

**IN THE MATTER OF: *The Registered Teachers Act, 2015*
and Michel André Joseph Levesque, registered teacher certificate # [REDACTED]**

**DECISION OF THE DISCIPLINE COMMITTEE FOR THE
SASKATCHEWAN PROFESSIONAL TEACHERS REGULATORY BOARD**

Counsel: Roger Lepage and Romain Baudemont
for the Professional Conduct Committee

Robert Kennedy, Q.C. and Rex Beaton
for Michel André Joseph Levesque

Darcia Schirr, Q.C.
for the Discipline Committee

Hearing Date and Location: November 29 and November 30, 2016
Regina, Saskatchewan

INTRODUCTION

1. By a Notice of Hearing and Formal Complaint (Formal Complaint) dated September 16, 2016, it was alleged that Michel André Joseph Levesque did on November 10, 2015 engage in professional misconduct as follows:

During Tech Class you forcefully threw a marker meant to strike an allegedly disruptive student sitting behind Student A. The marker struck Student A on the forehead above the right eye causing a cut and swelling. The incident caused loss of dignity and humiliated Student A.

2. For the reasons stated herein, the Discipline Committee of the Saskatchewan Professional Teachers Regulatory Board (SPTRB) finds misconduct.

FACTS

3. The basic facts are not in dispute. Mr. Levesque has been candid. In an undated reply to the Professional Conduct Committee he states as follows:

The grade 9 practical and applied arts class was about to begin its rotation working in the machine lab. I had just taken attendance and was attempting to review shop safety. All of the students except one were respectfully paying attention. I asked for the

inattentive student's attention repeatedly. The student continued to ignore me and turned his back on me. The student in question has demonstrated a pattern of inattention and disrespect during the course of the school year. I was seated at my desk in the front of the class.

After a number of unsuccessful attempts to secure the attention of the inattentive student and feeling rather stressed, I picked up a white board marker and tossed it in the direction, in order to get his attention not to injure him. I can assure you under normal circumstances I would simply walk over to the student and address the behaviour directly. However a recent foot injury made walking difficult, and I chose, unwisely, to obtain his attention so as to correct his behaviour in a manner which I now deeply regret. Throwing objects at students to gain their attention is certainly not a regular practice of mine.

The white board marker I threw made it only half way to the student in the back of the room when it struck a female student, [REDACTED] on the forehead above her right eye. . .

Shocked and distressed as to what had happened, I stopped class immediately and apologized to the student in front of the entire class. I also addressed the entire class of students to acknowledge that this was not an appropriate behaviour on my part. I asked [REDACTED] if she was okay but received no response. I noticed a welt above her right eye and immediately decided a cold compress was needed . . .

4. There is no dispute that Mr. Levesque threw a marker that struck a student and caused a minor injury. Counsel for the Professional Conduct Committee suggests this is professional misconduct. Counsel for Mr. Levesque suggests that the behaviour falls below the threshold of professional misconduct. The submissions of both counsel depend on a subtle interpretation of the facts.

- [REDACTED]
5. On November 10, 2015 [REDACTED] was in grade 9 who described herself as a serious student who maintained an 80% to 90% average. Mr. Levesque's tech class began with attendance and a safety orientation for the shop. The classroom in question has a typical layout. The teacher's desk is in the front of the room and there are two rows of three tables going back.

6. [REDACTED] described an incident early in the class involving two boys who were sitting at the first table directly in front of the teacher's desk. She states that Mr. Levesque sprayed them with water. Their table was wet and they chose to move back behind her table.
7. [REDACTED] testified that the two boys at the table behind her were talking and not paying attention. Mr. Levesque told them to stop, but could not get their attention. He threw a marker at one of the boys, but it missed its mark, and hit her above her right eye. In her description, he threw the marker overhand and "whipped" it across the room.
8. Photographs taken by her father within an hour of the incident show a red mark on her forehead that appears to be an abrasion. There is also some minor swelling around the abrasion. [REDACTED] said there was no bleeding from the site. Mr. Levesque approached her after the incident and said "This shouldn't have happened". He tried to render assistance in the form of a cold compress.
9. [REDACTED] gave evidence that she was upset by the incident. When Mr. Levesque was looking the other way, she left class and contacted a friend to meet her in the washroom. She then texted her father and asked for an immediate pick up.
10. [REDACTED]'s father picked her up before the end of the school day and took pictures of the injury. Soon thereafter [REDACTED] met her mother who drove her to the police station. She made a statement saying among other things, "The marker hit me hard in the forehead above my right eyebrow".
11. In examination-in-chief, she stated that Mr. Levesque looked distressed. On cross-examination, she said he appeared angry.
12. As previously stated, much turns on slight variations of facts. Counsel for Mr. Levesque systematically walked [REDACTED] through a series of written statements she gave to the police, the school administrator, the SPTRB and counsel for the Professional Conduct Committee. He questioned why there was a lack of reference to Mr. Levesque's state of mind or the force of the throw in many of the statements. In argument, he suggested that there was an escalation in the description of the incident over time.

