# THE SIGNIFICANCE OF JUDICIAL DECISIONS FOR THE BRITISH COLUMBIA PUBLIC SCHOOL SYSTEM

by

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ABSTRACT

The primary objective of the study was to research the nature and significance of judicial decisions relevant to British Columbia public school operations. The methodology was based on Yogis and Christie's four-part procedure for research of case law: analysis of the problem area, research of the relevant law, synthesis of principles, and expression of findings and conclusions. The analysis followed basic divisions into areas of school operations, the method used by Bargen and Volente, as the study's emphasis was on educational administration rather than jurisprudence.

The basic information was gathered from legal encyclopedia and digests, law reports, and texts and studies on school law; also from discussions with officials of the B.C. School Trustees Association, the B.C. Teachers' Federation and the B.C. Ministry of Education, and from a review of the trustee association's legal files for the last ten years. Decisions made by courts of law in Canada, England and the United States, and by quasi-judicial bodies in British Columbia, were reviewed and studied. Evaluations were made of those decisions relevant to B.C. public school operations, and the decisions deemed significant were selected.

Twelve major findings resulted from the study. The existence of a substantial body of court of law decisions relevant to B.C. public school operations was identified, and forty-nine of these were determined significant. Also identified were several significant decisions by quasi-judicial bodies. It was found that many of the significant decisions were not included in law reports, and information concerning them was obtained from the teachers' and trustees' associations. An additional finding confirms that the nature of the statute law governing public schools affects the number and nature of judicial decisions.

In addition to reporting these findings, speculations were made concerning four critical issues identified during the study:

(a) whether the school "arena" in British Columbia is likely to become more litigious;

(b) whether education problem solving in the Province is likely to change even more from a political and/or pedagogical process to a judicial function;

(c) the extent to which courts and quasi-judicial bodies are the best way for society to make decisions about education; and

(d) whether teachers and school boards are over exposed to litigation for injuries to students, with inhibiting effects upon educational programs.

The study concludes with a series of recommendations concerning: the need for an improved school law information system for educational administrators and policy makers; greater awareness and involvement by educators in the "selection" process for cases which are to be reported; more certain and comprehensible school statute law; and, further specific studies into the role and significance of judicial decisions in public school education.

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# CHAPTER I

# INTRODUCTION

## General Overview

Public schools were introduced in nineteeth century Europe and North America to meet the needs of the state as much as those of the individual student. By law schools were required to be established and attendance was made compulsory, in the belief that the future prosperity of an industrialized society necessitates the education of its children. The concept of universal, compulsory education was readily accepted by a majority of the populace in each instance, thus providing the essential societal commitment (Bargen, 1961, p.48).

Today, public schools continue to function basically as institutions designed to serve particular societal purposes. In effect they are social sub-systems responsive to the broader social system through formal structures of governance and informal methods of influence (Campbell et al., 1965, p.18).

Being open-system organizations, public schools are required to reconcile and adapt to the many influences exerted upon them by their broader society, including those from within their own sub-system. But where society makes laws affecting public schools little compromise is possible, for positive or formal laws are authoritative statements of society's wishes which must be obeyed under pain of penalty. Such statements emanate from the governance structure adopted by society; traditionally they provide the foundations for the public school system plus substantial portions of the administrative superstructure.

The extent to which a public school organization is linked to its broader society through positive school law, as opposed to informal influences, determines what proportions of the school system's macrocosm and its operational procedures are pre-determined for its administrators, and what are the boundaries for their discretionary decision-making.

## School Law in British Columbia

Under the British North America Act of 1867, education in Canada became almost exclusively the responsibility of the Provinces. The terms of British Columbia's union with Canada in 1871 provided for all sections of the B.N.A. Act to apply, and the first B.C. Public Schools Act came into effect in 1872. A frequently revised and reconsolidated version of this statute exists today as the School Act, R.S.B.C. 1979, Chapter 375.

In spite of the School Act's delegation of many legislative as well as administrative responsibilities to the Minister of Education and to local school boards (Nicholls, 1981, p.106), the Provincial Legislature continues as the supreme authority for public schools. The statute law governing B.C.'s public schools includes regulations and "rules and orders" issued pursuant to the School Act, and also formal resolutions and by-laws of local school boards as authorised by the Act.

This statute law governs much of the B.C. public school system's organizational structure, and many of its finance and operating procedures. 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. But in addition to this statute law there is a body of judicial decisions forming a separate part of the positive law; it determines both the practical interpretation of the school statute law and the application of the common law to public school operations.

This same dichotomy of school law sources prevails in all Canadian provinces except Quebec which follows a Code Civile rather than the common law. Within this broad Canadian context, 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."

## Statement of Problem

In British Columbia few persons involved in the governance and operation of the public school system appear to appreciate the importance of judicial decisions, if one assumes that Enns' and Bargen's conclusions are valid for British Columbia today. Nor does it appear that B.C. public school administrators are as knowledgeable concerning the results of judicial decision making for school operations as they are for those resulting from school statute law. Indeed, in the current absence of any comprehensive, but comprehensible, written review of

judicial decisions affecting B.C. public school operations, there appears to be widespread uncertainty among such administrators as to the decisions' relevance and specific applicability; for example the September 1980 confusion in the South Cariboo school district over its responsibilities towards a severely handicapped child, Warren Lowe. The results of this confusion and uncertainty are detrimental to the school system and the child.

