LEGAL ISSUES IN EDUCATION

Guest Editor:
Justice Marvin Zuker

Ontario Institute for Studies in Education
of the University of Toronto
Orbit publishes four theme issues per volume on topics of concern and relevance for teachers and administrators working in schools and school systems, from junior kindergarten to the end of high school.

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Special thanks to the student photographers in Robert Jong’s class at Louis St. Laurent School, Edmonton Catholic School District, whose photo credits are acknowledged throughout this issue.
Trapped people found a moment to pick up their cell phones or swipe a credit card through the phone on the back of their airplane seat to make one last call. That Tuesday morning, September 11, 2001, an uncounted number of humans knowingly turned their faces toward death, and as they did so pressed the talk button on their cell phones.

To quote Ralph Waldo Emerson: “To leave the world a bit better, whether by a healthy child, a garden patch, or a redeemed social condition; to know that even one life has breathed easier because you have lived that is to have succeeded.” The Bridge of San Luis Rey is the bridge of love, the only survival to life, the only meaning.

Since September 11, so many teachers and educators have guided children through times of fear and uncertainty. Imparting subject matter is only a small part of what teachers do.

Education law is a dynamic, invigorating, and intellectually stimulating discipline because it is constantly evolving to meet the needs of today’s schools. The merits of its decisions aside, one has only to read recent Supreme Court decisions in such areas as the role of the teacher, searches in schools, school funding, and so on.

In light of these cases, among others, principals and administrators are charged with the task of developing and implementing policies that will enhance the school environment for students, teachers, and staff.

Perhaps the only constant in education law is that it evolves to meet the demands of a constantly changing world. It will always remain of utmost importance for all of us who are interested in children. In fact, the seemingly endless proliferation of new statutes, regulations, case law, and ministry memoranda speak of the need to be ever vigilant of how legal documents impact on education. The challenge for all educators, then, is to harness this knowledge in this ever-growing field so that we can all make our schools better places for all children.

Surely there is a direct connection between social justice and criminal justice? Making streets safer has as much to do with literacy as it does with law, with the strength of families as with the length of sentences, with early intervention as with mandatory supervision. Crime prevention means recognizing connections between the crime rate and the unemployment rate, between how a child behaves at school and whether that child has had a hot meal that day.

Changes to our schools shouldn’t be driven by myths or, for that matter, by attempts at fiscal restraint masquerading as educational reform. Improvements must be based on principles that have to do with the kind of education we want for our children. If we begin to treat education as a commodity or a product, as opposed to a process, we run the risk of losing control over our own future. The responsibility for educating our young people is a collective responsibility. We all have an interest, and a say, in seeing that our schools reflect our society’s values.

Some of the most destructive violence does not break bones, it breaks minds. Children may be malleable but they are not resilient. If adolescents are deemed inadequate, how do we know when the indictment is true and when we really need to address this crisis? The pattern of adult convictions does not compute. If every generation were so superior to the next, we could find a nation of demigods living not too far back in time. Yet although a golden age never existed, adults continually...
marshal statistics to confirm their disappointment in the young.

Values and motivation are at the core of educational achievement. Kids do well in school when their internal value system encourages achievement, when their parents demand it, and when their peers reinforce it.

Education is very different from health care and other professionally based relationships. The most important event is not what the teacher does in the classroom. It is what the student does outside the classroom. To expect our classroom teachers to lead and motivate to the extent that they overcome the social forces outside our schools is naive at the least. How can you teach someone who is hungry? How can you teach when nothing is ever good enough? There are human faces behind every test score—faces of students, teachers, and administrators.

Our childhood makes us what we are. Our hurts and our happiness. Our loves and our hates. Our successes and our failures. All of our childhood experiences are woven into the fabric of our adult character. If hate gets out of hand for children at home, it often is fuelled later by hate groups, or sometimes fanned by their anti-hate counterparts. No matter what the hatred gets out of control, it generally is traceable to childhood. Bigotry and hate. Love and tolerance. If parents can teach their children the importance of the difference, they can make a bigger difference than all of our laws.

The inequalities imposed on children by their home, neighbourhood, and peer environment are carried along to become the inequalities with which they confront in adult life after school ends. Money does not buy educational achievement. Kids do well in school when their internal value system encourages achievement, when their parents demand it, and when their peers reinforce it.

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The inequalities imposed on children by their home, neighbourhood, and peer environment are carried along to become the inequalities with which they confront in adult life after school ends. Money does not buy educational quality. Although the premise of many a crusading volume, including Kozol’s Savage Inequalities, is that ghetto schools have been allowed to rot, school spending in itself is not necessarily correlated with school achievement.

The success of our Russian, Italian, and Irish immigrants almost a century ago, and many Asian immigrants today, makes it plain that the issue has less to do with poverty as such than with culture, with conscious values as well as unconscious behaviour. Kenneth Clark first popularized the phrase “the pathology of the ghetto,” in Dark Ghetto, published in 1965. Clark wrote about how “the stigma of racial inferiority” leads to self-destructive behaviour, including violence, alcohol and drug abuse, family breakdown, and every social pathology, save suicide. But Clark understood this damage as emotional and psychological, not cognitive. Clark did not reckon with the cognitive harm done to children who grow up in a world without books or stimulating games, whose natural curiosity is regularly squashed, and who are isolated from the world beyond their neighbourhood.

As trust in traditional authorities decline, we are increasingly turning to law to regulate the kinds of behaviour that used to be governed by manners and mores. In schools, in workplaces, in churches and in politics, our interactions are increasingly conducted in the shadows of legalese. We are becoming a nation of separate, resentful, legalized selves. Many of the authors in this issue present the adversarial nature of our society and components of our educational system that have given rise to a proliferation of legal issues.

As traditional authorities find themselves under siege, citizens increasingly turn to laws and legalisms to resolve their social and political disputes. But when courts actually take sides in those disputes, they find their own legitimacy challenged by the losers, who disagree too violently with the rulings to accept them with good grace. As a result, the one branch of government that society trusts to exercise its authority loses its authority the more that it tries to exert itself.

The message I have heard from so many teachers is that children today come with more emotional baggage than ever before, and we do not have the preparation, training, or time to deal with such issues. Teaching and shaping the minds of young people has always been a demanding and exhausting job. It can be exhilarating, but when children with more complex needs are put into larger schools with larger classes, teachers feel overworked, overstressed, and burned out. Students react by becoming apathetic, unmotivated, and unsuccessful. Teachers today not only teach, but also act as counsellors, social workers, administrators, and marketing directors, bringing in everything from art therapy to conflict resolution and anger management programs.

More than a quarter century ago, a young Canadian Justice Minister, Pierre Elliott Trudeau, coined the phrase “the just society.” He used the phrase, not as a description, but as a dream—a dream of what Canada could become. Canada: the just society. He had a dream of a new Canada with its own Constitution that would entrench rights and freedoms for all Canadians. He achieved that dream in 1982 when our Constitution was patriated and our Charter of Rights and Freedoms was proclaimed.

The Canadian Charter of Rights and Freedoms prohibits discrimination and provides students with guaranteed rights. The Charter guarantees certain fundamental rights and freedoms to all Canadians. The Charter applies to government action and government actors. A broad definition of ‘government’ is used to include all bodies that act as government agents in carrying out functions or policies. The Charter of course applies to provincial educational legislation and to school boards.

The Charter has changed the delivery of education in many ways. First, it gives parents a

Surely there is a direct connection between social justice and criminal justice? Making streets safer has as much to do with literacy as it does with law.
The tragedy of September 11 may in the long run help us to nurture the best in all, to rekindle civic engagement, to connect each more fully with family, friends, and neighbours, and to put our children first, a Ministry of the Child.

tool for challenging school board decisions. Before the Charter, parents were restricted to administrative law remedies that dealt mainly with procedural irregularities. The Charter is national in scope, unlike provincial education and human rights statutes. Since the Charter is the supreme law and applies to all Canadians, decisions of the Supreme Court of Canada are binding on all provinces, and subsequently on school boards. If, for example, a case involving the religious rights of a student arises in Ontario and is decided by the Supreme Court of Canada, it may dictate how students are to be treated elsewhere. Our authors approach and review many of these cases.

The rights revolution began before the Charter and the Charter can be seen in some sense as its product or logical result. The Supreme Court’s increased importance in Canadian national life is a direct result of the proliferation of rights, and its consequent tendency to turn all conflicts of interests into conflicts of rights susceptible to judicial interpretation and adjudication.

Education is a shared responsibility and a shared accountability. To many if not most of the participants of the recent Toronto District School Board Future Search Conference, parental commitment and involvement are critical to student success, especially in the early grades.

The legal issues in education that our outstanding contributors address reflect all of our stakeholders, and all of the constituent elements required to come together to work collaboratively. But parents hold the mutual responsibility for ensuring the importance of education and supporting their child’s efforts to succeed.

An effective accountability system must recognize the role of the larger community in ensuring student success. Without family literacy support services, without tutors and mentors, without after-school and weekend enrichment and recreational programs, without daycare and pre-school services, we may never provide healthy relationships and environments conducive to reducing school misconduct and crime and the ability to foster a real sense of belonging.

When all is said and done, attachment to family and school are protective factors. Commitment to school will reduce our number one concern, which seems to be a lack of discipline and a lack of respect. We have seen the enemy. We must not allow it to become us. The tragedy of September 11 may in the long run help us to nurture the best in all, to rekindle civic engagement, to connect each more fully with family, friends, and neighbours, and to put our children first, a Ministry of the Child.

It is time to choose to be a hero in your own family and community.

Marvin Zuker is a Justice of the Ontario Court of Justice. He sits in Family Court in Toronto. He is an Associate Professor in the Department of Theory and Policy Studies at OISE/UT and is the author and co-author of several books including Canadian Women and the Law and The Law Is Not for Women with June Callwood and Education Law with Anthony Brown. Justice Zuker is a member of several editorial boards and writes frequently on law-related issues in education.
A New Era of Education Litigation

Why Educators Need to Know the Law

Legislation Is Increasing
“Teenager Sues School Teacher; $250,000 Sought as Accused Awaits Fate”1

“Groton School Declines Comment on Lawsuit—Former Student Alleges Sex Assaults”72

“Students Accuse High School of Censoring Yearbook, Sue District”3

“Ex-Student Sues State in Rapes at Deaf School”9

“SJC Rules School’s Search of Student Was Not Legal”75

“Ex-Coach Joining School Lawsuit—Student Claims Officials Ignored Sexual Abuse”76

“Honors Student’s Suit Against Putnam School Officials Tossed”77

“Ex-Chapman Students Sue Law School”8

“Students Balk at Being Searched for Guns—A Los Angeles Case Involving A School’s Procedures May Clarify Lawsuits Nationwide”99

“Star Former Teacher Sued by Victim of Advances—Sexually Abused Female Student Also Sues School”10

“Teacher Wants $1.7m for Bullying”11

“Twisted Lawsuit Targets Board; Fallout From Teen’s Essay”12

These headlines were gleaned from just a few months of newspapers, and of course there were many more. The subjects are as diverse as the numbers are great—religion, homosexuality, Internet use and abuse, censorship, violence, discrimination, curriculum, negligence, malpractice, and on and on. As these headlines suggest, the number of lawsuits against schools is increasing dramatically. In 1960, the education law reporters published some 300 suits with schools named as parties; in 1970, it was about 700; and by 1989, it was over 1800. The amount of legislation and regulation affecting schools is increasing at an equally striking pace.

Knowledge of the law will ...
✓ Give you the ability to respond to new legislation
✓ Allow you to be proactive
✓ Recognize your share of decision-making

Sarah E. Redfield

2 8/10/01 Boston Globe B.2, 2001 WL 3948858.
3 8/10/01 San Diego Union &Trib. A.5, 2001 WL 6481455.
4 8/17/01 Portland Oregonian B02, 2001 WL 3611389.
6 7/19/01 Daily Oklahoman 3A, 2001 WL 24250907.
8 7/1/01 L.A. Times B1, 2001 WL 2499962.
12 The Ottawa Sun, April 26, 2001 Thursday, Final Edition, News, Pg. 3.
We are educators in denial?

Inevitably, more and more educators find themselves involved in the leading legal concerns of our day. So too, more and more lawyers find themselves needing to understand the reality of school life as they become involved in legislating and litigating about such issues. If educators know more about the law (and for that matter if lawyers know more about schools), more informed decisions would be made in this arena, the dialogue would surely be improved, and the situation in schools would be made easier. Law-informed educators and leaders will be in a position to better avoid or minimize conflict and costly litigation.

Many legal and education experts have written for years about the importance of educating teachers and other educators about the law. Surveys show that educators themselves recognize the need to learn more about school law. Yet, many education schools offer only sporadic ed. law courses, often only one. (The Franklin Pierce Law Center’s Education Law Institute is the notable exception to this.) Why is there a dearth of law education for educators? Could it be that educators and those who form their curriculums are in denial about the law? So much easier to think that all educators have roots deep in our values system that need to be recognized. Educators are responsible for more than teaching. And law defines why educators need to learn the law. The answer has at least four parts.

Four Reasons to Know the Law

1. Knowing the law—especially its procedural aspects—allows educators to incorporate societal values about fairness and due process in their institutions. The classic U.S. Supreme Court opinion in Goss v. Lopez held that before a student could be suspended from school for more than ten days, he or she had to be given notice of the reasons for the suspension and an opportunity to respond. This opinion set the minimum standard for fair

principles. Consider, for example, civil rights and liberties including free speech rights of students and teachers, due process rights for notice and opportunity for hearing before students are expelled or teachers fired, rights to be protected from discrimination and harassment based on race or gender or ethnicity or religion. Indeed, consider the right to an education, including the unique statutory right to a free appropriate public education for special needs students. There are also the protective statutes such as mandatory reporting requirements (e.g., for abuse), or the more recent efforts to protect children online. And there are the ever-increasing accountability measures illustrated by the new push toward mandatory assessment.

The preceding list is itself only an abbreviated one. These obligations to create a learning environment consistent with constitutional and statutory mandates form an important part of the teacher and administrators obligations. Even in its shortened form, such a list defines why educators need to learn the law.

2. More and more educators and leaders will be in a position to protect children online. And there are the ever-increasing accountability measures illustrated by the new push toward mandatory assessment.

3. The reality of school life as they become

educators and leaders will be in a position to push toward mandatory assessment.

4. Inevitably, more and more educators find themselves involved in legislating and litigating about such issues. If educators know more about the law (and for that matter if lawyers know more about schools), more informed decisions would be made in this arena, the dialogue would surely be improved, and the situation in schools would be made easier. Law-informed educators and leaders will be in a position to better avoid or minimize conflict and costly litigation.

But given this reality, it is of course inevitable. Indeed, there are important issues at the core of our society where law has played and must continue to play a role—representation of the unrepresented and other issues of social justice for example. But given this reality, it is of course also true that the vast majority of educators did not go to law school. Indeed, they didn’t and don’t want to go to law school. While they don’t need to go to law school, it seems inescapable that they need some grounding in the field and some method for staying current with the relevant law.
process for school discipline. In defining terms, the Supreme Court thus did in Goss what the Supreme Court does best—that is, set a standard for constitutional principles to be incorporated into society, in this case into schools. Similarly, the Supreme Court opinions have set the societal standard for searching in schools. In New Jersey v. T.L.O., the U.S. Supreme Court held that for a search of a student to be upheld it must be reasonable at its inception and justified in its scope. And in Tinker v. Des Moines Community School District, the Court similarly set the societal parameters for student freedom of speech recognizing that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and holding that the prohibition of wearing black armbands to protest the Vietnam war was unconstitutional “without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline.”

Schools should be teaching and exemplifying these important values, and for them to do so well requires that those involved with the schools be informed of the leading court cases of the day.

2. **Knowing the law helps educators act reasonably and preventively.** This allows schools to avoid costly conflict and litigation. For just one example, a principal who knows the law about sex discrimination will know that the standard for imposing liability for peer-to-peer sexual harassment requires that the complaining student show that the school acted with deliberate indifference. Knowing the deliberate indifference standard, the administrator can address potential problems by putting in place an adequate reporting and investigating system to avoid situations where such problems will be ignored. Since the liability will lie only where there is “deliberate indifference,” a reasonable, preventive, pre-existing system for review and response can put the administrator in a position avoiding liability.

3. **Knowing the law allows educators to limit their liability under the typical immunity doctrines.** The liability standard is well illustrated by a famous U.S. case settled in 1997 for just under a million dollars. The case involved a student, Jamie Nabozny, who sued his school district and several individual employees for what can only be described as a long pattern of egregious treatment, which Nabozny alleged was based on his sexual orientation and gender. The Seventh Circuit Court of Appeals, in reviewing the case before it was settled, set the standard for liability as whether the defendants knew or should have known at the time that their actions violated the student’s legal and constitutional rights. If they knew or should have known, they faced liability; otherwise they would be immune. But how many educators would have known the state of the law on discrimination and harassment? Where would they have learned the law? Had they actually known (as opposed to should have known) at the time, would the administrators in Nabozny have put in place a sex-neutral system for complaints of harassment?

In our currently-litigious society, it is impossible to completely avoid being sued, but it is possible to act carefully to limit the number of suits or the grounds for litigation, and to enhance your chance for winning in court. For example, the Nabozny administrators might have acted differently. Similarly, administrators who know the law about due process for suspending or expelling a student, or who know the law about school searches, can, by following the correct procedures, vastly limit their potential liability. A law-informed educator or administrator will put in place appropriate procedural protections.

4. **We do not want only lawyers as our “gatekeepers” for legislative and legal school policy.** As the Education Commission for the States has observed, it is crucial that educators at all levels understand the process by which law and regulations are enacted so that their voices can be heard and influential as school issues are considered and defined.

**How Much Law?**

So, how much law should an educator know? Enough to assure that our educational institutions are reflecting society’s core decisions on constitutional rights. Enough to anticipate legal problems and avoid them by preventive action, or if not avoid them, at least know when to call for legal counsel early in the dispute. Enough to consider legal implications in policy-setting and to participate fully in the legislative and administrative process. At least, educators should demand and take that one course, preferably one that is a relatively in-depth survey of basic principles. Beyond this, they would be well served with another course that deals with the civil rights issues, and perhaps a third that deals with the legislative and administrative system. Educators also need to have access to conferences and seminars to keep current on legal developments.

When educators know the basics they will be both better educators and better clients, and our schools and children will be the better for it.
The Charter of Rights and Freedoms

The Case of School Censorship

A Complex Web of Competing Rights

Two years ago, I was asked to co-author a chapter on censorship in schools for a book entitled Interpreting Censorship in Canada. I assumed the task would be simple. It soon became evident school censorship involves a complex web of competing rights. I discovered educators face difficult dilemmas when selecting “appropriate” educational resources due to the fine line between selection and censorship. Censorship involves power relationships and decisions that prevent access to content deemed harmful. Selection suggests professionally informed decisions to include or exclude information for educational purposes. Selection becomes censorship when arbitrary decisions ignore consequences to all stakeholders and decision-makers fail to investigate actual versus perceived harm.

Historically, parents have exerted the most vocal pressure on school officials to protect their children from exposure to harmful influences. Concern about witchcraft and wizardry fuelled a recent controversy regarding use of the popular Harry Potter children’s books in Ontario classrooms. Harry is simply one example in the long history of school disputes about books perceived objectionable by one segment of the population and valued for their merit by another. Well-known literary works: Laurence’s The Diviners; Salinger’s Catcher in the Rye; Valgaardson’s Gentle Sinners; and Shakespeare’s Hamlet have all raised parental objections to their use in schools.

In censorship conflicts, one side or the other is always forced to compromise the values it seeks to protect.

In censorship conflicts, one side or the other is always forced to compromise the values it seeks to protect. Often the “winners” are parents or interest groups who apply the greater political pressure or whose position is more closely aligned with the personal consciences of the educational officials empowered to authorize the materials. A group of Alberta parents once held a school principal hostage until he agreed to remove the Impressions series from his Grade 4 classroom. Parents, however, are not the only ones that influence censorship in schools. Teachers and principals often engage in censorship to avoid controversy or loss of jobs.

The Surrey Case

The Surrey case contains all the complex elements of censorship. It illustrates the difficulties of responding to competing demands by polarized parent groups. The books were on a resource list introduced by Gay and Lesbian Educators of British Columbia (GALE) supported by the British Columbia

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2 Ibid.
CENSORSHIP IS ALWAYS ABOUT POWER

✓ In a public school system that caters to a diverse society, disagreements surface regarding information perceived to be controversial, age-inappropriate, or morally harmful to children.

✓ At the heart of any censorship debate in the educational context are two key concerns: the educational value of the resources, and justification for selection or censorship of those resources.

✓ The key dilemmas are about who ought to decide what children learn; what kinds of literature negatively impact moral development, and whether schools are mandated to teach values.

✓ Ultimately, the debate involves justification to protect the rights of certain stakeholders at the expense of others.

✓ Censorship is always about power. Power also influences decisions to curtail student creative expression, raising difficult questions on limits of free expression.

dren. The Surrey School Board (SSB) succumbed to pressure from these parents and arbitrarily banned the books, culminating in one of the few school censorship cases to go before a Canadian court.

Chamberlain and colleagues commenced action in the British Columbia Supreme Court on grounds that:

✓ the SSB had acted ultra-vires the BC School Act;

✓ the ban resulted in discrimination under Section 2(b) (freedom of expression) and Section 15 (equality) of the Charter.

The SSB and religious parents responded that:

✓ the books would infringe their Section 2(a) Charter right to freedom of religion and conscience.

Justice Saunders ruled the trustees gave too much weight to the religious concerns of one group of parents. Section 76 (2) School Act directs the “highest morality will be inculcated” but Section 76 (1) requires “All schools must be conducted on strictly secular and non-sectarian principles.” She quashed the resolution that banned the books and asked the trustees to reconsider their decision. The SSB appealed on the grounds Justice Saunders incorrectly interpreted Section 76. The Court of Appeal overruled her decision on the basis the religious parent group was entitled, in a free and democratic society, to participate in the decision regarding the books, and that secular schools do not preclude input by people of religious faiths into moral decisions about school matters. The ban was reinstated in Surrey kindergarten classrooms and the books allowed only in school libraries. Chamberlain and his supporters have appealed the decision to the Supreme Court of Canada. The high court has agreed to hear the appeal.

It is ironic that neither the lower court nor appeal court directly confronted the Charter issues initially raised at trial. The legal arguments included challenges by the Petitioners that the fundamental equality rights of same-sex parents, their children, and gay and lesbian teachers were infringed by the ban. They explained that although sexual orientation is not explicitly mentioned as a guaranteed right under Section 15 of the Charter, recent court cases such as Egan v. Canada and Vriend v. AG Alberta have established sexual orientation as an analogous ground, warranting protection under Section 15. Affidavits asserted children of same-sex parents feel stigmatized and isolated during discussions of family groupings because their families are not validated. Moreover, same-sex parents cannot freely exercise their parental prerogative and have fewer schooling options outside of the public school system than heterosexual or religious parents who are easily accepted at traditional or denominational private schools. This imposes an undue burden on same-sex parents and their children not imposed on others and impairs their equality rights to a greater degree. Furthermore, the Petitioners argued the rights guaranteed under section 2(a) and (b) of the Charter include the right not only to freedom of religion, but to freedom from religion and students’ rights for free expression.

The SSB and religious parents threatened to withdraw their children from class if the books were introduced, and claimed their children would feel stigmatized and their equality rights would be infringed. They also asserted their Section 2(a) rights to freedom of religion and conscience.

1 British Columbia School Act, R.S.B.C. 1996, ch. 412 (the “School Act”)
2 Above note, at p.45.
Charter Arguments

Clearly, the courts can no longer avoid these issues by deferring to educational expertise. There is now a significant body of law resulting from Charter cases in which judiciary did not hesitate to scrutinize the substance of school policies if they infringed Charter rights. It is hoped the Supreme Court of Canada will specifically address the Charter arguments in context of Section 15 (equality), Section 2(b) of freedom of expression, and Section 2(a) freedom of religion and conscience. If infringement of those rights is established at law, justifications for the ban advanced by the SSB can then be adjudicated to assess whether they are “reasonably justified in a free and democratic society” under Section 1. Based on the famous Oakes test, the court ought to ask: Are the objectives of the ban (to protect children from perceived moral harm and confusion) so pressing and substantial that they outweigh the equality rights of marginalized students who remain stigmatized and vulnerable to violence from homophobia? Does the ban minimally impair the equality and freedom of expression rights of same-sex parents, children, and teachers? Which stakeholders suffer undue burden or hardship as a result of the ban? Are the means employed to implement the ban justified and do they respect the rights of the greatest number of stakeholders and violate the fewest?

In terms of students’ rights to free expression under the Charter, the following case may provide guidance if it reaches the courts. Last fall, an Ontario boy was incessantly bullied by peers, read out a fictional story he had written for his drama class assignment. His story, entitled Twisted, depicted a bullied student who places explosives in the school. School authorities had him arrested and imprisoned without bail for four weeks, based on his fictional essay, and rumours that he uttered death threats in conversations following the reading of the essay in class. The charges against him were dismissed in September. Shortly after his arrest, Professor Mackay made some interesting observations regarding the implications of the school’s handling of his case:

“There is now a significant body of law resulting from Charter cases in which the judiciary did not hesitate to scrutinize the substance of school policies if they infringed Charter rights.”

