Dalhousie Law Journal

Volume 8 | Issue 1 Article 5

1-1-1984

# Public Education in Nova Scotia: Legal Rights, Fleeting Privileges or Political Rhetoric?

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Recommended Citation

A. Wayne MacKay, "Public Education in Nova Scotia: Legal Rights, Fleeting Privileges or Political Rhetoric?" (1984) 8:1 DLJ 137.

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# Public Education in Nova Scotia: Legal Rights, Fleeting Privileges or Political Rhetoric?

A truly democratic and egalitarian society cannot exist without a broadly based public education. Nova Scotia has an enviable record in the field of education as a leader and innovator in the development of both the public schools and post secondary institutions. The Scots, who have always valued educating their young, implanted this same value in Nova Scotian soil. Other groups have also followed the Scottish lead in educational matters. Even in difficult economic times, which came frequently to Nova Scotia, education has not been sacrificed on the altar of economic restraint.

In the 1980's education does not appear to hold such a protected position. Education budgets are being slashed at both the public school and post-secondary levels. Economic restraint has become the accepted gospel and not even education is immune from the message. It is thus timely to consider the status of education in the political and legal framework of Nova Scotia. Moreover, it should be strongly asserted that Nova Scotia's children have a legal right to education that cannot be diminished either in the name of financial restraint or political expediency. The purpose of this article is to make that assertion.

At the outset it should be stated that declaring education to be a right is merely asserting that it is sufficiently important in both a practical and philosophical sense to be accorded legal protection. It is of course somewhat circular to argue that education is a right because it receives legal protection. Indeed there is a broader moral claim to education which would justify calling it a right even in jurisprudential terms.[1] With the objective clearly in mind, the travellers should begin the journey into the uncharted domain. Be watchful for the landmarks which may provide the clues to the ultimate destination.

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1. R. Dworkin, *Taking Rights Seriously*, (London: Duckworth Ltd., 1977).

## I. *Education: Right or Privilege?*

Is there a right to education or is there only a privilege bestowed by the state? This is more than a matter of linguistic semantics. Rights are protected by law and can normally be removed only by special procedures. Privileges, on the other hand, are granted at the good graces of the donor and can be just as easily taken away.[2] If education is in some way a right, to whom does it belong? Does the state have an educational obligation to the parent or the child? These questions will permeate this article at both a general and a specific level. The compulsory attendance provisions of the *Education Act*[3] and the problems of special education are closely related to the above questions. Furthermore, the rights of parents to be involved in the education of their children and the parental duties imposed are related to the broader issues of education.

At common law there is no general right to education nor is an obligation imposed to ensure that the child is educated. However, at the international level Canada has clearly accepted that children have a right to education. The *Universal Declaration of Human Rights*[4] which has been accepted by Canada proclaims:

> ARTICLE 26
>
> 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
>
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
>
> 3. Parents have a prior right to choose the kind of education that shall be given to their children.

Parents are accorded a specific right to participate in education. Because children have little legal power, parental involvement is

2. Since the development of the doctrine of fairness the clear lines between rights and privileges have been blurred. Certain benefits when sought are considered privileges but once acquired crystalize into rights. *Re Webb and the Ontario Housing Commission* (1978), 93 D.L.R. (3d) 187 (Ont. C.A.).
3. R.S.N.S. 1967, c. 81, as amended.
4. U.N. Doc. A/811, 1948.

vital. The previous declaration was buttressed by the passage of the *Declaration of the Rights of the Child.*[5] This document not only reaffirms the right, but also indicates that parents have a duty to make it meaningful:

> Principle 7
>
> The child is entitled to receive education which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.
>
> The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
>
> The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

The *International Covenant on Economic, Social and Cultural Rights*[6] was the final product of a series of United Nations declarations. Article 13 of the Covenant now supersedes both of the previous declarations. It states:

> Article 13
>
> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the request for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations . . . .
>
> 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education . . . .

5. U.N. G/A Resol. 1386 (XIV), 14th G.A., 1959.
6. *Human Rights: A Compilation of International Instruments,* (New York: United Nations Publications, 1978) at 114-115.

While Canada is bound by international law to observe these declarations, they have no automatic legal impact in Canada. At most these declarations can be used as guides to interpreting the relevant state legislation. In Nova Scotia the relevant statute is the *Education Act*. Since the international law is only a guide and there are no common law rights, the case for educational rights must be built on the statute itself.

The critical section of the *Education Act* is section 2:

> 2(1) All schools established or conducted under this Act are free schools.
>
> (2) Subject to this Act and the regulations and notwithstanding the Age of Majority Act, every person over the age of five years and under the age of twenty-one years has the right to attend a school serving the school district or school section in which he resides.

Several aspects of the above provision should be noted. There is no specific mention of education; rather, it speaks of "the right to attend a school." Furthermore, even this right is a qualified one. It is subject to the *Education Act* and regulations made under that Act. Presumably this means that whatever rights exist can be whittled away and possibly even extinguished. On the face of it, s. 2 seems to accord a privilege, not a right.

However, this provision must be read in the context of both Canada's international commitments and the rest of the *Education Act*. Amendments to the Act have altered the law concerning the suspension and expulsion of students.[7] These changes allow for American style "due process" in the form of notice and hearings for students and parents. Thus education can only be taken away by following procedures designed to protect the interests of those affected. This is one of the important *indicia* of a right.

More importantly, the *Education Act* as a result of 1982 amendments[8] imposes upon the school board a positive duty to provide education.

> 48.(2) A school board shall make provision for the education and instruction of all pupils residing in the area within its jurisdiction in such subjects and services prescribed by the Governor in Council as are included in the school program . . .

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7. S.N.S. 1979, c. 15, as amended by S.N.S. 1982, c. 23, s. 43.
8. S.N.S. 1982, c. 23, s. 36.

While this only entitles a student to the courses as set out, it is an important step forward. It does specifically mention the provision of education and not just attendance.

As early as 1954 education was described as "the most important function of state and local government." This statement appeared in the celebrated *Brown* v. *Board of Education*.[9] This assertion is equally applicable to Nova Scotia and more compelling in the 1980's than it was in the 1950's. Surely it would be unfair to suggest that children do not have a right to a commodity as vital as education. Thus, what appears at first blush to be a privilege may be argued in context as a right.

### 1. *Whose Right to Education?*

The wording of the *Education Act*[10] makes it clear that anyone between the ages of five and twenty-one has the right to attend a school. It is not quite so clear who has the claim to the education that should result from this attendance. In *Wilkinson* v. *Thomas*[11] the court concluded that the right belonged to the child. Education was not left to the discretion of either the school board or the parents. Although the Saskatchewan school legislation expressly gave a right to appropriate instruction, this is surely implicit in Nova Scotia. Thus the child should be the claimant although parents, guardians or other adults will often make the claim on his or her behalf.

The identity of the appropriate claimant of the right is more clearly expressed under the *European Convention on Human Rights*.[12] In Article 2 of Protocol No. 1 the following statement appears: "No person shall be denied the right to education . . . ." In *Campbell and Cosans* v. *United Kingdom*[13] the majority of the European Court of Human Rights affirmed that the right to education belongs to the child and not the parent. This ruling has no binding effect in Canada but provides a persuasive buttress to the existing legal position in Canada. Of course parents as

9. (1954), 347 U.S. 483.
10. R.S.N.S. 1967, c. 81, s. 2.
11. [1928] 2 W.W.R. 700 (Sask. K.B.).
12. W. Tarnopolsky *et al.*, *The Canadian Charter of Rights and Freedoms: Commentary*, (Toronto: Carswell Ltd., 1982) at 557 (Appendix 4).
13. (1982), 4 E.H.R.R. 293 at 307.

taxpayers also have a definite interest in education but the right is properly focused on the child.[14]

The interests of children and their parents are not always congruent. This point has been dramatized by a trilogy of recent Canadian court cases. In *Re Clark and Clark*[15] Ronald Clark sued in County Court to have his twenty year old multiply handicapped son declared mentally incompetent. Justin suffered from cerebral palsy since birth. The Advocacy Resource Center for the Handicapped, a community legal aid clinic, represented Justin in the legal dispute with his parents. In the judge's opinion Justin Clark was mentally competent and capable of making decisions about his own life. In reaching this conclusion the judge made a rather eloquent statement about the rights of the handicapped.

> "With incredible effort Justin Clark has managed to communicate his passion for freedom as well as his love of family during the course of this trial. We have recognized a gentle, trusting, believing spirit and very much a thinking human being who has his unique part to play in our compassionate interdependent society.
>
> So, in the spirit of that liberty which Learned Hand tells us seeks to understand the minds of other men, and remembers that not even a sparrow falls to earth unheeded, I find and declare Matthew Justin Clark to be mentally competent."[16]

A more dramatic conflict between parent and child surfaced in the Stephen Dawson[17] case. This case has been described as a more significant right to life case than the earlier American case concerning Karen Ann Quinlan.[18] Stephen Dawson was stricken with meningitis as a child, and as a result suffered severe brain damage. His parents went to court to assert their son's right to die with dignity. They argued that to perform life-saving brain surgery would be cruel and unusual treatment under s. 12 of the *Charter*. Provincial Court Judge Patricia Byrne ruled in the parents' favour. However, this decision was appealed to the British Columbia

14. S.N.S. 1982, c. 23, s. 36: this new section imposes a duty to educate, but does not specify to whom it is owed.
15. An unreported decision, November 25, 1982, per Matheson Co. Ct. J. (Ont. Co.Ct.).
16. *Id.*
17. *Re Superintendant of Family and Child Service and Dawson et al.*, An unreported decision, March 14, 1983 (B.C. Prov. Ct.).
18. (1975), 348 A (2d) 801 (Sup.Ct.N.J.); (1976), 355 A (2d) 647 (Sup. Ct. N.J.).

Supreme Court, which reversed the earlier ruling and authorized the brain operation which the parents opposed.[19]

At the British Columbia Supreme Court level the *Dawson* case emphasized a child's right to life as reaffirmed in the general language of section 7 of the *Charter*.

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section of the *Charter* is the heart of a heated dispute about whose rights are at stake in respect to abortion. Whether this is really a parent and child dispute depends upon when a foetus is considered to be a child, which is an important issue in the *Borowski*[20] case. This controversial Saskatchewan court battle also raises important issues about the quality of life, which has implications for rights to education as a means of ensuring some degree of quality. It appears that the assertion of rights by children, distinct from and even in conflict with their parents, is a growing phenomenon. However, the age of the child is an important factor in claiming any rights, including education.

In order to qualify as a school-age child, the age of five must be reached before the end of the first school term. This is mandated by regulation 3(1) made under the *Education Act*.[21] Even if a child is over five years or deemed to be, he or she must present himself or herself to the school before September 20. After this date the school board has a discretion to admit the child, but is not compelled to do so.