## Objectives of the Study

The primary objective of the study is to research the nature and significance of existing judicial decisions affecting B.C. public school operations. From the results it is hoped to develop principles upon which conclusions and recommendations concerning current public school operating procedures and school statute law may be developed. The basic goal is to provide an overall picture of judicial decisions as they affect public school operations, not to provide a legal treatise.

## Significance of the Study

If judicial decisions do have important consequences for the governance and administration of B.C. public schools, then their nature and operational implications should be widely known and recognised by those responsible for decision making. The results of this study could assist in achieving that general objective. Additionally, the study might help formulate a basis for improved, general understanding of the specific mechanisms by which judicial decisions help articulate B.C. public schools to society.

Such a widespread, comprehensive knowledge of relevant judicial decisions, and of the mechanisms by which they arise, would assist specifically in evaluation of existing school statute law, including that which precedes any rewrite of the B.C. School Act as proposed by the Minister of Education, Hon. Brian Smith. For, if thought desirable, statute law may be used to change school law established by judicial decisions, or to make school law more certain and perhaps forestall uncertain outcomes from judicial decisions.

## Definition of Terms

As some critical, legal and educational terms employed in the study have, in addition, coloquial meanings, it is believed desirable to specify the exact definitions intended:

Law - a specific decree or ruling which the state is prepared to enforce, frequently known as positive law to distinguish it from principles of morality, honour, etc.

School Law - 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.

Judicial decisions - specific interpretations and applications of statute and common law by a body authorised by the state to do so where a dispute or uncertainty has arisen; such decisions are law, and enforced by the state. Sometimes known as case law, they are to be distinguished from

administrative decisions made by a government ministry or agency.

Statute Law - the body of law established directly by Acts of the Legislature, or by regulations, "rules and orders", and by-laws issued in accordance with such Acts.

Common Law - that body of law which is not statute law but is based upon long-held usages and customs, and has been confirmed and implemented by the courts in specific decisions. Originally it was the usage and custom common to all of England as interpreted by the King's judges, as opposed to local law and custom. Equity is a body of law developed by the old Court of Chancery, based on natural justice, which was invoked through an appeal to the King of England against any unjust consequences arising from strict application of the common law. During the nineteenth century equity was merged under one court system with common law, and for the purposes of this study is considered as part of it.

# CHAPTER II

# REVIEW OF THE LITERATURE

## Introduction

The literature concerning jurisprudence, the origins and purposes of law, is vast and complex. There is a long history of theories and concepts, going back to ancient Greece. It is now generally accepted that there are two antithetic conceptions of the growth of law: that it is imposed upon society by a sovereign will, and that it develops within society of its own vitality (Allen, 1963, p.1). Today, the latter concept is more widely accepted, and credence is placed with it for the purposes of this study.

The empirical literature concerning school law is more limited, certainly that which applies directly to school law in British Columbia. The major reliance in this study is on Canadian and United States works which review the context and the effects of judicial decisions which are part of school law.

Actual, written sources of law, such as statutes, law reports, digests, and specific articles or monographs which recount rather than comment, are classified for the purposes of this study as source documents; they are taken into consideration in Chapters III & IV - Courts of Law and Methodology.

## Philosophical Aspects of Law

Prior to the nineteenth century most theories of the origin of law adhered to the concept of natural law established by divine

ordinance, such as that developed by St. Thomas Aquinas. In the late eighteenth century the positivist or analytical school developed a theory which relied heavily upon the concept of sovereign will, divine or temporal; law is created by an omnipotent authority, issuing down its behests and enforcing them. Under this theory, legislation is considered the most appropriate conduit, and custom and precedent are subordinate sources of law (Allen, 1963, p.2).

A relatively modern exponent of this positivist school was John Austin, 1790-1859, who in his lectures as professor of jurisprudence at the University of London provided an analysis of the principles underlying all legal systems. Austin argued that law was solely the expression of the will of the sovereign authority, and must not be confused with religion and ethics. In Allen's (1963, p.5) opinion, this Austinian concept is based in part on Thomas Hobbes' theory of "Leviathan" sovereignty being required to save society from itself. Allen argues, however, that social warfare cannot be demonstrated as a natural state, when he writes (1963, p.6):

> A group existing by combination and unity of aim is bound to provide itself with rules; it is not, in mere desperation, necessarily compelled to surrender its will to a supreme law-giver in order to save itself from disruption. Law, in short, begins to grow as soon as society begins to grow; it is not invented and imposed *ab extra* at any specific stage of development.

Eighteenth century rationalism and individualism, with its concept of a "general will", had apparently been ignored by Austin, as had the English common law tradition that the King is subject to the law, first stated by Henry Bracton circa 1260 and developed in

the seventeenth century by Sir Edward Coke - the distinction between *ius et lex*. The rationalists believe that government is a form of trust, and that those in office must act for the people as a whole.

During the latter half of the nineteeth century Darwinism and the theory of biological evolution influenced jurisprudence, as did the newly developing science of sociology, by directing attention to the necessity of considering law in relation to other social phenomena. A sociological school of jurisprudence developed, which believes that there is no eternal law - what suits one period does not another - and that each culture has its corresponding legal system. From this theory developed the "functional" concept of law, which emphasises study of the actual social circumstances which give rise to legal institutions and condition their scope and operation.