“...If in fact this student faces charges due to the content of a story written for a class assignment, The implications of this case are serious and far reaching. The Charter right to freedom of expression, regardless of content, is compromised. The right of students to freedom of expression will be further put into question. This is not to diminish the importance of safe schools and the growing problem of violence.” (p.8)

Canadian authors Margaret Atwood and Robert Munsch protested the arrest. They argued his freedom of expression under section 2(b) of the Charter was infringed. Furthermore, the arrest and detention suggest infringement of his rights under Section 9 of the Charter. The student has reportedly commenced civil action against the school board and school administrators for failing to protect him from the bullying, which he argues fuelled the violent nature of his story. This case raises serious concerns regarding not only the school’s failure to protect the student from violence, but also the message conveyed to all students regarding acceptability of creative expression through non-violent means. Censorship of the story ironically implies violent means may be preferred over creative expression depicting violence. As MacKay observes, although schools are sometimes thought of as a “marketplace of ideas” in reality this may

THE SURREY CASE

James Chamberlain, a gay kindergarten teacher, applied to his school board to have some books approved for use during discussions of family groupings. The books were on a resource list introduced by the Gay and Lesbian Educators of British Columbia and supported by the British Columbia Teachers’ Federation to help address homophobia and violence in schools.

A vocal group of largely religious parents objected on grounds that the books were age-inappropriate and morally harmful. They argued gay teachers would inculcate or indoctrinate homosexual values in their children.

In the ensuing court case, Justice Saunders ruled the trustees gave too much weight to the religious concerns of one group of parents. Section 76 (2) School Act directs the “highest morality will be inculcated” but Section 76 (1) requires “All schools must be conducted on strictly secular and non-sectarian principles.”

The board appealed on the grounds Justice Saunders incorrectly interpreted Section 76. The Court of Appeal overruled her decision on the basis the religious parent group was entitled, in a free and democratic society, to participate in the decision regarding the books, and that secular schools do not preclude input by people of religious faiths into moral decisions about school matters.

The ban was reinstated in Surrey kindergarten classrooms and the books allowed only in school libraries.

Chamberlain and his supporters appealed the decision to the Supreme Court of Canada, which has agreed to hear the appeal in late summer.
When schools attempt to control curriculum content and curtail student creativity through censorship instead of openly debating controversial issues, they compromise student rights and stunt educational growth.

simply mean a “marketplace of acceptable ideas” (p. 8), depending upon which aspects of education society values—those of control and discipline, or those of free expression. If Charter challenges are also raised, the case will have important implications for school policies on violence and censorship in schools. The decision will rest on whether the school’s action and concerns were sufficiently pressing and substantial to justify overriding the student’s fundamental freedom of expression, liberty, and equality rights.

Conclusion

When schools attempt to control curriculum content and curtail student creativity through censorship instead of openly debating controversial issues, they compromise student rights and stunt educational growth. Suspicious or sensitive content does not justify censorship. Censorship simply maintains powerful and interlocking systems of oppression such as homophobia, racism, ableism, and sexism that perpetuate violence against vulnerable and marginalized students. Therefore, it is of crucial importance that our high court establish guidelines for a reasonable standard regarding freedom of expression in Canadian schools.

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The Leading Student
Case Law in the United States

Most Important Decisions to Date

One way to obtain a macro view of the case law developments in the United States is to select and review the most important court decisions to date. Inasmuch as students are central to the education enterprise and, thus, to school litigation, this article focuses on the “top” student court decisions.

This selection is limited to Supreme Court decisions directly in K–12 education. For purposes of comparison, the final choices are listed chronologically in two groups: the top four cases or case clusters concerning students generally and, based on their recent relative growth, the corresponding four specific to students with disabilities.

Concerning Students Generally

The traditional view was that courts should defer to the decisions of public school authorities, with particular abstention for academic issues. Thus, the Supreme Court’s case law within the context of elementary and secondary education was negligible in the 19th and for most of the first half of the 20th Century. Although the Supreme Court provided a harbinger of the modern era of case law in the early 1940s with West Virginia State Board of Education v. Barnette, which changed the direction in favor of students with respect to the flag-salute ceremonies in public schools, the most visible major signal for the shift to the new era of education litigation was in the mid-1950s.

1. BROWN V. BOARD OF EDUCATION AND ITS CONTINUING PROGENY

Generally recognized as the father of student litigation in the United States and representing another of its rare reversals, Brown I made clear that de jure segregation violated the equal protection clause of the U.S. Constitution’s Fourteenth Amendment, ruling that separate schools deprive minority children of equal educational opportunities, even though the physical facilities and other tangible factors may be equal. In Brown II the Court remanded the case back to the trial level for desegregation “with all deliberate speed.” The resulting long line of Supreme Court decisions illustrated the conscience-like role and limited power of...
The Leading Rulings

U.S. case law, although not legally binding in Canada, nevertheless may be followed or referred to in Canada.

Concerning Students Generally
1. Separate schools deprive minority children of equal educational opportunities (Brown v. Board of Education).
2. School officials may not censure student speech unless it poses a “substantial disruption” of school operations (Tinker v. Des Moines Independent Community School District).
3. For suspensions of up to and including ten school days, school officials must provide at least oral notice of the charges and, if the student protests, an explanation of the evidence and an opportunity for the student to tell his or her side of the story (Goss v. Lopez).
4. The Fourth Amendment applies to searches of students (New Jersey v. T.L.O).

Concerning Special Education Students
1. The Court defines the primary meaning of “appropriate” placement for special education students (Board of Education v. Rowley).
2. The Court rules that clean intermittent catheterization needed by the plaintiff-student to access her special education program is an obligation of the defendant-district (Irving Independent School District v. Tatrothe).
3. The Court establishes a two-part test for tuition reimbursement in the wake of a unilateral placement (School Committee of Burlington v. Department of Education).
4. The Court rules that the only exception for excluding an eligible student for more than ten consecutive days is based on dangerousness to self or others (Honig v. Doe).

The judiciary in effectuating social and school reform.

2. Tinker v. Des Moines Independent Community School District® and Its Relatively Recent Counterparts

Whereas Brown signaled the student-friendly shift for minority student in the mid-1950s, the full change in direction for students more generally was not until the end of the 1960s in Tinker. In this much-heralded decision, the High Court ruled that, based on First Amendment freedom of expression, school officials may not censure student speech unless it poses a “substantial disruption” of school operations. In its famous dictum, the Court cryptically signaled the two successive pendulum shifts, one sweeping away from deference in the message that “[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate” and the other providing for a subsequent counter-movement with the clarification that such constitutional rights must be adjusted to fit the “special characteristics of the school environment.”

Marking the return shift to the traditional approach of deference to school authorities, the Supreme Court, approximately two decades later, in Bethel School District v. Fraser and Hazelwood School District v. Kuhlmeier respectively ruled that neither disciplining a student for a lewd nominating speech at a high school assembly nor censoring student expression in a school newspaper violated the First Amendment just as long as such actions were reasonably related to legitimate educational interests, such as values inculcation. The new standard that harmonized this pair of decisions and effectively compartmentalized Tinker was “school-sponsored” student expressive activity. However, two intervening decisions more broadly demarcated the pendulum swing in student litigation.

3. Goss v. Lopez

First, in the mid-1970s, Goss marked the high water mark of students’ constitutional rights. Specifically, relying on the Fourteenth Amendment’s due process clause, the Goss Court held that for suspensions of up to and including ten school days, school officials must provide at least oral notice of the charges and, if the student protests, an explanation of the evidence and an opportunity for the student to tell his or her side of the story. In dicta, the Court warned that longer suspensions may require more formal procedures in terms of notice and a hearing. The High Court did not revisit this issue for general education students, but the lower courts have spelled out the Fourteenth Amendment procedural protection applicable to suspensions and expulsions, with the interpretation and application favoring public school officials in recent years.

4. New Jersey v. T.L.O. and Its More Recent Refinement

Second, serving as a major turning point in student rights cases under the Constitution, T.L.O. established that although the Fourth Amendment applies to searches of students, 1) public school authorities only need reasonable suspicion, rather than the higher standard of probable cause, to initiate such searches, and 2) reasonableness determines the scope of such searches based on the objectives of the search, the age and gender of the student, and the nature of the infraction.

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11 391 U.S. at 506.  
12 Id.  
16 However, Ingham v. Wright, 410 U.S. 651 (1977) illustrated the corresponding boundary in terms of “constitutionalizing” school discipline.  
Completing this swing less than a decade late, the High Court in 1995, as summarized below, the High Court concluded that student drug-testing on a “suspicionless,” i.e., without the reasonable suspicion being individualized, basis, did not violate the Fourth Amendment.

Special Education Students

Although the Supreme Court’s student jurisprudence included various other constitutional and statutory decisions that merit attention,20 much of this litigation is either too broad, such as the church-state case law, or too narrow, such as the gender-based liability litigation, to square with the boundaries of general education students. However, a relatively recent and continuing line of High Court case law provides the leading edge of a wave of decisions specific to students with disabilities and in contrast with the broad pendulum-trend of general education case law. The basis of these decisions is the Individuals with Disabilities Education Act (IDEA), originally passed in 1975 under the title the Education of the All Handicapped Children’s Act.21

1. BOARD OF EDUCATION V. ROWLEY22

Representing the landmark decision, Rowley interpreted the meaning of the statutory entitlement of a “free appropriate public education” under the IDEA, originally passed in 1975 under the title the Education of All Handicapped Children’s Act.21

2. IRVING INDEPENDENT SCHOOL DISTRICT V. TATO24 AND ITS RECENT COROLLARY25

Two years after Rowley, the Supreme Court interpreted the “medical services” requirement within the statutory definition of “related services,” which is a component of the FAPE obligation. Specifically, the Court ruled that clean intermittent catheterization, which the plaintiff-student needed to access her special education program, was not within the Act’s exclusion for medical services and, thus, was an obligation of the defendant-district.

More recently, in Cedar Rapids Community School District v. Garret F.,26 the Court ruled that constant, specialized nursing services, where necessary for access by an eligible student, is also a related, not medical, service. In doing so, the Court made clear the more general bright-line standard that medical services in this statutory context are only those services that must be performed by a physician.

3. SCHOOL COMMITTEE OF BURLINGTON V. DEPARTMENT OF EDUCATION27 AND ITS PARTNER28

One year after Tatro, the Court in Burlington interpreted the intersecting IDEA provisions for providing FAPE; keeping the child in the pendent, or stay-put, placement; and awarding appropriate relief. Specifically, the Court established a two-part test for tuition reimbursement in the wake of a unilateral placement: 1) whether the school district’s proposed placement, pursuant to the IEP, was appropriate; and 2) whether the parents’ private placement was appropriate.

More recently, in Florence County School District v. Carter,29 the Court clarified that the standards for parents at the second step are less stringent than the first-step standards for districts. For districts to avoid the significant financial burden, absent a change in the language of the IDEA, districts need only conform to the IDEA’s mandate to provide an appropriate placement in the first place.

4. HONIG V. DOE30

Paving the way for the discipline-related adjustments of the 1997 IDEA Amendments, this most recent Supreme Court ruling concerning students with disabilities addressed whether the IDEA’s explicit mandate that students with disabilities remain “stay-put” in their current educational placement upon the filing for a due process hearing and until completion of the review proceedings implicitly allowed an exception for excluding an eligible student for more than ten consecutive days based on dangerousness.
The Court’s answer, based on the IDEA’s accompanying authorization for appropriate judicial relief was that the only such exception, other than a mutual agreement between the district and parents, was a preliminary injunction from a court based on a judicial finding that the student was substantially likely to injure self or others.

**Conclusion**

This brief selection and comparison of the top four Supreme Court case-based concepts in the general education and special education contexts, respectively, suggests that the federal judiciary in the United States started with and has moved back toward a deference to public school authorities in Constitution-based student cases, while steering a much more narrow course in relation to pertinent federal legislation. These contrasting patterns are accentuated by:

1. the U.S. Constitution’s durable and flexible framework, which provides for cryptic individual protections, such as freedom of expression, and otherwise leaves education as a reserved power of the states; and

2. Congress’s specific and elaborate fine-tuning, which has been particularly pronounced in relation to students with disabilities.

Of course, there are notable exceptions at the Supreme Court level and the lower federal courts, state authorities and courts, and both federal and state administrative agencies provide for a much more complex pattern for modern education law. Nevertheless, the overall message for policy makers and practitioners is to import the United States penchant for “hyperlexis” with extreme caution...
Teachers, Trust, and the Law

The Matter of Sexual Misconduct

Dimensions of Teacher-Student Trust

Society trusts teachers to be both guardians and purveyors of knowledge, truth, and virtue—this is the abstract idea behind the seriousness of breach of trust by educators. Though never far from the moral guardianship idea, trust also transcends this dimension.

There is a political or administrative aspect to trust in education: social institutions depend on public trust for their viability, and misconduct by their agents (teachers in this case) brings the institutions themselves and the levels of government responsible for them into disrepute.

And there are also pedagogical and managerial dimensions: teachers who prove untrustworthy cannot operate effectively in the classroom, suffering a loss of credibility regarding both the content of their message and their right to enjoin the student to pay attention.

The last dimension of trust I want to mention is perhaps the most important because it is the most visceral, dealing as it does with the idea of children’s individual vulnerability. Society collectively, and parents individually, entrust children to the safeguarding of teachers in terms of both their psychic and physical well-being. This has all to do with the authority and power relationship between, on the broadest level, the state and individual citizens, and, on the most particular, an individual teacher and his or her student. The importance of this dimension of trust is exacerbated by the fact that up to age 16 children are, by some interpretations, captives of the state. Under this variation of social contract theory, it seems intuitively fair for students (and their parents) to expect a high level of trustworthiness in the teachers with whom they are legally required to associate.

A Matrix of Laws and Rules

A truly astounding range of laws and rules enforceable by law exists to reinforce the centrality of trust in the teacher’s role. A teacher accused of sexual misconduct can face one or all of the following: criminal prosecution, civil litigation in tort and breach of fiduciary duty, professional discipline, employment discipline, and a human rights complaint. And when it comes to civil litigation, it is common, if not invariable, that a claim will also be made against the teacher’s employing board sounding in negligence, vicarious liability, breach of fiduciary duty, or all three.

Institutional liability for breach of trust (fiduciary duty) will be discussed below. Though a related concept, vicarious liability of school boards for teacher sexual misconduct, is a complex topic of its own, about which I have written elsewhere (Dickinson, 2000 a,b), and I don’t propose to deal with it here except in passing.

We are indebted to these words of Plato, written some 2,300 years ago, for the idea of social guardianship: that some among us need to be trusted to display moral leadership. This perhaps earliest characterization of teachers as moral exemplars suggests our modern understanding—a role well-known to judges, if not actually articulated by provincial legislation.
The case of R. v. Audet, decided by the Supreme Court of Canada in 1996, has become a classic example of the judicial characterization of the trust inherent in the teacher-student relationship, even outside of school.

Criminal Prosecution

Some of the Criminal Code provisions dealing with sexual offences evidence the centrality of the notion of trust. The most glaring is section 153 which makes it an offence for a “person who is in a position of trust or authority towards a young person [14 – 17 years old inclusive] or who is a person with whom the young person is in a relationship of dependency” to sexually exploit that relationship. Also telling is that the Code provides that “consent” is no defence to this offence and to some others dealing with vulnerable victims and the exploitation of trust and authority (s. 150.1(1), 265(3)(d)).

The case of R. v. Audet, decided by the Supreme Court of Canada in 1996, has become a classic example of the judicial characterization of the trust inherent in the teacher-student relationship, even outside of school. Audet, a 22 year old male teacher was charged under section 153(1) of the Criminal Code with touching a young person (a 14 year old female student he had taught the previous year in Grade 8) for a sexual purpose. The incident, which involved oral sex initiated by the accused, occurred during the summer holidays at a cottage where the accused and the complainant had gone after a chance encounter at a night spot.

The important legal issue before the court was whether there was a relationship of trust or authority between Audet and the complainant given the conduct had occurred during the summer break when Audet was technically not her teacher. Commenting a year later on his judgment in Audet, Justice La Forest wrote that although teachers are not always, as a matter of law, in a position of trust with their students, “they will be in the vast majority of cases”; in fact, “no evidence [is] required to prove that the role of teachers in society places them in a direct position of trust and authority towards their students” and it “is only in exceptional circumstances . . . that this will not be the case” (La Forest, 1997, p.132-3). In other words, a trust and authority relationship can be presumed from teachers’ social role.

In Audet, the Court also had to consider whether there needed to be proof of exploitation of this relationship. Such exploitation was necessary to negate the consent that the defence argued the victim had given to the sexual activity. The Court nixed this argument, pointing out that consent can never be a defence to section 153 (La Forest, 1997, p.132). That is, as a matter of law, children 14 to 17 inclusive cannot consent to this kind of conduct by a person in a position of trust. Why? Because Parliament has said so. Why? Because the notion of “trust” in the victim-vulnerability sense, discussed above, is simply too powerful a social norm to permit it.

Civil Litigation

Assault and Battery

Teachers are sued civilly for damages all the time. Most of the time—certainly historically—these suits are framed in tort, specifically in negligence, alleging careless supervision that caused physical injury. However, civil suits framed in battery for sexual misconduct have become common. Such civil action typically is postponed until the resolution of any related criminal charges. Upon the finding of guilt beyond a reasonable doubt in criminal court, it is usually pointless to contest civil liability for the same conduct in a trial where the lesser standard of proof on a balance of probability applies. Precluded in some criminal charges, as we saw above, consent is an available defence in civil cases, although it is a difficult defence to mount in cases of assault and battery where a trust and power relationship is involved because of the inequality of bargaining power between the parties and the domination and influence often brought to bear on the victim. Nevertheless Grace and Vella (2000) discuss a number of cases in which the defence of consent was successfully raised despite the existence of trust-power relationships. Mere inequality of bargaining power may not be sufficient to negate consent; evidence of actual
duress, unconscionability, or exploitation may also be required (Grace & Vella, 2000, p. 143). It seems, however, that courts have been far less willing to accept consent as a defence to the newest type of civil claim for sexual misconduct—breach of fiduciary duty.

**Breach of Fiduciary Duty**

Although breach of fiduciary duty is still in its early stages (Grace & Vella, 2000, p. 59) as a modern theory of recovery, its conceptual origins are traceable to the early 18th century British case of *Keech v. Sanford* (1726), in which a trustee of a lease who renewed the lease for his own benefit was called to account for the profits. The public policy principle that developed out of this case and subsequent ones was that trustees should be accountable to the courts to act in the best interest of beneficiaries and should not be in a conflict of interest. The concept gradually was extended to relationships not involving property trusts but where trust and confidence were common features (La Forest, 1997, pp. 121–22), such as banker-customer, doctor-patient, and solicitor-client. Until a couple of decades ago, the relationships said to be fiduciary comprised a closed set. The courts have begun, however, to hold that there are many other relationships beyond the traditional ones whose attributes merit recognition. The trick, of course, was to develop a principled way of identifying them.

In *Frame v. Smith* (1987) Justice Wilson of the Supreme Court of Canada developed a “rough and ready guide,” still used by the courts, that considers the scope for the exercise of discretion or power unilaterally so as to affect the legal or practical interests of a beneficiary who is peculiarly vulnerable or at the mercy of the fiduciary (La Forest, 1997, p. 123). Subsequently the Supreme Court extended the approach by establishing two categories of fiduciary relationships termed “presumptive” and “case by case.” The first category includes relationships that, by dint of the inherent presence of discretion, influence, and vulnerability, will be deemed fiduciary unless a party introduces sufficient evidence to prove otherwise. Grace and Vella (2000) point out that teacher-student and parent-child relationships have been held to fall into this category as does Justice La Forest (1997), who states that since “discretion, influence and vulnerability are inherent in the teacher-student dynamic . . . there is a rebuttable presumption that teachers owe a fiduciary obligation to their students” (p. 125).

What then are the core duties owed by fiduciaries? They include a strict duty to act in the best interests of the beneficiary, and to act loyally and honestly avoiding conflicts of interest (Grace & Vella, 2000, p. 61). The best interests of a beneficiary extend beyond pecuniary ones and include health (physical and mental) and safety.

Grace and Vella (2000) point out that courts have found breaches of fiduciary duty arising from sexual assaults by parents, doctors, psychologists, psychotherapists, and clergy, among others. They argue that consulting criminal cases, including *Audet*, suggests success for a plaintiff suing a teacher for breach of fiduciary duty. They have been proven correct by recent cases that have included successful claims for fiduciary breach. For example, in an Alberta case, *SGI v. Goezline* (2001), the defendant’s liability for breach of fiduciary duty for acts of sexual assault against a student he had coached was not disputed (Keel & Tymochenko, 2001a, p.19), although a similar claim against the school board itself was, as discussed below.

**Fiduciary Breach by School Boards**

It has become more and more commonplace for sexual assault suits to include a claim alleging breach of fiduciary duty by the institution that employed the person who committed the abusive acts. It is important to understand that this form of liability is distinct from both an employer’s vicarious liability for the wrongful acts of an employee done within the scope of employment, and an employer’s liability for negligent acts or omissions that caused injury.

The courts have yet to settle the question of whether the breach of institutional fiduciary

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**KEY POINTS**

- A teacher accused of sexual misconduct can face one or all of the following: criminal prosecution, civil litigation, professional discipline, employment discipline, and a human rights complaint.
- Section 153 of the Criminal Code makes it an offence for a “person who is in a position of trust or authority towards a young person [14–17 years old inclusive] or who is a person with whom the young person is in a relationship of dependency” to sexually exploit that relationship. Consent can never be a defence to section 153 because the notion of “trust” in the victim-vulnerability sense is too powerful a social norm to permit it.
- Civil suits framed in battery for sexual misconduct have become common. Consent is an available defence in civil suits, but a difficult defence to mount because of the inequality of bargaining power between the parties and the domination and influence often brought to bear on the victim.
- The newest type of civil claim for sexual misconduct—breach of fiduciary duty—is based in the principle that trustees should act in the best interest of beneficiaries and should not be in conflict of interest. This concept has gradually extended to other relationships where trust and confidence are common features, such as banker-customer, doctor-patient, solicitor-client, and teacher-student. The courts have found breaches of fiduciary duty arising from sexual assaults by parents, doctors, psychologists, psychotherapists, clergy—and teachers.
- In cases of sexual misconduct by teachers and other school employees, the institutional target of breach claims is the school board. Attempts to extend liability to school boards for breach of their own fiduciary duty to students have had mixed success.
duty is a form of strict liability, or one requiring proof of fault in the form of either simple negligence or dishonest or intentionally disloyal conduct by the institutional entity itself. Grace and Vella (2000) report that attempts to extend liability to institutions for breach of their own fiduciary duty have had “mixed success” (p. 64).

In cases of sexual misconduct by teachers and other school employees, the institutional target of fiduciary breach claims is, of course, the school board itself. Two recent cases suggest that while courts seem willing to find that school boards owe a fiduciary duty to pupils based on their statutory and common law authority and power over them, and the trust, dependency and vulnerability inherent in their relationship with students, they will not easily find that an institutional breach of that duty has occurred.

In G. (E.D.) v. Hammer (2001), a B.C. case involving a school janitor who had sexually abused a student, the Court of Appeal characterized the relationship between the school board and the student as fiduciary because the statutory and common law duties and powers of school boards demonstrated inherent power and influence over vulnerable, trusting, and dependent students in whose best interests the school boards are expected to act (Keel & Tymchenko, 2001, p. 20). The Court refused, however, to find a breach of that duty in the absence of evidence of the board’s having exploited the trust relationship for its own personal advantage through dishonest or intentionally disloyal conduct. In the following passage, adopted from A. (C.) v. Critchley (1998), the Court leaves the strong impression that it disapproves of plaintiffs’ attempts to widen the catchment of breach of trust to include no-fault or strict liability:

“This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. In effect, this redirects fiduciary law back towards where it was before this experiment began.” (Quoted in Keel & Tymchenko, 2001b, p. 18)

Ontario’s Education Act, s. 264(1)(c), requires teachers to inculcate by precept and example respect for a daunting array of traditional Judaeo-Christian virtues, including others, industry, frugality, purity, temperance and respect for the law.

The other recent case reaching similar conclusions is Gorsline (2001), discussed above. The Alberta Court of Queen’s Bench concurred with the Hammer court’s reasons for finding that school boards owe a fiduciary duty to students. And, like the BC Court of Appeal, the Alberta court required evidence of actual wrongdoing on the part of the board before it would find the duty had been breached. In this case, given the absence of evidence proving negligence by the board, there could be no finding that the board breached either its duty of care in tort or its fiduciary duty. The court also rejected the plaintiff’s claim that the board was liable for breach of a non-delegable fiduciary duty. Since the duty could not be delegated, so the argument went, the board could not escape responsibility when one of its agents acted contrary to that duty.

This was also argued and rejected in Hammer, although accepted by a dissenting judge in that case. The legal reasoning related to this line of argument is intricate to say the least, and tied to some difficult and contentious theories regarding vicarious liability. So I will not wade into that swamp here. Suffice it to say that both the Hammer and Gorsline courts appear to have rejected the arguments relating to vicarious liability and breach of fiduciary duty and breach of non-delegable fiduciary duty based on a compelling dislike of the idea of visiting strict (no-fault) liability on the boards for the conduct in question.

Conclusion

I have spent most of the time talking about breach of trust in the sense that I described as the “particular” sense: the fiduciary duty owed by teachers and boards to individual students to act in their best interests in terms of their health and safety. As I said, the individual trust relationship between teacher and student is the more visceral and immediate dimension of trust in education.