13. Also on cross-examination, [REDACTED] was shown pictures of the classroom and a sketch diagram. The diagram showed that the distance from her table to the teacher's desk was 2.5 meters and the distance between the teacher's desk and the intended target was about 5 meters. [REDACTED] did not take issue with the diagram other than she recalled that the location of the teacher's desk was in the center of the room rather than off to the side. Little turns on this issue.

Mr. [REDACTED]

14. The Professional Conduct Committee next called [REDACTED]'s father to testify. As mentioned, he picked her up at school shortly after the incident and took photographs. He also testified that she looked shaken by the events.
15. In cross-examination, Mr. [REDACTED] was asked to relate his conversation with [REDACTED] especially as it related to the force of the throw. He said she did not use the word 'forcefully', although he could not recall her exact words. Later in cross-examination, he stated he did not recall [REDACTED] telling him how hard the throw was.

Mrs. [REDACTED]

16. Mrs. [REDACTED] is [REDACTED]'s mother. As stated, she met her daughter soon after the incident and drove her to the police station. She was then involved in contacting the school administrator, the superintendent and other school officials. She eventually made a public complaint to the SPTRB which is the subject matter of this hearing.
17. She confirmed that [REDACTED] was shaken by the incident and the nature of the injury. She also suggested that the injury was bleeding.
18. Mrs. [REDACTED] had an emotional response to the incident. In her statement to the SPTRB she states:

Mr. Levesque threw a marker at full excessive force at what has been described as a disruptive student that was sitting behind my daughter. The marker hit my daughter on the forehead just above the right eye creating a cut and an immediate goose egg.

19. Later in the statement, she suggested the action “promotes violence and violence against women”.

Mr. Levesque

20. Mr. Levesque was admitted as a registered teacher in 1996 and gave a brief history of teaching in various schools over the years. On November 10, 2015 Mr. Levesque was having a bad day. He describes waking up in the early morning hours with an allergic reaction to medication. He took antihistamines but had a very poor night’s sleep. He considered asking for a substitute teacher the following morning. Mr. Levesque also had foot pain that he initially thought was an injured achilles tendon. It was later diagnosed as gout. In fairness, Mr. Levesque did not suggest that these conditions excused his behaviour but they are repeated in this decision because they may provide context to his actions.
21. As previously stated, Mr. Levesque put photographs of the room and a sketch of the table layout and distances in evidence.
22. Mr. Levesque states that he tried to call the class to order. He recalls spilling water on the front desk although he does not recall how it happened. He certainly did not indicate that it was a malicious action. There was no further evidence as to this event and we are not convinced that it is relevant to his conduct that day.
23. He repeated that there were two students standing at the back table who did not heed his call to attention. He once again repeated that he picked up a white board marker but threw it with the intent to tap one of the boys on the back. It was not intended to injure.
24. He also gave evidence that he had previous disciplinary issues with this particular misbehaving individual throughout the semester.
25. Mr. Levesque gave evidence that he had a right shoulder injury that prohibited him from making a forceful overhand throw. He entered a copy of a letter dated September 26, 2011 from the [REDACTED] Medical Imaging and Woman’s Imaging Centre. It identifies an insertional tear of the supraspinatus.

