

The Canadian *Charter of Rights* and the Right to Education for Exceptional Children

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This paper studies the probable impact of section 15 of the Canadian *Charter of Rights and Freedoms* on the rights of disabled students to educational services in provinces with permissive legislation (New Brunswick, Prince Edward Island, Alberta, and British Columbia) and, by comparison, in provinces with mandatory legislation (Nova Scotia, Newfoundland, Quebec, Ontario, Manitoba, and Saskatchewan). The pre-*Charter* effects of the legal distinction between permissive and mandatory legislation on the rights of children with special needs as well as on the right to an appropriate education are discussed. Two interpretations of the Canadian *Charter of Rights and Freedoms*, a minimal intervention and a more active intervention by the courts, are presented with their probable impact.

Le présent article examine l'impact éventuel de l'article 15 de la *Charte canadienne des droits et libertés* sur les droits en matière d'éducation dont jouissent les enfants handicapés demeurant dans les provinces à législation non-normative (Le Nouveau-Brunswick, l'Île-du-Prince-Édouard, l'Alberta, et la Colombie Britannique) et dans les provinces à législation normative (La Nouvelle-Écosse, Terre-Neuve, le Québec, l'Ontario, le Manitoba, et la Saskatchewan). On discute des effets de la distinction faite entre les deux législations sur les droits des enfants exceptionnels et le droit à une éducation appropriée. Les auteurs présentent deux interprétations de la *Charte* ainsi que l'impact éventuel de celles-ci: l'une relative à une intervention minimale des tribunaux, l'autre relative à une intervention plus active de ces derniers.

INTRODUCTION

The rights of students in the school setting have become the subject of analysis in England and Canada only within the past 15 years. According to Wringe (1981, ch. 1), the Canadian students' rights movement, which appeared about 1970, continues to spread slowly (Berkeley, Gatfield, & West, 1978; Horne, 1972; Leduc & de Massy, 1981; Levin & Sylvester, 1972; MacKay, 1984, ch. 3 & 10; Rivard, 1979; Ungar, 1978). The rights of handicapped children have given a new impetus to the students' rights movement (Conférences socio-économiques du Québec, 1981, ch. 5; Cruickshank, 1982; Goguen, 1980; Poirier, 1984; *Report of the special committee on the disabled and handicapped*, 1981; 1982; Smith, 1980; 1981; Treherne & Rawlyk, 1979; Warnock, 1978). For handicapped children,

the problem of students' rights is more fundamental than that established in the 1970s where students were more worried about their rights and liberties within the school system than about their theoretical right to an education. For the handicapped, the issue is whether they do or do not have a right to an education.

An important factor in the issue of the rights of the handicapped to an education has been introduced by the Constitution Act (1982) which enacted the *Canadian Charter of Rights and Freedoms*. The equality rights provision found in s. 15(1) of the *Canadian Charter of Rights and Freedoms* states:

every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and in particular, without discrimination based on ... mental and physical disability.

In April, 1985, three years after the *Charter* was enforced (Canada Act 1982, s.32(2)), this section came into effect. Our intent is to study *the probable impact of the coming into force of s.15 of the Canadian Charter of Rights and Freedoms on the rights of handicapped students to educational services* in provinces with permissive legislation and, by comparison, in provinces with mandatory legislation.

THEORETICAL CONSIDERATIONS

Basis of the Right to Education

Although the basis of the right to education is somewhat unclear, it is generally accepted that the right to an education falls within the category of welfare rights, that is, the category of rights to things without which the individual will sustain some relatively serious or permanent harm (Wringe, 1981, p. 75). Without education, children could not understand the world in which they live and could not exist independently among other human beings. It is thus not surprising that the United Nations has chosen to include the right to education in its *International Covenant on Economic, Social and Cultural Rights* (1966), the *Declaration of the rights of the child* (1959), and the *Declaration of the Rights of the Mentally Retarded* (1971). The latter insists that the mentally retarded be given the same rights as other human beings, including access to education, instruction, and guidance, which will help them develop their aptitudes and capabilities.