But the other sense of trust—the wider one where the trust relationship is between the teacher and society at large represented by local and provincial governments—is just as real and important in the eyes of the law. The idea of teachers as social or moral guardians is represented in both statute and case law. For example, Ontario’s Education Act, s. 264(1)(c), requires teachers to inculcate by precept and example respect for a daunting array of traditional Judaeo-Christian virtues, including among others, industry, frugality, purity, temperance and respect for the law. An archaic “lame duck” legal provision one might have thought in the age of the Charter but one need only consult recent arbitration and court rulings, such as Toronto (City) Board of Education v. O.S.S.T.F. District 15, a 1997 Supreme Court of Canada ruling, to be convinced that, blunt instrument or not, it is alive and well and underpinning judicial sentiment concerning the teacher’s role as moral exemplar, even outside of school hours. The section was used in that case to illustrate that teachers’ off-duty conduct is subject to scrutiny “based on the teacher’s special position of trust.” This scrutiny is required by both “the vulnerability of students and the need for public confidence in the education system” (La Forest, 1997, p. 135 quoting Toronto (City) Board of Education, 1997, p. 403).

Teachers are very much defined legally by their position. The importance of their role as the social “medium” for knowledge and basic moral values (no matter how ill-defined) as well as custodians of children’s health and safety, carries with it the necessity for a deep trust.
This trust is legally embodied in duties to both safeguard and protect the individual interests of students as well as preserve public respect and faith in the education system. Breach of trust as a means of enforcing teachers’ duties seems so far to have added little beyond attaching significantly more opprobrium and an aggravating flavour to teacher misconduct. Breach of fiduciary duty, however, may hold promise for plaintiffs who hitherto have not met with much success in holding boards indirectly responsible for teachers’ sexual misconduct.

We will have to wait and see.

References


Keech v. Sandford (1726), Sel. Cas. Ch. 61, 25 R. R. 223.


Duties and Responsibilities of Teaching

The idea of duty of care, based in Common Law, is also emphasized in the statutory duties for teachers outlined in the Acts and Regulations that govern teaching. Ontario’s Education Act and its attendant regulations specify the responsibilities that a teacher must undertake. In the realm of assuring student safety, each teacher under section 264 of the Education Act has the duty “to teach diligently and faithfully the classes or subjects assigned to the teacher and principal,” “to maintain, under the direction of the principal, proper order and discipline in the teacher’s classroom and while on duty in the school and on the school ground.”

Regulation 298, Section 20 further defines duties of the teacher regarding student safety and well-being. The teacher shall “be responsible for effective instruction, training and evaluation of the progress of the pupils in the subjects assigned to the teacher and for the management of the class or classes, and report to the principal the progress of pupils on request,” “carry out the supervisory duties and instructional program assigned to the teacher by the principal and supply such information related thereto as the principal may require,” “ensure that all reasonable safety procedures are carried out in courses and activities for which the teacher is responsible,” “co-operate with the principal and other teachers to establish and maintain consistent disciplinary practices in the school.”

The principal of the school is also charged with certain duties to safeguard students’ welfare. In the Education Act, section 265, the principal, in addition to his/her duties as a teacher, is “to maintain proper order and discipline,” “to give assiduous attention to the health and comfort of the pupils, … to the care of all teaching materials and other school property, and to the condition and appearance of the school buildings and grounds.”

Regulation 298 section 11 outlines that the principal has responsibility for “the instruction and the discipline of pupils in the school” and “the organization and management of the school.” Further, “… in addition to the duties under the Act and those assigned by the board, the principal of a school shall … provide for the supervision of pupils during the period of time during each school day when the school

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Am I liable? Was I negligent?

How do I know if I’m negligent?

The standard of care that is expected of a teacher is first that of a careful and prudent parent.

Parents empower teachers to work with their children, and teachers, on being assigned to work with children, assume a duty of care. This special student-teacher relationship finds its basis in Common Law which clearly establishes that there is a duty of care that teachers owe to their students. Teachers are to be attentive and careful in situations where students are involved to ensure that students are not exposed to any unnecessary risk of harm. This duty of care is imposed on teachers because of the distinctive character of their work.

This article explores “the prudent parent standard” which also governs the Acts and Regulations of the teaching profession. Citing examples from case law, the author acknowledges that the prudent parent model is no guarantee that accidents will not happen but not adhering to the standard will compromise students’ safety and well-being, and teachers, principals, and school boards may be found liable.

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1 Yogis, J. A. (1990). Canadian Law Dictionary (2nd Edition). Toronto: Barrons, p. 44. Common Law has been explained by John Yogis as a “system of jurisprudence … that is based on judicial precedent rather than legislative enactment;… Common Law depends for its authority upon the recognition given by the courts to principles, customs and rules of conduct previously existing among the people. It is now recorded in the law reports that embody the decisions of the judges together with the reasons they assigned for their decisions.”
The idea of duty of care is based in Common Law but it is also emphasized in the statutory duties for teachers outlined in the Acts and Regulations that govern education.

Traditionally the in loco parentis privilege allows teachers to act in the place of the parent for the purpose of educating the child.

In determining if there has been a violation of the standard of care the Courts have ruled, over the years, on what is expected of the teacher: what would a firm, kind, and judicious parent do in similar circumstances?

The standard of care is not the same in every case. It depends on the number of students being supervised; the nature of the activity in progress; the age and degree of skill the students may have developed; the nature and condition of the equipment in use; the competency of the students involved; and other factors ranging from student dress at the time of the incident to lighting.

KEY POINTS

To what degree is a teacher in compliance with these? And if a teacher is not adhering to the statutes, the Court has, over the years, ruled on what is expected of a teacher: what would a firm, kind, and judicious parent do in similar circumstances?

The standard of care is not the same in every case. It depends on the number of students being supervised; the nature of the activity in progress; the age and degree of skill the students may have developed; the nature and condition of the equipment in use; the competency of the students involved; and other factors ranging from student dress at the time of the incident to lighting.

In addition to the regulations, the Court has, over the years, ruled on what is expected of a teacher...

...the court master was bound to take such care of his boys as a careful father would take of his boys, and there could be not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way.4

In this case, the Court found that the schoolmaster had not acted as a careful father and found him negligent, even though the schoolmaster had locked the chemical away and the boy had taken the key in a surreptitious manner.

CASE TWO:

“THE FACTORS AFFECTING THE STANDARD OF CARE”

In Myers v. the Peel County Board of Education5 in 1981, a 15-year-old boy broke his neck in attempting his dismount from gymnastic rings. The teacher was not in the room where the student was practising his routine and, at the time of the accident, there were better quality gym mats that could have been used.

4 Ibid., at 42.
...not adhering to the standard of care and observing the duties will guarantee that the safety and well-being of students are compromised.

than those under the rings. Mr. Justice McIntyre of the Supreme Court of Canada explained the careful or prudent parent model as follows:

“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. 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...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 the 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.”

The standard of care, Mr. Justice McIntyre concluded, is not the same in every case and depends upon the following:

a. The number of students being supervised at any given time: It stands to reason that the more students that are in the activity, the less direct supervision each individual student will receive. Thus, adequate supervision must be provided.

b. The nature of the exercise or activity in progress: If the activity is judged to be dangerous or could cause harm to the student, then attentive supervision and progressive and precise instruction are required.

c. The age and the degree of skill and training which the students may have received in connection with such activity: The younger the students are, the more supervision, training, and direct instruction are required.

d. The nature and condition of the equipment in use at the time: If the equipment is in poor condition and/or unsuitable for the activity, the greater is the likelihood of injury.

e. The competency and capacity of the students involved: If the students do not understand what is expected of them, the greater is the risk of harm and injury.

f. A host of other matters which may be widely varied: Other factors could include student dress, attentiveness of the student to the activity, lighting, health of the student, etc.

In addition, Mr. Justice McIntyre chastised the teacher for not having “anticipated reckless behaviour from at least some of the boys” since these were high school students who were given to work their gymnastic routines without spotters and tended to act carelessly at times. In this case, foreseeability that an accident may happen demanded greater caution on the part of the teacher and the school authorities. However, the fact that students participate in higher risk activities is not a breach of the standard of care of itself.

CASE THREE: “UNFORESEEABLE DANGERS”

Working in chemistry laboratories can also be fraught with danger as the next scenario outlines. During a science class, one 15-year-old student sprayed another student with an acid. In this case, Crouch v. Essex County Council, the Court found: that it was not foreseeable that the student would intentionally squirt another student with the acid since the teacher had explained the hazards of using chemicals; that the deportment of the students was generally appropriate; and that the teacher’s classroom management was appropriate. The teacher had anticipated that an accident could happen and took all reasonable measures to ensure that it would not, but could not predict the action of the offending student.

Conclusions

Given the number of children in schools and the nature of children to be active, there are many opportunities for accidents, even with close supervision. These accidents range from very minor to the worst case scenario. Maintaining the careful and prudent parent model and diligently exercising the duties of a teacher or principal cannot guarantee that nothing will happen. It should be emphasized that not adhering to the standard of care and observing the duties of a teacher will increase the likelihood that the safety and well-being of students is compromised.

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6 Ibid., at 279.
7 Ibid., at 282.
8 Ibid., at 282.
Managing Medication in Schools

Duty and Standard of Care in Ordinary Circumstances

The trend to request schools to manage medication is attributable to a number of factors. First, medical advances have allowed children who have various health conditions to remain in or return to regular classes provided they receive their medication.\(^1\) Second, shifts in societal attitudes have moved toward accepting the integration of special needs students into regular streams. Third, more students are taking medication, such as Ritalin or Dexedrin, to control hyperactivity or hyperkinesis, and often require dosages during a school day.\(^2\) Fourth, a growing awareness and appreciation of human rights issues has impressed upon educators their obligation to accommodate individuals with handicaps.\(^3\)

It is generally accepted that the Ontario Education Act and related statutory provisions impose an obligation on school administrators to assist in or manage medical treatment where doing so is in the best interests of the student, is reasonable, and can be carried out with no training or special skills.\(^4\) There does not appear to be any prohibition on the delegation of this task by principals to teachers, or even non-teaching personnel, such as a school secretary. In special circumstances, where the administration of medical treatment is not commonly assumed by ordinary lay persons, training should be afforded to the individuals who will be responsible for supervising the student.

Duty and Standard of Care in an Emergency

The Common Law generally provides that there is no general civil duty to render assistance to others in danger. A person who attempts in good faith to assist someone in peril exposes himself or herself to potential civil liability if the attempt is bungled, whereas the person who stands idly by without lifting a finger incurs no liability.

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3. W.F. Foster, supra note 2 at 176.
4. E.M. Roher & S.A. Wormwell, supra note 1 at 155.
5. This paper has been adapted from E.M. Roher & S.A. Wormwell, An Educator’s Guide to the Role of the Principal (Aurora: Canada Law Book Inc., 2000), at 153–171.
The general principle which encourages passive inaction does not apply to the special relations between a school and its students.

Our courts have held that a person who makes a reasonable decision as to a course of action in an emergency will not be treated as having acted negligently if the course of action ultimately turns out to be wrong. All that is necessary is that the decision was not unreasonable, having regard to the particular circumstances of the case. There is no absolute standard of care, but rather the standard of care varies according to the circumstances and the risk involved.

In all likelihood, the general principle which encourages passive inaction does not apply to the special relations between a school and its students. Canadian courts have held that a school has a special responsibility toward its students which, it is suggested, imports an additional obligation to engage in positive action for the students’ benefit.7

In Common Law, the standard of care which a teacher is expected to show towards a child under his or her charge is such care as would be exercised by a reasonably careful or prudent parent. In providing emergency medical treatment, a teacher or other school board employee should first make a determination that an emergency in fact exists and that immediate emergency care is necessary.

In emergency situations, the issue of consent becomes important. An emergency may necessitate immediate medical action either by the supervising teacher or on his or her authorization. Acquiring parental consent in these circumstances may be impractical, if not impossible. In Common Law, an individual under the age of 18 can consent to his or her own medical treatment. As a basic rule, unless there is contrary evidence, the law presumes that a person is legally and mentally capable of giving consent. Whether a student can consent depends on the individual in question, his or her mental ability, and the treatment or procedure which the individual is asked to understand.

In an emergency, the teacher should talk to the student and find out what type of medication, if any, the student takes or what is required for treatment. If the student is mentally capable of consenting to the administration of medication, the student’s consent should be obtained. On the other hand, if the student is not mentally capable of providing consent (i.e., does not understand or is unconscious) it is not necessary to obtain consent from the student.8

### School Policy and Procedure

At the beginning of each school year, registration forms sent home to parents should request that the parents provide information about relevant medical conditions their children may have, as well as any limitations on their activities and treatment required. With respect to the administration of prescribed medication, it is suggested that a written authorization be provided to the school with clear instructions from the student’s physician. The physician should specify the name of the medication, the reason for its use, and the method of administration.

As indicated above, school administrators are under an obligation to assist in or manage medical treatment where doing so is in the best interests of the student, is reasonable, and can be carried out with no special training or skills. The following factors should be considered in each case to determine whether this test is met:

- the type of medication
- the availability of qualified staff members to administer the medication
- the degree to which the administering or management of medication interferes with the normal duties of staff members
- the timing and locale of the administration of medication
- the method of administration
- potential risks associated with the management of a student’s medication
- the seriousness of the student’s condition
- It is ultimately the principal’s responsibility to determine whether medication manage-

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7 E.M. Roher & S.A. Wormwell, supra note 1 at 160.
8 E.M. Roher & J.J. Morris, supra note 3 at 2.
ment is appropriate in the circumstances. The principal will be in the best position to decide whether school resources should be used to assist the student in receiving a certain medical treatment. Provided the principal receives adequate information, a balancing of all relevant criteria must be undertaken in order to reach a determination about the reasonable course of action.

**Requiring School Personnel to Administer Medication**

In most schools, there will likely be more than one student who must receive medication during the school day. This fact, combined with the myriad of other duties a principal must attend to, demands that the principal delegate the responsibility of administering care and medication to other members of the staff. For many, including various teachers’ associations, the question of whether teachers and other school staff can be required to participate in the administration of medication and other care to students remains.

Applicable education-related legislation in each province prescribes certain duties for teachers. For instance, the Ontario Education Act requires that teachers “maintain, under the direction of the principal, proper order and discipline in the teacher’s classroom or while on duty in the school and on the school ground.”

The legislation is worded in such a general way that the reasonable delegation of various non-teaching activities is contemplated. Additionally, the legislation of many provinces provides that teachers must also undertake duties assigned to them, in addition to the listed statutory duties.

Unless the administering of medication or medical care is specifically listed in the legislation, or as a duty in the teaching contract or collective agreement of a particular staff member, any requirement to undertake such activities must form an implied obligation of the employment relationship. The issue of which activities may form implied duties of a teacher’s contract has been considered by the Canadian courts. In these decisions, there has not been any finding of law which prevents the delegation of administering medication or care to teachers. However, the assignment must be fair and reasonable in the circumstances, and further the principal duties to which a teacher is expressly committed.

Generally speaking, the administration of medication in schools is in furtherance of the education of the students who require the service. Many of these students could not attend classes but for receiving medication during school hours. For the most part, the manner of administering medication does not make unreasonable demands of the designated staff member. The method is usually administering oral medication which can be done simply and quickly. Only where the manner of administration becomes overly complex, risky or lengthy would this assignment likely be considered unreasonable.

**Managing Students with Diabetes**

Several students in Canadian schools suffer from diabetes. There are two main types of diabetes: type 1 and type 2. People with type 1 diabetes must take insulin injections each day, and must also learn to use meal planning, physical activity, and self-monitoring to help them control their diabetes. Type 2 diabetes can usually be controlled by diet alone or with oral medication.

In general, children with type 1 diabetes can participate fully in all school activities, including field trips, school sports, and extracurricular activities. It is critical, however, that educators be aware of the special needs of such children. In particular, educators need to be aware of what duties they may have, if any, in respect of insulin injections and blood glucose testing, monitoring food intake, and recognizing and treating hypoglycemia and hyperglycemia.

The school registration forms sent to parents at the beginning of each school year should solicit information about a student’s diabetes, including what treatment is required and any limitations on the student’s activities, as well as any other specific, relevant information. All school personnel who are in contact with the student with diabetes should then be educated about the student’s condition and any emergency and treatment procedures. A copy of the student’s photograph, together with details of treatment and emergency procedures, must be readily available for all staff to refer to.

School staff should not be responsible for administering insulin injections. If the student requires insulin during school hours, the student and family should be responsible for this procedure. It would seem reasonable for schools to provide the student with a clean, private place to perform the injection, as well as make arrangements for the safe storage of insulin and syringes and the disposal of lancets and syringes.

Students with diabetes also need to monitor the level of glucose in their blood through simple blood tests; unless these students are especially young or have special needs, they should be expected to perform such testing themselves.
If the student is mentally capable of consenting to the administration of medication (such as an epi-pen), the student’s consent should be obtained.

Young children with diabetes may require extra supervision during the lunch hour to ensure that they eat all or most of what they have been provided. A child with diabetes may also require regular snacks during the day. Where possible, these can be coordinated with recess or class snack times. If it comes to the attention of a teacher that a student has missed a meal or snack, parents should be notified.

Hypoglycemia is an emergency situation caused by low blood glucose, which is usually the result of either insufficient food, increased activity levels, and/or too much insulin. Parents should inform school personnel about the causes, prevention, symptoms and treatment of this condition, and provide their child with extra snacks to eat in the event of low blood glucose. In a severe situation, the student may require an injection of glucagon. Generally, this injection should only be performed by a trained health professional. Difficult questions arise when a school nurse or other health professional is not available. However, whatever the situation, no school personnel should engage in the administration of medication or emergency treatment unless they are trained and competent.

Hyperglycemia refers to high blood glucose levels. The symptoms of this condition are excessive thirst and urination. This is not generally an emergency requiring immediate treatment, however, parents should be notified to assist them in long-term treatment.

Managing Students with Allergies

The life-threatening reaction for those with allergies is called an anaphylactic reaction or anaphylaxis. Symptoms of this condition include breathing difficulties, hives, itching, swelling, red watery eyes, vomiting, diarrhea, change of voice, difficulty swallowing, dizziness, fainting, or a change in colour.15

Parents should be asked to provide medical information regarding a child’s allergies at the commencement of the school year, and such information should be circulated to the appropriate school personnel. Parents should also inform the school of the appropriate elements of emergency treatment. Preventive measures that can be taken to reduce the exposure of students to allergic reactions include: ensuring that students with allergies eat only food that has been prepared for them, placing students with severe food allergies in a separate or supervised eating area, encouraging hand washing by students before and after eating, prohibiting the sharing of food, food utensils, and food containers, cleaning surfaces of contaminating foods, and placing restrictions on the types of food that students and staff may bring to school.

The Canadian Society of Allergy and Clinical Immunology has determined that epinephrine (or adrenaline) is appropriate medication for emergency treatment of anaphylaxis. Epinephrine is administered easily through the use of an auto-injector, often referred to as an “epi-pen.” It can be self-administered or administered by a third party by simply injecting the epi-pen into the thigh of the patient.

Students who are old enough and able to self-administer an epi-pen should be encouraged to carry their own at all times. Parents should also provide epi-pens to the school, labelled with the student’s name, to be stored in a readily available, unlocked location known to all staff. In an emergency, the principal or teacher should talk to the student and find out what medication, if any, should be administered. If the student is mentally capable of consenting to the administration of medication (such as an epi-pen), the student’s consent should be obtained. If the student is not mentally capable of providing consent, it is not necessary to obtain consent. After receiving emergency epinephrine, the student should immediately be taken to hospital by ambulance.

Conclusion

Overall, school administrators have an obligation to assist in or manage the administration of medication where doing so is reasonable, in the best interests of the student, and can be carried out with no special training or skills. At the same time, training should be provided to individuals called upon to administer medication in situations where the administration is not something that ordinary lay persons could perform.

School administrators are expected to use the same standard of care as would be exercised by a reasonably careful or prudent parent. This degree of care will vary according to the circumstances.

An understanding of the legal issues surrounding the management and administration of medication in schools will provide educators with a foundation to effectively carry out their duties in caring for the needs of students.

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15 The Canadian Society of Allergy and Criminal Immunology, Anaphylaxis in Schools and Other Child Care Settings (August, 1995).
Mr. Attorney General, there is a concern that litigation is a costly and time-consuming problem for education providers and the community. Do you see this as a trend as legislation, both Provincial and Federal, allows for litigation?

Obviously we want to strike a balance between having a cost-efficient court system and making sure everyone is allowed their day in court and that justice is done. It’s always difficult to achieve that balance. We’re always looking for new ideas and we are trying to streamline the system in numerous ways. I am not aware that the cost of litigation to school boards is any greater than any other parts of our community. If there is a particular problem in this area, I’d be happy to address it.

Can you comment on the anonymity provisions in the Youth Criminal Justice Act?

I feel that the both the Young Offenders Act and the Youth Criminal Justice Act place unreasonable limits on the disclosure of information. It does not assist anyone by restricting accessed information in the way that the current federal bill does and the proposed federal bill would do. I believe school officials should be given particulars of the convictions and treatment that a young offender has had before an offender is allowed back in the classroom. I think that is important for the safety of students and staff. It is also important to ensure the young offender receives the assistance that is required.

Should the Courts be involved with kids under 12 who have committed crimes?

In most instances, the answer is not to incarcerate young children. Alternative diversion programs should be considered, especially for first time, non-violent offenders.

Do you feel the working relationships with school districts provide the court with sufficient information to make fair judgments?

Attorney General
David Young

Stu Auty, Former Chair of the Ontario Safe School Task Force has been a teacher and vice principal for the Peel Board of Education in Ontario. Stu is the founding president of the Canadian Safe School Network. Contact: stuauty@istar.ca.
Based on my own personal experiences, I think there is good rapport most of the time. Having said that, there is always room for improvement. I would be happy to sit down with school officials, court officials, and police to try to achieve better lines of communication.

The proposed legislation provides significant judicial authority to divert youth into community-based programs without Crown consent. Do you see any problems arising—for example, from the victim's perspective?

It depends how the diversion programs are operated, but I guess the short answer is yes, there may be problems from the victim's point of view. With the Young Criminal Justice Act, it will be very difficult for some young people to be tried as adults even if they commit adult crimes. If a 17 year old has committed a third sexual assault, I think, frankly, the victim and the public should do have an expectation that he will be sentenced as an adult. The Young Criminal Justice Act is an unnecessarily complicated piece of legislation that is going to prove to be extremely cumbersome and expensive to initiate. Every Attorney General across the country has agreed with me and expressed great concern about the availability of the court system to administer this new legislation. There are not the resources available at this time and the federal government has put little money forward, which is going to put a great strain on the system. I think victims, in particular, are going to be frustrated by the time that will be taken to bring a young person to justice.

Is it fair to say that the two largest provinces in Canada, namely Ontario and Quebec, have contrary views on how to deal with youth in the criminal justice system? Quebec allows for youth to be physically locked up under their Child Welfare legislation and Ontario does not allow for this. Has this any bearing on the paths taken in the approach to criminal legislation?

I think that Quebec and Ontario agree that the Young Criminal Justice Act will be difficult and costly to administer and should be shelved. Now it is true they have a different approach to youth criminal justice in a general sense and I am not going to speculate as to why they feel the way they do, but I can tell you the people of Ontario feel very strongly that legislation dealing with young people should be meaningful and should hold young people accountable.

The Young Offenders Act—Enacted Federal Legislation

- The Young Offenders Act, introduced in 1984, was 20 years in the making and believed to be in contrast to the “get tough” Juvenile Delinquents Act.
- Evidence suggests that more youth are confined today than the prior JDA. Those of 16 and 17 heard as adults were dealt with more leniently under Code provisions than now under the YOA in some provinces.
- Confusion is promoted in the Young Offenders Act in that it encourages on the one hand punitive measures and on the other informal measures such as youth justice committees and alternative measures, both with many issues of principles of fairness and due process.


What do you feel is the best form of deterrence in the youth justice system?

I don’t think one size fits all. I think there are certain situations where it is sufficient to have a first time, non-violent offender brought before a youth justice committee, apologize to the victims, involve himself voluntarily in community service, stay in school and so on and so forth. I think those types of diversion programs work well for some people, which is why I’ve greatly expanded them across the province over the last few months. I don’t want to see those people in court and certainly I don’t want to see them in jail, for example, for shoplifting for the first time at Sears. On the other hand, if you’re talking about a violent repeat offender at 16 or 17, I think that different remedies are required. If you’re talking about violent crimes and if you’re talking about violent crimes involving the use of weapons those remedies should include incarceration.

There’s a view that some segments of society see government as soft on youth crime. What is your response to that?

I understand that the CTV/Angus Reid poll confirms that fact that 72% of Canadians have little or no confidence in the Young Offenders Act. At least that many Canadians feel the same way about the Youth Criminal Justice Act. I’ve spoken to many police officers who talk about the fact that many young offenders laugh outside Young Offenders’ court. They just don’t have any fear or respect, and I think that frankly there is a demand for greater accountability within the system governing youth justice in this country.

We have talked about the reality of youth who commit crime. What priority is given to preventing it in the first place? How do you sell prevention when according to some studies $1 spent in prevention is $7 saved in the justice system?

