STUDENT RIGHTS UNDER THE CHARTER

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I. INTRODUCTION

The arrival of the *Canadian Charter of Rights and Freedoms*[1] has changed the direction of Canadian constitutional law. It marks a shift from Parliamentary supremacy to judicial scrutiny, where fundamental rights and freedoms are affected. The *Charter*, by virtue of its being part of the Constitution of Canada, is the supreme law of Canada, and laws inconsistent with it are of no force or effect.[2] Subsection 24(1) of the *Charter* provides that anyone whose rights or freedoms have been infringed or denied may apply to the court for a remedy. Thus it is not only legislation but also official action which may be found to be in violation of the *Charter*.

The pre-*Charter* case of *Ward v. Board of Blaine Lake School Unit No. 57*[3] offers a good illustration of how the constitutional position has changed. An eleven-year-old grade 6 student was temporarily suspended until he obeyed a resolution of the Board prescribing the maximum length of hair for male students. Because the principal was validly exercising a purely administrative power, the Court found that it had no power to review the correctness of the decision. Nor could the Court review the Board's resolution, as it had been made pursuant to statutory authority.

The courts are no longer so restricted if constitutional rights and freedoms are affected. The court could now quash the principal's decision to suspend the student. It could also set aside the Board's resolution, and could invalidate any legislation found to be inconsistent with the *Charter*.

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[1] *Constitutional Act, 1982*, as enacted by *Canada Act, 1982*, (U.K.), 1982, c. 11.
[2] *Ibid.*, s. 52(1).
[3] [1971] 4 W.W.R. 161; 20 D.L.R. (3d) 651 (Sask. Q.B.).

II. APPLICATION AND LIMITATIONS

Subsection 32(1) of the *Charter* provides that the *Charter* applies to Parliament and the legislatures of the provinces, and to the federal and provincial governments. The *Charter* protects the individual from government action, but does not apply in respect of private disputes between individuals.[4] There should be little doubt that the *Charter* applies to school authorities and officials. The schools carry out a public function and are publicly funded. Moreover, attendance at schools is compulsory, and to a large extent matters such as attendance and discipline are regulated by *The Education Act*[5] of Saskatchewan.

It is important to recognize that the rights and freedoms set out in the *Charter* are not absolute, but are, by virtue of section 1, subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Leading *Charter* decisions to date have indicated that the onus is on the government to establish that the limitation is justified.[6] A second important point is that the limitation must be "prescribed by law." The limitation therefore cannot be merely a matter of unfettered discretion, but must be ascertainable and understandable.[7]

One final point should be kept in mind. Even where an argument succeeds that the *Charter* does not apply, there may still be recourse to the Bill of Rights provisions of *The Saskatchewan Human Rights Code*.[8] Freedom of conscience and religion, freedom of expression and the right to association and peaceable assembly are all protected. Any law to the contrary is inoperative.[9]

III. THE FUNDAMENTAL FREEDOMS

Section 2 of the *Charter* provides that every person has freedom of conscience and religion; freedom of thought, belief, opinion and expression; freedom of peaceful assembly; and freedom of association.

It is only since the *Charter* that these freedoms have gained the status of an entrenched constitutional guarantee. Although Canadian jurisprudence in respect of the fundamental freedoms is multiplying, the operation of these freedoms within the school system has been largely ignored. Thus, other sources must be examined for guidance.

The American First Amendment is the cornerstone of American civil liberties. It guarantees freedom of speech, freedom of the press and the right of the people peaceably to assemble. American constitutional law is particularly rich in jurisprudence relating to freedom of speech in the schools.

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[4] *See* K. Swinton, "Application of the Canadian Charter of Rights and Freedoms" in *Canadian Charter of Rights and Freedoms* ed. Tarnopolsky & Beaudoin, Toronto: Carswell, 1982, at 41.

[5] R.S.S. 1978, c. E-0.1, ss. 151-63.

[6] *Re Southam Inc. and The Queen (No. 1)* [1983], 14 D.L.R. (3d) 408; 3 C.C.C. (3d) 515; 33 R.F.L. (2d) 279; 41 O.R. (2d) 113; 34 C.R. (3d) 27; 6 C.R.R. 1 (Ont. C.A.); *Quebec Association of Protestant School Boards v. A.G. Quebec* (1982). 140 D.L.R. (3d) 33; 3 C.R.R. 114 (Que. S.C.); aff'd., (1983), 1 D.L.R. (4th) 573 (Que. C.A.).

[7] *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58; 41 O.R. (2d) 583; 34 C.R. (3d) 27; 5 C.R.R. 373 (Ont. Div. Ct.); aff'd, (1984), 45 O.R. (2d) 80 (Ont. C.A.).

[8] S.S. 1979, c. S-24.1.

[9] *Ibid.*, s.44.

A. FREEDOM OF EXPRESSION

1. Political Expression

Tinker v. Des Moines Independent Community School District[10] is the leading case on student rights to free expression in the classroom. A number of high school students wore black armbands in class to protest the war in Vietnam. They were suspended until they chose to come without armbands.

The United States Supreme Court indicated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[11] A mere desire to avoid "the discomfort and unpleasantness *that always accompany an unpopular viewpoint*"[12] was not a sufficient reason for banning the armbands. Mr. Justice Fortas, for the Court, stated:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[13]

The test of constitutionality applied by the Court was whether there were any facts which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities.

Another important factor is the selectivity of any rule limiting freedom of expression. It is more difficult for the school officials to argue that they were concerned with disruption if they ban only those political expressions with which they disagree. The Court in *Tinker* noted that other students were permitted to wear iron crosses.

