

# Judicial Decisions and the Public Schools

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While the statute law governing B.C.'s public schools is familiar to a majority of its educators, there appears to be widespread uncertainty as to the content and relevance of judicial decisions, and also as to the ways in which the courts and various quasi-judicial bodies make the decisions. The major purpose of the research reported herein was to evaluate the extent and the significance of these decisions as they relate to public school operations in British Columbia. Scattered information concerning relevant decisions was gathered, organised and evaluated. In addition, a number of issues concerning the current and future impact of judicial decisions on school operations were brought into perspective. Major conclusions were: (1) judicial decisions do play a significant role in B.C. public school operations; (2) greater interest, knowledge and involvement on the part of educators is required.

Alors que la majorité des éducateurs oeuvrant dans les écoles publiques de la Colombie Britannique connaissent bien le droit statutaire qui régit leurs écoles, on observe chez eux beaucoup d'incertitude touchant, d'une part, le contenu et l'applicabilité de la jurisprudence et, d'autre part, la manière dont les cours et les divers organismes quasi-judiciaires prennent leurs décisions. La recherche rapportée ici avait pour but principal d'évaluer la portée et la signification de ces décisions en relation avec le fonctionnement des écoles publiques de la Colombie Britannique. Nous avons réuni, organisé et évalué les données éparses qui concernaient les décisions applicables. De plus, nous avons situé en perspective un certain nombre de questions relatives à l'impact actuel ou futur de ces décisions judiciaires. Nos principales conclusions sont les suivantes: (1) les décisions judiciaires ont une influence significative sur le fonctionnement des écoles publiques de la Colombie Britannique; (2) les éducateurs doivent développer un intérêt, des connaissances et un engagement accrus en regard de ces questions.

## SHOULD EDUCATORS CONCERN THEMSELVES WITH JUDICIAL DECISIONS?

Should Canadian educators concern themselves with judicial decisions which affect public school operations? Is the overall impact of such decisions beyond their ability to influence and, dare one suggest, their comprehension? These questions are posed because the education profession in Canada apparently pays little attention to judicial decisions, despite their being one of the principal means by which society exerts control over and provides direction to the public schools. Judicial decisions have, in the opinion of Enns (1963, p. 6), "at least equal importance" as statute law with regard to public school operations, while Bargen (1961, p. 1) states that "public education may receive its structure from statutory law, but it receives its operational pattern, in large part, from the legal principles laid down by the courts." Despite this apparent importance, however, studies of the relevant judicial bodies and their decisions have to

date been limited to particular aspects of public school operations, moreover the major Canadian works are rapidly becoming outdated: Bargen published his study of the legal status of the Canadian public school pupil in 1961, Enns's study concerning the Canadian school board was published in 1963, and McCurdy's on the Canadian teacher in 1968. Some additional studies have since taken place on other aspects of school operations, particularly school board and teacher liability for school accidents, teacher dismissal procedures, etc., but none appears to have focussed on the overall significance of judicial decisions for Canadian schools or for a particular provincial school system. Compared to the United States, the study from an educational viewpoint of the judicial decisions component of school law in Canada appears to be in its infancy.

The study reported herein attempted to survey and analyse the judicial decisions which influence and affect B.C. public school operations. As far as can be ascertained no similar, broad study of this type has previously been undertaken in Canada. Before reviewing the study, however, the article outlines the structure of school law in the subject jurisdiction, and further develops the rationale for the study.

#### THE STRUCTURE OF B.C. SCHOOL LAW

To examine the sources and the significance of laws governing British Columbia's public school system requires an analysis of the nature and composition of school law. School law may be defined as that special legislation, regulation, by-law or judicial decision which applies primarily to all or part of the public school system; it does not include, therefore, the mass of criminal and civil law which governs all of society's operations, including the schools.

School law has two basic constituents: statute law and case law. In British Columbia the former includes The School Act, R.S.B.C. 1979, Chapter 375, the regulations and "rules and orders" issued pursuant to the School Act, and also formal resolutions and by-laws of local school boards as authorized by the Act. The school case law applicable in British Columbia emanates from courts of law and quasi-judicial bodies, and it is that body of judicial decisions which determines the practical interpretation of school statute law and the application of the common law. Under the principle of *stare decisis*, British Columbia's lower courts must follow the decisions of its higher courts and of the Supreme Court of Canada. Should no British Columbia nor Supreme Court precedent be available, then a precedent from another common law province or country may be taken into account; although not binding, such precedents are treated as "persuasive" according to the status of the court which handed down the decision. The quasi-judicial bodies whose decisions are part of school law in British Columbia are identified and reviewed later in this paper.

This fundamental dichotomy between statute law and case law in-

corporating common law precedents prevails in all Canadian provinces except Quebec. That province follows a Code Civile rather than the common law which has developed over the centuries in England and many other English-speaking countries, including the United States.