Again, as I indicated earlier, there is no panacea. We want to educate our youth to have appropriate behaviour and part of that is having respect for society, and society has to deserve respect and I appreciate that.
One program I am very proud of is a program with Chief Justice McMurthy that is bringing young people in contact with the court before they commit any crimes. Young people can see how the court system works and understand the consequences of committing a crime. They can interact with police officers before they’re in trouble and I think that helps.

Q As you look to the future, do you have any view on how to reduce the ever-expanding costs of the youth justice system in a way that would still provide justice for both the victim and the youth charged?

A We’ve suggested that the Youth Criminal Justice Act needs to be amended. We’ve included the need for a streamlined process that would allow for a first time, non-violent offender to be diverted in a routine fashion in appropriate situations. It would also allow for serious, hardened, violent, repeat offenders over the age of 16 to be tried and sentenced as adults. If you commit a serious crime, I think, there are certain assumptions the system should and could make, so I think that if our proposed amendments are adopted, the system would operate more efficiently and in a more cost-effective manner.

Q Do you have any final suggestions for our educational readership?

A My only suggestion is an invitation to continue to communicate with legislators, to continue to inform us to what is working and what is not working inside schools and classrooms. Educators are on the front lines and have information that we don’t have at Queen’s Park or in the House of Commons. Keep us informed and let us know what you think and how we can do our job better. We’ll do our best to conduct ourselves accordingly.

To contact the Attorney General’s Office:

Website: www.attorneygeneral.jus.gov.on.ca

Email: jus.g.mag.webmaster@jus.gov.on.ca

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YOUTH CRIMINAL JUSTICE ACT—PROPOSED FEDERAL LEGISLATION

✓ Introduced in the House of Commons on February 5th, 2001, Bill C-7 or the Youth Criminal Justice Act, represents the key element in the Federal government’s self-proclaimed “comprehensive strategy to renew Canada’s youth justice system.”

✓ The Act contains a significant emphasis on sanction and sentencing options, increasing the alternatives available to police, crown attorneys and judges.

✓ In addition to the changes to the sentencing provisions of the YOA, the treatment of statements to the police and the publication of young offenders’ identifying information, including criminal records, mark a significant departure in the YCJA.

✓ There are also numerous, less potentially contentious changes made in the new Act, such as explicit recognition of victim concerns and the establishment of “conferences.”

✓ The replacement of “disposition” under the YOA with “sentences” is probably the most indicative of the shift toward a crime-control model of youth criminal justice that brings the system more in line with the adult regime.

✓ It could be argued that the principle of deterrence finds enhanced significance in the new act.

provide programming aimed at rehabilitation. Youth crime still presents us with a disturbingly serious level of violence. Sexual assault cases appear to be on the increase, and although other youth are generally the victims of youth crime, purse snatches from women are becoming as prevalent as they were in the seventies.

Q Teachers raise concerns over youth bringing weapons to school; however, the stats for youth crime suggests that this has flat-lined and therefore teachers shouldn’t worry. Are these valid concerns?

A I agree with the teachers’ concerns. The problem is the unknown. Which student, when in a fight or when threatening someone, has a knife or gun? Which one will use it, or carry through on the threat? If you knew the answer to those questions, you could stop being worried. Identifying youth who are at-risk of becoming violent and introducing methods to deal with this youth would be a strategy to reduce the fear of violence.

Q Do you feel that the working relationships with school districts provide the Court with sufficient information to move to fair judgments?

A I have always found the board to be very co-operative, and in this regard we were fortunate to have Mr. Richard Waugh as a school court liaison representative for a number of years at the Family Court at 311 Jarvis Street. During that time the Court obtained useful information relating to youth behaviour in schools that was previously lacking from police investigations. However, since then, board budget restraints were forced to terminate that position, leaving the Court in a vacuum. Now, if any information regarding their schooling comes before the Court, it comes from the youth themselves, or occasionally from the probation officer. Since a high percentage of the cases involve the youth going back to school, it would be helpful to have the school’s position made known to the Court so that a realistic order could be made.

Q What do you see as the best form of deterrence in the youth justice system?

A In my view, deterrence has to strike that balance of punishment that is neither oppressive nor a joke from the youth’s perspective. Deterrence should also have an element of predictability, so that the young person possesses some idea of what the punishment will be for the crime committed. Without the notion of predictability, punishment is random and of no deterring value.

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Peer Mediation and the Justice System in Secondary Schools

**Research on Peer Mediation**

Koch (1988) claims that students can resolve disputes better than adults because they are able to connect with their peers in ways that adults cannot. Young people perceive peer mediation as a way to talk out problems without the fear of an adult judging their behaviour, thoughts, or feelings (Crawford & Bodine, 1996). This is perhaps the reason why peer mediation programs are among the most frequently chosen types of conflict resolution programs in schools (Cohen, 1995). Cohen also claims that young people can become effective mediators because they understand their peers, make the process age appropriate, empower their peers, command their respect, and normalize the conflict resolution process.

Students in my study (Samuels, 2001) were very supportive of the peer mediation programs in their school. This is what one 18 year old had to say:

“Peer mediation is talking about it, getting out in the open the underlying issues and notions so that they can be resolved. That might quench any physical fights or whatever is going on, but getting out the emotions is the root of the issues.” (p. 93)

Jones (1998) found that, at all levels, there is a very high rate of agreement between disputants after mediation has taken place and there is also a high mediator and disputant satisfaction. Toronto District School Board of Education researchers have also emphasized the positive effects of peer mediation (Brown, 1995). One TDSB student explains:

**REASONS FOR SCHOOL-BASED PEER MEDIATION**

1. Conflict is a natural human state often accompanying changes in our institutions or personal growth. It is better approached with skills than avoidance.
2. More appropriate and effective systems are needed to deal with conflict in school settings than expulsion, suspension, court intervention, and detention.
3. The use of mediation to resolve school-based disputes can result in improved communication between and among students, teachers, administrators, and parents. It can also improve the school climate and provide a forum for addressing common concerns.
4. Using conflict resolution methods can result in a reduction of violence, vandalism, chronic school absences, and suspensions.
5. Mediation training helps both young people and teachers to deepen their understanding about themselves and others and provides them with lifetime dispute resolution skills.
6. Mediation training increases students’ interest in conflict resolution, justice, and the legal system and encourages a higher level of citizenship.
7. Shifting the responsibility for resolving appropriate school conflicts from adults to young adults and children frees both teachers and administrators to concentrate more on teaching than on discipline.
8. Recognizing that young people are competent to participate in the resolution of their own disputes encourages student growth and gives students skills in listening, critical thinking, and problem-solving that are basic to all learning.
9. Mediation training, with its emphasis upon listening to others’ points of view and the peaceful resolution of differences, assists in preparing students to live in a multicultural world.
10. Mediation provides a system of problem-solving that is uniquely suited to the personal nature of young people’s problems and is frequently used by students for problems they would not take to parents, teachers, or principals.

Davis & Porter, 1985
“It makes me more aware of what I’m doing. Like now I’m negotiating, now I’m brainstorming. I used to get very carried away when I had a fight or an argument... but ever since this mediation training I’m more calm, especially in my house with my dad. I don’t go head on… I express myself but I do it calmly, I don’t let my stress level go up.”

Peer mediation may take the form of a cadre program (a group of students selected and trained as peer mediators), a whole class approach, or even a whole school program. Jones (1997), who studied 8,475 students and staff in U.S. peer mediation programs, reports that both cadre and whole school programs yield significant benefits. She also reports that cadre programs yield better individual outcomes while whole school programs yield a better climate outcome.

Q and A About Peer Mediation

Q Which types of disputes can be resolved?
A Only certain types of conflicts are sent to mediation. The conflicts must be non-violent. Verbal disputes about rumour and gossip are the types of conflicts that occur most frequently in schools (Brown, 1995, p. 35) and these are the conflicts that peer mediators mediate. The conflicts are usually between boyfriend/girlfriend, male friends/female friends, and student/teachers. These conflicts usually take the form of verbal fights, physical fights, bullying, and harassment.

Q How are the peer mediators selected?
A The peer mediators are students who have been trained in the skills of conflict resolution and mediation. Once they are sufficiently trained they are assigned by their advisors to the role as peer mediators for their school.

Students are selected in a variety of ways. However, the two most common methods of selection are application and interview, and sociometric selection (Cordasco, 1996, p.19). The application and interview method requires that the student fill out an application form and attend an interview. In the sociometric selection, peers select peers. Cordasco (1996) also says that no research could be found comparing the success of one method of selection to the other in reference to producing a more effective mediator and that little or no information existed to explain the chosen selection method that was employed.

Regardless of the method of selection, three common principles should be present in all programs in order for them to be successful:

1. Student involvement
2. School staff involvement
3. Selection of mediators who represent a cross-section of the student population with respect to gender, race, class, achievement level, etc.

Q When does mediation take place?
A Mediation usually takes place before and after school as well as during the lunch periods when the mediators and the disputants are free. Rarely are students taken out of class to participate in the peer mediation process.

Q How can peer mediation help reduce violence in schools?
A Security guards are now a familiar presence at athletic events in Toronto schools and some Ontario school boards have installed video cameras for general surveillance purposes. One student in my study reflected on the frequent acts of violence he witnessed in his school community:

“When I first started at my school, believe it or not, every other weekend there would be some grand act of violence. I remember one time a guy got a cut from his ears to his mouth that required a couple dozen stitches. People were scared.”

As a way to de-escalate the conflict that leads to violence, some administrators think peer mediation should be mandated in every school:
"It should be encouraged, it’s a positive way of resolving conflicts; I think the public should be made aware of it and I think every suspension or anything that’s done in a school should have some kind of a peer mediation attachment, mainly to get the kids to talk. If they don’t talk to one another it could eventually lead to incidents recurring over a period of time. Overall, it is a very, very positive thing.”

Some schools have seen the light. They have developed their peer mediation program in partnership with the justice system.

**Mediation and the Justice System**

The information that follows was acquired during the implementation of a “School-Based Peer Mediation Program in Partnership with the Justice System” at a school where I worked. I was the co-ordinator of the peer mediation program and I initiated the partnership.

This program is an extension of the regular peer mediation program. The main differences are that the program is linked with the Crown Attorney’s office and the police are more involved with decisions concerning which conflicts should go to mediation at the school level. There are three primary goals:

1. to keep young offenders out of the court system;
2. to provide an alternative to probation; and
3. to find alternatives to the Criminal Justice System for dealing with many school-related disputes.

The underlying principle of the program is that we need different “lenses” to address the issue of juvenile crime, that we need to move from the lenses of retributive justice to those of restorative justice. We need to help youth deal with the violation of people and of relationships and give them the opportunity to meet the person(s) they offend face-to-face. Then both the young person and the victim can become active participants in the outcome of the agreement, and the approach might be more lasting. This is a powerful alternative to jailing young people where they may become hardened and even more criminal in their behaviour.

**HAZARDS OF JAILING YOUNG PEOPLE**

- Jails lack adequate physical facilities, trained staff, recreational and other programs to meet the minimum standards of juvenile confinement.
- There are potential risks of suicide and other forms of abuse that put jails at great risk of litigation.
- Researchers say that prison will hardly teach the juvenile non-violent patterns of behaviour; instead it is more likely to make the young person even more violent.
- Jails will protect society from the offender for a while but eventually the individual will be out of jail and may be worse from the experience.
- While in prison the victim may even become a danger to fellow inmates or be in danger.
- Prisons will not deter the offender. The offender is more likely to commit crimes because of the lack of coping skills and the patterns of behaviour learned in prison.
- The threat of prison will no longer hold such terror for young offenders, since the individual will know he/she can survive there. For many it will be home after a number of visits. Some might even feel more insecurity outside.
- Jail fails to change most lives.

Working in partnership means all stakeholders who are involved in the program have a voice in establishing the guidelines for the program. This includes determining the types of behaviour that qualify for the program. The peer mediation process remains voluntary and parties must consent to participate in the partnership with the Youth Justice System.

**How the Program Works**

A core team decides whether mediation will take place. The team consists of one school administrator, one mediation staff advisor, and one police officer. Once an incident occurs there are three stages and a number of actions within each that need to be taken.

**Stage 1/Reporting**

When an incident occurs two things should happen within one to two days (see the chart on p. 36). The incident should be reported to the school officials and the Mediation Screening Committee should call the police for input.

**Stage 2/Laying Charges or Not**

Within two to three weeks, Stage 2 becomes effective. At this stage, neighbourhood police are usually involved. They will decide if the incident is chargeable. If there is no charge, the incident goes to peer mediation, but if there is a charge, the police will initiate the steps that must be followed. If mediation fails and there is
The nature of the resolution is determined by the parties—imposing a fine, ordering compensation for loss, restitution of property, performing community or personal services. Decisions made through mediation can be customized to fit the specific situation. When the resolution is reached, it is recorded and an agreement is signed by the parties. The peer mediation program co-ordinator then monitors the compliance with the resolution. The terms of the resolution must be fulfilled within a set period of time, to be agreed upon by the Crown Attorney’s Office.

Q and A about Peer Mediation in Partnership with the Justice System

Q What is the legal status of peer mediation?
A The program encourages the openness, honesty, and true feelings required in peer mediation. In order to respect the confidentiality of the process, the parties must not use admissions, confessions, and other statements against one another later on. This assurance is given under the partnership program.

Under the Young Offenders Act, mediation can be designated an Alternative Measure if it begins after the laying of criminal charges. If mediation begins before the laying of criminal charges it cannot be designated as an Alternative Measure. However, the Crown Attorney’s Office under instructions from the Attorney General’s Office and the Office of Youth Justice will undertake in writing not to use any statements made by any of the parties in the mediation process at any later proceedings.

Stage 3/Making the Agreement Official

Within four months, the incident reaches Court and the Peer Mediation Agreement becomes an official court document. The Mediation Screening Committee reports to the court on whether the Peer Mediation Agreement has been followed. If there has been non-compliance in the preceding four months, the offender(s) may return to mediation for clarification of the agreement or a charge may be laid.

If the agreement has been fulfilled, the charges will be withdrawn and the incident will return to court where there may be full withdrawal or an extension for completion. The nature of the resolution is determined by the parties—imposing a fine, ordering compensation for loss, restitution of property, performing community or personal services. Decisions made through mediation can be customized to fit the specific situation. When the resolution is reached, it is recorded and an agreement is signed by the parties. The peer mediation program co-ordinator then monitors the compliance with the resolution. The terms of the resolution must be fulfilled within a set period of time, to be agreed upon by the Crown Attorney’s Office.

2. The Board: Superintendent of Schools
The Superintendent of Schools financed the funding for the training of the peer mediators and kept the School District informed about the progress of the program.

3. Representative from the School Council
Parents were concerned about the violence in the school. The inclusion of a representative from the School Council helped other parents to gain support and confidence in the program.

4. Regional Police Officers
Police representatives were involved in the decision-making team for determining whether each dispute was eligible for mediation. Police were often called for consultation based on the Board’s Protocol and whether or not charges should be laid, etc.

5. The Crown Attorney’s Office
A representative from the Crown Attorney’s Office was involved in the training program to help the staff and students to become familiar with the role of the Crown. The precise role of the Crown Attorney in each instance is determined by the procedure adopted—namely, whether or not charges are laid and if mediation is recommended at the first appearance in court, etc.

6. Role of Justice for Children and Youth
A lawyer from Justice for Children and Youth was present at all meetings and available for consultation. The lawyer co-ordinated the planning, set up, implementation, and monitoring of the program, and explained the role of each person as well as providing information about the additional training and expertise that the peer mediators needed to link their existing program to the criminal justice system.

7. Trustee
A trustee in our family of schools was part of the team.
Q Which offences qualify for peer mediation?

A Theft of property under $5,000
Possession of property obtained by crime under $5,000
Fraud where the value of the subject matter of the offense is under $1,000 (defrauding the public or any person of any property or money)
Mischief where the damage is correctable
Assault and threats following Board policy on Safe Schools
Any behaviour which qualifies for “Alternative Measures”

Q Which offences will not qualify for peer mediation?

A Murder
Manslaughter
Drinking and driving offences
Possession of narcotics
Possession of narcotics for the purpose of trafficking
Any offence involving explosives or firearms

A behaviour will be considered to be serious if there is an element of:
Intimidation beyond adolescent bullying
Likelihood of substantial physical or psychological injury
Chronic or repetitive behaviour

Some Early Results

The School-Based Peer Mediation Program in Partnership with the Criminal Justice System helped strengthen the peer mediation program. Some incidents that may have ended in suspension or a charge by the police were resolved faster once the students involved were given the choices. Students often chose mediation. The school climate also improved once the program was implemented. Students see change in terms of the peer mediation program. One student in my study explains:

"Before peer mediation, it was like a prison. Every student in the school was like they were in a prison cell, they were like yelling at each other, there were always fights, lots of violence in the school."

The teachers speak positively about the program. They see a difference in the classrooms and in certain community issues. One teacher claimed that the program also improved the racial tensions that previously existed in the school.

Conclusion

Peer mediation is finally getting the recognition in Canada that it deserves. Many people are beginning to recognize peer mediation as beneficial to students, parents, teachers, administrators, and society (Samuels, 2001). It is also seen as an effective Alternative Program.

In his document "Youth Violence and Youth Gangs," the Solicitor General states that "young people and parents are being encouraged to develop self-help initiatives, such as peer mediation usually with the assistance of professionals" (7.0, p. 31). The document also cites peer mediation as an example of "youth educating youth" and explains that "conflict resolution and peer mediation have helped curb violence in many schools" (8.3, p. 33).

This means that not only has the Ministry of Education encouraged the establishment of peer mediation programs in schools but the Solicitor General has also given permission to consider community-based programs as alternatives to detention before sentencing and as alternatives to custody. From my perspective, this describes the School-Based Peer Mediation Program in Partnership with the Justice System.

Hopefully, the critics of peer mediation and those who are reluctant to implement the partnership program described here are now more convinced and empowered to implement the School-Based Peer Mediation Program in Partnership with the Justice System in their school community.

References


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For more information Dr. Fae Samuels can be contacted at St. Augustine Secondary School (905)450-9990.
"I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to write parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money; certainly not my soul.”

Gandhi

DIVERSIONARY PEER MEDIATION IN PARTNERSHIP WITH THE JUSTICE SYSTEM

STAGE 1
1–2 Days

INCIDENT

REPORT TO SCHOOL OFFICIALS

MEDIATION SCREENING COMMITTEE (Call Police for Input)

STAGE 2
2–3 Weeks

No Charge

Charge

Mediation (Charge Pending)

Court

No Resolution

Agreement

No Resolution

Agreement

Charge

No Further Action

Monitoring Agreement

Court

Monitoring Agreement

STAGE 3
Within 4 months

Fulfilled

Non-compliance

Withdraw Charges

Court

Court

Extention for Completion

Withdraw Charges

Return to Mediation to Clarify

Charge

No Further Action
The Search of Students by School Officials

It is the authors’ views expressed in this article, which are not representative of the views of the Department of Justice or the Peel District School Board.

The Law

In the course of their duties, and in order to maintain school safety, officials and representatives of a school are occasionally required to search the personal items of a student and seize offensive weapons or drugs. School officials must exercise this power with caution and common sense. While the law permits searches and seizures, this power is limited both in its application and manner of execution.

Section 8 of Canada’s Charter of Rights and Freedoms protects all citizens from unreasonable searches and seizures by agents of the state. Section 8 attempts to balance the right of an individual’s liberty with the legitimate state interest of crime detection and prevention.

In the school context, the most significant judicial pronouncement in this area is the Supreme Court’s decision in R. v. M. (M.R.) C.C.C. (3d) 361. In M (M.R), a vice-principal was told by a student informant he considered trustworthy that M.R.M. planned to sell drugs at the school dance. The evening of the dance, the vice-principal escorted M.R.M. to his office, and asked that he turn out his pockets and pull up his pant legs. The vice-principal noticed a bulge in M.R.M.’s sock that upon inspection turned out to be a plastic baggie containing marijuana. An RCMP officer who had been contacted earlier was in the room during the search of M.R.M. but said nothing. After the marijuana was found, the officer advised M.R.M. that he was under arrest.

At trial, Dyer J.F.C. held that M.R.M.’s search was an unreasonable intrusion upon his freedom. Eventually, the appeal was heard by the Supreme Court of Canada which overturned the decision of the Trial judge and admitted the evidence. This decision affirmed the power of teachers to search students. According to Cory J. for the majority, teachers should be permitted to search students and seize offensive items when enforcing the rules of the school. A low threshold permitting

While the law permits searches and seizures, this power is limited both in its application and the manner of execution.

1 There is no specific statutory power to search. The common law provides the authority incident to sections 264 and 265 of The Education Act R.S.O. 1990, c. E. 2:
(1) It is the duty of the teacher and a temporary teacher, (c) to maintain, under the direction of the principal, proper order and discipline in the teacher’s classroom and while on duty in the school and on the school ground.
2 M(R)M is largely follows the U.S. Supreme Court decision in New Jersey v. T.L.O., 469 U.S. 325 (1985)
searches was justifiable given students’ low expectation of privacy in school and the legitimate need for safety within schools. As stated by Cory J. at paragraphs 48 and 49:

“A search by school officials of a student under their authority may be undertaken if there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched. . . . School authorities must be accorded a reasonable degree of discretion and flexibility to enable them to ensure the safety of their students and to enforce school regulations.”

Although this decision established teachers’ authority to conduct searches, it is important to understand why the Court attempted to find a balance between the needs of schools with the rights of students.

### The Needs of Schools

There is a strong public sense that schools are increasingly dangerous places in which to learn. This may in large part be due to the media attention given to tragedies such as Columbine and the portrayal of school violence in movies and TV. Although most studies indicate that overall school violence is declining in both the United States and Canada, there is still work to be done. The Canadian Safe School Network states that 80 percent of high-school students report having experienced sexual harassment, and as often as every 7 minutes a child is bullied on the playground.

Such violence has a deleterious effect on students’ success in school, and thus it is imperative that teachers and school administrators protect children once in the school context.

The decision in M.R.M. also recognizes that students should not relinquish their privacy just because they are in school. Instead, limits must be placed on the scope, extent, and manner of the search. Students spend a great deal of time at school and must necessarily carry and use items of personal significance that are not directly related to learning, such as medication, personal correspondence, clothes or religious paraphernalia. Consequently, students should expect some limited right to privacy, whether the material in question is on their person, bag, or desk.

First, in New Jersey v. T.L.O 469 U.S. 325 (1985), the court noted that students should be afforded some expectation of privacy based on the flexible standard of “reasonable suspicion” rather than the higher standard of “reasonable ground.” This reduced standard provides teachers and school administrators the right to intervene more quickly, to conduct searches without a warrant, and to seize material found in violation of school policy with greater ease than if the state were to conduct the search.

### The Rights of Students

M.R.M. also recognizes that students should not relinquish their privacy just because they are in school. Instead, limits must be placed on the scope, extent, and manner of the search. Students spend a great deal of time at school and must necessarily carry and use items of personal significance that are not directly related to learning, such as medication, personal correspondence, clothes or religious paraphernalia. Consequently, students should expect some limited right to privacy, whether the material in question is on their person, bag, or desk.

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### Key Points

- While the law permits searches and seizures, this power is limited, both in its application and the manner of execution.
- Section 8 of Canada’s Charter of Rights and Freedoms protects all citizens from unreasonable searches and seizures by agents of the state.
- In the school context, the most significant judicial pronouncement is the Supreme Court’s decision in R. v. M. (M.R.) which permitted a vice-principal, following the lead of a student informant, to conduct a student search at a school dance. The case established the lower standard of “reasonable suspicion” as the rationale for a school search versus the higher standard of “reasonable ground under the Criminal Code.”
- This lower standard provides teachers and school administrators with the ability to intervene quickly, to conduct searches without a warrant, and to seize material with greater ease than if the police were to conduct the search.
- Security personnel working on behalf of the school do not necessarily have to apply the higher standard of “reasonable ground.” But fears that school officials will become the unwitting pawns of the state may be unfounded.
- Teachers and school officials need to acknowledge the tension between the need to provide a safe learning environment and the privacy rights of students.
- The Supreme Court has mandated a two-part procedure that sets criteria which teachers and school officials must meet before a search can proceed, and once the search has begun the procedure sets limits on its scope.
officers acting under the aegis of their authority can search a student without a warrant provided that the search is related to the infraction. However, two questions remain in light of M.R.M.: 1. What standard will apply to police officers or security personnel who conduct searches while enforcing the rules and regulations of the school? 2. Do school officials have the legal authority to conduct random searches of students?

What Standard Applies to Police Officer?
In an effort to combat violence and contraband in our schools, some administrators have increased co-operation between the police or have hired paid guards resulting in a security personnel in schools. It is important to remember that different standards apply to the conduct of police than to the conduct of teachers.

However, given the rationale for the lower standard of reasonableness as articulated by M.R.M., a departure from this standard will only be necessary when police or administrators conduct a search or seize items for the main purpose of collecting evidence of criminal activity. In such instances, the police are acting outside of their mandate as security hired to enforce the rules of the school.

Thus, security personnel working on behalf of the school to ensure the maintenance of school aims do not necessarily have to apply the higher standard of “reasonable ground”, just because the school official conducting the search wears a uniform. A valid search based on a standard of reasonable suspicion is not automatically converted into an unlawful search merely because criminally significant items are incidentally located. 11

Of course there is a potential for abuse, whereby police officers pursuing the state’s

6 While school officials cannot disregard the reputation or past history of student, a search cannot be justified on that basis alone. The information must be current and particularized. See Conofield By Lewis v Consolidated High School District No. 230 (991 F.2d 1316).

