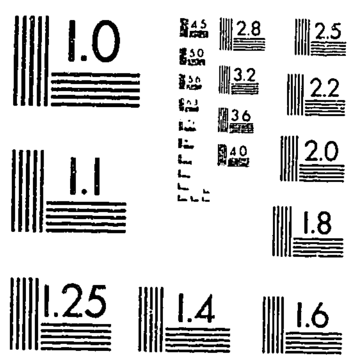
1



National Library of Canada
Acquisitions and Bibliographic Services Branch
395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale du Canada
Direction des acquisitions et des services bibliographiques
395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Canada

UNIVERSITY OF ALBERTA

THE RIGHT OF ACCESS TO AN EDUCATION PROGRAM FOR STUDENTS 6 TO 19 IN ALBERTA

BY

CHRISTINE M. BRODSKY-INGHAM

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Education.

DEPARTMENT OF EDUCATIONAL ADMINISTRATION

Edmonton, Alberta
FALL 1993

ISBN 0-315-88317-0

UNIVERSITY OF ALBERTA

RELEASE FORM

NAME OF AUTHOR: Christine M. Brodsky-Ingham

TITLE OF THESIS: The Right of Access to an Education Program for Students 6 to 19 in Alberta

DEGREE: Master of Education

YEAR THIS DEGREE GRANTED: 1993

Christine M Brodsky

135 Lynnover Place S.E.
Calgary, Alberta
T2C 1L4

September 28, 1993

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled THE RIGHT OF ACCESS TO AN EDUCATION PROGRAM FOR STUDENTS 6 TO 19 IN ALBERTA submitted by Christine M. Brodsky-Ingham in partial fulfillment of the requirements for the degree of Master of Education.

Dr. F. Peters (Supervisor)

Dr. W. Samiroden

Dr. J.M. Small

July 22, 1993

ABSTRACT

The purpose of this thesis is to determine the rights of students six years of age or older and younger than nineteen to an education in Alberta. The sources of law are interconnected. Provincial and federal legislation is subject to the Canadian Charter of Rights and Freedoms (1982) which has its roots in international human rights law. Alberta law is also influenced by the common law, decided cases, and developments in the law.

The study examines federal and Alberta legislation and the relevance of international instruments in determining the right to an education. The Charter, which has introduced a new approach to legal issues, has supremacy over all Canadian laws. The study examines the impact of the Charter.

The issues of who possesses the right to an education and of whether or not there is a right to an appropriate education are studied in the context of the philosophical basis for the claim of each of the state, the parent, and the student to an interest in determining the type of education a student receives. Approaches to the resolution of conflicts between the state, the parent, and the student are extrapolated from the principles of decided cases.

The legislated rights of students in Alberta are compared to those of students in the territories and in other provinces and to those enumerated in international instruments, especially conventions which have been interpreted by international courts.

Law from all these sources works in concert to create the body of law that determines educational rights in Alberta.

ACKNOWLEDGEMENTS

I would like to thank those who provided so much support while I worked to complete this thesis. Special thanks is due to my supervisor, Dr. Frank Peters, who provided both good advice and encouragement.

The encouragement of my husband Stan, who has gone this route himself, and the patience of my children Michael and Parker, who have seen little of me over the last three years, are appreciated. The hard work of my mother Carmen, who helped care for the boys so that I could finish this thesis, has helped enormously. Thanks, also, to my mother-in-law Florence for her generosity.

The support of my colleagues Audrey, Marshall, Norm, and Tara gave me the courage to persevere to the end, and Dr. Pat Prestwich and Madam Justice Russell believed in the value of the study.

TABLE OF CONTENTS

CHAPTER I

Introduction

Statement of the Problem

The purpose of this thesis is to answer the question "What is the nature of the right of access to an education program for students six years of age and older and younger than nineteen years of age in Alberta?" As a guide to answering this question, the study addresses the following questions and issues.

1. Is there a right to an education?

2. Is there a right to an appropriate education?

3. Who has an interest in a child's education, and who determines the type of education the child will receive? The parent, the state, and the child all claim to have a legitimate interest.

4. How can conflict be resolved in the case of inconsistency among the interests of the parent, the state, and the child?

In answering these questions, the study examines both domestic and international law as well as philosophy as potential sources of rights. The legal and philosophical basis for the claims of each of the parent, the state, and the child in decision making is analysed, and a rational

framework for conflict resolution is proposed.

Chapter I provides the Introduction to the study. Chapter II examines the significance of international law in the interpretation of Canadian law and the development of international and Canadian human rights law. It surveys the education provisions in United Nations declarations and conventions, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in the Charter of the Organization of American States and the American Declaration of the Rights and Duties of Man. Chapter III describes education legislation in each Canadian provincial and territorial jurisdiction, with special emphasis on Alberta.

Chapter IV examines definitions of education, and both the legal and philosophical bases for the right to education. The study examines substantive education rights.

Courts have been faced with the need decide among the competing interests of the parent, the state, and the child. Chapter IV reviews court decisions supporting the interest of each of the parent and the state in determining the kind of education a student receives: the study analyses the philosophical and public policy perspectives underlying the decisions in parallel lines of cases which emphasize a particular perspective to the detriment, or the exclusion, of alternative policy options. The issue of whether or not children have a right to determine the type of education

they receive has not been litigated. Chapter IV also examines the philosophical basis for the authority and role of each of the parent, the state, and the child in making decisions about the education of a child.

Both legal and policy considerations provide insight into the right to an education and demonstrate the complexity of the interdependence of the interests of the parent, the state, and the chid in determining the type of education the child receives.

Chapter V examines the issue of whether or not Alberta law provides students a right to education consistent with evolving international human rights perspectives. This Chapter posits a theoretical framework which balances the interests of students, parents, and the state while keeping in mind the best interests of students. It comprises the Conclusion and develops Implications for Further Research.

Significance Of The Problem

The Alberta School Act (1988) expressly gives all resident students entitlement to "access to an education program" (s. 3), but it is not clear whether or not this right includes the right to an appropriate education. (All references to the School Act are to the Alberta School Act, S.A. 1988, chap. S-3.1 unless otherwise stated.) As the importance of education increases in society (Jones v. R., 1986) and as individuals become more aware of their rights

as evidenced by the burgeoning case law, particularly litigation involving the Canadian Charter of Rights and Freedoms (1982) (referred to as the Charter), an understanding of the nature of this right becomes crucial to parents, students, and administrators.

The study defines the right to an education, and considers the issue of whether there is a right to an appropriate education beyond a basic right of access to an education program. It examines the basis of the claim of each of the parent, the state, and the child to determine the type of education the child receives, and proposes a rational framework for resolution of conflict.

A knowledge of Canadian law and court decisions and of the impact of international law on Canadian domestic law is important in defining the scope of the right of access to an education program and in determining how this right can be exercised. An understanding of and the ability to analyse the philosophical principles and public policy considerations utilised by courts in applying the law will aid in predicting court decisions. A review of the philosophical issues underlying parental, student and state rights will place legal principles in context.

Since school boards receive their authority through provincial legislation, they and their employees represent the interest of the state in education. School boards, as well as the teachers and administrators whom boards employ,

need to know their responsibilities and the rights of parents and students so that they can act appropriately.

For parents, a knowledge of the law will enable them to make appropriate educational decisions for their children within the legal framework, and will assist them in ensuring that governments and school boards fulfill their responsibilities towards students.

Students themselves may wish to influence their own education. They may exercise their rights independently if they are sufficiently mature or if they are "independent students" as defined by the School Act (s. 1). Younger students may wish to exercise rights on their own behalf or through an adult.

Methodology

The study defines the right to an education by reviewing legislation and case law applicable in Alberta. The relevance of international law, particularly as it relates to human rights, and of the Charter with its roots in international human rights law are discussed. The historical context of rights and the significance of international accords in interpreting the law of Canada provide the background for the study. The education legislation of the Canadian territories and provinces is reviewed. The study analyses decisions of courts, tribunals, and the Alberta Minister of Education in

placement reviews under section 104 of the School Act and draws on relevant case law of other Canadian jurisdictions.

The study, based on statute, case law, and public policy considerations expressed by courts, examines the issue of the right to an appropriate education. The views of commentators are considered.

The study analyses the philosophical basis for the interests of each of the parent, the state, and the student in the education of children and the way in which conflicts among representatives of these interests can be resolved.

The four questions identified in the Statement of the Problem are addressed from the points of view of the parent, the state, and the child by applying domestic and international law and by taking into consideration philosophical principles raised by commentators on children's rights. Where the law does not provide adequate solutions, policy considerations are of particular significance. A rational solution is proposed by blending legal and philosophical approaches to the issues.

Data Sources

Federal legislation, relevant United Kingdom legislation, particularly the Charter, the legislation of the territories and provinces, particularly Alberta, and the regulations made under these statutes are reviewed.

Judgments of the Alberta courts and the Supreme Court of Canada, a limited number of decisions of courts of provinces other than Alberta, and decisions of provincial human rights commissions are considered. These decisions are found in various reporting series, particularly the Supreme Court Reports, Western Weekly Reports, Dominion Law Reports, and the Canadian Human Rights Reporter. Some unreported Alberta decisions are used.

The reasoning of the courts and tribunals, including minority decisions interpreting statute and common law, is a source of information. These cases are analysed to determine the existing state of law in Alberta and to apply the principles to unresolved issues.

The proceedings of the Joint Committee of the Senate and House of Commons on the Constitution and of the Alberta Legislature are considered as factors in the interpretation of statute law. The discussion paper published by the Policy Advisory Committee on the School Act Review in Alberta is used.

The Director of the Appeals and Student Attendance Secretariat of Alberta Education provided statistics on the decisions of the Alberta Minister of Education on appeals under section 104 of the School Act.

International law sources, including the Charter of the United Nations (1945) (referred to as the UN Charter), declarations of the United Nations, and United Nations

treaties ratified by Canada are considered. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (referred to as the European Convention) and the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) (referred to as First Protocol), and decisions of the European Court of Human Rights under this Convention and First Protocol are analysed in view of their moral force in interpreting Canadian law. The Charter of the Organization of American States (1948) and the American Declaration on the Rights and Duties of Man (1948) are reviewed in light of Canada's membership in the Organization of American States.

The work of commentators on the philosophical bases of education is analysed: books and articles dealing with the interests of children, parents and the state in decisions about children are canvassed. Articles analysing education as a natural or human right and as a "welfare good" which is a closely allied concept and as a legal right provide a philosophical basis for the provision of education by the state.

Secondary sources include books and articles commenting on judicial interpretation of legislation and on decided cases. Articles discussing legislative interpretation and commenting on policy and decided cases are reviewed. Some media items are referred to. Texts on education law issues, on constitutional interpretation, and on the construction of

statutes are consulted.

Articles and texts discussing the effect of international law on Canadian judicial decisions are used.

Some Unites States materials are consulted: the Education for All Handicapped Children Act, Public Law Number 94-142 (1975), related court decisions, and articles analysing the effects of these decisions are used. Several British court decisions are considered.

Data Analysis

The interests of parents, children and the state with respect to rights of children to an education in Alberta are determined from the legislation and from cases, including the decisions of administrative and quasi-judicial tribunals and the Minister. These sources, along with international law sources and secondary sources, are utilized to identify situations in which there has been conflict between the interests of parents, children and the state and to study the resolution of these conflicts. Arguments advanced by litigants and the disposition of these arguments are analysed.

Assumptions

The major assumption underlying the thesis is that an analysis of legislation, case law, and policy considerations can be applied in the investigation of the issues raised by

this study.

The Charter applies to provincial, territorial, and federal legislation, and this study assumes that the Charter applies to the actions of school boards. This conclusion is based on an analysis of the reasoning of the Alberta Provincial Court, Family Division, in R. v. H. (1986) and of the Alberta Board of Reference in Jonson v. The Board of Education of the County of Ponoka No. 3 (1988), as well as the reasoning of the Supreme Court of Canada in both Retail, Wholesale and Department Store Union v. Dolphin Delivery (1986) and Douglas College v. Douglas/Kwantlen Faculty Association (1990).

The Constitution, the supreme law of Canada (s. 52 of the Charter), includes the Charter which has roots in international human rights law. Since the Supreme Court of Canada has in some decisions allowed itself to be influenced, if not persuaded, by international law and by the decisions of the courts which interpret this law, it is assumed that international human rights law will increasingly affect the interpretation of this legislation through the Charter.

Delimitations and Limitations

This study deals only with entitlement to access to an education program at the primary and secondary levels for individuals six years of age or older and younger than

nineteen years of age under the Alberta School Act. The rights defined by section 23 of the Charter (the right to primary and secondary education in the minority language, either English or French) are not discussed, nor is the scope of rights under section 29 of the Charter relating to denominational education.

A limitation of this study is the fact that, since the Charter is relatively new, the principles of interpretation are still in the development stage. A further limitation is the fact that the persuasive influence of the body of international human rights law on Canadian law is only now being felt and Supreme Court of Canada Justices as well as legal commentators suggest that this influence may well increase significantly as the Charter evolves.

CHAPTER II

International Law and the Right To Education

Introduction

The relationship between international law and Canadian domestic law is the subject of some uncertainty as it evolves. International law, either customary or conventional, may in some cases be the law of Canada and, at the least, exerts a moral influence. The Canadian Charter of Rights and Freedoms (1982) (the Charter) has its roots in international human rights law. Since all federal, provincial, and territorial law is subject to the Charter, the role of international law in Charter interpretation is significant in determining children's rights to education. International law, particularly United Nations Declarations and Conventions, deals extensively with the right to education.

Views on the relationship between international law and the law of Canada vary. MacKay (1984b) makes the general statement, "While Canada is bound by international covenant to observe the UN declarations, they have no automatic legal impact" (p. 39). Cohen and Bayefsky (1983), Claydon (1981 and 1982), and Macdonald (1974) consider international law significant in two ways in determining the law of Canada. First, international law may be a part of the law of Canada,

and second the interpretation of international conventions may provide insights into the interpretation of Canadian law, also referred to as domestic law or municipal law.

As the significance of the Charter increases, the impact of international law on Canadian domestic law will increase correspondingly because the Charter has its roots in international human rights law. All federal, provincial, and territorial law is subject to the Charter (s. 32) and Courts have indicated a willingness to apply the Charter to the actions of school boards and their employees. Dickinson and MacKay (1989) believe that "The Charter has provided courts with the authority to scrutinize legislative and administrative action for their compliance with the rights and freedoms enshrined in it" (p. 1) and they predict, "a major implication of the Charter ... will be an expansion of judicial review" (p. 13). Consequently, an understanding of the Canadian judicial approach to international law, treaties, customs and principles will be helpful in predicting the courts' approach to these international instruments in Charter interpretation and application (Cohen and Bayefsky, 1983, p. 275).

Sources of International Law

International law comprises both customary law and conventional law or treaty. The relationship between Canadian law and customary international law differs from

the relationship between Canadian law and conventional international law. The rules which have evolved to govern these relationships attempt to reconcile competing interests including the protection of national sovereignty, the supremacy of Parliament and the legislatures, the satisfaction of Canada's international obligations, and the acceptance of international norms (Cohen and Bayefsky, 1983, p. 275).

International law can become part of the law of Canada in two ways. The first is through adoption or incorporation which applies to customary law, and the second is through transformation which applies to conventional law. Under the adoption theory, customary international law becomes "part of domestic law automatically ... except where it conflicts with statutory law, or well-established rules of the common law" (Cohen and Bayefsky, 1983, p. 275; see also Bayefsky, 1985, p. 3) or where it infringes on national sovereignty (Macdonald, 1974, p. 111; see also Cohen and Bayefsky, 1983, p. 279). This principle "ensures maximum support for international rules" (Macdonald, 1974, p. 111). Domestic law "can change as customary international law changes" (Cohen and Bayefsky, 1983, p. 279; see also Macdonald, 1974, p. 107).

Claydon (1982) believes that the Universal Declaration of Human Rights (1948) (referred to as the Universal Declaration) is "the most important set of international

human rights norms that can be said to have customary law status" (pp. 288-89). Cohen and Bayefsky (1983, p. 282) provide some support for this view as does Schabas (1991, p. 19) who, citing three authors and one judge in an International Court of Justice decision, concludes, "A serious argument can and has been made that the Universal Declaration ... states norms of customary international law" (1991, p. 19). Consequently, in the view of these commentators, the Universal Declaration is "binding on Canada as a matter of international law" (Claydon, 1982, p. 289; see also Cohen and Bayefsky, 1983, p. 283, and Schabas, 1991, p. 19).

Transformation theory applies to international conventional law which generally becomes part of domestic law only after it has been incorporated (Cohen and Bayefsky, 1983, p. 275) usually through legislation (Macdonald, 1974, p. 114; Cohen and Bayefsky, 1983, p. 294). Once a "rule" of international law has been transformed, it is "fixed until a new version" is "transformed" (Macdonald, 1974, p. 107). The "applicability" of conventional international law, "depend[s] upon its express incorporation" (Cohen and Bayefsky, 1983, p. 279). Thus, treaties signed by Canada may be either of two categories - incorporated or unincorporated. A third category of conventional law comprises treaties to which Canada is not a party.

The principles for determining whether or not domestic legislation has implemented a treaty are imprecise. Two major issues arise. The first is the form the implementation should take. Express incorporation of the terms of the treaty in implementing legislation would suffice, but less rigid forms of implementation may also be sufficient (Cohen and Bayefsky, 1983, pp. 294-5). For example, domestic legislation which includes substantive provisions similar to those included in a treaty but which does not refer to the convention may be sufficient to implement the treaty, especially if the statute's legislative history or other extrinsic evidence reveals an intention to implement the convention (Cohen and Bayefsky, 1983, pp. 286-87).

Some portions of the Charter, for example, include substantive provisions that are similar to provisions included in treaty. "The Universal Declaration was an important source for the drafters of the Canadian Charter" (Schabas, 1991, p. 46). "Both a textual comparison and a review of the evidence before the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1981-82, confirm that the International Covenant on Civil and Political Rights was an important source of the terms chosen" in the development of the Charter (R. v. Videoflicks, 1985, p. 35). Courts will undoubtedly be asked to assess the impact of these conventions in interpreting

the Charter and in applying Charter provisions to legislation and administrative actions.

There is an argument to be made that some United Nations covenants which include provisions relating to education have been implemented indirectly by provincial governments. For example the Preamble to the Alberta School Act is similar to a portion of the United Nations International Covenant on Economic, Social and Cultural Rights (1966) (referred to as ECOSOC) and there is an intentional connection between a portion of the School Act and ECOSOC (Framework for Legislation: A New School Act, 1986, p. 1.7).

The second issue to be considered in determining whether or not domestic legislation has implemented a treaty is whether the federal government can implement a treaty when the subject matter is within the scope of provincial legislative jurisdiction (Cohen and Bayefsky, 1983, p. 292). Traditionally, treaty-making has been a power of the federal executive, but treaty-implementation has been distributed between the federal government and the provinces (Cohen and Bayefsky, 1983, p. 292). However, the more recent comments of the Supreme Court of Canada in MacDonald v. Vapour Canada (1976) suggest that the federal government may have the power to pass legislation which implements treaties on matters within provincial authority (Cohen and Bayefsky, 1983, p. 293).

Education, a matter within the scope of provincial jurisdiction, has been the subject of international treaties, particularly United Nations conventions, signed and ratified by the federal government. Since "no general human rights treaty ratified by Canada has been implemented" expressly by legislation, (Claydon, 1981, p. 728; personal communication with J. Freebury, Alberta Labour, Interdepartmental Committee on Human Rights) these treaties either have remained unimplemented or have been indirectly implemented. These international conventions, particularly if they have been implemented, are relevant in the interpretation of education legislation in Alberta.

Chief Justice Dickson of the Supreme Court of Canada stated, "Canada acceded to both [the International Covenant on Civil and Political Rights and ECOSOC] on May 19, 1976 and they came into force on August 19, 1976. Prior to accession the Federal Government obtained the agreement of the provinces, all of whom undertook to take measures for implementation of the Covenants" (Reference Re Public Service Employees Relations Act, 1987, p. 350). Schabas (1991) states, "In international law, this bound Canada to ensure the respect of the two Covenants from the date they formally entered in force ... on August 19, 1976" (p. 8). It would be illogical for a province to recommend ratification of a treaty and later disavow its terms. The potential significance of such treaties is discussed below.

Keeping in mind the "rule of construction that Parliament and the legislatures are presumed not to intend to act in violation of Canada's international legal obligations" (1983, p. 295), Cohen and Bayefsky conclude, "the courts will interpret domestic implementing legislation in conformity with a convention insofar as the domestic legislation permits" (pp. 295-6). However, if "the domestic legislation cannot be given a possible meaning in conformity with the treaty it is the domestic legislation which will take effect" (p. 296).

Courts may also use unincorporated conventions to which Canada is a party "in interpreting domestic legislation" (Cohen and Bayefsky, 1983, p. 298). Although unimplemented treaties have not traditionally had the force of law in Canada, "the presumption that Parliament and the legislatures do not intend to legislate in violation of Canada's treaty obligations still operates. Accordingly wherever possible, statutes are not to be interpreted as violating international conventional law, even in the absence of domestic legislation passed to give effect to the treaty" (Cohen and Bayefsky, 1983, p. 298).

Although some courts ignore unincorporated treaties because they do not have legal effect, Cohen and Bayefsky (1983) cite Pigeon J.'s dissent in Capital Cities Communications v. Canadian Radio-Television and Telecommunications Commission (1978), to support the view

that "this is an oversimplification, and in fact is clearly at odds with the presumption that Parliament and legislatures do not intend to breach Canada's international obligations" (p. 299), even though a treaty has not been incorporated by legislation.

Canada has a moral obligation to honour its international treaties. Although Parliament and the legislatures could legislate in violation of Canada's international obligations, "the force and effectiveness of international human rights law has been amply confirmed by the consistent and unequivocal desire of Canada's lawmakers to comply with the international provisions" (Schabas, 1991, p. 27). To support this view, Schabas refers to Lovelace v. Canada (1985) in which the Human Rights Committee of the United Nations declared section 12(1)(b) of the Indian Act (1985) contravened article 27 of the Optional Protocol to the International Covenant on Civil and Political Rights (1966) by violating the cultural rights of a native woman. Although the Committee's finding did not invalidate section 12(1)(b), Parliament amended the Indian Act, and the Canadian government reported the amendment to the Human Rights Committee (p. 27-28).

International conventions to which Canada is not a party may provide insight for the interpretation of Canadian law. The norms of these conventions may be useful because the language of the conventions and the forums in which the

conventions were drafted may be similar to those of conventions to which Canada is a party (Cohen and Bayefsky, 1983, p. 301) and because there is an extensive body of jurisprudence interpreting these conventions (Claydon, 1982, p. 290).

In his discussion of the effect of international instruments on domestic law, Driedger (1983, p. 155) recommends Lord Denning's approach in Salomon v. Commissioners of Customs and Excise (1967). In interpreting domestic legislation, Lord Denning considered an international convention which was neither mentioned in the Act being interpreted nor appended to it. Lord Denning stated, "I think we are entitled to look at it, because it is an instrument which is binding in international law; and we ought always to interpret our statutes so as to be in conformity with international law" (p. 141).

Rather than relying on rigid rules to interpret statutes, Driedger (1983) (a leading Canadian authority on the construction of statutes), concludes that "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act and the intention of Parliament" (p. 301).

Development of International and Canadian Human Rights Law

Arising from precedents in the development of human rights law and standards, "the modern international complex of human rights standards, claims, principles and obligations, is essentially a product of the United Nations Charter (1945) and the many instruments that have come out of the United Nations Charter system" (Cohen and Bayefsky, 1983, p. 271).

"The Second World War marked a turning point in both international and Canadian law dealing with human rights and fundamental freedoms" (Schabas, 1991, p. 4). The adoption of the UN Charter in 1945 "placed unprecedented emphasis on human rights" (p. 5) and the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 "forms the centrepiece of the international law of human rights and fundamental freedoms" (Schabas, 1991, p. 5). In introducing Bill C-60 which became the Canadian Bill of Rights (1960), the Right Honourable John Diefenbaker stated in the House of Commons that this was "the first step on the part of Canada to carry out the acceptance either of the international Declaration of Human Rights or of the principle that actuated those who produced that noble document" (Debates, House of Commons, 1960, p. 5887).

The Joint Committee of the Senate and the House of Commons on Human Rights and Fundamental Freedoms was established in 1947 "to consider Canada's obligations under

the United Nations Charter and the Universal Declaration" (Schabas, 1991, p. 6). The Universal Declaration was complemented by the International Covenant on Civil and Political Rights (1966) with the Optional Protocol (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) (Schabas, 1991, p. 8) which "led to formal Treaty obligations" (Cohen and Bayefsky, 1983, p. 271). "The Canadian government, after obtaining the support of the governments of all ten provinces, acceded" to the these covenants (Schabas, 1991, p. 8). Subsequently, Canada acceded to additional United Nations human rights treaties, most recently the Convention on the Rights of the Child (1989) on December 11, 1991. On November 13, 1989, Canada formalized membership in the Organization of American States thereby making a commitment to human rights as elaborated in both the Charter of the Organization of American States (1948) and the American Declaration of the Rights and Duties of Man (1948).

The Canadian Charter itself fits into this larger pattern of human rights legislation. It "is part of the universal human rights movement. It guarantees that the power of government ... shall not be used to ... abrogate the fundamental rights to which every Canadian [and] every other human being ... is entitled at birth", stated Mr. Justice Dickson (quoting Belzil, J.A., of the Alberta Court of Appeal in R. v. Big M Drug Mart) writing for the majority

of the Supreme Court of Canada in R. v. Big M Drug Mart (1985, p. 494).