One of the leading exponents of sociological jurisprudence was Professor Roscoe Pound, Dean of Harvard Law School, 1916-1936. His philosophy is one of practical compromise based on the concept that "interests" are the chief subject matter of law, and that the task of law in society is the satisfaction of changing human wants and desires. Although many English jurists are suspicious of theoretical ideas, a somewhat similar viewpoint is expressed by Arthur Goodhart (1949, p.43), Professor of Jurisprudence in the University of Oxford:

> Law must be a compromise between conflicting interests, and the proper interpretation of the law depends not on abstract conceptions but on wise judgement which does not forget that it is concerned with the lives of ordinary men.

As the basis for this study credence is placed with the "functional", evolutionary theory of law, and the pragmatic viewpoints expressed by Professors Pound and Goodhart. Certainly these viewpoints appear to reflect the manner in which legislation and judicial decisions concerning education are reached today, and certain concepts rationalize and support this statement. Political scientists such as David Easton have developed widely accepted "flow" models, to demonstrate how the political system is designed to resolve societal conflicts over the distribution of resources, with legislation or "political outputs" as the outcome of such resolution (Van Loon and Whittington, 1976, pp.8-12). Braybrooke and Lindblom (1963, pp.107-109) developed the concept of incrementalism which emphasises the evolutionary aspect of society's decisions, including those of the legal system, while Lindblom (1965, p.4) also suggests that the co-ordinated growth of the common law is achieved in part through the process of "mutual adjustment."

Turning specifically to judicial decisions, the "functional", evolutionary approach is apparent in Canada and England, and strongly evident in the United States. Great emphasis is laid on reason and the "reasonable man" in common law, and as knowledge and society's values change so must judges' decisions; Goodhart (1953, p.7) speaks of reason bridging the gulf between the past and present, and of building on the foundation of the old law, while McCurdy (1968, p.167) states that while the court is the interpreter rather than the creator of law, "rules of law announced in decisions on Common Law reflect changing attitudes of the population." In the United

States, in addition to the application of the common law by the court systems, the Supreme Court has the responsibility of interpreting a written constitution and adapting such interpretations to changing societal conditions; for example, the Supreme Court's 1954 reversal in Brown v Board of Education of its 1896 Plessey v Ferguson decision on "separate but equal" public facilities for blacks and whites. In the 1896 decision, separate but similar facilities for blacks and whites were ruled equal; in 1954 the same court, operating under the same law, ruled they were unequal. The attitudes of society and of the Supreme Court had changed.

## Judicial Decisions and School Law in British Columbia

There appears to be no literature concerning the total extent and significance of judicial decisions which are part of school law in British Columbia, nor even for any substantial portion of such decisions.

Significant groundwork was performed by Bargen (1961), Enns (1963) and McCurdy (1968), when they examined respectively the judicial decisions affecting the Canadian public school pupil, the Canadian school board, and the Canadian teacher. The basic purpose of these authors, however, was to identify and analyse the existing law in an attempt to establish principles governing the legal status of their subjects. They were handicapped, moreover, by the differences between the statutes applicable in each Province, which mitigate against the drawing of general principles from court cases based on these statutes. It is only in their general or peripheral comments,

therefore, that Bargen, Enns and McCurdy throw any light on the questions to be addressed in this more jurisdictionally restricted study.

Bargen emphasises the importance of a knowledge of school law to the school administrator: "There is little doubt that the school administrator will be more capable and tactful if he possesses a knowledge of school law" (1961, p.1). Such knowledge should encompass case law and legal principles as well as statute law, says Bargen, for while statute law may state what laws are to be applied, case law and legal principles determine how this application is to be made. And as the law is "dynamic and to a degree keeps pace with social progress" (Bargen, 1961, p.162), the educator must ensure that he keeps in touch with current legal developments.

With reference to the relative influence of each of the branches of school law, statute and case, Bargen (1961, p.159) states that this is difficult to estimate although one branch tends to assume more importance than the other in certain specific areas of education.

On the role of the courts, Bargen reviews the judiciary's functions of interpreting statute and common laws and applying them to specific cases. He argues (1961, p.13) that in a federal country such as Canada the courts' importance is increased as "at the points of articulation between the different levels of jurisdiction lies a legal no-man's land that only the Courts are competent to enter." Presumably the points of articulation referred to are both the federal-provincial and the provincial-local interfaces.

Bargen ends this section of his work with a plea for clearly written statute law (1961, p.14), as then "the Courts are not likely to interfere in the administrative affairs of any educational system." (Underlining added).

Perhaps one of Bargen's major contributions is his system of synthesis. He demonstrates consummately that by analysing school operations into various, separate categories, and then researching the law applicable to each category, a comprehensive synthesis of underlying principles may be effected.

Enns, in his "The Legal Status of the Canadian School Board", emphasises (1963, p.1) that, in addition to school statute law, school boards are "subject to a large body of legal rules and principles established by courts of law and embodied in the common law and equity." He also asserts (1963, pp.1 and 2) that court decisions are one of the five chief sources which determine the structure and operation of Canadian public school systems - the other four being the British North America Act, provincial statutes, departments of education rules and regulations, and school board rules and regulations - and that these decisions "are of at least equal importance" (1963, p.6) as school statute law.