In effect, statute law provides the structural framework and many basic procedures for the B.C. public school system, while judicial decisions made by the courts and certain quasi-judicial bodies fill in any operational interstices. The B.C. School Act determines the organization of the provincial school system, its finance formula and significant operating procedures such as the determination of curriculum. Frequently invoked and expounded in non-legal terms, it is familiar to a majority of school administrators, teachers and trustees; its merits are widely and frequently debated, and its content is regularly amended through the political process. A rewrite and updating of the Act was prepared for public scrutiny and reaction during late 1982, with a view to approval by the legislature in 1983.

School case law, however, is not so well known nor understood in British Columbia. Few persons involved in the operation of its public school system appear knowledgeable concerning the specific sources or the content of relevant judicial decisions, and there is little appreciation of the role that case law plays in the overall articulation of B.C. schools to society. A similar lack of understanding concerning school case law may well exist in other parts of Canada.

#### RATIONALE

The relative paucity of information and understanding concerning school case law in B.C. is becoming a matter of increasing concern among its public school policy makers and administrators. This appears due, in part, to a perceived increase in the number and importance of judicial decisions relevant to public school operations, and in part to a dawning awareness of Canada's Charter of Rights as a potential, new basis for judicial decisions. British Columbia's school policy makers and administrators apparently sense that the legal context within which they operate is changing.

The result is a growing interest in the role of the courts and of relevant quasi-judicial bodies vis à vis B.C. public school operations, as school trustees and administrators seek opportunities to familiarize themselves with legal principles and practices, and to increase their knowledge of judicial decisions. For example, the B.C. School Trustees Association has successfully sponsored a series of school law seminars in recent years, while in 1978 and again in 1981 the University of Victoria's Faculties of Education and Law provided conferences on the subject for the province's school district superintendents. At the 1981 conference there appeared to be general agreement that the number and importance of

relevant judicial decisions is growing, and that the future incidence of cases is likely to increase.

It was in this setting of an “awakening” field of interest in British Columbia that the study described in this paper was conceived. For it is self-evident that if judicial decisions do have important consequences for the governance and administration of public schools in British Columbia then their nature and operational implications should be widely known and recognized by those who work within the school system. Moreover, the procedures and circumstances under which the judicial decisions are made should be familiar to those persons, if they are to play a knowledgeable and positive role in the overall articulation of schools to society. Society does appear to have benefited where professionals comprehend more fully and participate in the governance and regulation of their spheres of operations – for example, engineering and medicine.

The primary purpose of the study, therefore, was to provide an overall picture of the sources, nature and significance of judicial decisions relevant to B.C. public school operations. This article provides an outline of the method of study and presents the highlights of the findings, the basic conclusions, and the speculations arising from the study.

#### THE METHOD OF STUDY

The primary objective of the study required that comprehensive procedures be developed for locating, measuring and evaluating the various classes of judicial decisions which affect B.C. public school operations. Following detailed study of the provincial school system’s current operations, and of the applicable statute law, it was established that the pertinent decisions would be those emanating from: Courts of Law; Boards of Inquiry, appointed under the Human Rights Code of B.C.; Review Commissions, appointed pursuant to Section 130 of the School Act of B.C.; Boards of Reference, appointed pursuant to Section 129 of the School Act of B.C.; Arbitration Boards appointed pursuant to Section 136 of the School Act of B.C.; Arbitration Boards, appointed under the Labour Code of B.C.

Apart from courts of law, all of the above may be classified as quasi-judicial bodies. The essential criteria for a quasi-judicial body to be included in the study were that its decisions authoritatively affect the operations of the British Columbia public school system; such decisions are considered to be authoritative even where they are subject to appeal, as with the decisions of the lower courts. In consequence, the various advisory bodies which operate in B.C. public school education, but where the authority for the decision lies elsewhere, were excluded – an example here would be a committee formed to investigate a teacher’s appeal against transfer, as under Section 120(b) of the B.C. School Act the final decision on the transfer rests with the Minister of Education.

Using these criteria for quasi-judicial bodies no other sources of judicial

decisions relevant to this study could be located, although note was taken of a potential source under the Ombudsman Act, R.S.B.C. 1979, Chapter 306, if and when the relevant sections of the Act are proclaimed, and if the Ombudsman's decisions may be considered as authoritative. It was also noted that the Provincial Cabinet has the authority under Section 20 of the School Act to investigate and rule upon public school board decisions, but there is no record of this power ever being formally invoked.

It became evident during the investigation into current school operations and the relevant statute law in British Columbia that each of the sources of judicial decisions identified would require a research procedure tailored to its statutory mandate and its operating practices. These procedures are reviewed separately for each source, together with the principal findings concerning that source.

#### COURTS OF LAW

It was apparent that the majority of judicial decisions affecting the province's public school system issues from courts of law in British Columbia, other provinces and other countries with common law legal systems and similar school statute law. A four-step procedure for conducting legal research proposed by Yogis and Christie (1974, p. 2) was followed:

- i Analysis – the attempt to isolate “legal” problems, by identifying which elements of law are relevant in the factual situation being considered;
- ii Research – of the particular law that bears upon the “legal” problems being considered;
- iii Synthesis – of principles of law from that found applicable to the “legal” problems;
- iv Expression – careful verbal and/or written communication of findings and conclusions.