International Law and the Charter

"Canada's international human rights obligations" were a "necessary and pervasive context in which the Charter of Rights was introduced and adopted" (Claydon, 1982, p. 287) and the Charter "is now inextricably associated" with "international legal instruments, general principles and ideas" (Cohen and Bayefsky, 1983, p. 266; see also Schabas, 1991, chap. 4, pp. 66-125). "The two main sources of international human rights law, as of all international law, are custom and treaty" (Claydon, 1982, p. 288). As Claydon points out, Chief Justice Dickson stated that international human rights documents and the interpretation of these documents by "adjudicative bodies" are of "considerable relevance" in Charter interpretation in light of "the similarity between the policies and provisions of the Charter and those of international human rights documents" (Reference Re Public Service Relations Act, 1987, p. 348). "The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation" (p. 349). Charter interpretation "must be 'aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection'" (Reference Re

Public Service Relations Act, 1987, p. 349).

The human rights and freedoms that existed under customary law (which includes human rights law) before the Charter was enacted continue to exist. Consequently, "in human rights areas where the common law has not been settled, and a conclusive statute or constitutional provision does not exist, customary international human rights law can continue to fill in the gaps" (Cohen and Bayefsky, 1983, p. 280).

The rights enumerated under the Charter are not, however, restricted to rights that existed prior to the Charter. In R. v. Big M Drug Mart (1985), Mr. Justice Dickson writing for the majority of the Supreme Court of Canada stated, "the Canadian Charter of Rights and Freedoms does not simply 'recognize and declare' existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment" (p. 523). Rather, "the Charter is intended to set a standard upon which present as well as future legislation is to be tested" (pp. 523-24).

The scope of a right enumerated in the Charter is not restricted to the wording of the Charter provision (Bayefsky, 1985, p. 22; see also Chief Justice Dickson, Reference re Public Service Employee Relations Act, 1987, p. 349). In both Re Warren, Klagsburn, Boyle and Costigan (1983) and Re Mitchell and the Queen (1983), the Ontario High Court resolved a conflict between the wording of the

United Nations Covenant on Civil and Political Rights and the Charter by applying the Covenant provision to the interpretation of a section of the Canadian Criminal Code. Although the Charter and the Covenant covered substantially the same subject matter, the wording of the Covenant was more beneficial to the accused (Bayefsky, 1985, pp. 22-25).

"Three possible uses of conventional law" in Charter interpretation are "(a) consideration of the Charter as in part implementing legislation for human rights conventions, (b) interpretation of the Charter using unincorporated Canadian human rights conventions, and (c) interpretation of the Charter using non-binding international human rights conventions" (Cohen and Bayefsky, 1983, p. 302).

Conventions to which Canada is not a party "may affect the interpretation of domestic law" (Cohen and Bayefsky, 1983, p. 301). The European Convention is important in relation to the Charter because there is "similarity between the legal, political and social systems of Canada and the Western European States, that are parties to it and because of the extensive jurisprudence [that has been] developed by the international organs established to implement it" (Claydon, 1982, p. 290). Cohen and Bayefsky cite three Canadian court decisions referring to the European Convention within a year of the Charter coming into force (p. 301).

In his dissent in Reference Re Public Service Employee Relations Act (1987) Chief Justice Dickson stated,

> A body of treaties ... and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement. (p. 348)

Consequently, "sources of international human rights law - declarations, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms" are "relevant and persuasive sources for interpretations of the Charter's provisions" (Reference Re Public Service Employee Relations Act, p. 348).

The Charter should be "presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (Dickson, J., dissenting in Reference Re Public Service Employee Relations Act, p. 349). However, Chief Justice Dickson concludes:

> though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source

> for interpretation of the Charter, especially when they arise out of Canada's international obligations under human rights conventions. (pp. 349-50)

Mr. Justice La Forest of the Supreme Court of Canada, speaking in a non-judicial context, stated that Mr. Justice Dickson's "comments on the use of international law generally reflect what we all do" (Speech to the Canadian Council of International Law, October 22, 1988 quoted by Schabas, 1991, Footnote 1, p. 17).

Although they place caveats on the legal authority of international law, Cohen and Bayefsky as well as Schabas believe that international sources will become increasingly significant in the interpretation of Canadian law, especially the Charter. Schabas (1991) concludes, "the use of international authority is a logical and consistent result of the recognition and establishment of international norms in the field of human rights" (p. 155). "Within the scheme of law as a whole, and even in international law, human rights is still very young" (p. 158). The approach of the Supreme Court of Canada suggests that it will "keep pace with the evolution of international human rights law" (Schabas, 1991, p. 158).

The distinction between customary law and treaty has become blurred and may disappear. "The treaty and custom sources merge where widely accepted treaties can be viewed

as establishing evidence of a general practice recognized as law, and hence of international custom" (Claydon, 1982, p. 294, Footnote 22). The Charter with the exception of section 15 (equality rights) was proclaimed on April 17, 1982, and section 15 was proclaimed on April 17, 1985. More than 145 Canadian cases reported between proclamation of the Charter and 1990 "refer to international sources" (Schabas 1991, p. 12, p. 155). Between 1985 and 1990, "the Supreme Court of Canada ... referred to international sources in some 27 judgments dealing with Charter interpretation" (Schabas, 1991, p. 12). "Alberta reports 27 international human rights law cases, with the ... Court of Appeal making reference in seven Charter decisions" (Schabas, 1991, p. 15).

Judicial interpretation of the Charter is significant because the Constitution is the "supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force and effect" (s. 52(1) of the Charter). The Charter "applies to Parliament and the government of Canada ... including all matters relating to the Yukon Territory and the Northwest Territories" as well as to the provincial legislatures and governments (s. 32(1) of the Charter).

Claydon (1982) suggests, "the search for meaning is the major concern of judges responsible for applying the Charter" (p. 295) and, consequently, the "judicious use of

international human rights law, in combination with comparative analysis of the jurisprudence of other culturally similar countries, can help to supplement and confirm domestic sources of inspiration that may range from pre-existing case law to basic concepts of political philosophy" (1991, p. 302). Canada will not only comply with its international obligations, but will also "improve the quality of interpretation of the Charter by our courts" (p. 302).

The Right to Education In United Nations Documents

The Charter, which is grounded in international human rights law, is "an expression of our Canadian value system. To define and elaborate these values it is helpful to look at our international obligations", including the right to education embodied in United Nations documents to which Canada subscribes. (Vickers and Endicott, 1985, pp. 386-7).

The right to education is a human right enumerated in United Nations documents including the UN Charter (1945), the Universal Declaration of Human Rights (1948) (referred to as the Universal Declaration), the Declaration on the Rights of the Child (1959), the Convention Against Discrimination in Education (1960), the International Convention on the Elimination of all Forms of Racial Discrimination (1965), the Declaration on the Rights of Mentally Retarded Persons (1971), ECOSOC (1966), the

Convention on the Elimination of All Forms of Discrimination Against Women (1979) (referred to as CEDAW), and the Convention on the Rights of the Child (1989). The International Covenant on Civil and Political Rights (1966) provides for the right of parents to ensure that their children's education is consistent with the parents' convictions.

The Preamble of the UN Charter affirms "faith in fundamental human rights" and the "dignity and worth of the human person", and strives to "establish conditions under which justice and respect for the obligations arising from ... international law can be maintained." The provision of education is an integral part of this process.

Education is of benefit to society. Article 13 of the UN Charter requires the General Assembly to "initiate studies and make recommendations for the purpose of ... promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all". Article 55 provides, "With a view to the creation of conditions of stability and well-being ... necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote ... international ... educational co-operation".

The "specialized agencies, established by intergovernmental agreement" with a special relationship with the United Nations, have "international responsibilities" in five areas including education (Article 57). Member nations which "assume responsibilities for the administration of territories whose peoples have not yet attained ... self-government" have an "obligation to promote ... the well-being of the inhabitants", including "educational advancement", and to report on "educational conditions" (Article 73). As well, the promotion of the "educational advancement of the inhabitants of the trust territories" is one of the "basic objectives" of the trusteeship system (Article 76).

Education also benefits the individual within society. Article 26.1 of the Universal Declaration, adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948, states, "Everyone has the right to education". Article 26.2 describes the purposes of education which "shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms" and "shall further the activities of the United Nations for the maintenance of peace". Under Principle 7 of the Declaration on the Rights of the Child (1959) education shall "promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual

judgement, and his sense of moral and social responsibility, and to become a useful member of society".

Article 26.1 of the Universal Declaration states, "Education shall be free, at least in the elementary and fundamental stages" and shall be "compulsory". Principle 7 of the Declaration on the Rights of the Child (1959), entitles the child to "education which shall be free and compulsory, at least in the elementary stages". This principle is echoed in Article 13.1 of ECOSOC.

The Universal Declaration states, "technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit" (Article 26.1) and Article 13 of ECOSOC (1966) reflects and expands these basic provisions. Article 13.2(c) promotes the "progressive introduction" of "free" higher education, and Article 13(2)(e) encourages "development of a system of schools", the establishment of an "adequate fellowship system", and "continuous improvement" of "the material conditions of teaching staff".

Smith (1980) asserts that ECOSOC "was the culmination of a series of United Nations Declarations, two of which - the Universal Declaration of Human Rights ... and the Declaration of the Rights of the Child ... - had proclaimed the same right to education in slightly different words. Other provisions not superseded by the Covenant continue to exist independently" (pp. 367-68).

Discrimination in the provision of education is prohibited. The Convention Against Discrimination in Education (1960) provides that "every person has the right to education" without discrimination (Preamble) and includes the basic educational rights set out in the Universal Declaration as well as the undertaking to encourage the provision of education of those who have not completed their primary education (Article 4(c)). The International Convention on the Elimination of All Forms of Racial Discrimination (1965) requires signatories to "guarantee" to "everyone without distinction" the "right to education and training" (Article 5(e)(v)), and CEDAW (1979) provides for equality of educational opportunity for men and women (Article 10).

Children are granted special rights. The Declaration of the Rights of the Child, Proclaimed by the General Assembly of the United Nations on November 20, 1959, refers in the Preamble to both the UN Charter and the Universal Declaration. Principle 2 provides that

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be paramount.

Principle 5 of the Declaration of the Rights of the Child states, "the child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition." The Declaration on the Rights of Mentally Retarded Persons (1971) "recalling" the principles in other United Nations documents and the recommendations of United Nations organizations (Preamble), states, "The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings" (s. 1) including " a right ... to such education, training rehabilitation and guidance as will enable him to develop his ability and maximum potential" (s. 2). The Convention on the Rights of the Child provides, the "special needs of a disabled child" are to be taken into account and assistance extended "to ensure that the disabled child has effective access to and receives education, training," and other services including "preparation for employment" (Article 23.3).

The relationship between the child's best interests and parental choice is emphasised. "The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents" (Principle 7). The Universal Declaration also provides that "Parents have a prior right to choose the kind of education that shall be given to their children" (Article 26.3).

The International Covenant on Civil and Political Rights (1966) does not directly address the matter of education, but under Article 18.4 States Parties to the Covenant will respect the "liberty" of parents to "ensure the religious and moral education of their children in conformity with their own convictions".

ECOSOC clarifies the principle that the rights of parents are established as a balance to the power of the state. It advocates the right of parents to "choose for their children schools, other than those established by public authorities, which conform to minimum standards" determined by the State "and to ensure the religious and moral education of their children in conformity with their own convictions" (Article 13(3)). Under Article 13(4), "the liberty of individuals and bodies to establish and direct educational institutions" is confirmed.

The more recent Convention on the Rights of the Child (1989) (acceded to by Canada on December 11, 1991) is the first United Nations document to explicitly recognize the interests of the child in his own education. Article 28 provides, "States Parties recognize the right of the child to education" and this opportunity is to be provided "on the basis of equal opportunity to all". The Convention also recognizes the family as "the fundamental group in society and the natural environment for the growth and well-being of all its members and particularly children" (Preamble).

Both "society" and "public authorities shall endeavour to promote" the child's "opportunity for play and recreation, which should be directed to the same purposes as education" (Convention on the Rights of the Child, Principle 7).

Under Article 22 of the Convention on the Rights of the Child, a child seeking refugee status should receive "appropriate protection and humanitarian assistance in the enjoyment of ... rights" in both this Convention and "other international human rights and humanitarian instruments". Article 23.4 promotes international co-operation in the exchange of information in the provision of various services including "education".

This Convention addresses the issue of standards: Article 3.3 requires that "States Parties ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities" including the "areas" of "number and suitability of their staff, as well as competent supervision". Although this Article does not set standards specifically for education, the principle applies to all services for children which would include education.

Education Provisions in The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)

The Charter "was intended to issue in a new era in protection of human rights but domestic sources of interpretive assistance are lacking" (Bayefsky, 1985, p. 47). In relation to the Charter, the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (referred to as the European Convention) "is important because of the similarity between the legal, political and social systems of Canada and the Western European states, that are parties to it" (Claydon, 1982, p. 290) and because there are "judicial decisions on [the] meaning and content" of the Convention (Cohen and Bayefsky, 1983, p. 308). These interpretations are made by the Human Rights Committee, the Human Rights Commission, and the European Court of Human Rights which are responsible for implementation of the Convention (Claydon, 1982, p. 293). Both the Commission and the Court publish their decisions (Claydon, 1982, pp. 293-94).

As Schabas (1991) points out, "drawing on the Universal Declaration, the nations of the Council of Europe, in 1950, agreed to the Convention for the Protection of Human Rights and Fundamental Freedoms" (p. 5).

Chief Justice Dickson in his dissent in Reference Re Public Service Employee Relations Act (1987) quotes Claydon's view that "the more detailed textual provisions of

the treaties may aid in supplying content" to some of the more "imprecise concepts" in the Charter (p. 349). As Claydon (1981) points out, "interpreting a treaty involves much more than perusing a text; a plethora of committee and commission discussions, reports, recommendations, and decisions, comprising both the travaux preparatoires and authoritative interpretations, is an important part of the interpretative process" (p. 751).

Although the European Convention decisions are "not directly applicable to the Canadian context", nevertheless, "given that the Commission has had the opportunity to consider many of the issues that are coming before our courts, the more frequent citation of these materials would assist us as we develop a Canadian approach to these common issues" (Schabas, 1991, p. 56 quoting Mr. Justice La Forest in a speech to the Canadian Council on International Law, October 22, 1988).

Between April 17, 1982, when the Charter came into force (except for section 15, the equality section, which came into force on April 17, 1985), and October, 1985, the European Convention was referred to in thirty-two Canadian court decisions. Eighteen of these cases "refer explicitly to decisions of the European Court or Commission of Human Rights" (Bayefsky, 1985, p. 37). Some of these decisions "mention the relevance of reviewing the situation in other democratic societies when giving meaning to Charter rights

and their limitations" (Bayefsky, 1985, p. 41).

Article 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) (referred to as the First Protocol) deals with two facets of education: the first is the right to education and the second is the parents' right to determine the kind of education their children will receive. Article 2 states:

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

In the Case Relating To Certain Aspects Of The Laws On The Use of Languages in Education in Belgium (Merits), (1968) (referred to as the Belgian Linguistic Case (No. 2)), in Kjeldsen, Busk Madsen and Pedersen v. Denmark (1976) (referred to as Kjeldsen), and in Campbell and Cosans v. United Kingdom (1982) (referred to as Campbell and Cosans), the European Court of Human Rights interpreted Article 2.

In the Belgian Linguistic Case (No. 2), the Court examined the specific provisions "touching the rights or freedoms of a child with respect to his education or of a parent with respect to the education of his child" (p. 280) within the context of the European Convention and the First

Protocol as a whole (pp. 280 and 283).

The Court held that "Article 2 does enshrine a right" (p. 280) to "education" (p. 281) which is "secured ... to everyone within the jurisdiction of a Contracting State" (p. 281). The Court considered the "content of this right and the scope of the obligation" it "placed upon States" (p. 280). When the First Protocol was opened for signature, all member States of the Council of Europe had a "general and official educational system" (p. 281) and these systems still existed when this case was heard. Therefore the issue is not one of "requiring each State to establish" an education system but one of "guaranteeing to persons ... the right, in principle, to avail themselves of the means of instruction existing at a given time" (p. 281).

However, "a right of access to educational institutions existing at a given time ... constitutes only a part of the right to education" (p. 281). To be "effective", this right also requires that "the individual who is the beneficiary should have the possibility of drawing profit from the education received" (p. 281).

"The right to education guaranteed by the first sentence" of Article 2 "calls for regulation by the State, regulation which may vary ... according to the needs and resources of the community and of individuals" (p. 281) but "such regulation must never injure the substance of the right to education nor conflict with other rights enshrined

in the Convention" (p. 282), including parental rights. These statements were reiterated in almost identical language by the Court twenty-four years later in Campbell and Cosans (1982, p. 307).

The Court considered the intent of the European Convention which "implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter" (p. 282).

Since "the Convention must be read as a whole" (p. 283), Article 2 was interpreted in light of Articles 5 and 8, and Article 14 which provides that the rights and freedoms set forth in the European Convention and First Protocol "shall be secured without discrimination" (p. 283). Article 2 does not grant individuals the "right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an [educational] establishment could not, in laying down entrance requirements, take discriminatory measures" (Belgian Linguistic Case (No. 2), 1968, p. 283) as this would contravene Article 14 of the European Convention.

In Kjeldsen (1976), the Court stated, "the second sentence of Article 2 must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of

parents to respect for their religious and philosophical convictions" (p. 729). The Court points out, "The second sentence of Article 2 aims ... at safeguarding the possibility of pluralism is education" which is "essential for the preservation of a 'democratic society'" (p. 729).

Article 2 "applies to each of the State's functions in relation to education and to teaching" (p. 729), and it "enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme" (pp. 729-30).

The Court explained the relationship between the two facets of education. "Article 2 constitutes a whole that is dominated by its first sentence" (p. 730). Thus,

> The right set out in the second sentence ... is an adjunct of this fundamental right to education. It is in the discharge of a natural duty towards children - parents being primarily responsible for the 'education and teaching' of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to the responsibility closely linked to the enjoyment and the exercise of the right to education. (p. 730)

In Campbell and Cosans (1982), the Court again addressed the nature of the right in Article 2 which "constitutes a whole

that is dominated by its first sentence, the right set out in the second sentence being an adjunct to the fundamental right to education" (p. 307). The Court in Kjeldsen (1976) concluded,

> The second sentence of Article 2 implies ... that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. (pp. 730-31)

In Campbell and Cosans (1982), the Court considered the meaning of the term "convictions", and the court concluded, "The word 'convictions' ... is more akin to 'beliefs'" which "guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance" (p. 304). Further, "having regard to the Convention as a whole" the term "'philosophical convictions' ... denotes ... such convictions as are worthy of respect in a 'democratic society' and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education" (p. 305).

In this case, the Court contrasted education with teaching: "the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching and instruction refers in particular to the transmission of knowledge and to intellectual development" (p. 303).

Effect of Canada's Membership In The Organization of American States

A recent factor in this context is the fact that Canada joined the Organization of American States (referred to as the OAS) on January 8, 1991. Article 2(4) of the Charter of the Organization of American States (1948) (referred to as the OAS Charter) provides that one fundamental purpose of the Organization is to "fulfill its regional obligations under the Charter of the United Nations" (Article 2). According to Schabas (1991), the members of the OAS were also "inspired" by the Universal Declaration to create the American Declaration of the Rights and Duties of Man (p. 58) (referred to as the American Declaration).

The OAS Charter establishes the Organization of American States. Article 3(l) of the OAS Charter "reaffirms" twelve "Principles" including the principle that "the education of peoples should be directed toward justice, freedom, and peace". Article 31 states, "To accelerate

their economic and social development, ... the Member States agree to dedicate every effort to achieve ... basic goals" including "rapid eradication of illiteracy and expansion of educational opportunities for all."

Article 45 provides, "The Member States will give primary importance within their development plans to the encouragement of education, science, and culture, oriented toward the over-all improvement of the individual, and as a foundation for democracy, social justice, and progress". In addition, "Member States will exert the greatest efforts ... to ensure the effective exercise of the right to education." The first of the "bases" of this right is "elementary education, compulsory for children of school age" and "when provided by the state it shall be without charge". The second is "middle-level education" which "shall be extended progressively to as much of the population as possible, with a view to social improvement".

As Schabas (1991) points out, "membership ... automatically entails Canada's obligation to respect the terms of the American Declaration, and subjects Canada to a petition system before the inter-American Commission on Human Rights" (p. 59). Canada is now bound by the American Declaration (1948). Article XII of this Declaration states, "Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity" and which will "prepare" the individual "to

attain a decent life, to raise his standard of living, and to be a useful member of society". This right "includes the right of equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide." Article XII also supports the principle, "Every person has the right to receive, free, at least a primary education."

Although the American Declaration has not been incorporated into Canadian law by legislation, there is a principle that Parliament and provincial legislatures do not intend to act in violation of Canada's treaty obligations. Consequently, it is likely courts will perceive the American Declaration as imposing a moral obligation which may well have legal force. As well, any advisory opinion rendered by the Inter-American Court may bring international pressure to bear on Canada to adhere to the terms of the American Declaration.

CHAPTER III

Canadian Education Legislation

Alberta

Background

Before Alberta became a province, An Ordinance respecting Schools (1901) (referred to as Ordinance 29) and An Ordinance respecting Assessment and Taxation in School Districts (1901) (referred to as Ordinance 30) governed education and the levy of assessments for education purposes in the Northwest Territories. In 1901, the area that is now Alberta was part of the Northwest Territories. Ordinances 29 and 30 continued in effect when Alberta was established in 1905.

Section 93 of the British North America Act (1867) renamed the Constitution Act, 1867, empowered the provinces to pass legislation dealing with education, but this section did not yet apply to Alberta because the province of Alberta had not been established.

Provisions similar to those in section 93(1) of the British North America Act, were included in section 17 of the Alberta Act (1905). Section 17 of the Alberta Act provides, in part, that the Alberta Legislature "May exclusively make laws with respect to education" in the

province, subject to rights or privileges with respect to establishment of separate schools and with respect to religious instruction in both public and separate schools guaranteed under Ordinances 29 and 30 (1901). The remainder of section 93 was made applicable to Alberta by section 17 of the Alberta Act (1905). Section 93(4) provides that, if these guarantees are not honoured, the Parliament of Canada may make remedial laws.

The Revised Statutes of Alberta Act, 1922 consolidated as statutes those Ordinances of the Northwest Territories that were still in effect in Alberta. Ordinances 29 and 30, became chapters 51 and 52, respectively, of the Revised Statutes of Alberta, 1922. The School Act was ultimately replaced. The School Assessment Act was repealed and the assessment provisions are now included in the School Act (1988). (All references to the School Act are to the Alberta School Act (1988) unless otherwise stated.)

The School Act governs education of students six years of age or older and younger than nineteen years of age on September 1 in a year in Alberta. The Act also authorizes the Minister and the Lieutenant Governor to make regulations about specified matters, and these regulations have the force of law.

The Act allows boards to permit an individual younger than six and older than eighteen to have access to an education program (s. 3), as long as he or she fulfills the

citizenship or Canadian residence criteria (s. 3(2)). A child who is under six on September 1 of a year and who attends an early childhood services program is "not ... a resident student of the board" (s. 24(2.1)(a)) and is "not ... entitled to any of the rights or benefits given to a student under this Act" (s. 24(2.1)(b)).

The School Act provides for the establishment of boards of trustees ("school boards") including boards of separate school districts (ss. 1(1)(b), 217, 218). The Act delegates to school boards some of the authority granted to the provincial legislature by section 17 of the Alberta Act (1905). The powers of school boards are enumerated in the School Act. In addition, the School Act imposes on school boards specific obligations, including the obligation to provide an education program to resident students (s. 28). The determination of who is a resident student is discussed below.

The Alberta Department of Education Act (1980) establishes the Department of Education. It authorizes the Minister of Education to make regulations, including regulations relating to the operation of facilities for the education of persons with special educational needs (s. 6(1)(d)). It permits the Lieutenant Governor in Council to make regulations relating to grants (s. 7(2)).

Right of Access To An Education Program

Section 3(1) of the School Act provides the criteria for determining whether or not an individual is entitled to access to an education program. Age plus either citizenship or lawful admission to Canada on the part of the student or the student's parent are determining factors. An individual who is a Canadian citizen, a child of a Canadian citizen, an individual lawfully admitted to Canada for permanent residence, or a child of an individual lawfully admitted to Canada for permanent or temporary residence is entitled to access to an education program in a school year in which he is six years of age or older and younger than nineteen (s. 3) on September 1.

In addition, there is a residence requirement. Either the student's parent as defined by section 1(2) of the School Act must reside in Alberta (s. 27(1)) or the student, if he or she qualifies as an independent student as defined by section 1(1)(h), must reside in Alberta.

One exception comprises Indians "as defined in the Indian Act (Canada)" (School Act, s. 1(1)(i)) whose education is the responsibility of the federal government. The federal government has also assumed some responsibility for the children of personnel living on military bases pursuant to Order in Council PC 1977-4/3280 (1977). On military bases on which the federal government provides the facilities, staff, and programs, Alberta Education pays only

one-half of the School Foundation Program Basic Instruction Grant (1992/93 School Grants Manual, p. 1.2) plus one-half the Special Education Block Grant for each student (1992/93 School Grants Manual Appendix Grant Rates, p. 9). If the federal lands of the military base are added to a provincial school jurisdiction, Alberta Education pays the jurisdiction the same grants at the rates it would ordinarily pay on behalf of students, with the federal government paying the jurisdiction a grant in lieu of taxes.