26. He denies that he threw the marker overhand and gave evidence that he used a flipping motion because of the injury to his right shoulder. He denies he threw the marker hard but only used enough energy to get it as far as the student he was aiming at. He denies he was angry.
 27. Following the event, Mr. Levesque confirmed that he spoke with [REDACTED]. He states he apologized and offered her aid in the form of a cold compress. He was unable to offer further assistance because he did not have a telephone in the class room and could not leave the students unattended. Following the class, he walked the hall looking for [REDACTED].
 28. At the hearing, he expressed remorse for the incident.
 29. Following the complaint, there were various correspondences between the SPTRB and Mr. Levesque or his representatives. Some of this correspondence was put in evidence during examination in chief. In closing argument, Mr. Levesque's counsel made reference to the fairness of the investigation. Counsel invited the Discipline Committee to comment on the investigation but also agreed that the issue was not a factor in determining the disposition of the complaint. We decline to engage in an analysis of a collateral issue.
 30. On cross-examination, Mr. Levesque agreed that throwing the marker could cause an injury. He also explained that it was not his usual form of classroom management and gave examples of other appropriate management methods. On the day in question, he did not stand up and walk to the disruptive student because of foot pain. He stated that the action was light-hearted and not intended to injure.
- [REDACTED]
31. Mr. [REDACTED] is a superintendent with the [REDACTED]. By letter of December 1, 2015 he advised Mr. Levesque that a formal letter of reprimand would be placed on his personnel file in relation to this incident.

32. Mr. [REDACTED] also gave evidence as to his dealings with the parents and the school administration after the event. Neither counsel made any reference to this evidence in closing argument.

ISSUES

33. The only issue is whether Mr. Levesque's action as described herein constitutes professional misconduct, and if so, the appropriate disposition that the Discipline Committee should make.

LAW

The Registered Teachers Act

34. Section 33 of *The Registered Teachers Act* (the Act) states as follows:

33 Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, constitutes professional misconduct within the meaning of this Act if:

- (a) it is harmful to the best interests of students or other members of the public;
- (b) it tends to harm the standing of the profession;
- (c) it is a breach of this Act or the bylaws; or
- (d) it is a failure to comply with an order of the professional conduct committee, the discipline committee or the board of directors.

35. Regulatory Bylaw 2.01 defines misconduct. It reads as follows:

2.01 Without restricting the generality of section 33 of the Act, the following conduct on the part of a teacher is misconduct:

- (a) conduct which is harmful to the best interest of pupils or affects the ability of a teacher to teach;
- (b) any intentional act or omission designed to humiliate or cause distress or loss of dignity to any person in school or out of school which may include verbal or non-verbal behavior;

(c) physically abusive conduct which involves the application of physical force which is excessive or inappropriate in the circumstances to any person;

(d) sexually abusive conduct that violates a person's sexual integrity, whether consensual or not which includes sexual exploitation;

(e) an act or omission that, in the circumstances, would reasonably be regarded by the profession as disgraceful, dishonourable or unprofessional;

...

36. The Formal Complaint alleges that Mr. Levesque breached section 2.01(a), (b), (c) and (e) of the Regulatory Bylaws.

Standard of Proof

37. The Discipline Committee must weigh the evidence presented during the hearing and determine if the professional conduct committee has proven professional misconduct on a balance of probabilities. As the Supreme Court of Canada stated in *F.H. v McDougall*, [2008] 3 SCR 41:

Like the House of Lords I think it is time to say once and for all in Canada that there is only one civil standard of proof at common law and that is proof on a balance of probabilities.

38. The Discipline Committee is also conscious that professional regulation prosecutions are considered to be strict liability with broad standards of review. The Saskatchewan Court of Appeal in *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33 said at paragraph 62:

The definition in the *Act* is expansive, and conduct unbecoming may be established through intentional conduct, negligent conduct or total insensibility to the requirements of acceptable practice (as in professional incompetence). In the last two instances, where practitioners have been careless or merely incapable in some aspect, moral turpitude is not, typically speaking, a feature of the unacceptable behaviour. The section provides that the conduct in question need not be disgraceful or dishonourable to constitute conduct unbecoming. It is abundantly clear that moral turpitude is no longer an active requirement.

39. The Act also provides in section 4 that its overall purpose is the public interest. Section 4(2) states:

The objects of the regulatory board are to establish and administer the professional certification and the standards of professional conduct and competence of teachers for the purpose of serving and protecting the public interest.

40. The Discipline Committee's reading of the Act is that it provides a wide latitude in considering allegations of professional misconduct.