Like Bargen, Enns emphasises the flexible nature of case law in responding to changes in social and economic conditions, and the need for school administrators to keep abreast of new developments. He adds that most school statute law is "exceedingly complex" (1963, pp.34 and 35) and that this "may actually increase the amount of litigation...to give clarification."

McCurdy, in his "The Legal Status of the Canadian Teacher", concurs with Bargen and Enns on the significant implications of judicial decisions for Canadian public school systems, adding (1968, p.3) that it is doubtful whether teachers generally realize the importance of school law in determining "their rights, duties, powers, privileges and responsibilities." He comments not only on the role of the courts in establishing and enforcing school law, but also "the increasingly important influence that various administrative or quasi-judicial bodies are having on their (teachers') legal status," for example, the boards appointed to review questions of individual teacher's competency. Throughout his book McCurdy emphasises the need for these quasi-judicial bodies to strive towards the judicial attributes characteristic of the courts, for as he points out they are performing essentially the same role, although created by legislators who believe them to be more expeditious, accessible and economic than the courts, and to have greater expertise in their specialised fields.

The trio of Bargen, Enns, and McCurdy appear to have established that judicial decisions by the courts and quasi-judicial bodies constitute a considerable portion of school law in Canada, and that these decisions have significant effects upon the operations of the country's public school systems. But as all three studies were Canada wide, and limited to restricted areas of public school operations, it is not possible to establish from their works the overall significance of judicial decisions within one provincial school system.

They also concurred that school administrators, teachers, and trustees would benefit from improved understanding of school case law and of the role played by the courts and quasi-judicial bodies, and that additional and updated studies are worthwhile.

Many such additional studies have taken place; for example the series of publications on "The Interaction of Law and Education" by the Ontario Institute for Studies in Education during the 1970s, and several dissertations emanating from such institutions as the Department of Educational Administration in the University of Alberta. But none of these additional studies appear to have focussed on the overall significance of judicial decisions for a particular provincial school system.

With regard to literature concerning the situation in British Columbia, it also appears limited to specific areas of public school operations. Occasional specialised memoranda and articles have been issued by the Ministry of Education, the B.C. Teachers' Federation and the B.C. School Trustees Association. Nicholls (1980) superficially reviews the major common law responsibilities of teachers, principals and school boards which flow from their functions as specified in the School Act. One of the more productive sources of information on judicial decisions which affect B.C. public school operations are the reports of proceedings at the 1978 and 1981 conferences for District Superintendents and Superintendents of Schools, arranged by the Faculties of Education and Law at the University of Victoria. At the 1981 conference there appeared to be general agreement that the number and importance of relevant judicial decisions is growing

and is likely to increase, and that school administrators should consider legal principles when making educational decisions within their districts. In particular, the possibility of lawsuits in British Columbia on behalf of students for financial loss arising from inadequate or improper counselling and instruction was depicted as "storm clouds on the horizon to the south."

Turning to the south, there is little doubt as to the significance of judicial decisions for the operation of the United States' public school systems. The fifty or more decisions of the U.S. Supreme Court which relate directly or indirectly to education issues have had profound effects upon the organisation of schools, upon teachers and students, and upon the educational administrators who have had to implement the Court's decisions at the State, school district, and individual school levels. In the opinion of Campbell (1965, p.34) these decisions have done more than the U.S. Congress to create a national education policy in the United States. Fellman (1960) illuminates the way in which the Supreme Court's rulings have reflected changes in U.S. social and economic conditions, for example the 1954 reversal of its "separate but equal" doctrine re public facilities as quoted earlier.

In addition to decisions of the Supreme Court there are those of State courts systems which have had critical effects upon each State's public schools, and on occasion the schools in other States. An example is the renowned 1971 Serrano v Priest decision in the California Supreme Court, which shook the foundations of many States' education finance systems.

The study of school law in the United States is considerably more advanced and extensive than in Canada. The literature is abundant, and it includes volumes which attempt to review the total school law, statute and case, applicable within a State - for example, Martinez et al.'s "Basic School Law", published by the New Jersey School Boards Association - and even attempts to do the same at the national level, for example, Valente's 1980 epic, "Law in the Schools".

It must be recognised that the United States has a formal, written constitution with provisions concerning individual rights, due process, and equal protection of the law, and these form the basis for many judicial decisions concerning education; also, that society in the United States is generally litigious. Both such situations, however, appear to be developing in Canada, as is examined later in this study.

Additional Canadian interest in U.S. judicial decisions arises from their direct and indirect effects upon education in this country. The United States and Canada share the same English Common law heritage, and consequently precedents developed in U.S. courts may directly influence Canadian judges' decisions, and vice versa; while not binding under the principle of *stare decisis* the precedents may be construed to have some "persuasive authority". The indirect effects arise from the similarity between the two countries' society and culture, and the excellent system of communications between them; educational developments in the United States frequently influence Canada's public school systems.

The major conclusions to be drawn from the empirical literature on U.S. judicial decisions concerning education is that such decisions are numerous, play a highly significant role in U.S. education and have ripple effects in Canada, and that they are thought worthy of in-depth study with widespread publication of the findings and conclusions. As Valente states in the preface to his 1980 "Law in the Schools":

> Given the proliferating welter of laws, careful organization of legal materials becomes critical to a practical understanding of the dominant policies and themes of school law. Without an organized foundation and rational framework, the elements of constitutional, statutory, regulatory, and case law become, in the words of Holmes, a "ragbag of details".