Once the eligibility for access to an education program has been established, the School Act identifies whether a public school board, a separate school board, or the Government of Alberta is responsible for providing access to an education program.

Eligible students have a right of access to an education program. This access is usually provided by a publicly funded school board, either public or separate: if such access is not available, the Minister of Education is required to ensure that the student has access to an education program. Both public and separate boards are eligible to receive provincial moneys at the same rates (s. 17(2) of the Alberta Act, 1905) and both are entitled to levy assessments (s. 17(1) of the Alberta Act).

If a public district has been established but no separate school district has been established, all students are residents of the public district. Once a public school

district has been established, the minority of ratepayers, either Protestant or Roman Catholic, has the right to establish a separate school district and to impose assessments on themselves (Ordinance 29, 1901, s. 41), and these rights are reaffirmed in section 17 of the Alberta Act (1905). Section 17 provides that if the Alberta Legislature makes laws with respect to education,

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

The Charter guarantees the continuation of this right: section 29 states, "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect to denominational, separate or dissentient schools". Section 200 of the current School Act provides for the right of separate school electors to establish a separate school district within an existing public school district, and section 132 provides that the property of separate school supporters is assessable for separate school purposes.

Corporate assessment is dealt with in section 136.

Once a separate school board is established, the student's residency for school purposes is determined by faith, usually the faith of the parents. In the remainder of situations, residency is based on the faith of the student.

Subject to the exceptions discussed below, electors who are of the same faith as those who established the separate district are residents of the separate school district and are entitled to have their children educated by the separate school board (School Act s.27(4)). Schmidt v. Calgary Board of Education and the Alberta Human Rights Commission (1976), decided by the Alberta Supreme Court, Appellate Division, reaffirms this principle. Moir, J.A., writing for the Court, stated, "The effect of the separate school legislation is to provide that residence is determined by religion" (p. 722) and "where the Roman Catholic minority has established a separate school district then all the members of the minority religion are excluded as public school supporters and are not resident in the public school district" (p. 719).

There are three circumstances in which the faith of the student, not the faith of the parent, determines residency. First, the residence of an independent student is determined by the faith of the student (School Act, s.1(3)). An independent student is one who is eighteen years of age or

older or who is sixteen years of age or older and who is living independently or who is a party to an agreement under section 7(2) of the Child Welfare Act (1980) or one on behalf of whom a social allowance is issued under the Social Development Act (1980) (School Act, ss. 1(1)(h), 1(2), and 1(3)). Second, the faith of a student who is under sixteen and the subject of an allowance under the Social Development Act and who is not the subject of an order or agreement under the Child Welfare Act determines residency (School Act, s.27(5.1)). Third, if a student is in the care of a foster parent and the faith of the student differs from that of the foster parent, and the area in which the foster parent resides is served by both a public and separate school jurisdiction, residence is determined by the student's faith.

There are exceptions to the general rule that the faith of the parent determines the residence of the student. One exception occurs when residence is based on the faith of the student discussed above. A second can occur in a marriage in which one parent is a separate school supporter and a third can occur in St. Albert when a public school supporter wishes to support the separate district. When there is a marriage in which only one parent is a resident of a separate school district, both parents may choose the same jurisdiction and as a consequence their child becomes a "resident student of the board chosen" (School Act, s.

27(7)). If the parents do not make the choice, the Minister shall do so (s. 27(8).

Individuals who live within the municipal boundaries of the City of St. Albert are in a unique situation. Residents of St. Albert School District Number 3 (the public school district) may choose whether to support the public district or the Protestant separate district for school tax purposes. Pursuant to section 132(4) of the School Act, the Board of Trustees of St. Albert Protestant Separate School District No. 6 passed Resolution 12380 on March 8, 1989, and the Board of Trustees of St. Albert School District No. 3 passed resolution 54/89 on March 6, 1989, permitting this direction of taxes. Once such a public school supporter chooses to support the separate district, this individual is "deemed to be resident of the separate school district and to have all the rights, duties and obligations of a resident of the separate school district" (School Act s. 132(4)). This option is open to boards in certain other jurisdictions in the circumstances specified by the School Act (s.132(4)), but no other board has chosen this option.

Most students are resident students of a school jurisdiction. A "student who resides in an unorganized territory and who is not an Indian residing on a reserve pursuant to the Indian Act (Canada)" is a resident student of Government (s. 27(6)(a)). All other resident students of Government are students who would be resident students of a

board in ordinary circumstances, but, due to one of the special circumstances listed in section 27(6) of the School Act, have become the responsibility of the Government. The Minister "must make arrangements" for resident students of government "to receive an education program" (s. 28(5) of the School Act).

Section 27(6) of the School Act provides that certain categories of individuals who are resident students of Government, regardless of where their parents live in Alberta. The first encompasses students who are in custody under the Corrections Act, the Penitentiary Act, the Young Offenders Act (Canada) or the provincial Young Offenders Act, the second refers to students who are either in the custody of a director or who have a guardian appointed under the Child Welfare Act and who reside in either an institution or group home prescribed by the Minister and operated or approved by the Government of Alberta, and the third consists of students who are under long term care in an institution that is under the control, direction or administration of the Government.

In addition to access provided under section 3 of the School Act, section 28 of the School Act states, "a board shall provide to each of its resident students an education program consistent with the requirements of this Act and the regulations". Section 29(1) states, "a board may determine that a student is, by virtue of the student's behavioral,

communicational, intellectual, learning or physical characteristics, or a combination of those characteristics, a student in need of a special education program" and 29(2) provides that "a student who is determined by a board to be in need of a special education program is entitled to have access to a special education program provided in accordance with section 28."

In Alberta, integration is a matter of policy but is not legally required. Ministerial reviews such as the Eggert decision have required integration when that is considered best for the student.

If the board cannot provide an education program, it must refer the matter to a Special Needs Tribunal (s. 30). If the Tribunal agrees that the Board cannot provide the program, it "shall develop or approve a special needs plan that is consistent with the needs of the student" (s. 30(2)). The Tribunal shall also "determine the relationship between the student, the board and any other person or government that may provide" the needed services (s. 30(3)(a)) and "apportion the cost of providing the services ... between the board and the Government" (s. 30(3)(b)). Both the board and the parent "shall comply with the decisions and determinations" of the Tribunal (s. 30(5). The decision of the Tribunal must be reviewed at least every three years by a Tribunal until "the student is no longer entitled to have access to an education program under this

Act" (s. 30(6)).

"Where a decision of an employee of a board significantly affects the education of a student", the parent and, if the student is over sixteen, both the parent and student have the right to appeal the decision to the school board (s. 103(2)). This appeal provision could well include the right of any parent or parent and student to appeal placement in an education program. As well, section 104 allows the parent or the student if he is 16 years of age or older to request the Minister to review the board's decision respecting "the placement of a student in a special education program".

Ancillary Rights

In addition to the entitlement to access to an education program, the School Act provides ancillary rights.

The education program is essentially free as section 32 prohibits a board from charging "any tuition fee in respect to attendance of its resident students at a school operated by the board". If a parent requests a board to enroll a non-resident student, the board must enroll the child if it has "sufficient facilities and resources" and if it is agreed that the fees authorized by the School Act will be paid. The tuition fee is limited by the School Act to a fee which "does not exceed the net average cost per student of maintaining the education program in which the individual is

enrolled" (School Act, s. 32(3)).

The Act does, however, permit school boards to "charge fees with respect to instructional supplies or materials" (s. 44(2)(i)) and to "charge the parent of a student receiving transportation provided by the board any fee determined by the board" (s.34(3)). Section 104(1)(e) provides that a parent or a student who is sixteen years of age or older "may request in writing that the Minister review the decision of the board" with respect to its decision on "the amount and payment of fees and costs". Section 105 provides for the manner in which the Minister may review the matter and the Minister may make any decision "that appears to him to be appropriate in the circumstances".

In Calgary Board of Education v. Thompson, (April 6, 1992), on appeal from Alberta Provincial Court, Mr. Justice Cairns agreed with the Provincial Court which had concluded that the Calgary Board of Education could not charge Mr. Thompson fees for "instructional supplies" and "materials" because the School Act does not specify who is required to pay the fees.

During the current session of the Legislature, the Alberta Government introduced Bill 8, School Amendment Act, 1993 (referred to as Bill 8), and section 13 would make "a parent of a student" responsible for payment of these fees. Since Bill 8 has received only First Reading, it has not yet

become law.

Section 4 of the School Act provides, "Every student is entitled to receive school instruction in English".

Section 5 of the School Act provides, "If an individual has rights under section 23 of the Canadian Charter of Rights and Freedoms to have his children receive school instruction in French, his children are entitled to receive that instruction in accordance with those rights wherever in the Province those rights apply." Section 104(1)(b) provides a parent or a student 16 years of age the right to "request in writing that the Minister review the decision of a board" if the board makes a decision "with respect to (b) a matter referred to in section 5". Section 105 deals with procedures and the decisions the Minister may make on a review.

Under the School Act, an eligible student is entitled to "access to an education program" (s. 3(1)) and a board "shall provide the students attending its schools with those health services that the board considers necessary" (s. 39). Bill 8 (which has not yet become law) would repeal this provision (s. 11).

Section 18 of the School Act provides that the parent of a student may review his child's student record. In addition, a student 16 years of age or older may review his own student record. An individual who "has access to the student under an order made under the Divorce Act (Canada)"

also may review the student record. These individuals are entitled to receive "from a person who is competent to explain and interpret it an explanation and interpretation of the test, test result, evaluation or information" (s. 18).

A person who examines a student record and who forms the "opinion that the student record contains inaccurate or incomplete information" may then "request the board to rectify the matter" (s. 18(7)). An individual entitled to review a student record under section 18 may subsequently "request in writing that the Minister review a decision of the board ... respecting access to or the accuracy or completeness of the student record" (s. 104). The manner in which the Minister may review this request and the decisions the Minister may make are outlined in section 105.

The School Act provides, "If a board makes a decision on appeal to it or otherwise with respect to (a) a home education program", the parent of a student under 16 or a student 16 or older "may request in writing that the Minister review the decision of the board" (s. 104). Section 105 provides for the manner in which the Minister may review the decision and permits the Minister to "make whatever decision ... appears to him to be appropriate in the circumstances, and that decision is final."

Pursuant to section 13 of the School Act, a teacher "while providing instruction or supervision" is under an

obligation to provide certain educational services including the duty to "provide instruction competently to students", to "teach courses of study and education programs that are prescribed, approved or authorized" pursuant to the School Act, and to "regularly evaluate students and periodically report the results to the student, his parents and the board".

The principal's obligations with respect to the education of students include the duty to "provide instructional leadership" (s. 15(a)), to "ensure that the instruction provided by the teachers employed in the school is consistent with the courses of study and education programs prescribed, approved or authorized pursuant to this Act" (s. 15(b)) and to "supervise the evaluation and advancement of students" (s. 15(g)).

The School Act also sets out requirements for private schooling and home education as well as for public schooling. Section 22 deals with registration and accreditation of private schools and it authorizes the Minister to "make regulations respecting private schools". Section 23 deals with a "home education program" and authorizes the Minister to "make regulations respecting home education" (s. 23(3)). It requires that the home education program be "under the supervision of a board" (s. 23(1)(b)) or, if the program is in unorganized territory, "the Minister shall act as a board" (S.23(2). Pursuant to

sections 22 and 23, the Minister has made the Private Schools Regulation (Alberta Regulation 39/89) and the Home Education Program Regulation (Alberta Regulation 37/89), respectively.

Compulsory School Attendance

The Alberta School Act makes school attendance compulsory for individuals who are six or older on September 1 of a year and younger than 16 (s. 8(1)). Section 1(1)(q) defines "school" as

> a structured learning environment through which an education program is offered to a student by
> (i) a board,
> (ii) an operator of a private school,
> (iii) an early childhood services operator,
> (iv) a parent giving a home education program, or
> (v) the Minister.

Exceptions include a student subject to suspension (s. 8(3)(c)) or expulsion (s. 8(3)(d)). Pursuant to section 8(3)(e)(ii), a student may also be excused for a specified period if two conditions are fulfilled. First, the board or, if the student is enrolled in a private school or resides in an unorganized territory, the Minister "determines that the parent of the student has shown sufficient cause as to why the student should not be

required to attend school". Second, the board or Minister, respectively, "excuses the student from attending school for a prescribed period". There is no requirement for consultation with the student about these decisions which can significantly affect his education and his future opportunities in life.

A student who is required under section 8 of the School Act to attend school but who refuses to do so may become subject to an order of the Attendance Board (School Act ss. 10, 108-112). The Attendance Board's powers include directing the student to attend school (s. 110(1)(a)) and giving "direction ... that it considers appropriate in the circumstances" (s. 110(1)(f)).

Citing the United States decision in Mills v. Board of Education, MacKay (1984b) argues that "compulsory-attendance provisions" in education legislation "provide strong support for the argument that there are legal rights to education" (p. 72). He reasons, "if the state has the right to compel a child to attend school surely the child has a corresponding right to claim some beneficial education from the school" (p. 72).

Limitation of Rights

Although the Preamble of the School Act provides that "the best interests of the student are the paramount considerations in the exercise of any authority under this

Act", the School Act gives students few powers to protect their interests. There is no specific provision stating that the right to education belongs to the child.

The Preamble of the current School Act provides that "parents have a right and responsibility to make decisions respecting the education of their children". The School Act defines "school" as a "structured learning environment through which an education program is offered to a student" (s. 1(1)(q)). The Act includes the positive right of the parent to choose for his child an education program offered by a "board" (s. 1(1)(q)(i)), or by "an operator of a private school" (s. 1(1)(q)(ii)), or by a "parent giving a home education program" (s. 1(1)(q)(iv)), but the program must comply with the requirements of the School Act and applicable regulations. The determination of whether the child has a right of access to an education program offered by a public or a separate school board is also set out in the School Act. (The principles are explained on pp. 53 to 55 of the study.)

The Act grants school boards extensive power to make educational decisions for children and young adults. For example "a resident student of a board, unless otherwise permitted under this Act or by the board, shall attend the school that the board directs the student to attend" (s. 8(2)). Although a school board must consult with parents and "where appropriate" with the student before placing the

student in a special education program (s. 29(3)), there is no requirement that the board follow the wishes of the parent or the student. Similarly, the board could accede to the wishes of the parent and completely disregard the wishes of the student. The right to appeal a special education placement has been discussed. The School Act does not give the parent or the student any right of consultation if the student is not being placed in a special education program.

A student who is sixteen years old but who is not an independent student has limited additional rights specified by the School Act, and most of these rights can be exercised by both the student and his parent: there is no provision for resolving a difference of viewpoints between the student and parent. These rights include the right of "the student, his parent or both of them" to review the school record (s. 18(1)(b)). When a board expels a student, the board "shall notify" both the parent and the student of "their right to request the Minister to review the matter" (s. 19(8)). Also, a school board is required to obtain the student's consent when it "directs a student to attend a work experience program" (s. 37(3)(a)).

An independent student is "entitled to exercise all the rights and powers and receive all the benefits under this Act with respect to himself" that his parent previously had under the School Act (s. 1(3)). Simultaneously, the parent loses these rights, powers or benefits. An independent

student is one who is "18 years of age or older", or one who is "16 years of age or older" and is "living independently" or is "a party to an agreement under section 7(2) of the Child Welfare Act" or "on behalf of whom a social allowance is issued under section 9(1) of the Social Development Act" (s. 1(1)(h).

A student can be suspended or expelled. A student has a right to "make representations to the Board with respect to his suspension" if he is suspended and if he "is not to be reinstated within 5 school days from the date of his suspension" (s. 19(4)). Further, "If a student is expelled, the board shall notify, in writing, the parent and, in the case of a student who is 16 years of age or older, the student of their right to request the Minister to review the matter" (s. 19(7)). Reviews by the Minister are dealt with in sections 104 and 105.

Section 2 of the School Act states, "The exercise of any right or the receipt of any benefit under this Act is subject to those limitations which are reasonable in each circumstance under which the right is being exercised or the benefit is being conferred." It may be difficult to determine how this "reasonableness" test is to be interpreted since there are no guidelines in the legislation. Although the Charter also imposes a "reasonableness test", there are at least guidelines to provide the framework for determining "reasonableness". The

Charter "guarantees the rights and freedoms set out ... subject only to such reasonable limits prescribed by law as can be demonstrably justified in free and democratic society." The fact that the Supreme Court has elaborated the "reasonableness" test in a number of decisions indicates that it is difficult to define even though there are some guides in the Charter. Since the School Act offers no such guidelines, the courts may have even greater difficulty in determining which kinds of "limitations" are "reasonable" in a particular "circumstance under which the right is being exercised or the benefit is being conferred".

The document Framework for Legislation: A New School Act: Draft for Discussion developed for the Office of the Deputy Minister of Education and dated October, 1986, points out, "An education requires that the student participate and contribute in a meaningful way. While the right of access may be extended to a student, it is up to the student to exercise his right to the fullest possible extent" (pp. 1.8-1.9).

The School Act adds responsibilities of students for their own education. Section 7 states that "A student shall conduct himself so as to reasonably comply with the following code of conduct". This code includes the requirements that a student "be diligent in pursuing his studies" and "attend school regularly and punctually".

The School Act provides for the penalties of suspension and expulsion. A teacher may suspend a student from one class period. A principal who suspends a student must inform the student's parents and report the circumstances to them in writing (s. 19(2.2)). The student and parent "may make representations to the board with respect to the suspension" if the student "is not to be reinstated within 5 days from the date of his suspension" (s. 19(4)). In addition, the "parent and, in the case of a student who is 16 years of age or older, the student" may "request that the Minister review the matter" if the student is expelled (s. 19(8)).

Canadian Jurisdictions Other Than Alberta

Summary

Education is within the jurisdiction of the provinces and territories, and each province and territory has passed its own legislation. Although some of the basic concepts such as compulsory education are common to all the jurisdictions, the wording of legislative provisions varies: on the other hand, some features are unique to specific jurisdictions. This section reviews the legislation with a view to enumerating the rights of students that are specified in the legislation.

Attendance is compulsory for nine years in most jurisdictions. Nova Scotia, Ontario, and Quebec require ten years, and British Columbia requires eleven. Generally, the compulsory commencement age is approximately six years, although in British Columbia it is five and in Prince Edward Island and Saskatchewan it is seven. However, all jurisdictions permit students to take advantage of educational opportunities for longer than the compulsory years. Quebec allows children as young as four to have access to "developmental cognitive learning services, to student services and to special services" if the children are "handicapped" or "living in economically disadvantaged areas" (Regulations, s. 33).

Most jurisdictions provide quasi-criminal penalties for parents who do not fulfill their obligation to send their children to school. Although Ontario retains the penalty, the legislation provides for a combination of training, work experience, and school attendance under supervision pursuant to the Supervised Alternative Learning for Excused Pupils Regulation (532/83).

The legislation of four provinces directly provides for some form of a right to access, although some provinces qualify this right based on the pupil's behaviour and ability to benefit from education. Subject to age and residence or citizenship requirements, the Yukon Education Act (1990, s. 10) and the New Brunswick Schools Act (1990,

s. 52) entitle all resident students to access to an appropriate education program. Saskatchewan enumerates the right to education without discrimination in both The Saskatchewan Human Rights Code (1979) and the Education Act (1978), and the Quebec Charter of Human Rights and Freedoms (1977) provides for free public education in accordance with law.

Legislative provision for special education varies; some jurisdictions allow exemptions. As statutes are amended or repealed and replaced, more specific provisions addressing the rights of special needs children are included. The Nova Scotia Handicapped Persons' Education Act (1989) provides for educational services for handicapped persons in facilities developed for that purpose. These facilities are open to residents of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland. School legislation in the Yukon, New Brunswick and Quebec requires, in effect, that students be placed in the least restrictive environment. British Columbia requires integration only if possible, and the Northwest Territories Education Act (1976) provides that students in a special education program remain in the school they would normally attend whenever practical. In both The Quebec Human Rights Commission and Marcil v. The School Board of Saint-Jean-sur-Richelieu (1991) decided by a Human Rights Tribunal and Micheline Godbout in her Capacity as Guardian of Annie B. v. Board of Trustees of the

Asbesterie School Board (1992) decided by the Quebec Superior Court, the student was integrated into the least restrictive environment.

Most jurisdictions impose on teachers the obligations to teach diligently or teach students the curriculum. Some also require students to conform to a code of conduct including diligence in their studies and appropriate behaviour towards others in the school. In some, failure to live up to these requirements can result in suspension.

In most jurisdictions, legislation imposes on either school boards or the Minister of Education the obligation to provide education facilities and programs for students entitled to education. Even if the legislation does not impose this obligation, it would appear that this obligation still exists. In McLeod v. Salmon Arm School Trustees (1952), the British Columbia Court of Appeal held that the board of trustees had an unequivocal duty to provide a school and that economic factors did not justify the refusal to provide students with accommodation and instruction.

British Columbia specifically provides for parental choice in the education of children. Quebec grants older students some rights, but British Columbia is the only jurisdiction to provide, without restriction, that "a student is entitled to consult with a teacher or administrative Officer" about his own "educational program" (School Act, 1989, s. 7).

Three jurisdictions specifically provide for cultural rights. In British Columbia, education may be provided in an Indian language. In the Yukon, programs may be provided in an aboriginal language and the Minister must include the heritage of the Yukon and its aboriginal people and the Yukon environment in prescribed courses of study. In the Northwest Territories, school staff must utilise local cultures in the curriculum and in teaching. In addition, students may be excused from compulsory education while participating in traditional native activities.

Newfoundland

Pursuant to The School Attendance Act (1978), every child who will be six by December 31 of a year and who is younger than 15 on August 31 of a year is subject to compulsory school attendance (s. 3); section 11 provides a penalty for a "person having care of a child who neglects or refuses to cause that child to attend school". Pursuant to The Schools Act (1970), the "School Board" has a corresponding obligation to "organize the means of elementary or secondary education or both" (s. 12(1)), to provide "schools" (s. 12), and to "make provision for the admission to school ... of all children intended to be served" (s. 61) for all children six years of age by December 31 of the school year (s. 61). Section 63 provides that, if the appropriate denominational school is not

"reasonably available", the child has the right to attend a school of another religious faith. Section 81 outlines the duties of teachers including the obligation to "teach diligently and faithfully all subjects he is required to teach".

Part VI of The Schools Act (ss. 82-84) deals with "conduct of pupils". Section 83 provides that "when a pupil fails to apply himself to his studies or does not comply with the discipline of the school" or when there is another "serious reason", the pupil may be given a series of warnings and may ultimately be expelled by the Board with the concurrence of the Department of Education.

The Schools Act deals with special education: section 13(p) provides that "Every School Board may (p) establish special classes of instruction for children who are, for any physical or mental cause, unable to take proper advantage of the regular school courses of study". Section 50 authorizes the Minister to establish a school "in any hospital or similar institution operated by or for the Department of Health and in any prison or similar institution operated by the Department of Justice."

Prince Edward Island

The Prince Edward Island School Act (1988) states, "each regional school board shall admit pupils" (s. 30(1)). Every child between 7 and 16 is of compulsory school age (s.

1(a)) and "shall attend school" (s. 46(3)); the parent has the obligation to "cause the child to attend school" (s. 46(4)). Exceptions include a child "under efficient instruction elsewhere" (s. 46(3)(a)). The Minister "after consultation with the regional school board (a)(ii) may construct and furnish school buildings".

The teacher "shall diligently and faithfully teach to the best of his ability" (s. 34(a)) as well as perform other duties. "The Lieutenant Governor in Council may make regulations (v) respecting the provision of special education" (s. 54(v)).

Nova Scotia

The Nova Scotia Education Act (1989) states, "it is the duty of a teacher in a public school to (a) teach diligently the subjects and courses of study prescribed" (s. 54(a)). Section 59 provides that the "age limits" for compulsory attendance "shall be prescribed in regulations made by the Lieutenant Governor in Council" (s. 59) and "the parents of a child shall cause the child to attend school" (s. 60) although "exemptions" may be "contained in regulations".

The Handicapped Persons' Education Act (1989) states, "The purpose of this Act is to provide through the co-operative efforts of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, educational services, programs and opportunities for

handicapped persons in the said Provinces and for facilities and personnel for the operation and administration of the same and for financing hereof" (s. 2). Section 4 establishes the Atlantic Provinces Special Education Authority. Section 7 provides for resource centres: on the recommendation of the chairman of a school board, the Authority "shall admit" or make other suitable provision for a student who is a resident of the Atlantic provinces (s. 11).

School attendance is compulsory for "every student" who is between six and sixteen (Regulations Pursuant to Section 3 of the Education Act, 1989, s. 62) although permitted exceptions include a child "receiving training and instruction in a private school, at home or elsewhere, equivalent to that which he would be receiving if he were in regular attendance in a school" (Regulations, s. 63 (f)). "A child shall not be required to attend school ... if (d) the mental condition of the child is such as to render his attendance at, or instruction in, school inexpedient or impractical" (Regulations, s. 63(d)).

"A school board shall be responsible for the control and management" of schools (Education Act, s. 33(1)), and "shall provide for the operation and maintenance of schools" (Regulations, s. 10).

A student may be suspended (Education Act, 1989, s. 39), and the principal "may suspend ... students who are

persistently disobedient or who conduct themselves in such manner as to be likely to affect injuriously the proper conduct of the school or the character of other students." (Regulations s. 56(1)).

