophobia while Mr. Jubran attended the school.⁶⁴

This case demonstrates that it is not enough to respond to individual incidents without an appreciation for the broader context in which the incidents are happening, particularly when students appear to have continued the harassment after specific students involved were disciplined and stopped. Negative relationship dynamics are at the core of bullying, harassment and discrimination; a response to these types of inappropriate behaviour that teaches students about the impact of their actions on others, offers a way to repair the harm, and also provides students with a new way of relating, deserves consideration. As one of the few cases that finds a school board liable for the conduct of students related to another student, this case provides important information about the kinds of steps a school board may be expected to take to stop discrimination between students. Restorative practices, either as an alternative, or in addition to traditional discipline, offer an effective approach to accomplish these goals.

The Challenge of Time Limits

Another major barrier to the use of restorative practices is the time limits mandated by the *Education Act* for conducting an expulsion hearing.⁶⁵ When a student is alleged to have engaged in misconduct that may result in an expulsion, a school board's decision whether or not to expel must occur within 20 school days.⁶⁶ The time limits are designed to minimize disruption to a student's academic program. The challenge of time limits may be lessened if the parent of the accused student (or the accused adult student) consents to the Discipline Committee holding an expulsion hearing after the 20 school day deadline, however, there is no requirement for a parent or adult student to provide that consent.

In addition to the legislated time limits, preparing properly for a restorative conference is time-consuming. To determine whether or not holding a restorative conference is viable in the circumstances, the facilitator needs to meet separately with the accused student and his or her parents, the victim and his or her parents, and any other support people who may be attending, to explain the process and find out if all the necessary parties are willing to participate.⁶⁷ Where it is not possible to get consent from all of the parties, the conference would not proceed. Also, it is essential that the accused

⁶⁴ *Ibid.* at 96-97.

⁶⁵ Due to space constraints, this paper will focus on time limits for a school board to conduct an expulsion hearing. However, similar time limit issues exist once an appeal of a school board's decision to expel has been filed with the CFSRB. It is also important to remember that a wide range of incidents do not fall into the categories of misconduct for which a suspension or expulsion may be imposed, and so time limits will not pose the same barrier. Using restorative practices to resolve less serious incidents is an option supported by PPM 145.

⁶⁶ *Education Act*, *supra* note 1 at s. 311.3(8): "The board shall not expel a pupil if more than 20 school days have expired since the pupil was suspended under section 310, unless the parties to the expulsion hearing agree on a later deadline."

⁶⁷ Adult students, or students who are 16 or 17 years old and have withdrawn from parental control, may consent on their own behalf to participate. However, they may still choose to have a parent or guardian participate as a support person.

student be willing to acknowledge responsibility for the incident, which may require more than one conversation.

When a Principal imposes a 20 day suspension pending possible expulsion on a student, the Principal attempts to complete an investigation into the incident within the first few days of imposing the suspension. A restorative process should not be offered without the Principal coming to a determination, on a balance of probabilities, regarding what role each student played in the incident and whether or not each student engaged in misconduct as outlined under the *Education Act* and school board policies. It is only after the Principal does this fact-finding analysis that it is appropriate to consider whether a restorative conference may be an appropriate way to resolve the incident, or whether it is an appropriate alternative to the discipline being recommended. Since participation in a restorative process requires an accused student to accept responsibility for his or her actions, the Principal needs to be clear about what misconduct the student is being asked to accept responsibility for. A restorative conference is not to be used for fact-finding or as another method to conduct an investigation.

When the Principal communicates his or her decision to refer for an expulsion hearing to the student and the student's parents, the Principal could offer to facilitate a restorative conference. The accused student and his or her parents will likely be more motivated to participate if the Principal offers not to refer the matter to an expulsion hearing if the student participates in a successful restorative conference. The restorative conference will require the accused student to acknowledge responsibility for his or her actions, to hear how his or her actions have impacted the victim and others, and will result in an agreement on ways for the student to make restitution. Participating in this process and the resulting restitution become the consequence.

