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# Student Freedom of Expression: Violent Content and the Safe School Balance

A. Wayne MacKay

*Dalhousie University - Schulich School of Law*, [wayne.mackay@dal.ca](mailto:wayne.mackay@dal.ca)

Janet Burt-Gerrans

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# STUDENT FREEDOM OF EXPRESSION: VIOLENT CONTENT AND THE SAFE SCHOOL BALANCE

A. WAYNE MACKAY *Dalhousie University*  
JANET BURT-GERRANS *AWM Legal Consulting*

**ABSTRACT.** The authors begin with a discussion of the duality in how children are viewed in both international and domestic law. Children are viewed as both under the protection and authority of adults, at the same time as being rights bearing individuals. Following recognition of the difficult tension created by this duality, these authors focus on its application in the balancing of the safe school environment with student freedom of expression. In particular these authors examine cases and scenarios that highlight the complex relationships that result when student expression contains violent content. This timely examination gives consideration to the contemporary societal context, and proposes a proactive path forward.

**LIBERTÉ D'EXPRESSION DES ÉTUDIANTS :**  
**CONTENU VIOLENT ET L'ÉQUILIBRE SÛRE DE L'ÉCOLE**

**RÉSUMÉ.** Les auteurs commencent avec la dualité dans laquelle les enfants sont vus dans les lois domestiques et internationales. Ils sont vus à la fois comme étant sous la protection et l'autorité des adultes, et dans le même temps comme des individus possédant des droits personnels. Suivant l'identification des tensions difficiles créées par cette dualité, ces auteurs se concentrent sur leurs applications dans l'équilibre d'un environnement scolaire sûr avec une liberté d'expression pour l'étudiant. Ces auteurs examinent en particulier quelques cas et scénarios qui éclaircissent les relations complexes qui parviennent quand l'expression d'un étudiant à un contenu violent. Cet examen opportun amènent de la considération au contexte social contemporain et propose un chemin proactif pour le futur.

## INTRODUCTION

Striking the balance between rights and order is always complex but particularly so in the school context. Children at various times in their lives experience overwhelming rates of development. As part of this maturation process, they sometimes make mistakes, and learn from the guidance provided by adults who are charged with the responsibility of their care. Through all of this, children are from the beginning little people, with thoughts, ideas,

and perspective. The duality of viewing children as legitimate rights bearing individuals at the same time as viewing children as being under the protection of adults creates a difficult tension. Awareness of this tension can cause stress for adults charged with the responsibility of caring for children on a day to day basis.

In this article, we focus on the complex and delicate balancing required of educators, when children's expression in school contains violent content. All of the cases and examples we discuss here fall into a difficult gray zone. In each case, the student expression concerned raised *perceptions* of violence and provoked fear and discomfort; however, none of the cases clearly resulted in, or demonstrated *actual* violence. In all of the cases we consider the students involved experienced negative consequences as a result of their contentious expression.

The apparent conflict between the protection and care of young people on one hand and rights and freedoms for young people on the other provides an opportunity for the entire community to learn about democratic rights in Canadian society. Our paper draws attention to the fact that some school responses that are widely believed to respect student rights, may not adequately protect students or promote safe learning environments. The balance between protection of the safe learning environment and student free expression is a balance educators must think about. We hope to encourage educators to join in the dialogue aimed at finding effective strategies to address violence, without sacrificing student expression. Such strategies would also be respectful of student rights.

This duality in how we view children finds clear expression in one of the most widely ratified international conventions, the United Nations *Convention on the Rights of the Child*. This Convention is ratified by Canada<sup>1</sup> and supported by Canadian courts and legislatures.<sup>2</sup> The preamble of this convention sets out a clear recognition of the need to extend particular care to children due to their physical and mental immaturity and their very status as children. The *Convention on the Rights of the Child* then goes on to outline in detail numerous specific rights attributable directly to children. Some of these rights can be claimed directly by children without adult intervention on their behalf. These rights include, among others: the right to an identity;<sup>3</sup> the right to the highest attainable standard of health and health care<sup>4</sup> the right to education,<sup>5</sup> the right to be protected from all forms of physical and mental violence<sup>6</sup> and the fundamental freedoms of expression, thought, conscience and religion.<sup>7</sup>

Moreover, the ambiguity in the legal status of children also finds expression in Canada's domestic legislation. The recently enacted, *Youth Criminal Justice Act*<sup>8</sup> (YCJA) is one example. This Act approaches youth crime in a manner very different from the adult criminal justice system. The adult system, governed

by the *Criminal Code of Canada*,<sup>9</sup> sets out a crime and punishment model in which the elements of all acts defined as crimes are specifically outlined. Once proven beyond a reasonable doubt, punishment is rendered.

Alternately, the new YCJA sets out a system in which the needs of youth, rehabilitation and reintegration are the cornerstones. The preamble of the YCJA sets out a shared “responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood.” It places an onus on anyone “concerned with the development of young persons” to prevent youth crime “by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes.”<sup>10</sup>

These contradictions at law are a relatively recent development.<sup>11</sup> It is difficult to strike the balance between care and protection (as defined and enforced by adults) and freedom for children. The tension that results from trying to balance these dual interests plays out in many contexts, especially where controversial student expression is concerned. Prior to addressing the school context however, it is important to briefly note the scope of freedom of expression in Canada.

#### THE SCOPE OF FREEDOM OF EXPRESSION IN CANADA

As part of our Constitution, under Section 2 of *The Charter of Rights and Freedoms*, everyone has the fundamental freedom of “. . . thought, belief, opinion and expression. . .”<sup>12</sup> A significant amount of litigation and dialogue from the Supreme Court of Canada has led to our current understanding of the meaning of freedom of expression in Canada.