There have been some rather unusual cases challenging school boards' powers to discriminate in school admission, based upon age. One of these is *Winnipeg School Division* v. *McArthur*[22] which

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19. *Re Superintendent of Family and Child Service and Dawson et al.*, An unreported decision, March 18, 1983, per McKenzie J. (B.C.S.C.); summarized in (1983), 19 A.C.W.S. (2d) 99. Now reported (1983), 34 R.F.L. (2d) 34.

20. *Borowski* v. *Minister of Justice of Canada and Minister of Finance Canada,* Heard May, 1983 (Sask. Q.B.). Decided on October 13, 1983 that a foetus is not a person for constitutional purposes.

21. Section 3 of the *Education Act* gives the Governor in Council broad powers to make regulations and it has more specific power to make regulations in other parts of the Act. The Minister of Education also has a power to make regulations (s. 4). These regulations are difficult to locate but those concerning education have been conveniently collected into a consolidation, updated to February 12, 1980. This volume is *Regulations Under the Education Act,* (Halifax: Department of Education, 1980). All regulation citation will be in relation to the consolidation and regulations will be abbreviated to reg.

22. [1982] 3 W.W.R. 342 (Man. Q.B.).

concerned the admission to kindergarten of a child who was a month short of the required age. The ingenious parents argued that to refuse their child admission would be age discrimination in contravention of Manitoba's human rights legislation.

If the parent had won on this claim, it would have affected not just age limitations for kindergartens but all school programs. The Manitoba court held that schools were not a "facility customarily available to the public" and thus were not covered by the age discrimination provisions of the human rights legislation. Furthermore, it was held that the age limitations in the school legislation were specific and enacted later than the human rights statute: hence, the age limitations should prevail. School boards can discriminate in student admission based upon age.

Under Nova Scotia's *Human Rights Act*[23] there is no prohibition concerning age discrimination for people under forty. However, there is no such restriction on the age provision in section 15 of the *Canadian Charter of Rights and Freedoms*[24] (hereafter the *Charter*). This provision does not come into effect until 1985, but when it does, it will prevail over any legislation.[25] It is likely that a court faced with a case like *McArthur* would conclude that it is reasonable for school boards to discriminate based upon age; thus such actions would be protected by the reasonable limits exception found in s. 1 of the *Charter*.

School boards and administrators can also limit attendance at school by suspending students already in attendance. The *Education Act*[26] permits principals or other designated teachers to suspend disobedient or harmful students for up to five days. The school board has the power to order longer suspensions.[27] These provisions, which were consolidated into one section as a result of 1982 amendments to the *Education Act,* have caused alarm among both school board members and school administrators.

Defining the content of the concept labelled education is a large task, involving as much philosophy as law. Such consideration is beyond the scope of this article. Instead an attempt will be made to describe particular aspects of education, including accommodation, language, conveyance and quality content. This discussion will

23. S.N.S. 1969, c. 11, s. 11 B(1) (a).
24. *Constitution Act, 1982*, Schedule B of *Canada Act, 1982* (U.K.), 1982, c. 11.
25. *Id.* s. 52.
26. R.S.N.S. 1967, c. 81, s. 53(1).
27. *Id.* s. 53(3)(c).

raise but not exhaust the duties of the state regarding the appropriate delivery of education. However difficult to define, there are rights beyond a simple right of attendance.

2. *What is the Content of the Right?*

Section 2 of the *Education Act* entitles a person to attend a school in the school section in which he resides. By making the residence of the child the relevant factor Nova Scotia has avoided the confusion over parental residence and taxpaying status which has caused litigation in other provinces. There can, nonetheless, be problems in deciding where a child resides. What is the status of a child under a joint custody order who spends half his time in one school district with his mother and the other half in another with his father? This is a question of fact rather than law and will often be resolved by compromise.

In order to meet its obligations under the *Education Act,* the school board must provide adequate school accommodation within the school district. How many schools are adequate is a judgment for the school boards. However, this judgment can be reviewed. In *McLeod* v. *Salmon Arm School Trustees*[28] a school board closed a school because the municipality did not adequately contribute to its funding. As a result the students were to be without a school for the rest of the year. The court concluded that the duty to provide a school was absolute: not even the defence of lack of funding will prevail. Where other schools are available, however, declining enrolments and economic restraints may justify school closings.[29] Parents have also been given monetary compensation in court for losses resulting from an improper school closing.[30]

Although there is a right to a school there is no right to a *particular* school. *Patrick* v. *Yorkton*[31] established that where there are two schools in a district the choice belongs to the school board and not the parent. It would appear that attending a particular school is a privilege which is subject to the discretion of the relevant school

28. [1952] 2 D.L.R. 562 (B.C.C.A.).
29. *MacDonald* v. *Lambton County Board of Education* (1982), 37 O.R. (2d) 221 (Ont. H.C.), is a more recent case where a board closing of a school based upon a forecast of declining enrolment, was upheld as being within the powers of the school board. Of course in this case the students were to be accommodated in other schools.
30. J. Wilson, *Children and the Law,* (Toronto: Butterworths, 1978) at 225.
31. (1914), 6 W.W.R. 1107 (Sask. S.C.).

board. This was the position taken in *Re Robertson and Niagara South Board of Education*.[32] A committee of parents was not permitted to review a school closing in the courts. This decision might be modified by the extension of a duty of fairness to administrative decisions; nonetheless, the result would likely be the same.[33]

The powers of school boards also extend to matters less drastic than closings. One example is the use of schools. *Crawford* v. *Ottawa Board of Education*[34] provides a good example. It involved the conversion of a high school from an English language school to a French school. The attempt to get an injunction against this conversion failed because other English schools were available in the district. This point was reaffirmed in another case which held that a school board could designate a whole school as a French immersion school if the program demand so warranted.[35] The availability of French immersion programs is an issue which will become even more controversial in the 1980's.

Language of education is historically a very important issue in Canadian education. Canada's new *Charter* guarantees rights to minority language education where numbers warrant:

> 23.(1) Citizens of Canada
>
> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province.
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or

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32. (1973), 41 D.L.R. (3d) 57 (Ont.H.C.).
33. *Re Arts and London and Middlesex County Roman Catholic Separate School Board* (1979), 106 D.L.R. (3d) 683 (Ont.H.C.), held that although the closure of a school was an administrative function, those affected were entitled to a hearing in accordance with the principles of administrative fairness. This same approach was followed in *MacDonald* v. *Lambton County Board of Education* (1982), 37 O.R. (2d) 221 (Ont. H.C.).
34. [1971] 2 O.R. 179 (C.A.).
35. *Damus* v. *Board of Trustees of St. Boniface,* [1980] 3 W.W.R. 197 (Man.Q.B.).

> French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

While subs. 3 indicates that these rights only apply "where numbers warrant," it does indicate that the education is to be provided out of public funds. It shall be the task of the courts to decide what numbers warrant the provision of minority language education. If the number of families required is small, this could have considerable impact on the cost and delivery of education. The controversy which has erupted over the 1982 amalgamation of the school boards in the districts of Clare and Argyle suggests that the language of education debate will be as emotional in Nova Scotia as it has been elsewhere.

On the basis of s. 23 of the *Charter* minority language education is only available in the two official languages — French and English.[36] However, the *Charter* leaves some room for third language groups to make claims. According to s. 15 of the *Charter* everyone is entitled to the equal benefit of the law. Could twenty Gaelic families in Cape Breton argue that they have a right to education in Gaelic because twenty families in Clare are being educated in French? Equality rights are delayed until 1985 but the answer will be no easier then.

The arguments for third language education could also be buttressed by the *Charter* which states that it should be interpreted to promote multiculturalism:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Would not Gaelic education promote Canada's multicultural heritage? There will be many interesting and difficult questions to answer.

Conveyance is another important aspect of education. All students should be able to attend school regardless of distance from it. This principle was well-established long before the *Charter* in *Ridings* v. *Elmhurst School District*.[37] The court held that the

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36. *Quebec Association of Protestant School Boards* v. *A.G. Quebec*, (No. 2) (1982), 140 D.L.R. (3d) 33 (Que.S.C.), *per* Deschenes C.J., held that Quebec laws denying education in English were in violation of s. 23 of the *Charter* and thus of no effect. Equality of French and English are now guaranteed by the *Charter*. There was no question in this case that numbers warranted the constitutional protection. This decision was affirmed by the Quebec C.A. and is now on appeal to the Supreme Court.

37. [1927] 3 D.L.R. 173 (Sask. C.A.).

school board would either have to transport the student from his remote location or reimburse the parent for the cost of so doing. There is an absolute duty to provide conveyance, not a discretion.[38] Of course, school boards can refuse to transport students within a reasonable distance of the school.[39] Since the 1982 amendment adding s. 48(c), boards have an express duty under the *Education Act* to provide and finance transport.

The transport must also be adequate. The school board was liable for students transported to and from school in a horse-drawn van when an accident occurred. In *Tyler* v. *Ardath School Trustees*[40] the board was held to have not escaped its liability by employing an independent contractor with his horse-drawn van. The parent recovered damages. Conveyance standards for Nova Scotia schools are set out in reg. 39 pursuant to the *Education Act* and there are departmental and board policies on it as well.[41]

A student can lose his or her rights to conveyance by undesirable conduct. If the student uses "profane, threatening, abusive or improper language" towards the bus driver, in the presense of other students he or she may be fined under s. 54(1) of the *Education Act*. Furthermore, the principal or the bus driver can suspend a student from the use of the bus according to s. 54(3) of the *Education Act*. Grounds for this suspension are failure to comply with reasonable rules set by the school board or directions given by the bus driver. Student conduct which in the driver's opinion endangers the safety of others is also sufficient reason to suspend.

Simple access to schools does not ensure that education will occur. Does the right to an education end with being safely tranported to a school where a student sits in a desk and listens to a teacher? International declarations would say not. They assert that a child has a right to an appropriate education tailored to his or her individual needs. There is no general statement in the *Education Act* to this effect. Nor is there any specific reference to educational rights in the *Charter*. However such rights may be prerequisite to the exercise of the democratic and free speech rights. This approach was taken by a recent decision of the United States Supreme

38. *Perreault* v. *Kininisto School* (1956), 8 D.L.R. (2d) 491 (Sask.C.A.).
39. *R.* v. *Oak Bluff School,* [1937] 4 D.L.R. 368 (Man.C.A.).
40. [1935] 2 D.L.R. 814 (Sask.K.B.).
41. *Supra,* note 21. Regulation 39 incorporates the standards of the *Motor Carrier Act* R.S.N.S. 1967, c. 190, as amended.

Court.[42] There is a provision concerning special education in the *Education Act* and this specific area will be used to explore the meaning of an appropriate education in Nova Scotia.

## II. *Special Education: Appropriate to the Child*

Education has been labelled the greatest but least met need of the child.[43] This is certainly true for the child with a physical or mental handicap. Special education as a moral imperative has been accepted and there have been some efforts to define the groups in need of special services.[44] A series of United Nations declarations proclaim the rights of the handicapped[45] and 1981 was honoured as the "Year of the Disabled." To speak of rights in regard to the physically and mentally disabled may be misleading. They are at best welfare rights bestowed by the state and to that extent are analogous to privileges. Whatever label is attached, the interests of the handicapped have only recently acquired any legal or practical recognition. In times of economic restraint there is always the fear that special education programs will be cut as an unnecessary frill.