The Nova Scotia Human Rights Act (1989) prohibits discrimination in "the provision of access to services or facilities" (s. 5(1)(a)) on the basis of "physical disability or mental disability" (s. 5(1)(o)). The definition of "physical disability or mental disability" is wide and includes "loss of abnormality of psychological, physiological or anatomical structure or function" (s. 3(1)(i)), "physical disability" (S. 3(1)(iii)), "learning disability or a dysfunction ... in understanding or using symbols" (s. 3(1)(iv)), and the "condition of being mentally handicapped" (s. 3(1)(v)).

The Human Rights Act defines discrimination as making a "distinction, whether intentional or not", on the basis of the prohibited characteristics with the result of "imposing burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals" (s. 4). Since education is a benefit generally available to students of school age, this legislation should protect the right of all school age children to equality of educational opportunity and would support the right of

special needs children to an appropriate education.

New Brunswick

The New Brunswick Schools Act (1990) states, "the Minister shall provide free school privileges for every person from five to twenty years of age inclusive" who is a "resident" and "has not graduated from high school" (s. 52(1)) and for "persons from three to twenty-one years of age inclusive who are exceptional pupils receiving special education programs and services" (s. 52(2)). A board shall place pupils receiving special education services in "circumstances" where they "can participate with pupils who are not exceptional pupils within regular classroom settings to the extent ... practicable" (s. 53(4)). "Where an exceptional pupil is not able to receive a special education program or service in a school ... the Minister may provide the program or service in the pupil's home or in an institution" (s. 52(5)).

Every teacher shall "diligently and faithfully teach" (s. 70(1)). Pupils can be suspended "for cause" (s. 65).

"Every child shall attend school" (s. 57(2)); exceptions include a child "under efficient instruction elsewhere" (s. 57(3)(a)). A child whose parent does not ensure he regularly attends school may be placed in the protective care of the Minister of Health and Community Services (s. 62).

The Minister may "construct and furnish school buildings" (s. 7(c)).

The Education of Aurally or Visually Handicapped Persons Act, (1975) provides for the "education, training or treatment" in a resource centre established under the Atlantic Provinces Special Authority (s. 3). (Refer to p. 72 above for more information on this Authority.)

Quebec

The Quebec Education Act (1988) states, "Every person is entitled to the preschool developmental and cognitive learning services and to the elementary and secondary instructional services provided for by this Act and by the basic school regulations" (s. 1) and "is also entitled to the student services and special educational services provided for by this Act and the basic school regulations (regime pedagogique)" (s. 1). "The school is an educational institution whose object is to provide education to students" (s. 36). Section 40 of the Quebec Charter of Human Rights and Freedoms (1977) states, "Every person has a right, to the extent and according to the standards provided for by law, to free public education".

Order in Council 73-90 (The Basic School Regulations for Preschool and Elementary School Education, s. 1) and Order in Council 74-90 (The Basic School Regulations for Secondary School Education, s. 1) provide under the heading

"Nature and Objective of Educational Services" that the "purpose" of "educational services" is "to promote the students' overall development and integration into society".

Section 19 of O/C 73-90 and section 18 of O/C 74-90 both state,

> Instructional services in the home or in a hospital are intended for students who are unable to attend school because of their need to receive specialized health services or social services. The purpose of instructional services in the home or in a hospital is to enable students to continue the achievement of the objectives of the programs of studies.

The "age of admission to preschool education is five years on or before the date prescribed by the basic school regulations" and "the age of admission to primary instruction is six years on or before the same date" (Education Act, s. 1). Section 32 of the Basic School Regulations for Preschool and Elementary School Education states that date is "1 October of the school year". However, "handicapped students and students living in economically disadvantaged areas ... who reach the age of four before 1 October of the current school year may be admitted to developmental cognitive learning services, to student services and to special services" (O/C 73-90, s. 33).

School attendance for a child is compulsory "from the first day of the school calendar in the school year following that in which he attains six years of age until the last day of the school calendar in the school year in which he attains 16 years of age or at the end of which he obtains a diploma awarded by the Minister, whichever occurs first" (Education Act, s. 14). "Parents must take the necessary measures to ensure that their child attends school" (Education Act, s. 17). Students are "exempt from compulsory school attendance" in circumstances including expulsion (Education Act, s. 15(3)), and "at the request of parents and after consultation with the advisory committee on services for handicapped students and students with social maladjustments or learning disabilities established under section 185, by reason of a physical or mental handicap which prevents him from attending school" (Education Act, s. 15(2)).

Section 47 of the Education Act states,

> The principal, with the assistance of the parents of a handicapped student, or of a student with a social maladjustment or a learning disability, of the staff providing services to the student, and of the student himself, unless he is unable to give such assistance, shall establish a special education program adapted to the needs of the student.

In addition, "the principal shall see to the implementation and periodical evaluation of the program" (Education Act, s. 47).

Quebec offers educational choice: "the parents of a student or any student of full age shall have a right to choose, every year, the school best suited to their preferences or having the educational project best suited to their personal values" (Education Act, s. 4) although "the exercise of this right is subject to student enrollment criteria established by the school board" (Education Act, s. 4). Provision is made for the spiritual needs of students. "Catholic students ... are entitled to student services of pastoral care and guidance", and "Protestant students ... are entitled to student services of religious care and guidance" (Education Act, s. 6). Students may also "choose ... moral and religious instruction of a religious denomination other than Catholic or Protestant where such instruction is given at that school" (Education Act, s. 5).

"Every school board shall ensure that the persons who come under its jurisdiction are provided the educational services to which they are entitled" (Education Act, s. 208), and "in order to carry out that function, the school board shall ... (2) provide educational services" (Education Act, s. 209(2)).

"Every school board shall establish a program for each student service and special education service contemplated

in the basic school regulations" (Education Act, s. 224). The board "shall ... adapt the educational services provided to handicapped students and students with social maladjustments or learning disabilities according to their needs" (Education Act, s. 234) and "shall adopt ... standards for the organization of educational services for such students with a view to facilitating their learning and social integration" (Education Act, s. 235).

Teachers' rights include "the right to govern the conduct of each group of students entrusted to his care" (Education Act, s. 19). Their duties include an obligation to "contribute to the intellectual training and to the full development of the personality of each student entrusted to his care" (Education Act, s. 22(1)) and to "act in a just and impartial manner in his dealings with his students" (s. 22(4)).

Section 112 of the Education Act provides that school boards be either "French language" or "English language" once the Government divides Quebec, by order, into one group of territories for French language boards and one group of territories for English language boards (s. 111). However, these sections are not in force because the Government has not made an order under section 111.

The board is required to consult the parents' committee on matters including "details concerning implementation .. of the basic school regulations" (Education Act, s. 193(4))

and "the distribution of educational services among the schools" (s. 193(5)).

Ontario

The Ontario Education Act (1980) makes school attendance compulsory in a school year for children who are between six and sixteen on the first day of school (s. 20(1)), although the child is excused from school for reasons including receipt of "satisfactory instruction at home or elsewhere" (s. 20(2)(a)). "The fact that a child is blind, deaf or mentally handicapped is not of itself an unavoidable cause" that will excuse school attendance (s. 20(3)). "A person has the right ... to attend school" in the appropriate jurisdiction (s. 31), and has the right to attend from September 1 of the year in which he attains 6 until the last school day in June in the year in which he attains 21 (s. 32).

Duties of a board includes the obligation to "provide instruction and adequate accommodation" for its pupils (s. 14(6)). "It is the duty of a teacher ... (a) to teach diligently and faithfully" (s. 235(1)(a)). Limits on the size of special education classes are specified by section 35 of Ontario Regulation 262 (1980). Class size ranges from six for children with more severe exceptionalities to sixteen for students with less severe exceptionalities. The maximum class size for gifted students is twenty-five.

A "'hard to serve pupil' means a pupil who, under this section, is determined to be unable to profit by instruction offered by a board due to a mental handicap or a mental and one or more additional handicaps" (Education Act, s. 34(1)(b)). When the principal or parent considers a pupil to be "unable to profit from instruction offered by the board", the matter must be referred to the board which shall appoint a committee (Education Act, s. 34(2)). If the committee concludes that the pupil is either "considered to need placement in a special education program or a "hard to serve pupil", the board must participate in either providing or locating an appropriate placement and the board is required to pay the costs (Education Act, s. 34(8)-(9)). Regulation 262 states, "A hearing handicapped child who has attained the age of two years may be admitted to a special education program for the hearing-handicapped" (s. 33).

Section 182(2) of the Education Act provides that specified boards shall "establish a special education advisory committee" which "may make recommendations to the board in respect of any matter affecting the establishment and development of special education programs and services".

The legislation also sets out appeal procedures culminating with a Special Education Tribunal or, where applicable, a regional Special Education Tribunal (Education Act, s. 36). The procedures for appeals to these tribunals are explained in greater detail in Ontario Regulation 554/81

under the Education Act Respecting Special Education Identification Placement and Review Committees and Appeals.

Section 72 of the Education Act provides every local board shall provide "adequate accommodation" for "trainable retarded pupils" and may have classes or schools for them.

Regulation 262 sets out requirements for pupils including the duties to "be diligent" in mastering their studies (s. 23(1)(a)), to "exercise self-discipline" (s. 23(1)(b)), and to "attend classes punctually and regularly" (s. 23(1)(d)).

Ontario Regulation 532/83 under the Education Act provides for Supervised Alternative Learning for Excused Pupils. This program may include "employment" (1(f)(i)), "completion of a life-skills course" (1(f)(ii)), "continuing studies or other activity directed towards the pupils' needs and interests" (s. 1(f)(iii)) or a combination of these activities (s. 1(f)) while "a pupil is excused from attendance at school either full-time or part-time" (s. 1(f)) and while under supervision.

A student may be suspended "because of persistent truancy, persistent opposition to authority, habitual neglect of duty, the wilful destruction of school property, ... conduct injurious to the moral tone of the school or to the physical or mental well being of others in the school" (Education Act, s. 22(1)). A parent who "neglects or refuses to cause" a child to attend school can be convicted

of an offence (Education Act, s. 28) and a child who is "habitually absent from school" can also be found guilty of an offence (Education Act, s. 29(5)).

Manitoba

Under the Manitoba Public Schools Act (1987) the duties of school boards include the provision of "adequate school accommodation for the resident persons who have the right to attend school" (s. 41(1)). The "right to attend school" is extended to a child who will be 6 within 12 weeks of the date for admission for enrolment, and he "has the right to attend school to an age three years beyond the age of majority" (s. 259).

A student is of "compulsory school age" if he attains the age of 7 within twelve weeks of the "date for admission to enrolment" and is younger than 16. Every parent or other person who has custody of a child in his house "shall ensure that the child attends school" (s. 260(1)). "Every teacher shall (a) teach diligently and faithfully" (s. 96(a)).

Saskatchewan

The Saskatchewan Human Rights Code (1979) states, "every person and every class of persons shall enjoy the right to education in any school ... or other institution or place of learning ... without discrimination" (s. 13(1)). Pursuant to The Education Act (1978), "a board of education

shall (a) administer and manage the educational affairs of the school division ... (d) provide and maintain school accommodation" (s. 91). In addition "no teacher trustee, director, superintendent or other school official shall in any way deprive .. a pupil of access to, or the advantage of, the educational services approved and provided by the board of education" (The Education Act, s. 143(1)). The teacher's duties include the obligation to "diligently and faithfully teach the pupils in the educational program assigned to him" (The Education Act, s. 227(a)).

Every person between 6 and twenty "shall have the right to attend school" (The Education Act, s. 144(1)). Every student has the "right ... to receive instruction appropriate to his age and level of educational achievement" (The Education Act, s. 144(1)), and "a board of education shall provide educational services on behalf of pupils with disabilities" (s. 184(2)). The board shall "provide educational services on behalf of pupils with disabilities", but a board may exclude a "pupil with a disability" from attendance in a particular program when his "presence is detrimental to the education and welfare of other students" (The Education Act, s. 184(2)(a)). If a pupil is "so seriously disabled as to be unable to benefit from any of the instructional services provided by the board", the board must "make available any of its consultant services that may be of assistance and clarify and arrange other services

appropriate to the needs and circumstances of the pupil" (The Education Act, s. 184(2)(b)).

"In the exercise of his right of access" to "schools" and "the benefits of the educational services ... every pupil shall co-operate fully" with board employees and others "assigned" educational responsibilities (The Education Act, s. 149). A student may be suspended (The Education Act, s. 153). Students between 7 and 16 are of "compulsory school age" (s. 2(g)) and the parent "shall take all steps that are necessary to ensure regular attendance" of the pupil; exceptions include home education (The Education Act, s. 156(a)) and "attendance at a registered independent school" (The Education Act, s. 156(a.1)).

British Columbia

The British Columbia School Act (1989) states, "the purpose of the British Columbia school system is to enable learners to develop their individual potential and to acquire knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy" (Preamble). A person who will be 5 by the first day of a school year and younger than 16 must "enroll in an educational program" (ss. 3(1)and (2)). "A person (a) who is of school age, and (b) who is resident of a school district is entitled to enroll in an educational program" (s. 2). An individual is of "school age" if he will be 5 by

December 31 of the school year and is younger than 19 at the beginning of the school year (s. 1). "A student is entitled to consult with a teacher or administrative officer with regard to that student's educational program" (s. 4), and "a parent of a student ... may ... consult with the teacher or administrative officer with respect to the student's educational program" (s. 7(2)).

Minister of Education Order 13/89, the Special Needs Students Order made pursuant to sections 94 and 182(2)(k) of the School Act states, "unless the educational needs of a handicapped student indicate that the student's educational program should be provided otherwise, a board shall provide that student with an educational program in classrooms where that student is integrated with other students who do not have handicaps" (s. 1(2)).

Duties of teachers which are set out in The School Regulation 265/89 include "providing teaching and other educational services" (s. 4(1)).

A parent of a child "may educate the child at home or elsewhere" (School Act, s. 12). Section 17 of the School Act states, "A teacher's responsibilities include ... providing instruction to individual students and groups of students". A board's "responsibility" includes "management of the schools in the school district" (School Act, s. 93(1)), and "a board shall make available an educational program to all persons of school age resident in its

district who enroll" (School Act, s. 94(1)).

Order in Council 1280/89, Statement of Education Policy Order (Mandate for the School System) made pursuant to section 183(3)) of the School Act states that "Government" is "committed to the principle that parents have a historic right of choice regarding the schooling of their children" (Part B: General Policies for the School System, Diversity and Choice).

Students, along with the "opportunity to avail themselves of a quality education", also "have a responsibility to make the most of their opportunities, to respect the rights of others, and to co-operate with fellow students in the achievement of their goals" (Regulation 1280/89, Part C: Policy Statement on Public Schools, Duties, Rights and Responsibilities of Students).

The student's duties include compliance with "school rules" and "the code of conduct and other rules and policies of the board" (School Act, s. 6(1)). A parent "is entitled (a) to be informed ... of the student's attendance, behavior and progress in school" (s. 7(1)).

The School Regulation (Regulation 265/89) provides, "A board shall provide instruction in an Indian language if (a) the board and the council of a band have entered into an agreement" and "the Minister has approved the Indian language program" (s. 14).

The Northwest Territories

The Northwest Territories Education Act (1976) states, "The Minister shall have charge of (e) the provision of special classes, facilities and instruction for students who may require special education programs" (s. 2(2)(e)), and "every Board shall (p) provide instruction appropriate to their learning levels for all students in the education district" (s. 34(p)). Section 108 states, "where a special education program is operated, a student participating in the program shall remain in the school he or she normally would attend wherever that arrangement is practical" (s. 107(2)).

The duties of the teacher include the obligation "to diligently and faithfully teach the students under his or her care" (s. 129(a)). Section 131(2) provides for compulsory attendance, and section 129(4)) states, "every parent shall cause a child to attend school" although there are exceptions such as a "child receiving adequate instruction elsewhere" (s. 131(3)(a)) and a child participating in "traditional native activities" (s. 131(3)(d).

Principals and the superintendent must take into account "the wishes of the voters" in the local jurisdiction "in planning the school program" (s. 92(1)), and "school staff shall utilize aspects of the local cultures" in the curriculum and in teaching (s. 92(2)). "Every Board of

Education" is required to "provide, maintain and furnish school buildings". The Minister "may operate student residences or boarding homes for the accommodation of students" (s. 146).

The Yukon

The "goal of the Yukon education system" is to "develop the whole child" so that students "may become productive, responsible, and self-reliant members of society while leading personally rewarding lives in a changing world" (Preamble to the Yukon Education Act, 1990). The "system will provide a right to an education appropriate to the individual learner based on equality of educational opportunities" (Preamble, Education Act). Persons who are between five years and eight months of age and twenty-one on September 1 of a year are "entitled to receive an education program appropriate to their needs" provided they comply with Canadian residence or citizenship requirements (s. 10). No tuition fees will be charged (s. 12). Section 15 outlines the entitlement of special needs students to a program which shall be "delivered in the least restrictive and most enabling environment ... practicable".

The duties of a School Board include provision of "educational programs" (s. 116.(1)) and provision of equipment and supplies for its schools (s. 116.(1)(g)). Teachers' duties include teaching prescribed courses of

studies and encouraging students "in the pursuit of learning" (s. 168).

Sections 50 and 52 deal with provision of programs "in an aboriginal language", and section 51 requires the Minister to include "studies respecting the cultural, linguistic, and historical heritage of the Yukon and its aboriginal people, and the Yukon environment" in prescribed courses of study.

"Every child who at September 1 in a year is 6 years and 8 months of age or older and is younger than 16 shall attend" school (s. 22) although students may be excused if they are "enrolled in regular attendance at a private school or a home education program" (s. 22(2)). The duties of students including the obligation to "pursue in a diligent manner the courses of study and carry out learning activities as may be required by a teacher" are enumerated in section 38.

CHAPTER IV

The Right to Education

Definition of Education

MacKay (1984b) states, "Defining the concept of 'education' is a large task, and involves as much philosophy as law" (p. 41).

Smith (1980) in discussing Article 13 of ECOSOC states, "'Education' is not defined, and its definition would have raised ideological controversy; but the bare essential must be learning resulting from teaching: teaching producing no learning is not education, and still less is mere attendance at school" (p. 367).

In Campbell and Cosans v. United Kingdom (1982), the European Court of Human Rights stated, "the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development" (p. 303).

The Saskatchewan Court of King's Bench held that "the right to attend school and receive an education" is "the right of the child" and the child is entitled to "receive the benefit of the right" (Wilkinson v. Thomas, 1928, p. 701).

In Wisconsin v. Yoder (1972), Mr. Justice Burger of the United States Supreme Court considered the purpose of education. He concluded, "the State is not concerned with the maintenance of an educational system as an end in itself; it is rather attempting to nurture and develop the human potential of its children" and "to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance".

The European Court of Human Rights addressed the meaning of education in the Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (1968) (referred to as the Belgian Linguistic Case (No.2)). There is a positive "right" to "education" (p. 280). The Court stated that the "first sentence" of Article 2 of First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) (referred to as the First Protocol) "guarantees ... a right of access to educational institutions existing at a given time, but such access constitutes only a part of the right to education. For the 'right to education' to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received" (p. 281).

Basis of The Right to an Education

Education has been viewed as a natural or human right, as a welfare right closely allied to a human right, and as a positive legal right. The boundaries between the three types of rights are blurred. Coughlin (1973) defines a "right" as "a moral power in virtue of which human beings may make just claims to certain things" (p. 8). A natural or human right "belongs to man by reason of his very existence as a human being" (p. 8) and "can neither be granted nor withheld" (p. 9). "Civil rights, by contrast, are the effect of legal enactment" (p. 9), although they may include natural rights. Plant (1988) agrees with Moon's contention that "the welfare state" is "based on the extension of the classical list of human rights to include 'social' or 'welfare' rights" (pp. 30-31). Consequently, "the welfare state" is "an essentially internal development of the idea of human rights" (p. 31). Gutmann (1988) suggests, "Every modern industrial state is a welfare state" and "all have programs whose explicit purpose is to protect adults and children from the degradation and insecurity of ignorance, illness, disability, unemployment, and poverty" (p. 3).

"The state and all institutions have the responsibility to acknowledge [natural rights] and to establish a social order that protects and guarantees under law their free exercise" (Coughlin, 1973, p. 22).

Although the UN Charter (1945) does not define the term "fundamental human rights" which is included in the Preamble, the body of the UN Charter, including Article 13, links the concepts of human rights and fundamental freedoms with the promotion of "international co-operation" in the "economic, social, cultural, educational, and health fields". These are areas of human endeavour that make human life possible and worthwhile. United Nations documents suggest that the larger society will benefit from the education of children because it will become a more humane place. Individuals will also benefit from being educated.

The Preamble to the Universal Declaration (1948) promotes "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world". United Nations members "reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom" (Preamble). United Nations documents expand on the basics and on the ways in which these rights are to be implemented. (Chapter II includes additional detail about UN documents that encompass the right to education.)

Children are in a special position in that, "because of their dependency", they "have a claim to this protector and

guarantor role of the state" (Coughlin, 1973, p. 22). Society has a "commitment" to ensure that children's rights are protected (Coughlin, 1973, p. 22). To support his view, Coughlin cites the Declaration on the Rights of the Child (1959) which provides that "the child shall enjoy special protection ... opportunities and facilities" which will "enable him to develop ... in conditions of freedom and dignity" (pp. 22-23). Assistant Chief Justice Patterson of the Alberta Provincial Court concluded, "the welfare of all child citizens .... includes the universal right of a basic education" (R. v. Bienert, 1985, p. 209). Judge Litsky of the Alberta Provincial Court views "compulsory education as a concomitant of child welfare" (R. v. Powell, 1985, p. 50).

There are "certain needs that must be satisfied if one is to participate in the life of the community" (Moon, 1988, p. 45) and these include education which is "essential to citizenship" (Moon, 1988, p. 45).

In a welfare state "public provision of a (nearly) universally consumed service enables everyone to receive the service without stigma" (Moon, 1988, p. 45). "The welfare state is required to guarantee" certain "social rights" including "education" (Moon, 1988, p. 31) and, thus, the existence of these rights will "give rise to duties ... on the part of political society as a whole" (p. 43).

Gutmann perceives "public schooling" itself is an important "welfare good" (p. 8). MacKay and Krinke (1987)

state, "Education, commonly referred to as a 'welfare' right, a right which makes claims on the government, fits within this new concept of human rights" (p. 75), thus creating "a basic human right to education" (p. 75).

The legal right to education has been discussed in judicial decisions. The Saskatchewan Court of King's Bench held in Wilkinson v. Thomas (1928) that children of the age specified in the Saskatchewan School Act "have the right to attend school and receive an education" (p. 701). In Bales v. Board of School Trustees, School District No. 23 (Central Okanagan) (1985), the British Columbia Supreme Court observed, "eligible children" have "a legal right to an education" (p. 212). In Alberta (Department of Education) and Calgary Board of Education v. Deyell (1984), also decided in 1984 before section 15 of the Charter had come into effect, the Alberta Court of Queen's Bench extended the position taken in Bales, stating "the School Board has a statutory obligation to provide education" to "all children between the ages of 6 and 16" (transcript, p. 16).

The clarity of the dichotomy between natural and legal rights is blurred, especially in light of human rights documents which entrench human rights as legal rights. For example, the European Court of Human Rights, in interpreting the legal right to education contained in Article 2 of First Protocol to the European Convention (1952) pointed out that the "general aim" of the Contracting Parties to the European

Convention "was to provide effective protection of fundamental human rights" (Belgian Linguistic Case (No. 2), 1968, p. 282). In the Belgian Linguistic Case (No. 2), in Kjeldsen et al. (1976), and in Campbell and Cosans (1982), the European Court interpreted specific aspects of the legal right to education. The European Court held in the Belgian Linguistic Case (No.2) that there is a positive "right" to "education" (p. 280) Article 2.

The Canadian Charter of Rights and Freedoms (1982) is a legal document which has its roots in international human rights law. Prior to Second Reading of Bill 27, The School Act, in the Alberta Legislature, the Minister of Education stated, "the Charter has added a whole new dimension to the protection of rights within [the] education system". Commentators suggest that sections 7 and 15 of the Charter are particularly relevant in defining educational rights. Cruickshank (1986, p. 66, p. 69), MacKay (1987b, pp. 109-110), and Vickers and Endicott (1985, pp. 395-99) rely on section 15 (equality rights) of the Charter as the basis for ensuring equality of educational opportunity. Schmeiser and Wood (1984) suggest that section 7 ("the right to life, liberty and security of the person") "could also be used as a foundation for creating a general right to education" (p. 61) while MacKay (1987b) relies on section 7 of the Charter to substantiate his view that "there is a constitutional right to education implicit in the Charter" (p. 108; see

also MacKay and Krinke, 1987, p. 80). Section 7 states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" and MacKay (1984b) believes, "without a proper education, a child lacks both liberty and security of the person" (p. 72-73). MacKay (1984b) notes, "in the United States education rights have been protected as one aspect of liberty under the Constitution. The same approach could be followed in Canada by relying on section 7 of the Charter" (p. 72). Mr. Justice Barry of the Newfoundland District Court stated, "a child's right to education is included in the liberty guaranteed to it in section 7 of the Charter" (R. v. Kind, 1985, p. 338).

MacKay (1984b) states that compulsory attendance provisions in education legislation "provide strong support for the argument that there are legal rights to education" (p. 72). He reasons, "if the state has the right to compel a child to attend school, surely the child has a corresponding right to claim some beneficial education from the school" (p. 72; see also Forer, 1973, p. 34).