Section 1 of the *Charter*, which subjects all rights set out in it “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” has had a major impact on how freedom of expression has been interpreted. This section places an onus on legislators and policy-makers (including school officials), to justify why, in some cases, their policies are required – even though they risk infringing the guaranteed *Charter* rights of a few individuals. It is incumbent on policy-makers to convince the court that their policy is needed to protect the rights and interests of the greater collective, and therefore reasonably justified in a free and democratic society. Thus, for example, a school policy censoring student free expression containing violent content (protected under section 2(b) of the *Charter*), may be subject to section 1 scrutiny. The court would first determine whether the student’s freedom of expression right has been infringed in a specific context. If it has, the burden of proof would shift to the policy-makers (in this case the school officials). They would be required to establish that their policy was essential to protect the safety interests of the larger student population.

This analysis has been used to justify protecting the widest possible definition of freedom of expression. Expression that is protected by our Constitution includes any expression that intends to convey meaning -- as long as it does not take a violent form.<sup>13</sup> This includes oral and written expressions that convey meaning. Expression protected by the Constitution has been found to include hate propaganda and speech with violent content.<sup>14</sup> Expression need not even be true to be protected by our Constitution.<sup>15</sup>

This broad interpretation of the freedom of expression trusts that when called upon, the government can prove that the limits it places on peoples' freedom of expression through its laws can be demonstrably justified. In order to be demonstrably justified, limits must pass a strict legal test. This test involves an in-depth analysis including the minimal impairment of the citizen's right and consideration of the effect of the methods used.<sup>16</sup>

The government has been able to demonstrably justify some limits on everyone's freedom of expression. In one of the most well known cases, Canada's law criminalizing the dissemination of hate propaganda was upheld. The majority of the Supreme Court of Canada found the anti-hate law justifiable in a free and democratic society because it found that the distribution of hate propaganda against an identifiable group significantly impaired the rights of persons in that group to participate in society.<sup>17</sup>

#### FREEDOM OF EXPRESSION AND THE SCHOOL CONTEXT

Prior to the addition of the *Charter* to our Constitution in 1982, students enjoyed very little freedom of expression in schools. For example, thirty years ago, hair style was a freedom of expression issue for students. In *Re Ward and Board of Blaine Lake School*<sup>18</sup> a student was expelled, without a hearing, for breaching the school rule regarding "proper" hair length for boys. On judicial review, the judge deferred to the authority of the school officials claiming that no hearing was necessary because the principal and school board were engaged in administrative rather than judicial acts.

Since that time there have been many shifts in Canadian law, including shifts in administrative law incorporating elements of procedural fairness into even administrative proceedings. This means that hearings such as those in *Re Ward* are subject to procedural fairness requirements, including notice and a fair hearing. These kinds of procedural rights are now commonly outlined in provincial education statutes.

Substantive rights contained in the *Charter of Rights and Freedoms* do apply to children, even when they are in school.<sup>19</sup> *Lutes v. Board of Education of Prairie View School Division No. 74* is an interesting case relying on the *Charter*. In it a student asserts the claim that school officials violated his freedom of expression when they disciplined him for singing a popular song.<sup>20</sup> In this case, the school district banned the playing of the song "Let's Talk About

Sex” by popular artist Queen Latifa. Chris Lutes, a student at the school sang the chorus of the song out loud in front of a school district official, in apparent defiance of the ban. He was punished with detention and sought judicial review of this decision. In a preliminary injunction decision, the court found that the freedom of expression rights of this student had been violated and the limit was not demonstrably justified in a free and democratic society. In the court’s words “the problem arose as a result of overreaction to an inoffensive song that carried a powerful message.”<sup>21</sup>

The *Lutes* case is interesting and squarely demonstrates the application of freedom of expression rights in the school context. Because the case was at a preliminary level, as an interim injunction case, it has less legal value in terms of precedent. A more exhaustive discussion of student freedom of expression in general and with a focus on written expression in high school newspapers was recently published by Canadian scholar Nora M. Findlay (2001-2002).

Striking the balance between care and protection on one hand, and student freedom on the other, is much more difficult when school safety is directly implicated. Courts have been quite willing to tip the balance toward safety and protection as defined and enforced by adults, when serious issues of order arise in schools. In the case of *R. v. M.R.M.*, the majority of the Supreme Court of Canada found that if the principal (as long as she or he is not acting as an agent of the police), has reasonable grounds to believe that a dangerous weapon or drugs are being concealed, no prior authorization (i.e., search warrant) is necessary to detain a student and legally conduct a search.<sup>22</sup> Furthermore, that if the manner of the search is reasonable (based on the court’s list of factors), any evidence turned up in the search is admissible in court. This is a dilution of the rights that would be accorded to an adult in a similar search and seizure context and is the subject of vigorous criticism from legal commentators.<sup>23</sup>

The primary rationale used by the Supreme Court to justify its approach to student rights, is the claim that students have a lowered expectation of privacy because they have prior knowledge that an education official may need to conduct searches in schools.<sup>24</sup> In addition, the Court held that ensuring the safe school environment is an overriding concern for school officials if protection from dangerous weapons or drugs is involved.<sup>25</sup>

There is no question that the responsibility on educators to ensure a safe learning environment for students is onerous and very important in the context of frequent media headlines highlighting serious incidences of violence perpetrated by students and young people. In the following section, we review a few examples of responses to student expression with violent content. It would appear from these examples that the same rationale of an overriding concern for ensuring a safe school environment and the consequent dilution

of student rights in the search and seizure context have migrated into the area of freedom of expression as well.

## VIOLENT CONTENT IN STUDENT EXPRESSION

### *Video inspired content*

Video games, television, movies and internet media have emerged as a significant interest among young people in the past few decades. It is well known that some of the popular technology children use today is quite violent. Current research is not conclusive on the exact relationship between seeing violence in media and an increase in violent or aggressive behavior. Eric Roher (1997), a prominent Canadian education lawyer suggests that violent themes in the media may provide the “stimulus and script for some students to release their anger” (p. 19).