There is often a gap between the declaration of rights and their enforcement. The child with special education needs still faces many obstacles in becoming a productive member of society: most of these barriers are institutional and one of them is education.[46] All Canadian provinces now have some provision which deals with special education, but as Ruth Kimmins concludes from a survey of education legislation in Canada, there is considerable variance from province to province.[47] Many inadequacies still exist, not the least of which is defining those who are entitled to special education.

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42. *San Antonio Independent School District* v. *Rodriguez* (1973), 411 U.S. 1. Parents had challenged the school finance system on the basis that children in poor districts were not given the same opportunity as those in wealthier ones. The parents lost.

43. J.A.C. Smith, "The Right to an Appropriate Education: A Comparative Study" (1980), 12 Ottawa L. Rev. 367.

44. D. Kendall, *Atlantic Provinces Report of the Special Education Committee to the Ministers of Education* (1973).

45. *Supra,* note 6; *Declaration of the Rights of the Child,* Principle 5, at 114; *Declaration of the Rights of the Mentally Retarded Persons* (1971), at 127 and *Declaration of the Rights of Disabled Persons* (1975), at 127-128.

46. *Obstacles: Report of the Special Committee on the Disabled and Handicapped,* (Ottawa: Minister of Supply and Services, 1981).

47. R. Kimmins, "An Examination of Legislation Pertaining to the Practice of School Psychology," unpublished paper submitted to the Department of Education, Mount Saint Vincent University as part of a Master of Arts degree, Halifax, 1982.

Ontario has tackled the thorny problem of definition in its progressive and controversial *Education Amendment Act,* commonly known as "Bill 82."[48] It defines the exceptional child in terms of the program.

> 20a. "Exceptional; pupil" means a pupil whose behavioral, communicational, intellectual, physical or multiple exceptionalities are such that he is considered to be suited for placement in a Special Education program . . .

The Ontario Act wisely left to the more flexible regulations the detailed delineation of who is entitled to special education programs. Those entitled to special education under the Ontario scheme range from the gifted child to traditional categories such as the retarded, physically handicapped, emotionally disturbed and learning disabled. Ontario's Bill 82 is Canada's boldest education initiative and the only serious effort to copy the landmark legislation in the United States — the Education for All Handicapped Children Act.[49]

1. *The Nova Scotia Scene.*

In Nova Scotia provision for the education of students with special needs is made in the regulations under the *Education Act* and not the Act itself. Regulation 7 is the relevant one:[50]

> 7. Each municipal school board and board of school commissioners shall provide for all pupils resident in the municipality, city or town who are entitled to attend school and who are qualified to pursue the studies in the grades or courses for which they are enrolled: . . .
>
> (c) instruction for physically or mentally handicapped children.

The duty to educate is placed upon the municipal school boards which after the report the *Walker Commission on Public Finance*[51] have been amalgamated into larger district boards. Local board control has resulted in an uneven distribution in the quantity and quality of special education programs. The *Walker Report*

48. Although still referred to as a bill, the proposed amendments on special education were passed by the Ontario Legislature in December, 1980 and are now part of its *Education Act* R.S.O. 1980, c. 129.

49. 1975, Public Law 94-142. Recent American Supreme Court decisions have, however, restricted the reach of this statute.

50. *Supra,* note 21.

51. G. Walker, *Report of Commission on Public Education Finance,* (Halifax: Nova Scotia Government, 1981); hereafter referred to as the *Walker Report.*

recommended that the province assume full fiscal responsibility for special education.[52] This could alleviate problems of inequality between urban and rural school systems. This report also alluded to the lack of definition for special education in the *Education Act,* suggesting that it was a matter properly left to those with expertise in the field.

As a result of reg. 7, Nova Scotia has been described as a "zero-reject" province. However, there is some doubt about this description. The duty set out in the regulation is qualified by two phrases. Students must be "entitled to attend school" and "qualified to pursue the studies." These phrases are not defined in the Act or regulations. The assumption that there are children who are not qualified or entitled to attend public school is buttressed by the *Education Act*:

> s. 74 It is the duty of a teacher in a public school to:
>
> (k) report to the inspector as promptly as possible the names of children who from defective sight or hearing or other physical or mental condition are incapable of receiving effective instruction in public school;

The attendance regulations add further confusion to the issue. Regulation 92 establishes a number of cases in which a child is not required to attend school:

> 92. A child shall not be required to attend school and the parent is not liable to a penalty under the Act, if
>
> (a) the physical condition of the child is such as to render his attendance at or instruction in school inexpedient or impractical; or
>
> (b) the child is under ten years of age and lives more than two and one half miles from the school of the section in which he resides, such section not being a school district established under Section 36 of the Act or a school section for which conveyance has been provided in accordance with any of the provisions of the Education Act or the regulations; or
>
> (c) there is not sufficient accommodation in the school that the child is required to attend;

One of the exceptions occurs where the physical or mental condition of the child renders it "inexpedient or impractical" for the child to

52. While a general increase in provincial funding as advocated by the *Walker Report* is implemented by S.N.S. 1982, c. 23, there is no express mention of special education and the provincial role in financing it.

be accommodated in the public school. At first glance these regulations appear to allow the school board to reject students. However, the regulations merely provide excuses for what would otherwise be truancy. They state that the child shall not be required to attend, which does not mean he or she can be refused.

In any event, reg. 7(c) speaks of providing education for all pupils. This provision of services need not be in the regular public schools so long as the educational services are funded by the public purse. It may be practical and expedient in some cases to pay the expenses incurred by sending a child to an appropriate institution in the United States. In this broader sense, Nova Scotia is a "zero-reject" province.

There is a plethora of other Nova Scotia statutes concerned with providing education to the handicapped. Visually and aurally handicapped children have special rights under the *Handicapped Persons' Education Act*.[53] There are also statutory provisions which permit the operation of classes in the I.W. Killam Hospital for Children.[54] Education for emotionally disturbed children is provided in the psychiatric unit of the Killam Hospital for Children and the Nova Scotia Hospital in Dartmouth.[55] Finally, the Social Services Department provides for the education of some mentally retarded children in training centers[56] such as those in Pictou, Digby, Sydney and Dartmouth. Special education has not escaped the notice of the legislators but the real test is how the laws are applied.

2. *Procedures for Student Classification.*

The labelling of students is vital in that it can seriously affect their future.[57] This has been recognized in the United States, where there has been concern with providing due process hearings at the initial classification stage, as well as in the courts.[58] Under Ontario's Bill 82 there are elaborate hearing and due process mechanisms for the

53. S.N.S. 1974, c. 5, as amended. The blind had earlier acquired rights under the *Education of the Blind Act*, R.S.N.S. 1967, c. 82, as amended.
54. *Hospital Education Assistance Act*, S.N.S. 1975, c. 11, as amended.
55. *Hospitals Act*, R.S.N.S. 1967, c. 249, as amended.
56. *Children's Services Act*, S.N.S. 1976, c. 8, as amended.
57. *Hoffman* v. *Board of Education of New York* (1979), 424 N.Y.S. (2d) 376 (App. Div.) vividly illustrates this point.
58. A.P. Turnbull, "Due Process Hearing Officers: Characteristics, Needs, and Appointment Criteria" (1981), 48 Exceptional Children (No. 1) 48; *P.A.R.C.* v. *Pennsylvania* (1972), 343 F. supp. 279 (E.D.Pa.).

classification and streaming of students. Indeed, some educators fear the Ontario scheme will strangle itself in red tape.

Nova Scotia's *Education Act* is silent as to the placement of students in special classes and removal of students from such classes. However, some boards such as that in Halifax County have developed a *Policy Handbook* (1981) to deal with such matters. This manual, provided to the Special Services branch of the Halifax County District School Board, stresses the need to communicate with both parents and students. The following excerpt from this handbook is illustrative:

> COMMUNICATION
>
> In keeping with the total child concept the parents are to be involved in and informed as to the academic, emotional, behavioural status of the child at all times. When feasible the child himself should be directly consulted.
>
> Parents and children have the following rights:
>
> (1) To be throughly informed as to the reason for referral for Special Services.
>
> (2) a. to accept or refuse psychological assessment or behavioural programming and/or intervention.
> b. to accept or refuse services from speech and resource.
> c. to accept or reject special class placement. When the placement is accepted the program is also accepted and although parent concern and contributions are encouraged, the program direction is ultimately determined by Special Services. A letter of confirmation will be sent to a parent upon acceptance of a child into a program restating the decisions made at the parent meeting and the decisions made by the admissions committee.
>
> (3) A parent may remove a child at any time from a special class placement, speech therapy, resource remediation and psychological intervention or behavioural management programs.
>
> (4) A parent has the right to examine any documentation on their child.
>
> (5) A parent has the right to have meetings with any Special Services personnel having had direct contact with the child or having dealt with the child on a consultative basis.
>
> (6) The parent has the right to procure private consultative services for their child and to have that consultant represent the child in placement or behavioural management programming decisions.
>
> (7) The parent may request a written account of the child's program outlining short and long term objectives at any time.

Not all school boards have a detailed written policy but most do have established modes of procedure. An open process which involves both parent and child often saves trouble further down the road. It is desirable that more school boards express their policies concerning education in written form.

One of the major concerns with special education placement has been non-culturally biased testing.[59] In particular there has been concern that an inordinate number of minority students are being placed in special classes. This same concern has surfaced about the placement of black children in the Halifax area school systems. Many standardized tests have a middle class bias which works to the disadvantage of those not in this select group.

In 1980 the Quebec Human Rights Commission asked the provincial education department to ban tests administered to kindergarten children in the province. Controlled studies demonstrated that the tests discriminated against children from working class backgrounds.[60] It was reported that the tests measured social background rather than intelligence. As a result of findings such as this, the reliability of many tests is in doubt.

Although the school psychologist receives only scant mention in reg. 77A(1) under the *Education Act,* he or she is the critical person in student classification. As professional psychologists, these people are bound by the code of ethics and professional standards of the Canadian Psychological Association. There may sometimes be a conflict between professional ethics and the law.[61]

One of the prime areas of concern is the handling and release of information. To whom does the school psychologist owe professional duties — the school board (employer) or the student who is the immediate client? What should the psychologist do when the interests of the school and student are in conflict? Many of the same issues face the school guidance counsellor in regard to sexual conduct, child abuse, and criminal actions. These difficult ethical and legal issues dramatize the need for a coherent policy. The *Policy Handbook* (1981) of the Halifax County School Board suggests the following guidelines for Special Services:

> Confidentiality is assumed in the handling of personal information and must be assured by the use of locked files and acquisition and release of information procedures.

59. *Hobson* v. *Hansen* (1967), 269 F. Supp. 401 (D.D.C.).
60. *Supra,* note 47, at 8.
61. *Supra,* note 47.