It is recommended that the Principal obtain consent from the accused student's parents for the hearing to be held after the 20 school day deadline in the event that the restorative conference is not successful (for example, if a student decides to stop participating mid-way through the conference). If an accused student and his or her parent are interested in conference, but are not willing to consent to an extension of the 20 school day time limit, the Principal has limited options to proceed: continue to do the necessary preparatory work to facilitate a restorative conference, with the hope that it will be facilitated and successful prior to the 20 school day deadline (this option is generally not recommended as it may result in loss of jurisdiction to expel); proceed along a dual track as the 20 school day timeline runs, by preparing for both the expulsion hearing and the restorative conference, with the goal to complete a successful conference within the time limits so the hearing is not necessary (this option may not be possible, given a Principal's other responsibilities); or drop preparations for the restorative conference until after the Discipline Committee has made a determination at the expulsion hearing (this may be the most realistic option).

If the student is expelled, whether from school only or from all schools of the board, the Principal may still offer a restorative conference to resolve the relationship

harm that was caused, which may be a key factor in whether or not the student is allowed to return to the same school after serving the expulsion.

Being mindful of the various points in the disciplinary process when a restorative conference may be possible, and maintaining flexibility to allow a restorative process to take place when students are ready to participate, are important ways to work with, and around, the time limits and associated challenges presented by the legislation governing student discipline. Given the emphasis in PPM 145 on progressive discipline⁶⁸, especially the emphasis on building healthy relationships⁶⁹, prevention and awareness raising⁷⁰ of inappropriate behaviour, and on applying disciplinary measures that are not solely punitive, but also corrective and supportive⁷¹, school boards and administrators need to be creative about opportunities for offering to facilitate restorative conferences, notwithstanding the challenges presented by the legislated time limits.

Restorative Practices in Inappropriate Situations

Are there incidents which are too serious or otherwise inappropriate for a restorative approach?⁷² Despite the successes of Nova Scotia's Restorative Justice Initiative, the Department of Justice has recognized that gender and power imbalance issues may make the use of restorative justice inappropriate in some circumstances:

In April of 2000, the Program imposed a moratorium on the referral of cases related to sexual assault or spousal/partner violence which a judge could potentially refer after a finding of guilt. The moratorium is in place to allow further research and consultation with representatives from women's equality seeking organizations. It continues to be in effect.⁷³

The issue of power imbalance, particularly as it relates to gender and domestic violence, is not unique to criminal law and restorative justice. In family law, much research into this issue has been done to assist mediators and collaborative family lawyers who work with separating parties to assist them to work out their own agreement, rather than litigating.⁷⁴ The issues are important, as power imbalance can significantly hamper a party's ability to get a fair outcome and may cause further harm to a party in the process.

68 PPM 145, *supra* note 16 at 3-4.

69 *Ibid.*

70 *Ibid.* at 6-7.

71 *Ibid.* at 3-4 and 6-7.

72 The issue of capacity, based on a student's special needs, mental health issues and/or age, to participate in a restorative process is significant and, unfortunately, beyond the scope of this paper due to space constraints. Restorative practices are generally flexible enough to be adapted appropriately for the age of the students involved. Where concerns about capacity relate to a student's special needs or mental health needs, educators are encouraged not to take a one-size-fits-all approach, but to assess on a case-by-case basis whether a restorative process is appropriate and possible, given the specific students and circumstances. This may require seeking the expertise and assistance of other professionals.

73 Nova Scotia DOJ, *supra* note 21 at <<http://www.gov.ns.ca/just/rj/program.asp>> (Heading: Moratorium for certain types of cases).

74 For example: Riverdale Mediation, online: <<http://www.riverdalemediation.com/learn/mediation-or-collaborative-law/>>. Note excerpt on power.

Concerns about power imbalance overlap with concerns that some incidents are too serious to be dealt with through a restorative process. As will be outlined below, the *YCJA* has different processes depending on the seriousness of the charges and history of the youth. Typically, organizations who facilitate restorative processes for the criminal justice system and/or school system determine what types of incidents they will accept for referral. However, even in the most serious incidents, such as murder and manslaughter, in addition to a criminal conviction and a custodial sentence, victims and offenders may eventually choose to participate in a restorative process.⁷⁵ “In serious cases, where the loss to the victim is more profound, restorative justice has been found to be more meaningful for victims, community members and offenders.”⁷⁶

For school boards and administrators, addressing these issues requires awareness, training and thoughtful planning. One strategy is to begin using restorative practices only for certain types of incidents, and to build on the range of incidents as people in the system develop expertise and experience. Conference facilitators have a responsibility during the preparation stage to assess whether there are any factors that would make a conference inappropriate, including whether the facilitator is experienced enough to handle the case.⁷⁷ Consent of the parties is not the only determining factor in whether to proceed. Victim needs are the priority in deciding whether to run a conference and facilitators need to assess whether a conference will provide an appropriate forum to satisfy these needs.⁷⁸