Part i of the procedure, the analysis, followed the broad design used by Valente (1980) and other United States writers on general applications of school law: identification of major areas of school operations in which “legal” problems and questions arise. This decision not to follow legal categories reflected the study's affiliation to educational administration rather than the law *qua* law. Seven major categories of school operations were developed: role of school boards; provision of education; educational environment; students' rights and responsibilities; teachers' responsibilities and rights; management of schools; teacher salary negotiations.

Within these major categories, 40 sub-classifications were established to provide comprehensive coverage of operating areas in which legal problems have arisen or might plausibly arise. This detailed list was then used during step two of the procedure, the research phase, to help identify and classify the various cases located.

Part ii of the procedure, the research aspect, followed the steps advoca-

ted by Yogis and Christie for research of case law. First, legal encyclopedia for Canada, England and the United States were reviewed, both in order to establish the relevant law and to note the applicable judicial decisions or cases. Abridgements of leading cases under relevant topical headings were also reviewed, and notations made under the study's categorisation system. Information concerning additional cases was obtained at meetings with officials of the B.C. School Trustees Association, the B.C. Teachers' Federation and the Ministry of Education, and by searching "legal files" at the Vancouver office of the trustees' association which cover the last decade of B.C. school districts' operations.

In all instances where the judicial decision appeared to be of relevance and significance to school operations, the full text of the decision was studied in the "primary" sources; where a case is not included in law reports, a copy of the "reasons for judgment" issued by the relevant court registry was obtained, and studied.

Part III of the procedure, the "synthesis" aspect, required not only the identification and assessment of each decision's *ratio decidendi* (reason for decision) and its *obiter dicta* (additional things said), but also the consideration of the degree to which any implications for school operations may be deemed "significant." The judgments on "significance" were made subjectively, on the basis of each decision's actual influence on, or perceived potential to influence, the thoughts and actions of public school policy makers and administrators in British Columbia. This actual or potential influence may arise should the decision: (1) establish a new principle of school law; (2) directly affect methods and procedures of school or school district operations; (3) award a substantial quantum of damages; or (4) combine two or more of the above features. Because these were subjective judgments, the precaution was taken of consulting with officials of the trustees' and teachers' associations, and of the Ministry of Education, on whether they perceived particular decisions as being "significant"; after taking into consideration organizational interests, a satisfying, if not surprising, similarity of opinion was expressed on almost all cases.

The sheer volume of decisions in Canadian and foreign courts which might have relevance for the B.C. public school system made comprehensive research difficult. Primary reliance was placed upon decisions originating in B.C. courts, but some important operational areas for public schools listed during phase one, "analysis", have not been the subject of litigation in the province. In such situations, where a relevant court decision from another province was available it was considered – provided that it was based on common law or an interpretation of a similar statute law to that in British Columbia. If no such case from another province could be located, then any pertinent decisions from England or the United States were reviewed. In practice it was necessary to limit research to reported Canadian cases and certain unreported B.C. cases,

plus prominent or landmark English and United States cases mentioned in secondary legal materials.

### *Findings*

Based on research conducted it was concluded that there are 750–800 reported courts of law decisions which are relevant to public school operations in British Columbia. Over 550 of these decisions are from Canadian courts, approximately 100 from English courts and another 100 from courts in the United States. In addition, there could be a few relevant decisions from courts in Australia, New Zealand and other common law countries, but it was believed that these potential sources did not warrant examination.

An approximation (750–800 decisions), rather than an exact number, was given, due to difficulties encountered in establishing clear-cut criteria to assess the potential of various cases to serve as a precedent, should similar sets of facts arise in British Columbia. In addition, some of the source documents, notably B.C. law reports for 1947–77 and B.C. statute citators, provide incomplete coverage. As far as can be ascertained this particular field of research has not been attempted before, so no comparisons may be made. Nevertheless valid impressions may be drawn from the figures produced, and they do provide general evidence to confirm the existence of a vast body of court decisions relevant to public school operations in B.C.

Forty-nine court decisions were identified as significant for public school operations in British Columbia, and these were individually reviewed in an appendix to the study. Each decision reviewed carries the name, citation and legal nature of the decision, together with a statement of the decision's reasons for significance, and a summary of the facts of the case. Of these 49 decisions, 41 originated in Canada (33 in B.C.), 4 in England and 4 in the United States. Thirteen of the B.C. decisions identified are unreported, that is not included in law reports.

The ratio of decisions which interprets statute law to decisions which apply the common law is approximately two to one.

The primary classifications of school operational areas affected by the 49 decisions are:

- Role of school boards – 11
- Provision of education – 9
- Educational environment – 6
- Student's rights – 2
- Teachers' responsibilities – 11
- Management of schools – 3
- Teacher salary negotiations – 7

The true nature and significance of the 49 decisions identified can

perhaps only be recognized by study of their individual reviews. Unfortunately it is impossible to summarize these decisions further, or to reproduce all 49 reviews in a journal article. Two examples are provided, however, with the review of decision #14, *Arlene Bell v. North Vancouver School District*, appearing as Figure 1, and the review of decision #28, *Diane Dow v. Renfrow* as Figure 2.