Federal and Provincial Jurisdictions in Canada

The right to education is constitutionally recognized by a number of countries, including Russia, China, Egypt, and Venezuela. In those

countries which specifically recognize human rights as part of their national law, the right to education is a legal right (Wringe, 1981, p. 139). This is not necessarily the case in Canada. Although the *International Covenant on Economic, Social and Cultural Rights* (1966) is legally binding in Canada (after an involved federal-provincial consultation process, Canada ratified the *Covenant* in 1976), article 13, which deals with education, is not specific about persons with disabilities and the anti-discrimination clause (s.2(2)) does not mention disabilities. The *Declaration of the Rights of the Mentally Retarded* (1971) only sets standards; it is not binding on member states. Canada does not customarily recognize international law as part of its internal law (Castel, 1976, ch. 2; Jacomy-Millette, 1975, pp. 206–207; Williams & de Mestral, 1979, pp. 29–31), and education is a matter of provincial jurisdiction (Constitution Act, 1867, s.93). We must therefore look at a province's own laws to discover whether the rights of children to education are recognized and protected in that province.

Mandatory vs. Permissive Legislation

The provinces of Canada have recognized the right to an education of all children in two different ways. Six of the 10 provinces (Manitoba, Newfoundland, Nova Scotia, Ontario, Quebec, and Saskatchewan) have enacted mandatory laws requiring school boards provide educational services to all children regardless of special difficulties. The others have enacted permissive laws – laws which merely permit school boards to provide educational services to students with special needs.

Canadian Charter of Rights and Freedoms

Even though the provinces hold sole jurisdiction in the field of education by virtue of the Constitution Act (1867), the Canadian *Charter of Rights and Freedoms* entrenched in the Constitution Act (1982) may seriously impact on this jurisdiction.² The Canadian *Charter of Rights and Freedoms* is the supreme law of Canada (*Law Society of Upper Canada v. Skapinker*, 1984, p. 11). Any statute that is inconsistent with the *Charter* is invalid (Constitution Act, 1982, s.52; Hogg, 1983). Mr. Justice Estey in the first case heard by the Supreme Court of Canada bearing on the Canadian *Charter* said that “with the Constitution Act 1982, comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights” (*Law Society of Upper Canada v. Skapinker*, 1984, p. 11).

Most authors suggest that the Canadian *Charter of Rights and Freedoms* applies to schools (Hogg, 1982, p. 75; MacKay, 1984, p. 17; Swinton,

1982, p. 73) and that anybody exercising statutory authority, such as school boards, is bound by the *Charter*. Recent decisions by Canadian courts confirm the position of these authors (*Black et al. v. Law Society of Alberta*, 1983; *Malartic Hygrade Gold Mines Ltd. v. The Queen*, 1982; *Re McCutcheon and City of Toronto*, 1983).

Plan of Our Study

In this study, we will first clarify the legal distinction between permissive and mandatory legislation. The distinction was important before the enforcing of s.15 of the *Charter*. The pre-*Charter* case law on the subject will be analyzed. The second phase of our study will be more difficult since the full impact of the Canadian *Charter of Rights and Freedom* is not yet known because the *Charter* has only been in force since 1982 and, more specifically, s.15 only since April 1985. Comparison with interpretations given by American jurisprudence to similar clauses will be made and the works of various experts will be consulted. It must be stressed that we are dealing with the *probable* impact of the *Charter* in this study, not necessarily with its *actual* impact. As well, the probable impact of the *Charter* on mandatory and permissive education legislation will be evaluated.

THE PRE-CHARTER EFFECT OF THE LEGAL DISTINCTION BETWEEN PERMISSIVE AND MANDATORY LEGISLATION

All Canadian provinces have enacted legislation providing free school access in the district where he or she lives for every person from 6 to 20 years of age, inclusive, who has not yet graduated from high school. It is a duty of boards to provide schools and of parents to send their children. Although all provinces have acknowledged the right of mentally and physically handicapped children to education (MacKay, 1984, p. 48; Poirier, 1984, p. 154; Smith, 1980, pp. 368–373), a difference exists in the duties of provincial boards with permissive legislation and those with mandatory legislation.