## Specific Objectives

Based on conclusions drawn from the literature reviewed, the following specific objectives are established in order to determine whether:

(1) school law in British Columbia develops in a "functional", evolutionary manner, in response to developing societal needs and expectations;

(2) judicial decisions form a significant part of school law in British Columbia, and directly affect educational operations within the B.C. public schools system;

(3) judicial decisions have a significant effect on the organizational structure of the B.C. public school system;

(4) judicial decisions made in the courts which affect the B.C. public school system may be categorised as either

the interpretation of statutes or the application of the common law;

(5) there are more judicial decisions in public school operational areas where B.C. school statute law is unclear or unspecific;

(6) judicial decisions will likely continue to play a significant role in the formulation of future school law in British Columbia, although continuing to be limited primarily to the operational aspects of the school system.

In addition to the foregoing objectives, other salient trends and developments may emerge as the study develops, and be included in the description of findings.

# CHAPTER III

## COURTS OF LAW, AND QUASI-JUDICIAL BODIES - A BACKGROUND REVIEW

This chapter provides an outline of the functions and methods of courts of law and of quasi-judicial, administrative bodies. Any evaluation of the nature and significance of judicial decisions which affect the British Columbia public school system requires a basic legal literacy.

The greater part of the chapter concerns courts of law, as they provide the majority of the relevant decisions and also the courts' operations are more complex.

### Courts of Law

Acquisition of this basic legal literacy entailed reading in the areas of constitutional law and the philosophy of law, in addition to the mechanics of the civil courts and of law reporting. As a supplement to this reading, listed in the study's bibliography, discussions were held with lawyers, the manager of a law reporting firm, a law librarian, and persons whose work in the public school system relates to school law in B.C. The knowledge acquired is summarised below, as this part of the chapter reviews:

- the "rule of law" concept
- the dichotomy of court functions between the interpretation of statute law and the application of common law
- the concept of natural justice, or "due process"
- the structure of the civil court system
- the hierarchy of compliance with the principle of *stare decisis*, or binding precedent
- how civil law actions are conducted
- the principles and practices of case law reporting

## The Rule of Law Concept

The preamble to the British North America Act of 1867 provides for Canada to have a form of government "similar in principle to that of the United Kingdom." In consequence, British constitutional law is followed concerning the functioning of courts, and the independence, or separation to use the Baron de Montesquieu's phrase, of the judiciary from the legislative and executive branches of government. In addition, Canada inherited from Britain many important fundamental laws including the Magna Carta and the "rule of law" concept under which everyone, including the government and the police, is controlled by the law. Under this British, and now "western world" concept, all operations of government, including the public school system, may be undertaken only by the legitimate authorities acting strictly in accordance with legally established processes and procedures.

The purpose of the "rule of law" is to protect the individual citizen or group of citizens from arbitrary decisions of government representatives and officials (Van Loon and Whittington, 1976, p.125). The objective is to make government decisions more rational and predictable, free from the personal whims of those in authority. Borowicz states (1978, p.4) that the rule of law "dictates that anyone who acts in an official capacity including school boards, superintendents, principals and teachers, cannot act capriciously, arbitrarily or illegally"; also, that "anyone who has a duty or an obligation imposed upon him by law must fulfill his duty, and its performance can be compelled."

That the rule of law concept underlies the B.C. public school system is evidenced by the statutory and common law limits on the powers of the Minister of Education and of school boards; also by their legal

obligations to perform specific functions. For example, school boards must follow specific procedures when suspending or dismissing a pupil or teacher; and they must provide "sufficient school accommodation and tuition free of charge" (section 155(1)(a) School Act of B.C.) for all residents of the school district statutorily eligible to attend public school or kindergarten. Failure to act in the prescribed manner, including observance of the principles of natural justice, or "due process", in any hearings before the school board, may result in the courts overturning its decision. There is also an instance of the B.C. Supreme Court (Coyle v. Minister of Education of B.C. [1978] 6 W.W.R. 279) ordering inoperative a Provincial order-in-council which had confirmed the dismissal of John Coyle, a teacher in the public school system. Only the Legislature is "above" the courts, and this power is not totally unrestricted.

The theory that the Crown can do no wrong has never applied to public education in England or Canada, although until recently it was necessary to gain permission to sue the B.C. Ministry of Education. It is interesting to note (Valente, 1980, p.393) that in the United States a few of the States have retained the "Doctrine of Governmental Immunity", under which school boards and other governmental agencies may claim immunity from tort liability, but otherwise the "rule of law" applies in U.S. public school education also.

Theoretically, under the rule of law concept everyone observes the spirit and the letter of comprehensive, equitable and updated laws. In consequence there are very few disputes and uncertainties. But as with Max Weber's theory of the beneficent functioning of a rational,

hierarchical and impersonal bureaucracy[1], the practice of the "rule of law" falters to the extent it is dependent on imperfect man. For laws, and bureaucratic rules, are made and exercised by men whose knowledge, values and motivations are not necessarily attuned to the needs of society as a whole.

It is almost inevitable that under the "rule of law" there will be uncertainties, disputes and claims of discrimination, both in the making and the application of laws. When all other attempts at resolution fail, the courts must act in a remedial role and resolve the issues in accordance with the courts' interpretation of the law. "Courts operate after the fact when other decision-making processes have failed and the parties to a dispute have been unable to solve their problem by other means" (Borowicz, 1978, p.3).