Decision #14 demonstrates the courts' capacity to interpret and resolve uncertainty in a statute – in this case the legality of community schools in British Columbia. Decision #28 shows how, in the absence of statute law, the courts will apply and refine the common law – in this case that concerning the search of students.

The 49 significant decisions demonstrate the extent to which public school operations in British Columbia are affected by the courts. In addition they constitute a body of knowledge on specific decisions which, it is believed, would be valuable for educators in British Columbia. It has been proposed that a review of the decisions identified be published.

#### QUASI-JUDICIAL BODIES

The major principles that characterize quasi-judicial bodies have been described in detail by Dawson (1970, p. 264 et seq.), and refined by political scientists such as Chandler (1979, p. 131) and the Canadian educator, McCurdy (1968, pp. 10–11). These characteristics appear to be a substantial and specialized workload which is outside the normal ambit and expertise of the courts, but where the application of open, fair and certain rules of procedure, and independence from the executive branch of government, are required. In effect, therefore, quasi-judicial bodies are created by legislatures to perform specific administrative tasks of a judicial nature which the courts would be unable to handle. It must be emphasized, however, that while the wisdom of an autonomous quasi-judicial body's decision may not be appealed, its procedures are under the supervision of the courts to ensure compliance with natural justice.

The principles identified above become apparent, in varying degrees, when studying the composition and functioning of the quasi-judicial bodies listed earlier in this report which influence the operations of the British Columbia public school system. These bodies are now reviewed in turn.

#### *B.C. Human Rights Boards of Inquiry*

The Human Rights Code, R.S.B.C. 1979, Chapter 186, applies directly to the admittance of students and to staff hiring practices in the B.C. public school system. Enforcement requires a complaint, which automatically results in an enquiry by the Director of Human Rights. If the complaint is unresolved and thought legitimate by the Minister of Labour he appoints

## FIGURE 1

*Example of Court of Law Decision which Interprets School Statute Law*

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*Classifications:* II(a) Provision of education – who may attend.  
I(a) Role of school boards – responsibilities and powers.

*Name and Citation:* *Arlene Bell v. Board of School Trustees of School District No. 44* (North Vancouver) (1979) 16 B.C.L.R. 94 (S.C.).

*Nature of Decision:* Interpretation of statute.

*Reasons for Significance:* This decision states that community schools, as funded and operated by several B.C. school districts, are a legitimate activity for school boards. The decision is a classic example of the courts' ability to interpret and construe a statute and thus resolve an apparent lack of certainty in the legislation.

*Facts of the Case:* Community schools are those staffed and organized to provide learning opportunities for all people in the neighborhood. They are neither defined nor referred to in the Schools Act and Regulations. In practice, the form of operation and type of programs provided varies from school district to school district, and between community schools in the same district.

The North Vancouver school board decided in April 1979, to "continue provision of full-time Community School Coordinators as at present for all Board-approved Community Schools." A ratepayer and elector in North Vancouver, Arlene Bell, applied to the courts to have the employment of community school coordinators prohibited, on the grounds that the School Act does not authorize school boards to fund and operate community schools.

Mr Justice Munroe ruled that section 160(g) of the School Act, which empowers school boards to establish and maintain "education programs ... for the instruction of persons of 15 years of age and upwards," does authorize such funding and operation.

In addition, in his reasons for judgment, Munroe, J., stated that: "Community education is an education process which serves all age groups in the community by developing education, *social* and *recreational* programmes and services needed or desired by students, teachers and residents" (emphasis added). (It should be noted, however, that the B.C. School Trustees Association's lawyers do not believe this statement authorizes school boards to provide and fund programs other than "educational".)

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## FIGURE 2

*Example of Court of Law Decision which Applies Common Law to School Operations*


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*Classification:* IV(g) Students' rights – search and seizure.

III(e) Educational environment – health and safety of students.

*Name and Citation:* *Diane Dow v. Renfrow et al.* 475 F. SUPP. 1012 (1979).

*Nature of Decision:* Application of common law.

*Reasons for Significance:* This appears to be the foremost judicial decision which identifies the legal principles governing the powers of school officials to search students.

In the absence of specific legislation the common law provides that there must be reasonable grounds to justify a search of any person, and also that the more extensive the nature of the search, the more extensive the grounds must be. In this decision, the United States District Court in Hammond, Indiana, ruled that the *in loco parentis* doctrine justifies searches of students required to maintain order and discipline in the schools and to protect the health and safety of students. Further, that searches which involve only a minor invasion of privacy, and are not intended as a basis for criminal prosecution, require school officials to have "reasonable cause to believe" that a student is violating school rules, while body searches or a search to gain evidence for criminal prosecution requires "reasonable and probable grounds for cause."