Reports and accounts of children's academic performance and behaviour must be written in the most objective manner possible with no malice or prejudice.

Reasonable care must be taken to protect the rights and privacy of the individual and family at all times.

Verbal communication should be made with discretion.

The above items appear under the heading "Professionalism And Ethics" and this seems to be a case where law and ethics are congruent. Of course, board policy has no direct legal force, and no relevance outside its own school district. Sensitivity to the confidential nature of the information involved and respect for the rights of the parents and children concerned will short-circuit most legal difficulties.

*Hoffman* v. *Board of Education of New York*[62] is a tragic illustration of the importance of putting the proper label on students. A child with normal intelligence was placed in a class for the mentally retarded because his performance on the Stanford-Binet Intelligence Test placed him at a 74 Intelligence Quotient (I.Q.). Had he been one point higher, he would have been placed in the regular class. In spite of the recommendation by the clinical psychologist that his intelligence be re-evaluated in two years, he remained in the class for retarded children for eleven years, without being retested.

The child's mother was never informed of her son's placement and as a working single parent she was not aware that her son was in a class of the mentally retarded. Only when he was finally retested at age seventeen did the mother discover that her son had been misclassified. When the child was removed from the class for the retarded, he suffered trauma at the loss of his friends and spent days crying in his room. In the first round of Court battles, Mrs. Hoffman recovered $500,000 in damages but in later court action the school board was found not liable, so the money was not paid. In the later *Hoffman* decision the court proclaimed that it would only intervene in school management in extreme cases and the courtroom was not the proper forum in which to assess the adequacy of a student placement. Most commentators feel that the earlier *Hoffman* decision was the correct one.

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62. (1978, 410 N.Y.S. (2d) 99 (App. Div.); reversed on further appeal in (1979), 424 N.Y.S. (2d) 376 (App. Div.).

Several other possibilities of malpractice arise in the United States from the Education for All Handicapped Children Act.[63] The success of such cases is doubtful in light of the ultimate decision in *Hoffman*. Nonetheless, the American statute extends the law beyond common law liability.[64] There has also been an interest in the *Hoffman* case in Canada.[65] In particular the passage of Bill 82 in Ontario has sparked increased concern about teacher liability. At least one commentator has reassured school personnel that there will be no problem as long as reasonable judgments are made.[66]

### 3. *Can Rights to Special Education be Enforced?*

Direct enforcement of rights to appropriate education is difficult in Nova Scotia. Until 1979 appeals from an unsatisfactory decision by a school board were to Cabinet rather than the courts. In the few cases where appeals were taken under the *Education Act*, Cabinet was unwilling to upset the sensibilities of local school boards.[67] The Act was changed in 1979 to allow appeals from a decision of the board of trustees to the municipal school board.[68] However, with the 1982 amendments arising from the *Walker Report*, the newly constituted district boards would have to be reviewed in the courts. The majority of administrative decisions would be final and never reach the courts.

In the United States the courts have been viewed as the logical forum for enforcing rights, educational or otherwise. *Mills* v. *Board of Education*[69] is the landmark case in the educational rights of the mentally handicapped. A group of parents brought a class action seeking an injunction to prevent the exclusion of their seven exceptional children. The court concluded that there was a duty to

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63. *Supra*, note 49.
64. E.A. Kurker-Stewart, "Educational Malpractice and P.L. 94-142: A New Dilemma for Educators" (1981), 10 N.O.L.P.E. School Law Journal (No. 1) 61.
65. H. Janisch, "Educational Malpractice: Legal Liability for Failure to Educate" (1980), 38 The Advocate 491.
66. A Keaton, "Teacher Liability and Bill 82" (1982), 12 Field Development Newsletter (No. 6) 1.
67. W. MacKay, *Appeal Book and Memorandum of Law: In the Matter of an Appeal from the Colchester-East Hants Amalgamated School Board Decision of November 17, 1977*, (Halifax: Dalhousie Legal Aid, 1978). Cabinet refused even to hear the Colchester Committee of Concerned Parents and the Canadian Association for the Mentally Retarded.
68. S.N.S. 1979, c. 15, as amended by S.N.S. 1982, c. 23, s. 43.
69. (1972), F. Supp. 866 (D.D.C.).

provide an appropriate education for each child implicit in the compulsory attendance provisions.

> . . . The Court need not belabour the fact that requiring parents to see that their children attend school under pain of criminal penalties, presupposes that an educational opportunity will be available to the children. The Board of Education is required to make such opportunity available . . .[70]

The logic of this reasoning is hard to escape and is applicable to Nova Scotia because she also has compulsory attendance provisions in the *Education Act* subjecting parents to criminal style penalties.[71] There is a difference. Such issues have not traditionally been litigated in the Canadian courts.

As a result of the arrival of the *Charter* the American experience is more relevant. The United States does not provide the ideal model nor has the enforcement of rights to special education been easy even with the aid of a constitution.[72] However, the *Charter* does offer new possibilities. The critical section in respect to special education is the equality rights provision:

> Equality Rights
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision does not come into effect until 1985, but when it does, many doors to court challenge are opened. These doors may be closed if a province opts out of the *Charter* pursuant to s. 33 of that document. Courts may also hold that in times of economic restraint, it is a reasonable limit on equality within s. 1 of the *Charter* not to grant full equality to the handicapped child. Section

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70. *Id.* at 872-873.
71. R.S.N.S. 1967, c. 81, as amended.
72. T. Rowe, "Enforcing the Right to an Appropriate Education: The Education for All Handicapped Children Act of 1975" (1979), 92 Harv. L. Rev. 1103.

15 is analogous to the Fourteenth Amendment to the American Constitution[73] which states:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Due process cases in the United States have established rights to procedural protections before a child is excluded from a class or stigmatized by a label.[74] There may be added strength in the positive confirmation of rights in the Canadian *Charter*, rather than the negative state restraint in the American Bill of Rights.[75] Rights to appropriate education must be defined from the perspective of the individual student. The *Charter* may assist this process as the Bill of Rights has in the United States.[76]

Human rights legislation is one way of promoting equal opportunity for the disabled. An obvious example is the need to make buildings accessible to those with physical handicaps. However, it has not been conclusively settled that human rights codes apply in the school context. *Winnipeg School Division No. 1* v. *McArthur*[77] as discussed earlier in this article, held that schools were not services or facilities customarily available to the public. Exactly the opposite conclusion was reached in *Schmidt* v. *Calgary Board of Education*[78] when a Roman Catholic child was denied access to the public school on the basis of religion. In a recent

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73. *The Constitution of the United States* reprinted in *Black's Law Dictionary* (5th ed.), at 1500. The other provision of the *Charter* relevant to this is s. 7, which speaks of the "principles of fundamental justice".

74. *P.A.R.C.* v. *Pennsylvania* (1972), 343 F. Supp. 279 (E.D.Pa.).

75. T. Deller, "The Right of Handicapped Children to Appropriate Education" unpublished paper submitted to Dalhousie Law Faculty in partial fulfillment of requirements for a Law degree, Halifax, 1982. This activist court role would be *contra* Canadian tradition where educational problems have been handled in political arenas. When there were charges of lower quality education in Halifax's north end, there was no court action. Rather a committee was struck — The Committee on Inner City Education — in June 1978. This has been the Canadian way.

76. *Lau* v. *Nichols* (1974), 414 U.S. 563.

77. *Supra*, note 22.

78. [1975] 6 W.W.R. 279 (ALTA. S.C.). Although the claim of religious discrimination was denied at the Board of Inquiry level, the trial court found that there was a violation of Alberta's Individual Rights Protection Act. On appeal the decision was reversed and Mr. Schmidt's claim denied, but there was no comment upon the ruling at trial that the human rights legislation applied to schools as facilities customarily available to the public. [1976] 6 W.W.R. 717 (ALTA. C.A.).

Saskatchewan case[79] the court held that a hospital was a place "to which the public is customarily admitted" and thus a hospital visitor with a seeing-eye dog could not be denied entry. This same kind of reasoning could be applied to schools.

The relevant section of Nova Scotia's *Human Rights Act*[80] uses the phrase "public access". It states:

> 4 No person shall
>
> (a) deny to any individual or class of individuals enjoyment of accommodation, services and facilities to which members of the public have access; or
>
> (b) discriminate with respect to the manner in which accommodations, services and facilities, to which members of the public have access, are provided to any individual or class of individuals,
>
> because of the race, religion, creed, colour or ethnic or national origin of the individual or class of individuals.

Nova Scotia's Human Rights Commission operates on the assumption that schools fall within its jurisdiction.

Nova Scotia's *Human Rights Act*[81] gives limited protection for the handicapped, including children:

> 11C(1) No person shall deny to, or discriminate against, an individual or class of individuals, because of the physical handicap of the individual or class of individuals, in providing or refusing to provide any of the following:
>
> (a) accommodation, services and facilities customarily provided to members of the public; . . .

However, if the *McArthur*[82] decision is correct, schools are not "services or facilities customarily provided to members of the public." Thus this provision would not help an assertion of equal education opportunity in Nova Scotia. The section is also concerned only with physical handicaps and not mental disabilities.

In the school context there tend to be more problems with mental handicaps than with physical ones. *Bouchard* v. *St. Mathieu-De-Dixville*[83] is a case in point. Two students with

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79. *Peters* v. *University Hospital Board* (1983), An Unreported decision, May 18, 1983 (Sask. C.A.).
80. *Supra,* note 23.
81. *Id.,* at s.4. Unlike Quebec and Saskatchewan, the *Nova Scotia Human Rights Act* has no specific reference to education.
82. *Supra,* note 22.
83. [1950] S.C.R. 479.

learning problems were unable to follow the course of instruction and made it difficult to teach the other children. They were expelled for insubordination and Canada's Supreme Court refused to order the school board to re-admit the students. If students were expelled for these reasons in Nova Scotia, alternate education would be mandated by reg. 7(c) under the *Education Act*.

A more recent Alberta case, *Carrière* v. *County of Lamont,*[84] produced a more progressive result. Shelley Carrière, an eleven year old cerebral palsied girl, was denied access to an appropriate education by the local school board. The court ruled that she had a right to an education program. Shelley was enrolled in the elementary program, but it was a short-lived victory. Although she was not retarded, she was required to take some classes with the mentally retarded. Adopting a more traditional Canadian approach, the parents of Shelley Carrière then lobbied the legislature for a change in the relevant education statute.

In the *Damus* case the judge was specific about the need to pursue issues of quality education through legislative rather than judicial channels:

> The plaintiffs are men and women of conviction and integrity . . . . They have turned to the courts as their last resort. I think that their remedy, if they have one, lies not in the legal process but in the democratic political arena and through the ballot box.[85]

However the rights are enforced, education is now owed to those with learning disabilities, physical and mental handicaps or indeed to all children who deviate from the norm. As so often is the case, defining what education rights are due constitutes the problem. Appropriate special education means different things to different people. There is not even agreement upon who should decide what education is appropriate. One important point has been established. A child cannot be denied an education merely because he or she does not fit the profile of the average public school student.