Substantive Educational Rights

MacKay (1984b) believes, "rights beyond a simple right of attendance do exist" (p. 42). His enumeration of these rights includes the right of a student to school attendance

in the locality in which he resides and "adequate school accommodation" provided by the school board (p. 42), minority language education in accordance with section 23 of the Canadian Charter (p. 43), such transportation as is necessary to enable the student to attend school (p. 47), and in some provinces the right to denominational schools (p. 12). MacKay (1987b) suggests that defining educational rights in Canada is a process which involves the "concept of equality enshrined" in section 15 of the Charter (p. 103) and that "section 15 dictates that once a benefit is provided to some, it must be provided to all" (MacKay and Krinke, 1987, p. 80).

MacKay and Krinke (1987) point out, "there is some danger in assuming that the right to education derives solely from statute" (p. 73); it is "preferable to view education as a basic human right with the legislature providing the mechanism by which the right is exercised" (pp. 73-74).

Minority Language Rights and Denominational Education

The meaning of the right to minority language education, enshrined in section 23 of the Charter, has been interpreted by the Supreme Court of Canada. In Mahe et al. v. Her Majesty The Queen in Right of Alberta (1990), for example, the Court held that where numbers warrant this right included the right of management and control and the

right to separate facilities. It is beyond the scope of this study to examine in depth the right to minority language education.

The right to denominational education described in the Alberta School Act (1988) is touched on in Chapter III. However, it is beyond the scope of this thesis to examine in detail the scope of the right to denominational education since the evolution of this complex right differs from province to province.

Accommodation

The British Columbia Court of Appeal, in McLeod v. The Board of School Trustees of School District No. 20 (Salmon Arm) (1952), concluded that the board had an "absolute and imperative duty imposed upon it by statute to provide school accommodation for the children within its jurisdiction" (p. 563). Education legislation in most Canadian jurisdictions explicitly requires school boards to provide accommodation for their students.

Access

Judicial views on the right of universal access to an education program have reversed since the Supreme Court of Canada denied a difficult handicapped child access in Bouchard v. School Board of Saint-Mathieu-de-Dixville (1950). Mr. Justice Taylor's comments in Bales v. Board of

School Trustees (1985) would likely apply in all Canadian provinces. He points out, "only since the early 1960s has public schooling been offered generally by school boards in [British Columbia] for children with significant mental disabilities" (p. 208). In Robichaud v. School Board Number 39 (1989), Mr Justice Jean cited New Brunswick education legislation in combination with section 15 of the Charter in support of his view that all children are entitled to an education. This decision also reflects a move toward the inclusion of all children in the school experience.

In Bouchard v. Saint-Mathieu-de-Dixville (1950), a pre-Charter decision, the Supreme Court of Canada concluded that there are exceptions to the general rule that a board must admit all eligible children. In this case, the backward mentality and insubordination of the pupils which was prejudicial to the good order, discipline, and advancement of other pupils was sufficient to justify expulsion. The Court refused to order the board to re-admit these pupils. In light of more recent decisions based on principles of fundamental rights, particularly those made since the advent of the Charter, it is reasonable to conclude that this decision would not be followed to-day.

In Dore and Lapointe v. Drummondville School Board (1983) which was decided before section 15 (the equality section) of the Charter became law, the Quebec Court of Appeal rejected the "universal rights" approach as "the duty

to offer special educational services is not an absolute one" (Poirier, Goguen, and Leslie, 1988, p. 59). The right of access to an education program was denied to Andre Dore because he made no effort whatsoever to benefit from the educational opportunities offered him and he seriously interfered with the learning of other students. The Court pointed out that the student needed not only special education services but also medical care and that the board was not obliged to fill the role of a hospital or institution which would normally provide those services. Although the Court did not oblige the school board to provide education in its classrooms, it pointed out that Andre Dore was entitled to appropriate services in facilities able to provide the medical care he needed (p. 279).

In Carriere v. County of Lamont No. 30 (1978), the board argued that section 142(3) of the former Alberta School Act (1970) exempted it from the obligation to provide an education program for Shelley Carriere, a disabled child. Section 143(2) permitted the board to "temporarily excuse" a pupil "from attendance in a regular classroom" if the child's "special education needs ... are of such a nature that regular classroom experience is not productive or is detrimental to the pupil or to the school". Shelley's parents requested the board to provide education for Shelley. The Court of Queen's Bench, finding that excusing

the student for a year went beyond a "temporary absence", required the board "to accept [Shelley] in its schools" (p. 3) although it did not require the board to provide a specific program.

Mr. Justice Jean of the New Brunswick Court of Queen's Bench in Robichaud v. School Board Number 39 (1990), accepted the principles that "every child has a right to an education within the public school system" and that "a pupil with difficulties has the right to an education which takes his special needs into account" (p. 380). These principles enunciated by the New Brunswick Department of Education are "consistent with section 15(1) of the Charter" (p. 380).

Partners in Education: Principles For A New School Act (1985) outlined the philosophy of the proposed School Act, stating "the focus of the educational system is the student" (p. 10). It recognized, "Clearly there exists in today's society a right to be educated" (p. 31). The Honourable Nancy Betkowski who was the Alberta Minister of Education stated in the Legislature prior to Second Reading of Bill 27, The School Act, "All children in Alberta will be guaranteed access to the education system and to a program which addresses their unique needs" (Alberta Hansard, June 13, 1988, p. 1665).

Adequacy and Appropriateness of Education

The issues of quality and appropriateness were raised

in the Framework Discussion Draft which states, "The matter of a right of access to education raises the question as to whether or not that is simply a right of attendance or whether quality and appropriateness of programming should be considerations" (p. 1.8). Subject to the student's willingness to exercise his right to education, it can be argued that the student has a right of access to a certain standard of education "suitable to his physical, intellectual and emotional needs" (Forer, 1973, p. 35). MacKay (1984b) suggests that "a child has a right to an appropriate education tailored to his or her individual needs" (p. 48). The student's right of access to equitable educational opportunities may be the issue rather than the right of access to identical opportunities. Equity may involve the amount of money spent to educate the student. Equity also requires that sufficient and appropriate pedagogical resources are available to enable the student to exercise his right to education. Appropriate placement is part of the definition of appropriate education. Since the needs and abilities of the student vary, these are factors to be considered in determining the type of education which will enable the student to derive the most profit from education.

A major issue is the determination of how access to the right to education is to be distributed. Gutmann (1988) discusses how much the democratic welfare state should spend

on education and how access to educational resources should be distributed (p. 115). Gutmann's "democratic threshold principle" holds that "inequalities in the distribution of educational goods can be justified if, but only if, they do not deprive any child of the ability to participate effectively in the democratic process" (1988, p. 115). Thus, "Although education above the threshold may rightly be democratically distributed according to meritocratic principles, education below the threshold may not" (1988, p. 115).

Gutmann (1988) discusses the education of handicapped children, particularly those who even "with the best schooling" may not attain "the capacity to deliberate and participate effectively in the democratic process" (p. 123). The author concludes, "We cannot owe such children the same democratic opportunities that we owe other children, but we can owe them a good life relative to their capacities - a life that we judge to be good for them (not simply convenient for us)" (p. 123). However, "an adequate combination" of "education" and "noneducational services" is "bound to be much more costly and demanding than providing average children with a threshold-level education" (pp. 123-24). Gutmann concludes, "the democratic interpretation of equal educational opportunity requires ... that all children be given an education that enables them to participate effectively in the democratic process" (p. 127).

Gutmann believes, "The federal government should play an important financial role in protecting [disadvantaged] children" (p. 124) and "in passing the Education for All Handicapped Children Act ... Congress began to assume such a role" (p. 124).

The Education For All Handicapped Children Act, Public Law, 94-142 (referred to as EAH), passed by the United States federal government in 1975, addresses appropriateness of education, including the provision of related services which enable a student to remain in school. The name of the statute was subsequently changed to the Individuals with Disabilities Education Act (1990) but, since most of the literature and decided cases refer to EAH, the terminology EAH will be used in this thesis. Since education is a state matter, the legislation concentrated on financial incentives to the states to encourage them to provide education to special needs children.

Mr. Justice Taylor of the British Columbia Supreme Court, commenting on the background to the EAH, pointed out that Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (1972) (referred to as PARC) and Mills v. District of Columbia Board of Education (1972) were "the leading cases which preceded the EAH legislation (Bales v. Board of School Trustees, School District 23 (Central Okanagan, 1985, pp. 209-210). In PARC "it was ultimately agreed between the parties ... that the

Commonwealth of Pennsylvania had an obligation to place retarded children in a 'program of education and training appropriate to the child's capacity'" (p. 210), and Mills held that the "preferable" placement" for "mentally retarded children" is a "regular public school class with appropriate ancillary services" (p. 21). MacKay (1987b) suggests that PARC was "the seminal United States decision on the rights of the mentally disabled within the school system" (p. 107).

Section 3 of EAH states, "Congress finds" that of the eight million handicapped children in the United States (s. 601(b)(1)) "more than half ... do not receive appropriate educational services that would enable them to have full equality of opportunity" (s. 601(b)(3)) and "one million... are excluded entirely from the public school system and will not go through the educational process with their peers" (s. 601(b)(4)). States have the "responsibility to provide education for all handicapped children" (s. 601(b)(8)). The "purpose of this Act is to assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" (s. 601(c)).

Some of the issues considered by United States courts in PARC, in Mills, and under EAH have also been identified as concerns by Canadian courts. The courts' interpretation of sections of the EAH may be of interest in interpreting

the application of educational provisions in Canadian legislation.

Cases on EAH have looked at the provision of ancillary services which will enable the child to gain access to educational facilities and to benefit from the education provided. An important issue for United States courts is differentiation between educational and medical needs. The Courts look at two aspects of the situation. First, is the related service "necessary for a child to benefit from special education" (Lehr and Haubrich, 1986, p. 361)? Second, if it is necessary, can it be "offered in a way that neither highly specialized training nor knowledge is necessary to deliver the service" (p. 361)? The handicapped child may need medical assistance during school hours; these services may not require medical personnel for their performance, but they may require that the individual administering the service receive some training.

The United States Supreme Court came to different conclusions in Irving Independent School District v. Tatro (1984) and in Board of Education of the Hendrick Hudson Central School District v. Rowley (1982). In Tatro, the Court held the School District responsible for the provision of clean intermittent catheterization for Amber. This procedure was not categorized as a medical service because a lay person with some specialized training could do the task. The procedure "was a supportive service ... required to

assist a handicapped child benefit from special education" (p. 672) since it enabled Amber to "remain at school during the day" and was "an important means" of providing her with "meaningful access to education" (p. 672). Chief Justice Burger asserted that to receive funds the State must "implement a policy 'that assures all handicapped children the right to a free appropriate public education'" (p. 671).

In the Rowley case, the School District refused to provide a sign language interpreter to Amy Rowley, a hearing impaired student who "comprehends less than half of what is said in the classroom" (p. 718). The Rowleys contended that "the goal of the Act is to provide each handicapped child with an equal educational opportunity" (p. 707). Mr. Justice Rehnquist, who delivered the judgment of the Court, stated there was no requirement for services "to maximize each child's potential 'commensurate with the opportunity provided other children'" (p. 707): rather, the intent of the legislation was "to provide a 'basic floor of opportunity' consistent with equal protection" (p. 708) which requires only "equal access" (p. 708). It is sufficient to provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (p. 710).

Three of nine Justices dissented, taking into consideration both the legislative history of the Act and the fact that "the Act itself announces it will provide a

'full educational opportunity' to all handicapped children" (p. 716). They concluded "the Act intends to give handicapped children an educational opportunity commensurate with that given other children" (p. 717).

The Quebec Court of Appeal also commented on the dichotomy between educational and medical needs in Dore (1983): schools could not be expected to replace medical institutions in the treatment of illness, and there was a limit on the type of medical services a board could be expected to provide. The child was, however, entitled to appropriate services in facilities providing the medical care that he needed.

In Rowley, the majority of the Court held that EAH "cannot be read as imposing any particular substantive educational standard upon the State" (p. 708). The EAH "was designed to open the door of public education to the disabled, but did not guarantee any particular level of instruction once inside" (1986, Yanok p. 50). This view is consistent with some Canadian court decisions. In Alberta (Department of Education) and Calgary Board of Education v. Deyell (1984), the Alberta Court of Queen's Bench observed, "the provisions of [the] School Act ... do not expressly or impliedly undertake to provide a particular quality of education to children with special needs" (pp. 17-18). In Re Dolmage and Muskoka Board of Education (1985), the Ontario High Court of Justice, Divisional Court stated, "it

is not for the court to meddle with the details of implementation of government policies [on the provision of special education] nor with the rate of progress of their implementation" (p. 553).

Controversy may arise when the board and parents have differing views on whether or not a specific child requires a special education program, or, if that fact is agreed upon, the nature of the program which will meet the child's needs. In Re Dolmage and Muskoka Board of Education (1985), the parents appealed to the Ontario High Court from the decision of an Identification Placement Review Committee which had been accepted at all levels of the appeal process. The issue was the determination of "appropriate special education programs and special education services" (p. 548). The parents wished the board to provide a particular type of educational program called "total communication" (p. 549) for their son. The Court found that the board was providing the child with a special education program as required by the Ontario Education Act (1980) and that the child's program and the board's plan to phase in additional special education programming were acceptable as they had been approved by the Minister of Education.

MacKay (1984) refers to the United States decision of Mills v. Board of Education (1972) to support his contention that there is "a duty implicit in the compulsory-attendance provisions to provide an appropriate education for each

child" (p. 54). The Court stated, "the fact that requiring parents to see that their children attend school under pain of criminal penalties, presupposes that an educational opportunity will be available to children. The board of education is required to make such opportunity available" (pp. 872-83). The Court in Dolmage concluded, "the idea of an 'appropriate' special education programme, and the 'appropriateness' of the placement of the pupil, surely involves the idea of suitability, and is not to be confused with a placement which amounts to perfection" (p. 554). In Bales v. Board of School Trustees (1985), Mr. Justice Taylor agreed that "eligible children" are "entitled" to an education "which meets some basic educational standard" (p. 212), but he declined to define that standard.

The issue of mainstreaming was considered in both PARC (1972) and Mills v. Board of Education (1972) which were decided pre-EAH and "these decisions gave impetus to the mainstreaming movement" which was given "legislative force" by EAH (Bales, 1985, p. 210). Integration is an issue in Canadian special education. In Bales (1985), the parents wished their son who had been classified as "moderately handicapped" (p. 206) to be returned to a segregated classroom with partial integration into a neighbourhood school, but the school board had placed him in a segregated school for moderately and severely handicapped students. The Court noted, "Expert evidence ... establishes that

'segregated' schooling for handicapped students such as Arron has come to be regarded by the majority of educators in the field as unwarranted and outmoded" (p. 205), but at the same time, "it has not been established that segregation is actually harmful" (p. 221). The Court concluded that the board had not acted unreasonably in placing Arron in a segregated school, since "the benefits which integration is thought to provide in the education of the handicapped is not a question which a court may decide" (pp. 224-5). Mr. Justice Taylor, after hearing evidence about integration and after considering both PARC and Mills, implied that integration was a desirable policy for the board to implement where possible.

As attitudes and legislation change, courts have been asked to take a closer look at the nature of the education provided to children, especially those with special needs. The resulting decisions are more consistent with the views of the three minority United Supreme Court Justices in Rowley. Justice White for the minority wrote, "The Act intends to give handicapped children an educational opportunity commensurate with that given other children" (p. 717) and "The basic floor of opportunity is ... intended to eliminate the effects of the handicap, at least to the extent that the child will be given equal opportunity to learn if that is reasonably possible" (p. 718). The decisions in Robichaud v. School Board No. 39 (1990) and the

negotiated settlement in Elwood v. Halifax County - Bedford District School Board (1987) (referred to as Elwood) provide examples of courts considering this issue after all sections of the Charter had come into effect. As well, the results of Ministerial reviews in Alberta provide insight into the expectation that boards provide educational opportunities for all students. Since special needs children represent one segment of the school population, it is logical to conclude that courts will, if asked to do so, consider the type and quality of education provided to other groups of students.

The extent of parental input was also an issue in the Nova Scotia case of Elwood. The case began as a legal action in the Supreme Court of Nova Scotia. The settlement negotiated between the parents and the board was registered by the Court and thus became legally binding.

The school board administration, on the advice of its special education staff, "insisted on a special education placement" of the student and "rejected the parents' requests for integration into the neighbourhood school" (MacKay, 1987b, p. 105).

"Luke was well liked by his peers", and "the parents of his fellow students" supported Luke's integration into a regular classroom (MacKay, 1987b, p. 106). The Agreement between the parents and board provided for an integrated placement as well as for parental involvement in determining

the program. The board had retreated from its initial position that it had "the final say" in placement of the child (Mackay, 1987b, p. 111). If there is "a dispute between parents and school authorities, which they cannot resolve themselves, the issue is referred to an independent arbitrator" (MacKay, 1987b, p. 111).

MacKay based his argument on the view a constitutional right to education exists pursuant to section 7 of the Charter which provides "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". MacKay (1987b) claims, "Without an education there is no right to a quality of life, liberty or security of the person" (p. 108). He also argues that the procedural safeguards to which Luke was entitled under this section were not adhered to.

With respect to Section 15 of the Charter (equality rights), Elwood considered what steps would provide "equality" for the individual child. As MacKay (1987b) points out, "One of the most controversial legal issues ... is whether equality for Luke necessitated integration" (p. 109). The Elwoods argued, "placement of Luke in a special class was on the [face] of it a discrimination based on mental disability" which is prohibited by section 15 of the Charter and, therefore, the school board must show under Section 1 of the Charter that such discrimination was

"reasonable" (MacKay, 1987b, p. 109). If, however, the court did not see any apparent discrimination, then, section 1 of the Charter would not come into play. There was no attempt to argue that "integration was the constitutional right of all mentally disabled children" (p. 109).

In Robichaud v. School Board No. 39 (1989), the New Brunswick Court of Queen's Bench granted an injunction which required the school board to "reintegrate" Natalie Robichaud "into a regular eighth grade class", provide her with services, and develop a plan to meet Natalie's needs, pending trial (p. 384).

Mr. Justice Jean pointed out there appeared to be "a conflict between individual and collective rights" (p. 378). He accepted

> "three principles to serve as guidelines for special education services. These principles which are consistent with subsection 15(1) of the Charter of Rights and Freedoms are that:
>
> 'Every child has a right to an education within the public school system;
>
> 'A pupil with difficulties has the right to an education which takes his special needs into account ...;
>
> 'Pupils with difficulties must be taught within the most normalizing environment possible. (pp. 378-9)

In Marcil and The Quebec Human Rights Commission v. St-Jean-sur-Richelieu School Board (1991) (referred to as Marcil), the Human Rights Commission noted the recent important evolution of integration of handicapped students in school (p. 25, translation). The Commission accepted the "cascade" model which keeps the child in the most normal environment possible (p. 26) and which brings necessary services to the child. The Court supports its conclusions by referring to international human rights instruments including the European Convention (pp. 42-3; p. 68), as well as United Nations documents, namely, the Universal Declaration of Human Rights (p. 43), the International Covenant on Civil and Political Rights (p. 44), the Convention on the Rights of the Child (p. 45), the Declaration on the Rights of Disabled Persons (pp. 46-8), and the Declaration on the Rights of Mentally Retarded Persons (pp. 48-9). With a view to the student's development and inclusion in society (p. 56), the Tribunal ordered partial reintegration of David in a regular classroom with the necessary support services paid for by the board and the Quebec government (p. 111-12).

Micheline Godbout in her Capacity as Guardian of Annie B. v. The Board of Trustees of the Asbesterie School Board (1992) was brought by the Quebec Human Rights Tribunal to the Quebec Superior Court. The Board's policy supported placement in the most natural milieu possible (p. 33). The

Court ordered that the child be returned within fifteen days to her neighbourhood school which her parents preferred and ordered the board within thirty days to develop and implement an intervention plan with the necessary specialists (pp. 48-9).

Limited information is available from the Appeals and Student Attendance Secretariat of Alberta Education. As of May, 26, 1992, there had been eight requests for Ministerial review under section 104 of the Alberta School Act relating to the decision of a board in "placement of a student in a special education program". Section 105(1) authorizes the Minister to conduct the review "in any manner he considers appropriate" and section 105(2) provides that "the Minister may, subject to this Act and the regulations, make whatever decision with respect to the matter in dispute that appears to him to be appropriate in the circumstances, and that decision is final."

Of the requests for review, the board's placement decision was upheld in two, the parent's placement decision was upheld in two, a compromise was reached between the board and parents in two, and there were no grounds for review in two.

In the Eggert case which was publicized by the parents through the media, the Minister intervened very directly in the operation of a school, which is inconsistent with the judicial perspective. The Eggerts requested a Ministerial

review of their mentally handicapped daughter's placement by the County of Strathcona in a school "where she would be put in regular classes half the time and put in a class with other mentally handicapped students the rest of the time" (Edmonton Journal, Dec. 28, 1990). The parents wished an integrated placement for their daughter in her neighbourhood school. The Minister ordered that "Margaret be placed in a Grade 1 class ...with low enrolment" at her neighbourhood school, that "an additional teacher be provided" and that "a school-based collaborative approach be used to involve ... school board staff, and her parents in planning and monitoring Margaret's program" (Edmonton Journal, December 22, 1990).

In addition to requests for placement reviews, there have been thirty-three requests for Ministerial review of the decision of a board "with respect to ... (e) the amount and payment of fees and costs" (s. 104(1)(e)). These requests were made by parents who had placed their children in settings other than schools operated by the board and these costs were part of the cost to parents of educating special needs children. Of these cases, five requests were granted, ten were refused, compromise was successful in eleven, a resolution was mediated in one, in five there were no grounds for a review, and in one the board's decision was upheld after a placement by the board. Three reviews were pending and six additional requests had been received.

Procedural Fairness

Natural justice or procedural fairness is a necessary element in making a placement decision. One of the elements of natural justice is the right to be heard. Courts have maintained that boards must consider parents' views when determining the placement of special needs children. In Yarmoloy v. Banff School District No. 102 (1986) the Banff school board, which had previously provided special education to Nicole Yarmoloy in a local school, decided that it was in Nicole's best interest that she be enrolled in a special education program in Calgary. This necessitated Nicole's living away from home five days per week.

Nicole's parents objected and, since the school board had not given them an opportunity to provide input into the decision, the Alberta Court of Queen's Bench referred the matter back to the school board for reconsideration with input from Nicole's parents. The school board ultimately agreed to continue to provide a program for Nicole in a local school.

Mr. Justice Taylor in Bales (1984) also upheld the parents' right to present their point of view to the board before the board made a placement decision (p. 222) and "in seeking a declaration of their rights" when there is inconsistency between Ministry of Education policy and school board practice (p. 225).

EAH requires that the state and its educational agencies establish and maintain procedures "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education" (s. 615(a)).

Participation in Decision Making

Parental input into decisions about both placement and programming provided to handicapped children may be an emerging right. One line of cases supports parental freedom of conscience and religion in determining the type of education a child shall receive, but these deal often with education provided at home or in a school with a homogeneous population or with parental withdrawal of the child from school before the legal school leaving age. Parents are now seeking to be partners with the school board and its employees in publicly provided education.

The extent of parental input was also an issue in Elwood. The school board initially "insisted on a special education placement" and rejected the parents' requests for integration into the neighbourhood school (MacKay, 1987b, p. 105), but the Agreement between the parents and board provided for parental involvement in determining the program in Luke's integrated placement. The board modified its initial position that it alone should make the final determination in placement of the child (Mackay, 1987b, p.

111). If the parents and school authorities could not agree, the issue would then be referred to an independent arbitrator (MacKay, 1987b, p. 111).

Transportation

The EAH requires that "transportation services must be provided to special education students, if necessary to enable them to get to school" (Lehr and Haubrich, 1986, p. 360). Section 602(17) of EAH states, "The term related services means transportation and such ... other supportive services ... as may be required to assist a handicapped child to benefit from special education". Hurry v. Jones (1983) held that transportation includes the means of getting the child from the house to the bus, if necessary. MacKay (1984b) states, "there is an absolute duty [on the school board] to provide conveyance" or to compensate the parent for the cost of doing so (p. 47). The cases do not, however, address whether the board must transport the student from his home to the conveyance or from the conveyance to the school building.

Section 104(1)(e) of the Alberta School Act provides for an appeal to the Minister on "the amount and payment of fees or costs": determination of transportation needs and the decision of who will pay these costs can be an issue in the provision of special education, especially if there is a difference of opinion between parents and a school board

about placement of a special needs student.

Interests In The Child's Education

Introduction

The type of education a child receives is of great significance to the child's future. Since children have the right of access to an education and the right to at least a basic standard of education, the next issue is how best to ensure that the child is able to take advantage of this right. The student, the parent, and the state each have an interest in the child's education and all three interests are "intricately interconnected" (Aiken and LaFollette, 1980, p. viii). This section will examine the question of who determines the type of education the child will receive as well as the basis of the claim of each party to participate in this determination. Both legal and philosophical perspectives will be canvassed.

Much of the case law centres on the conflict between the parents' right to freedom of conscience and religion and the state's "compelling" interest in the "education of the young" (Jones v. R., 1986, p. 297, judgement of La Forest, J.) in the context of the child's right to an education. There are inconsistencies as the decisions may have been based on different public policy considerations. Although the parents' right to freedom of conscience and religion has

been considered, there do not appear to be any court decisions on the child's right to freedom of conscience and religion if the child's views differ from those of the parents. The philosophical perspective suggests a basis for the rights of each of the interests.

A comparison of the approaches adopted in court decisions and a review of the literature can be helpful in devising an approach which will balance the interests of students, parents, and the state which represents society.