Many studies have been conducted attempting to determine the link between violence in media and violent or aggressive behavior. Most peer-reviewed studies conclude that there may be a correlation between exposure to violent media and increased violence, but that, at most, violence viewed in media or electronic game playing is only one factor to be considered in identifying children at risk of violent and aggressive behavior (McLellan, 2002). Studies also find that viewing violence in mass media can cause fear in children. McLellan observes that if this fear is unexpressed or untreated it can manifest itself later as depression or aggression. We have not uncovered studies that examine the risk of violent or aggressive behavior specifically among children who play act violent scripts or who are inspired by violent themes in their creative play, writing or art.

We have uncovered discussion of the kinds of responses displayed by some educators when children play act violent scripts or express violent themes in their creative play and writing. Given the wide interpretation of freedom of expression in Canada, there is a need to strike a delicate balance in protecting the safe school environment. There is a need to ensure that the responses to frightening or disturbing expression also respect the rights and values of our democratic society.

**A GRADE TWO FIELD-STUDY:** During a field study, researcher Linda Wason-Ellam joined a multi-lingual grade two classroom where she immersed herself in the social culture of the students as an “honourary grade two student” (Wason-Ellam, 1997). By engaging in this way the researcher was able to experience many layers of the social culture. As her research progressed, one class assignment in particular became important as did one student’s engagement with the assignment and the ensuing dynamic with the teacher. The assignment was a journal writing assignment in which the teacher recognized that each student came to the writing workshop with memories,

ideas, feelings and concerns that he or she needed to share with classmates. Wason-Ellam notes that the teacher made an effort to create an environment where ideas were valued, respected and shared, where children were encouraged to write and discuss their drafts with peers. She observed that while for the most part the experience was enriching for some of the young writers, not all children had such a positive experience. One student, named Duc Lan, an ESL (English as a Second Language) student was not able to share his written expression quite so easily:

Here is an excerpt from one of Wason-Ellam's (1997) field notes:

Tethering his thoughts during writers' workshop, Duc Lan is clandestinely hunched over with his pen to the paper as he begins to replicate the serial plot and violent action garnered from playing the latest weekend video game rental. His depersonalized text reflects a lack of authentic voice since video game topics such as violence and combative tactics were not for class consumption and he was interested in little else. . . . When the classroom teacher draws near to monitor his progress. . . . Duc Lan scrunches the paper and quickly discontinues composing the graphic details of the video story. He pulls out his writer's journal and pens a routine entry about a more acceptable theme [his own lived experiences: – a trip to the local supermarket]. . . . Another journal entry, another prosaic topic that puts little demand upon Duc Lan's literacy ability; rather than writing, he just puts down words, following other words. The teacher dismissed the minimal entry because of his ESL status. She believed that a beginning writer needed time to work out his ideas. What the teacher never saw were the other elaborated texts recast from video scripts brimming with gory details that were stuffed into his workspace just waiting to be shared with his peers. (Wason-Ellam, pp. 74-75)

In her ensuing analysis, Linda Wason-Ellam highlights research showing a correlation between being aggressive and increased preferences for violent games. She suggests that

[b]ecause aggressive behavior leads to peer rejection, aggressive children may have fewer options for alternative activities. Thus, video game playing might occupy that space for Duc Lan. Envoicing the violence garnered from video games often surfaced in Duc Lan's journal entries. His persistent use of video language appeared to be a deliberate attempt to mark his social identity and to communicate with his personal voice whether "school appropriate" or not:

*Yesterday I played a game called Tiddly Winks with Phillip. We need a cup and coins. All we half to do is to throw the coins in the cup. If I got it in the cup, I got to go again. If I don't get in the cup then the other person's turn. I won. I got all the turns. I killed the slime ball enemy.*

Admonished by the teacher, the last sentence was erased without critical dialogue about its persistent recurrence. But what is Duc Lan telling his teacher? . . . Do we deal with the problem of video game content by excluding them from classroom conversations or do we engage? . . . (Wason-Ellam, pp. 88-89)



Wason-Ellam raises a very important point here about the complexity of the relationship between violence in media and violence in expression. Violence in expression may be one factor to look for when trying to identify children at risk of future aggressive behaviour but it may also be an indicator of unmet needs. Secondly, she identifies an important concern regarding children's freedom of expression, including expression with violent content. No doubt the reaction to violent content in student expression varies by teacher, but certainly the censorship approach described above is not uncommon.

**VIOLENT THEMES IN GAME PLAY:** For young children, game play is an integral part of showing what they have learned about their world. Given the wide interpretation of freedom of expression, problematic behavior and choice of themes in game play also signals the need to strike the delicate balance between protecting the safe educational environment and respecting freedom of expression. It is certainly not uncommon to encounter children acting out violent scripts and themes. Increased sensitivity and reduced tolerance for violence instills pressure on adults to respond to this kind of situation. Like in the above discussion, responses should be carefully examined for their impact on student freedoms.

For example, the national media took an interest in one Nova Scotia primary student who was suspended from his school twice in one school year for pointing at a classmate and pretending to shoot by saying "bang". The first time the student pointed his finger and the second time he pointed a chicken finger in the lunch room (*The Toronto Sun*, Monday, July 31, 2001, at p. 4). While it is advisable for educators to address violent themes in children's play, the threat from this kind of expression in creative play is remote at best. A suspension for a young child in this situation sends a strong message of exclusion and adult restriction.

This is not to minimize the real concerns about violence in schools in the post Columbine and Taber world.<sup>26</sup> Teachers do have an obligation to maintain a safe classroom and to be alert to signs of violence. Nor are we suggesting that all violent content is benign and should be tolerated.<sup>27</sup> Children's experience of violence in the modern world, and particularly in the North American context, is profound.<sup>28</sup> When expression with violent content does not pose a particular or established threat to the safety of other children, but does cause fear or discomfort in the learning community, it too must be addressed. Responding to this kind of expression is an important opportunity to respect children's rights but also to teach children about how to respectfully relate to one another in a free and democratic society. The burden on school officials under the *Charter of Rights and Freedoms* framework to justify outright censorship of free expression is a heavy burden. There are serious questions about whether a censorship approach is the most effective way to curb school violence.