### III. *Parents: Rights, Duties and Input*

Whether lobbying is done through the courts or the legislature, it will be done by parents on their children's behalf. The primary duty

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84. Supreme Court of Alberta, unreported decision of August 15, 1978; discussed in D. Cruikshank, *Law for the Handicapped,* (Edmonton: Alberta Handicapped Forum, 1979).

85. *Damus* v. *Board of Trustees of St. Boniface,* [1980] 3 W.W.R. 197 at 213.

for the education and raising of children rests with the parents and not the state.[86] In spite of the moral necessity and logic of involving parents in the education of their children, the legal position is far from clear. When parents band together in committees and organizations it no doubt increases their political power but not necessarily their legal status. As one judge put the matter:

> Concerned citizens have no higher status before the Courts than have the great unconcerned.[87]

Nonetheless, schools cannot with impunity ignore the views of parents concerning the education of their children. This fact was dramatized in *Campbell and Cosans* v. *United Kingdom*[88] where the European Court of Human Rights held that parents' rights were violated by the Scottish school system, which required children who breached school rules to submit to corporal punishment. Although the fifteen year old child in issue was directly threatened with corporal punishment for taking a short-cut through a cemetery, the seven year old was never directly threatened with punishment.

The European Court relied upon Article 2 of Protocol No. 1 under the *European Convention on Human Rights* which reads as follows:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In the majority judgment, delivered by six judges, "philosophical convictions" were defined to include any parental opinions worthy of respect in a democratic society.[89] These judges included within this definition views concerning corporal punishment. Sir Vincent Evans, the United Kingdom judge, was the lone dissenter in the case. He felt that Article 2 was aimed exclusively at the problem of state indoctrination and thus should be restricted to the content of education, not its administration. Furthermore, he felt that the majority decision invited parental disruption in the daily operation of the schools.

Decisions of the European Court of Human Rights have no binding effect on Nova Scotia or any other Canadian province.

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86. This is clear from the various United Nations declarations *supra,* footnotes 4, 5 and 6; as well as the attendance provisions of the *Education Act* (ss. 80 and 96).
87. (1973), 41 D.L.R. (3d) 57 (Ont. H.C.).
88. (1982), 4 E.H.R.R. 293 at 307.
89. *Id.*, at 305.

However, the case may demonstrate a changed view about the rights of parents in the education process. It is fair to say that the dissenting views of Sir Vincent Evans would be more in line with traditional Canadian deference to the decisions of school authorities. In practice school boards and administrators are, nonetheless, very conscious of not offending the philosophical and religious views of parents. Teachers are often cautioned about teaching controversial topics and some degree of religious tolerance is mandated by the regulations under the *Education Act* as discussed later in this article.

Some job descriptions expressly limit teacher free speech in deference to the views of parents. The Halifax District School Board has a *Manual of Policy and Procedure*[90] and appended to that are regulations respecting the duties of teachers. Section 16 of this document reads as follows:

> 16(1) Teachers shall avoid giving offence to the religious and political beliefs and moral scruples of their pupils and the pupils' parents.
>
> (2) Teachers should be as objective as possible in dealing with controversial matters arising out of the curriculum subjects whether scientific, political, religious or racial.

Thus the views expressed in *Campbell and Cosans* v. *United Kingdom* are not completely foreign to Nova Scotia's education scene. One of the real problems facing parents, is finding an effective vehicle through which they can make their views on education known to those who control the schools.

There has been a growing tendency for parents to form their own organizations rather than just be a part of a Parent-Teacher Association (P.T.A.), which exists only at the pleasure of the individual school. A good example of this is the Community Involvement in Education group in Halifax. It has been operating for several years and regularly publishes a newsletter and holds meetings. Other parent groups have rallied around a particular issue and one notable example is the Salt Springs School Committee. It was because of this group's four year struggle against the Pictou County School Board and the Department of Education, that a separate elementary school was built in Salt Springs, Pictou

90. This document was approved by the Halifax District School Board in 1982 but its legal impact (if any) is not known. It clearly does not have the status of a statute or regulation. The quoted limits on speech are also found in the "N.S.T.U. Code of Ethics" in Nova Scotia Teachers Union, *Member Handbook* (1982), at 54.

County. Under the able guidance of Chairperson Betty Lou Scott, the Salt Springs Schools Committee provides a textbook example of citizen advocacy.[91]

One of the important tactics of the Salt Springs School Committee was to establish itself as a board of trustees under the *Education Act*. Prior to 1982 these boards had considerable power. The *Education Act* had not repealed the board powers of the school trustees, which were enacted when these local groups ran the schools. However, changes to the *Education Act* as a result of the *Walker Report* repeal the old trustee powers listed in s. 29 substituting the following supportive and advisory duties:

s. 12A (5) The board of trustees shall

(a) communicate to the school board the opinion and recommendations of the trustees and other members of the public respecting the conduct of the school program in the section;

(b) visit the schools of the section not less than twice in each year;

(c) make recommendations to the school board respecting use of a school building for purposes other than regular school purposes, so long as that use does not interfere with the proper conduct of schools;

(d) provide such assistance and perform other functions as required by this Act or requested by the school board.

As a result of the 1982 amendments, annual meetings of ratepayers and schools are discretionary rather than mandatory[92] but they are still discussed in considerable detail. Furthermore, the election of a board of trustees at school meetings is now a matter of choice and no longer required by the *Education Act*.[93] These changes, which reduce the powers of the board of trustees, do not necessarily reflect a change of policy. Rather they are an overdue recognition of the existing state of affairs as practiced in Nova Scotia.

An important power of trustees that continues is the power to supplement the education program by the assessment of an area rate. This power is described in considerable detail in s. 57 of *Education Act* but the essence is as follows:

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91. The Salt Springs School struggle was extensively covered in the *Pictou Advocate* and *New Glasgow Evening News* during the 1975-1979 time period.
92. R.S.N.S. 1967, c. 81, ss. 13-14.
93. *Id.* ss. 14(6) and 21(1).

> 57(1) The trustees of the school system at any time may, or on the written request of seven ratepayers or their spouses shall, call a special school meeting for the purpose of determining what amounts, if any, shall be requested of a council of a municipality by a school board to be raised by area rate for the purpose of providing the sums required for
>
> (a) supplementary programs or services to extend the school program operated by the school board in the school section;
>
> (b) educational programs or services in addition to those included in the school program; and
>
> (c) cultural or recreational activities related to the school program.

The existence of the above provision underscores the need for parents to become involved in school meetings and, if interested, stand for election as a member of the board of trustees. If no election takes place, the district school board can appoint trustees, or if no board of trustees has been established, determine that there will be none.[94]

Even with the increased centralization of power in district boards, meaningful parent participation is still implicit in the *Education Act*. Schools are no longer run by small local boards of trustees but provision is still made for grass roots input. The general supervision of education in Nova Scotia is left to the Cabinet and significant powers are given to the Minister of Education.[95] These elected officials are accountable to parents as taxpayers and to members of the voting public.

The logical right to parent involvement in education is underscored by s. 96 of the *Education Act*. By this section, a parent is compelled to send his child to school and failure to do so can result in a fine or imprisonment. Once the parent is compelled by the state to submit his child to a particular process it would be completely undemocratic to deny access to and control over the process. Clearly, the *Education Act* was intended to be a democratic framework in which parents play a meaningful role. Further, evidence of this is provided in reg. 38 made pursuant to the *Education Act*. This allows parents to exempt their child from devotional exercises for reasons of conscience.

Emphasis has been placed upon the democratic roots of the education system by the enactment of the *School Board*

94. *Id.* s. 25(1) and (3).
95. *Id.* ss. 3 and 4.

*Membership Act.*[96] This Act required that one-third of the school board's members be elected from the public at large. These elected members can and often do include parents who then have a direct input into the making of educational policy. As an example Eva Huber, the former President of the Halifax parents group, Community Involvement in Education, is now an active elected member of the Halifax District School Board.

One area where parents have been demanding input is the school curriculum. Sex education is the classic example.[97] Parents sometimes feel that schools have no role in educating children about sex. Hence, they advocate its deletion from the curriculum. The reading content of courses, particularly English literature, has also been a parental concern. This concern is often manifested through lobbying to have certain books banned from the school curriculum. Nova Scotia provides some notable examples of such censorship lobbying.[98]

Under s. 4(ka) of the *Education Act,* prescribing the course of studies is the responsibility of the Minister of Education. This Minister is also responsible for establishing and maintaining a School Book Bureau for the distribution of school materials.[99] The Governor in Council (Cabinet) may also get involved in the curriculum through its general supervisory powers under s. 3 of the *Education Act.* One of these powers is delegation, thus school boards too may be given authority over the curriculum. There is no statutory role for parents in curriculum matters and their only effective input will be by lobbying those who do have authority.

### 1. *Parents' Rights to Information*

There are some rights which parents exercise on behalf of their children, although the latter do not always agree with the parent. One of the critical issues is access to information. Without

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96. S.N.S. 1978, c. 13, as amended. In March, 1983, Nova Scotia's Minister of Education, Terry Donohoe suggested increasing the elected representation on the Board.

97. *Kjeldsen, Busk, Madsen* v. *Denmark* (1976), 1 E.H.R.R. 711, involved an attempt by parents to have their children exempted from sex education classes because they were offensive to their "philosophical convictions" pursuant to Article 2 of Protocol No. 1 of the *European Convention on Human Rights.* The claim was rejected and the students were not excused from the classes.

98. W. MacKay, "Schools, Censorship and Free Expression: Old Issues in a New Context," (1983), 2 The Canadian School Executive (No. 7), 6.

99. *Education Act,* R.S.N.S. 1967, c. 81, s. 4(i) and (j).

information about the operation of the school and the progress of their children, parents have no control over education. There are many problems involved. What if a student confides information to the guidance counsellor on the condition that it not be revealed to the parents? Do parents' rights to access prevail over the student's right to privacy? Can a school withhold information from parents because it feels the result of revealing the information would result in the child receiving a beating? Difficult balancing of interests is required.

The only section concerning access to information is a 1982 amendment to the *Education Act,* replacing the more limited section 10:

> s. 48(10) The books, records and accounts of a school board, of a committee of a school board and of the secretary of a school board or committee of the board, including payroll records but not including personnel records, shall be open to the inspection of any person without fee at all reasonable times.

This provision does not catch the records of the individual schools nor of the Department of Education.

It also fails to mention whether the meetings of the school board and its committees are themselves open to the public. In *Houde* v. *Quebec Catholic School*[100] the majority of the Supreme Court of Canada concluded that a school board could conduct business by secret ballot, even in the face of an express provision making meetings public. There is no public requirement in either the *Education Act* or the *Municipal Act*[101] in regard to Nova Scotia school boards. It would appear that access to school board meetings is only a moral claim in Nova Scotia.[102]

Unlike other provinces Nova Scotia's *Education Act* does not give parents access to their children's records. If parental access to information is handled in written form at all, it is at the board or school policy level. The Halifax District School Board in its *Manual of Policy and Procedure* has a specific section entitled "Reporting to Parents". This sets out the procedures for issuing report cards and encourages school officials to contact parents when a child is

100. (1978), 80 D.L.R. (3d) 542 (S.C.C.).
101. R.S.N.S. 1967, c. 192, as amended.
102. This is the net effect of a March 29, 1977 letter from then Minister of Municipal Affairs Glen Bagnell and an April 15, 1977 letter from the then Minister of Education, George Mitchell written to Mrs. Betty Lou Scott, Chairperson of the Salt Springs School Committee.

having problems in school. It does give parents some rights of access, but they are limited.