Some schools may wish to impose a blanket ban on all controversial emblems. The Province of New Brunswick by regulation under the *Schools Act* prohibits symbols "distinctive of any national or other society, political party or religious organization,"[14] other than the wearing of the cross or other religious emblem. A memorandum of the New Brunswick Minister of Justice indicated that the purpose of this regulation was:

> ... [t]o prevent any partisan activity in schools which would lead to disruption or dissension, a school being primarily a place of learning and not a forum for one group to impose its views upon another.[15]

It is questionable whether this policy would satisfy the test set out in *Tinker*. A regulation preventing free expression cannot be justified on the ground that it will prevent disruption if it cannot be demonstrated that disruption was anticipated by the school authorities. It may be constitutionally impermissible because it creates an overly broad rule.

In the United States, a ban on all badges and buttons was upheld in

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[10] 393 U.S. 503 (1969).
[11] *Ibid.*, at 506.
[12] *Ibid.*, at 509.
[13] *Ibid.*, at 511.
[14] *School Administration Regulation*, N.B. Reg. 80-100, s. 12.
[15] R.W. Kerr, "Constitutional Law — Political Rights and High School Political Clubs" (1972), 50 *Can. Bar Rev.* 347, at 350.

Guzick v. Drebus,[16] but in that case the rule had been put in place to prevent disruption of school activities. Racial tension in the schools had "fostered an undesirable form of competition, division and dislike."[17] The wearing by a white student of a button which read "Happy Easter Dr. King" (after Dr. King's assassination) had previously resulted in a fight.

If the American jurisprudence is accepted, the result would be that students would be free to voice disagreement with school policies without fear of punishment. This would not extend to the abuse of school authorities by profane speech. Nor would it condone a student's inciting others to break school rules. The time, place and manner of speech may also be regulated to provide orderly scheduling so long as the real purpose of the rule is not censorship.

2. School Newspapers

The American courts have found freedom of the press to be especially deserving of constitutional protection. The principles of a free press cannot, however, be wholly transplanted into the educational setting. Student publications are often subsidized by the school and distributed to a captive audience. The publication of the newspaper may, in fact, be regarded by the school as part of the educational process in which the supervision of teachers is thought to be advisable.

A school may wish to ban the distribution of all material unless it has received the prior approval of the school administration. In *Eisner v. Stamford Board of Education*[18] the United States Court of Appeals examined the validity of such a rule in respect of high school students. The guidelines for granting or denying approval were as follows:

> No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.[19]

The Court took note of the fact that the regulation did not authorize the punishment of any student, and did not regulate the students' dissemination of information while off school property. The guidelines incorporated the substantial disruption test of *Tinker* and the rule was narrowly drawn to achieve its permissible purposes. Thus, the Court found that it was not overbroad, and characterized it as a regulation of speech rather than a blanket prior restraint. The Court, however, did indicate that it would have preferred greater specificity in the policy guidelines. The Court raised the following areas where refinements of the policy would be desirable:

> (1) the extent to which the Board intended school authorities to suppress criticism of their own action and policies;
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> (2) whether the Board anticipated that school officials would take reasonable measures to minimize disruption before deciding to censor;
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> (3) the kinds of disruptions and distractions and their degree that would justify censorship; and
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> (4) the areas of school property where it would be appropriate to distribute approved material.

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[16] 431 F.2d 594 (6th Cir. 1970).
[17] *Ibid.*, at 596.
[18] 440 F.2d 803 (2nd Cir. 1971).
[19] *Ibid.*, at 805.

Although the Court found that the pre-screening was valid, it held that the regulation was constitutionally defective in its lack of an expeditious review procedure. The policy ought to have prescribed a definite period within which submitted material would be reviewed, and it should have specified to whom and how material was to be submitted for clearance. Finally, the Court found that the prohibition against the distribution of all written material was too broad, as this would, on its face, prohibit students from passing on class notes, or exchanging periodicals such as *Time* or *Newsweek*.

To what extent is the *Eisner* approach applicable in Canadian schools? It would seem that regulation of school newspapers and other student publications is a restriction on student freedom of expression. The question, then, is whether the restriction constitutes a "reasonable limit" under section 1 of the *Charter*. Canadian courts have indicated that they are prepared to look to the approach taken in other free and democratic societies in order to determine whether the limit is "justifiable."[20] In determining whether the limit is "reasonable" the court may find it useful to utilize the American technique of examining whether the rule is overbroad or void for vagueness. Further, in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*[21] it was emphasized that the limit must be "prescribed by law." Statute law, regulations and even common law rules may be permitted, but the limit must have legal force:

> The *Charter* requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as "law". It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable.[22]

It would appear, therefore, that the regulation of student publications cannot be at the discretion of school authorities, but must be pursuant to reasonable guidelines set out in concrete form.

Difficult problems may arise where school authorities attempt to determine whether the publication will cause a "substantial disruption of or material interference with school activities." In *Trachtman v. Anker*[23] the court upheld the decision of the school authorities of a New York high school to prohibit the distribution of an optional sex questionnaire. The court found that there was a reasonable basis for the school to foresee disruption, noting the testimony of several medical experts to that effect.

It is important that the school officials form an honest and reasonable opinion that the publication will result in disruption, and that their reason for prohibiting it is not simply a disagreement with the opinions expressed.