*Facts of the Case:* A dog was brought into the classrooms of the Highland High School to "sniff out" marijuana believed being carried by students for purposes of trafficking. Those students "identified" by the dog were then asked to empty their pockets and purses, and if necessary a body search was made.

Diane Dow was "identified" by the dog, and even though she protested that she never used marijuana, had to undergo a body search. Diane sued for invasion of privacy.

The Court held that the request for Diane to turn out her pockets and purse was reasonable, but that there were not "reasonable and probable grounds" to justify the body search. It declared that the body search was a violation of the plaintiff's right to privacy.

The Court also identified four factors governing whether "reasonable" or "reasonable and probable" grounds exist: (a) the student's age; (b) the student's history and record in the school; (c) the seriousness and prevalence of the problem to which the search is directed; (d) the exigency requiring an immediate search.

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a Board of Inquiry. The Board holds judicial hearings and issues a decision which may include a legally enforceable order.

As part of the study, copies of all education-related decisions by B.C. Human Rights Boards of Inquiry were reviewed, and evaluated on the same basis for significance for B.C. public school operations as for decisions by courts of law. Three decisions were identified as significant: two clarified the factors that must be proved to establish illegal discrimination in hiring by a school district, and the other interpreted the teachers' paid sick leave provisions in Section 125(2) of the School Act to include pregnancy-related illnesses.

The study noted, however, that the potential for further relevant decisions by Human Rights Boards of Inquiry in B.C. appears uncertain, because of the discretion vested in the Minister of Labour concerning the appointment of a board. In recent years few Boards of Inquiry have been appointed, and it appears that the philosophy of a particular Minister of Labour, or provincial government, is a factor to be considered when assessing the future importance of quasi-judicial decisions made under the Human Rights Act for the B.C. public school system.

### *Review Commissions*

A Review Commission is appointed automatically by the B.C. Minister of Education under Section 130, School Act, to hear an appeal by a teacher who has had his employment contract with a school board terminated under Section 123. Such termination may follow three reports "indicating that the learning situation in the class or classes of the teacher is less than satisfactory" (Regulation 65). A Review Commission consists of three persons who are or have been "actively engaged in education in the Province" (Section 130(6), School Act). Following its review of the events leading up to the termination, the Commission may uphold the school board's decision or order the board to reinstate the teacher. The Commission's decision is final and binding.

Information concerning the number and nature of Review Commission decisions handed down in B.C. was obtained from the Ministry of Education. Additional information and copies of leading decisions, including copy of "reasons for judgment" on an appeal to the Supreme Court of B.C. to interpret the functions of Review Commissions, were obtained and reviewed.

Two decisions of Review Commissions were identified as significant for the operation of the B.C. public school system, as they concern the accuracy of school boards' assessments of teachers' competency, and the administrative and personnel policies and practices followed in the school districts. It is interesting to note that in these two cases the Review Commissions exercised greater authority than the courts, for the latter may not question the wisdom of a school board's decision if legally made.

As there are approximately two decisions per year made by Review Commissions, based on statistics for the years 1974–82, there is definite potential for further significant quasi-judicial decisions from this source.

### *Boards of Reference*

Boards of Reference are appointed by the B.C. Minister of Education under section 129 of the province's School Act, upon appeal by any teacher who, for misconduct or having been convicted of a criminal offence, has been suspended without pay for more than ten days or dismissed by a school board. A Board of Reference has three members, and the chairman must be a member of the Law Society of B.C.; the hearing of an appeal and the handing down of a decision is "essentially a legal process" (Nicholls, 1980, p. 84). The decision is legally binding, but may be appealed by either the teacher or the school board to a Provincial County Court or the B.C. Supreme Court.

Information concerning the number and nature of Board of Reference decisions in the last eight years was obtained from the Ministry of Education, the B.C. School Trustees Association and the B.C. Teachers' Federation. Also, case digests and law reports were studied where the decisions had been appealed to the courts. Of the 24 Board of Reference decisions made between 1973–81, three were identified as significant. They all concerned the dismissal of teachers who had been found guilty of criminal offences but had been given absolute or conditional discharges by the courts. The potential clearly exists for further significant decisions by Boards of Reference.

### *Arbitration Boards: Teacher Salaries*

Arbitration Boards are appointed pursuant to section 136 of the B.C. School Act to establish teachers' salaries and direct financial benefits not specified in the School Act, for any school district where no settlement for the next calendar year has been negotiated prior to November 15. One member is appointed by the school boards in that bargaining zone, and one by the teachers' local associations in the zone; for 1981 salaries there were 14 bargaining zones established in B.C. The chairman is selected by the two members. No member or chairman may be an active teacher, trustee or employee of same. A final and binding decision must be made by the Arbitration Boards before January 1, failing which the chairman alone hands down his decision by January 5. Where an Arbitration Board interprets the School Act, however, concerning the Board's jurisdiction or how it should operate, its decision may be appealed to the courts.