Parallel Proceedings under the *YCJA* and the *Education Act*

In Ontario, student discipline is generally not based on whether or not a student has been charged with a criminal offence. Rather, it based on whether there is an incident of misconduct as defined by the *Education Act* and/or a school board’s Code of Conduct.⁷⁹ However, despite the separate proceedings, two key barriers to the use of restorative practices in schools result when an incident involving a student includes criminal charges under the *Youth Criminal Justice Act*: confidentiality of information and competing timelines. Students usually receive legal advice from their criminal defence lawyers not to discuss the incident with the school administration in order to protect their interests in the criminal proceeding. This is a significant barrier to overcome, as the short and long-term implications of a conviction cannot be dismissed lightly. The different timelines for the criminal proceedings and school discipline proceedings mean that Principals often have to make decisions about disciplinary

75 For example, the parents of Reena Virk, the Victoria, BC teenager who was bullied, beaten and drowned by other students, eventually participated in a restorative process with the male who was convicted and served time for Reena’s death. See: Terri Theodore, “One of Reena Virk’s killers granted full parole” *The Globe and Mail* (23 June 2010), online: *Globe and Mail* < <http://www.theglobeandmail.com/news/national/british-columbia/one-of-reena-virks-killers-granted-full-parole/article1615005/>>.

76 Nova Scotia DOJ, *supra* note 21 at <<http://www.gov.ns.ca/just/rj/faq.asp> (Question #6 Can restorative justice be used in serious cases?)>.

77 Terry O’Connell, Ben Wachtel & Ted Wachtel, *Conferencing Handbook*, (Canada: The Piper’s Press, 1999) at 32.

78 *Ibid.* at 35: “According to research in victimology and restorative justice, victims may need: an opportunity to express their feelings; acknowledgement from loved ones about what happened to them; assurance that what happened was unfair and undeserved; direct contact with offenders to hear the offender express shame and remorse, answer questions about the offense, and assure them that it won’t happen again; a sense of safety.”

79 School boards and schools are required to have Codes of Conduct in place in accordance with the Ministry of Education template, PPM 128 - The Provincial Code of Conduct and School Board Codes of Conduct.

consequences at the very early stages of the criminal process. Even if the school wanted to facilitate a restorative conference, if the accused student receives legal advice not to participate or speak about the incident at all, it will not be possible to proceed with a restorative conference, since willingness to accept responsibility is a key requirement.

Addressing Confidentiality Concerns

A key question becomes whether there is any way to protect the confidentiality of information that comes out during a restorative conference. Although protections exist under apology and evidence legislation, these protections alone are not broad enough to prevent information disclosed during a restorative conference from use in a parallel criminal proceeding.

In Spring 2009 Ontario enacted apology legislation and joined the ranks of British Columbia, Saskatchewan, Manitoba and Alberta, as well as a number of U.S. jurisdictions and Australia, who already have apology legislation in place.⁸⁰ Generally, the goals of apology legislation are to facilitate more open communication between parties and to allow a party to apologize in order to reduce litigation and to encourage earlier settlement of lawsuits.⁸¹ Ontario's *Apology Act*⁸² allows people to apologize without fearing that the apology will be used as evidence of fault or liability in a civil or administrative proceeding, or at arbitration.⁸³ However, it does not protect apologies and statements from being used in a criminal proceeding.⁸⁴

Likewise, the protections available under the *Canada Evidence Act*⁸⁵ and Ontario's *Evidence Act*⁸⁶ are limited. Both Acts have provisions that do not allow a witness to be excused from answering any question on the grounds that the answer may incriminate the witness or tend to establish his or her liability in a civil proceeding.⁸⁷ However, both Acts also have provisions that allow the witness to object to answering a question on one of these grounds and although the witness is still compelled to answer the question, the witness' answer cannot be used against him or her in any criminal proceeding⁸⁸ or, under Ontario's *Evidence Act*, in any civil proceeding either.⁸⁹ Unfortunately, because the Acts are restricted in application to defined legal proceedings, neither Act protects students who acknowledge responsibility for misconduct or make comments about an incident during a restorative conference from having those comments used against them in other legal proceedings. For example, in the *Canada Evidence Act*, the relevant provisions apply to "all criminal proceedings and to all civil proceedings and

80 Carlson, Daryl-Lynn, Law Times, "Apology Act signals cultural shift but professional organizations slow to take up spirit of new law" December 7, 2009.