3. Personal Appearance

The question of hair length and other personal appearance rules has led to a great deal of litigation in the United States. The results, however, have been inconclusive. Some courts have upheld the school rules, while others have indicated that personal appearance constitutes symbolic speech and

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[20] *Re Southam Inc. and the Queen (No. 1), supra,* note 6.
[21] *Supra,* note 7.
[22] *Ibid.,* 147 D.L.R. (3d) 58, at 65.
[23] 563 F.2d 512 (2nd Cir. 1977).

therefore ought to be protected. Accordingly, American case law is not particularly helpful.

Certain limitations are justifiable. The prohibition of steel-heeled motorcycle boots that damage floors and create a noisy distraction is reasonable, as are regulations concerning cleanliness. It is less clear whether the school authorities can ban the more extreme hairstyles and fashions. The courts will have to decide whether these constitute freedom of expression at all. Although some styles will convey a vaguely anti-establishment message, it is not, in essence, "symbolic speech." Rather, it is a mode of self-expression:

> Choices about appearance, moreover, are primarily means by which a person can develop a sense of "rightness" and security about himself and his place in the world; this may be particularly true of adolescents who are encountering the need to develop such a sense for the first time and who therefore attach great importance to personal image.[24]

It is debatable whether this falls within the *Charter's* guarantee of free expression. Even if it does not, it may nevertheless be argued that it constitutes a restriction on the students' right to liberty and security of the person, which is protected by section 7.

One might begin by asking why the school wishes to regulate personal appearance at all. Some have argued that it is the disruptive effect of long hair. This seems unlikely. One commentator noted:

> What is disturbing is the inescapable feeling that long hair is simply not a source of significant distraction, and that school officials are often acting on the basis of personal distaste amplified by an overzealous belief in the need for regulations.[25]

The *Charter* will not permit an attitude of "rules for the sake of having rules." There must be a reason for the rule, and the onus will be on school officials to justify the rule if it violates a right or freedom guaranteed by the *Charter.* Except for the more extreme cases, school officials who wish to regulate appearance must seek a different rationale than the disruption of school activities.

In the United Kingdom, the justification for regulating appearance, in the context of school uniforms, has been described as follows:

> The reasons for having a school uniform were largely reasons of practical convenience, to minimise external differences between races and social classes, to discourage the "competitive fashions" which he said tend to exist in a teenage community, and to present a Christian image of the school to outsiders, including prospective parents.[26]

Nevertheless, these reasons were held to be insufficient to justify the prohibition by a headmaster of a Sikh student from wearing a turban.

This case offers a clue as to how courts might view school regulation of personal appearance. Even if the courts agree that the school has an interest in regulating appearance, they will likely be concerned with the intrusiveness of the rule. Clearly the rule is invalid when it intrudes into the religious practices of the student. Professor Howard McConnell of the University of Saskatchewan has suggested that the same reasoning might apply in cases where native students wear their hair long in "making a statement of pride in

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[24] "Recent Cases" (1971), 84 *Harv. L. Rev.* 1702, at 1710.
[25] *Ibid.*, at 1715.
[26] *Mandla v. Dowell Lee*, [1983] 1 All E.R. 1062, at 1069-70 (H.L.).

their cultural past."[27]

The regulation of hair length is more intrusive than regulating dress because the effect of the rule will persist outside school hours. For this reason regulation of hair length and style is more suspect than dress codes. Prohibition of the more provocative or distracting fashions (such as the more extreme "punk" fashions) may be justified if they indeed create a distraction. A restriction against the wearing of jeans, or a rule that female students must wear dresses is more troublesome. There may be a reaction that such rules are simply motivated by the school officials' personal likes and dislikes.

The student does not possess an absolute right to choose his personal appearance. But it is likely that the courts will not rubber-stamp all school regulations, and will demand to know the purpose of the rule, and whether it constitutes too great an intrusion.

B. FREEDOM OF CONSCIENCE AND RELIGION

1. Compulsory Attendance

Section 155 of *The Education Act* places an obligation on parents and guardians to take all steps that are necessary to ensure regular attendance of a pupil who is of compulsory school age (between the ages of 7 and 16 years). Exemptions are provided by section 156, including where:

> (a) the pupil is under a program of instruction approved by the director or superintendent at home or elsewhere; and
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> (h) the student is absent from school on a holy day of the church or religious denomination of which he or his parent or guardian is a member.

Section 157 creates an obligation on the pupil to attend school regularly.

Controversies concerning compulsory attendance usually centre around the rights of the parent rather than those of the student. The parent may object to the child's attendance at school for religious reasons, or the parent may feel that a better education can be provided at home. The parent may argue that compulsory education of the child constitutes a violation of freedom of conscience and religion. He may also argue that it is a violation of his right to liberty under section 7 in that it interferes with the privacy of family relations.

This must be balanced against a very strong state interest in ensuring that children are properly educated. This idea is embodied in the *parens patriae* doctrine, which permits the state to intervene for the welfare of the child who is being neglected by the parents.

In 1972, the United States Supreme Court in *Wisconsin v. Yoder*[28] considered the application of compulsory attendance laws to children of the Amish faith. The Court concluded that an exemption was required for Amish children of fourteen years of age or more who had completed grade 8. The Court noted that the traditional way of life of the Amish was not merely a matter of personal preference, but pervaded their whole way of life.

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[27] L. Behm, "Law Expert Says Atmosphere in Schools Won't Change Much Because of *Charter*", *Prince Albert Daily Herald*, January 27, 1984.

[28] 406 U.S. 205 (1972).

The value of education was to be assessed in terms of its capacity to prepare the child for life which, for the Amish, was life within a separated agrarian community. The Court stated:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role which belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. ... In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.[29]

The *Yoder* decision was considered by the Alberta Provincial Court in *R. v. Wiebe*.[30] In that case, Mennonite parents withdrew their children from the public school because they felt that it was not teaching values that were in keeping with the parents' religious beliefs. The parents opened their own school.