In the *Policy Handbook (1981)* provided to the Special Services Division of the Halifax County School Board the following guidelines are expressed:

> RELEASE OF INFORMATION
> Communication with outside professionals involves mainly a two-way exchange of information.
>
> (1) Parent permission is required in writing prior to the release of written information to agencies.
>
> (2) Notation in a file must be made when a copy of documentation is sent out other than to persons or agencies stated on the original documentation.
>
> (3) Only pertinent and specific information is to be released and that information will be stated to the parent when permission is sought for release of information.
>
> (4) The release of information form is to be used at all times when seeking consent for release of documentation.

School board policies are often not written or if written are unavailable to the parents. Thus the approach taken by the American Family Educational Rights and Privacy Act[103] is preferable. This act ensures the confidentiality of student records, gives parents rights of access and permits challenge to recorded information. Even in the United States the courts have been unwilling to extend privacy rights to records held by educational institutions unless a statute so mandates.[104]

Some rights of access are provided in Nova Scotia by the *Freedom of Information Act:*[105]

> 3. Every person shall be permitted access to information respecting . . .
>
> (g) personal information contained in files pertaining to the person making the request; . . .
>
> (i) programs and policies of a department; and . . .

Department of Education files are caught by the Act but probably school board files are not. In any event, there are important exceptions to the statute.

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103. 20 U.S.C., s. 1232g (Supp. IV, 1974); this is commonly called the Buckley Amendment.
104. B.M. McLachlin, "Educational Records and the Right to Privacy" (1981), 15 U.B.C. Law Rev. 175 at 186.
105. S.N.S. 1977, c. 10.

4. Notwithstanding Section 3, a person shall not be permitted access to information which

(a) might reveal personal information concerning another person; . . .

(j) would be likely to disclose information the confidentiality of which is protected by an enactment.

Subsection (j) allows the legislature to exempt any information from the reach of the *Freedom of Information Act*. Meanwhile, subsection (a) would likely prevent parents from obtaining files about their children's teacher or principal.

2. *Religious and Patriotic Exercises*

To the extent that religious rights are respected in schools, it is the rights of the parents and not the child. Although it is uncommon that children have a different religion from their parents, it is the parents, not the students, who insist that religious beliefs not be violated.

In *Ruman* v. *Lethbridge School Board*[106] children whose parents were Jehovah's Witnesses refused to participate in patriotic exercises which included the saluting of the Canadian flag. The students were dismissed and the court upheld the dismissal as within the power of the school board. Religious freedom was not directly raised by the parents but it was clearly the basis of their objection.

Only two years later an Ontario court, in *Donald* v. *Hamilton Board of Education,*[107] reached the opposite conclusion. The facts were almost identical as two students, whose parents were Jehovah's Witnesses, were expelled for refusing to sing the national anthem and salute the flag. Perhaps the fact that the regulations under the Ontario statute contemplated that people might be exempted from such exercises was the decisive difference. The expulsion was declared illegal.

One of the intriguing sections of the *Education Act* is the provision requiring teachers to set a moral example for their students. It states:

s. 74 It is the duty of a teacher in a public school to . . .

(f) encourage in the pupils by precept and example a respect for religion and the principles of *Christian morality,* for truth,

106. [1943] 3 W.W.R. 340 (Alta. S.C.).
107. [1945] 3 D.L.R. 424 (Ont. C.A.).

> justice, love of country, humanity, industry, temperance and all other virtues; (emphasis added)

This provision may be in violation of section 2 of the new *Charter* on freedom of religion. It claims to impose "Christian" morality on all regardless of the conviction of the students or their parents. This would appear to violate the religious freedom of non-Christians. If it does, s. 74(f) would be unconstitutional by virtue of its conflict with the *Charter* in accordance with the language of s. 52 of the *Constitution Act, 1982*.

Exemption from devotional exercises is permitted by the regulations made under Nova Scotia's *Education Act*. Regulation 38 states that where parents signify their "conscientious objection" to devotional exercises or part of them, the exercises will either be modified or held after class. When parents object in writing to the board, their children need not be present at devotional exercises. If a parent only objected verbally the pupil could be required to take part in the exercises. This would be a very unusual practice; in any event, it might violate s. 2 of the *Charter*.

The flip side of this issue is that parents may insist upon a certain amount of religious instruction as part of an appropriate education for their child. This situation is covered by Reg. 37 under the *Education Act* which allows devotional exercises to be held before or after regular class hours. Provision is also made for different devotional exercises to be offered simultaneously. There are some special provisions in Halifax City which provide far more extensive religious instruction under the title of the *McQuinn Decision*.[108]

### 3. *Removal from School*

Can a parent for religious reasons withdraw a child from school altogether? In Canada the answer is unclear. *Perepolkin* v. *Superintendent of Child Welfare*[109] held that religious freedom did not include the right to remove a child from the public school. This conclusion is somewhat clouded by the court's opinion that non-attendance at the secular school was not a vital part of Doukhobor religion. In the United States keeping children away from the secular school was considered a part of Amish parents' freedom of religion.[110]

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108. This decision is really an excerpt from the Halifax School Board minutes of November 29, 1968. This excerpt plus a memorandum to principals (part of the Board minutes of May 27, 1975) are contained in an appendix to the *Manual of Policy and Procedure* (1982) of the Halifax District School Board.
109. (1957), 120 C.C.C. 66 (B.C.C.A.).
110. *Wisconsin* v. *Yoder* (1972), 406 U.S. 205.

In the surprising *Regina* v. *Wiebe*[111] case a Mennonite parent, who removed his child from school in violation of the compulsory school attendance provision, was found not guilty. The reason for this conclusion was that the compulsory attendance provisions unduly infringed Mr. Wiebe's religious beliefs. These provisions were thus rendered inoperative by the *Alberta Bill of Rights*. Mr. Wiebe's concerns about the public school were the access to radio, vulgar language and the discussion of sex in literature class. He preferred to have his child educated in the Mennonite school which was not a certified private school.

Nova Scotia has no bill of rights which will render an offending statute inoperative. However, s. 2 of the *Charter* on freedom of religion is effective in Nova Scotia. The same reasoning could be applied in Nova Scotia to exempt people from compulsory attendance under s. 96 of the *Education Act* on the basis of deep felt religious conviction. It should be remembered, nonetheless, that *Wiebe* was a provincial court decision and higher courts in Alberta or elsewhere might take a different view of the issue.

Often the parental decision to remove a child from school will bring parents into direct conflict with the compulsory attendance laws. The provision in Nova Scotia's *Education Act* is fairly typical of that in other provinces. As indicated by s. 96(3) of the *Education Act* there are very few excuses open to a parent. An offending parent must either convince the court after the fact that he or she was unable to induce the child to attend or serve notice of this inability before the fact. If this defence of parental impotence fails, the parent is subject to the penalities described in s. 96 of the *Education Act* which includes a 30 day imprisonment in default of a fine ranging from 10-30 dollars.

There is no doubt that s. 80 of the *Education Act* imposes upon parents a positive duty to have their child attend school. This duty also extends to others who have the care or custody of the child; even when others have custody the duty is not lifted from the parents. Parents, guardians or other persons having charge or control of a child are subject to the penalties under s. 96 of the *Education Act*.

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111. [1978] 3 W.W.R. 36 (Alta. Prov. Ct.). However, in *R.* v. *Ulmer* (1923), 1 W.W.R. 1 (Alta. C.A.) a Lutheran father who failed to send his child to school because there was no separate minority school, was subject to a fine for not sending his child to the majority public school.

Teachers and the school principal are also required to assist in the enforcing of compulsory school attendance according to ss. 93-94 of the *Education Act*. In fact teachers are asked to do everything lawful and reasonable to secure full attendance.[112] Specific attendance duties such as the keeping of a register are imposed on teachers by s. 74(d) of the *Education Act*. People generally are forbidden from employing a school age child during regular school hours unless a certificate of exemption has been issued.[113] Under Reg. 94 a child may be excused for a maximum period of six weeks if the parent needs the child for urgent household duties or necessary employment. This need must be supported by application in writing. A child may also be exempted by the board if it is satisfied that gainful employment is necessary to maintain the child or someone dependent on him or her in accordance with Reg. 95 under the *Education Act*. Finally a parent escapes the reach of the *Education Act* by seeing that equivalent schooling is provided outside the public school, in a private school or elsewhere.[114] If a parent has a teacher's license he or she may educate their children at home.

Measuring whether the alternate education is equivalent to that in the public schools is a difficult problem. In *Lambton County Board of Education* v. *Beauchamp*[115] the court held that the burden was on the educational authorities to demonstrate beyond a reasonable doubt that the parent was in breach of the compulsory attendance statute. Since the proceedings were criminal in flavour, the court felt that the criminal burden of proof was appropriate. Ms. Beauchamp removed her child from the public schools and supervised her in a correspondence course offered by the American Christian Liberty Academy. Although the school board investigators found the program inadequate the court found the parent not guilty.

In one early *Charter* case an exemption in Alberta's School Act requiring that alternate education be approved by the Department of Education, was found to be in conflict with the *Charter of Rights*. In *The Queen* v. *Larry Jones*[116] the parent charged with violation of

112. *Education Act*, R.S.N.S. 1967, c. 81, s. 93(1).
113. *Id.* ss. 98 and 82.
114. Reg. 92(c) and (f) pursuant to the *Education Act*.
115. (1979), 10 R.F.L. (2d) 354 (Ont. Prov. Ct.).
116. (1983), An Unreported decision, March 16, 1983 (Alta. Prov. Ct.). Summarized and discussed by J. Anderson, "Legal Notes: Compulsory Attendance contrary to the Charter" (1983), 3 *Can. School Exec.* (No. 2), 32.

the school attendance provisions, educated his own and twenty other children in a program called the "Western Baptist Academy". The parent refused to apply for Department of Education certification because he felt it would be sinful to ask the state's permission to do God's will. Somewhat surprisingly, the attendance exemption was struck down as being contrary to the guarantees of "liberty" and "fundamental justice" in section 7 of the *Charter* rather than as in conflict with the section 2 guarantees of religious freedom. This decision is now on appeal and it is anticipated that both the issues of due process and religious freedom will be aired in the higher courts.

An interesting situation arose in the case of *Spiers* v. *Warrington*[117] involving a British school which had a dress code. The parent purposely dressed the child so she would be refused attendance. This was considered a breach of the compulsory attendance rule. The offending apparel was a pair of slacks. The court ruled that unless the parent could produce a medical certificate showing that pants were required, the child would not be admitted while wearing slacks.