Presided over and directed by independent, dispassionate and objective judges, and following long established rules of procedure, the courts clarify the law and apply it to the specific circumstances before them. This interpretation and implementation process will involve either the statute or the common law, in that order, whichever is applicable to the facts before the courts.

## The Interpretation of Statute Law

Many court decisions affecting public school operations in B.C. concern the interpretation or "construction" of statutes. Although school statute law is extensive and almost constantly being amended,

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[1]For a commentary on Weber's and other theories of bureaucracy, see Hodgkinson, 1978, pp. 45-46.

it cannot attempt to cover in detail and in advance every aspect of those school activities which it governs. Moreover, the problem may be compounded where the original intent of the statute is uncertain, as for example the word "sufficient" in section 155 (1)(a) School Act. In such situations the courts ultimately must decide what the legislature intended the law to be and apply it to the facts before them.

Certain rules are followed by the courts when interpreting statute law, principally the assumption that words carry their conventional meaning when used in a statute, unless the context and the purpose of the statute suggest otherwise. Sometimes there is a specific definition contained in the statute's interpretation section or, failing that, in the Interpretation Act, R.S.B.C. 1979, Chap. 206. The word "municipality", for example, has a unique definition in section 1 (the interpretation section) of the School Act, which differs from that in the Interpretation Act; the former definition therefore must be used in any adjudication under the School Act. Failing contextual explicitness, or interpretation in the School Act or the Interpretation Act, the meaning of a word is usually taken by a judge from a legal dictionary or the Oxford English Dictionary - for example the word "tuition" in section 155 (1)(a) School Act.

Judges must also sometimes deal with problems of "fringe meaning", often where societal developments have outrun the statutes. An example here, drawn from an actual case in North Vancouver reviewed later in this study, is whether a school board's power to provide "education programs...for the instruction of persons 15 years of age and upwards" (section 160 (g) School Act) includes the funding and operation of community schools. In such cases the judge may rely on the general policy of the

Act in an attempt to deduce either what the legislature intended, or what the legislature would have done if it had anticipated the new development (Glanville Williams, 1978, p.90).

This relatively unrestricted approach of judges to the interpretation of statutes is a recent development which overlooks some of the older rules such as the "literal rule" - do exactly what the statute says regardless of any absurdidity - and the *eiusdem generis* rule - when a list of particular items is followed in a statute by general words, the general words should be confined to the same scope or genus as the particular items. The more modern attitude of judges, that statute law is not an arbitrary body of rules without underlying reason, is encapsuled in a statement by the eminent English jurist, Lord Denning: "A judge must not alter the material of which it (the statute) is woven, but he can and should iron out the creases." (Quoted in Glanville Williams, 1978, p.92)

There are two basic presumptions of a restrictive nature, however, which are still followed by judges: a statute is not retroactive in effect, nor does it violate principles of natural justice, unless it is clearly the legislature's intent that the statute do so.

It appears of great benefit for society to have the courts interpret the statute law where uncertainty or a dispute occurs, for in this way they close any interstices in the statute law. A solution achieved by compromise between disputing parties, or through bluff, establishes no legal precedent for similar, future situations. And under the "rule of law" only the courts may provide and enforce an authoritative interpretation.

Common Law and Natural Justice

The second area of judicial decisions concerns the application of the common law, principally where no relevant statute law applies. The common law, as defined earlier in this study, is contained in precedent cases based upon long-held usages and customs, including equity which incorporates the principles of natural justice. This whole area appears to be one of definitional uncertainty and some contention among legal philosophers and purists, involving as it does the origins and purposes of jurisprudence as touched upon in Chapter II of this study. Few persons would dispute, however, that many historic principles, customs and beliefs, including immutable "natural law" concepts of freedom, equality and justice, have become enshrined through precedent cases in the law of Canada. Glanville Williams states (1978, p.21) that the words "common law" are a chameleon phrase which is always used to point a contrast - like the word "laymen" which can mean non-lawyers, non-medical doctors, non-professional educators, etc., according to its context. "Common law," therefore, is taken here to mean that body of law which is not statute - consequently it includes judicial decisions on such well established and publicised topics as contract and tort, and the application of principles of natural justice to quasi-judicial proceedings.

Natural justice is founded in natural law - "in the broad sense natural law signifies natural justice" (Bargen, 1960, p.4). Natural law is in effect a set of goals developed through man's power of reason from basic social and religious beliefs. Its history can be traced through ancient Greek and Roman legal concepts, and the tenets of the Christian church. It represents what the law would be if equality for all men, and justice between them, were the prime considerations of society.

It is not a written system of law but is rather an ideal state to be aimed for, and against which the workings of positive law can be evaluated (d'Entrèves, 1951, p.95). It acts as a leaven to the law rather than a component or ingredient.

The courts will not adjudicate cases based solely on natural law; a claim to the courts must show for its foundation some positive law in statute or precedent. On the other hand the courts may not judge a case strictly on the basis of positive law if some principle of natural justice, which has developed out of natural law, is endangered. Although the courts' primary function is to apply the positive law, where the statutes or precedents are inadequate, vague or contradictory, the judge may turn to natural law in an attempt to establish what justice requires (Enns, 1963, pp.14-15).