Background

At common law, "the father has the control over the person, education and conduct of his children until they are twenty-one years of age" (In re Agar-Ellis, 1883). As Mr. Justice La Forest points out, "For many years the individual and the church played a far more significant role in the education of the young than the state" (Jones v. R., 1986, p. 296). Subsequently, however, "when the state began to take a dominant role, it had to make accommodations to meet the needs and desires of those who had dissentient views" (p. 296). Schabas (1991) suggests, "Justice Wilson, in her dissenting opinion in [Jones v. R.] held that the Charter protects the right [of parents] to educate children in accordance with [the] parents' religious and philosophical convictions" (p. 79). Relying on the European Convention and Article 2 of the First Protocol, Madam Justice Wilson

concluded that the "basis for such protection under the Canadian Charter ... would appear to be the 'liberty interest' of section 7" (Schabas, 1991, p. 79). Mr. Justice La Forest states, "Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society" (Jones v. R., 1986, p. 296). He agrees with the view of the Supreme Court of the United States citing Brown v. Board of Education of Topeka: "Today, education is perhaps the most important function of state and local governments" (p. 297).

Judicial Role

Judicial support of parental rights.

In R. v. Wiebe, (1978) the Alberta Provincial Court supported the right of parents to determine the type of education that their children will receive. Mr. Wiebe was a member of the Holdeman Mennonites whose objection to sending their children to schools operated by the local board of education was that the public school system was doing irreparable harm to Mennonite children and taught values which were contrary to the Mennonites' religious views. The Mennonites attempted to comply with the law by seeking approval of their own school, but both board and provincial education officials refused even to inspect the school. Mr. Wiebe was found "not guilty" of the offence of failing to

send his child to a school approved by a school board under sections 133 (truancy) and 171 (penalties) of the former School Act (1970).

Judge Oliver initially stated that the defendant, Elmer Wiebe, should be found guilty of a strict, or absolute, liability offence: the fact that Mr. Wiebe "acted reasonably and without any blameworthy state of mind" would not provide a defence (p. 40). Once "the essential ingredients of the offence have been proven ... the accused must be convicted" unless "constitutional" issues or the Alberta Bill of Rights dictates a contrary conclusion (pp. 41-2). Judge Oliver concluded that the Alberta Bill of Rights applied to all Alberta legislation unless specifically excluded. The Court considered both Section 2 which protects freedom of religion and the Preamble. Judge Oliver found that Mr. Wiebe's "religious beliefs are irrefutably and irrevocably linked to education" and, applying the Alberta Bill of Rights, concluded that Mr. Wiebe's "freedom to educate [his own] children in conformity with those beliefs is infringed upon" (p. 62). On that basis the accused was acquitted.

Although Judge Oliver considered the traditions and history of the Mennonites and the guarantees given by the Canadian government to induce them to immigrate to Canada, he concluded that from a legal point of view these guarantees had no effect in law in Alberta (pp. 44-45). As well, the Judge related the attempts of the Mennonites to

obtain Ministerial approval for their school and the attempts of both local officials and Department of Education officials to impede these efforts.

In coming to his decision, Judge Oliver considered the decision of the United States Supreme Court in Wisconsin v. Yoder (1972) (referred to as Yoder). The refusal of Amish parents to send their children to school beyond the eighth grade resulted in contravention of state law which required children to attend school until they were 16. The parents had argued that their way of life was intimately connected with their religious beliefs and that their children were growing up to be self-sufficient, productive citizens who did not become involved in socially undesirable activities.

Although the Alberta Court was not under any obligation to follow a United States decision, the court appeared to accept the reasoning that Mennonite children were being trained to be useful and law abiding citizens. It would appear that courts consider genuine religious convictions when they affect the lifestyle of entire, relatively self-contained and self-sustaining communities.

As a result of the decision in Wiebe, the provincial government created a fourth class of private schools which were required to follow a curriculum prescribed or approved by the Minister of Education, but were not required to employ certificated teachers. This category of schools was not entitled to any government funding.

In Yoder, Chief Justice Burger observed, "Compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining Amish community and religious practices as they exist today" (p. 27). He stated that "this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children" (p. 35). In balancing these "legitimate interests" the Court concluded that "the interest of parents in determining the religious upbringing of their children outweighed the claim of the state in its role as parens patriae 'to extend the benefit of secondary education to children regardless of the wishes of their parents'" (Feinberg, 1980, pp. 133-34). The decision exempted Amish children from school attendance beyond grade 8.

In R. v. Anderson, decided on July 10, 1985, Judge Casson of the Alberta Provincial Court held, "Three forms of education are lawful in Alberta: public schooling; private schooling; and tutorage" (p. 16). Tutorage includes a "study program at home" (p. 16). The "right to choose between public or private schooling and tutorage ... is a right given to the parent by the legislature" (p. 17). The Superintendent of Rocky Mountain House School Division No. 15 had refused to certify that Susun Anderson was "under efficient instruction at home", which would have been a sufficient reason to "excuse" her "from attendance at

school" under section 143 of the Alberta School Act (1980) which was then in force. The court concluded that the parents were not guilty of truancy under section 180 (penalty section) of the former School Act (1980) since they had the right to establish the home education program prior to the Superintendent's determination of whether or not the instruction was "efficient".

The Anderson decision followed the reasoning of Judge Fitch of the Alberta Provincial Court in R. v. Wilcox decided on February 14, 1985. In Wilcox, however, the accused had entered a guilty plea.

In R. v. Kind (1985), the Newfoundland District Court held that home instruction "is not an exception to the general rule of compulsory and universal education" (p. 344). The parent had the right to educate his child at home as long as the child received efficient instruction (p. 338) although "this right was subject to reasonable regulation by the state" (p. 339).

Subject to the province's role in establishing educational standards and the school boards' role, "it is the primary right of parents to choose the education of their children" (Partners in Education: Principles for a New School Act, p. 34). This view is reiterated in the Preamble to the Alberta School Act which provides that "parents have a right and a responsibility to make decisions respecting the education of their children". The current Alberta

School Act which became law on December 31, 1988, specifically provides for the three types of education listed in R. v. Anderson (1985), namely, public education, private education, and home education. The Act authorizes the Minister to make regulations; accordingly, the Home Education Program Regulation (AR 37/89) was made pursuant to section 23 and the Private Schools Regulation (AR 39/89) was made pursuant to section 22.

Article 2 of the First Protocol to the European Convention states that "in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions". The "object" of this Article and Article 8 of the European Convention is "essentially that of protecting the individual against arbitrary interference by the public authorities in private family life" (Belgian Linguistic Case (No. 2), 1968, p. 282).

Judicial support for the state's rights.

The issues of freedom of religion and parental choice are intertwined in cases focusing on decisions about the kind of education a child shall receive; the cases include Perepolkin v. Superintendent of Child Welfare (No. 2) (1957), R. v. Hildebrand (1920), and in R. v. Ulmer (1923)

in which the state's interest in education was held to be paramount. Section 2 of the Charter which guarantees freedom of conscience and religion was interpreted in R. v. Powell (1985), R. v. Bienert (1985), and in Jones v. R. (1986) and it is likely that it will be examined again by the courts.

In Jones v. R. (1986), the importance of education was expressed by Mr. Justice La Forest of the Supreme Court of Canada who cited with approval the United State SUpreme Court decision of Brown v. Board of Education of Topeka. He quoted the Brown decision including the statement, "In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" (p. 12). Thus, the province may "place reasonable limits on the freedom of those who ... believe that they should themselves attend to the education of their children and to do so in conformity with their religious convictions" (p. 12).

Judge Oliver's decision contrasts with the outcome of three previous cases - R. v. Hildebrand (1920), R. v. Ulmer (1923), and Perepolkin v. Superintendent of Child Welfare (No. 2) (1957) - in which defendants in similar circumstances were found guilty; however, as Judge Oliver pointed out, no Bills of Rights existed at the time of these earlier decisions. In this corresponding but differently decided line of cases the courts overruled the parental

claim to freedom of religion in favour of the child's right to an "open future". In some of these cases the court relied on the interest of the state as a support for its decision to overrule the parents' arguments that freedom of conscience and religion enabled them to determine the type of education their children would receive.

In R. v. Hildebrand and R. v. Doerksen (1920) which were heard together, the Manitoba Court of Appeal held that the parents were guilty of truancy under the Manitoba School Attendance Act because they did not send their children to a Public School as required by the Manitoba Public School Act (p. 420). The federal Order in Council dated August 13, 1873, stated, "The Mennonites will have the fullest privilege of exercising their religious principles, and educating their children in schools, as provided by law, without any kind of molestation or restriction whatever" (p. 423-24). However, the Court of Appeal did not accept the argument that this Order in Council was sufficient to excuse Mennonite children from compulsory school attendance.

The Alberta Provincial Court in R. v. Wiebe (1978) concluded that this Order in Council was not effective in Alberta although Mennonites "have always thought - and with good reason - that the Order in Council applied to all of Canada" (p. 42).

In R. v. Ulmer (1923) the Alberta Court of Appeal convicted a parent under the Alberta School Attendance Act

of having neglected or refused to cause his child to attend school. The Act provided for an exemption if "in the opinion of a school inspector, as certified in writing ... the child is under efficient instruction at home or elsewhere" (p. 4). The father had argued that his son attended a German Lutheran Protestant denominational school. The teacher was "regularly qualified" (p. 4) and the "authorities of the school were willing to submit to regular government inspection" (p. 4-5). The school inspector had declined to issue the certificate verifying that the child was under efficient instruction and "had refused to announce any reasons for his withholding the certificate except that the work done was unsatisfactory or inefficient" (p. 4). The Court held that the parent was guilty because the certificate had never been issued and the court "could not ... go behind these facts and enquire into the action of the school inspector in refusing the certificate" (pp. 23-24). Neither could the Court address the issue of "whether by some other independent and appropriate proceeding the accused could compel the granting of the certificate" (p. 24). This reasoning was not followed in either Anderson or Wiebe in which the superintendent's refusal to grant a certificate was not the determining factor.

The Court also rejected the argument that Mr. Ulmer was a member of a "'class of persons' who possessed 'any right or privilege with respect to denominational schools'" (p.

21) and whose rights had been preserved by section 17 of the Alberta Act (1905).

In Perepolkin v. Superintendent of Child Welfare (No. 2) (1957) the British Columbia Court of Appeal reviewed the committal of a Doukhobor child to the Superintendent of Child Welfare pursuant to section 7(m) of the British Columbia Protection of Children Act: this legislation provided that "a child 'who is habitually truant from school and is liable to grow up without proper education' may be detained by the Superintendent" (p. 78). The Public School Act required "all children to attend public school unless excused by specified reasons" (p. 73). The parent refused to send his children to school because he objected to the public schools' "materialistic influences and ideals" and its interpretation of "history" to "glorify" the "taking of ... life" (p. 74).

Smith, J.A., concluded in Perepolkin that "the mere fact that bona fide legislation on education may indirectly affect religion in some aspects does not affect its validity" (p. 73). Smith, J.A., in Perepolkin stated, "I absolutely reject the contention that any group of tenets that some sect decides to proclaim form part of its religion thereby necessarily takes on a religious colour" (p. 74).

The argument of infringement of freedom of conscience and religion has been advanced by defendants in cases decided after the Constitution Act, 1982, including the

Charter, come into force. Two aspects of the issue are addressed by courts. The first is whether or not the beliefs are of a "religious" tenor and ought therefore to be protected; the second is whether or not these beliefs are infringed and, if they are infringed, whether such infringement is reasonable within the meaning of section 1 of the Charter.

In R. v. Powell, (1985) the Powells argued that their freedm of religion guaranteed by the Charter was being infringed. Judge Litsky stated, "It is not every expression of religious conviction, however deeply and sincerely held, which is constitutionally protected" (p. 49). He adopted a portion of his own judgement in re: M (L and K) (1978). In that case he had concluded that "freedom of religion is well protected in the province" but it "does not, however, include absolute freedom, especially when it comes to the rights of children". Further, "concern for the child's upbringing is also society's major concern, and it has to be predicated by the court's interpretation" (R. v. Powell, p. 49). Consequently, "the Court cannot allow a proliferation and acceleration of unapproved sub-standard home study espoused by splintered religious factions" (p. 50).

The Judge stated, "The purpose and effect of the School Act ... is not religious but secular and regulatory with intent to set suitable standards of education for the province where it only incidentally affects religious

philosophy such as the Powells'" (p. 50).

In R. v. Bienert (1985), His Honour Assistant Chief Judge Patterson considered the Charter in a truancy charge against Pastor Bienert who refused to seek authority to operate a private school under the former Alberta School Act (1980). He commented, "Citizens ... have a twofold concern about education of young persons" (p. 209) which embraces both the "self-interest" of the state and the interests of the child. The first concern is that "children who are particularly gifted should be given opportunities to permit their talents to flourish, thereby enhancing the state and its subjects" and the second is "the welfare of all child citizens" which "includes the universal right of a basic education to equip young persons to earn a livelihood and enjoy self-fulfillment" (p. 209).

Judge Patterson allowed that the Charter right to freedom of conscience religion (s. 2) could be violated if "coercion is necessary to protect ... the fundamental rights and freedoms of others" (pp. 208-9). He concluded that the requirement for approval to ensure that a private school meets "acceptable educational standards" (p. 209) is a reasonable limitation on Pastor Bienert's freedoms under section 1 of the Charter.

Judge Patterson differentiated this case from Wiebe (1978). Here Pastor Bienert refused to seek Ministerial approval for the school as required by the School Act (1980)

whereas in Wiebe the Minister of Education's representative had acted arbitrarily in refusing to consider the Holdeman Mennonites' request for approval (p. 205).

Pastor Larry Jones was also charged pursuant to Section 180 of the School Act (1980) (penalty section). He claimed that state intervention in the education of his children interfered with his right to freedom of conscience and religion under section 2(a) of the Charter and that he was responsible only to God for the education of his children (p. 290). Like Pastor Bienert, he had refused to apply for approval of his private school under section 143 of the School Act (1980). Mr. Justice La Forest of the Supreme Court of Canada concluded that, although the School Act requirement for registration of a private school "does constitute some interference with [Pastor Jones'] freedom of religion" (p. 295), at the same time "the interest of the province in the education of the young is ... compelling" (p. 297). Consequently, this requirement is not an unreasonable restriction on his right of freedom of conscience and religion (p. 298) under section 1 of the Charter and the Supreme Court of Canada upheld his conviction for truancy.

Four of the seven Supreme Court of Canada Justices held that the compulsory provisions of the School Act (1980) taken as a whole did not offend freedom of conscience and religion guaranteed by Section 2(a) of the Charter; rather,

the School Act (1980) was a flexible piece of legislation which seeks only to ensure that all children receive an adequate education. Legislation which has an insubstantial effect on religion is not a breach of the religious guarantees of section 2(a) of the Charter.

The remaining three judges held that the provincial legislation effected some interference with Pastor Jones' freedom of religion, but that the compelling interests of the state in the education of children renders such interference reasonable pursuant to section 1 of the Charter.

Six of the judges rejected Pastor Jones' argument that the School Act offends his right to life, liberty and security of the person pursuant to section 7 of the Charter. They concluded that, whether or not section 7 of the Charter includes the rights of parents to educate their children as they see fit, a decision on this point was unnecessary because the School Act (1980) did not deprive parents of that right contrary to the principles of fundamental justice. Madam Justice Wilson, dissenting, found that section 7 of the Charter included the right of a parents to bring up their children as they see fit, and impairment of this liberty in sections 143(1) and 180 of the Alberta School Act is not in accordance with the principles of fundamental justice.

Mr. Justice La Forest rejected the approach in R. v. Ulmer (1923) in which the lack of a certificate of efficient instruction led to an automatic finding of guilt on the part of the parent (p. 307). He also pointed out the contrast between the facts and decisions in Jones (1986) and Wiebe (1978). In Wiebe, the Holdeman Mennonites attempted to comply with the law insofar as their religious perspective permitted. They applied for approval of their own private school because they believed that the public school system was doing irreparable harm to their children by teaching values which were contrary to their religious views. They argued that their way of life was inextricably bound to their religion. On the other hand, Pastor Jones rejected all state intervention in the education of children.

Philosophical Considerations

Right of the state.

van Geel (1976) suggests that "the public ... has an important interest in the education of the children" (p. 8). Mr. Justice La Forest in the Supreme Court of Canada decision in Jones v. R. (1986) wrote, "Education is today a matter of prime concern to government everywhere" (pp. 296-7). He quoted with approval part of the decision of the Supreme Court of the United States in Brown v. Board of Education of Topeka (1954): "Today, education is perhaps the

most important function of state and local governments" (p. 12). Brown concluded that education is the "foundation of good citizenship" and "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" (p. 297). Mr. Justice La Forest concluded, "The province has a compelling interest in the quality of education" (p. 303).

His Honour Judge Patterson of the Alberta Provincial Court concluded in R. v. Bienert (1985), "Citizens of any state have a twofold concern about the education of young persons. The first is ... self-interest" (p. 209) and the second concern is "the welfare of all child citizens" which "includes the universal right of a basic education to equip [them] to earn a livelihood and enjoy self-fulfillment" (p. 209).

Since legislation is created by the state, it represents the intentions of the state. Since "the province has a compelling interest in the quality of education" the Alberta School Act (1980) "provides a system to ensure that the requirements [the province] considers necessary to advance this interest are complied with" (Jones v. R., 1986, p. 303).

"Children are not legally capable of defending their own future interests against present infringement by their parents, so that task must be performed for them, usually by the state in its role of parens patriae" (Feinberg, 1980, p.

128). "The supreme courts of the provinces have an inherent responsibility to oversee the welfare of children based on a notion of parens patriae or 'parent of the country'" (MacKay, 1984b, p. 184).

Feinberg (1980) includes in children's rights the "right to an open future" (p. 126) which means that "while he is still a child ... these future options [will be] kept open until he is a ... self-determining adult capable of deciding among them" (p. 126). These rights must be protected while he is still incapable of forming his own decisions. When the child's rights "appear to conflict" with certain parental rights "the courts must adjudicate the conflict" (p. 128). The conflict typically is between the child's right to "growth and development" and "the parents' right to control their child's upbringing" (p. 128). Feinberg states, "among the more difficult cases ... are those that pose a conflict between the religious rights of parents and their children's rights to an open future" (p. 128).

The "existence" of "the child's right to an open future" inevitably "sets limits to the ways in which parents may raise their own children, and even imposes duties on the state, in its role as parens patriae, to enforce those limits" (Feinberg, 1980, p. 140).

Children's "personal interests in growth and development" may also include a facet that is of interest to

the "state as representative of the collective interests of the community" (Feinberg, 1980, p. 128). Feinberg suggests that Mr. Justice Burger's comments in Wisconsin v.Yoder (1972) support this view. "A state has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least provide them with an option other than the life they have led in the past" (p. 138).

Right of the parent.

van Geel (1987) outlines reasons "for recognizing a right in parents to control the upbringing of their children. First, parents, unlike other available agents, can and are more likely to serve the best interests and rights of their children" and "second ... the rights of parents over their children are an extension of the parents' own negative rights not to be interfered with" by the state (p. 16).

"Traditionally, childhood has been associated with immaturity and vulnerability" (Young, 1980, p. 178). Reasons for supporting parents' right to make decisions about the education of their children include the belief that children are not sufficiently knowledgeable, rational, or experienced to make decisions for themselves (Bishop, 1980, p. 155) and do not have "an adequate conception of

their present and future interests" (Young, 1980, p. 184) and the belief that parents' power arises from parents' duty to care for their children (Palmeri, 1980, pp. 107). Prior to the development of sufficient maturity, the child "is entitled to the protection of a mature person who will make the choice ... in his best interest" (Arthur, 1973, p. 137).

The right to education belongs to the child (MacKay, 1984b, p. 40) but, "because children have little legal power, parental involvement is vital" (p. 38).

In describing the "role of parents", Partners in Education: Principles for a New School Act (1985), a discussion paper submitted to the Minister of Education by the Policy Advisory Committee for the School Act Review, stated that "as trustee and guardian of the rights of their children it is the responsibility of parents to protect the interests of their children" (p. 34). The Preamble of the School Act states, "parents have a right and responsibility to make decisions respecting the education of their children".

van Geel (1987) writes, "the judiciary's resolution of ... disputes ... between the government and the family has rested on several basic assumptions" (p. 15) which include "the existence of fundamental individual rights and liberties that people simply have as people" that "pre-exist the law and are not rooted in positive law ... the Constitution, the common law, or ... statutes" (p. 15).

These "rights and liberties" include "a right of parents to retain possession of their biological children (absent proof of neglect) and to retain primary control of their upbringing" (p. 15).

These rights are not "absolute" and may be "constrained and regulated by government", but the judiciary approaches the "legitimacy" of such regulation from the "perspective" of "the state as standing in opposition to civil society" (van Geel, 1987, pp. 15-16).

As Chief Justice Burger of the United States Supreme Court stated, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations" (Wisconsin v. Yoder, 1972, p. 35 quoting the United States Supreme Court decision in Pierce v. Society of Sisters).

Right of the child.

In Wilkinson v. Thomas (1928), the Saskatchewan Court of King's Bench stated, "the right is the right of the child itself to receive proper instruction, and it is not a matter left in the discretion of the parents or in the school board" (p. 701). Although courts seem to advocate for children as the beneficiaries of educational rights, the cases suggest that the state protects these rights through the courts: children themselves are not given the power to

exercise their right. Children do not have any automatic right to counsel or to other direct representation of their interests.

With few exceptions, the legislation does not give children under sixteen the tools with which to enforce their rights or to protect their interests nor does it include a specific provision stating that the right to education belongs to the child. The Alberta School Act, for example, takes the philosophical position that "the best educational interests of the student are the paramount considerations in the exercise of any authority under this Act" (Preamble) but children under sixteen are not expressly granted substantive rights. The British Columbia School Act (1989) entitles a "student" to "consult with a teacher or administrative officer" about his own "educational program" (s. 4). Although the Quebec Education Act (1988) accords limited rights to students approaching the age of majority, there is little legislation granting rights to students. The Saskatchewan Human Rights Code (1979, s. 13) acknowledges "the right to education ... without discrimination", and the Quebec Charter of Human Rights and Freedoms (1977, s. 40) provides for "free public education" for every person to the extent provided by law (s. 40).

As van Geel (1987) points out, relatively little "attention has been paid to the natural rights of children vis-a-vis their parents" (p. 16). He continues,

> It is only recently that philosophers have begun to question this tradition and to suggest that children do have certain moral rights in relation to their parents, namely, the right to an education and the right to an 'open future', a right not to have their basic occupational options foreclosed by a narrow educational program. (pp. 16-17)

Students have received "little attention" because they have "few means of raising their concerns" (MacKay, 1984b, p. 293; see also Forer, 1973, p. 26 on children's difficulties in asserting rights in the absence of the right to counsel).

In view of the judicial vacuum, this thesis reviews philosophical perspectives and some suggested arrangements which could empower students. Wilkerson (1973) points out that the Preamble of the Declaration of the Rights of the Child states, "mankind owes to the child the best it has to give" but he notes that "human rights and legal rights are relatively sterile unless they are placed in complementary relationship" (p. vii). Only recently has society developed "a perception of the child as a person with his own full range of rights with societal mechanisms for their enhancement" (p. viii). Wilkerson suggests that society must now consider the future directions of children's rights (p. ix).

MacKay (1984a) does allow that there is some Canadian legislation and case law as well as United States case law which might be used by students as a staging area for establishment of their right to make determinations about the type of education they should receive. He points out that "the degree of parental control diminishes in legal terms as the child's age increases" (1984a, p. 181) and suggests that the Charter may be of some assistance as it will "raise the issue of age discrimination" (p. 175).

Abella (1983) points out that "the child is an inescapable part of the balancing process" and that it is essential to "protect" the "child's right to participate as effectively and fully in the community as possible" (p. 9). Young (1980) argues in favour of children's "interest" in matters relating to their "welfare" and in "achievement" of "goals that reflect what we want to do in and with our lives" (p. 180). He rejects two presumptions that have been used to deny rights to children: the first is that "children and youths have no independent interests that have precedence over the interests of parents" and "other adults" (p. 180), and the second is that children and adolescents "lack the competence to articulate and evaluate their interests for themselves" (p. 180).

Wringe (1980) recommends that "even if pupils are not accorded equal status with adults", they should "be taken seriously and treated as persons whose ends and purposes are

of some account" (p. 281). The "dispute over pupils' rights" involves "how far and under what circumstances children, and more especially pupils, ought to be taken seriously" (p. 281). There is a "need for the establishment in some circumstance of procedural safeguards to ensure that any separable interest cannot just automatically be overridden" (Young, 1980, p. 181). In addition, Forer (1973) recommends that lawyers and other professionals co-operate to "devise statutes, rules, regulations and government institutions to formulate and enforce" children's rights (p. 36).

Palmeri (1980) defines "liberty" as "the sense of being a person, meaning being responsible, having reasons, acting with intentions and purposes" (p. 119). She believes "We want a society that enhances the liberty of a person to develop (creatively) in the fullest sense possible" (p. 119) and that "it is possible to enhance the liberty of children if we allow them to participate more in the decisions about their own education" (p. 120).

Writing in favour of progressive acquisition of rights, Arthur (1973) suggests that a child "should be given the freedom to choose between alternatives only when he can recognize each alternative, forecast its consequences, and compare the advantages and disadvantages" (p. 137). Young (1980) recommends that the initial presumption be that "children and adolescents are competent to evaluate whether

they have interests separable from adults" (p. 181). The validity of the presumption as it relates to each individual can be evaluated (181).

Fleming and Fleming (1987) point out that "congruence between the interests of parents and children may not routinely exist", (p. 394) and that even though courts assume that "parents generally act in their child's best interests" (p. 394) the parents' good intentions "may not adequately represent the best long- and short-term interests of their children" (p. 395).