In another unusual case a Quebec court held that a father was entitled to remove his child from a school because the board refused to promote the child to the level warranted by his abilities. The father was also paid the additional expenses involved in placing the child in another school. In *Brault* v. *Commissaires D'Ecoles De Ste. Bridge*[118] the court found that the board refused to promote the child with the intention of injuring the father. The case is unlikely to be repeated as such malicious conduct is rarely proven.

In spite of the lack of express language in the *Education Act* conferring rights on parents, silence does not mean absence. Interpretation of the statute law and development of the common law has accorded certain parental rights. This evolution is buttressed by the state of the law in Europe and at the international level. Parents have duties in relation to the education of their children and corresponding rights must exist as well. To deny such rights would be inconsistent with a democratic nation which values the role of the family in society.

117. [1954] 1 Q.B. 61.
118. [1951] R.L. 479 (Que. S.C.).

IV. *Attendance and Truancy*

A student is also subjected to penalties for failure to attend school. This is justified on the basis that education benefits not only the parent and the child, but also the state which acquires an informed and educated citizenry.[119] The offence of truancy can result in a child being sent to the reformatory pursuant to s. 99 of the *Education Act*. Thus the consequences of conviction can be serious.

The offence of truancy is created by s. 99 of the *Education Act:*

> 99(1) A child who:
>
> (a) is habitually absent from school contrary to this act or regulations made pursuant to this act; or
>
> (b) is absent from school contrary to this Act or regulations made pursuant to this Act for five days or more during a period of twelve months after the date upon which a warning notice was served on his parents; or
>
> (c) persistently violates the regulations of the school in which he is enrolled: or
>
> (d) persistently misbehaves in a manner that renders him liable to exclusion from school;
>
> may upon conviction be committed to a reformatory institution to be detained there subject to the rules and regulations of the institution until he is released under this Act.

Persistent misbehaviour and rule violation as well as habitual absence can result in a conviction under this section. This raises the question whether a student who has been suspended for misbehaviour or breach of school rules could also be charged under the truancy section of the *Education Act*. The statute permits such a course of action; therefore a student could face two levels of penalties.[120]

Legal age limits for compulsory attendance are not specified in the *Education Act* but are prescribed by regulations pursuant to s. 79 of the *Education Act*. Regulation 91 under the act sets the minimum age at six and the maximum age at sixteen. This can be changed quite easily and may be affected by the extension of the juvenile age

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119. *Supra*, note 30 at 225.

120. *Finlayson* v. *Powell*, [1926] 1 W.W.R. 939 (Alta.C.A.), held that truancy can be a ground for suspension as willful opposition to authority. Section 120 of the *Indian Act*, R.S.C. 1970 c. I-6 deemed an Indian student expelled from school to be a delinquent. This provision has been rendered inoperative by the *Canadian Bill of Rights* and is now repealed by the *Young Offenders Act*.

to eighteen under the *Young Offender's Act*.[121] In an unusual provision s. 109 of the *Education Act* requires a student who appears to fall within the age limits to prove to the contrary. Thus the student would have the burden of showing that he or she was older than sixteen and thus beyond the reach of the truancy laws.

Truancy cases used to be tried in a summary fashion under s. 12 of the *Juvenile Delinquent Act*[122] which made it an offence of delinquency for a young person to breach any provincial statute. However, the *Juvenile Delinquent Act* was replaced in 1982 by the *Young Offender's Act*. This latter statute does not include a breach of a provincial statute in the definition of an offence. Thus truancy must now be handled under the *Education Act*. Nonetheless, it will still be tried in the Family courts as it was before.

Procedures for enforcement are established in the *Education Act* and its regulations and the pattern of enforcement has been properly described as selective.[123] School boards designate one or more persons to enforce the attendance provisions in particular geographic areas.[124] For the purposes of carrying out their task these enforcement officers are granted all the powers and immunities of a peace officer. Effectively these designated people police the attendance provisions of the act and their duties combine the roles of investigator, social worker and prosecutor.[125]

There are exceptions to compulsory student attendance and they are listed in regs. 92 to 95 under the *Education Act*. Many other provinces, such as Ontario, include the exceptions in the statute itself rather than in the regulations. This is preferable because regulations are much harder to locate than statutes. Parents and students are very unlikely to track down regulations and thus discover the exceptions. The exceptions concerning the physical and mental condition of children have already been considered in relation to special education. There are also some obvious exceptions concerning incapacitating illness.

121. Bill C-61 passed third reading May 17, 1982, First Session of the Thirty-Second Parliament. Both the proclamation of the Act and the extension of the age to eighteen have been delayed, the latter until 1985. S.C. 1980-81-82, c. 110.

122. R.S.C. 1970, c. J-3 (repealed upon proclamation of *Young Offenders Act*).

123. G. Morgan, "The Truancy Offence: The Conservative Position Considered", A paper prepared in partial fulfillment of the LL.B. program at Dalhousie Law School, Halifax, 1982, at 10-19.

124. *Education Act*, R.S.N.S. 1967, c. 81, s. 87.

125. Reg. 96 pursuant to the *Education Act*.

If a child cannot be accommodated in a particular school district or necessary transportation is not provided, that child is exempted from regular attendance in the district public school by reg. 92(b) and (c). However, the excuse only works if the child is receiving equivalent education elsewhere. Allowance is made for education of a child at home as long as a school inspector certifies that the schooling is equivalent and a teacher certifies that a satisfactory grade is attained. Some of the problems involved with this kind of provision were discussed in relation to the Ontario case, *Lambton* v. *Beauchamp*.[126] Since that case the Ontario practice has changed and school administrators no longer decide whether the alternate education is satisfactory. Nova Scotia, on the other hand, does require approval for a proposed course of studies, from supervisors or inspectors.

Excuses arising from necessary home employment and gainful employment have already been discussed under the attendance duties of parents. These are set out in regs. 94 and 95 under the *Education Act*. There are some glaring omissions in Nova Scotia's school attendance laws when they are contrasted with the more modern *Ontario Education Act*.[127] Students are exempted from compulsory attendance in Ontario during religous holidays, and also if they are suspended or expelled. Neither excuse exists in Nova Scotia. Furthermore, in Ontario a parent who is unhappy with a school officer's decision on the legality of a student's absence may request a hearing and inquiry.[128] No such possibility exists under Nova Scotia's *Education Act*.

Some kind of hearing for both parents and students may be required after an administrative ruling has been made on non-attendance but before a trial under s. 99 of the *Education Act*. A possible basis would be the *Charter* which states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This would be a bold extension of the *Charter* and not one that either parents or students should expect.

The compulsory attendance provision of the *Education Act* provide strong support for the argument that there are legal rights to

126. (1979), 10 R.F.L. (2d) 354 (Ont. Prov. Ct.).
127. R.S.O. 1980, c. 129, s. 20.
128. *Id.* s. 23.

education. If the State has the right to compel a child to attend school, surely a child has a corresponding right to claim some beneficial education from that school. Only if what is provided in the educational process is valuable and of real quality does it make sense to penalize students for non-attendance. Education must mean more than just sitting in the classroom, if the state is justified in sending those who do not attend to a reformatory. Any other conclusion would indicate an abuse of state power.

## V. *Student Suspensions and Fair Procedures*

Legal rights can normally only be removed after the application of procedural protections deemed to promote fairness. Thus it is instructive to consider what happens when a student is suspended and his or her rights to education are temporarily denied. It is a serious matter to prohibit a student from attending school and a decision to do so must be taken in accordance with proper procedures. In Nova Scotia as in most provinces the power to suspend is given by statute to the school board which may in turn delegate the power to suspend for short periods to the school principal.

Until the summer of 1982 teachers also had a limited power to suspend or dismiss students from the school or room, if they were persistently defiant or disobedient. This power was removed by the amendments which resulted from the *Walker Report*. The present amended version of s. 74(b) of the *Education Act* reduces the teacher's power to reporting to the principal case of defiance or disobedience:

> s. 74 It is the duty of a teacher in a public shcool to:
>
> (b) maintain proper order and discipline in the school or room in his charge and report to the principal or other person in charge of the school the conduct of any pupil who is persistently defiant or disobedient;

Prior to 1979 amendments to the *Education Act*, neither students nor parents were entitled to much due process in connection with a suspension or expulsion. Indeed, if a parent or pupil were dissatisfied with a school board ruling, the appeal provided by s. 3(e) of the *Education Act* was to the provincial Cabinet. Such appeals were rare if any were allowed at all.[129] Nonetheless, the

129. *Supra*, note 67. Cabinet refused to hear the appeal from the school board ruling as it was generally opposed to interfering with local control.

existence of the Cabinet appeal has been used to deny judicial review of a student suspension for trafficking in drugs on the school ground.[130]

Appeal to Cabinet has now been removed and there is a better argument that the final school board decision on a suspension is subject to review in the courts. Furthermore, 1979 amendments introduced requirements of notice and hearings for both parents and students into the *Education Act* as well as the right to appeal a Board of Trustees decision to the Municipal School Board.[131] These new provisions also gave to the Municipal School Board the power to expel a student after established procedures were followed. This power to expel has now been eliminated, although long term suspensions (not to exceed the school year) are still permissable under the 1982 provisions.[132] The critical provisions are ss. 53 and 54 of the amended *Education Act*.

1. *Who can Suspend and What Procedures Follow?*

Principals of schools have the power to suspend students up to a period of five school days under s. 53(1) of the *Education Act*. Once such a suspension is made notice and reasons in writing must be given to the affected pupil, his or her teachers and parents, as well as the relevant school board in accordance with s. 53(2). There is nothing in the *Education Act* which allows the principal to delegate his suspension power. However, the school board can designate a vice-principal or other teacher who is in charge to suspend for five days or less.

Only the district school board or its delegate has the power to suspend a student for more than five days according to s. 53(3) of the *Education Act*. The school board can delegate its authority to a committee consisting of the superintendent of schools and two other board members; the trustees of the school section; or any other committee approved by the Minister of Education.[133]

When a school board receives notice of a principal's suspension pursuant to s. 53(1) of the *Education Act,* ordering a suspension of more than five days is only one option under this section. The board

130. *Wilkes* v. *Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (N.S.S.C.).
131. S.N.S. 1978-79, c. 15.
132. S.N.S. 1982, c. 23, s. 43.
133. *Education Act,* R.S.N.S. 1967, c. 81, s. 53(4).

may also confirm the suspension of five days or less or order any suspension expunged from the student's record. If either of these latter options are used, it is not clear whether the requirements of notice, reasons and rights of appeal, arise. They are certainly triggered by the more serious option of a suspension for more than five days.

It is safer for a school board to assume that the final paragraph of s. 53(3), according procedural protections and the right of appeal, applies to whatever option the board adopts. There is ambiguity in the section and it is just one of the problems to be ironed out regarding the new suspension provisions.