There were 15 school districts with arbitrated teacher salary settlements in 1981; during the mid 1970s 40 or 50 arbitration settlements were not unusual. From an economic viewpoint most of these decisions were significant for the operation of B.C. public schools, for teacher salaries

and benefits comprise approximately 70% of the school districts' operating budgets and, if nothing else, the decisions on them affect the amount of spending on other budget items. But the only decisions that met the established criteria for significance were all appealed to the courts, and therefore included in the 49 significant court decisions. All five of these decisions helped to determine which financial benefits come under the jurisdiction of Arbitration Boards and which are established by the School Act, who may serve on the Boards, and whether a decision could apply for more than one year and include substitute teachers. Again, there is a clear potential for future decisions significant for B.C. public school operations, from this particular quasi-judicial source.

*Arbitration Boards: Labour Code of B.C.*

Arbitration Boards appointed under the Labour Code, R.S.B.C. 1979, Chapter 212, have a relatively minor effect upon the province's public school operations, as their jurisdiction extends only to the interpretation of current collective agreements between school boards and their staff who are not certified teachers. Compulsory, binding arbitration applies to disputes over the terms of agreements already in force; there is no compulsory arbitration when a new contract is being negotiated.

Information regarding arbitration under the B.C. Labour Code was obtained from the Arbitration Branch of the Provincial Ministry of Labour, and from the B.C. School Trustees Association. Copies of relevant decisions were studied and it was determined that these quasi-judicial rulings have a relatively minor influence on B.C. public school operations. No significant decisions were located, and there is little potential from this source as long as its rulings solely concern the interpretation and application of existing agreements covering minority groups of school district employees.

*The B.C. Ombudsman*

The Ombudsman Act, R.S.B.C. 1979, Chapter 306, provides for a Provincial Ombudsman and staff who may investigate and report on "a decision or recommendation made; an act done or omitted; or a procedure used by an authority that aggrieves or may aggrieve a person" (Section 10(1)). An authority includes the Ministry of Education but section 7 of the schedule to the Act, which provides for the inclusion of public schools and school boards, has not yet been proclaimed. In his Annual Report to the Legislature (1981, p. 7) the Ombudsman urges their early inclusion due to "popular demand." Between October 1979, when the B.C. Ombudsman's office began operations, and December 1980, the Ombudsman received 27 complaints concerning public schools and school boards (1981, p. 90).

As the Ombudsman's office actually followed up on 14 of these

complaints, and it reports that "resolution was facilitated" in six cases (1981, p. 90), it appears that the Ombudsman already has some influence on public school operations at the school and the school district level, although lacking the legal authority to demand documents and subpoena witnesses which would accompany proclamation of section 7 of the schedule to the Act.

During the same period there were 20 complaints to the Ombudsman's office concerning the Ministry of Education, seven of which were reported (1981, p. 88) as "corrected," but their specific nature is unknown as section 9 of the Ombudsman Act declares that all complaints shall be confidential.

There is some doubt whether decisions of the Ombudsman should be included in this study, as his office does not strictly meet all the criteria for a quasi-judicial body. In particular his decisions are not authoritative; he may only report his opinion and make the recommendations he considers appropriate (Section 22, Ombudsman Act). Nevertheless, there is a strong, judicial aura surrounding the Ombudsman, and while his decisions may not have the force of law they do have considerable impact for public bodies such as the Ministry of Education and the school districts.

It appears, in summary, that decisions of the Ombudsman already have some relevance for the operations of the B.C. public school system and, should Section 7 of the schedule be proclaimed, then some decisions might be significant. It appears that complaints made to the Ombudsman concerning school districts and school boards will not reduce the volume of judicial and quasi-judicial decisions already being experienced, but add a supplementary source of near quasi-judicial decisions that will concern specific rules, procedures and practices in public schools and school districts which are alleged to be unjust, oppressive or improperly discriminatory.

#### ADDITIONAL STUDY FINDINGS

In addition to the findings concerning specific sources of judicial decisions, some supplementary information was gathered which warrants commentary.

(1) There was evidence that specific sections of the School Act concerning public school operations which provide clear and relatively certain directions to the school system appear to attract few judicial decisions. Other sections, however, which tend toward broad or hazy statute law, have a tendency to generate many judicial interpretations, particularly where the statute law has not kept pace with current educational developments.

(2) Not all court decisions of relevance to B.C. public school operations are included in the law reports. And in the opinion of one knowledgeable and experienced official, keeping track of such decisions has become a

“private preserve” of the B.C. Teachers’ Federation and the B.C. School Trustees’ Association.

(3) A proposal is before the Attorney-General of B.C. to establish criteria for selecting court decisions which will be published, linked to a proposed rule that only published decisions could then be cited in court. The proposal is of considerable, potential importance to the development of school law in British Columbia and it is believed that educators should have some say on the proposed selection criteria.