Unlike school boards in provinces with permissive legislation (New Brunswick, Prince Edward Island, Alberta, and British Columbia), which may but need not provide education for handicapped children, school boards in those provinces having mandatory legislation must do so. The difference can be extremely important. Even when money is scarce and budgetary restrictions and cuts are envisaged, school boards in provinces with mandatory legislation may not abandon their duties under these statutes unless the legislation is modified by the legislature whereas those in a province with permissive legislation are free to do so.

A look at some of the pre-*Charter* case law in this area may help us to understand the impact of legislation providing for mandatory special educational services. In the case of *Shelley Joyce Marie Carrière v. County of Lamont No. 30* (1978), a nine-year-old girl suffering from cerebral palsy applied to an Alberta court for a writ of *Mandamus* requiring a school board to permit her to attend school. She had attended Edmonton's Glenrose Hospital School for two years at a cost of \$28,000 to the school board. However, in June 1977, the Glenrose staff had decided that she was mentally retarded and did not belong in the hospital school which served only the physically handicapped, and so they had excluded her. Psychologists at the University of Alberta had subsequently performed a series of tests on her and concluded that she was not mentally retarded but merely required individual assistance at school. The court directed the school board to accept the child into one of its schools or to arrange the needed education for her in a school of another district, assuming that the board of another district could accept the young girl. The court directed the school board to assume, in any event, responsibility for the cost of the girl's education, provided she attended the school to which she was directed.

Another decision dealt with the right of an autistic child to attend school. In *McMillan c. Commission Scolaire de Ste-Foy* (1981), an autistic child had been placed in a kindergarten classroom in an anglophone school for one year with the help of a special subsidy of \$3,000 from the Quebec Department of Education. The following year the school board decided that the subsidy was inadequate and gave the child's parents a choice between a special class for autistic francophones set up locally or an anglophone class in Montreal. Since the *Loi sur l'instruction publique du Québec* (1979, s.480) provides that school boards must integrate handicapped children under 16 years of age into their regular schools, the judge ruled that the law no longer conferred a power upon the board but rather imposed an obligation. This decision left no doubt that the amendment intended to impose a duty upon school boards to provide special education services to all children needing such services and that they were obliged to accept such children into district schools. By replacing the word "may" with the word "shall," the legislature had recognized the right of such children to receive special education. Such a simple change of words in the statutes of provinces with permissive legislation, it is suggested, would have the effect of recognizing the right of all children to education in those provinces as well. Judge Moison also stated that, although he was aware that his decision would impose a financial and administrative burden on the defendant board and on all the school boards in the province of Quebec, he would not be guided by

this consideration in deciding the rights and obligations of the parties before him.

With respect to the right of children to an appropriate education, it is to be noted generally that Canadian courts have indicated clearly that the placement of the child in a specific school or classroom within a school district is the prerogative of the school board and that the courts will not intervene in this regard. The policy underlying this position is based on the fact that the "school board does not have the resources to maintain classes and pay teachers for small numbers of pupils" (*Lapointe v. Board of School Trustees*, 1979, p. 96). Such statements indicate the formidable problem in establishing the concept of appropriate education, especially when individualized education is considered.

In *Shelley Joyce Marie Carrière v. County of Lamont No. 30* (1978), Judge O'Byrne acknowledged that he did "not have authority to direct the board as to what must be done or the manner in which the order [to accept the applicant in its schools] is to be complied with." These were matters for the board to resolve. A somewhat different view was taken by Judge Moison in *McMillan c. Commission Scolaire de Ste-Foy* (1981), where the judge ordered that the autistic child be placed in a regular kindergarten classroom because the child needed to establish a normal relationship with the world around him. The judge also strongly suggested that special aid be provided by a specialized teacher already familiar with the autistic child. The requirement that the board accept the autistic child into its regular classes, the least restricted environment of all, is very significant.