ANALYSIS

41. As mentioned, the basic facts are not in dispute. Counsel have drawn the Committee's attention to subtle differences in the evidence as to the placement of tables in the room, the location of students and more importantly, the force of the throw and the purpose of the throw.
42. Given the wording of the Formal Complaint, the Professional Conduct Committee must prove, on a balance of probabilities, that the marker was thrown forcefully. Much was made in argument as to this issue. There are two versions of the events. In one version, Mr. Levesque whipped the marker across the room. In another version, he tossed the marker across the room. Both descriptions may be honest but very subjective interpretations of the events. The Discipline Committee finds that neither subjective interpretation is completely accurate or reliable.
43. The Act gives teachers self-governing responsibility for professional conduct because it is recognized that professional judgment is an important element in determining misconduct. In this regard, context is very important.
44. The context in this case is that the teacher needed to regain control of a disruptive student through some form of correction. The Discipline Committee is of the view that throwing an object at a disruptive student is not appropriate classroom management. This finding is also in keeping with Mr. Levesque's statement wherein he acknowledges that, "I chose, unwisely, to obtain his attention so as to correct his behaviour in a manner which I now deeply regret. Throwing objects at students to gain their attention is certainly not

a regular practice of mine”. We also note that his actions led to a reprimand by school administration.

45. Although intent is not an issue, Mr. Levesque’s state of mind has relevance. He was having health issues and suffering from lack of sleep on the day in question. He admits to being stressed. [REDACTED] describes him as being angry.
46. Once again, there may be very subjective elements to both of these descriptors. The Discipline Committee finds that his mental state contributed to his error in classroom management. Perhaps not anger but clearly impatience.
47. Clearly an error in judgment is not necessarily professional misconduct. In this case we need not make a finding of fact whether the throwing of an object under all circumstances would constitute professional misconduct.
48. We now turn to the forcefulness of the throw. We prefer to determine if the throw was forceful from a negligence perspective as an objective question. This determination may depend on a number of factors including the weight of the object, the hardness of the object, the velocity of the object and the distance thrown. A throw is forceful if a reasonable person would foresee the force doing harm.
49. The Discipline Committee finds that a reasonable person could foresee precisely the type of injury that occurred to [REDACTED] when a hard marker is thrown five meters across the room. The Discipline Committee finds that in this context, a reasonable person would conclude the marker was thrown forcefully.
50. Demonstrably impatient behaviour, inappropriate classroom management techniques and the foreseeability of injury in combination constitute a marked departure from the norm and constitute professional misconduct.
51. The prefix to section 2.01 of the Regulatory Bylaws makes it clear that the conduct listed is not intended to completely define all instances of professional misconduct.
52. The Formal Complaint alleges that section 2.01(a) has been breached in that the conduct was harmful to the best interests of pupils or affects the ability of a teacher to teach. The

Discipline Committee agrees. The Discipline Committee also finds that it was an act that, in the circumstances, would be regarded by the profession as unprofessional.

53. The Discipline Committee does not find that it was an intentional act designed to humiliate nor that it was physically abusive conduct.

DISPOSITION

54. A disposition is perhaps the most difficult part of professional regulation. There are a myriad of principles to be considered. The Discipline Committee considered the following in this case:

- (a) the nature and gravity of the teacher's conduct;
- (b) the age and experience of the teacher;
- (c) the age of the student and the impact on the student;
- (d) the number of times the offence occurred;
- (e) whether the teacher suffered from other serious consequences;
- (f) the presence or absence of mitigating circumstances;
- (g) the need to promote specific or general deterrence;
- (h) the need to protect the public confidence in the profession;
- (i) the range of sentences in other jurisdictions.

55. The Discipline Committee had no hesitation finding that the conduct did not meet acceptable standards but that the nature and gravity of the conduct was at the lower end of the misconduct spectrum.

56. There are also some mitigating factors. The evidence does disclose that on the day in question, Mr. Levesque was suffering from health issues that may have clouded his

judgment. In addition, he immediately expressed regret to the student [REDACTED] Mr. Levesque was also disciplined by his employer for the conduct.