The Court held that the legislation violated the parents' freedom of religion under the *Alberta Bill of Rights*. The Court found that the matter at issue involved deep religious convictions and was not simply a matter of very strong preference. The Court was also influenced by the fact that the decision whether to approve a school was a decision of a school official made without recourse to the courts.

It seems that the Court in *Wiebe* gave a generous interpretation to the *Yoder* decision. The Justices of the United States Supreme Court went to great pains to emphasize that the Old Amish were more than simply a tightly knit religious community, but that the compulsory education would rend the very fabric of their society. Even then only a very limited exception was made. There was no evidence to suggest that the Mennonite community was as vulnerable as the Old Amish.

A dispute may also arise where the parent wishes to educate the child at home. This is permitted if the program of instruction is approved by the director or superintendent. This is likely a reasonable limitation provided that there are sufficient procedural safeguards. The parent should be given a fair hearing and written reasons for any refusal should be given. It might also be advisable to provide an appeal mechanism and to give notice to the parents that an appeal mechanism exists. Again, it would be advisable to have these procedures set out in a concrete form in order to satisfy the requirement that any restriction of rights be "prescribed by law."

2. Choice of Curriculum

Rather than attempting to withdraw the child from the school altogether, the parent may object to certain aspects of the school curriculum. For example, a parent may object to his child's participation in a sex education class, or in a science class in which the theory of evolution or scientific theory as to the creation of the universe is discussed. The parent may claim a

[29] *Ibid.*, at 235-6.
[30] [1978] 3 W.W.R. 36.

constitutional right to supervise the religious, moral and philosophical education of his child. The state also claims a right to ensure that children are educated.

The American courts have generally shown more sympathy for the state's position in such a dispute. They have indicated that the student will be served best if the teaching takes place in a climate of openness. The United States Supreme Court concluded that the role of education is to provide a "marketplace of ideas" which teaches "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."[31] In doing so, they have indicated that parents do not have an exclusive right to supervise the education of their children. In *Cornwell v. State Board of Education*[32] the school administration was permitted to teach compulsory sex education classes. Neither the parents' right to privacy, nor their religious objection to the material succeeded. Courts were careful to note in the reported cases that permissible programs were of a factual nature and did not promote any particular religious viewpoint.[33]

A similar approach has been taken by the European Court of Human Rights. Article 2 of the First Protocol to the *European Convention on Human Rights* provides:

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

Notwithstanding this strong statement as to the parents' right of supervision, the Court in the *Kjeldsen, Busk, Madsen and Pedersen*[34] case upheld compulsory sex education in Danish schools. The legislation was principally intended to give better information to the pupils. This was particularly important in light of the increasing incidence of unwanted teenage pregnancies and venereal disease. It did not amount to "an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour."[35] Nor did it interfere with the parents' ability to advise and guide the child in a manner consistent with their own religious and philosophical convictions.

The American courts have been far less sympathetic to attempts by the state or the school administration to restrict the teaching of certain material. This tendency may be seen in the "monkey law" case of *Epperson v. State of Arkansas*,[36] in which the United States Supreme Court held that a law prohibiting the teaching of evolution in the classroom was unconstitutional. In another case, an American court held that the school board could select books but it could not remove them from the school library without regard to the First Amendment.[37]

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[31] *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, at 603 (1967).

[32] 314 F. Supp. 340 (D. Md. 1969).

[33] *See, Citizens for Parental Rights v. San Mateo County Board of Education*, App., 124 Cal. Rptr. 68 (1975).

[34] (1976), 1 E.H.R.R. 711.

[35] *Ibid.*, at 732.

[36] 393 U.S. 97 (1968).

[37] *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976).

In Canada such cases are seldom, if ever, argued before the courts. Freedom of religion and of conscience under section 2 of the *Charter*, and the right to privacy emanating from the right to "liberty" under section 7 could be used to found an argument in favour of parental control of the curriculum. However, both the American and European experience has been that these arguments will fail.

School authorities must be careful when they attempt to ban materials from the classroom. In doing so they must avoid arbitrariness. For example, a school official should not take it upon himself to prohibit certain material from the curriculum in an area in which he has no expertise and without consultation with other teachers who teach the course. Some procedure for removal of books from school libraries should exist if the school wishes to remove books. These should set out criteria for acceptability and such standards should be applied uniformly.

3. Religious and Patriotic Exercises

American and Canadian constitutional law differs significantly in respect of religious teaching in the classroom. The United States First Amendment has been interpreted as creating "a wall of separation between church and state."[38] Religious activity in publicly funded schools is not permitted. The United States Supreme Court has prohibited Bible readings and non-denominational prayers even where the student is permitted to opt out.[39]

There is no such constitutional prohibition in Canada. Section 17 of *The Saskatchewan Act*[40] provides that a modified version of section 93 of the *British North America Act* (now the *Constitution Act, 1867*) applies in Saskatchewan. Section 93 of the *Constitution Act, 1867,* provides that each province may exclusively make laws in relation to education. The following subsection is added by *The Saskatchewan Act:*

> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons has at the date of the passing of this Act, under the terms of chapters 29 and 30 of the ordinances of the North-West Territories passed in the year 1901 or with respect to religious instruction in any public or separate schools as provided for in the said Ordinances.