The rationale for "involving children in special education assessment and placement decisions is premised on research evidence indicating that allowing children to set goals and to plan the means for achieving those goals leads to their increased commitment towards goal attainment" (pp. 395-6).

"Competence to participate is the second key issue involved in assessment of the risks and benefits of minors' involvement in decision-making" (Fleming and Fleming, 1987, p. 397). Fleming and Fleming believe a progressive devolution of responsibility in "psychoeducational decisions assumes, first, that the desired goal is to create a joint adult-child decision-making process and, second, that a strict view of competency requirements may effectively bar most special education populations from participation" (p. 398). The "developmental steps" in "consent" are "assent"

and "full consent" (p. 398).

> Assent does not require a full comprehension of information provided and assumes the ability to express some preference concerning alternatives. In contrast, consent requires thorough comprehension of the problem and alternative solutions and the ability to clearly express a preference (p. 398).

Refusal to allow children to participate in decision-making "denies them any meaningful involvement and deprives the adult decision makers from hearing the special concerns of children" (Fleming and Fleming, 1987, p. 400), but "increased involvement would represent a step toward treating children like persons with their own interests and rights and may have the additional benefit of increasing student motivation to learn new skills" (p. 400). Although Fleming and Fleming suggest that this model is particularly suitable in special education decision-making, it may well be applicable to children at various stages of maturity whether or not they have special needs.

An alternative system utilising the views of the minors is that of the Virginia Task Force on Commitment Statutes Concerning Psychiatric Hospitalization of Minors. The report of this task force "recognizes the differential capacities of minors of various ages and proposes procedures for the voluntary commitment of minors" based on age (p. 400).

"Informed parental consent is alone sufficient to place a child under the age of seven" whereas "the collateral assent of the minor and the consent of the parent are required to place a child age 7 through 13" and "the consent of both groups is required for minors age 14 and older" (Fleming and Fleming, 1987, p. 399). Again, children are given progressively more input into important decisions affecting them. This model could be applied to children who are not facing such significant handicaps.

Devising a method for determining whether or not the child possesses sufficient maturity to make the decision alone, or whether the decision should be made in consultation with the child, may be difficult. Various methods can be used. Age or a subjective measure of maturity are possibilities. The significance of the decision as it relates to the life chances of the child will affect the maturity needed to should make the decision. For example, the determination of the kind of education a child should receive is of greater long term importance than the choice of hairstyle.

Feinberg (1980) believes children should be "permitted to reach maturity with as many open options, opportunities, and advantages as possible" (p. 130). The child should be entitled to an advocate. The age at which a child can instruct counsel will depend on the maturity of the individual.

CHAPTER V

Conclusions, Implications, and Recommendations

Conclusions

1. Is there a right to an education?

Children have a right to an education. The Alberta School Act provides, "Every individual who at September 1 in a year is 6 years of age or older and younger than 19 ... is entitled to have access in that school year to an education program in accordance with this Act" (s. 3). This entitlement is subject to either the lawful admission of the child or his parent to Canada for residence or the citizenship of the child or his parent. Case law supports the view that the right to education belongs to the child (Wilkinson v. Thomas, 1928; R. v. Bienert; Bales v. Board of School Trustees, School District No. 23 (Central Okanagan), 1985), and the school board has "a statutory obligation to provide education" (Alberta (Department of Education) and Calgary Board of Education v. Deyell, 1984).

Although this entitlement is accorded to the child and the School Act states, "the best educational interests of the student are the paramount considerations in the exercise of any authority under this Act" (Preamble), the child's

right is circumscribed by the rights of both the state and parents. The Preamble of the School Act grants parents the right to make decisions about the education of their children. Parents stand in opposition to the arbitrary exercise of the authority of the state (Belgian Linguistic Case (No. 2), 1968, p. 282; see also van Geel, 1987, p. 16; see also Wisconsin v. Yoder, 1972, p. 35., Chief Justice Burger citing the decision in Pierce v. Society of Sisters).

The power of parental decision making is in turn restricted. The School Act grants the school board the authority to make the majority of decisions about the education of children. The courts, representing the state, can both interpret legislation and exercise their inherent "parens patriae" jurisdiction to make decisions in the best interests of the child.

Both customary and conventional international law to which Canada is a party provides for children's right to education. There is support for the view that customary international law as well as conventional international law to which Canada is a party is the law of Canada. Courts generally interpret Canadian law consistently with Canada's international obligations. Alternatively, Canadian courts will look to international law and jurisprudence for guidance in interpreting domestic legislation. The Supreme Court of Canada has acknowledged the value of international law in interpreting the Charter, which has its roots in

international human rights law.

Numerous United Nations documents reiterate the child's right to an education without discrimination, but generally provide parents the right to make educational decisions for their children. Only the recent Convention on the Rights of the Child, to which Canada acceded to in 1991, provides some freedom for children to make their own decisions, but even this Convention supports the significance of parents in making decisions for children.

Both the Charter of the Organization of American States and the Declaration of the Rights and Duties of Man which bind Canada provide for a right to education.

The European Court of Human Rights in interpreting the European Convention has elaborated on the child's right to education while providing for parental influence in determining the kind of education the child will receive. Although Canada is not bound by the European Convention, Canadian courts are likely to at least consider relevant jurisprudence in interpreting Canadian law.

Schmeiser and Wood (1984) as well as MacKay (1987b) suggest that section 7 of the Canadian Charter of Rights and Freedoms provide the foundation for "a right to education", and Cruickshank (1986), MacKay (1987b), and Vickers and Endicott (1985) believe that section 15 of the Charter is the basis of equality of educational opportunity.

The decision of the Supreme Court of Canada in R. v. Jones (1986) suggests that courts will intervene to ensure that a child's right to education is respected in a context that offers the child a more "open future" while taking into consideration parental rights. Although three of the seven Justices allowed that the parent has an "interest" in his children's education and that the School Act does to a limited extent interfere with the parent's "freedom of religion" (La Forest, J., p. 8), the state also has a vital interest in children's education. The state protects children's interests and encourages education of its citizens which is "critically important" to "society" (LaForest, J., p. 11). Since the state's "interest" in children's education is "compelling", the state may "place reasonable limits" on the rights of parents in the education of their children" (La Forest, J., p. 12).

From a philosophical point of view, education can be viewed as a natural or human right or as a welfare right which is an extension of the concept of human rights.

From a policy point of view, it may be desirable to place more emphasis on the student's perspective since the student is the individual most directly affected. His educational experiences will have a profound effect on the opportunities which will ultimately be available to him.

2. Is there a right to an appropriate education?

Children have the right to an appropriate education. Section 29 of the Alberta School Act requires that a student "determined by a board to be in need of a special education program is entitled to access to a special education program". Since special needs students are entitled to an appropriate program, it is logical to conclude that all students are entitled to appropriate programming. The principles that "every child has a right to an education within the public school system" and "a pupil with difficulties has the right to an education which takes his special needs into account" are "consistent with section 15(1) of the Charter" (Robichaud v. School Board No. 39 (1990). Although students may not be entitled to "a placement which amounts to perfection", students are entitled to "appropriate" programming" (Dolmage and Muskoka Board of Education, 1985).

The School Act requires that a board consult the parent and, "where appropriate", the student prior to placing a student in a special education program (s. 29(2)), but the Act does not require the board to follow the recommendations of either the parent or the student. The Act also provides for an appeal by the parent, or a student sixteen years of age or older, or both of them to the board (s. 103). The parent or the student if he is sixteen years of age or older

may ultimately request the Minister to review the issue of placement, and the Minister's decision is final (s. 104).

Courts generally do not require a board to put a specific program in place. However, the School Act does enable the Minister to make any decision "that appears to him to be appropriate in the circumstances", and the Eggert (1990) case is one example of the Minister requiring the board to provide specific services and programming for a special needs child.

If the board cannot meet the needs of a student with special needs, the board must refer the matter to a Special Needs Tribunal which "shall develop or approve a special needs plan" and may apportion the cost (s. 30).

If commentators such as MacKay, and Vickers and Endicott are correct in assessing the impact of section 15 of the Charter on education law, equality of opportunity will increase for all students. Students will be entitled to equitable treatment which does not necessarily mean identical treatment for each student. MacKay (1987b) recommends a collaborative model of decision-making and suggests that, if parents and school authorities cannot agree, the matter be referred to an independent arbitrator.

The philosophical bases of equitable distribution of educational resources are the beliefs that society owes individuals "a good life relative to their capacities" and that all children should be given an education that enables

them to participate effectively in the democratic process (Gutmann, 1988).

3. Who has an interest in a child's education and who determines the type of education the child will receive?

Education benefits the parent, the child, and the state (MacKay, 1984b, p. 70). The parent, the state, and the child all have a legitimate interest in determining the type of education the child will receive. These interests are based on both legal and philosophical grounds.

Legal Considerations

Freedom of religion is an issue that illustrates the conflict between parents and the state in determining the type of education a child will receive. Canadian cases have traditionally stressed either the parents' freedom of religion or the state's right to intervene, but has left little room for children's freedom of religion.

The line of cases of R. v. Hildebrand (1920), R. v. Ulmer (1923), and Perepolkin v. Superintendent of Child Welfare (No. 2) (1957) conclude that the state's interest in education is paramount. The Supreme Court of Canada decision in Jones v. R. modifies this view by acknowledging the role of the parent while supporting the need for state supervision of the education of children. The Court held

that the state can place reasonable limits on the right of parents to educate children in conformity with their own religious views because children need education in order to succeed in life. An education is necessary both to enable individuals to fulfill their role as citizens and to attain self-fulfillment (R. v. Bienert, 1985).

On the other hand, the court respected the religious convictions of parents in R. v. Wiebe where Mennonite parents sought government approval for their school. In addition, the parents provided evidence that the education was suitable for the life the children were expected to live. In view of Jones, however, a court hearing a similar case might be more inclined to require that the parents provide an education that offered the children more opportunities for choice.

Acknowledgment of children's progressive right to make their own decisions, to receive information (Convention on the Rights of the Child, 1991), and to benefit from equality rights and implied education rights in the Charter will provide a sound human rights basis for the belief that children are entitled to a greater right than has previously been accorded them to determine the nature of their own education.

The European Court stated in the Belgian Linguistic Case (No. 2) (1968) that the European Convention "implies a just balance between the protection of the general interest

of the community and the respect due to fundamental human rights while attaching particular importance to the latter" (p. 282). Perhaps, the most rational response is to view the right to education as a right of the child which can be clarified by balancing the interests of the child with the interests of the parents and the state.

Wald (1986) makes a valid point when he states, "if decision-making authority is removed from the realm of parental discretion, it must be decided who will be given the authority - the child or an adult other than the parents" (p. 17). "Courts should not assume more control over school politics than necessary" (Gutmann, 1988, p. 128).

Philosophical Approaches

Judicial resolution of conflicts between parents and the state rests on the assumption that parents have the natural right to retain control of their children's upbringing unless there is strong evidence to the contrary (van Geel, 1987). There is also an assumption that parents know what is best for their children. Since children are generally considered immature and unable to determine the course of action that will best serve their future interests, parents usually make decisions on their behalf.

The state, too, has an interest in the education of children as future citizens. Education is one of the most

important functions of government (Jones v. R., 1986). The court in its role as "parens patriae" has a duty and an inherent jurisdiction to make decisions in the best interests of children. Providing children with an appropriate education that will enable them to earn a living and to seek self-fulfillment falls within this jurisdiction.

Since the right to education belongs to the child (Wilkinson v. Thomas, 1928) and since the child is entitled to access to an education program (School Act, s. 3), children may also have "moral rights" to an education that offers them an "open future" (van Geel, 1987). In practical terms, however, legal rights are necessary to enforce moral rights. Thus, in considering the future of children's rights, it appears to be appropriate to provide children the legal mechanisms to enforce their rights. As individuals mature, they generally attain a clearer understanding of their own best interests and parental control diminishes correspondingly (MacKay, 1984a).

The issue then becomes how best to enhance children's legal right to participate in their own educational decisions. Various arrangements have been suggested to progressively grant children more power in decision-making that affects them. Possible criteria are maturity, ability to comprehend problems and solutions, and age.

4. How can conflict be resolved in the case of inconsistency among the interests of the child, the parent, and the state?

The ideal is achievement of a balance among the interests of the child, the parent, and the state. To date, children's rights have been articulated by parents or agents of the state on behalf of children. Since children have moral and legal rights to education, it is important to seriously consider the child's point of view in making educational decisions. These rights may be exercised on a progressive basis.

If representatives of the three interests cannot agree, they could initially seek the assistance of an arbitrator.

Court intervention could rely on common and statute law plus Charter protection. A review of international human rights law indicates that parental rights in education have been emphasized, perhaps to the detriment of children's rights. The new Convention on the Rights of the Child to which Canada acceded in 1991 places more emphasis on children's rights to education and to information than previous declarations and conventions have done. It offers more of a balance among the rights of the parent, the child, and the state and this approach may indicate the path of the future. Courts are increasingly willing to consider international law and may well find the decisions of international human rights tribunals of relevance. This is

particularly the case since the Charter, with its close connection to international human rights law, came into effect in 1982 and section 15 of the Charter came into effect in 1985.

Implications for Education

Students have a right to an appropriate education, and boards have an obligation to provide a suitable education program to students. Compromise may be the appropriate solution - forcing school boards to keep in mind parents' and students' rights when making decisions. This must be balanced by the need for school administrators to keep order in their schools; however, the need for order does not permit boards and their employees to act arbitrarily and to develop and administer unreasonable policies. The state has an interest in supervising the education of children.

As MacKay points out, it is sometimes necessary to protect children from both unreasonable parents and unreasonable educators. This point was made my Mr. Justice Purvis in the decision in Mahe et al. v. Her Majesty the Queen in Right of the Province of Alberta (1986) when he pointed out that children could not be used as pawns to further the ambitions of parents, especially if the desires of parents were not in the best interests of the children involved (p. 53).

In view of the evolution of human rights, it may be appropriate to seek the opinions of students, especially more mature students, on the type of education they will receive.

MacKay (1987b) suggests that in situations where agreement cannot be reached, a decision by an independent arbitrator may be "a good compromise which respects both the rights of the parents and the statutory powers of the school authorities. It also protects the child against both unreasonable parents and unreasonable educators" by introducing an "outside perspective" (p. 111).

MacKay (1987a) suggests that, although the "judicializing of education is a mixed blessing", the Charter has the "potential to enhance the development of Canadian education" (p. 118). He also mentions that "if school boards, school administrators, and teachers evolve a plan for implementing equality in the school, the courts are less likely to interfere" (pp. 118-19).

Recommendations

Children have a right to appropriate education, but do not have the ability to legally enforce this right themselves. Parents and the state have traditionally represented the rights of children since it was believed that children could not assert their rights in their own best interests. In view of the lack of legal status of

children in regard to their education rights, it is recommended that the following steps be taken to protect each child's right to education and to ensure that each child can have meaningful input into educational decisions about himself.

1. Every province and territory will include in legislation the right of every child to education without discrimination.
2. Legislation will acknowledge that children are the beneficiaries of the right to education.
3. Every province and territory will include in legislation the right of every child to an appropriate education and to the services needed to ensure that the child benefits from the education provided.
4. Provincial governments will adopt policies and allocate sufficient resources to implement each child's right to an appropriate education and services.
5. Each special needs children will be provided with an with an education and services that will enable him to be placed in a setting that is as normal as possible, taking into account the right of all students to an appropriate education.
6. Each province and territory will include in legislation provisions for each child to participate in educational decisions that affect him.

The nature and degree of participation in decision-

making would be progressive, determined by criteria such as the child's maturity or the ability to comprehend the problems and possible solutions.

If there is lack of agreement on the nature of the child's participation, an independent tribunal could arbitrate the dispute. It is important that there be a flexible and practical conflict resolutions mechanism.

7. Provide independent counsel, although not necessarily lawyers, to ensure that the child's interests are represented.

8. If there is a lack of agreement among the parents, the board, and the child about the child's education, the matter be referred to an independent arbitrator, preferably one agreed upon by the parties.

Implications for Further Research

It appears that the research for this thesis has raised a number of questions for further research. First, further study of the effect of section 15 of the Charter is an area which would be of benefit to all children although it is of particular interest to special needs children and their advocates. Second, a detailed analysis of the principles of decided cases and development of a framework for the application of section 15 would be useful at this early stage of Charter development.

Third, in light of provisions of the Charter which has its roots in international human rights law and in view of the Supreme Court's increasing willingness to consider international judicial decisions, it is likely that the significance of international law will increase. Consequently, further analysis of the decisions of international tribunals and of the role of international law in the interpretation of Canadian law will be warranted in the future.

Fourth, a thorough examination of the right to denominational education which has been enshrined in the Charter would involve complex constitutional issues. The right to denominational education was included in Ordinances 29 and 30 (1901) of the Northwest Territories and guaranteed in the Alberta Act and there is case law interpreting this legislation. For example, although the public and separate school boards each have defined areas of responsibility for their resident students, the issue of whether students or parents on their behalf could opt out of this system on the basis of equality of opportunity or other grounds could be investigated. Other questions are whether it is necessary for separate school boards to provide denominational education for their resident students and whether the motives of electors establishing separate school districts are open to scrutiny. Another issue is whether the establishment of separate school jurisdictions could be

streamlined to allow establishment of jurisdictions coterminous with large public jurisdictions such as divisions or counties.

BIBLIOGRAPHY

BOOKS

Aiken, W., LaFollette, H. (1980). General Introduction. In W. Aiken & H. LaFollette (Eds.), Whose child? Children's rights, parental authority, and state power (pp. vii-ix). Totowo: Littlefield, Adams, & Co..

Arthur, Lindsay G. (1973). The Rights of Children. In A. E. Wilkerson (Ed.), Should Children Be as Equal as People? (pp. 118-137). Philadelphia: Temple University Press.

Bala, Nicholas, Fountain, Sherri, & Perron, Francois (1988). Introduction. In Youth and the Canadian Charter of Rights and Freedoms: An analysis of the implications (pp. 1-15). Ottawa: Canadian Youth Foundation [A youth policy institute sponsored by the Canadian Council on Children and Youth].

Bala, Nicholas, Fountain, Sherri, & Perron, Francois (1988). Education. In Youth and the Canadian Charter of Rights and Freedoms: An analysis of the implications (pp. 17-35). Ottawa: Canadian Youth Foundation [A youth policy institute sponsored by the Canadian Council on Children and Youth].

Bezeau, Lawrence M. (1989). Educational administration for Canadian teachers. Toronto: Copp, Clark, Pitman Ltd.

Bishop, Sharon (1980). Children, Autonomy and the Right to Self-Determination. In W. Aiken & H. LaFollette (Eds.), Whose child? Children's rights, parental authority, and state power (pp. 154-176). Totowo: Littlefield, Adams, & Co..

Brown, A.F. (1989). Legal handbook for school administrators. Toronto: Carswell.

Coons, John E., & Sugarman, Stephen D. (1978). Education by Choice: The case for family control. Berkeley: University of California Press.

Coughlin, B.J (1973). The Rights of Children. In A. E. Wilkerson (Ed.), The rights of children: Emergent concepts in law and society (pp. 7-23). Philadelphia: Temple University Press.

Cruickshank, D. (1986). Charter Equality Rights: the Challenge to Education Law and Policy. In Michael E. Manley-Casimir and Terri A. Sussel (Eds.), Courts in the Classroom: Education and the Charter of Rights and Freedoms (pp. 51-76). Calgary, Detselig.

Csapo, Marg, & Goguen, Leonard (Eds.). (1989). Special education across Canada: Issues and concerns for the '90s. Vancouver: Centre for Human Development and Research.

Dickinson, G. M., & MacKay, A.W. (1989). Rights, freedoms and the education system in Canada: Cases and materials. Toronto: Emond Montgomery Publications Limited.

Driedger, Elmer A. (1983). Construction of Statutes (2nd ed.). Toronto: Butterworths.

Feinberg, Joel (1980). The child's right to an open future. In W. Aiken & H. LaFollette (Eds.), Whose child? Children's rights, parental authority, and state power (pp. 124-153). Totowo: Littlefield, Adams, & Co..

Forer, Lois G. (1973). The Rights of Children. In A. E. Wilkerson (Ed.), Rights of Children: The Legal Vacuum (pp. 24-35). Philadelphia: Temple University Press.

Giles, W.H. (1988) Schools and students: Legal aspects of administration. Toronto: Carswell.

Guggenheim, Martin, and Sussman, Alan (1985). Age of majority and emancipation. In The Rights of Young People [An American Civil Liberties Union Handbook] (pp. 187-196). Toronto: Bantam Books.

Gutmann, A. (1988). Introduction. In A. Gutmann (Ed.), Democracy and the welfare state (pp. 3-12). Princeton: Princeton University Press.

Gutmann, A. (1988). Distributing public education in a democracy. In A. Gutmann (Ed.), Democracy and the welfare state (pp. 107-130). Princeton: Princeton University Press.

Houlgate, Laurence D. (1980). The child as a person: recent Supreme Court decisions. In W. Aiken & H. LaFollette (Eds.), Whose child? Children's rights, parental authority, and state power (pp. 221-236). Totowo: Littlefield, Adams, & Co..

Hurlbert, E.E., & Hurlbert, M.A. (1989). School law under the Charter of Rights and Freedoms. Calgary: University of Calgary Press.

Keith-Lucas, A. (1973). Speaking for the child: A role-analysis and some cautions. In A. E. Wilkerson (Ed.), The Rights of Children: Emergent Concepts in Law and Society. Philadelphia: Temple University Press.

Macdonald, R. St J. (1974). The relationship between international law and domestic law in Canada. In Macdonald, R. St J., Morris, G.L., & Douglas, M.J. (Eds.), Canadian Perspectives on International Law and Organization (pp. 88-136). Toronto: University of Toronto Press.

MacKay, Wayne (1984b). Education Law in Canada. Toronto: Emond-Montgomery Publications Limited.

MacKay, W.A. (1991). The Rights Paradigm in the Age of the Charter. In R. Ghosh & D. Ray (Eds.), Social Change and Education in Canada (2nd ed.) (pp. 202-216). Toronto: Harcourt Brace Jovanovich, Canada.

MacKay, A. Wayne, and Sutherland, Lyle I. (1992). Teachers and the Law. Toronto: Emond Montgomery Publications Limited.

Manley-Casimir, Michael E., & Sussel, Terri A. (1986). Courts in the classroom: Education and Charter of Rights and Freedoms. Calgary: Detselig.

Moon, Donald (1988). The Moral Basis of the Democratic Welfare State. In A. Gutmann (Ed.), Democracy and the welfare state (pp. 27-52). Princeton: Princeton University Press.

Nicholl, A.C., & Wuester, T.J. (1989). Charter issues in education. Vancouver: EduServ.

Palmeri, Ann (1980). Childhood's End: Toward the Liberation of Children. In W. Aiken & H. LaFollette (Eds.), Whose child? Children's rights, parental authority, and state power (pp. 105-123). Totowo: Littlefield, Adams, & Co..

Panzeri, Allen. (1990, December 22). Parents win battle to keep handicapped child in local school. The Edmonton Journal, p. A1, A2.

Panzeri, Allen. (1990, December 28). Decision of Minister said likely to affect integration policy. The Edmonton Journal, p. B4.

Poirier, D., Goguen, L., & Perry, L. (1988). Education rights of exceptional children in Canada. Toronto: Carswell.

Robertson, Gerald B. (1987). Mental disability and the law in Canada. Toronto: Carswell.

Schabas, W.A. (1991). International human rights law and the Canadian Charter. Toronto: Carswell.

Sussman, A.N. (1977). The rights of young people. New York: Avon Books.

van Geel, T. (1976). Authority to control the school program. Lexington: Lexington Books.

van Geel, T. (1987). The courts and American education law. Buffalo: Prometheus Books.

Vickers, David, & Endicott, Orville (1985). Mental disability and equality rights. In Anne F. Bayefsky & Mary Eberts (Eds.), Equality rights and the Canadian Charter of Rights and Freedoms (pp. 381-409). Toronto: Carswell.

Walzer, Michael (1988). Socializing the Welfare State. In A. Gutmann (Ed.), Democracy and the Welfare State (pp. 13-26). Princeton: Princeton University Press.

Wilson, J., & Tomlinson, M. (1986). Wilson: Children and the law (2nd ed.). Toronto: Butterworths.

Worsfold, Victor L. (1980). Students' Rights: Education in the Just Society. In W. Aiken & H. LaFollette (Eds.), Whose child? Children's rights, parental authority, and state power (pp. 254-273). Totowo: Littlefield, Adams, & Co.

Wringe, C.A. (1980). Pupils' Rights. In W. Aiken & H. LaFollette (Eds.), Whose child? Children's rights, parental authority, and state power (pp. 274-288). Totowo: Littlefield, Adams, & Co.

Young, Robert (1980). The child's right to an open future. In W. Aiken & H. LaFollette (Eds.), In the Interests of Children and Adolescents (pp. 177-198). Totowo: Littlefield, Adams, & Co..

Zuker, M.A. (1988). The legal context of education. Toronto: OISE Press - Guidance Centre.

PERIODICALS

Abella, Rosalie (1983). Family versus state: The educational rights of the child. Orbit, 14(2), 8-9.

Baldwin, R. Steven (1991). The legal dimensions of parental control in special education. Education and Law Journal, 3(3), 217-261.

Boehm, Bob. (1990, December 28). Decision of Minister said likely to affect integration policy. The Edmonton Journal, p. B4.