*The unique challenges of the high school context*

The consequences of censorship or an exclusionary approach to responding to violent content in student expression seem to worsen as the students get older. Because many of the violent incidents that the media reports involve high school age children, the threats seem more serious and more real. The connection between violent content in student expression and the safe school environment seems more direct. In addition, the conduct of other students in the learning community seems to be more significant and complex as students get older. Bullying and intimidation as well as the reactions of the student body to disturbing or controversial expression are difficult to control, but are factors that add to the complexity of the dynamics with older students.

*E.B.J. (LITIGATION GUARDIAN OF) V. UPPER CANADA DISTRICT SCHOOL BOARD.*<sup>29</sup>

One Ontario high school student, E.B.J.<sup>30</sup> who was taunted and bullied by his classmates for a long time, wrote and presented a story to his drama class. The story, entitled “Twisted” was about a boy who had been harassed and bullied all his life. In his story, the bullied student plotted revenge by planting explosives throughout the school. Although the exact facts of what transpired after his presentation are slightly unclear, journalist Stephen Kimber reported that in the time between the student’s class presentation and his suspension and police investigation, other students in the school community embellished the context surrounding E.B.J.’s class presentation. These other students claimed that E.B.J. was:

Writing about himself, they said. And it wasn’t just fantasy. He had explosives in his basement. And guns. Assault rifles too. He had compiled a list. He was planning to blow up the school and kill them all. Two weeks after the classroom reading – and after the boy had insisted to school authorities the story was entirely a product of his imagination – the OPP [Ontario Provincial Police] and a team of bomb-sniffing dogs. . . [searched] the school and the boy’s home. . . for evidence that a crime had been, or was about to be committed. They found. . . no bomb. No instructions for making a bomb. Not even a list of fellow students the boy didn’t like. (Kimber, 2001)

E.B.J. was arrested within three weeks of the classroom presentation and spent more than a month in jail as pre-trial custody (including Christmas and his 16<sup>th</sup> birthday). It is claimed by the crown attorney’s office that the arrest was based on threats made by the student after reading his story (in the context of the harassing gossip circulating the school), not directly for writing the story. After finding no evidence that the student had actually plotted revenge, the charges were eventually withdrawn on terms that included not having contact with certain students, necessitating that E.B.J. not take the local school bus.

E.B.J. was also suspended from school. The Upper Canada District School Board's Eastern Region Safe Schools Committee then decided that it was "in the best interests of E.B.J., the students and staff of Tagwi Secondary School, that he [E.B.J.] be placed in an alternative educational setting. The Committee recommended that E.B.J. be placed on home instruction once his suspension was completed."<sup>31</sup> The judge in the civil action launched by E.B.J. following this decision to place E.B.J. on home instruction, summarizes the facts as follows:

E.B.J. has never been back to school. His education has consisted of home schooling. While he is receiving home schooling now, it has not been continuous. . . E.B.J. states that he does not have the opportunity to meet other people his age. He cannot participate in extra-curricular activities. He wants to go to a school where he can take regular courses and meet other people. By court order he is prohibited from association with certain students who regularly take the local school buses.<sup>32</sup>

With regard to the other litigant in this case, C.J. (who appears to be E.B.J.'s brother), the judge states:

According to the materials, C.J. was also subject to mistreatment at his school. One day students pelted him with rock-hard ice balls. He says that he then carried a pocket knife for protection. It is alleged that he pulled the knife out. He was subsequently arrested, charged and suspended from school...His education now consists of home schooling. He says he would like to go to a school where no one knows him and his brother.

Following the test for irreparable harm set out by the Supreme Court of Canada in *RJR MacDonald v. Attorney General (Canada)*<sup>33</sup> the judge here found sufficient evidence of irreparable harm from the exclusion caused by involuntary home schooling to grant an interlocutory injunction.<sup>34</sup> However, he did not grant the relief sought, which was for a monetary award to pay for the students' fees at a private college. Instead the judge:

Request[ed] further evidence from both parties on the public school alternatives. . . and on the anticipated costs. . . Ottawa has been mentioned. It would be helpful to know why that alternative is not available and whether the Ottawa-Carleton District School Board would reconsider its position. If the public school system cannot accommodate the boys, which would be most unfortunate indeed, then the private school alternative must be considered. . . As in my view the harm to the boys increases with each passing day, my objective is to try and see the boys in school at the beginning of November. . . This case cries out for a practical resolution.<sup>35</sup>

#### *SCHMUNK ESTATE V. MEDICINE HAT CATHOLIC BOARD OF EDUCATION.*<sup>36</sup>

Another high school situation, which is less complex in terms of the student's motivations, is the series of events leading up to the lawsuit in *Schmunk*. The events of this case highlight the difficult issue of how to respond to

a false alarm and the actions of a fearful student body when provoked by disturbing expression.

The expression in this case pushes the boundaries of expression protected by the *Charter*. In this case the expression consisted of a practical joke. Does a practical joke intend to convey meaning? If the broad definition of expression does include practical jokes, it would undoubtedly be reasonable to limit the expression in this case, as it is akin to shouting fire in a crowded theatre. Nonetheless, it is important to evaluate the methods used in responding to this incident. Did the methods used protect the safe learning environment and also promote students' rights and responsibilities in a free and democratic society?

Daniel Schmunk, a teenaged boy was described in the judgment as being even tempered, hard working, having an excellent school record, and having ambitions to become a police officer for the Medicine Hat City Police Service. Daniel did not have any known mental health issues, problems with depression or generally have any difficulty dealing with problems. There was nothing in his behaviour which caused any concern to his parents.<sup>37</sup>

The Judge sets out the context and facts in the following excerpt:

April 29<sup>th</sup>, 1999 was the day after the tragic school shooting deaths at Taber High School in Taber, Alberta. It was, as well, a short time after the equally tragic shootings at Columbine High School in the State of Colorado. Both Terry and Susan Schmunk had discussed those specific incidents with their two sons. Susan Schmunk warned her sons not to joke about either of those two incidents at school, because jokes would not be appropriate, and the school authorities would treat any joking about those incidents as serious.