Students may also be suspended from school buses for misconduct according to s. 54(3) of the *Education Act* which reads as follows:

> s. 54(3) The principal of a school, or such other supervisory person as may be designated by the school board, may suspend a pupil's right to use a school bus if in his judgment the pupil has refused to comply with reasonable rules or regulations of the school board or directions given by the bus driver or if in his judgment the behaviour of the pupil while on the bus endangers the safety of others using the bus.

It is certainly open to a school board to designate the bus driver as a person who can suspend and that is what is usually done. Such suspensions must be reported immediately to the school board and if the suspension is for more than two days the pupil and parents must be given notice and reasons.[134] Rights of appeal to the school board arise from suspensions over five days under s. 54 of the *Education Act*.

### 2. *What Grounds for Student Suspension?*

Grounds for suspension are described in broad language in s. 53(1) of the *Education Act*.

> . . . pupils who are persistently disobedient or who conduct themselves in such a manner as to be likely to affect injuriously the proper conduct of the school or the character of other pupils.

Whether particular conduct justifies suspension will depend upon the circumstances and courts have been reluctant to second guess

134. *Id.* s. 54(4) and (5).

the judgment of school officials.[135] Some cases go so far as to suggest that a school board suspension will only be questioned where there is evidence of malice.[136]

School authorities have the power to remove a pupil from school who they feel endangers other students. This power extends to conduct which may fall short of criminal activity. Accordingly the principal who believes a student is trafficking in drugs may suspend him or her, even if the evidence available would not produce a criminal conviction. This is implicit in *Wilkes* v. *Municipal School Board of Halifax County*.[137]

Furthermore, what conduct justifies suspension changes over time. In the 1880's suspending a student for carving his initials in a desk was quite acceptable. It was also considered appropriate to keep the student out of school while he replaced the desk top with his own handiwork. In *Re McCallum*[138] this school board decision was upheld by the courts. By todays standards the penalty was rather severe.

Schools and school boards often have detailed regulations concerning student conduct. Persistent disregard of these rules can constitute cause for suspension. Failure to attend school because the work was not interesting has been held to constitute "willful opposition to authority" and thus provide grounds for suspension.[139] Similarly, failure to conform to school rules concerning the length of boys' hair justified suspension in *Ward* v. *Board of Blaine Lake School*.[140] The divided authority on the power to suspend for not participating in religious or patriotic exercises was discussed earlier in this article. Courts continue to be reluctant to get involved in matters related to academic standards.[141] Judicial

135. *Warnock* v. *Board of School Trustees of Penticton* (1979), 17 B.C.L.R. 374 (B.C.S.C.); *Re McCallum*, [1889] O.R. 451 (Q.B.) and J. Wilson, *supra*, note 30 at 245.
136. *McIntyre* v. *Public School Trustees of Blanchard* (1886), 11 O.R. 439 (C.P.) and P.F. Bargen, *The Legal Status of the Canadian Public School Pupil* (Toronto: MacMillan Co. of Can., 1961), at 128.
137. (1978), 26 N.S.R. (2d) 628 (N.S.S.C.).
138. [1889] O.R. 451 (Q.B.).
139. *Finlayson and Tucker* v. *Powell*, [1926] 1 W.W.R. 939 (Alta. C.A.).
140. [1971] 4 W.W.R. 161 (Sask.Q.B.). This decision is much criticized. W.R. Hunter, "Reviewability of School Board Regulations Relating to Dress and Grooming" (1971-72), 36 Sask. L.R. 479.
141. *University of Missouri* v. *Horowitz* (1978), 435 U.S. 78; *Doane* v. *Mount St. Vincent* (1977), 24 N.S.R. (2d) 298 (N.S.S.C.).

procedures are considered more appropriate to breaches of conduct which result in discipline for misbehaviour.

In the past school officials have had broad discretion to establish and enforce school rules. The *Charter* may place some limits on this state power. In *Tinker* v. *Des Moines Independent Community School District*[142] the United States Supreme Court upheld the right of students to protest the Vietnam war by wearing black arm bands. To suspend them for this conduct was held to be a violation of their rights to free speech. Such restrictions on basic constitutional rights could only be tolerated where there was a serious disruption of school discipline.

Section 2 of the *Charter* guarantees certain fundamental freedoms to everyone. These rights include freedom of expression, religion and assembly. These provisions provide a new constitutional standard by which to measure the content and application of school regulations. However, many rules will be justified as "reasonable limits in a free and democratic society" pursuant to s. 1 of the *Charter*.[143] Assuming that school boards are caught by the *Charter*, a student's education rights have acquired a new dimension. The state must provide education in such a way as not to violate a student's constitutional rights.[144]

### 3. *Due Process and Fair Procedures*

Quite apart from the relevant sections of the *Education Act* the principles of administrative fairness impose obligations similar to American due process on all decision-makers, including those in the field of education. Procedural protections such as notice and the rights to a hearing by an unbiased decision-maker, have been applied in the education context.[145] The exact content of the procedures will vary with the nature of the decisional process.

This same flexibility of procedural content is also reflected in the American cases. The Fourteenth Amendment to the United States Constitution was applied to a school suspension by the United States

142. (1969), 393 U.S. 503.
143. *Kelly Kingsbury* v. *Minister of Social Services of Saskatchewan*, Unreported decision, November 30, 1982, (U.F.C. of Sask.), provides an early example.
144. In *Wood* v. *Strickland* (1974), 420 U.S. 398 and *Carey* v. *Piphus* (1978), 435 U.S. 249, breaches of constitutional rights by a school boards led to awards of damages.
145. *Board of Education* v. *Rice*, [1911] A.C. 179 (H. of L.).

Supreme Court in *Goss* v. *Lopez*.[146] The Court concluded that the due process clause required that:

> . . . the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[147]

Even the above procedures would not have to be followed according to *Goss* v. *Lopez* if the student concerned posed an immediate threat to other students or school property. Canadian courts are likely to take a similar flexible approach in applying s. 7 of the *Charter* which guarantees the principles of fundamental justice. It provides the closest equivalent to the American due process clause.

One of the many intriguing questions that will emerge from the *Charter* is whether the "principles of fundamental justice" will be equated to the common law concepts of natural justice and fairness.[148] If a substantive due process approach is followed, the impact on schools would be great. The dissenting judges in *Goss* v. *Lopez* feared that the educational process would break down in an overly judicialized school structure. There are different decision-making models to choose from and the consequences of a particular choice are far reaching.[149]

Long before the *Charter*, teachers generally and the school principal in particular, have had to play the role of judge.[150] The methods are more informal but they are aimed at resolving conflicts in a fair way. A further judicial element is added by the existence of appeals from the principal or school official to the school board under the *Education Act*. All of this supports the argument that legal rights and not mere privileges are the focus of educational decision-making.

There has been a growing awareness of the need to follow fair procedures in making decisions which affect a child's right to

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146. (1975), 419 U.S. 565.
147. *Id.* at 581.
148. W. Tarnopolsky, *The Canadian Charter of Rights and Freedoms: Commentary*, (Toronto: Carswell Ltd., 1982) (per Patrice Garant) at 258, suggests that the narrower view will prevail.
149. "Due Process, Due Politics and Due Respect: Three models of Legitimate School Governance" (1981), 94 Harv. Law Rev. 1106.
150. D. Murphy, "The Principal as Judge" (1982), 2 The Canadian School Executive (No. 3) 6.

education. This change is reflected in the common law evolution of fairness, amendments to the *Education Act* and the provisions of the *Charter*. Learning fair procedures for decision-making can in itself be a valuable education. The existence of these procedures provide solid evidence that education has matured into a legally protected right.

## VI. *Conclusion*

Having completed a rather lengthy safari into the unexplored terrain of rights to education, what lessons have been learned? One notable observation is that there were many legal landmarks that emerged during the course of the journey. This is attested to, both by the length of this article itself and the numerous footnotes which spot the terrain. Education is much more than political rhetoric to be dished out on the appropriate occasions.

Courts and legislators have grappled with the role of the state in providing education at both the national and international level. While the international declarations are more far reaching and bold, Canadian courts have also recognized some aspects of education as a matter of legal right. Defining what constitutes an appropriate education is a difficult task for either judges or legislators. However, the difficulty of describing a right should not lead to the conclusion that no right exists.

Special education or education designed to meet the needs of the exceptional child is a case in point. A few years ago people with learning disabilities were simply neglected by the school system. However, the situation has changed as a result of both statutory enactments and judicial interpretation. Elaborate procedures now apply to the classification of students and most provinces have a "zero reject" education system.

Parental input into education provides another example of how rights have evolved over time. At most parental rights are implicit rather than explicit in the *Education Act*. However, the vital interests of parents in the education of their children are recognized in the everyday practice of the education structure and in a landmark decision of the European Court of Human Rights.[151] To deny parents a meaningful role in education would emaciate the right to education accorded the child.

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151. *Campbell and Cosans* v. *U.K.* (1982), 4 E.H.R.R. 293.

Finally the sections in the *Education Act* concerning truancy and student suspensions emphasize the importance of education. If the state mandates attendance, it must deliver a worthy product. The evolution of fair suspension procedures by way of the common law, regular statute and constitutional enactment, underscore that education is considered a valuable commodity deserving of legal protection. This is also reflected by a greater reluctance to suspend students from school.

To return to a theme enunciated at the beginning of this article — education is the only safe foundation upon which a democratic society can be built. In the United States education rights have been protected as one aspect of liberty under the Constitution. This same approach could be followed in Canada by relying upon section 7 of the *Charter of Rights* which guarantees "life, liberty and security of the person". Without a proper education there is neither liberty nor security for the individual concerned. It has been recognized by Canadian judges that free speech is a vital prerequisite to a genuine parliamentry democracy.[152] It is a logical corollary that an informed and educated citizenry is a precondition to meaningful free speech.[153] Viewed in this context education is not only a legal right but also one of constitutional dimensions in the broadest sense.

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152. *Alberta Statutes Reference*, [1938] S.C.R. 100 and *Saumur* v. *Quebec City*, [1953] 2 S.C.R. 299 (*per* Duff C.J. and Rand J. respectively).
153. *Board of Education, Island Trees* v. *Pico* (1982), 102 S.Ct. 2799, at 2808 describes the right to receive ideas as "a necessary predicate" to free speech.

# The Dalhousie Law Journal




The Dalhousie Law Journal is published by the Faculty of Law of Dalhousie University. Communications having to do with editorial matters should be addressed to The Editor, Dalhousie Law Journal, Faculty of Law, Dalhousie University, Halifax, Canada, B3H 3J5. The Editorial Committee welcomes the submission of material for possible publication and advises potential contributors that a style sheet is available from the Editor. Views expressed in a signed contribution are those of the writer, and neither Dalhousie University nor the Faculty of Law accepts responsibility for them.

This issue of the Journal was printed by Earl Whynot and Associates. All communications concerning subscriptions should be addressed to The Carswell Company Limited, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7. The price of an individual copy is $8.00 "Indexed": Index to Canadian Legal Periodical Literature.