Cohen, Maxwell (1986). Towards a paradigm of theory and practice: The Canadian Charter of Rights and Freedoms - International law influences and interactions. In William Pinkney and Daniel Proulx (Eds.), Canadian Human Rights Yearbook, 47-73.

Cohen, M., & Bayefsky, A. F. (March, 1983). The Canadian Charter of Rights and Freedoms and public international law. The Canadian Bar Review, 61(1), 265-313.

Claydon, J. (Fall, 1981). The application of international human rights law by Canadian courts. Buffalo Law Review, 30(4), 727-752.

Claydon, J. (1982). International human rights law and the interpretation of the Canadian Charter of Rights and Freedoms. In E.P. Belobaba & E. Gertner (Eds.), The new Constitution and the Charter of Rights: Fundamental issues and strategies [Special Edition]. Supreme Court Law Review 4, 286-302.

Doctor, Eleanor, & Kennedy, Priscilla (Eds.). (April, 1992). The best interests standard: Is it appropriate in mass education? EduLaw School Newsletter, 3(8).

Doctor, Eleanor, & Kennedy, Priscilla (Eds.). (February, 1990). Focus: Education for Special Needs Students. EduLaw School Newsletter, 1(6).

Duffy, P.J. (1980). English Law and the European Convention on Human Rights. The International and Comparative Law Quarterly, 29.

Fleming, Evelyn R., & Fleming, Donald C. (Fall, 1987). Involvement of minors in special education decision-making. Journal of Law and Education, 16(4), 389-402.

Foster, William F., & Pinheiro, Gayle (1987-88). Constitutional protection of the right to an education. Dalhousie Law Journal, 11, 761-832.

Gutmann, A. (1980). Children, paternalism, and education: A liberal argument. Philosophy and Public Affairs, 9(4), 338-358.

Ince, John G. (Ed.). (November, 1989). Tribunals may set aside their constituent statues. Charter of Rights Newsletter, 3(6).

Johnstone, I. (Winter, 1988). Section 7 of the Charter and constitutionally protected welfare. University of Toronto Faculty Law Review, 46(1), 1-47.

Lehr, Donna (March, 1990). Providing education to students with complex health care needs. Focus on Exceptional Children, 7(22), 1-12.

Lehr, Donna, & Haubrich, Paul (January, 1986). Legal precedents for students with severe handicaps [special issue]. Exceptional Children, 52(4), 358-365.

Lepofsky, M. David (1992). The Canadian judicial approach to equality rights; Freedom ride or rollercoaster? National Journal of Constitutional Law, 1, 315-359.

MacKay, A. Wayne (1984a). The Canadian Charter of Rights and Freedoms: A springboard to students' rights. Windsor Yearbook of Access to Justice, 4, 174-228.

MacKay, A. Wayne (1986). The equality provisions of the Charter and education: A structural analysis [Special Issue - Education In Canada and the Charter of Rights and Freedoms]. Canadian Journal of Education, 11(3) 293-312.

MacKay, A. Wayne (1987a). The Charter of Rights and special education: Blessing or curse? Canadian Journal for Exceptional Children, 3(4), 118-127.

MacKay, A. Wayne (1987b). The Elwood case: Vindicating the educational rights of the disabled. Canadian Journal of Special Education, 3(2), 103-116.

MacKay, A. Wayne (1987c). Pupil allocation - Consumer Free Choice and legitimate board control. Administrative Law Reports, 21, 51-58.

MacKay, A. Wayne, & Krinke, Gordon (1987). Education as a basic human right: A response to special education and the Charter. Canadian Journal of Law and Society, 2, 73-95.

Magone, Michael A. (Winter, 1988). Education malpractice - Does the cause of action exist? Montana Law Review, 49(1), 140-146.

Magsino, Romulo F. (March, 1989). Student rights and the Charter: An analysis of legal and extra-legal considerations. Education Law Journal, 1, 233-260.

McArdle, K.M. (Winter, 1982). Creating an implied educational malpractice action for the handicapped in New York. Albany Law Journal, 46(2), 520-545.

McConnell, Howard, & Pyra, Joe (May, 1989). The impact of some aspects of the Constitution and the Canadian Charter of Rights and Freedoms on Education. Education and Law Journal 2(1), 2-48.

Mendes, E.P. (1982). Interpreting the Canadian Charter of Rights and Freedoms: Applying international and European jurisprudence on the law and practice of fundamental rights. Alberta Law Review, 20(3), 383-433.

Nelson, C. Michael, Rutherford, Robert B., Jr., Center, David B., & Walker, Hill M. (April, 1991). Do public schools have an obligation to serve troubled children and youth? Exceptional Children, 57(5), 406-415.

Osborne, Allan G., Jr., (May, 1992). Legal standards for an appropriate education in the post-Rowley era. Exceptional Children, 58(6), 488-494.

Panzeri, Allen. (1990, December 22). Parents win battle to keep handicapped child in local school. The Edmonton Journal, pp. A1, A2.

Pitsula, Pat, & Manley-Casimir, Michael E. (1989). The Charter, educational administration and U.S. case law: Contrasting legal norms and traditions. Education and Law Journal, 2(1), 49-117.

Ray, Wendy S., Garber, Malcolm, & Wilson, Anne J. (June, 1991). Placement under Bill 82: A legal analysis. Education and Law Journal, 3(3), 263-284.

Rigaldies, Francis, and Woehrling, Jose (1980). Le juge interne canadien et le droit international [The Canadian domestic judge and international law]. Les Cahiers de Droit, 21, 293-329.

Rothstein, L.F. (1985). Accountability for professional misconduct in providing education to handicapped children. Journal of Law and Education, 14(3), 349-393.

Schmeiser, D.A., and Wood, R.J (1984-85). Student Rights Under the Charter. Saskatchewan Law Review, 49(1), 49-67.

Schoeman, Ferdinand (1980-81). Rights of children, rights of parents, and the moral basis of the family. Ethics, An International Journal of Social, Political, and Legal Philosophy, 91, 6-19.

Smith, J.A.C. (1980). The Right to an Appropriate Education. Ottawa Law Review, 12(2), 367-391.

Steinberg, Adria (Ed.). (1989). The mainstreaming debate. The Harvard Education Letter, 5(2).

Sussel, T., and Manley-Casimir, M. (1987). Special education and the Charter; The right to equal benefit of the law. Canadian Journal of Law and Society, 2, 45-71. [See also Reports: Manley-Casimir & Sussel, Report submitted to the Human Rights Law Fund, Department of Justice.]

Vanek, D.C. (1949-50). Is international law part of the law of Canada? University of Toronto Law Journal, 8, 251-297.

Vitello, Stanley J. (1986). The Tatro case: Who gets what and why [special issue]. Exceptional Children, 52(4), 353-356.

Wald, M.S. (Summer, 1989). Introduction. University of Michigan Journal of Law Reform, 18(4), 799-804.

Wald, Pat (1976). Making sense out of the rights of youth. Child Welfare, 55, 379-393.

Wood, Frank H., Johnson, John L., & Jenkins, Joseph R. (January, 1986). The Lora case: Nonbiased referral, assessment and placement procedures [special issue]. Exceptional Children, 52(4), 323-331.

Yanok, James (March/April 1986). Free appropriate education for handicapped children: Congressional intent and judicial interpretation. Remedial and Special Education, 7(2), 49-53.

Zirkel, Perry A., Stevens Paul L. (Summer 1987). The law concerning public education of gifted students. Journal for the Education of the Gifted, 10(4), 305-22.

UNPUBLISHED MANUSCRIPT and PUBLICATIONS OF LIMITED CIRCULATION

Bayefsky, A.F. (1985). Public International Law in the Canadian Legal Context, In Particular, the Context of the Canadian Charter of Rights and Freedoms and Legal Rights. Unpublished Manuscript, Law Reform Commission.

Office of the Deputy Minister. Framework for Legislation: A New School Act (Draft for Discussion) (October, 1986).

Porter, David (April 10, 1981). The authority of the parent to control the education of the child. Children's Law Committee of Alberta.

REPORTS

Drafting Committee 1 - Intervention in the lives of children. Abuse and Neglect (1981). Prepared for the Juvenile justice Standards Project of the Institute of Judicial Administration and the American Bar Association. Ballinger Publishing Company.

Fyfe, Myrna, Chairman, Policy Advisory Committee for the School Act Review (January 11, 1985). Partners in Education: Principles for a new School Act. Alberta Education: Edmonton.

Manley-Casimir, Michael E. & Sussel, Terri A. (15 July, 1986). Special children and the Charter: Constitutional implications for the legal right to an appropriate education. Human Rights Law Fund, Department of Justice. (ERIC Document Reproduction Service No. ED277103).

Turner, David (January, 1990). Holding Governments Accountable for Children's Rights: The Canadian Experience. School of Social Work, University of Victoria, Victoria, B.C..

PROCEEDINGS OF LEGISLATIVE BODIES

Alberta Hansard, the 21st Legislature, Third session vol.1, pp. 2, 429, 614; vol. 2 pp.1581-81; vol.3 pp.1823-24, 1664-67, 2107, 2121, 2126-27, 2259. Speaker of the Legislative Assembly of Alberta.

House of Commons Debates, 1960, p. 5887.

CASES - CANADA

Alberta (Department of Education) and Calgary Board of Education v. Deyell and Human Rights Commission (Alberta), Unreported Decision, October 23, 1984, Alta. Q.B.; affirmed by (1986), 71 A.R., 253 ; 9 C.H.R.R. Decision 777 (1987) (Alta. C.A.).

Antonsen v. Vancouver School District No.39, Action No.1387, [1989] B.C.J. (QL on-line system). (B.C.S.C.).

Bales v. Board of Education of School Trustees, School District 23 (Central Okanagan), 8 Admin.L.R., 202 (B.C.S.C.) (1985).

Bouchard v. School Board of Saint-Mathieu-de-Dixville [1950] S.C.R., 479.

Calgary Board of Education v. Thompson, Unreported Decision, April 6, 1992, Alta. Q.B., on Appeal, No.9101-185631.

Capital Cities Communications v. Canadian Radio-Television Communications Commission, 81 D.L.R. (3d), 609 (S.C.C.) (1978).

Carriere v. County of Lamont No. 30, Unreported Decision, Alta. Q.B. Chambers, August 15, 1978.

Cuddy Chicks Ltd. v. Ontario Labour Relations Board and United Food and Commercial Workers International Union, [1991] S.C.J. No. 42 (QL on-line system); [1991] 2 S.C.R. 5.

Dore and Lapointe v. Drummondville School Board, 4 C.H.R.R. Decision 279, (Que. C.A.) (1983).

Douglas College v. Douglas/Kwantlen Faculty Association and A.G. Canada and A.G. Saskatchewan, [1990] 3 S.C.R., 570.

Edwards Books and Art Limited v. The Queen, and Nortown Foods Limited v. The Queen [1986] 2 S.C.R. 713.

Elwood v. Halifax County - Bedford District School Board (1987). Unreported out of court settlement dated May, 1987. included in MacKay, A. Wayne, The Elwood Case (1987b above).

Henchel v. Board of Medicine Hat School Division No.4, [1950] 2 W.W.R., 368 (Alta. Dist. Ct.).

Hickling v. Lanark, Leeds, and Grenville (Roman Catholic Separate School Board), 40 D.L.R. (4th), 316 (Ont. H.C. Div. Ct.) (1988). Also reported as Re Lanark, Leeds and Grenville County Roman Catholic Separate School Board and Ontario Human Rights Commission 60 O.R. (2d), 441 (1987).

Hicks v. Etobicoke (City) Board of Education, November 23, 1988, O.J. (No.1900, QL on-line system). Ontario District Court, Action No.306622.

In the Matter of a reference as to the Constitutional Validity of Section 17 of the Alberta Act, [1927] S.C.R., 364.

Jones v. R., 31 D.L.R. (4th) 569 (1987); [1986] 2 S.C.R., 284.

Jonson v. The Board of Education of the County of Ponoka No. 3, (1988), 88 A.R., 31 (Board of Reference under the Alberta School Act).

Mahe et al. v. The Queen in Right of the Province of Alberta, (1986) 64 A.R., 35.

Mahe et al. v. The Queen in Right of the Province of Alberta, [1990] 1 S.C.R., 342.

Marcil and the Quebec Human Rights Tribunal v. The School Board of Saint-Jean-sur-Richelieu, Unreported decision of the Quebec Human Rights Tribunal, October 10, 1991, No. 755-53-000001-915.

McKinney v. Board of Governors of the University of Guelph and Attorney General for Ontario, [1990] 3 S.C.R., 229.

McLeod v. The Board of School Trustees of School District No. 20 (Salmon Arm), [1952] 2 D.L.R., 562 (B.C.C.A); Also reported as McLeod v. Board of School Trustees of Salmon Arm, [1951-52] 4 W.W.R. (N.S.), 385.

Micheline Godbout in her Capacity as Guardian of Annie B. v. Board of Trustees of the Asbesterie School Board, Unreported Decision of the Quebec Superior Court, January 27, 1992, Action No. 450-05-000423-919.

Moss v. Boisvert, 74 Alta. L.R. (2d), 344 (1990) (Alta. Q.B., Master in Chambers).

Perepolkin et al. v. Superintendent of Child Welfare (No.2), 20 C.C.C., 67 (B.C.C.A.) (1957).

R. v. Anderson, Unreported Decision, Alta. Prov. Ct., July 23, 1985.

R. v. Bienert, 39 Alta. L.R. (2d), 198 (Alta. Prov. Ct) (1985).

R. v. Big M Drug Mart Ltd., [1985] 3 W.W.R., 481 (S.C.C.), affirming [1984] 1 W.W.R., 625 (Alta. C.A.).

R. v. Cameron, (1983), 39 A.R., 194 (Alta. Q.B.).

R. v. H., 43 Alta. L.R. (2d), 250 (Alta. Prov. Ct., Youth Division) (1986).

R. v. Hildebrand and R. v. Doerksen, 31 C.C.C., 419 (Man. C.A.) (1920).

R. v. Kind, (1985), 50 Nfld. & P.E.I.R., 332 (Nfld. Dist. Ct.).

R. v. Powell (No.2), (1985), 63 A.R.. 43 (Alta. Prov. Ct.).

R. v. Ulmer, [1923] 1 W.W.R., 1 (Alta. C.A.).

R. v. Videoflicks Ltd., 14 D.L.R. (4th), 10 (1985) (Ont. C.A.).

R. v. Wiebe, [1978] 3 W.W.R., 36 (Alta. Prov. Ct.).

R. v. Wilcox, 36 Alta. L.R. (2d), 243 (Alta. Prov. Ct.) (1985).

Re Dolmage and Muskoka Board of Education, 49 O.R. (2d), 546 (Ont. H.C.J., Div. Ct.) (1985).

Re Lanark, Leeds and Grenville County Roman Catholic Separate School Board and Ontario Human Rights Commission, 60 O.R. (2d), 441 (1987); Also reported as Hickling v. Lanark, Leeds, and Grenville (Roman Catholic Separate School Board), 40 D.L.R. (4th), 316 (Ont. H.C., Div. Ct.) (1988).

Re M. (L. and K.), 6 R.F.L. (2d), 297, (1978) (Alberta Prov. Ct., Juvenile Div.).

Re Maw and Board of Education for the Borough of Scarborough et al., 43 O.R. (2d), 694 (Ont. H.C., Div. Ct.) (1984).

Re Townsend et al. and Board of Education for the Borough of Etobicoke, 54 O.R. (2d), 449 (Ont. C.A.) (1986).

Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R., 313.

Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd. et al., [1986] 2 S.C.R. 573.

Robichaud v. School Board Number 39, (1990) 95 N.B.R. 2(2d), 375 (N.B.Q.B.); Reversed by N.B.C.A., April 28, 1989, No. 40/89/CA.

Robichaud v. School Board Number 39, Unreported out of court settlement dated September 28, 1989, approved by N.B.Q.B., No. M/C/1366/88.

Rouette v. Board of Trustees of Regional School Board of the Peninsula, Unreported, Quebec Superior Court, January 7, 1992, No. 110-05-000134-912.

Rowett v. York Region Board of Education, 63 O.R. (2d), 767 (Ont.H.C.J.) (1988); reversed by Ont. C.A., 69 O.R. (2d), 543 (1989).

Schmidt v. Calgary Board of Education and Alberta Human Rights Commission, [1976] 6 W.W.R., 717 (Alta. C.A.).

Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

Vancouver General Hospital et al. v. Stoffman et al., [1990] 3 S.C.R., 483.

Wilkinson v. Thomas et al., [1928] 2 W.W.R. 700 (Sask. K.B., In Chambers)

Yarmoloy v. Banff School District No. 102, 16 Admin. L.R., 147 (Alta. Q.B.) (1986),

CASES - UNITED STATES

Brown v. Board of Education of Topeka, 347 U.S. 483 (U.S.S.C.) (1954).

Board of Education of the Hendrick Hudson Central School District v. Rowley, 73 L.Ed. 2d 690 (U.S.S.C.) (1982).

Hurry v. Jones, (1983), 560 F. Supp., 500 (D.R.I.).

Irving Independent School District v. Tatro, L.Ed. 2d 664 (U.S. Supreme Court, 1984).

McDaniel v. Georgia Association of Retarded Citizens, 53 LW 3594 ((U.S. Supreme Court, 1985).

Mills v. Board of Education of the District of Columbia, (1972), 348 F. Supp., 866 (DDC).

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania et al., (1972) 343 F.Supp. 279 (ED Pa.)u.

Wisconsin v. Yoder, (1972) 406 U.S. 205; 32 L ED 15 (1972).

CASES - UNITED KINGDOM

Council of Civil Service Unions et al. v. Minister for the Civil Service, [1984] A.C., 374.

In Re Agar-Ellis, 24 Law Reports Ch.D., 317 (1883).

Salomon v. Commissioners of Customs and Excise, [1967] 2 Law Reports Q.B.D, 116 (U.K. House of Lords).

CASES - INTERNATIONAL

Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits) [1968] 1 E.H.R.R., 252 (European Court of Human Rights).

Campbell and Cosans v. United Kingdom, [1982] 4 E.H.R.R., 293 (European Court of Human Rights).

Kjeldsen, Busk Madsen and Pederson v. Denmark, [1976] 1 E.H.R.R., 711 (European Court of Human Rights).

STATUTES, ORDERS IN COUNCIL - CANADA

Alberta Act, 1905, 4-5 Ed. VII, c.3 (Canada).

Canadian Bill of Rights, (1960), 8-9 Eliz. II, c.44 (Can.)

Order in Council P.C. 1977-4/3280, Regulations Respecting the Provision of Educational Facilities at Defence Establishments in Canada, November 17, 1977.

STATUTES, ORDERS IN COUNCIL, AND REGULATIONS - TERRITORIES AND PROVINCES

An Act to Provide for the Consolidation and Revision of the Public Statutes of Alberta (Revised Statutes of Alberta Act), S.A. 1922, chap. 49.

An Ordinance respecting Assessment and Taxation in School Districts, Ordinances of the Northwest Territories, 1901, chap. 30.

An Ordinance respecting Schools, Ordinances of the Northwest Territories, 1901, chap. 29.

Bill 41, School Amendment Act, 1992, Alberta, received second reading June 29, 1992, in the Alberta Legislature.

Charter of Human Rights and Freedoms, R.S.Q. 1977, chap. C-12.

Department of Education Act, R.S.A., 1980, chap. D-17.

Education Act, R.S.O., 1980, chap. 129.

Education Act, R.S.N.S. 1989, chap. 136.

Education Act, S.N.W.T., 1976, chap. E-1.

Education Act, S.Q. 1988, chap. 84.

Education Act, S. Y., 1990.

Handicapped Persons' Education Act, R.S.N.S. 1989, chap. 194.

Home Education Program Regulation, A.R. 37/89

Human Rights Act, R.S.N.S., 1989, chap. 214.

Private Schools Regulation, A.R. 39/89.

Ontario Regulation 532/83 under the Education Act: Supervised Alternative Learning for Excused Pupils.

Ontario Regulation 554/81 under the Education Act: Special Education Identification Placement and Review Committees and Appeals.

Order in Council 73-90, Basic School Regulations for Preschool and Elementary School Education, Quebec Education Act, 1988, chap. 84.

Order in Council 74-90, Basic School Regulations for Secondary School Education, Quebec Education Act, 1988, chap. 84.

Order in Council 774/88, School Foundation Program Fund Grants Regulation, Alberta Regulation 382/88, December 22, 1988.

Order in Council 746/76 School Grants Regulation, Alberta Regulation 171/76, July 7, 1976

Provision of Educational Facilities at Defence Establishments in Canada, P.C.O 1968-13/288.

Public Schools Act, R.S.M., 1987, chap. P250.

Regulation 262 under the Education Act, R.R.O. 1980.

Regulations Pursuant to s. 3 of the Education Act, Nova Scotia, 1984.

School Act, R.S.A., 1980, chap. S-3.

School Act, S.A., 1988, chap. S-3.1

School Act, S.B.C., 1989, chap. 61.

School Act, R.S.P.E.I., 1988, chap. S-2.

School Regulation, B.C.Reg. 265/89, Authority: Sections 5 and 189 of the School Act.

Schools Act, S.N.B. 1990, chap. S-5.1.

School Grants Manual (Alberta) 1992-93

Special Needs Students Order, Minister of Education Order No. 13/89, , (Authority: sections 94 and 182(k) of the School Act).

Statement of Education Policy Order (Mandate for the School System), Order in Council 1280/89, British Columbia, Authority: section 183(3) of the School Act.

The Education Act, R.S.S., 1978, chap. E-0-1.

The Saskatchewan Human Rights Code, R.S.S. 1979, chap. S-24.1.

The School Attendance Act, S. Nfld., 1978, chap. 78.

The Schools Act, R.S. Nfld., 1970, chap. 346.

RESOLUTIONS OF SCHOOL BOARDS

Resolution 12380 of St. Albert Protestant School Board of Education, March, 1989.

Resolution 54/89 of the Board of Trustees of St. Albert School District No. 3.

STATUTES - UNITED KINGDOM

British North America Act, 1867 (Constitution Act, 1867) 30-31 Vict., c. 3 (U.K.).

Canadian Charter of Rights and Freedoms Enacted by the Canada Act, 1982, 1982 c. 11 (U.K.).

Constitution Act, 1982, Part I of Schedule B of Canada Act, 1982, 1982 c. 11 (U.K.)

STATUTES - UNITED STATES

Education for All Handicapped Children Act of 1975, An Act to Amend the Education of the Handicapped Act to provide educational assistance to all handicapped children, and for other purposes, November 29, 1975, Public Law 94-142, @ 3(a), 89 Stat. 774; 1975 U.S.C.S. 1400 et. seq.. October 30, 1990, P.L. 101-476, Title IX, @ 901(b) substituted the title Individuals with Disabilities Education Act for the title Education of the Handicapped Act.

INTERNATIONAL INSTRUMENTS

American Declaration on the Rights and Duties of Man, (1949) 43 A.J.I.L. Supp. 133; O.A.S. Off. Rec. OEA/Ser. L./V/II.23, doc. 21, rev. 6. (Adopted by the 9th International Conference of American States in 1948).

Charter of the Organization of American States, (1952) 119 U.N.T.S. 4; (1952) 46 A.J.I.L. Supp. 43. (Adopted by the 9th International Conference of American States in 1948).

Charter of the United Nations, [1945] C.T.S. 7, Cmd. 7015, P. (1946-7) XXV 1, 145 B.S.P. 805.

Convention Against Discrimination in Education, 14 December 1960, 429 U.N.T.S., 93.

Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 U.N.T.S. 221; Cmd. 8969, E.T.S. 5.

Convention on the Elimination of All Forms of Discrimination Against Women , G.A.O.R. 34 Supp. 46 (A/34/46), p. 193; [1982] C.T.S. 31. (Adopted by the General Assembly of the United Nations on December 18, 1979).

Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 U.N.T.S. 195, [1970] C.T.S.28,3 I.L.M. 164, 58 A.J.I.L. 1081.

Convention on the Rights of the Child, Official Records of the General Assembly, Forty-Fourth Session, Doc. A/RES/44/25. (Adopted by the General Assembly of the United Nations on November 20, 1989).

Convention Relating to the Status of Refugees, (1954) 189 U.N.T.S. 137, [1969] C.T.S. 29.

Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N. GAOR, Supp. (No.34) 92, U.N. Doc A/10034 (1975).

Declaration on the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR, Supp. (No. 16) 19 U.N. Doc. A/4354 (1959).

Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N GAOR, Supp. (No. 29) 99, U.N. Doc. A/8429 (1971).

First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 U.N.T.S. 262, Cmd. 9221, E.T.S. no. 9. (Made March 29, 1952).

International Covenant on Civil and Political Rights, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47. (Adopted by the General Assembly of the United Nations on December 16, 1966).

International Covenant on Economic, Social, and Cultural Rights (1976) 993 U.N.T.S. 3, [1976] C.T.S. 46.

International Convention on the Elimination of All Forms of Racial Discrimination, (1960) 660 U.N.T.S. 195, [1970] C.T.S. 28, 3 I.L.M. 164, 58 A.J.I.L. 1081. December 21, 1965).(Adopted by the General Assembly of the United Nations on December 21, 1965).

Optional Protocol to the International Covenant on Civil and Political Rights, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47. (Adopted by the General Assembly of the United Nations on December 16, 1966).

Protocol No.2 to the Convention for the Protection of Human Rights and Fundamental Freedoms Conferring upon the European Court of Human Rights Competence to Give Advisory Opinions, E.T.S. 44.

Universal Declaration of Human Rights, signed Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc.A/810, at 71 (1948), reprinted in [1948] U.N.Y.B. 465.