Despite these warnings Daniel did take part in an ill-advised prank that morning of April 29<sup>th</sup>, in his period 3 English class. A friend had composed a distasteful note which stated:

Secret Plan  
Get Guns  
Go to School  
Shoot Everyone

... The friend dared Daniel to distribute the note in the school by sliding it under a door. Daniel accepted the dare.

As a result of the prank Daniel Schmunk was interrogated by the principal and vice-principal (who had also received a report from a teacher that Daniel carried a pellet gun in the trunk of his car). Daniel at that point was very cooperative and readily admitted that there was a pellet gun locked in his car's trunk in the school parking lot. He explained that he used the pellet gun for target practice on the Schmunk family acreage after school. As it contravened school policy to have a weapon on school property, the principal

then called the police. The police arrived, took Daniel into custody and confiscated the pellet gun, just as school was letting out for the lunch break. Daniel was also advised that he might be suspended from school.

During the afternoon sessions, the school was buzzing with suspicion and rumours. Students circulated a rumour "to the effect that Daniel was the next school killer and he had a sawed off shot gun". Furthermore, Daniel's brother, Andrew, who attended the same school "received many insensitive comments from fellow students about his brother."<sup>38</sup>

Daniel was released without charges after a trip to the police station. In the mean time, the school principal was in contact with Daniel's parents, who in advocating for their son were able to convince the principal not to suspend Daniel. At the parents' request, the principal and vice-principal made statements to the school community to the effect that the incident that had taken place earlier that day was a mistake and that there was no real threat to the students or teachers. Unfortunately, Daniel never returned home. His mother found him in the garage of a rental property owned by his family, asphyxiated by carbon monoxide in one of the cars he and his father were restoring.<sup>39</sup>

In their subsequent lawsuit alleging negligence on the part of the school officials, the Schmunk estate put forward a theory that Daniel had committed suicide because he was so upset over the matter, as he was under the impression that his impending graduation was in jeopardy. After reviewing all of the evidence (of which there was quite a volume) Justice Park held that Daniel's death was not a suicide, but an accidental carbon monoxide poisoning triggered by running the car in the closed garage.

To further complicate matters, Daniel was 18 years of age. He was competent to and did consent to the search by police (although it is not clear whether he was provided the opportunity for legal counsel). Regardless of his age, Justice Park held that the defendant school officials did owe a duty of care toward Daniel, as a student. He held that that duty of care was discharged in the actions of school officials and that school officials were merely following school board policy in respect to weapons in school. They discharged their duty by:

[e]nsuring Daniel reasonably was protected from abusive and humiliating scrutiny in the school and community setting; using reasonable care to ensure Daniel was not subjected to any harm at school; ensuring Daniel was provided with a safe educational environment at school.<sup>40</sup>

Justice Park then goes on to find:

There can be no doubt on the evidence that as a result of the recent Columbine and Taber shooting incidents, the police, the school authorities, the teachers and the students were in a state of heightened apprehension regarding the possibility of a similar incident at McCoy High School.<sup>41</sup>

Finally, Justice Park relied upon the following passage, partially reproduced here from Justice Cory of the Supreme Court of Canada in *MRM*:

... [t]eachers and principals must be able to act quickly to protect their students and to provide the orderly atmosphere required for learning. If a teacher were told that a student was carrying a dangerous weapon the parents of all the other students at the school would expect the teacher to search that student.<sup>42</sup>

Much of this case revolves around the operation of school board policy and negligence principles. It is reasonable for school boards to have a policy requiring police intervention where a threat to the safety of students is made, especially where weapons are involved. This case demonstrates the complexity of the dynamics when a threat turns out to be a false alarm. The use of suspensions and exclusion from the school community fails to provide students with an opportunity to engage in critical dialogue about an incident and to debrief together. Once he was released from the police station after the determination that there was no real threat, Daniel Schmunk should have been encouraged to return to the school and address the student body, to take responsibility for his expression and the fearful reaction it caused. This approach would have validated the fear that the students and staff felt, and would have assisted the resolution of the situation, potentially preventing harassing comments made to the student's brother. An opportunity was missed, to respond as a school community in a way that balances the need for order and respect for students' rights.

With all due respect, we disagree with Justice Park where he found that the school authorities had fully discharged their duty of care toward Daniel by:

[e]nsuring Daniel reasonably was protected from abusive and humiliating scrutiny in the school and community setting; using reasonable care to ensure Daniel was not subjected to any harm at school; ensuring Daniel was provided with a safe educational environment at school.<sup>43</sup>

The duty of care includes addressing the abusive and humiliating retaliation against students whose expression is controversial, as well as protecting the school community from acts of aggressive violence by students. The boys' prank in the *Schmunk* case was very serious, as too was bringing a weapon to school. Inciting fear and shock among classmates with an ambiguous and provocative drama story (like in the *E.B.J.* case) is also very serious. In both cases exclusion, in the absence of any specific measures to promote free and democratic values was the response. Particularly in the case of *E.B.J.* school officials failed to ever address the long history of harassment and bullying experienced by *E.B.J.* prior to and following his controversial expression, and failed to address the impact this may have had on his choice of expression.

Ensuring a safe school community involves far more than responding to threats of violence and weapons complaints. It involves ensuring that students

learn about rights and responsibilities in a democratic society; that they learn how to respectfully address someone who makes controversial or disturbing expression and how to engage in critical dialogue. The critical dialogue should address the underlying fear and insecurity in the modern world. In addition other dynamics such as bullying or other exposure to violence should be addressed. These matters are not simple and there are no easy answers but this further emphasizes the need for constructive dialogue.

In terms of the learning environment, allowing the student body's imagination to run away with itself and portray both Daniel Schmunk and E.B.J. as monsters, without addressing the serious impact this has, fails to meet the educator's duty to transmit the Canadian values of tolerance, respect and freedom to participate. Furthermore, rumour and exaggeration make it more difficult to discern cases of real threat from those that are simply disturbing or controversial. Educators need to be creative in their search for balanced responses to school violence and students' rights should not be sacrificed on the altar of school order (MacKay, 2001).