7 A reasonable suspicion should be particularized and search must be limited to those areas or people where the evidence can be located. A class-wide search for material on the hunch that something may be discovered is therefore unjustifiable. See Bellnier v. Lund (438, F. Supp. 47, N.D.N.P. 1977).

8 A good example of specific information and the type of justifiable search can be found in Regina v. J.M.G. (1986) 36 O.R. (2d) 705 (4th) 277, 29 C.C.C. (3d) 455 application for leave to appeal from dismissed by the Supreme Court of Canada By and Payne v. Darcey County Board of Education (655, S.W. 2d 28 - Ky. App. 1983).

9 School officials should have regard to how the item searched for represents a risk to the safety of the school In Galford v. Mark Anthony B. (433 S.E. 2d 41), a strip search of a 14 year old students was overly intrusive and not justified where a student was thought to have stolen $100, given that the theft of money was not related to the safety of the school.

10 Of course not all searches will be personal searches. Searches of lockers will be also permissible where reasonable suspicion exists. R. v. Z. (S.M.) (1998) 131 C.C.C. (3d) 436 (M.C.A.)

interest in enforcing criminal law search students under the guise of a school official’s power to maintain discipline within the school. Yet, fears that school officials will become the unwitting pawns of the state are unfounded. The disclosure and pre-trial discovery process and the eventual trial of the matter will certainly reveal the directing mind of an investigation.

Despite these cautions, school officials should not be fearful from mere collaboration or co-operation with the police. If school officials believe otherwise, they may be reticent to seek the protection and advice from officers who are more equipped to handle security risks.

Can School Officials Conduct Random Searches?

School officials may consider subjecting students to a search upon entry to ensure that they do not possess offensive weapons or illegal substances. The certainty of searches or the pervasive risk of being subjected to searches may have the effect of encouraging compliance with school regulations. The legality of these types of searches has not been decided in Canada, but there is some direction from American case law. Random searches are problematic in that they are conducted without reasonable particularized suspicion that weapons or controlled substances may be located and have the potential to widen the infringement of students’ privacy rights.

The legality of a random search should depend on balancing the need for safety within the school, and the nature of the intrusion. Where random searches are conducted in emergent circumstances, or where there is a real risk of harm and where the method of search is only minimally invasive, such searches should be within the boundaries of the Charter.

12 Police officers cannot use school officials to circumvent their investigatory hoops. While the precise level of police involvement that amounts to an improper agency relationship is not clear, the ultimate question in each case should be whether the search would have happened in the manner in which it occurred if the police were acting in their capacity as an officer outside the school. In most cases where officers and/or security guards seize items, it cannot be said that a similarly situated school official would not have seized the item. See R. v. Beyles (1991), 68 C.C.C. (4d) 308 (S.C.C.), R. v. Johnson (1997) O.J. No. 4648, People v. Prant (1996) IL-QL 128

13 The authors make no comment about the legality of random drug testing where different considerations would apply. See Vermont Sch. Dist. v. Acton, 515 U.S. 646, 662-63 (1995)


GUIDELINES FOR SEARCHES

☑ When violations which are detrimental to establishing a climate conducive to learning are suspected, searches of desks, bags, lockers, and the emptying of pockets are permissible. Such violations include playing with a toy, smoking, theft, and alcohol use.

☑ When students are engaging in violations that are more serious than impeding a teacher’s attempt to create an environment conducive to learning, such as drug use or possession of a weapon, a more intrusive search can be conducted. These situations could justify pat-downs and the taking off of some articles of clothing (jacket, shoes, and socks).

☑ Immediately dangerous infractions where exigency plays a significant role in contributing to the safety of students or staff (for example, when a gun is brought to school), may require a teacher to take immediate action and invasively search students (Keel. R., Education Law, p.6).

In one school, the principal of authorized a drug detection police team utilizing a drug dog to conduct a wide-ranging cursory search of the school’s lockers. Only those lockers pointed to by the dog were opened, and in one of those lockers a small amount of marijuana was found. In addition to anonymous information from students and observations of teachers, the principal pointed to various factors which necessitated his decision including:

☐ the passing of small packages between students in the hallways
☐ increased use of drug counseling
☐ calls from parents
☐ students carrying beepers and large amounts of money
☐ increased use of pay phones by students
☐ students showing physical signs of drug use

A majority of the court upheld the search holding that such searches will be legal where they are based on “neutral, clearly articulated guidelines.”

In M.R.M., the Supreme Court clearly established the authority for teachers and school administrators to search students provided that the search is reasonable at its inception and reasonable in scope. Yet, the extent to which the search is permissible given a particular offense has only been addressed by the courts in the wake of the M.R.M. decision.

We have presented some guidelines that school officials and administrators can use to help determine what manner of search is permissible in situations where officials are in possession of fresh and credible information.

Summary

Teachers must be able to, when necessary, quickly intervene, search students, and seize possessions that interfere with the safety and maintenance of environments which are conducive to learning. However, such searches
In M.R.M., the Supreme Court clearly established the authority for teachers and school administrators to search students, provided that the search is reasonable at its inception and reasonable in scope.

cannot be at the expense of students’ basic rights. The Supreme Court’s decision in M.R.M. attempted to find a balance between these two positions by requiring the search to be both reasonably justified at its inception and reasonable in scope given a number of factors, most notably the severity of the infraction.

Of course it is teachers and school administrators who must ultimately decide how best to create such a balance. Although precarious, by sensitively considering the duties and rights of all the players involved, ensuring all parties are aware of school policy, and treating students with respect, a balance can be achieved.

Colin Ballosingh completed his BA and BEd at the University of Toronto and his MEd at OISE/UT. He is currently working on completing his doctorate at OISE/UT. Colin is Vice-Principal at Camilla P.S., Peel District School Board.

Peter Thorning received his LL.B from Queen’s University in 1998 and since then has been employed with the Department of Justice Canada. He currently holds the position of Federal Prosecutor at Old City Hall Courthouse.

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LESSONS FROM MUSIC • May 2000
Guest Editors: Lee Bartel, Faculty of Music, U of T and Linda Cameron, OISE/UT
How do we engage students in learning? How do we keep wonderment and delight alive? What role do immersion, demonstration, and motivation play? The authors explore these and other issues that riddle the enterprise not only of music education, but of education generally.

SCHOOL-TO-WORK TRANSITIONS • Sept. 2000
Guest Editors: Howard Russell, OISE/UT and Ron Wideman, Nipissing University
Ontario has finally introduced a comprehensive program for the majority of students who will not go on to post-secondary institutions and too often face under-employment and unemployment. This issue features lighthouse programs in electronics, aerospace, construction and manufacturing and includes debates on what implementing these new programs will require from education, industry, and government.

SCIENCE, TECHNOLOGY & MATH LEARNING FOR ALL • November 2000
Guest Editor: Larry Benecke, OISE/UT
Many think that education in science, math, and technology is only suitable for the small proportion of students advanced enough to go on to study in these fields and related professions in university. This issue challenges the status quo in SMT and offers an array of strategies for how schools can help students develop scientific literacy.

HEALTHY SCHOOLS • February 2001
Guest Editor: Andy Anderson, OISE/UT
Children who are sick, tired, and afraid have trouble learning. What can schools do to help students become healthier and begin to achieve their potential? The authors in this issue help kids face the tough issues—poverty, family troubles, violence, substance abuse, and toxic environments—and outline what schools can do to make a difference.

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The Net Generation

In R. v. M. (M.R.), Mr. Justice Cory of the Supreme Court of Canada wrote: “. . . schools have a duty to foster the respect of their students for the constitutional rights of all members of society.” If the goal of an education is also to foster the development of independent, critical thinkers, then another duty of educators is to permit students to express views that may be unpopular and, indeed, views that may make the educators uncomfortable. Our Supreme Court has also recognized that the purpose of freedom of expression is to pursue the end of promoting truth, political and social participation, and self-fulfillment. Moreover, the Court has also emphasized that the protection of expression extends to the protection of minority beliefs which a majority of citizens may view as unpopular, wrong, or false.

Ten years ago, when a student was unhappy with a teacher at her school, the audience to whom she could express her views was generally limited to those students she could speak with at school. Today, with a little technical knowledge, that student’s audience includes any student, parent, teacher, or person with access to the Internet. The Internet provides a cheap, effective, and often creative means for that student to communicate her views, however unpopular in the school’s eyes, to an enormous audience.

In recent years, school-based access to the Internet has increased precipitously. Between 1997 and 1999, Internet access in Toronto schools almost doubled. Across Canada, access to the Internet in schools increased by roughly 50 percent. The increase in home-based access to the Internet has outstripped the growth in school-based access. Statistics Canada notes that one of the driving forces behind the growth in Internet access is cheaper access to the Internet. Clearly, young people are positioned to take advantage of this growth. The so-called Net Generation is more fluent and adaptive to digital media, including web page design and email, than its predecessors.

The ability of schools to discipline students for conduct that occurs on the Internet poses both pedagogical and legal problems for educators.

WHAT EDUCATORS WANT TO HEAR/
WHAT STUDENTS ARE PERMITTED TO SAY

The tension between what educators want to hear and what students are permitted to say provides a challenge to educators both in their role as teachers with a pedagogical duty to foster critical minds and in their role as disciplinarians in deciding when boundaries have been crossed. The advent and proliferation of the Internet has only complicated this tension.

At present, there is little guiding authority from our courts to assist educators in striking the proper balance. However, courts in the United States are regularly called upon to adjudicate disputes involving restrictions on student expression or speech. This article extrapolates from U.S. cases to the Canadian context and suggests a list of guidelines for school boards that will help them set safe boundaries for Internet and email use that also respects students’ rights of expression and need for exploration.

The ability of schools to discipline students for conduct that occurs on the Internet poses both pedagogical and legal problems for educators. Students should be encouraged to think critically and independently. On the other hand, web-based publications may contain disruptive and offensive material that threatens the safety and security of students and staff or compromises order in the school.

**The American Experience**

Since 1969, when the United States Supreme Court issued its landmark decision in *Tinker v. Des Moines Independent Community School District*, US courts have recognized that a student has a substantive right to express opinions, even unpopular opinions, in school. In *Tinker*, a number of students attended school wearing black armbands as a protest against the Vietnam War. They were suspended from school for violating a school district rule banning the wearing of armbands. The Supreme Court determined that the school’s actions violated the students’ right to freedom of speech. The Court wrote:

“In order for the State in the person of school officials to justify the prohibition of a particular expression of opinion it must be able to show that its action was caused by something more than a mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school the prohibition cannot be sustained.”

The United States Supreme Court recognized the substantive right of a student to exercise his or her First Amendment rights in the school. At the same time, the Court recognized that, in the school context, there were limits to the exercise of this right.

In the context of the Internet, the issue of a student’s rights to free speech may arise in a number of ways:

- Student speech in public, discussion group messages
- Student speech in private email messages
- Student speech posted on a district website, including material posted in classroom sections, the school newspaper, and, if allowed by the district, material posted on an individual student web page or on extracurricular organization web pages
- Student speech that pertains to the school, teachers, or other students and that appears on a personal web site

In the recent case of *Beussink v. Woodlord R-IV School District*, a district court addressed the issue of a school district’s ability to discipline a student arising from material posted on the student’s personal (non-school) website. In *Beussink*, a high-school student posted material on a personal web page that was very critical of the administration of his school. In a preliminary injunction, the court indicated that if the speech had been sponsored by the school, the standard that would apply would have been that of *Hazelwood*. However, in the Beussink case the speech was not school sponsored and therefore the standard set forth in *Tinker* was the appropriate standard to apply. Applying the *Tinker* standard, the court concluded that “while speech may be limited, based on a fear of disruption, that fear must be reasonable and not an undifferentiated fear of disturbance” and that “(d)islike or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech.” The Court concluded that the wider public interest was served by allowing the student’s message to be distributed free from censure and by giving the student that opportunity to see the protections of the United States Constitution and Bill of Rights at work.

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**THE LEADING U.S. CASES**

Schools should be prepared to accept alternative voices. However, there is often a thin line between responsible, critical analysis of school issues and personal attacks

1. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court recognized that a student has a substantive right to express opinions, even unpopular opinions, in school. In *Tinker*, a number of students were suspended from school for violating school policy by wearing black armbands as a protest against the Vietnam War. The United States Supreme Court determined that the school’s actions violated the students’ right to freedom of speech.

2. In *Beussink v. Woodlord R-IV School District*, a high school student posted material on a personal web page that was very critical of the administration of his school. Applying the *Tinker* standard, the court concluded that “(d)islike or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech.”

3. In *J.S. v. Bethlehem Area School District*, a U.S. court upheld the discipline imposed on an eighth grade student who had created a website from home that made derogatory comments about his math teacher and invited visitors to contribute money in order to hire a hitman to kill the teacher. A persuasive factor for the Court was that the teacher had been forced to take a medical leave as a result of the threats contained on the website.

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In *Emmet v. Kent School District No. 415* a student created a website at home entitled “Unofficial Kentlake High Home Page.” The website contained two mock obituaries of students and invited visitors to vote on who should die next. The school imposed a five-day suspension on the student. The Court, noting that this was not a school-sponsored activity or class project, applied the *Tinker* standard. It held that the school had failed to establish that the website intended to threaten anyone or that it manifested any violent tendencies whatsoever and, therefore, no substantial disruption to the school was shown. Similarly, in *Beidler v. North Thurston School District No. 3* expulsion proceedings were initiated against a student who developed a home-based web page which depicted a school administrator at a Nazi book burning, drinking beer, and spraying graffiti. The student won a temporary restraining order based on the violation of his right to free speech and the fact that the school had failed to satisfy the court that the web page had caused material and substantial disruption.

In *J. S. v. Bethlehem Area School District*, a U.S. court upheld the discipline imposed on an eighth grade student who had created a website from home that made derogatory comments about his math teacher and invited visitors to contribute money in order to hire a hitman to kill the teacher. In that case, the Court found that the school could continue with expulsion proceedings because it had demonstrated that the off-premises materially and substantially interfered with the educational process. The Court found this was the case, in part because the student had discussed the website at school and at school-sponsored events. More persuasive for the court, and standing in contrast to the *Beidler* decision, was the fact that the teacher who was the subject of the website had been forced to take a medical leave as a result of the threats contained on the website.

**Policy Development for Canadian Schools**

Clearly, the U.S. experience, and the recent proliferation of cases dealing with student speech and web-based publications, will provide some guidance to Canadian courts when they are required to deal with the issue. In the meantime, educators would do well to heed some of the lessons learned in the U.S. The

**Guidelines for School Boards**

**Managing Internet Use and Access**

1. School boards should have a clear written Internet and email user policy.

2. The policy should apply to all users and be consistently enforced.

3. In drafting an Internet and email user policy, school boards should consider the following:
   a) whether its users will use email during teaching time;
   b) a description of what is “fun” and “acceptable” and what constitutes “mischief”;
   c) whether users will require user identification for accountability purposes;
   d) whether computers are to be turned off when not in use, preventing access by others to information on the computer screen;
   e) whether the school board will create a “filter” to block the school’s computers from certain Internet sites; and
   f) whether it requires consent of the users before the users may use the system.

4. The Internet and email user policy should be clear as to what activities are permitted and forbidden. An example of prohibited acts should be set out in the policy.

5. The policy should be explicit that the computer system is the property of the school board and it retains ownership of all files, documents, and communications received, created, or stored by users of the system.

6. The policy should indicate that the school board intends to monitor user compliance with its rules relating to the acceptable use of email and web browsing.

7. The school board should review its policy on a regular basis for the purpose of keeping up with technological changes.

8. The policy should inform users that they could lose the privilege in the event the policy is violated.

9. The policy should advise users that a contravention could result in disciplinary action, up to possible dismissal/expulsion. It is important that due process is afforded to a staff member or student before discipline is carried out, as individuals may happen upon sites by mistake while conducting a legitimate search.
guidelines provided with this article should be considered by schools in managing its Internet use and access.

**Conclusion**

As the law struggles to keep up with the issues of student expression, technology is changing at a rapid pace. It is hoped that the role of our schools as a centre for a free exchange of ideas remains intact and protected. There is no doubt that freedom will continue to have its limits, especially in a school context. The issue involves balancing freedom of expression with the values of equality. However, the new, rapidly changing technology may pose new challenges as to how the balance will be struck.

Students who distribute material on websites or through email may provide a critical and responsible voice to alternative viewpoints in the schools. Schools should be prepared to accept alternative voices. However, there is often a thin line between responsible, critical analysis of school issues and personal attacks. Similarly, the difference between humour and harm may not always be apparent to young people. In administering any policy which attempts to limit Internet access or use, educators should exercise their authority judiciously and with a good deal of common sense.

Robert W. Weir is an associate with the law firm of Borden Ladner Gervais LLP. He practises education law and has represented school boards and educators before courts and administrative tribunals.

He writes frequently on topics related to education and the law and recently presented a paper at the 2001 CAPSLE Conference on the topic of student freedom of expression. He is the Secretary of the Education Law section of the Ontario Bar Association. Robert is a graduate of the University of Toronto and Dalhousie Law School.

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The Changing Role of the Principal
Labour Relations in a New Context

Leading in Turbulent Times
Michael Fullan says that effective teachers in schools craft their own theories of change, consistently testing them against new situations. He says that in turbulent times the key test of leadership is not to arrive at early consensus, but to create opportunities for learning from dissonance.2

Fullan states that the “new leadership” requires principals to take their school’s accountability to the public. “Successful schools are not only collaborative internally, but they also have the confidence, capacity, and political wisdom to reach out, constantly forming new alliances.”3

Principals have a critical role in leading change in the school as an organization. Researchers have made the distinction between leadership and management and emphasize that both are essential. Leadership relates to mission, direction, inspiration. Management involves designing and carrying out plans, getting things done, working effectively with people.4

Important requirements for leadership involve: (1) articulating a vision; (2) getting shared ownership; (3) evolutionary planning; (4) creating a collaborative school culture; and (5) fostering staff development. Management involves: (1) negotiating demands and resources; and (2) co-ordinated and persistent problem-solving. It should be recognized that both sets of characteristics are essential and must be blended within the same person or team.5

Researchers have attempted to unravel the meaning of problem-solving by attempting to examine how “expert” principals go about solving actual problems. They found that successful principals took action to strengthen the school’s improvement culture. In addition, they concluded that effective principals fostered long-term staff development, engaged in direct and frequent communication about cultural norms and values, and shared power and responsibility with others.6

The role of the principal is not solely one of implementing innovations in specific classrooms. There is a limit to how much time a principal can spend in individual classrooms. The larger goal is in transforming the culture of the school. This points to the centrality of the principal in working with teachers to shape a school or a workplace with shared goals, teacher learning opportunities, and teacher commitment, focussed on student learning.

1 This paper is derived from E. Roher and S. Wormwell, An Educator’s Guide to the Role of the Principal (Aurora: Aurora Professional Press, 2000).
3 Ibid., at p. 9.
5 Ibid.
6 Ibid. p. 86.

Principals and vice-principals have become targets outside the collegial environment of their old bargaining units.

BALANCING DEMANDS

Whether it is in the context of labour relations, safe schools, negligence and liability issues, rights of non-custodial parents, dealing with problem individuals, managing medication or responding to changing government policy, the role of the principal has become increasingly complex. Principals are balancing a competing set of demands. School boundaries have become more and more transparent.1

The role of principals in implementing innovations more often than not consists of being on the receiving end of externally initiated changes. The constant bombardment of new tasks and the continual interruptions keep principals off balance. This article supports principals in their changing role by providing an overview of the massive legislative changes of the past five years. The author focusses on the impact of Labour Relations Act in the educational setting.
Massive Legislative Change in Ontario

In 1997, the Ontario government introduced a comprehensive reform package intended to fundamentally alter the education system. These reforms are set out in *Fewer School Boards Act, 1997* ("Bill 104"),7 and the *Education Quality Improvement Act, 1997* ("Bill 160").8 Bill 104 was proclaimed into force on April 24, 1997. Among other initiatives, it provided for the amalgamation of existing school boards. Bill 160 received Royal Assent on December 8, 1997, though most of its provisions did not come into force until January 1, 1998. While Bill 104 described the framework for educational reform, Bill 160 attempted to introduce some detail into the implementation process. Essentially, Bill 160 gave district school boards the authority to address many of the uncertainties created by Bill 104.9

In June 2000, the Ontario government introduced two new statutes that would change different aspects of the *Education Act*. The *Education Accountability Act, 2000* ("Bill 74")10 contained four major components, involving co-instruction activities, class size, instructional time, and compliance mechanisms. In addition, the *Safe Schools Act, 2000* ("Bill 81")11 was intended to increase respect and responsibility and to set standards for safe learning and safe teaching in schools. Among other things, it authorized the Minister to establish a provincial code of conduct governing the behaviour of people in schools. Bill 81 has added significant new responsibilities to the principal’s role, and, in particular, it has introduced a new statutory regime governing both the suspension and expulsion of students.

The recent amendments to the *Education Act* have significantly changed the duties and responsibilities of a number of key players in the education system. For example, teachers’ employment has been modified, in part, by the statutory requirements governing such issues as class size, preparation time, and instructional time. And, the principal and vice-principal have emerged with relatively new roles under the revised Ontario regime.

Recent education reforms have created new relationships and demands for principals and vice-principals. Bill 160 has caused a fundamental change in the legal employment relationship between school boards and its administrators, from one of management and union to one of master and servant. They are now clearly members of management and are no longer with their colleagues in the teachers’ collective bargaining process.

In this regard, there has been a “cultural shift” in the education community.12 It is essential that principals, vice-principals, teachers and senior administrators develop a new understanding of each other’s role.13

Across the province, in recent years there has been conflict with teachers on a range of issues. Principals and vice-principals have become targets outside the collegial environment of their old bargaining units. They are on the front line to deal with and respond to the complaints and concerns from teachers, students and parents. Principals and vice-principals are the “critical link” between senior school board administration and teachers, students and parents.14

**Labour Relations**

Under Bill 160, the *Ontario School Boards and Teachers’ Collective Negotiations Act* was repealed. As a result, collective bargaining between

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7 S.O. 1997, c. 3.
8 S.O. 1997, c. 31.
10 S.O. 2000, c. 11.
11 S.O. 2000, c. 12.
13 Ibid., p. 258.
14 Ibid., p. 258.
teachers and their respective school boards is now subject to Part X.1 of the Education Act and the Labour Relations Act, 1995. Among other things, principals and vice-principals are excluded from teachers’ collective bargaining units. They are no longer subject to existing collective agreements or entitled to partake in collective bargaining. Given the principal’s essential management and leadership role within a school, it is more important than ever that they have a good understanding of salient provisions of the Labour Relations Act, 1995.15

In this section, we will examine the impact of the Labour Relations Act, 1995 in the education setting, including unfair labour practice provisions of the Act, the duty of fair representation, and the expedited grievance procedure. An understanding of these provisions and comfort with them will provide a foundation to effectively carry out a principal’s responsibilities and enhance their leadership role in the school.16

Unfair Labour Practices

The unfair labour practices provisions in the Labour Relations Act, 1995 apply to relations between school boards and teachers unions. Section 70 makes it an unfair labour practice for an employer to participate or interfere in the formation, selection, or administration of a trade union. Employers are expressly not deprived of the freedom to express their views regarding labour relations, so long as they do not use coercion, intimidation, threats, promises, or undue influence. The purpose of the section is to insulate employees from employer pressure and influences while exercising rights established by the Labour Relations Act, 1995. The OLRB will make a declaration of an unfair labour practice in situations where there is evidence that the employer’s actions were motivated by anti-union animus.

The OLRB has said that apart from the employer’s right to express its views, the Act imposes a simple rule for the employer: “Do not interfere.”17 The OLRB has found a wide variety of employer conduct to constitute a violation of section 70, including where the employer gave an employee the use of company premises to hold an anti-union meeting,18 conferred benefits and solicited grievances in order to undermine the union,19 supported an employee’s committee against the union, and reduced hours of work following the filing of a grievance.20 The OLRB also found a contravention of the Act where an employer disciplined employees to prevent them from coming together on coffee breaks to discuss union business.21

Although the protection is broad, it does not limit the principal in his or her duty to manage the school. Many decisions made by principals will necessarily have an impact on teachers. Provided the decisions are made as part of the day-to-day management of a school and in good faith to further that end, principals will not likely face an unfair labour practice complaint. In the interests of healthy labour relations, it is always best to cultivate a practical and co-operative approach to labour relations issues. Principals should work co-operatively with teachers and union representatives and make an effort to appreciate all reasonable concerns that might arise in the day-to-day management of a school.

Duty of Fair Representation
The Labour Relations Act, 1995 also imposes a duty of fair representation on teachers’ unions and other bargaining agents. Section 74 provides that a trade union shall not act in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees in the bargaining unit. Section 74 requires that a union act honestly and consider all relevant matters when representing its members.

A union may not make distinctions between members for any reason or on grounds that are not relevant to a matter. An employee who feels that the union has breached its duty of fair representation may apply to the OLRB to determine the issue.

The duty of fair representation applies both to the processing of grievances and to the conduct of negotiating, although the OLRB will not lightly interfere with the wide discretion granted to the bargaining agent in negotiating in the best interests of the employees.

During a failure to represent hearing, the OLRB follows a non-technical procedure because the complainant is often not represented by counsel. The onus of proof on the complainant is to establish on a balance of probabilities that the union acted in a manner that was arbitrary, discriminatory, or in bad faith. It should be noted that where the OLRB cannot determine whose evidence to prefer, the complainant will fail.