Section 137 of *The School Ordinance* (chapter 29 of the 1901 Ordinances) then provided that religious instruction was permitted only in the last half hour of each school day other than opening class with the recitation of the Lord's Prayer. Section 138 provided that any child might leave the school room at the time at which religious instruction is commenced or might remain without taking part, if the parents or guardians so desired.

These provisions should be compared with the provisions of *The Education Act.*[41] Section 181 provides that religious instruction may be given for a period not exceeding two and one-half hours per week. A pupil who does not wish to participate in courses of religious instruction is exempt from attendance with the written consent of his parent or guardian. The daily program of instruction may be opened by the reading or reciting of the Lord's Prayer or by certain passages of Bible readings.

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[38] *Everson v. Board of Education of the Township of Ewing,* 330 U.S. 1 (1947).
[39] *Engel v. Vitale,* 370 U.S. 421 (1962).
[40] 1905, 4-5 Edw. 7, c.42, s. 17 (U.K.).
[41] R.S.S. 1978, c. E-0.1.

The provisions of *The Education Act* are somewhat different than those in *The School Ordinance.* For example, *The Education Act* permits two and one-half hours of religious instruction per week, but does not demand that it take place in the last half hour of each day. It is possible that a parent may take the position that the separate school must strictly comply with *The School Ordinance.* The answer, however, is that although the parent's rights are affected, they are not "prejudicially" affected so as to violate the constitutional guarantee.[42]

The status of religious instruction in public schools is different. There is no constitutional entrenchment of rights in respect of public schools. Although both public and separate schools are subject to *The Education Act,* the provisions relating to religious instruction may be amended in respect of public schools.

Canadian courts have generally been reluctant to compel student participation in religious exercises against the wishes of their parents. In *Chabot v. School Commissioners of Lamorandiere*[43] the Court utilized natural law concepts as an aid in interpreting the regulations in a way that did not infringe the right of the parent to control the education of his children.

Exemption from compulsory religious exercises may now rest on a constitional basis. Section 181 of *The Education Act* goes far in permitting the opting out of religious exercises, but there are two potential defects. First, the exemption applies only to religious instruction; there is no similar exemption in respect of prayer or Bible reading. Likely the exemption from participation would be extended here as well if the student found this objectionable. Second, the exemption only applies if the student has a written consent of a parent or guardian. If the student refuses to participate on a matter of principle rather than out of mere disobedience, then the consent of the parents might not be necessary. It is central to any theory of students' rights that the student be considered as an individual possessed of rights, and not merely an object of dispute between parents and school officials.

It is possible, however, that the *Charter* does not have the same effect in respect of separate schools. Section 29 of the *Charter* provides that:

> Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

It would appear that under *The School Ordinance* it is the parent, and not the student, who has the right to demand that the student be exempted from religious instruction. It is likely that the rights and privileges protected by section 17 of *The Saskatchewan Act* include the parents' right to ensure that their children receive religious instruction in the separate school system.

Similar considerations are involved in respect of patriotic exercises. Subsection 182(2) of *The Education Act* states that the schools shall make provision for instruction in Canadian citizenship and participation in patriotic observances and exercises. The United States Supreme Court in *West Virginia State Board of Education v. Barnette*[44] decided that compulsory flag

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[42] Lord Dunedin in *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Quebec Bank,* [1920] A.C. 230, at 237, indicated that "there might be cases where a right might be affected without being prejudicially affected."

[43] (1957), 12 D.L.R. (2d) 796 (Que. C.A.).

[44] 319 U.S. 624 (1943).

salutes were unconstitutional, overturning the expulsion of Jehovah's Witness children for refusing to engage in patriotic exercises. The Court indicated that their decision was not restricted to an objection on religious grounds (the Jehovah's Witnesses considered the flag to be a "graven image"), but also applied where the objection was based on a matter of conscience.

Pre-*Charter* cases in Canada are equivocal on whether schools may compel participation in patriotic exercises.[45] The entrenchment of the *Charter* permits a much stronger case to be made against compulsory patriotic exercises.

C. FREEDOM OF ASSOCIATION AND PEACEFUL ASSEMBLY —POLITICAL AND SOCIAL CLUBS

Again, there is little Canadian case law in respect of school organizations and clubs. Much of the American case law deals with fraternities and secret societies. The regulation, and even prohibition, of such organizations has generally been upheld; "the public interest of promoting equality and nondiscrimination and in avoiding tensions, divisiveness and elitism among students has been held to outweigh student associational interests."[46]

School authorities may wish to restrict the activities of such organizations on school property. The banning of political buttons has been previously discussed. The school may also attempt to restrict meetings that occur on school property. But if the students are permitted access by school rules to a hall or room, it would seem that the school has no right to control the topics they discuss. The school may, however, decide not to officially recognize the organization. This may mean that the organization is denied the privileges afforded recognized organizations: the non-sanctioned club may be denied a meeting room or funding. Freedom of association restricts the power of the state to interfere with associations. It does not create an obligation to assist these associations. However, the school might possibly run afoul of the section 15 guarantee of equality rights if, in its non-recognition of student organizations, it discriminates on an objectionable basis.

IV. LEGAL RIGHTS

A. THE RIGHT TO LIBERTY — THE RIGHT TO EDUCATION

There is, at present, some controversy over the effect of section 7 of the *Charter,* which guarantees 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. The Manitoba Court of Appeal in *R. v. Hayden*[47] has held that section 7 is a guarantee of fair procedure only, and does not cover substantive requirements of legal policy. The British Columbia Court of Appeal has taken a different view. In *Reference Re Section 94(2) of the Motor Vehicle Act*[48] it held that the effect of section 7 was not simply to enshrine in

[45] *Ruman v. Board of Trustees of Lethbridge School District,* [1943] 3 W.W.R. 340 *(Alta. S.C.)* held that the school could compel such services. However, *Donald v. The Board of Hamilton for the City of Hamilton,* [1945] 3 D.L.R. 424; [1945] O.R. 518 (C.A.) held that students could not be forced to participate.