#### A DIFFERENT APPROACH

The Supreme Court of Canada has recognized that teachers' duties include an awareness of their role in values transmission, something that happens continuously and subtly.<sup>44</sup> Teachers, it was held by a unanimous Supreme Court of Canada, must be seen to uphold the values sought to be transmitted by our education system. When children express violent content in schools a very difficult situation of competing rights emerges. The burden is on teachers, principals and vice-principals to find the right balance. The responses in the above examples illustrate the many complex dilemmas that arise when children's expression contains violent content. Threats to the safe school environment range from remote to more direct. Does the school community's interest in being free from exposure to this expression justify the kind of responses shown in these examples? The negative consequences for the students in these situations are significant.

There is no doubt that expression with violent content by children is a cause for concern, as it may be a warning signal of future violence or aggression that could compromise the safe school environment. Expression with violent content may also warn that a student is having a difficult time coping with the violence he or she is experiencing (particularly if the student happens to be a victim of violence, either in school or out of school). This expression may be a signal of anger or aggression stemming from some underlying problem, including mental or physical health issues. The more remote the connection between the controversial expression containing violent content and the safe school environment, the more careful and subtle will the responses by school officials need to be. The expression of threats of violence should always be taken seriously and investigated. If, however, it is established that



there is no actual, imminent threat of violence, follow-up and creating a climate of reconciliation and dialogue are critical components to fostering the on-going safe school environment.

The critical questions that we pose are: where children's expression contains violent content, is their right to free expression being respected? Furthermore, where limits are necessary to protect the safe school environment, do they meet the *Charter of Rights and Freedoms* test for limits that are justifiable in a free and democratic society? There is no dispute that a safe school environment is a pressing and substantial objective. Debate arises over whether the means used are rationally connected to the aim or objective: do they impair the guaranteed right as minimally as possible? Moreover, we question whether the benefits gained from certain school responses in fact outweigh any harm caused. Finally, will exclusion and censorship really curb or prevent violent behaviour, particularly in cases where the connection between expression with violent content and the safe school is remote?

It is important to ensure that the response to children who express violent content is consistent with our Canadian values of tolerance and respect. First, children learn what they experience. This premise, recognized by the Supreme Court of Canada<sup>45</sup> applies to both the student making the expression as well as the rest of the school community. If the response to violent content is based on fear and exclusion, the rest of the student community will learn to be afraid and are denied the experience of facing and respectfully addressing that which provokes fear or discomfort.

Furthermore, students will learn that as children, they are not permitted to make mistakes with their expression and that expression which crosses (in many cases unwritten) boundaries of what is acceptable, will be met with exclusion from the school community. The consequences for students who make controversial expression are a denial of the validity of their perspectives and often a loss of educational value, if they are excluded from school by a suspension.

Exclusion and censorship teach nothing about rights and responsibilities in a democratic society. This is particularly true in cases where the connection between the expression and the safe school is remote. Responses that appropriately address the level of threat in a given situation while also promoting tolerance and respect should be determined on a case by case basis. Age, maturity level, and other individual factors do need to be taken into account. Responses should be designed to teach all students why violent content causes concern among the adults responsible for the safe school environment. Finally, if violent content in expression is an early warning signal for future violent behavior or aggression against classmates, exclusion will not proactively address the needs of these students.



It is not our contention that students who express violent content should be simply tolerated with no consequences. There will no doubt be some cases that pose real threats and demand immediate responses. There are also, clearly, many instances where a student's expression with violent content does not precipitate a real threat. In the face of this reality the burden is heavy on educators to find the right balance. In order to be justifiable, the means used to limit freedom of expression must be rationally connected to the goal of ensuring the safe school and be minimally intrusive of student rights. Furthermore the harm to the students' right to freedom of expression (and further rights in the case where discipline in the form of suspensions, detentions, and expulsions are used) must not outweigh the benefit to the safe school environment.

We propose that there are strategies to proactively address violence among youth (including addressing issues that arise due to expression with violent content) without resorting to measures that infringe student rights to this degree. Strategies exist which also offer the opportunity to address far more than merely expressions with violent content.<sup>46</sup> For example taking an incident of violent expression as a "teachable moment" to explore both the motivations for the expression, and the perspective of the presenter, as well as the responses and perspectives of the receivers, would be a good start. Other strategies may include engaging in age-appropriate critical dialogue with students before particular incidents arise regarding violent expression. There are also a wide range of strategies that can be used to promote positive relationships among students that address harassment or bullying as an underlying factor. Furthermore, providing appropriate outlets for aggression, such as martial arts programs, may provide an avenue for validating an aggressive child's perspective, while at the same time teaching about respect and responsibility. All of these strategies can, and should, be used in concert to help promote a safe school environment. We do not claim to be educational or social science experts in respect to strategies to respond to the growing concerns about violence in schools. Many readers of this article will be able to add more creative and effective responses to balancing the legitimate concerns about school violence and respect for student free expression.

## CONCLUSION

There exists a duality in how children are viewed at law, both internationally and in domestic law. Children are viewed as being under the protection and authority of adults as well as being autonomous, rights bearing individuals. Although potentially causing some confusion and stress for adults concerned with the daily care and development of children, this duality propels us toward a more sophisticated view of our obligations to children. There is an obligation to ensure that students' experiences in schools reflect the Canadian values set out in our Constitution.

Specifically we have examined the right to freedom of expression guaranteed for everyone in Canada by s.2(b) of our *Charter of Rights and Freedoms*. This right protects a very broad definition of expression including expression with violent content, subject only to such limits as are demonstrably justified in a free and democratic society.