No reported Canadian decision deals with the possibility of an order that educational services be provided to a child at home. It is interesting, however, that the Ontario Education Act (1980, s.34(14)) provides that when a pupil is hard to serve or a placement in a particular setting is not suited to the needs of the pupil, the board *shall* assist the child's parents in locating a placement suitable to those needs. The above-mentioned section seems to go much further than any other provincial statute in providing for an appropriate education. In some cases, one could argue that a placement suited to a child's needs can only be found in the child's home. American decisions (*Leitner and Country of Westchester*, 1971; *Re H*, 1972; *Re Kirschner*, 1973; *Re Lofft*, 1976) ordering that educational services be provided to children in their homes at the expense of school boards could perhaps be used to support this argument. A recent Quebec Court of Appeal decision shed some doubt on whether a child could receive educational services at home. In *André Doré et Rita Lapointe c. La Commission Scolaire de Drummondville* (1983), an autistic child was excluded from the special class in which he had made no progress for four years and was disturbing all other pupils. In the court of appeal's opinion, the

mandatory section of the legislation obliged the school board to educate a child but not to provide medical care or therapy which it is not able to provide. A recent Ontario decision dealt with the definition of a "hard to serve pupil," but the court decided that the children were not pupils since they were not enrolled in the school board from which they were seeking a ruling regarding whether they were entitled to a "hard to serve pupil" hearing (*Maw et al.*, 1984).

Who decides whether a particular program is suited to the needs of a child? In Ontario, Smith argues, there is no right to an appropriate education because "the boards of education, the sole suppliers of the service, are still the sole judges of the adequacy of that service. Bill 82 permits hardly anything that was not permitted already, gives no enforceable rights, and compels no one to obey it" (1981, p. 207). While it may be true that the school board makes the final decision concerning appropriate education suited to the needs of a particular pupil in Ontario, we believe that the additional Ontario provision allowing a parent or guardian to request the board appoint a committee to review the determining of the placement of the child is preferable to no remedy at all, a situation which is the case in most provinces whether they have mandatory or permissive legislation.

IMPACT OF THE CHARTER ON THE RIGHT TO ATTEND SCHOOL OF CHILDREN WITH SPECIAL NEEDS

Since the new constitution is the supreme law and applies to provincial education legislation and to school boards, it is useful to assess its impact on balancing the rights of individuals against those of the community. Notable in this regard is s.15 of the Constitution Act, 1982 which came into force in April 1985:

Every individual is equal before and under the law, and has the right to the equal protection of the law without discrimination and in particular, without discrimination based on ... mental and physical disability.

Hogg (1982, p. 51) argues that

the use of the phrase 'equal protection ... of the law' which is similar to the phrase 'equal protection of the laws' in the American Bill of Rights (fourteenth amendment) suggests that the American jurisprudence on equal protection, which the Supreme Court of Canada has heretofore ignored, is relevant to the interpretation of s.15.

Other authors support the same view (MacKay, 1984, p. 55; Tarnopolsky, 1982, p. 532). Two interpretations may be given to s.15 as it applies to the

right of children to attend school. The first is based on minimal intervention by the courts; the second is based on more active intervention by the courts.

Minimal intervention

Minimal intervention by the courts would suggest that s.15 of the *Charter* may not impose upon provinces the obligation to provide education for all children regardless of their problems. Swinton (1982, p. 55) believes that reference to equal benefit under the law is more appropriately involved when a litigant claims that a statute provides benefits for one group and not for another. She also believes that the section does not impose an obligation of redistribution on governments nor does it contemplate positive action. The purpose of the *Charter* is to restrain government action, not to generate action.

A further problem lies in interpreting the relevant American jurisprudence. Tarnopolsky (1982, p. 532) is of the opinion that in light of s.1 of the *Charter* (which allows the legislation to put such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society") and in light of the fact that some of the listed grounds, such as mental or physical disability, are clearly subject to *bona fide* qualifications or requirements, a less stringent test may come to be applied to these, a test such as the American one of *intermediate scrutiny*. Such a test would not necessarily mean that the court would intervene to correct inequalities as it would do in cases of racial discrimination. The interpretation would be closer to the one used in American sex discrimination cases. Distinctions based on mental or physical disability could be allowed if they answer to important government objectives and are closely linked to those goals (Tarnopolsky, 1982, p. 513). If the intermediate scrutiny test were applied to the rights of exceptional children to attend school, then s.15 would not have a very great impact since no greater obligation would be imposed by the *Charter* as long as the province has financial difficulties or is doing its best to provide services to children with problems.