#### CONCLUSIONS

Several major conclusions were drawn from the above findings. The most important is that judicial decisions made by the courts and relevant quasi-judicial bodies do form an important part of school law in B.C., and thus significantly affect educational operations within the province’s public school system. The evidence for this conclusion lies in the 49 court decisions and the 8 decisions of quasi-judicial bodies identified in the study. The study does not, however, provide evidence to support Enns’ contention (1963, p. 6), that judicial decisions have “at least equal importance” as statute law with regard to public school operations.

School law in B.C. develops in a “functional,” evolutionary manner, in response to developing societal needs and expectations, with the courts “picking up the slack” when the relevant statute law lacks specificity or topicality. This role of the courts in helping the law to adjust to a changing society is not unique to the public school system, but it is interesting to observe that on occasion, such as significant decision #14 concerning community schools, the courts appear to be more contemporary than the politicians and officials responsible for school statute law.

Judicial decisions will likely continue to play an important role in the formulation of future school law in B.C., although continuing to be limited primarily to the operational aspects of the school system. This assumes, of course, that the B.C. School Act and Regulations continue to provide a mixture of broad commissions and detailed prescriptions for the various public school operational areas. Should the statute law become more precise and detailed there will likely be a concomitant reduction in the role of the courts and conceivably that of quasi-judicial bodies. The nature of the School Act, a broad mandate or a detailed prescription, should be a fundamental issue for consideration by those responsible for the drafting and final approval of a revised B.C. School Act during 1982–83.

One uncertain factor concerning the future role of the courts in school law is, of course, the effects of Canada’s new Charter of Rights (Lederman, 1982; Russell, 1982, pp. 1–33). It has been widely predicted that the courts may use the content of the Charter to adopt a more positive law-making role, as cases based on specific Charter sections come before them. Note should be taken, however, that section one of the Charter

guarantees rights and freedoms included in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This may be interpreted to mean that the courts will continue to observe specific provisions of school statute law, unless they wish to challenge the ability of the legislators to pass laws which "can be demonstrably justified in a free and democratic society." Moreover, Section 33 provides Canada's legislatures with the so-called "notwithstanding" power to exempt a statute expressly from the fundamental rights (s. 2), legal rights (s. 7–14) or equality rights (s. 15), contained in the charter. To what extent the courts may attempt to challenge statutes, and legislatures to exempt their Acts from the Charter, only time will tell.

#### INFORMED SPECULATIONS

(1) There are many factors that affect the volume of litigation concerning public school operations. Prominent among these are the nature of the statute law, the temper of the parents, taxpayers and teachers, and the ease with which judicial or quasi-judicial proceedings may be entered into. The preliminary evidence gathered on all three of these factors suggests that more school litigation may be experienced in British Columbia during the next few years. Certainly it is a common belief among B.C. education officials that there will be more litigation initiated by parents (Stables, 1981).

(2) Whether education problem solving in British Columbia is likely to change even more from a political and/or pedagogical process to a judicial one depends largely on the skills, determination, and intestinal fortitude of the province's politicians and educational administrators. As suggested earlier, a major role of the courts is to make decisions in areas not directly addressed, or neglected, in statute law. Hogan states (1974, p. 5) that social and political problems which tend to defy solution gravitate to the courts, and that the United States has reached the stage where there is "education under supervision of the courts." Rist and Anson contend (1977, pp. vii and viii) that United States' courts have taken over the responsibilities of education's administrators and public officials by default – "the failure of traditional centres of decision-making to achieve a political or ethical consensus on solutions." This type of situation, but on a more limited scale, has been projected as a possibility for British Columbia by the President of the B.C. School Trustees Association (Begin, 1981).

(3) Whether the courts and quasi-judicial bodies are the best means for society to make future decisions about public school education is a pressingly important issue. There is a strong antipathy in Canada towards judges determining what the law ought to be, rather than what it is. This feeling is shared apparently by at least some judges. In the United States,

where judges are making educational policy decisions, the Attorney-General of New Jersey has expressed doubts about "the ability of the courts to grapple with an issue as large and complex as the public school system" (Hogan, 1974, pp. 77). Rist and Anson suggest that the U.S. courts have become dependent on the opinions of "expert" technical witnesses for education decisions (1977, p. viii).

It is apparent that Canadian as well as United States law courts are inevitably distanced from the social realities of educational policy issues, and because they are always able to give answers does not mean that they are right. Braybrooke and Lindblom conclude (1963, p. 108) that while "common law procedures may be used to facilitate change, particularly where judges are socially enlightened and courageous ... the case system is unsuitable to crisis, when great leaps or changes have to be made."

On the other hand the courts serve needed societal purposes by clarifying school law, developing it incrementally, and applying it to specific sets of facts. It is because of the courts' ability to perform a truly "judicial" function, shared by quasi-judicial bodies which follow the same principles of independence and neutrality, that the public school system functions under the democratic safeguard of the rule of law; basically the rule of law ensures protection from "arbitrary decisions of government representatives and officials" (Van Loon and Whittington, 1976, p. 125).

In summary, the courts perform an essential role in the democratic functioning of the public school system, but they should not be asked to make policy decisions for the schools. To paraphrase an organizational analysis maxim, the courts should be on tap, but not on top. Again, Canada's new Charter of Rights may be of significance in determining the extent of the problem.