Expedited Grievance Procedure
Section 49 of the Labour Relations Act, 1995 sets out a process by which grievances under a collective agreement can be referred to a single arbitrator on an expedited basis. The Act mandates that a party to a collective agreement may request the Minister of Labour to refer to a single arbitrator any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement.

An arbitrator appointed by the province must commence to hear the matter referred to him or her within 21 days after the receipt of the request by the Minister. The arbitrator is required to deliver an oral decision forthwith or as soon as practicable without giving his or her reasons in writing.

Where a request is received under subsection 49(1) to refer a grievance to a single arbitrator, the Minister must appoint an arbitrator who will have exclusive jurisdiction to hear and determine the matter referred to him or her, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

It should be noted that the Minister of Labour may appoint a settlement officer to confer with the parties and endeavour to effect a settlement prior to the hearing by an arbitrator.

From a school administrator’s perspective, given the expeditious nature of this process, once an arbitration date is set by the Ministry of Labour, it cannot be adjourned without the consent and approval of both the teachers’ union and the school board. In this regard, the section 49 process can be extremely inconvenient as it foists the first day of hearing on the parties, whether they have conflicts with the specified date or not. In the event that there is a need for future hearing dates, the process is more accommodating, and all future dates are agreed to by the parties involved.

Overall, principals and vice-principals should be cautious regarding any form of coercion, intimidation, threats, or undue influence that could be regarded as anti-union. In the interests of healthy labour relations, it is advised that principals and vice-principals cultivate a practical and co-operative approach to labour relations. Principals and vice-principals should work co-operatively with teachers and their union representatives in an effort to achieve a positive and collegial working and learning environment.

Conclusion
Every action taken by a school board, school administrator, principal, or teacher is founded upon a law which either permits those actions or limits them in some way. School principals have unique common law and statutory powers and responsibilities in relation to their staff and to students. Of great relevance in their
daily work are topics such as labour relations, negligence and liability, student records, harassment, rights of non-custodial parents, medication, student discipline and school violence. An awareness of education law and an ability to recognize that an issue has legal aspects is critical to properly respond to events and to prevent problems from arising in the future.

Strong leadership is key in order to generate positive change in the education community. In this regard, I encourage school boards to develop thorough training and in-service programs for new principals and vice-principals. In addition, I suggest that boards support peer coaching and mentoring and focus on development of leadership strategies and skills.

Overall, it is essential to recognize and foster leadership among principals and vice-principals. They set the tone, provide direction, and articulate the vision in their respective schools. In developing a collaborative school culture, creating school goals and objectives, promoting staff morale, listening to members of the school community, and encouraging staff development and professional growth, a principal and vice-principal can play a critical role in creating and shaping a positive, productive and safe school environment.

Eric M. Roher is a partner with the law firm of Borden Ladner Gervais LLP. He is the Chair of the firm’s Education Law Practice Group. Mr. Roher advises school boards and independent schools on a range of education law issues, including those pertaining to student discipline, human rights, labour relations, employment law, freedom of information and special education. He is the co-author (with Simon Wormwell) of An Educator’s Guide to the Role of the Principal and the author of An Educator’s Guide to Violence in Schools, both published by Canada Law Book. Mr. Roher is the editor of the Borden Ladner Gervais LLP Education Law News. He is a member of the adjunct faculty of the University of Toronto Law School, where he teaches a course on education law. Mr. Roher is a graduate of Brown University and the McGill Faculty of Law.

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Performance Expectations and Competency

Every employee should possess the ability, knowledge, training, and skill for the particular job he or she is assigned to perform, whatever that may be. Being reasonably competent to perform the work which the employee has been hired to do is what the common law has said is an implied warranty of the employee in a non-union employment situation. A breach of such warranty could be cause for dismissal without notice. Incompetence may be “just cause” for dismissal in unionized workplaces too. Under the law, there is a high threshold of proof of incompetency to justify a dismissal for that reason alone.

Employees have a right to know what their employer’s expectations are now and will be in the future. Reasonable performance expectations have to be identified and communicated to employees on a regular basis if they are to be of any value. Clear standards must be set by employers to have something to measure employee performance by, and to demonstrate incompetence, if it exists.

Corrective action is required by employers before drawing any conclusion that an individual is incompetent and can be fairly removed from the job. Traditionally, the process requires reasonable assistance by the employer and a reasonable period of time for the employee to improve, as well as clear notice of what consequences will likely follow if insufficient improvement is achieved by the end of the period.

There is a formal procedure that school principals are required to follow under the Operations of Schools—General Regulation, Regulation 298, s.11 (4), respecting their teaching staff. Formal warnings about consequences are an essential part of any performance appraisal system, once concerns are identified, so there can be no misunderstanding or plea of ignorance. An employer should not wait in dealing with poor performance situations because on-going inadequate work performance can lead to the conclusion that the employer has condoned or accepted it as satisfactory, since no complaints were ever brought to the individual’s attention.

Many of the existing teacher performance appraisal policies in use in this province are based on a professional growth model, where continuous development of teaching skills is expected throughout one’s career. Teachers are expected to demonstrate satisfactory performance through this method of evaluation every few years. The “Supervision for Growth Model” has been widely accepted by senior educators in this province as an appropriate method of evaluating teachers. Through this process, school administrators can identify serious performance concerns and, should time go on with no real improvement, compe-
The Education Improvement

Commission recommended a
substantial increase in professional
education funding so that school
boards could provide better in-service
programs for teachers and school
administrators.

Professional Development

Regular professional development activities
for practising teachers are nothing new. Pro-
fessional activity days have been part of the
school year calendar for decades. In school
year calendars, certain days have been sched-
uled for teachers to engage in professional
development activities and attend educational
conferences. However, the number of days
during the school year devoted to professional
activities has been reduced from the usual nine
to four since the 1998–1999 school year. In
fact, s.11 (7.1)(b) of the Education Act expressly
states that a school calendar shall not provide
for more than four professional activity days in
any school year. The School Year Calendar Reg-
ulation, Regulation 304, as amended, provides
that a school year shall include a minimum of
194 school days of which a school board may
designate up to four days as professional activity
days and the remaining days are instructional
days. But, professional activity days are not
used just for the purpose of professional develop-
ment of teachers or for attending education-
al conferences. This time may be devoted to
consultation with parents, curriculum and program evaluation and development, and
other similar things. The opportunity to sched-
ule professional development activities for
classroom teaching staff during work hours has
been significantly reduced in recent years.

Since the inception of the Student-Focused
Funding Model in the 1998–1999 school year,
there has been some funding of professional
development activities for teachers. It is part
of the Foundation Grant and falls under the
Classroom Teachers component. Unfortunate-
ly, how much is actually spent by school boards
for on-going professional development
remains unclear and probably varies from
school board to school board. The Education
Improvement Commission estimated that in
2000, Ontario school boards received about
$41 million for professional development,
which is less than one-half of one percent of
total payroll. In its final report, A Report on
Improving Student Achievement, the Education
Improvement Commission recommended a
substantial increase in professional education
funding so that school boards could provide
better in-service programs for teachers and
school administrators. According to the Com-
misson, Ontario lags far behind other
provinces, which on average spend about 1.6
percent of payroll in funding professional
development activities. Professional develop-
ment should be a priority, according to the
Commission and the Task Force on Effective
Schools, especially with the growing gener-
ation of new teachers due to early retirements and enrolment growth.

In September 1999, the Premier announced that his government planned to implement a teacher
testing program, as part of a strategy for improving teacher
competence, by June 2000.

Upon invitation, the Ontario College of Teachers wrote a
comprehensive discussion paper on teacher testing that
was well received by most stakeholders as a model for profes-
sional growth.

In May 2000, the Ontario Government announced a
controversial new program of its own called the “Ontario
Teacher Testing Program.”

The Ontario Teacher Testing Program

On September 2, 1999, the Premier announced that his government planned to
implement a teacher testing program by June
of 2000. Thereafter, the new Minister of Edu-
cation, Janet Ecker, wrote to the Ontario Col-
lege of Teachers outlining the general
parameters of the program and asked the Col-
lege to consult with its members and other
stakeholders about the initiative and report
back to her by the end of the year. The pro-
gram’s parameters at that time were:

- Regular assessment of a teacher’s knowl-
  edge and skills
- Methodologies which include both writ-
  ten and other assessment techniques
- A link to re-certification
- Remediation for those who fail assessments

HISTORY

According to the Education Improvement Commission, Ontario lags far behind the other
provinces in funding professional development, and now more
than ever before individual teachers are being pressured to
look after their own professional development, with their own
funds, and on their own time.

Professional development
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Force on Effective Schools, especially with the growing gener-
ation of new teachers due to
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Government announced a
controversial new program of
its own called the “Ontario
Teacher Testing Program.”
4. Teacher re-certification

3. Entrance Examination for new teachers

2. “Ontario Teacher Testing Program.” These are:

   - Language proficiency testing for teachers trained outside Ontario
   - Entrance Examination for new teachers
   - Teacher re-certification
   - Province-wide standards for teacher evaluation
   - Internship program for new teachers; and
   - Parental/student involvement in the new evaluation process

The Ministry of Education established the Ontario Teacher Testing Project Unit to start to carry out development of this program.

1. Language Proficiency Requirements

   Language proficiency testing was the only part of the teacher testing program introduced in 2000. Successful written and oral proficiency test results are required for all new applicants, seeking certification or licensing by the Ontario College of Teachers, who obtained their teacher training in a language other than English or French.

The College administers these tests and has recommended a stricter standard. There was a fundamental disagreement between the College and the Minister of Education about which new teachers had to take the language proficiency tests. The College proposed to the provincial government that all applicants who have not done both their postsecondary studies and their teacher training in English or French pass the language proficiency tests. The Minister informed the College that only applicants from outside Ontario who have not taken their teacher training in English or French would be required to take the language proficiency tests. The Governing Council of the College sought reconsideration by the Minister, but was unable to change the government’s mind. The provincial government used its authority under section 12 of the Ontario College of Teachers Act, 1996 to compel the outcome. This was the second time that the provincial government overruled the College on proposed changes to its regulations.

The College has been outspoken in its view that the scope of the language proficiency testing is too narrow since teachers need to have mastery, in English or French, of their subject matter. Aside from this, there has been no serious opposition to this requirement. Whether the language proficiency testing goes far enough remains an issue for future debate.

2. Entrance Examinations for New Teachers

Beginning next year, all new entrants to the teaching profession in Ontario will be required to pass a qualifying test, expected to be known as the Ontario Teacher Qualifying Test, before they can apply to obtain their licence from the College. Again, there has been no serious opposition to this initiative by any stakeholder. However, there has been opposition from some organizations, including teachers’ unions, about who prepares the test.

Educational Testing Services, a U.S.-based private testing company, was awarded the contract in June of this year, along with the Ontario Principals’ Council, to develop and implement the qualifying test. So far, the Ministry of Education has maintained considerable control over the design and development of the Ontario Teacher Qualifying Test. There appears to be a “turf war” over control of the test. College representatives were only asked

WHERE THE PROGRAM NOW STANDS

- Language proficiency testing was introduced in 2000. The College administers these tests and has recommended a stricter standard.
- Beginning next year, all new entrants to the teaching profession will be required to pass a qualifying test before they can apply to obtain their licence from the College. There has been opposition about who prepares the test.
- In June 2001, Bill 80, the Stability and Excellence in Education Act was introduced. Implementation of this re-certification initiative will be a challenge for the government. One can expect forms of collective action, and even litigation, by one or more the teachers’ unions to continue their fight against mandatory re-certification.
- The implementation of a minimum standards-based performance appraisal program for teachers, applicable to all boards in the province, is addressed in Bill 110. The College, in its report, recommended such a program to the Minister.
- What the policy-makers appear to have in mind is an induction program providing coaching and support from seasoned, veteran teachers to new teachers.
- Also, paying a premium to encourage superior teachers to stay in the classroom has been suggested. The teachers’ unions claim this solely belongs with the collective bargaining process.
- The government wants to give parents, and perhaps students, the opportunity to become involved in the teacher assessment and improvement process. The College, in its report on teacher testing, did not recommend this course of action. Opposition from the teachers’ unions is assured.
by the government to participate on an advisory committee for the test, along with other stakeholders. The College is participating and has claimed that the test will be based on competency standards derived from the College-approved Standards of Practice for the Teaching Profession. In any event, there will be a qualifying test before an individual can apply for membership in the College beginning next year. Bill 110, the Quality in the Classroom Act, addresses this component.

3. The Five-Year Itch: Re-Certification for All Teachers

Opposition to testing current members of the teaching profession has been intense. Ontario teachers’ unions vigorously oppose re-certification and, no doubt, this resistance to the government’s plan will not go away any time soon. The past president of the Ontario English Catholic Teachers’ Association has described it as “an act of educational tyranny” and “perpetual probation.” According to the president of the Elementary Teachers’ Federation of Ontario in a press release from June of this year:

“Mandatory professional development and teacher testing denies teachers’ professionalism, is redundant and insulting.”

Outrage is a good way to describe the opposition to the government’s re-certification initiative by the teachers’ unions, and boycotts are expected.

On June 7, 2001 the Minister of Education announced details of the mandatory re-certification program. Bill 80, the Stability and Excellence in Education Act, 2001 was introduced a few days later, which included statutory amendments to the Ontario College of Teachers Act, 1996 to implement the re-certification program and its five-year cycle of professional development activities. A new Part III.1 called “Professional Learning” was added to the Act.

The College was not consulted about the proposed changes and is not in complete charge of the professional development program. There is a new Professional Learning Committee of the College composed of up to five persons appointed by the Minister of Education and six persons who are College Council appointees, including two members of Council from the individuals appointed by the provincial Cabinet. The Minister will be able to make binding policy directives respecting course content and curriculum and require the Committee to comply with these directives. The College is expected to keep track of professional learning activities and will eventually accredit courses and course providers. In the meantime, the Minister of Education will be able to approve courses and course providers. According to the College, the re-certification program is not supposed to be a competency test, but is designed to support its Standards of Practice for the Teaching Profession, which includes competency statements, and its Ethical Standards for the Teaching Profession.

The re-certification program involves a five-year cycle of courses that must be completed by each teacher to maintain certification. All new teachers, as well as a random selection of about one-third of practising teachers, began the cycle this fall. Principals, vice-principals, and all other certified teachers will begin the cycle next fall. There are seven core courses and seven elective courses from an approved list of courses, which must be completed each five-year cycle. All courses include formal assessments and will vary in length from one-day courses to more involved courses to upgrade teaching qualifications. The College’s current working definition of “course” includes being a minimum of five hours long. It is conceivable that current additional qualification and academic courses will be considered equivalent to more than one course.

Failure to fulfill these requirements would normally lead to suspension of College membership until there is compliance within one year. Cancellation of membership would follow, if there were no compliance after a one-year suspension. The Registration Appeals Committee of the College has been given the responsibility of overseeing and dealing with any extenuating circumstances.

Responsibility for paying the cost of re-certification is a big issue. The College has formally requested both start-up and ongoing funding from the Ministry of Education for this initiative. So far, the government has made no funding commitments to the College respecting the implementation and maintenance of the re-certification program, so these costs may have to be borne by the membership. Who must bear the cost (in both time and money) of taking the courses to satisfy the requirements will remain a contentious issue for some time. The College and individual members face additional expense for mandatory involvement in the re-certification process. Both time and money issues will continue to surface in the collective bargaining process and there is no indication of return to the number of professional development days during the school years of the past.

Implementation of this initiative will be a challenge for the government. One can expect forms of collective action, and even litigation, by one or more of the teachers’ unions to continue their fight against mandatory re-certification of teachers in Ontario. However, the current government’s mandate will come to an end before the expiration of the first five-year cycle and, therefore, an election will be fought first, with the political support of the teachers’ unions being courted by both opposition parties.

4. Province-Wide Standards for Teacher Evaluation

The Ministry of Education issued a Request for Proposal last February for the collection of information on effective performance appraisal policies and procedures in different school boards across the province, and in other jurisdictions and professions. The implementation of a minimum standards-based performance appraisal program applicable to all boards in the province is addressed in Bill 110, based on the information collected. The College, in its report, recommended such a program to the Minister.

School board employers will still manage the evaluation process of their teachers. A level of consistency in expectations across the province appears to be the desired outcome. Finding the time to spend on formal performance evaluation of teaching staff will still remain a challenge for all school administrators.
5. Internship Programs for New Teachers

Mentoring and watching exemplary teachers perform is a good way to learn. A new generation of teachers needs mentoring, guidance, training, support and development. What the policy-makers appear to have in mind is an induction program providing coaching and support from seasoned, veteran teachers to new teachers, so they get a strong start to their careers. Mentoring during the first two years of teaching, which corresponds with the normal probationary period, seems to be the intention, especially so new teachers acquire strong teaching and classroom management skills from the get-go.

There have been a number of successful projects, such as the Mentoring for Literacy project at the Toronto District School Board where new teachers and mentors worked together during the school year on improving skills in teaching language and other areas of the curriculum. Teachers’ unions generally favour these kinds of programs, as long as school boards devote appropriate time and money to them.

Further announcements about this aspect of the program are expected. The concept of “master teacher” has been introduced by the government, which is connected to this program. The government has shown great interest in a system to recognize teaching excellence and encourage excellent teachers to remain in the classroom instead of moving on to senior administrative positions. Paying a premium to encourage superior teachers to stay in the classroom has been suggested. The controversial aspect of the teacher testing program.

The government wants to give parents, and perhaps students, the opportunity to become involved in the teacher assessment and improvement process. The College, in its report on teacher testing, did not recommend this course of action. Report cards for teachers from parents and/or students may be part of what the government has in mind.

Opposition from the teachers’ unions is assured, since, in their view, the employer alone is responsible for evaluating its teachers. One can expect steady resistance to this measure as well. So far, there has not been much action on this initiative and we will have to wait for further announcements.

Conclusions

There are some good things in the new reform initiatives of the provincial government respecting teacher testing and performance evaluation and plenty of questionable things too. On-going challenges to re-certification and the involvement of parents in the evaluation process are expected. Language proficiency standards might be too low and qualifying tests might be unsuitable for Ontario teaching.

It is beyond any doubt that on-going professional development and improvement for teachers in this province is essential for first-rate student achievement. But, clearly, it is a shared responsibility. Time will tell whether or not these initiatives are good, or even enough, for the public and separate school systems in Ontario to prosper and continually produce exemplary students.

6. Parental and Student Involvement in Teacher Evaluation

This is what the government considers part of the quality assurance process. It is part of “accountability” to the public and another
Role, Reach, and the Regulation of Teacher Preparation

The College of Teachers and the University

New Regulations for Teacher Preparation

In 1988 in British Columbia and in 1996 in Ontario, the respective provincial governments legislated the creation of a College of Teachers to provide a professional organization, generally comparable to other established professions, with responsibilities for the regulation of the teaching profession in that province. The creation of the British Columbia College of Teachers (BCCT)\(^1\) and the Ontario College of Teachers (OCT)\(^2\) interposed a new regulatory authority within the existing set of relationships respecting teacher preparation. Until then, the respective provincial Ministry of Education had regulated teaching, including the licensing and disciplining of teachers as well as the approval of teacher education programs. With the legislative interposition of a College of Teachers to regulate the teaching profession, the existing set of relationships changed fundamentally.

At the outset, each College had to work with its legislative mandate and decide how to proceed to implement it; such working through of necessity involved developing a whole new set of relationships with the stakeholders in its environment—the Ministry of Education, teacher federations, and school boards as well as, of course, the Faculties of Education traditionally responsible for the preparation of new cadres of teachers for the schools of the province. While working out these new relationships has been complicated and tension filled in many instances, this article focuses on the particular relationship between the College of Teachers and Faculties of Education where the conflict between the traditional role of Faculties of Education and the newly implemented reach of the College brings the distinctive agendas of these players into sharp relief.

The Mandates

The mandates of the BCCT and OCT are in many respects quite similar but they are not

\(^1\) Teaching Profession Act, R.S.B.C. 1996, c. 449.

\(^2\) Ontario College of Teachers Act, R.S.O. 1996, c. 12, as am. by S.O. 1997, c. 31, s. 161; 2001, c. 9, Sched. E, s. 1; 2001, c. 14, Sched.B.
It is understandable that conflicts could arise between the College in seeking to realize its mandate and the Faculties of Education in striving to protect their traditional and legislatively established autonomy. Identical. There are differences in membership, in the structure and functioning of the Governing Councils, in the role of the College in professional development, in investigating complaints against members, in the disciplining of teachers, as well as in their authority to regulate teacher education and preparation. This last is particularly important for it sets the context of the primary relationship between the College and the Faculties of Education. So, for example, the mandate of the BCCT is to approve all teacher education programs, while that of the OCT is to accredit and review all pre-service and in-service programs. Differences notwithstanding, each College has substantial legislatively established authority and discretion in matters of regulation—review and approval of teacher preparation programs, extending in Ontario to their formal accreditation.

Faculties of Education—as constituent parts of their host university—fall under quite different legislative mandates. In British Columbia the four public universities—University of British Columbia, University of Victoria, Simon Fraser University, and the University of Northern British Columbia—all fall under the legislative umbrella of the University Act which establishes, inter alia, the powers of the Senate of the university as follows:

37(1)
(c) to determine all questions relating to the academic and other qualifications required of applicants for admission as students to the university or to any faculty, and to determine in which faculty the students pursuing a course of study must register;
(f) to consider, approve and recommend to the board the revision of courses of study, instruction and education in all faculties and departments of the university;3

In Ontario, by contrast, each university has its own statute; so, for example, the Brock Act stipulates in relevant part that the Senate of Brock University is responsible, inter alia, for:

13. …the educational policy of the university, …and, has power…
(c) to determine the courses of study and standards of admission to the University and continued membership therein, and qualifications for degrees and diplomas.4

It is understandable that conflicts could arise between the College in seeking to realize its mandate and the Faculties of Education in striving to protect their traditional and legislatively established autonomy. In fact, three examples of such conflict follow.

Two cases involving the reach of the College and the autonomy of the university are from British Columbia.5 In both cases judicial review limited the reach of the College. The third case, from Ontario, did not receive judicial review but arose from the process of initial accreditation instituted by the College for Faculties of Education.

KEY POINTS

☑ In 1988 in British Columbia and in 1996 in Ontario, the provincial government legislated the creation of a College of Teachers to provide a professional organization, generally comparable to other established professions, with responsibilities for the regulation of the teaching profession in that province.

☑ Until then, the provincial ministries of education had regulated teaching, including the licensing and disciplining of teachers as well as the approval of teacher education programs.

☑ Conflicts have arisen between the College in seeking to realize its new mandate and the Faculties of Education in striving to protect their traditional and legislatively established autonomy, around such issues as program and course development, admission criteria, and accreditation.

☑ Two conflicts have arisen in BC between the College of Teachers and the universities. Both have gone to judicial review, where the outcome has been to limit the reach of the College into the regulations of the university.

☑ One conflict has arisen in Ontario, where Lakehead University sought the appeal of the OCT’s accreditation judgment on the grounds that the College did not technically have the statutory responsibility to accredit teacher preparation programs. (The Lieutenant Governor must enact, through Order in Council, an “accreditation regulation”; a regulation is presently being drafted.)

3 University Act, R.S.B.C. 1996, c. 468, s. 37(1)
4 Brock University Act, R.S.O. 1964, c. 127, s 13, as am. by S.O. 1971, c. 107.
5 For an excellent summary of these two cases see W. Harris, “The Regulation of Teacher Education Programs by the College of Teachers” (2001) 10(4) Comments 1-4.
At issue lay TWU’s code of Community Standards, applicable to students, faculty, and staff alike, that included a statement requiring members of the TWU community to refrain from a set of personal practices “biblically condemned” including inter alia “homosexual behaviour.”

The majority of the Supreme Court held that the BCCT had jurisdiction to consider discriminatory practices when considering TWU’s application but that BCCT’s expertise did not qualify it to interpret the scope of human rights issues at stake nor to reconcile issues of competing constitutional rights. Invoking the standard of correctness, the Court found that BCCT had erred because there was no concrete evidence that teachers trained at TWU treated homosexual students unfairly:

“...there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate. Although this evidence is not conclusive, given that no students have yet graduated from a teacher education program taught exclusively at TWU, it is instructive.”

Further, the Court noted that while tolerance of divergent beliefs is the hallmark of a democratic society, “[a]ltering on those beliefs, however, is a very different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT.”

In effect, then, the Supreme Court limited the reach of BCCT in this case to adjudicating actual instances of discriminatory conduct. Matters of belief are protected and beyond the reach of the BCCT; matters of teacher conduct where conduct emanates from those beliefs may fall under the jurisdiction of the College. The distinction is between “belief” and “conduct.”

Case 2
University of British Columbia v. The B.C. College of Teachers

This case, adjudicated by the BC Supreme Court, addresses exactly the point of this article—namely, the jurisdiction of the BCCT to approve/deny approval of a teacher education program submitted by the Faculty of Education at UBC and whether, by attaching specific conditions to its approval, the BCCT unlawfully invaded the university’s statutory mandate to manage its own internal affairs.