More Active Intervention by the Courts

If s.15 of the *Charter* does not require the provinces to provide educational services to all children regardless of their difficulties, *a fortiori*, the *Charter* will not impose upon the provinces to provide educational services appropriate or suited to the needs of the children. As suggested by Hogg (1982, p. 51), a more active court could look to the American jurisprudence for guidance in the interpretation of s.15(1).

Equality rights under s.15(1) are defined in terms of proscription of discrimination with respect to administration and enforcement of the law, substantive application of the law, and protection of the law (Tarnopolsky, 1982, pp. 531-532). If there is discrimination in the benefits or services provided to children with mental or physical disabilities, then, it is argued, equality is denied and redress may be sought under s.24 of the *Charter*.

According to the American decision in *Brown v. Board of Education* (1954), it is not education itself which is guaranteed by the constitution but its availability as a right to everybody once it is provided by the appropriate legislature. In other words, the effect of the discrimination or distinction complained of must be looked at to see if the subjected individuals or groups are denied equality with respect to enforcement of the law, substantive application of the law, protection of the law, or benefits of the law. An American decision may help understand the possible effect of s.15(1) on the rights of children with problems relative to their right to attend school.

In *Pennsylvania Association for Retarded Children et al. v. Commonwealth of Pennsylvania et al.* (1972), the plaintiffs instituted a class action on behalf of all mentally retarded persons between the ages of 6 and 21 in the state of Pennsylvania whose school boards were excluding them from a program of education and training in the public schools. The statutes of Pennsylvania did allow the exclusion of retarded children from programs of education and training in public school as is the case in Canadian provinces with permissive legislation. The cause of action was based on the denial of equal rights under the laws provision of the American constitution. The case unfortunately does not provide a constitutional analysis by the court of the situation, as it was eventually settled amicably with the settlement agreement forming part of a consent order issued by the court. The court, however, did comment on the plaintiffs' equal protection argument. It answered the question whether the state, having undertaken to provide education to some children (perhaps all children), may deny it to plaintiffs entirely by saying that the evidence raised serious doubts (and hence a colourable claim) as to the existence of a rational basis for such exclusions (p. 297). The court also referred to *Brown v. Board of Education* (1954).

If the courts were to interpret s.15(1) as has been done in the United States, what would be the probable effect on provinces with mandatory legislation and on provinces with permissive legislation? For provinces with mandatory legislation pertaining to the right of the handicapped child to attend school, the *Charter* will have little or no effect, since the right to attend school is already recognized. If the Education Act (1970)

of Nova Scotia were to be interpreted as covering adequately the physically and mentally handicapped as well as the blind but not those children with other learning or emotional problems, then s.15(1) of the *Charter* could be interpreted in the same manner as that used by the court in the *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*.

The *Charter* would probably have a greater impact on provinces with permissive legislation (namely, New Brunswick, Prince Edward Island, Alberta, and British Columbia). For them, s.15 could be interpreted to say that having undertaken to provide public education to some children, the province may not deny it entirely to handicapped students unless there exists a rational basis for such exclusions. S.15 would have the effect of raising serious doubts and colourable claims where groups of students are excluded. The onus would then be placed on that province to show the existence of a rational basis for such exclusions. Lack of money may not be enough. In *Mills v. Board of Education of District of Columbia* (1972), the court said that if sufficient funds were not available to finance all of the services and programs that were needed and desirable in public school systems, then available funds must be expended equitably in such a manner that no child would be entirely excluded from publicly supported education.

Even if the Canadian *Charter of Rights* were interpreted as imposing an obligation upon the provinces to provide educational services to all children regardless of their problems, it is not clear whether the courts would go so far as to impose upon the provinces the obligation to provide educational services appropriate or suited to the needs of the child. The Canadian legal tradition may not hesitate to declare rights, but it will hesitate before directing a provincial government as to what shall be done to correct the situation. Although the *Shelley Joyce Marie Carrière v. County of Lamont No. 30* (1978) case was decided before the enacting of s.15 of the *Charter*, it gives an indication that courts feel they do not have the authority to direct the board as to what must be done or as to the manner in which the order is to be complied with.