57. The evidence does not disclose a history of classroom mismanagement by Mr. Levesque.
58. Counsel for the Professional Conduct Committee provided two cases from the Ontario College of Teachers wherein a teacher was disciplined for throwing an object. As this is the first discipline decision by the SPTRB, there is a lack of immediate precedent to follow. Counsel agreed that the conduct in the Ontario cases was more serious than the present case. Counsel for the Professional Conduct Committee recommend several practice conditions and a reprimand.
59. Counsel for Mr. Levesque suggested that a reading of section 40(3)(b)(ii) of the Act contemplates the Discipline Committee can make a finding of misconduct without making an order. He suggests that no order was necessary because the conduct was at the lower end of the range.
60. Because there was no evidence of past misconduct and no ongoing concern for safety, practice conditions such as classroom management or increased supervision would not serve any purpose. In his testimony, Mr. Levesque also made it clear to the Discipline Committee that he was aware of other more appropriate measures. Mr. Levesque also satisfied the Discipline Committee, through the earnest nature in which he gave evidence, that he takes his teaching responsibilities seriously.
61. The Discipline Committee finds that this conduct requires some form of denunciation as general deterrence and to ensure public confidence in the profession. The Discipline Committee also finds that a reprimand is probably the lowest form of order available and in keeping with the gravity of the issue. It therefore orders that a reprimand be placed on Mr. Levesque's registration pursuant to section 40(1)(e) of the Act.
62. Section 40(2)(a)(ii) of the Act permits the Discipline Committee to impose costs of the investigation and hearing on a registered teacher. The Professional Conduct Committee provided an Affidavit claiming costs of \$54,288.76.

63. The Discipline Committee has considered the following principles:
- (a) Whether the costs are so significant to be punitive;
 - (b) Whether the costs would prevent a member from raising legitimate defences;
 - (c) The member's financial status;
 - (d) The degree of success; and
 - (e) The efficient conduct of the hearing.
64. Counsel for the Professional Conduct Committee submitted that the costs increased significantly because the teacher suggested that the fairness of the investigation was in issue. It complicated and prolonged the proceedings and was not part of the final determination. We agree with this assessment.
65. By letter dated November 16, 2016, teacher's counsel wrote: "The discipline committee will be asked to dismiss the complaint because of the inherent unfairness of the process". It is clear from the material filed that counsel for the Professional Conduct Committee took this issue very seriously. As a result of the position taken by Mr. Levesque's counsel, a case management conference call was held on November 14, 2016 involving counsel for the teacher, the Professional Conduct Committee and the Discipline Committee.
66. Counsel for Mr. Levesque spoke to the fact that this was the first discipline hearing before the SPTRB and there was a need for both Mr. Levesque and the Saskatchewan Teachers Federation to represent all teachers in dealing with new and unique issues under the legislation and Bylaws. We also agree that this first discipline hearing is precedent setting and have afforded the teacher significant discretion in advancing issues.
67. We also take into account that Mr. Levesque is not actively teaching at present.
68. In the future it is hoped that a relatively straight-forward matter such as this can be expeditiously resolved without the need for costly discipline proceedings.

69. The Discipline Committee is of the view that the costs of this case are needlessly high and that the teacher bears some responsibility for these costs. The Discipline Committee will fix costs in the amount of \$10,000.00 which is acknowledged to be only twenty percent of the actual costs but also a substantial burden for Mr. Levesque. The costs shall be paid within 30 days of this decision. Failing payment, Mr. Levesque's teacher's certificate shall be suspended pursuant to section 40(2)(b) of the Act.

DATED at Regina, Saskatchewan, this 10th day of January, 2017.



Thomas Schonhoffer, Chair
Robin Bellamy
Jacqueline Bouck
Yasmina Lemieux

DISSENTING OPINION

70. I have reviewed the decision of the majority and agree with all aspects of it with the exception of the imposition of a costs order in the amount of \$10,000.00. In reviewing the principles that Discipline Committees ought to consider when making a costs order, it is my view that even 20% of the actual costs incurred is excessive and punitive. Although we did not hear evidence as to Mr. Levesque's financial situation, I can as a registered teacher take notice of Mr. Levesque's pay scale based on his teaching experience.
71. Further and although Mr. Levesque did not seek to have the Discipline Committee dismiss the Formal Complaint because of an unfair investigation, there was miscommunication throughout the process between the Board and the Saskatchewan

Teacher's Federation, Mr. Levesque's representative. Matters became unnecessarily complicated and the costs much higher than necessary in this straight-forward matter.

72. In my view, an order of costs in the amount of \$1,000.00 is more appropriate, fair and reasonable in this case.

DATED at ~~Saskatoon~~, Saskatchewan, this 9th day of January, 2017.


Candace Elliott-Jensen