The key facts of this case are that the Faculty of Education at UBC developed a new teacher education program and submitted it to the BCCT for approval. The new program was designed to effect a better integration of course work and field experience by restructuring the course offerings, reconfiguring the practicum, and revising the role of the Faculty and School Advisors; the admissions requirements and the program options available to teacher candidates were not changed. BCCT denied approval for the program unless certain specified conditions relating to the administration and implementation of the program once approved were met. Specifically, BCCT’s conditions addressed the student/supervisor ratio, the issue of faculty representation on committees, and specific staffing requirements.

UBC challenged the reach of the BCCT into what it considered its own statutory role and jurisdiction and argued that the setting and administration of its budget, the organization of its faculty structures, the staffing of committees, and the provisions of its collective agreements were ultra vires the BCCT. Effectively, UBC argued that the jurisdiction of the BCCT should extend to scrutinizing the content—the “what” of teacher preparation programs—but that the “how”—the delivery of approved programs—fell within the statutory responsibility and institutional discretion of the university.

The Court, following its review of the facts and the law, concluded that the BCCT was
UBC argued that the jurisdiction of the BCCT should extend to scrutinizing the content—the “what” of teacher preparation programs—but that the “how”—the delivery of approved programs—fell within the statutory responsibility and institutional discretion of the university.

statutorily empowered with a limited discretion directed to “teacher certification” and not a broad discretion permitting it to sweep into the ambit of its review all aspects of the design and delivery of teacher preparation, particularly not those aspects statutorily delegated to the university. Effectively, the Court accepted UBC’s argument that the BCCT’s reach should be directed to the exit criteria to be achieved by a teacher candidate upon completion of the program, criteria deemed to be appropriate to warrant certification by the College. The Court remitted the UBC proposal to the College for reconsideration.

Case 3

Accreditation and Lakehead University

This third case did not receive judicial review but arose from the process of initial accreditation instituted by the Ontario College of Teachers for Faculties of Education in Ontario. The background to this case is that the OCT proposed an “initial” process of accreditation to Ontario Faculties of Education, conducted over a three-year cycle beginning in 1998. In each of these three years, pre-service teacher preparation programs in three or four Faculties were appraised for accreditation. Given that the process of accreditation was brand new, the manual and expectations around accreditation evolved over the three years, but at the end of the process each Faculty received a judgment respecting its “accreditation”; in most cases Faculties received “full” accreditation—two received conditional accreditation, one of which was Lakehead.

Upon receipt of the College’s accreditation judgment, and following legal advice, Lakehead appealed the College’s decision on the grounds that the College had acted ultra vires. Essentially, the Ontario College of Teachers Act confers the nominal authority upon the OCT to “accredit” teacher preparation programs in Ontario. For that nominal authority to become actual so that the College can accredit or officially recognize teacher education programs and establish standards that programs must meet to receive accreditation, the Lieutenant Governor in Council must enact, through Order in Council, an “accreditation regulation.” Until such a “regulation” is established the OCT’s statutory responsibility to “accredit” it is moot. Technically, then, none of the accreditation judgments rendered by the OCT in this “initial” process have, absent the “accreditation regulation,” any legal force; such will occur once “accreditations” are conducted in keeping with a duly authorized regulation.

A draft “accreditation regulation” is currently under consideration by the Ministry of Education. Originally drafted by the OCT, the draft regulation has received extensive consultative comment and criticism from the Ontario Association of Deans of Education, including a series of recommendations respecting the need for evidence-based criteria and procedures, an appropriate appeal mechanism, and representation of teacher educators on the various panels and committees associated with the accreditation process.

We, in the OADE, hope that the Regulation once approved will provide a practically useful and functional framework to enable the OCT to accredit teacher preparation programs in the public interest as it is charged to do, while enabling Faculties of Education to continue to prepare new cadres of well-qualified teachers for the school systems in Ontario.

Conclusion

While these cases exemplify the tensions evident in the relationships between the BCCT and the OCT and their respective universities, they still only scratch the surface of working out the limits of regulatory reach and institutional role. What would happen, for example, were the OCT to condition accreditation approval on the admission to pre-service preparation programs of teacher candidates with specific academic averages or configurations of courses, majors or minors? Unlikely though this might seem, the College could argue that such conditions speak to its public responsibility to ensure the preparation of well-qualified teacher candidates for the schools of Ontario; the universities—with one voice I expect—would cry “foul” on the grounds that such decisions are statutorily their responsibility through their Senates. Ultimately, such and related issues may require judicial determination and will, as in the UBC v. BCCT case, require judicial interpretation of relevant statutes and the powers accorded therein. While the regulatory reach of the College and the institutional role of the university are both legitimate, working out an effective delimitation of the one versus the other will require considerable wisdom and compromise.

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10 H. Blakie, per J. Murray “Request for Reconsideration of the Accreditation Decision of the Ontario College of Teachers Accreditation Committee in respect of Lakehead University’s Pre-Service Teacher Education programs.” (September 29, 2000)
What is Harassment?
There are two categories of harassment recognized by law: criminal harassment and civil harassment. Within each of these categories, there are four types of harassment: oral, physical, telephone, and written. In some cases, an individual will subject an administrator to all four forms! Whether the conduct constitutes criminal or civil harassment depends on the facts of each case. As defined more fully below, there are sections in the Criminal Code dealing with criminal harassment. In addition, there are sections in the Criminal Code dealing with nuisance and harassing telephone calls. In general, fear for one’s safety is an essential element in a criminal harassment charge. On the other hand, the factual components for nuisance and harassing telephone calls are completely different. On the other side of the spectrum are the civil harassment cases which do not require fear for one’s safety.

Whether the conduct constitutes criminal harassment, again, depends on the facts of the case and the impact on the “victim.” All of the forms of civil harassment are recognized by the courts as constituting nuisance.

Avoiding Judicial Review
In the majority of cases involving disruption or harassment, the matter can be resolved without recourse to more serious forms of intervention such as the police or the courts. In some cases, a letter from the supervisory officer or director or even a trustee explaining the circumstances can resolve the issues. In other cases, referral to mediation can solve a real or perceived dispute. For example, in a number of special education situations, we have used mediation to resolve the conflict and avoid judicial review and possible human rights complaints. In many cases, the individual is looking for a way to vent their anger and, once this is done, can participate in resolving the substantive issues.

Training Educators to Deal with Harassment
One reality that cannot be overlooked is the necessity to teach teachers and administrators how to recognize and deal with disruptive parents or individual harassment. Recognition of the problem can sometimes lead to an effective resolution before the matter escalates. Many directors have commented that educators are not well trained to deal with such confrontations. With appropriate professional development, strategies can be developed to deal with both criminal and civil forms of harassment. In many cases of civil harassment, the strategies may effectively resolve the matter.

HARASSMENT IS A SAFETY ISSUE
Parental or intruder harassment can sometimes be enough to push an administrator into burn-out. Boards that ignore or downplay the phenomenon of harassment could face significant increases in stress-related disability claims, job transfers, or early retirement. Indeed, parental or intruder harassment may constitute a safety issue sufficient to trigger the work refusal provisions of the Occupational Health and Safety Act. Sexual harassment has already been determined to be a safety hazard that justifies a staff person refusing to work in particular circumstances. The possibility of work refusal must also be taken into account in dealing with situations involving parental and/or intruder harassment. Consequently, it is essential that appropriate strategies be developed to deal with each case.
**Working as a Team**

One complaint we have heard from administrators is that quite often the board considers these issues to be the responsibility of the principal alone, and does not provide sufficient back-up. Senior administrators should remember that the principal is acting on behalf of the board. As a result, the strategy that is utilized should be developed consensually between the principal and the appropriate supervisory officer. Otherwise, principals are left to fend for themselves. In such cases, the methods of dealing with the issues will differ from school to school, thereby creating inconsistency within the board’s jurisdiction. Moreover, principals might act inappropriately causing greater friction or even placing a principal in jeopardy of liability for inappropriate action. Working together as a “team” and developing appropriate strategies should eliminate this risk.

**Harassment Under the Criminal Code**

One would think that the *Criminal Code* and the criminal justice system would be an effective means to deal with criminal harassment. This is just not the case. The problem is that the harassment provisions of the *Criminal Code* are relatively new, and the courts are still struggling with the appropriate interpretation and application of the sections. In addition, while the process is supposed to be expeditious, it can often turn out to be lengthy and traumatic. Moreover, the victim may be “forgotten” as the process moves forward. Where there is no prior record, counsel for the accused might “plea bargain” and arrange for the accused to plead guilty and receive a discharge or, alternatively, probation with some restrictive conditions. This might work for the short-term, but not in the long-term. Nevertheless, it should be remembered that a finding of guilt or a plea of guilty can be cogent evidence in any civil proceeding which may be required to bolster the restraining order. In addition, it may be possible to obtain an interim or permanent order requiring the perpetrator to obtain appropriate counseling. This is a remedy that may be more readily available in the criminal context than in the civil context.

Notwithstanding these concerns, in any case of criminal harassment, the police should be contacted immediately. Where the matter involves physical or oral threats, the police may be able to proceed under sections of the *Criminal Code* which are more readily enforceable. In cases of “criminal harassment,” which involve watching or besetting, the police should be consulted to determine whether charges will be laid and what the “victim” might expect. It is important for schools to develop a liaison with the local police to ensure an appropriate and expeditious response. Liaisons which have developed through community policing or school safety initiatives may be more readily enforceable. In cases of “criminal harassment,” which involve watching or besetting, the police should be consulted to determine whether charges will be laid and what the “victim” might expect.

**Steps and Provisions**

One would think that the *Criminal Code* and the criminal justice system would be an effective means to deal with criminal harassment. This is just not the case. The problem is that the harassment provisions of the *Criminal Code* are relatively new, and the courts are still struggling with the appropriate interpretation and application of the sections. In addition, while the process is supposed to be expeditious, it can often turn out to be lengthy and traumatic. Moreover, the victim may be “forgotten” as the process moves forward. Where there is no prior record, counsel for the accused might “plea bargain” and arrange for the accused to plead guilty and receive a discharge or, alternatively, probation with some restrictive conditions. This might work for the short-term, but not in the long-term. Nevertheless, it should be remembered that a finding of guilt or a plea of guilty can be cogent evidence in any civil proceeding which may be required to bolster the restraining order. In addition, it may be possible to obtain an interim or permanent order requiring the perpetrator to obtain appropriate counseling. This is a remedy that may be more readily available in the criminal context than in the civil context.

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place in her daughter’s classroom. The accused suggested that the complainant was covering up the incident and should be held accountable for the cover-up. The principal of the school had dealt with the matter, and the matter was in no way related to any of the complainant’s responsibilities. After this incident, the accused’s actions and emotions toward the complainant changed. The accused began phoning the complainant at work and at home, coming by her home asking to speak with her, and also continued to send the complainant gifts. The accused would sometimes become very angry with the complainant and, at other times, would be friendly and apologetic. On a few occasions, the accused wrote to the complainant apologizing for her behaviour. However, the behaviour did not stop. As a consequence, the complainant was unable to sleep, eat, and ended up on stress leave. The accused was charged under section 264(2)(b) and found guilty.

Reference should also be made to the cases below under “Civil Action.” Given the particular circumstances in this case, it is likely that the complainant could have obtained a restraining order. However, with a criminal conviction, the court can include appropriate restraining provisions in the sentence. If the sentence is time-limited (e.g., two years), it could be followed by a civil restraining order if necessary.

The court comments that section 264 requires that the accused “know” that the complainant is harassed, or at least be “reckless” as to whether the person is harassed. In addition, “establishing the complainant’s state of mind is an element of the offence.”

Dealing with Nuisance and Harassing Phone Calls

As noted above, there are two other possibilities under the Criminal Code. Subsection 180(1) of the Code deals with “nuisance.” In one recent case, a parent was charged with nuisance resulting from obstructing the entrance to a school and attempting to “storm” the school. On the first appearance, the Court issued a restraining order that the parent remain more than 50 metres from the school. The possibility of such an order is a substantive strategic advantage over a civil restraining order.

Another section of the Criminal Code that should be taken into consideration is subsection 372(3) which deals with harassing telephone calls. Unfortunately, there are two significant detriments to this particular provision. In the first place, it is necessary for the Crown to prove “intent.” However, it is quite likely that a Court will draw a conclusion of “intent” depending on the nature, extent, and content of the telephone calls. Secondly, the offence is punishable on summary conviction, which is not as serious as the other criminal sections referred to above. Nevertheless, it may be possible to obtain an interim or permanent order restraining the accused from further telephone harassment. This section might be referred to as “hybrid” since it is a middle ground between the requirements of the criminal harassment sections and the possibility of a civil remedy.

What to do with the accused?

A more recent decision indicates another significant strategic advantage to proceeding under the Criminal Code. In R. v. Dodangoda (2000, Ont. C.J.), the accused was convicted of mischief pursuant to section 430 of the Code. The Judge at Trial ordered a report pursuant to the Mental Health Act of Ontario to assist the Court with sentencing. On appeal, this aspect of the Order was upheld. The decision is quite significant since one of the missing links in all of these cases is what to do with the accused. In all of the cases above, a serious issue arises as to what the Court can do with the accused. Incarceration may not resolve the problem. In most cases, the accused needs significant psychiatric intervention or at least some form of appropriate counselling. This issue is expanded below in dealing with the concerns relating to civil remedies and how such remedies can address the “state of mind” of the harassing person.

Remedies Under Education Legislation

The education legislation may be applicable or useful where the activity falls short of criminal harassment; for example, where the conduct is harassing but does not meet the threshold of the fear for safety. In other words, a school can exclude someone who might be a risk as opposed to waiting until the person demonstrates that he/she is a risk.

The Power to Exclude

Before utilizing the exclusion provisions of the Ontario Education Act, an appropriate strategy should be developed. Certainly, it is our recommendation to schools that the supervisory officer concur with any exclusion. Indeed, the letter we utilize usually provides for both the principal’s and supervisory officer’s signature to demonstrate to the parent or intruder the support at the board level. In many cases, the letter from the principal and supervisory officer is also complemented by a letter from the director, usually utilizing the trespass legislation that puts specific conditions on visits to the board offices.

It should be noted that an intruder who has or has been expelled; or, indeed, is a student at another school. In addition to exclusion, other disciplinary strategies might also be invoked.

In some provinces, teachers are specifically given the power to exclude. We would not recommend that any teacher exercise this power without the support of the principal. In such cases, the letter might come from the teacher and the principal together.

Liaison with Police

Liaison with the police is essential in these matters. Again, if the person refuses to comply, the police can be summoned and can deal with the matter in an appropriate manner. The liaison with the police ensures an expeditious response and appropriate action.

It should be noted that involvement of the police is specifically referred to in subsection 231(5) of the Manitoba Public Schools Act and subsection 145(5) of the Prince Edward Island Education Act.

Appeal to the Board

Subsection 265(m) of the Ontario Education Act provides for an appeal to the board. As a result, most boards should review with the trustees the existence of this section, when it might be utilized, and ensure that the appropriate support is in place. Alternatively, Boards and schools may now rely on Part XIII and avoid this issue completely.

Recent Cases of Exclusion

In R. v. Burk (1969, Ont.), the court was asked to determine whether or not a school was pri-
A school can exclude someone who might be a risk as opposed to waiting until the person demonstrates that he/she is a risk.

vate property or public property, thereby determining the parameters for access to the school. The court held that the school was a public place and that the actions of those who entered the school must be considered in order to determine whether they are trespassing. This decision should not be surprising for any educator. However, the right of access is subject to restriction, such as exclusion under the relevant legislation. In Burko, the court held that the right of the public to use the corridors of a public high school is limited to usage in an ordinary and reasonable manner; in other words, in a manner consistent with the purpose for which the school is maintained. In this particular case, the distribution of newspapers relating to student matters by six university students was deemed not to be ordinary and reasonable usage and the six university students were found guilty of trespass under the Trespass to Property Act.

In Serup v. Prince George School District No. 57 (1987, B.C.), the court dealt with a situation where a parent was entering the school and using the school library without first visiting the office and without obtaining any permission. The intent of entering the library was to determine whether there were any books in the library that the parent considered to be inappropriate. The court referred to subsection 118(1) of the School Act as it then was, which provided: “A person who disturbs, interrupts or disquiets the proceeding of an official school function or disturbs, interrupts or disquiets a school established and conducted under the authority of this act … commits an offence” and ordered the parent not to attend the school. The approach of the court in Serup is actually quite interesting. The court makes reference to the offence section of the Act as a foundation for the restrictive order.

In Nagel v. Hunter (1995, Alta. C.A.), the plaintiff argued that she was wrongfully detained on school property where she was handing out pamphlets to students. The court held that the defendant had the right to arrest the plaintiff under section 21 of the Alberta School Act. The court also referred to section 240 of the Act which provides: “Any person who contravenes section 21 is guilty of an offence and liable to a fine of not more than $1,000.00”.

The approach in this case is problematic. Certainly, educators should not be attempting to “arrest” trespassers but should rely on the police wherever possible. Educators may restrain students from other schools who are trespassing but the risk of harm is such that an educator would be well advised to avoid such situations and rely on the police.

In the absence of exclusionary or offence provisions in education legislation, or provisions which are complementary, resort can be made to the provincial trespass legislation. The penalties under the legislation are not significant. Nevertheless, where a trespasser creates a disturbance, the police will generally remove the trespasser and lay a trespass charge. In other words, once again, the police can effectively deal with the situation by removing the person who is disturbing the school.

As noted above in R. v. Burko, access to the school must be for school purposes, otherwise, the person may be considered a trespasser and can be subject to charges under the trespass legislation.

Resorting to Civil Action

In Peel District School Board v. Taurozzi (1998), the defendant Taurozzi began making phone calls to the supervisory officer to complain about a specific situation. The calls escalated to 10 or 15 per day. Most of the calls and messages dealt with personal matters that were completely irrelevant to the school or education. While the calls were more of a nuisance to the supervisory officer, similar calls were made to other support staff. Eventually, support staff were feeling intimidated and harassed.

A warning letter was sent to the defendant which included an exclusion from board property. There were no further attendances at board property, but the phone messages continued.

UTILIZING THE EDUCATION ACT

Administrators should first review with the police whether a charge can be laid under the Criminal Code. If not, the education legislation may be applicable or useful.

Utilizing the exclusion provisions of the Ontario Education Act, a school can exclude someone who might be a risk as opposed to waiting until the person demonstrates that he/she is a risk.

It is our recommendation to schools that the supervisory officer concur with any exclusion. In many cases, the letter from the principal and supervisory officer is also complemented by a letter from the director usually utilizing the trespass legislation that puts specific conditions on visits to the board offices.

An intruder could include a student who is under suspension or has been expelled; or, indeed, is a student at another school.

In some provinces, teachers are specifically given the power to exclude. We would not recommend that any teacher exercise this power without the support of the principal.
As a result, the matter culminated in an application to the court for a restraining order. On October 15, 1998, Mr. Justice Campbell granted the restraining order.

In a prior case, Peel Board of Education v. Gradek (1994), the defendants were distributing defamatory pamphlets as part of their campaign of complaint against educators and trustees. Again, the police were consulted, but did not see any grounds for a charge under the Criminal Code. On the motion, although Mr. Justice Carnwath did not issue any Reasons, he did indicate from the bench that in situations of this nature, the court must balance the right of the individual to make fair comment and enter onto school property under appropriate circumstances, with the right of educators to be free from defamatory statements or harassing conduct. His Honour Judge Carnwath felt that in this case the defendants had stepped over the line and therefore the Judge granted the restraining order.

In the Taurozzi case, the court was dealing primarily with telephone harassment, but there was also the issue of the physical harassment involving the attendance at the office. In Gradek, the court was dealing with a number of issues including oral, physical, and written harassment, but also including defamatory statements. In many cases of parental harassment, the issues can include harassment and defamation.

One point which should be raised is that an interim restraining order can be obtained relatively expeditiously and is pursued under the control of the board or individual in comparison to criminal proceedings or a charge under the education legislation. The disadvantage is that the cost of civil proceedings must be borne by the board, whereas under criminal proceedings, it is the Crown that bears the cost.

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Future Shock

No incident of harassment should be taken lightly. In many cases, initial contact with the school may seem innocuous, but may be building toward something much more traumatic. Going back to the concept of professional development, educators should know how to recognize the initial stages of harassment.

Given cost-cutting in education, senior administrators are often reluctant to consult counsel. However, this is certainly one area where an ounce of prevention is worth a pound of cure. Counsel should be consulted early in the matter and should be part of the “team” devising the appropriate strategy. Boards should consider any case of harassment to be the responsibility of the board and not the individual employee. Otherwise, the failure to act can create morale issues or could result in friction with a union or association representing the employee.

The number of these cases suggests that this is not a concern that will disappear. As a result, educators should be aware of the issues, able to spot the symptoms, and should be prepared to work as a team to solve the problem.

RESORTING TO CIVIL ACTION

Educators have the right to be free from defamatory statements or harassing conduct and may resort to Civil Action if police advise that they do not see any grounds for a charge under the Criminal Code.

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The disadvantage is that the cost of civil proceedings must be borne by the board, whereas under criminal proceedings, it is the Crown that bears the cost.

Bob Keel is the senior partner of Keel Cottrelle, with offices in Toronto and Mississauga. He is qualified in Ontario and New York State. Bob acts as the liaison to the Keel Cottrelle affiliated offices in the United States. His practice includes Education law and First Nation law. Bob has appeared before all levels of the courts and before numerous administrative tribunals. He has presented at more than 100 conferences and has published over 100 papers and articles. Bob is the Executive Editor of the Education Law Newsletter and Human Resource Reporter, as well as the Edu-Law Bulletin. He is also the author of Student Rights and Responsibilities: Attendance and Discipline (1998). Bob may be contacted by email at rkeel@keelcottrelle.on.ca.
Advice to Educators

Custody, Access, and the School

1. Stay Neutral
During difficult custody proceedings it is not uncommon for school staff and administration to be requested by the lawyers for one or both parents to write a letter in support of that parent, to provide educational information and opinions about the student’s progress and daily activity, or to participate in an interview with the lawyer. These requests should be refused.

It is difficult if not impossible for a teacher or principal who has communicated with a parent’s lawyer to appear neutral in the eyes of the other parent and the student. The working relationship between that teacher, principal, and parent may be severely damaged by the perception that the school is taking sides. Both written and verbal communication with a parent’s lawyer may appear to be biased. There is no obligation to be interviewed if requested by a parent’s lawyer, and both the teacher and the school administration should deny such requests.

The duty of school staff and administration to remain neutral extends to the custody proceeding itself. In some cases parents will subpoena either the teacher or principal to attend court as a witness. In such cases, teachers and principals must be careful to remain neutral and to provide only factual information. Opinion evidence on anything other than a student’s academic progress or ability should not be offered unless the Court requests such information.

2. The Child May Need to be Interviewed at School
During a custody dispute, it is also not uncommon for the Office of the Children’s Lawyer, acting on behalf of the child, to contact principals and teachers. The Office of the Children’s Lawyer may wish to have a lawyer or psychologist interview the student at the school or may wish to conduct an interview with either the child’s teacher or the school principal.

Interviews of the child at the school may be the only method of conducting an honest interview of the child. Often the child’s home is an unwelcoming place and may not be conducive to such an interview. Where the child is too young to attend the lawyer’s office on their own, the school may be the only viable alternative for the interview. Administrators should attempt to facilitate such interviews where possible; however, only with the child’s and parents’ prior consent. In some cases the child may want the principal, guidance counsellor, or teacher to be present while the lawyer is conducting the meeting. This should be discussed with the lawyer, and where feasible, the teacher, guidance counsellor or principal should remain.

3. There is No Obligation for Staff to be Interviewed
In some cases a lawyer or psychologist from the Office of the Children’s Lawyer may seek to conduct interviews of school staff and administration. This can be fraught with problems and the school should deny these interviews. As stated above, there is no obligation to be interviewed. That being said, in some limit-
ed circumstances, the school may consider that it would be in the child’s best interest if such an interview were conducted. In these limited circumstances legal counsel acting for the principal or teacher being interviewed should be present throughout the interview.

Teachers and principals should also be aware that they might be called as a witness if the Office of the Children’s Lawyer has interviewed them. Agreeing to an interview does not preclude or prevent the Office of the Children’s Lawyer from calling that person as a witness; in most cases it ensures that they will be called.

4. You Need Copies of All Court Orders
Custody disputes can become long, drawn-out processes between parents. In an acrimonious dispute it is not uncommon for parents to attend Court on several occasions before a final order for custody and access is issued. Some of the orders school administrators may receive and require for their information include Restraining Orders, Interim Orders regarding custody and access, and Amending Orders. Administrators need to ensure that the student’s OSR contains the most recent Court Orders. The validity of an order in the student’s OSR should be confirmed with both the custodial and access parent. Administrators should also ensure that they have copies of all of the necessary orders. For example, Amending Orders may not include the information contained in the order being amended, without the original order the Amending Order may make little sense.

Custody and Access Orders, whether interim or final, typically provide information regarding whom the custodial parent will be, and when an access parent may see a child. These orders, in some cases, may restrict the non-custodial parent’s access rights.

5. Have a Procedure in Place for Dealing with Access Parents
Access parents have a legal entitlement, provided by the Children’s Law Reform Act, to “make inquiries and to be given information as to the education and welfare of the child,” unless, the right is specifically denied by court order. This right may include the right of the access parent to receive report cards and ask questions of the principal. It does not, however, include the right to make decisions regarding a child’s education. Each school should ensure that they have a procedure in place, consistent with their board of education’s policy, to provide access parents with the information to which they are legally entitled. It is also important that administrators review court orders to ensure that there are no restrictions on a parent’s access rights which may prohibit him/her from accessing information from the school about his/her child.