In practice a body of principles known as "natural justice", or "due process" in the United States, has developed relating to "the procedural and substantive requirements for the conduct of a proper hearing or enquiry...the decision making process must be fair." (Borowicz, 1978, p.4). Natural justice applies during any disciplinary proceedings against a teacher or a student, including such features as adequate notice to the "defendant", an open hearing and the right to counsel. The courts may intervene in the process if they believe that natural justice has not been observed:

> As to denial of natural justice, I take it to be common ground that a school board, although it has many administrative functions, is, in deciding whether a teacher should be suspended or dismissed, not acting as a purely administrative tribunal but is exercising a judicial or quasi-judicial function and is bound to act in a judicial manner, which

> includes acting in accordance with the principles of natural justice.
> (Fulton, J. In Johnston v. Board of School Trustees, S.D. #35, Langley. (1979), 12 B.C.L.R. 1 (S.C.)

The Hierarchy of Precedent in the Civil Court System

Judges' decisions in common law are grounded in past judgments of the courts, principally in order that the law may be as consistent as possible. The canon of *stare decisis* (let the decision stand) clearly reinforces and at the same time incrementally expands case law, the major component of the common law. A basic understanding of what constitutes a "precedent" decision, and in what courts it must be followed, involves a brief review of the hierarchical structure of B.C.'s civil court system. For previous court decisions are binding only on courts of lower jurisdiction - while a dispute or case usually works its way up the court system until finally resolved, precedents may be said to work their way down.

At the apex of the Canadian court hierarchy, the decisions of the Supreme Court of Canada bind all provincial courts. One of the functions of the Supreme Court's Chief Justice and eight other judges is to hear appeals from the decisions of Provincial appeal courts, but only if a civil case involves an important question of law. The Supreme Court is a lawyers' court; the parties involved in the case hardly ever appear before the court, only their lawyers.

British Columbia's highest court is the B.C. Court of Appeal (not the misleadingly named B.C. Supreme Court) and its decisions bind the Province's trial courts in all future cases unless overridden by

the Supreme Court of Canada. The B.C. Court of Appeal has a Chief Justice of B.C. and twelve Justices of Appeal (section 1, Court of Appeal Act, R.S.B.C. 1979, Chap. 74), all federally appointed and remunerated. One of its functions is to hear civil cases appealed from the trial courts on a question of law or a question of facts (Legal Services Commission, 1978, p.33). There are always at least three judges present to hear an appeal against the original hearing and decision. Like the Supreme Court of Canada, it is a lawyers' court; no witnesses appear, only the lawyers for the parties to the case.

The Province's trial courts for civil cases consist of seven County Courts dispersed geographically throughout the Province (section 2, County Court Act, R.S.B.C. 1979, Chap. 72), and also the B.C. Supreme Court. A County Court judge may sit alone, or with a jury, to hear cases involving claims of $25,000 or less (section 29, County Court Act). There are 40 or more County Court judges (the number is not fixed), appointed and paid by the federal government.

Claims over $25,000, or matters specified in provincial statutes, such as libel, go before the Supreme Court; it sits regularly in Vancouver and Victoria, and visits other centres on the Supreme Court "circuit". There is a Chief Justice and 30 Puisne Judges, also appointed by the federal government, who usually sit alone in court.

A County Court or Supreme Court decision which is not overruled by the B.C. Court of Appeal or the Supreme Court of Canada, and is not invalidated by subsequent legislation, may be considered as a judicial precedent. Occasionally, however, a fellow judge may "distinguish" or not follow the decision, in which case any final resolution is through the appeal process.

The part of the court's decision which establishes or reinforces a common law precedent is called the *ratio decidendi* (reason for decision), and this may be applied to future cases similar in basis. The *ratio decidendi* is essentially the basic principle of the decision, obtained by "a process of abstraction from the totality of facts that occurred in the case". (Glanville Williams, 1978, p.67)

Other remarks made by the judge in his "reasons for judgment" are *obiter dicta* (statements by the way). These are not binding on future cases but may be used as a guide according to the status of the originating judge and court, and whether the judge "reserved" his decision to give time for full consideration.

Where no *rationi decidendi* are available on a public school issue, an *obiter dictum* such as that of Fulton J. on natural justice, quoted earlier, may provide useful guidance not only for lawyers and the courts but also for school trustees and administrators.

Precedents from other common law jurisdictions may be taken into account in B.C. courts provided they are based on similar statute law. Although not binding, they are treated as "persuasive" according to the status of the court which handed down the decision.

There is a minor exception in B.C. to the hierarchy of precedent describedabove, with reference to teacher discipline for wrongdoing. Teacher dismissals or suspensions must first be appealed to Boards of Reference (section 129, School Act), and either party may then appeal the Board of Reference's decision to the Supreme Court, and presumably then to the appellate courts.

Decisions of all other quasi-judicial bodies, including Review

Commissions which hear appeals against teacher dismissal for incompetence (section 130, School Act), and those of teacher salary arbitration boards (sections 136 and 137, School Act), are final and binding and cannot be appealed to the courts, except on the grounds that the commission or board misinterpreted its function or violated the principles of natural justice. Examples and reviews of such appeals appear later in this study.