[46] [1983] 3 W.W.R. 756; 33 C.R. (3d) 22; 4 C.C.C. (3d) 243; 147 D.L.R. (3d) 539; 5 C.R.R. 1980 at 289.

[47] [1983] 6 W.W.R. 655; 36 C.R. (3d) 187; 3 D.L.R. (4th) 361 (Man. C.A.).

[48] [1983] 3 W.W.R. 756; 33 C.R. (3d) 22; 4 C.C.C. (3d) 243; 147 D.L.R. (3d) 539; 5 C.R.R. 148 (B.C.C.A.).

the Constitution the ancient principles of natural justice and the newer rules of administrative fairness. The section also permitted the Court to examine the substantive content of the law. In other words, a court is not limited to a review of procedural matters, but in deciding whether the deprivation of life, liberty or security of the person violates the *Charter,* a court may consider:

> . . . The historical development of rights protected by the common law, the legislative tradition in Canada as found in an analagous existing legislation, . . . [c]ommunity standards or the "living tradition" . . . [and] the need for compelling factors to justify placing the collective interests of society ahead of the rights of the individual.[49]

This latter interpretation would permit a court to "discover" a right to privacy related to the concept of liberty. This could then be used as a basis for protecting a parental right to supervise the education of children. The right to liberty could also be used as a foundation for creating a general right to education. It should be noted that until now the right to education has been given only legislative force, not entrenched as are constitutional rights. Subsection 143(1) of *The Education Act* provides:

> Subject to sections 153, 154 and 156, no teacher, trustee, director, superintendent or other school official shall in any way deprive, or attempt to deprive, a pupil of access to, or the advantage of, the educational services approved and provided by the board of education.

Section 144 provides that every person between the ages of 6 and 21 years has the right to attend school in the division in which he resides at the cost of the school division.

Section 13 of *The Saskatchewan Human Rights Code*[50] also refers to a right to education, though primarily in terms of an anti-discrimination right:

> 13(1) Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of his or their race, creed, religion, colour, sex, marital status, physical disability, nationality, ancestry or place of origin.

The guarantee of liberty in the *Charter* may add a constitutional dimension to the right to education. In the United States case of *Ordway v. Hargraves,*[51] the Court decided that the right to receive a public school education is a personal right or liberty. This right could become an issue where an unwed pregnant student wished to continue her high school education,[52] or it might be raised to argue that the state has an obligation to provide additional English language training for non-English speaking students.[53] These arguments may also be made on the basis of the section 15 guarantee of equality when that section comes into force in 1985.

The right to education is ill-defined and is, of course, subject to limitations. It is subject to rules of discipline, including suspension and expulsion from school. It is not an absolute right to all forms of education. Likely it will not permit a student to attend the school of his choice. The constitutional right would be most useful if government action went beyond mere regulation and constituted a denial of education.

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[49] *R.L. Crain Inc. v. Couture* (1984), 30 Sask. R. 191, at 219 (Q.B.).
[50] S.S. 1979, c. 24.1.
[51] 323 F. Supp. 1155 (D. Mass. 1971).
[52] *Ibid.*
[53] *See Lau v. Nichols,* 414 U.S. 563 (1974).

B. THE PRINCIPLES OF FUNDAMENTAL JUSTICE – SCHOOL DISCIPLINE

Section 7 of the *Charter* provides that a person's rights to liberty shall not be taken away except in accordance with the principles of fundamental justice. This will encompass the ancient rules of natural justice, which require that a tribunal be impartial and provide a fair hearing. It will also include the rules of fairness more generally applicable to administrative acts. The rules of fairness require that the person affected be given notice, be given an opportunity to make representations, and be given reasons for the decision. In *Due v. Florida Agricultural and Mechanical University*,[54] the Court set out three minimal due process requirements:

> First, the student should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based. Second, the student should be given an opportunity for a hearing in which the disciplinary authority provides a fair opportunity for hearing of the student's position, explanations and evidence. The third requirement is that no disciplinary action be taken on grounds which are not supported by any substantial evidence.[55]

In *Goss v. Lopez*,[56] the United States Supreme Court set out the procedural safeguards necessary in respect of suspensions from high school of ten days or less. The Court indicated that the student must be given oral or written notice of the allegations against him, and if he states that the allegations are not true, the authorities must disclose the evidence against him and give him an opportunity to state his side of the story.

The Education Act of Saskatchewan goes far in satisfying these procedural requirements. Under section 154, a principal may suspend a pupil from school for one day or less for overt opposition to authority or serious misconduct. The parents are to be informed immediately. The principal may suspend a student for up to seven days for persistent overt opposition to authority, refusal to conform to the rules of the school, habitual neglect of duty, wilful destruction of school property, use of profane or improper language, or other gross misconduct. The principal must deliver a written report to the director or superintendent and to the parents, inform the pupil of the reasons for his suspension, and grant a hearing to either the pupil or his parents. The principal's decision is automatically reviewed by the director or superintendent, and if it is confirmed or modified it is then forwarded to the Board of Education. The Board may, after investigating the matter, increase the suspension up to four weeks. The pupil and his parents must be granted every reasonable opportunity to make representations. The Board may, after investigation, expel the student, and this decision is reviewable after one year.