81 Barry Leon and Dale Barrett, OBA Civil Litigation Section Newsletter, September 2006: Safe to Apologize: New Law in British Columbia, Canada, p. 3.

82 *Apology Act*, S.O. 2009, c. 3 [*Apology Act*].

83 *Ibid.* at ss. 2(1) – (4).

84 *Ibid.* at s. 3. Note that this is in contrast to BC's legislation. See: *Apology Act*, S.B. C. 2006, c. 19, s. 2(2).

85 *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*Canada Evidence Act*].

86 *Evidence Act*, R.S.O. 1990, c. E.23 [*Ontario's Evidence Act*].

87 *Canada Evidence Act*, supra note 85 at s. 5(1) / *Ontario's Evidence Act*, *ibid.* at s. 9(1).

88 *Canada Evidence Act*, *ibid.* at s. 5(2) / *Ontario's Evidence Act*, *ibid.* at s. 9(2).

89 *Ontario's Evidence Act*, *ibid.*

other matters whatever respecting which Parliament has jurisdiction.”⁹⁰ Similarly, Ontario’s *Evidence Act* applies to “all actions and other matters whatsoever respecting which the Legislature has jurisdiction.”⁹¹

A restorative conference facilitated by a school would not fall under these provisions. However, the informal nature of a restorative conference in comparison to a trial or hearing does offer other protections. For example, no one takes notes during a restorative conference, aside from the final agreement drafted by the facilitator and signed by all participants to record how the accused student will make restitution. Otherwise, there are no notes that could be subpoenaed or summonsed for use in another proceeding. The agreement could contain a confidentiality clause to restrict access to only the conference participants, plus any other specified person required to facilitate the terms of the agreement.⁹² Although the confidentiality clause may not stop a criminal court from ordering the agreement into evidence if it is deemed relevant to the charges, the clause may protect the agreement from being used in civil proceedings.

The *YCJA* does offer potential for the use of restorative practices to resolve a criminal matter. Collaboration between the police and school could result in the use of a restorative process serving as an appropriate consequence for both the school and *YCJA* contexts.

For example, where a youth’s behaviour brings him or her into contact with the youth criminal justice system, and where the police, Crown or Court decides to deal with the youth via extrajudicial measures or sanctions in accordance with Part I of the *YCJA*, there are opportunities for using restorative processes as a response and alternative to charging a student.⁹³ For example, section 6 requires a police officer to consider, before starting judicial proceedings, whether it would be sufficient to issue a warning, administer a police caution⁹⁴, or to refer the youth to a program or agency in the community that may assist the youth not to commit offences.⁹⁵ Section 8 allows the Attorney General to establish a program authorizing Crown prosecutors to administer a caution to a youth instead of starting or continuing judicial proceedings.⁹⁶ If police are aware that a school is able to facilitate a restorative conference in response to an incident that also involves the school, it provides the police with an option under section 6 to hold the youth accountable outside of the justice system in appropriate situations.⁹⁷

⁹⁰ *Canada Evidence Act*, supra note 85 at s. 2.

⁹¹ *Ontario’s Evidence Act*, supra note 86 at s. 2.

⁹² For example, provide a copy of the agreement to the Principal and Vice Principal(s) if not present during the restorative conference.

⁹³ When a student has been charged, the important role of defence counsel cannot be overlooked in this discussion. Defence counsel play a key role in advising a youth about options and how to proceed in response to a charge. An understanding of restorative justice, the Police-School Board Protocol, and the administrative law framework for school discipline is required for defence counsel to work with police, school administrators and Crown counsel to create more restorative options in the youth criminal justice system.

⁹⁴ Section 7 of the *YCJA* requires the support of the provincial Attorney General to formalize a police caution program. So far, Manitoba, Nova Scotia and Yukon have formally recognized programs. See: Lee Tustin & Robert E. Lutes (Q.C.), *A Guide to the Youth Criminal Justice Act*, 2010 ed. (Canada: LexisNexis Canada Inc., 2009) at 30 [2010 *YCJA* Guide].