Striking the delicate balance between protecting the safe school environment and honouring students' right to freedom of expression is difficult and taxing for teachers. This is particularly true in instances where they are called upon to respond to student expression containing violent content. Censorship in the form of destroying children's work and excluding children from school are certainly strategies being practiced in some locales. We propose that there are more effective and more appropriate responses that help maintain the safe learning environment, while still promoting positive relationships within the school community. We maintain that expressions of violent content provide school authorities with an excellent opportunity to demonstrate respectful critical dialogue in response to controversial expression. These incidents also provide an opportunity to help children understand the difficulties and complexities of participation in a free and democratic society.

Teachers should model appropriate behavior. Children learn from the way their teachers respond. A response motivated by fear teaches children to respond in that manner. Addressing expressions of violent content through censoring and exclusion misses the opportunity to engage children in dialogue about these serious issues. Strategies that involve students in better understanding each other and promoting positive relationships should be promoted, wherever the situation allows. Children whose expression is violent should be exposed to the fear caused by their expression to help them understand the impact of their expression and to provide them an opportunity to help resolve the situation.

Furthermore, the abusive, harassing, and retaliatory responses of other students in the high school examples provided here also signal the need for a response from school officials. Serious strategies to engage students in dialogue and to understand everyone's responsibility to promote respectful relationships in a free and democratic society would be a constructive and educational approach.

Teachers' and education officials' duties with regard to ensuring safe schools are both important and complex. Only through exploring these difficult issues with a view to striking the right balance will teachers be prepared to respond constructively when these situations arise. We have only begun a dialogue on student expression with violent content. We have not provided neat answers. We are also confident that teachers want to strike the right balance. We hope to encourage teachers to continue in this dialogue and recognize the value of assessing and discovering the most effective strategies

for responding to violence as it arises in student expression. These creative strategies are also more likely to be respectful of student rights. The long term answers to problems of school violence are more likely to be found in strategies that respect the rights of all students in the school community and that actively promote the values of our free and democratic society, than in strategies that target and repress the perceived perpetrators of school violence.<sup>47</sup>

## NOTES

1. Canada Treaty Series 1992, No.3; Canada's Department of Justice submission to the United Nations on Canada's progress in implementing this convention can be found Online:<http://canada.justice.gc.ca/en/news/nr/2003/doc-30986.htm>\_News release (September 17, 2003) [Hereinafter *Convention on the Rights of the Child*].
2. This convention has been used to interpret domestic legislation *R.v.Sharpe* [2001] S.C.R. 45 at para 171 (S.C.C.); *Quebec (Minister of Justice) v. Canada (Minister of Justice)* 175 C.C.C. (3d) 321 (Que.C.A.); Including its impact on the s.1 *Charter* (*infra* note 12) analysis with application to provincial spheres of jurisdiction *Auton (Guardian ad litem) v. British Columbia (A.G.)* [2002] B.C.J. No. 2258 (B.C.C.A.).
3. *Supra* note 1 at Article 7-8.
4. *Supra* note 1 at Article 24.
5. *Supra* note 1 at Article 28.
6. *Supra* note 1 at Article 19.
7. *Supra* note 1 at Article 13-14.
8. S.C. 2002, c.1; In force April 1, 2003 by order of the Governor in Council SI/2002-91. [Hereinafter YCJA].
9. S.C. 1985, c. C-46.
10. YCJA, *supra* note 8 at Preamble.
11. Historically children were only seen as being under the protection of the adults responsible for them or under the protection of the state through *parens patriae* jurisdiction with no specific rights entitlements. Indeed, children were historically viewed as the property of their parents.
12. Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, section 2. [Hereinafter *Charter* or *Charter of Rights and Freedoms*]
13. *Irwin Toy Ltd. v. Québec (A.G.)* [1989] 1 S.C.R. 927.
14. *R.v.Keegstra* [1990] 3 S.C.R. 697. [Herinafter *Keegstra*]
15. *R. v. Zundel* [1992] 2 S.C.R. 731.
16. The criteria for this test were developed by the Supreme Court of Canada in *R.v.Oakes* [1986] 1 S.C.R. 103 at para 70 and further restated in *Egan v. Canada* [1995] 2 S.C.R. 513 at para 182. The test holds that a limitation to a constitutional guarantee is justified if two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this objective must be reasonable and demonstrably justifiable. In order to satisfy the second requirement three criteria are weighed 1) the rights violation must be rationally connected to the aim of the legislation 2) the provision must minimally impair the *Charter* guarantee and 3) there must be a proportionality between the effect of the measure and its objective –so that the attainment of the goal is not outweighed by the violation of the right.
17. *Keegstra*, *supra* note 14.