(4) That teachers and school boards in British Columbia are highly exposed to litigation for physical injuries to students resulting from negligence is proven. Indeed, this has virtually become a special branch of the law of tort, with its own established standards of care – which is why it is considered a part of school law. The courts have developed special standards of care for other professions, such as doctors and lawyers, and appear slowly to be developing a special standard of care for professional teachers, known as the "ordinarily competent instructor" test. There has also been one judicial assertion of a "duty to instruct properly" (*James v. River East School Division #9*, [1976] 2 W.W.R. 577). In consequence, more and more teachers will tend to observe the doctrine of "approved general practice" in their work with students, even though it is far from being an infallible defence, and thus experimentation and new developments in the learning process will possibly be inhibited. Even with the standard Insurance Corporation of B.C. \$3,000,000 general liability policy (some school districts carry extra coverage), which was extended in 1981 to cover "professional malpractice," the trauma of a negligence action nevertheless provides a strong disincentive to experiment and innovate. As

Patterson asserts (1980, p. 194) education lawsuits "stifle innovation, increase paperwork and make adversaries out of parents." Thomas (1976, Foreword) suggests that education needs to reconsider the medieval concept of "sanctuary," which provided special rules and courts for the early universities. The Province of Saskatchewan has for many years provided statutory immunity for teachers from students' personal injury suits (The Education Act of Saskatchewan, R.S.S. 1978, Chapter E-o.1, Section 228(1)), and since 1978 has provided teachers with immunity against malpractice claims for approved and supervised "innovative or experimental projects related to teaching methodology or curriculum content" (Section 228(2)).

Should the law of torts in Canada be expanded by the courts to include negligence in the provision of academic services to students, and it may only be a matter of time before the required situation occurs for such a judicial decision (Wuester, 1981, p. 17), then the public school system and society will have to face the decision of: "... treating the symptom (lawsuits) or dealing with the underlying problem of bad educational practices ... for negligence occurs in the academic arena just as surely as it does in the playground or gymnasium, on the highway, or the operating table" (Patterson, 1980, p. 195).

One final consideration concerns the possibility of political and administrative non-compliance with any future judicial decisions about public school operations in Canada which do not take into account the realities of local conditions. Such non-compliance has taken place in the United States and has been the subject of study there (Kirp, 1981, pp. 395-414); for example the gerrymandering of school districts and school attendance zones following the U.S. Supreme Court's decisions on school desegregation (*Brown v. Board of Education*, 347 U.S. 483(1954), 349 U.S. 294(1955)).

It is not beyond a reasonable imagination to postulate situations in Canada's public school systems where judicial decisions might generate non-compliance at the local levels. For example, the news media have predicted appeals to the Supreme Court, on the basis of the Charter of Rights, concerning the extent of the usage of English as the language of instruction in Quebec Schools. Another controversy occurred in Ashcroft, B.C., in September, 1980, (Nyman, 1980) concerning whether a court could order a school district to provide special facilities for a severely handicapped child, facilities beyond the district's limited financial and instructional resources. There appears to have been little if any research on this hypothetical but plausible problem. It is certainly worthy of consideration, for many Canadian school trustees and administrators may share the belief eloquently expressed by Edmund Burke: "It is not what a lawyer tells me I may do; but what humanity, reason and justice, tell me I ought to do."

## IMPLICATIONS OF THE STUDY

In view of the demonstrated pervasiveness and significance of judicial decisions for British Columbia public school operations, it follows that educators, particularly the school policy makers and administrators, should be encouraged to study such decisions and their practical implications. This would help them to achieve consistency in educational services and practices, and to reduce unnecessary and costly litigation; it would also provide a perspective from which to assess the efficacy of school statute law. Such studies would be assisted by the preparation of a basic text for educators outlining in layman's language the appropriate legal principles and practices, and the significant judicial decisions. This could be updated by means of a regular information service on developments in school law, similar to that provided in the United States by the National Organization on Legal Problems in Education.

It is also apparent that educators should take a more active interest in the structure and operating methods of the relevant judicial and quasi-judicial bodies, and in the practice of law reporting. School law is of critical importance to the operation of the public school system, and judicial decisions play a significant role in school law's formulation and application. All those concerned with public school operations should play a more positive, critical role, for the benefit of education and of society.

The objective of this improved knowledge and involvement is not to make pseudo-lawyers out of educators, but to de-mystify school law for them and provide a base of knowledge for educators to consider its specific and its broad implications for the public schools. The knowledge would also help educational administrators develop an improved awareness of when and how to use the services and advice of professional lawyers during their everyday work.

The final implication from the study is that it confirms its subject as worthy of further time and effort. Additional studies into the significance of judicial decisions for the public school system, and the role of the courts and quasi-judicial bodies in educational decision making, should be undertaken in Canada. More refined methodologies could likely be developed as a result of the experiences with this study. It would certainly be beneficial to make a comparative study of findings from similar studies in other provinces.

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