⁹⁵ *YCJA*, supra note 3 at s. 6.

⁹⁶ *Ibid.* at s. 8.

⁹⁷ 2010 *YCJA* Guide, supra note 94 at 30.

Extrajudicial sanctions are different from, or an extension of, extrajudicial measures. Extrajudicial sanctions are defined in section 10 of the *YCJA* and are designed where a warning, referral or caution would not be adequate to deal with the youth and the offence because of the seriousness of the offence or due to the nature and number of previous offences, or other aggravating factors.⁹⁸ To use extrajudicial sanctions, a number of conditions must be met, including, *inter alia*, providing the youth with a reasonable opportunity to consult with counsel, obtaining the youth's informed and freely-given consent, the youth's acceptance of responsibility for the offence, and, in the opinion of the Attorney General, sufficient evidence to proceed with prosecution of the offence.⁹⁹ Approaches and programs for extrajudicial sanctions vary by province across Canada, and share features of a restorative practice, including the involvement of all interested parties:

Extrajudicial sanctions can be applied at the pre-charge or post-charge stage in the proceedings. Sanctions can be anything from apologies to the victim to community service work or restitution for damages. This approach allows for creative, individual responses to a youth's offending behaviour. Because extrajudicial sanctions are unique to the youth and the circumstances, this option can have a more powerful impact on a youthful offender and provide a better opportunity to repair the harm done to the victim and the community.¹⁰⁰

Finally, in situations where a youth goes to trial, a successful restorative conference conducted through the school's disciplinary process may be useful evidence of the accused student's willingness to accept responsibility and to demonstrate remorse for his or her actions, which the Court may consider at the sentencing stage of a criminal proceeding.

In order for parallel proceedings to be less of a barrier to the use of restorative practices for student discipline, it is critical to work together with the police¹⁰¹, while respecting the differing roles and responsibilities of educators and police. In Ontario, the Ministry of Education-mandated Police-School Board Protocol¹⁰² has already laid the foundation for a working relationship between schools and police divisions when dealing with youth. This Protocol could be built upon to increase collaboration between government agencies for using restorative practices when responding to incidents involving youth. Creating a more coordinated approach presents challenges of its own, and would not do away with the need for the existing separate school disciplinary and youth criminal justice systems. However, in appropriate cases, there is certainly the opportunity to reduce the number of parallel proceedings by having police and administrators collaborate on opportunities to resolve student discipline and *YCJA* matters through a single restorative conference that allows both an accused student and the victim to have meaningful participation in the process.

⁹⁸ *YCJA*, *supra* note 3 at s. 10.

⁹⁹ *Ibid.* at s. 10(2).

¹⁰⁰ 2010 *YCJA* Guide, *supra* note 94 at 35.

¹⁰¹ *Ibid.* at 30-31.

¹⁰² Provincial Model for a Local Police/School Board Protocol (Ontario Ministry of Education & Ministry of Public Safety and Security, 2003).

Conclusion

A restorative approach in response to student misconduct is a major philosophical shift that emphasizes a relational approach to justice, discipline and school communities. There is certainly room to use restorative practices more often in schools in response to student misconduct thanks to the Bill 212 amendments and PPM 145, which emphasize the goals of building respectful, healthy relationships in schools and meaningful consequences that are tailored to the individual student and provide learning opportunities rather than being merely punitive. Understanding the legal framework for student discipline and having a more nuanced understanding of how liability is determined can raise awareness of opportunities to use restorative practices at different points in the disciplinary process. The existing Police-School Board Protocol provides a good foundation for working with the police when student misconduct also results in contact with the police and/or charges under the *YCJA*. If police are aware that the school can facilitate a restorative process in appropriate cases, the police will have more options for exercising their discretion to use extrajudicial measures in response to an incident. Collaborating with the police when facilitating a restorative process is also a way to address the concerns about maintaining confidentiality of what is said at a restorative conference. And finally, while it is important to evaluate whether a restorative practice is appropriate in the circumstances, considering the priority of victim needs, the necessity for consent, potential power imbalances, and the seriousness of the incident among other factors, it is equally important not to pass up opportunities to use restorative practices in response to some incidents just because it may not be an appropriate approach to all incidents. The restorative practices philosophy and approach offer compelling options for administrators, schools and school boards to respond to the major shift in Ontario's student discipline regime created by Bill 212 and PPM 145.

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