While access parents have a right to have access to their children, they may or may not have the right to exercise this access while the child is attending school. It is important that school administrators review the Custody and Access Order. When an access parent wishes to pick up a child from the school this should be confirmed with the custodial parent, preferably in writing if it is not specified in the court order. In some cases a non-custodial parent or access parent may attempt to access the child from the school without authorization. If this occurs the custodial parent should be contacted immediately, and in some cases it may be necessary to call police.

Access parents may also attempt to exercise access by becoming school volunteers. The access parent should be informed that becoming a school volunteer does not ensure that they will be volunteering with his/her child’s class. Similarly, if they are seeking to attend a class trip they should be informed that they might not be placed in the same group as their child. In all circumstances the custodial parent should be informed and consulted.

Access parents may also desire to become school council members at their child’s school. As parents they are entitled to become school council members. However, access parents should be informed that school councils meet after all of the students have left the building and that activities organized by the school council may not provide the parent with contact with his/her child or any children at all. Again, any applicable order should be carefully reviewed to determine whether this role should be restricted or denied.

6. Have Written Confirmation of Childcare Arrangements
Another frequent issue faced by school administrators, which may or may not be related to custody and access disputes, is the temporary absence of a custodial parent. When the custodial parent is unavailable to care for a child for a limited period of time due to illness, travel, or other commitments, it may be necessary for that child to be placed in the care of the access parent, an alternative family member or a friend. In these cases it is important for administrators to ensure that they have written confirmation of the temporary change in the daily care and control of the child, including acknowledgement from the person temporarily taking care of the child of their responsibilities and the duration for which they will be caring for the child. If there are any questions or concerns regarding the arrangement, either prior to or during the period of the parent’s absence, CAS should be consulted on a no-name basis immediately. Administrators should be very cautious in cases where a student may require special education services; these decisions should only be made by a custodial parent, never a temporary caregiver.

7. Your First Priority is the Child
In all cases of custody and access it should be remembered that the first priority is the child, to ensure their safety and well-being. While parents may want to embroil the staff and administration of a school in their custody dispute, this should be avoided. It is important that both parents and the child view the school, staff, and administration as a safe neutral place. There are many complicated and fact specific issues that may arise between parents and schools when custody is at issue. It is important that school administrators consult with their supervisory officers, who in turn should seek legal advice.

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Immigration Status and the Right to Attend School

In this article the relationship between immigration status and a person’s right to remain and study in Canada is examined. Persons remain in Canada for either a permanent or temporary purpose. Canadian citizens and permanent residents are persons who have the right to remain in Canada permanently. As such they have the right to study in Canada without obtaining a student authorization (visa) from Canada Immigration.

Right to Remain in Canada

Canadian Citizens

Canadian citizens are persons who have acquired citizenship by birth or by naturalization. Under Canada’s Charter of Rights and Freedoms (the Charter) they have the right to enter, remain permanently, or leave Canada.

Permanent Residents

Permanent residents are persons who have successfully immigrated to Canada and who have thereby manifested an intention to remain in Canada permanently. Such persons lose their right to remain in Canada if they become liable for deportation or if they leave Canada for more than 183 days in any one 12-month period with the intention of abandoning Canada as their place of permanent residence. Permanent residents become deportable if they engage in criminal activity or if they made a material misrepresentation to immigration officials when they came to Canada.

Canadian citizens and permanent residents have the right to move to and take up residence in any province and to pursue the gaining of a livelihood in any province. Subject to the provisions of the provincial Education Acts relating to the attendance of students in a particular school district, all citizens and permanent residents may attend school in Canada without the permission of Canadian immigration authorities.

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Irvin H. Sherman, O.C.
tecture in Canada that will make a significant contribution to the economy. The entrepreneur, the entrepreneur’s spouse and children are issued conditional visas. The entrepreneur must satisfy an immigration officer within two years of coming to Canada that he or she meets the terms and conditions imposed upon them when they came to Canada. If the entrepreneur fails to do so, then the entrepreneur and family may be deported from Canada, subject to their right to appeal on legal and humanitarian grounds.

An investor is a person who has successfully operated, controlled, or directed a business or commercial undertaking abroad. The investor must have a net worth of at least $800,000 and must make an irrevocable $400,000 with the Federal Government (or if the investor is destined for Quebec in an investment approved by the Province of Quebec) for a term of five years. There are several plans available for an investor to fund the obligation to invest. It thus may be possible for the investor to “buy” an immigrant visa.

A self-employed immigrant is a person who intends or has the ability to establish a business in Canada that will create employment opportunities for such person and which will make a significant contribution to the economy. This category of business immigrant usually relates to artists, farmers, sports personalities, or operators of small specialized trades or businesses.

**Members of the Family Class**

A Canadian citizen or permanent resident who is 19 years of age and residing in Canada may sponsor an application for immigration made by a member of the family class. The sponsor formally undertakes the obligation to support the sponsored family members for a ten-year period. Immigration officials rarely enforce this obligation. Members of the family class include the sponsor’s spouse, dependent children, parents, and grandparents. This category is based on family relationship. The applicant for immigration under the family class is not subject to the points system. The applicant does need to have an occupation in demand.

**Refugee Claimants**

Canada has subscribed to the United Nations Convention Relating to the Status of Refugees. Canada’s obligation in this regard is found in the provisions of the *Immigration Act*. Canada will not return (refouille) a person who has been found to be a Convention refugee to a country where that person’s life would be threatened provided that person has not engaged in serious criminal activity or activity that threatens national security.

A person who claims Convention refugee status is called a refugee claimant. That person must initially satisfy immigration officials that he or she is eligible to make a refugee claim. For example, a person is ineligible to make a refugee claim if he or she has already been found to be a Convention refugee in another country. This process may take several months. Until then the claimant cannot work and the claimant’s children (who are also refugee claimants) cannot attend school. Upon being found eligible to make a refugee claim the claimant is issued a conditional removal order.

In Ontario, refugee claimants are not eligible for OHIP. They are, however, eligible for Federal medical benefits which are not as generous as those offered under OHIP. The refugee claimant must satisfy a two-person panel of the Immigration and Refugee Board that he or she has a well-founded fear of persecution by reason of race, religion, nationality, and membership in a particular social group or political opinion. A person found to be a Convention refugee may apply from within Canada to become a permanent resident.

A failed refugee claimant has several options to pursue in order to remain in Canada. That person may:

(a) seek leave in the Federal Court for judicial review of the negative decision of the Immigration and Refugee Board;

(b) apply to become a member of the post-determination refugee claimants in Canada class (PDRCC); and

(c) make an application to remain in Canada on humanitarian and compassionate grounds.

The PDRCC applicant must satisfy an immigration officer that if he or she were removed from Canada to another country he or she would be subject to an identifiable risk that may endanger that person’s life or where that person would be subject to extreme sanctions or inhumane treatment.

**Persons who come to Canada for temporary purposes**

include visitors, persons who hold work permits, and student visa holders.

If the refugee claimant is ultimately unsuccessful in his or her quest to remain in Canada, the conditional removal order made against the claimant becomes unconditional and the claimant will be deported from Canada. A deportee cannot return to Canada without first obtaining the consent of the Minister of Citizenship and Immigration to return to Canada.

**Minister’s Permit to Enter Canada**

Persons, other than a failed refugee claimant, who do not otherwise qualify for immigration may also seek to immigrate to Canada on humanitarian and compassionate grounds.

In cases where an applicant for immigration is inadmissible and the reason for that inadmissibility is not serious, the applicant may be given a Minister’s permit to enter Canada. A Minister’s permit is usually issued for a year at a time and may be renewable. After five years the permit holder may apply to become a permanent resident of Canada.

**Temporary Entry**

Persons who come to Canada for temporary purposes include visitors, persons who hold work permits, and student visa holders. Children of persons holding work permits will be granted student visas upon application.
Foreign Students

A foreign student must obtain a student visa in order to study in Canada. The student must initially apply for his or her visa from outside Canada. This visa is issued for one academic year and may, upon application, be renewed from within Canada.

The foreign student must be accepted by the Canadian educational institution (school board) and must prepay the foreign student fee that can amount to several thousand dollars. The visa officer must be satisfied that the student has made adequate arrangements, including financial arrangements, for his or her stay in Canada. The student must impress upon the visa officer that his or her stay in Canada is for a temporary purpose and is not a disguised form of permanent residence. Subject to certain exceptions, (which are not relevant in the case of primary and secondary school students) foreign students may not work in Canada.

It is desirable that the foreign student makes adequate arrangements for health care prior to coming to Canada. Some provinces (such as Ontario) do not cover foreign students under their provincial health care scheme. In other provinces the foreign student must wait several months before becoming eligible for health care.

If a foreign student intends to remain in Canada for more than six months and that student has resided in a designated country for more than six months within the one-year period prior to the student’s arrival in Canada, then that student must undergo an immigration medical examination by an immigration doctor who is chosen to act as such by Canada Immigration. If, in the opinion of two immigration medical officers, the student suffers from a health problem that will cause an unreasonable demand on health or social services in Canada, then the student will be denied a visa. Foreign students who reside in most western countries do not usually have to undergo a medical examination when they apply for their student visa.

All dependents listed in the application for immigration made by the principal applicant, regardless if they accompany the applicant to Canada, must be medically admissible. The principal applicant may have a mentally challenged child who, during the course of the immigration process, may have to undergo psychological testing. The visa officer will reject the application for immigration made by the principal applicant on the basis that if the child were to come to Canada, the child would place an excessive demand on social services. In two recent cases it was argued that special education services do not constitute a “social service” for immigration purposes. The Federal Court of Appeal rejected this argument. The families were denied visas to Canada.

Subsection 49(6) of the Education Act mandates that a school board admit a pupil who is a visitor within the meaning of the Immigration Act or a person in possession of a student visa under that Act. In such case the school board shall charge such pupil the maximum fee permitted under the Regulations promulgated under the Education Act. Convention refugees, refugee claimants, and children of persons holding Minister’s permits and work permits are exempt from the payment of the maximum fee.

Notwithstanding the necessity for foreign students to obtain student visas before attending school in Canada, s 49.1 of the Education Act provides that a person who is entitled to be admitted to a school and who is less than 18 years of age shall not be refused admission because the person or the person’s parent or guardian is unlawfully in Canada.

Children of Illegal Immigrants

It often occurs that when families are in Canada illegally, the children do not attend school. It is this type of truancy that the Education Act seeks to remedy. Notwithstanding the benign intention of the Education Act, the fact remains that such children cannot attend school unless they are authorized to do so under the federal Immigration Act. It is an offence under the Immigration Act for a person to induce, aid or abet or attempt to induce, aid or abet a person to violate Canada’s immigration law. A school official would be liable to a fine and imprisonment if he or she induced or assisted a child who is unlawfully in Canada to attend school in Canada.

Summary

A person may attend school in Canada if that person is permitted by law to do so. Canadian citizens and permanent residents may attend school in Canada without seeking permission from Canada Immigration. All other persons must obtain an authorization from an immigration official before attending school in Canada.
Perspectives on Home Schooling

The Education Act recognizes the following types of schools: English and French language public schools, English and French language Separate schools, and private schools. The Education Act also recognizes that parents are able to teach their children at home, commonly referred to as home schooling. Interestingly, the term “home schooling” is not used in either the Education Act or Ministry of Education regulations or policies.

In other parts of Canada, particularly the Western provinces, the term home schooling has either been defined in legislation or developed as a distinct regulation. In provinces where this has been done, notably in Saskatchewan, Manitoba, and British Columbia, parents and school boards understand the requirements they must follow if parents wish to educate their children at home. Unfortunately, in Ontario, there is no definition of home schooling or a procedure for assessing it. As a result, many school board officials are uncertain about the limits of their authority to supervise home schoolers by determining satisfactory instruction.

Estimates vary as to the number of compulsory school-aged children being home schooled in Ontario. The most recent statistic from Ministry of Education School September Reports indicates that in the year 1999-2000, there were close to 3,000 students being home schooled. The Ontario Federation of Teaching Parents (OFTP) reports on its website (www.ontariohomeschool.org) that there are close to 20,000 children who are being home schooled. Because there are parents who do not inform their local school board that they are providing home schooling for their children, it is difficult for school boards to know the exact numbers. The truth may well lie somewhere between these two figures. The number is probably well below the figure cited by OFTP but more than the 3,000 reported to the Ministry of Education.

The closest reference to home schooling can be found in section 21(2)(a) of the Education Act which states that a child may be excused from attendance at school if (s)he is receiving “satisfactory instruction at home or elsewhere.” However, the Act does not define what is meant by “satisfactory instruction.” Therefore the major difficulty with this reference is that nothing in the Education Act indicates how satisfactory instruction is to be measured. This task has generally been assigned to school boards by the Ministry despite the fact that there is nothing explicit in the Education Act that gives school boards the authority to approve the educational program being provided by the parent. Notwithstanding that there is no statutory authority given to school boards to approve home school programs, it has been the Ministry of Education’s position that school boards have this authority. As a result, practices vary throughout the province.
home schooling programs. Some school boards have interpreted the 1981 Memorandum as official ministry policy, and they require their home schooling parents to have their programs approved. Other school boards ignore the Memorandum and treat their home schooling communities with benign neglect.

If a home schooling parent refuses to cooperate with a school board official, or if a home school feels that the local school board is trying to become too intrusive, the home schooling parent is able to obtain legal advice from the Home School Legal Defence Association (HSLDA). This organization is committed to the belief that the parent is the primary agent responsible for providing the child with an education. HSLDA believes that the State has a minimal role to play in ensuring that a child is receiving an adequate education. HSLDA has played a useful role as an advocate for home schooling parents in preventing potential litigation with local school boards and with the Ministry of Education’s Provincial School Attendance Counsellor.

The issue of who is responsible for ensuring that children receive a satisfactory education has been dealt with to some extent in the courts. In 1986 this issue reached the Supreme Court of Canada in the landmark decision of Jones vs. The Queen in which the court stated that:

“the province, and indeed the nation, has a compelling interest in the ‘efficient instruction’ of the young. A requirement is that a person who gives instruction at home or elsewhere have that instruction certified as being efficient is . . . demonstrably justified in a free and democratic society.”

The Jones case also recognized that professional educators are the most qualified individuals to determine whether instruction is satisfactory.

province with regard to how school boards handle home schooling within their jurisdictions.

In 1981, the Provincial School Attendance Counsellor of the day issued a memorandum to School Board Directors suggesting some criteria that school boards could use in order to assist them in making a determination of satisfactory instruction. Although this Memorandum has been helpful to some school boards, it is outdated. This Memorandum was sent to school board directors to assist them in interpreting the phrase “satisfactory instruction” and to provide possible methods of determining satisfactory instruction. It was not distributed to school boards as a general Ministry policy statement. Despite many requests by school boards to the Ministry of Education to have the issue of the determination of satisfactory instruction at home clarified, there has been no new policy development. There has not been any regulatory legislation to help school boards or parents understand the accountability mechanisms, or the extent of the authority of school boards to approve home schooling programs. Some school boards have interpreted the 1981 Memorandum as official ministry policy, and they require their home schooling parents to have their programs approved. Other school boards ignore the Memorandum and treat their home schooling communities with benign neglect.

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Despite the ruling of the Jones case, many home schooling parents and their associations refuse to accept the authority of the school board’s right to monitor their children’s education. Many school board officials, in this era of budget cutbacks, simply do not have the resources to carry out any significant monitoring of their home schools. Furthermore, they do not necessarily wish to interfere with parents who have actively decided to opt out of the publicly funded education system. School boards do not receive specifically targeted government funds to cover the costs of monitoring home schoolers. Home schooling parents do not receive any financial support from the government for educating their children at home. This is in sharp contrast to the passage of Bill 45, providing some tax credits to parents whose children attend private schools.

If home schooling parents are not accountable to local school boards, to the Ministry of Education, or some other educational authority, there can be problems for these children, their parents, and the local school, once these children re-enter the school system. Without some type of monitoring for basic literacy and numeracy achievement, how will parents and schools be aware of the quality of the child’s academic achievement? A large number of home schooled children eventually do find their way back to their local school by the time they are ready to begin their secondary education. It is therefore important to have some type of regulatory legislation or policy that clearly gives school boards and home schooling parents greater direction.

Because the Education Act recognizes the right of parents to educate their children at home, there should be legislation, specific policies, or an articulation of basic principles that support home schooling. Local school boards have asked for and deserve clearer guidelines in order to avoid unnecessary conflict with their home schooling communities. The home schooling movement is growing. The Ministry of Education would be well advised to provide greater leadership to this sector.
Religious Equality Comes to Ontario Education

Legal Challenge/Political Resolution
The Jewish community’s history with the issue of funding for independent schools is a lengthy one. In the 1970s, the Associated Hebrew School negotiated an arrangement with the North York Public School Board in which it would be affiliated with that Board as a speciality school, only to be struck down by the court as failing to comply with the specific statutory requirements of the day. Community advocacy groups and a coalition of Jewish day schools made submissions to the Shapiro commission set up by the Davis government to study this issue in the early 1980s, and Canadian Jewish Congress intervened in the Bill 30 Reference which reached the courts in the middle and late 1980s. In 1991, four parents, acting as nominal plaintiffs and with Jewish community support, commenced the Adler case, which ultimately took the question of funding all the way to the Supreme Court of Canada in 1996.

At each level of legal challenge, advocates have been told that the province’s existing state of educational affairs must be resolved in the political arena. At each level of legal challenge, advocates have been told that the province’s existing state of educational affairs must be resolved in the political arena. In 1986, the Ontario Court of Appeal remarked that “[a]s matters presently stand, no government policy has yet been formulated which takes into account the reality that denominational schools other than Roman Catholic exist in Ontario or which seeks to accommodate the … rights of supporters of those schools or promote … and enhance the multicultural heritage of Canadians.” Following up on this thought, the Supreme Court indicated in 1996 that “the province could, if it so chose, pass legislation extending funding to independent schools.” In its most recent budget, the government has now taken precisely that step that has been missing through the years. Religious school communities have expressed overall support for the proposal that parents who send their children to independent schools will be given a phased-in tax credit of up to $3500 per year per child. Although many would have preferred a fully implemented tax credit beginning in 2002, it has been widely acknowledged that at its maturity (in 2006) this measure will relieve a significant part of the cost borne by these parents. It can no longer be said that Ontario’s publicly supported education system, to use the words of the Supreme Court of Canada, “sits uncomfortably with the concept of equality.”

Ed Morgan

RELIEF FROM THE COST BURDEN OF RELIGIOUS SCHOOLING

In the spring of 2001, the government of Ontario enacted budgetary measures calling for a provincial tax credit to be given to families of children in private schools. The tax credit provision is to be phased in over a five-year period, allowing parents to offset ten percent of tuition payments in 2002, twenty percent in 2003, etc. to a maximum of $3,500 in five years’ time. Religious schools and faith communities have been at the forefront of the advocacy in favour of this measure, seeking relief from the cost burden of religious schooling and from the felt inequity of Ontario’s full funding for Roman Catholic separate schools and the non-funding of other denominational schools.

This article reviews the philosophical and legal position of independent religious schools in their struggle for equity in the Ontario education system.

Taking Multiculturalism Seriously

It must be emphasized that a society-wide embrace of multiculturalism means support for the serious cultural and educational projects of our diverse communities. It may be an admirable nod to multiculturalism for the public schools to include a Survey of World Religions course in the social studies curriculum, but it does little for those families with a bona fide commitment to a life of study and adherence to the teachings of classical Hebrew, Arabic, or Sanskrit texts. As one scholar has noted, cultural pluralism must go beyond an ability to sample "pastrami to which one can add ethnic radio programs." Culinary multiculturalism is fine as a metaphor, but it cannot literally be the singular manifestation of pluralism in our society. Taking multiculturalism seriously means fostering an environment that also accounts for the needs of those whose cultural, intellectual and religious life requires a form of education impossible to achieve in the public schools.

The new budgetary policy seeks to revive the true meaning of what were referred to at Confederation as the "dissentent schools." The original idea of publicly supported Roman Catholic schooling was to ensure funding for those who dissent from the educational mainstream of the public schools. The founders of Canada seem to have grasped a concept that would take academics in the humanities and social sciences another century to come to grips with: curriculum design is a profoundly value-laden, ideological exercise. The public schools must be commended and fully supported for their efforts in providing curriculum that reflects the values of a broad sector of Ontario society. However, the values and skills imparted in the public schools are not necessarily right for all children and all families. Now, in supplementing this with support for those who opt for an approach that differs philosophically, theologically, or pedagogically from the educational mainstream, the government has truly brought to life the constitutional pact of 1867. The educational value system, like Ontario society itself, is neither monolithic nor reflexively defensive; it is sufficiently strong to be open to alternatives and free choice.

Educational choice, like other policy and legislative categories, has now grown appropriately with the society and the times. One should recall that it was not until 1939 that the Supreme Court insisted that the federal constitutional authority over "Indians" be expanded to include the Inuit as well, despite the fact that the native peoples of the arctic region had apparently not been within the specific contemplation of the Constitution's framers.10 In another such stride, the definition was further extended in 1982, with the inclusion of the Métis in the governing constitutional definition of Aboriginal peoples.11 As society's understanding of social realities and needs has grown, so have the categories in which it implements its policies. The tax credit initiative of the Ontario government fits within this tradition of principled growth.

Assessing the Opposition

Policy innovation, whether in social, economic or legal spheres, frequently meets with initial opposition. In the three weeks immediately following the announcement of the Ontario budget in the spring of 2001, opposition groups mustered a series of arguments designed to preserve the status quo by instilling a fear of change. During the first week the budget was met with cries of financial ruin for the public schools, ignoring the fact that the partial tax relief for independent school families will not come out of the education budget.

FROM MULTICULTURALISM TO TAX CREDIT

- In 1986, the Ontario Court of Appeal remarked that "(a)ls matters presently stand, no government policy has yet been formulated which takes into account the reality that denominational schools other than Roman Catholic exist in Ontario or which seeks to accommodate the ... rights of supporters of those schools or promote ... and enhance the multicultural heritage of Canadians."

- In 1996, the Supreme Court indicated that "the province could, if it so chose, pass legislation extending funding to independent schools."

- In 2001, in its most recent budget, the government took a step in the direction of supporting Ontario's diverse cultural communities by calling for a provincial tax credit to be given to families of children in private schools, many of which have a religious foundation.

- In enacting the tax credit policy, the government has taken seriously the admonishment contained in a 1979 study done on behalf of the United Nations General Assembly, which stated that, "because of the enormous human and financial resources which would be needed for full cultural development, the right granted to members of minority groups to enjoy their own culture would lose much of its meaning if no assistance from the government concerned was forthcoming."

- Ontarians must be ready and willing to pay dollars—to put resources where our words are.
The original idea of publicly supported Roman Catholic schooling was to ensure funding for those who dissent from the educational mainstream of the public schools.

In a multicultural society, it is recognized that the values and skills imparted in the public schools, including the Roman Catholic public schools, are not necessarily right for all children and all families.

In supporting those who opt for an approach that differs philosophically, theologically, or pedagogically from the educational mainstream, the government has truly brought to life the constitutional pact of 1867.

The educational value system, like Ontario society itself, is neither monolithic nor reflexively defensive; it should be sufficiently strong to be open to alternatives and free choice.

The accusation was also made that there is something peculiar and sinister about the way in which the Ontario government intends to provide this money to partially fund independent schools from the educational mainstream, the government has truly brought to life the constitutional pact of 1867.

The educational value system, like Ontario society itself, is neither monolithic nor reflexively defensive: it should be sufficiently strong to be open to alternatives and free choice.

In our most renowned example, in 1930 the Privy Council in England found that women fit into the previously limited category of “persons” for the purposes of appointment to the Canadian Senate, overturning a contrary ruling by the Supreme Court of Canada. In the process, we were told that “[t]he British North America Act planted in Canada a living tree capable of growth and expansion…” The latest expansion of dissentent schools, giving contemporary voice to the notion of broad philosophical and multicultural choice, is a contemporary reaffirmation of the living tree in Ontario. It must be encouraged to take root and grow.

The experiences in British Columbia, Alberta, Saskatchewan, Manitoba, and Quebec— which provide public funds in similar proportions to independent schools— have demonstrated that no massive exodus out of the public school system or serious fragmentation of that system will occur. One only has to look at British Columbia, which has the highest percentage of students in independent schools— less than ten percent and not increasing— and keep in mind that the B.C. figures for independent schools include their Catholic schools which are not part of the public system in that province. Legislation designed to foster innovative approaches to education and to resolve existing inequities simply cannot be permitted to calcify out of abstract and unsubstantiated fear. To borrow a phrase from the English Court of Appeal, “we must use of [education and fiscal policy] the words which Galileo used of the earth: ‘But it does move.’”

Experience has shown that expanding old categories like “dissentent schools” to fit contemporary social reality is a necessary course for governments to take. In our most renowned example, in 1930 the Privy Council in England found that women fit into the previously limited category of “persons” for the purposes of appointment to the Canadian Senate, overturning a contrary ruling by the Supreme Court of Canada. In the process, we were told that “[t]he British North America Act planted in Canada a living tree capable of growth and expansion…” The latest expansion of dissentent schools, giving contemporary voice to the notion of broad philosophical and multicultural choice, is a contemporary reaffirmation of the living tree in Ontario. It must be encouraged to take root and grow.


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