Where an expulsion or more lengthy suspension is involved, it may be argued that the student has a right to counsel. The presence of a school board counsel would be influential in determining whether the student is entitled to counsel. Where there is a conflict of evidence, the Board should not restrict the student to oral or written representations, but should give the student an opportunity to present the evidence supporting his story.

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[54] 233 F. Supp. 396 (D.C. Fla. 1963).
[55] K. Alexander, *School Law* St. Paul: West Publishing Co., 1980 at 345.
[56] 419 U.S. 565 (1975).

There are, however, no hard and fast rules. The validity of the decision will ultimately depend upon whether the court feels that the student was given a fair hearing. At the very least this would require that the Board give full disclosures of the case against the student.

C. UNREASONABLE SEARCH AND SEIZURE

Section 8 of the *Charter* protects persons from unreasonable search and seizure. It is wide enough to cover searches by school authorities. In the United States, a similar protection against unreasonable search and seizure is found in the Fourth Amendment. Kraemer and Deutsch discuss the nature of the problem as follows:

> The problem facing the courts is not whether students at public institutions have rights of privacy *per se* but rather deciding at what point and in what situations students are entitled to expect freedom from government intrusion. Is a student entitled to Fourth Amendment protections when school officials conduct searches on school premises? If only internal school disciplinary sanctions are involved, do Fourth Amendment protections apply? Does the nature of the search make a difference, i.e., student lockers, student dormitory rooms, student possessions, the student himself? Can evidence secured by school officials without a warrant be legally introduced into an off-campus judicial proceeding?[57]

Courts in the United States have tended to resolve these issues by balancing the *in loco parentis* doctrine against the view of the school authorities as an arm of the state. In other words, the operation of the Fourth Amendment will depend upon whether the court views the school's action as being that of a parent or that of the police.

The American courts have applied two distinct approaches. Some have indicated that the *in loco parentis* doctrine has the effect of lowering the standard necessary to search. In *People v. Jackson* the Court indicated:

> The *in loco parentis* doctrine is so compelling in light of public necessity and as a social concept that any action, including a search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable.[58]

This standard is more relaxed than the normal requirement of probable cause. In *Bellnier v. Lund*[59] the school officials caused a strip search to be made on an entire grade 5 class in order to recover $3.00 that was missing. The Court found the search to be unconstitutional. There was a reasonable suspicion that someone in the class had stolen the money, but the suspicion had to be more pariticularized to justify the search.

Other courts have attempted to delineate the purpose of the search. The search will be upheld if it was to enforce school regulations but the Fourth Amendment will be applied where the purpose is to secure evidence that would lead to criminal conviction. This approach is less satisfactory because in many cases the search will be undertaken for both reasons. For instance, in *Mercer v. State of Texas*[60] a student was searched after the principal received a tip that the student was in possession of marijuana at school. The search was upheld because the school was acting with the delegated power of a parent.

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[57] *Constitutional Rights and Student Life* St. Paul: West Publishing Co. 1979, at 626.

[58] 319 N.Y.S. 2d 731, at 736 (App. Term, 1st Dept. 1971).

[59] 438 F. Supp. 47 (N.D.N.Y. 1977).

[60] 450 S.W. 2d 715 (Tex. Civ. App. 1970).

A synthesis of these two approaches may be the best solution. The protection against unreasonable search and seizure should be applicable whenever the school authorities search the property and person of the students. Where the search is for violations of school rules a reasonable suspicion test should be applied. However, where the reason for the search is to obtain evidence of crime possibly leading to criminal charges against the student, a stricter standard, similar to that which must be met by the police, ought to be applied. The recently enacted *Young Offenders Act*[61] may have a bearing in this area. Only persons above the age of twelve are liable to proceedings under the *Act*. Thus, where students under the age of twelve are involved, it would seem that a more relaxed standard may be applied because the students are not at risk of criminal proceedings because of their behaviour.

The intrusiveness of the search will also affect its reasonableness. A search of the person is obviously more intrusive than a search of desk or locker. Furthermore, an argument may be made that the desks and lockers are school property provided simply as storage are, and which do not carry any expectation of privacy.

The law in this area is unsettled, but it is possible to draw out a number of conclusions. It would seem that body searches conducted on an entire class are unreasonable. Reasonableness of the search will depend on the age of the student, the intrusiveness of the search, the seriousness of the infraction, the evidence pointing to the student and the need for haste. The standards will be higher when the search is for evidence of criminal activity. In such cases it may be advisable to call upon the police to perform the seach. Parents should be informed by the school authorities whenever searches are performed.

D. CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT — CORPORAL PUNISHMENT

Section 12 of the *Charter* provides a constitutional protection against cruel and unusual treatment or punishment. Manning states that its existence "as a separate legal right apart form any restrictive notions of detention, arrest, imprisonment or even a charge, clearly indicates a desire to secure the protection of human dignity."[62] The language of section 12 is wide enough to encompass corporal punishment in the schools.

Teachers have a common law power to administer such punishment in moderation as a disciplinary measure, but excessive, arbitrary or cruel punishment constitutes an assault. This position has been codified in the *Criminal Code*. Section 43 provides:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case by be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Clause 149(e) of *The Education Act* places the duty upon pupils to "conform to the rules of the school approved by the Board of Education and submit to such discipline as would be exercised by a kind, firm and judicious parent."

It is unlikely that corporal punishment contravenes the guarantee against cruel and unusual punishment. The test applied is "whether the treatment or punishment is so excessive as to outrage standards of decency

[61] S.C. 1980-81-82, c.110.