Even if s.15(1) were interpreted in favour of handicapped children, the consequences may nevertheless differ in many ways from the obligations imposed in provinces with mandatory legislation. First, the Canadian approach to law is different from the American. Traditionally, the Canadian courts seldom impose specific obligations upon a province but have declared inoperant a law which is inconsistent with the constitution. However, recently, the Supreme Court has imposed on the government of Manitoba the obligation to translate its laws into French (*Procureur général du Manitoba v. Forest*, 1979). Second, the excluded child would

have to go to court in a province with permissive legislation in order to obtain the services he required since s.15 has not yet been interpreted. Finally, unless the court orders the province to change its law, only the child who was the plaintiff would benefit from the order.

CONCLUSION

The right of all children to education is not guaranteed in the same way in all provinces. In provinces with mandatory legislation (Nova Scotia, Newfoundland, Quebec, Ontario, Manitoba, and Saskatchewan), school boards must provide educational services to all children. Provinces with permissive legislation do provide educational services to handicapped children, but school attendance by such children is not compulsory; and these provinces could, during times of budgetary restriction, cut these services since no duty is imposed upon them to offer such services. The effect of mandatory legislation with respect to the educational rights of handicapped children is to impose a duty upon school boards to provide special education services to all children regardless of their handicaps and regardless of the financial consequences of so doing.

It can however be argued that, with the Canadian *Charter of Rights* coming into force, s.15 will have the effect of imposing upon school boards in certain provinces the obligation to offer educational services to handicapped children because the denial of services to such children is discriminatory and the *Charter* expressly prohibits discrimination on account of physical or mental handicap. Application of these enactments may have the effect of guaranteeing handicapped children the right to an appropriate education even though the respective provincial school acts do not provide such a guarantee.

It is difficult to foresee whether the courts would oblige the provinces or the school boards to provide educational services appropriate or suited to the needs of the child. Nevertheless, there is an indication in the *Forest* case that the courts may be prepared to impose specific obligations on the provinces, and, in that case, the courts may venture into imposing upon the provinces the obligation to provide educational services appropriate to the needs of the child.

NOTES

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² See T. A. Sussel and M. I. Manley-Casimir, "The Supreme Court of Canada as a 'National School Board': The *Charter* and Educational Change" in this issue.

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In dieser Arbeit wird die wahrscheinliche Wirkung des in Kraft tretenden 15. Paragraphen der Kanadischen Verfassungsurkunde der Rechte und Freiheiten auf das Recht der körperlich behinderten Schüler zu Bildungsdiensten in Provinzen mit wahlfreier Gesetzgebung (New Brunswick und Prince Edward Island, Alberta und British Columbia) in Vergleich zu Provinzen mit pflichtmäßiger Gesetzgebung (Nova Scotia und Newfoundland, Quebec, Ontario, Manitoba und Saskatchewan) untersucht. Die Vorverfassungswirkungen des rechtlichen Unterschieds zwischen wahlfreier und pflichtmäßiger Gesetzgebung auf das Recht der Kinder mit besonderen Bedürfnissen, sowohl als auch auf das Recht zu einer angemessenen Bildung werden besprochen. Zwei Auslegungen der Kanadischen Verfassungsurkunde der Rechte und Freiheiten, eine der minimalen Intervention und eine der aktiveren Intervention des Gerichts, werden mit ihren wahrscheinlichen Wirkungen dargestellt.

Este trabajo presenta dos interpretaciones de la Constitución Canadiense de los Derechos y Libertades y sus posibles efectos. En una interpretación, la intervención de las cortes es mínima y en la otra, ésta es más activa. Específicamente se estudia la sección 15, comparando los servicios educativos para estudiantes especiales en provincias donde rige la legislación opcional (Nueva Brunswick, la Isla del Principe Eduardo, Alberta y Columbia Británica), y en las regidas por la legislación obligatoria (Nueva Escocia, Newfoundland, Quebec, Ontario, Manitoba y Saskatchewan). Se discuten las diferencias legales entre las dos legislaciones en lo referente a una educación adecuada para niños especiales.

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