18. [1971] 4 W.W.R. 161 (Saskatchewan Queen's Bench) [Hereinafter *Re Ward*]
19. *R. v. M.R.M.* [1998] 3 S.C.R. 393 at para 24-25. [Hereinafter MRM]
20. (1993), 101 Sask.R. 232 (Sask.Q.B) [Hereinafter *Lutes*]
21. *Ibid.*, at 239. The court held that the student could proceed with his action for damages, as the period of his detention had been served by the time the court rendered its decision.
22. *M.R.M.*, *supra* note 19.
23. Greg M. Dickinson, "Still Searching for Reason" Case Comment *R.v.M. (M.R.)* 10 *Education Law Journal* 125-135 (2000); A. Wayne MacKay, "Don't Mind Me, I'm From the RCMP" (1997), 7 C.R. (5<sup>th</sup>) 24; Greg Stich and Sarah McCoubrey, "Stay in Your Seat: The Impact of Judicial Subordination of Students' Rights on Effective Rights Education" 11 *Education Law Journal* 173-202 (2001-2002).
24. MRM, *supra* note 19 at para 33.
25. MRM, *supra* note 19 at para 35-36.
26. Here we are referring to the widely publicized school shootings at Columbine High School in Littleton, Colorado and eight days later in Taber, Alberta in the spring of 1999.
27. Expression that is harassing or discriminatory can be justifiably limited and teachers are required to address this kind of expression through their duty to maintain a safe and positive school environment. Some speech promoting the hatred of an identifiable group based on colour, race, religion or ethnic origin may be an offence under the *Criminal Code of Canada*, S.C. 1985, C-46, s.318-319.
28. A recent survey of violence against children under the auspices of the *United Nations Convention on the Rights of the Child* bears out the conclusion that children's experience of violence is profound (2005). The North American component of this report can be found Online: <http://www.unicef.ca/mission/childProtection/assets/report2.pdf>
29. *E.B.J. (Litigation guardian of) v. Upper Canada District School Board* [2001] O.J. No. 4174, Online: QL [hereinafter *E.B.J.*]
30. Only this student's initials may be used to identify him because of requirements to protect a youth's identity in the *Youth Criminal Justice Act*.
31. *EBJ*, *supra* note 29 at para 9.
32. *EBJ*, *supra* note 29 at para 10.
33. [1994] 111 D.L.R. (4<sup>th</sup>) 385.
34. *E.B.J.*, *supra* note 29 at para 10.
35. *E.B.J.*, *supra* note 29.
36. [2004] A.J. No. 491, Online: QL (Alberta Court of Queen's Bench) [Hereinafter *Schmunk*].
37. *Ibid.*, at para 13.
38. *Ibid.*, at para 28.
39. *Ibid.*, at para 37.
40. *Ibid.*, at para 128.
41. *Ibid.*, at para 134.
42. MRM, *supra* note 19 as cited in *Schmunk*, *ibid.* at 138.
43. *Ibid.*, at para 128.
44. *Attis v. New Brunswick School District 15* [1996] 1 S.C.R. 826. These conclusions were supported unanimously by the Supreme Court of Canada in the subsequent case *Trinity Western University v. British Columbia College of Teachers* [2001] S.C.R. 772.

45. Justice Cory, *MRM*, *supra* note 19 at para 3.
46. A more in depth analysis of these themes and strategies is forthcoming in a book by these authors: *The New 3 R's: Rights, Responsibilities and Relationships: A Proactive Approach to Education*.
47. *Surpa* note 46. As we develop in the forthcoming book, *The New 3R's: Rights, Responsibilities and Relationships: A Proactive Approach to Education*, rights, responsibilities and relationships are appropriate pillars of the school structure.

## REFERENCES

- Roher, E. M. (1997). *An educator's guide to violence in schools*. Aurora: Canada Law Book. p. 19.
- Findlay, N. M. (2001-2002). Students' rights, freedom of expression and prior restraint: The Hazelwood decision. *Education Law Journal*, 11, 343.
- Kimber, S. (2001, Jan. 12). Guilty of an Imagination. *The Daily News*, p. 11.
- MacKay, W. (2001). Student free expression in Canada: How Free is the educational marketplace and what ideas can be put on the market?" Published Proceedings of CAPSLE Conference, Vancouver, B.C., May 4-5.
- McLellan, F. (2002). Do violent movies make violent children? *The Lancet* 359(9305), 502.
- The Toronto Sun*. (2001, July 31, at p. 4).
- Wason-Ellam, L. (1997). Video games: Playing on a violent playground. In Ross Epp, J. & Watkinson, A. (Eds.), *Systemic violence in education: Promise broken*, pp. 72-93. Albany: State University of New York Press.

**A.WAYNE MACKAY** a graduate of Mount Allison University, recently completed a three-year term serving as the University's 12<sup>th</sup> President and Vice-Chancellor. Professor MacKay has returned to teach at Dalhousie Law School where he was the founding director of the Law School's Indigenous Black and Mi'kmaq Program (one of the first such programs in the country), and director of the Nova Scotia Human Rights Commission from 1995-1998. As a lawyer and a legal consultant, he has an impressive background in research and writing, including five books in education law and some seventy-five academic articles, primarily in the fields of constitutional law and human rights. He is nationally renowned as a legal scholar and specialist in human rights. Widely sought as a conference speaker, Professor MacKay has delivered more than one hundred conference presentations. Among his numerous teaching awards are the 1995 Association of Atlantic Universities Distinguished Teacher Award and the 1999 W.P.M. Kennedy Memorial Award as the top law professor in Canada. He was also named co-recipient of the 2001 Alumni Award of Excellence for Teaching by Dalhousie University for enthusiasm and interest in student needs. He holds the International Commission of Jurists' Walter S. Tarnopolsky Human Rights Award for his extensive contribution to the field of human rights. He was recently awarded the *Order of Canada*.

**JANET BURT-GERRANS** holds a Bachelor of Arts (honours) from McMaster University and a Bachelor of Laws from Dalhousie University. She writes from her home in Halifax, Nova Scotia. She is currently employed with AWM Legal Consulting Inc., working in the area of Inclusive Education.

A. WAYNE MACKAY a récemment complété une session de trois ans au service de l'université de Mont Allison en tant que 12<sup>ème</sup> président et vice chancelier. Professeur Mackay est retourné à l'enseignement à l'école de droit de Dalhousie où il a été le directeur de la fondation du programme de l'école de droit pour autochtones noirs et Mi'kmaq et directeur de la commission des droits de l'homme de Nouvelle Écosse de 1995-1998. Il est nationalement reconnu comme savant en droit et spécialiste juridique en matière de droit de la personne. Parmi de nombreux prix d'enseignement, il y a reçu le prix des enseignants distingués de l'Association des Universités de l'Atlantique. Il a aussi été nommé récipiendaire associé du prix pour l'excellence dans l'enseignement, des anciens élèves de 2001, à l'université Dalhousie pour son enthousiasme et son intérêt pour les besoins des étudiants. Il détient le prix de la commission internationale des juristes Walter S. Tarnopolsky pour sa contribution intensive aux droits de l'homme. Il a récemment reçu l'*Ordre du Canada*.

JANET BURT-GERRANS détient un baccalauréat d'Art (avec honneur) de l'université McMaster et un baccalauréat en droit de l'université Dalhousie. Elle écrit de sa maison à Halifax, en Nouvelle Écosse. Elle est actuellement employée avec la compagnie juridique de consultant AWN Inc., travaillant dans le secteur de l'éducation inclusive.