[62] M. Manning, *Rights, Freedoms and the Courts* Toronto: Emond-Montgomery Limited, 1983, at 438.

and surpass all rational bounds of treatment or punishment."[63] It is doubtful whether corporal punishment in the schools arouses such feelings. It may well be that the majority of parents agree with the practice.

In the United States the Eighth Amendment protection against cruel and unusual punishment was held to apply only to criminal proceedings.[64] This position will likely not be taken in Canada. Section 12 of the *Charter* is not limited by the restrictive language contained in some of the other sections of the *Charter* (section 11, for example, is premised upon an offence being charged). Furthermore, the addition of the term "treatment" indicates that it is not restricted to the punishment of criminals.

The European Court of Human Rights dealt with the question of corporal punishment in the schools in *Campbell and Cosans v. United Kingdom*.[65] Article 3 of the *European Convention* provides that no one shall be subjected to "inhuman or degrading treatment or punishment." The Court found that corporal punishment did not have a sufficient degree of severity to fall within this Article. A similar approach may be adopted in Canada. The punishment permitted is limited by statute in that it must be reasonable and not inflicted arbitrarily.

A number of other *Charter* arguments may, however, be utilized to restrict corporal punishment. It may be argued that corporal punishment contravenes equality rights. We are reminded in the 1853 case of *Cooper v. McJunkin* that children were not the only persons in the past who were liable to have physical punishment inflicted upon them:

> The husband can no longer moderately chastise his wife; nor, according to more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy "with his shining morning face" should be less sacred in the eye of the law than that of the apprentice or the sailor is not easily explained.[66]

The disciplining of school children is based on the doctrine of the delegated power of the parent. The courts may be reluctant to find corporal punishment to be impermissible if this would mean that they would have to rule tht parents are also not permitted to punish their children.

A more difficult question arises where the parents object to the school's use of corporal punishment on their children. In the *Campbell and Cosans* case the parents had requested that corporal punishment not be inflicted, but the school refused this request. Article 2 of the First Protocol to the *European Convention on Human Rights* provides that the state shall respect the right of parents to ensure that the education of their children is in conformity with the parents' own religious and philosophical convictions related to a "weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails."[67] The Court held that the school was therefore obliged to respect the parents' wishes.

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[63] *Re Mitchell and The Queen* (1983), 42 O.R. (2d) 481; 6 C.C.C. (3d) 193 (H.C.J.). A similar test was adopted under the *Canadian Bill of Rights: see R. v. Shand* (1976), 13 O.R. (2d) 65; 30 C.C.C. (2d) 23; 70 D.L.R. (3d) 395 (Ont. C.A.).

[64] *Ingraham v. Wright*, 430 U.S. 651 (1977).

[65] (1982), 4 E.H.R.R. 293.

[66] 4 Ind. 290, at 292-3 (1853).

[67] *Supra*, note 65, at 305.

The *Charter* contains no provision similar to Article 2 of the Protocol. Nevertheless, this right may be derived from the section 7 guarantee of liberty, or perhaps from the section 2 freedom of conscience and belief.

The section 7 guarantee may prove to be the most important in the context of corporal punishment. Corporal punishment clearly affects the student's right to security of the person. The deprivation of this right must therefore be in accordance with the principles of fundamental justice. One of the oldest and most fundamental rules of justice is that a person cannot be a judge in his own cause. Much of the criticism against the use of corporal punishment in schools is that it lends itself to abuse. A teacher insulted before the class is not in a position to be truly objective about the matter. There is a danger that he will inflict physical punishment in the heat of the moment. Section 7 may call for a rule that corporal punishment can only be inflicted or authorized by the principal after he has given the student an opportunity to explain his conduct.

V. CONCLUSION

The strongest argument for freedom of expression in the classroom can be made where the student makes a non-disruptive communication of personal opinion, such as wearing an armband or button. The argument becomes weaker when personal appearance is regulated. In such cases it is the intrusion into the student's privacy rather than a right to free expression that is really at stake. School newspapers will not necessarily attract the same protection as ordinary newspapers because they are usually wholly subsidized by the school and distributed to a captive audience.

Controversies concerning religious freedom will often involve a competition between the parents' religious beliefs and the state's obligation to educate its youth. In both the United States and Europe it is generally thought that the teaching of factual matters will not interfere with the parents' ability to advise and guide their children in accordance with their own religious and philosophical convictions.

It may be argued that section 7 of the *Charter* creates a substantive right to education. This would permit an argument for additional English language training. It might also be used to prevent school authorities from suspending an unwed pregnant student.

Section 8 of the *Charter* could be used to regulate the practice of school searches. The experience in both the United States and Europe is that the section 12 guarantee of no cruel or unusual punishment will not apply to reasonable corporal discipline in the schools. However, in Europe the parents' right to ensure that their children are educated in conformity with their own religious and philosophical convictions permits the parents to prevent the schools from corporally disciplining their children. A similar right in Canada might be created out of the substantive right to liberty under section 7, or out of the section 2 guarantee of freedom of conscience.

The section 7 right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice may also be useful. If corporal punishment is to be applied, it may be argued that fairness demands that the student be given an opportunity to present his side of the story, and that the punishment be meted out by the principal rather that by the aggrieved teacher.

It is unlikely that the *Charter* will introduce radical changes into the school system. Schools are first and foremost a place of learning. Courts would likely be reluctant to demand changes that disrupt school activity. But courts will also be aware that attitudes are often learned by example. Teaching about the fundamental rights and freedoms that may be enjoyed in a free and democratic sociey is a hollow exercise if the schools do not respect those rights.