Civil Law Proceedings

Civil actions usually concern contract disputes or torts - a tort is where one person breaks an accepted standard of care or responsibility to another person, and injury results. The rules and procedures governing civil cases in British Columbia are contained in the "Supreme Court Rules" (S.C.R.). The person suing, the plaintiff, has a lawyer issue a writ of summons and file a statement of claim with the appropriate trial court and a copy with the defendant (Rule 8, S.C.R.). The defendant's lawyer usually responds with a statement of defence, which may be followed by further claims and counter-claims concerning the original statements. This exchange of documents is known as "pleadings", and when completed there is a conference between the plaintiff, the defendant, their lawyers and a judge, called an "examination in discovery" (Rule 27, S.C.R.). Its purpose is to try to settle the dispute without court action; failing that, to isolate the issues in dispute which are to go before the court, in particular whether they are questions of fact, for example, was the student on school property when he was injured, or questions of law, such as the standard of care owed to the student by his teacher at the time the injury to the student occurred.

In trial court, plaintiff and defendant present their cases through their lawyers, documents concerning the issues are presented to the court, witnesses are sworn in to give evidence and to be cross-examined, and the lawyers then summarise their clients' positions (Rule 40, S.C.R.). The judge may ask questions during the proceedings to clarify the issues, as he may consider only evidence presented in court. His decision may then be given *ex tempore* (unprepared), immediately at the conclusion of the trial, or he may "reserve" his decision for due consideration. It is then handed down to the court, often several weeks after the trial, usually in a document called "reasons for judgment". These "reasons" are the principal raw materials for law reporters - to continue the earlier simile, the straw with which the bricks of common law are made.

Either the plaintiff or the defendant may then consider an appeal to the B.C. Court of Appeal. When the appeal is accepted for consideration, whoever files the appeal becomes the "appellant", and the other party becomes the "respondent." As mentioned earlier, there must be good reason in law or fact for an appeal and, being an appeal court, only the original proceedings and the record of evidence are considered.

## Law Reporting

The principle of *stare decisis*, or binding precedent, is clearly dependent upon the reporting and publication of judicial decisions. The essential information must be recorded, and disseminated.

Case reporting has to be accurate and its publication up-to-date, if the law is to be applied in a co-ordinated manner, for unless

judges are aware of all the current, major precedents, the application and incremental development of the common law cannot occur. As Lindblom suggests (1965, p.6) the co-ordination so evident in the common law is not achieved by a central co-ordinator but by the process of mutual adjustment - "the judges have an eye on each other."

But perhaps just as important as overall co-ordination is that a judge be aware of the specific cases relevant to the facts before him in today's trial. This places a heavy burden of research and updating of legal knowledge upon a trial lawyer, who must cite and bring cogently to the judge's attention all the relevant precedents which suit his client's purpose. The proliferation and complexity of case law is a major reason why some lawyers specialise on a particular aspect of civil or criminal law.

Not all judicial decisions are reported, of course, particularly *ex tempore* decisions, owing to the volume of court cases in all jurisdictions. Indeed, not even all decisions for which "reasons for judgment" are provided are included in formal law reports. According to Ellis (1975, p.5) those which are accepted for publication (and therefore achieve immortality) must "introduce new principles or modify existing principles of law, settle a doubtful question of law, interpret a statute, or be new applications of accepted principles; a case which is of interest solely because of its particular facts is not reportable."

Clearly, it is of great interest to this study to know how these critical decisions are made, and what percentage of school law cases become enshrined in the law reports. That interest provides the rationale for this section of the study, and also the fact that some familiarity with the mechanics of law reporting will assist the reader's

comprehension of the methodology followed later in the study.

A disclaimer and a caveat need to be stated here - this section should not be perceived as in incitement for school administrators to become their own lawyers. It is hoped that the pitfalls awaiting the layman, when searching for and applying case law to specific circumstances, are too well known for that conclusion to be drawn.

Who is responsible for law reporting? The pattern varies from court to court, between Provinces, and between common law countries. When its intricacies are understood, however, it appears to be more a mosaic than a farrago.

In Canada, the Supreme Court has issued its own official reports since it was established in 1875. Supreme Court Reports (cited as S.C.R.) contain virtually all the court's decisions (Yogis & Christie, 1974, p.86). Also at the national level, the "unofficial" Dominion Law Reports (D.L.R.), have provided since 1912 a wide selection of decisions on all branches of the law, from all jurisdictions in Canada. The word "unofficial" means that D.L.R. is published by a commercial firm, Canada Law Book Ltd., rather than by the courts; it is, however, respected by the courts as an authoritative reference on case law, and tends to be the work of specific citation following broader research of the law in legal encyclopedia and abridgements. The selection of cases for publication is at the editor's discretion, but broadly follows the policy described by Ellis at the beginning of this section.

At the regional level, the "unofficial" Western Weekly Reports, (W.W.R.), published by Carswell Co. Ltd. since 1911, carries a variety

of court decisions from the four western provinces and the two territories, some of which may also be contained in D.L.R. Apart from providing more extensive coverage of western decisions, however, W.W.R. helpfully categorises its cases under topical headings, for example "schools and school districts." Its editorial policy is to include "All cases of Value from the Courts of the Western Provinces and the Territories and Appeals therefrom to the Supreme Court of Canada and the Exchequer Court of Canada." (The Exchequer Court was the predecessor of the Federal Court, which hears claims against the Federal Government or one of its agencies). There is no Eastern Weekly Reports, but each province from Ontario east has its "semi-official" reports published by its lawyers' professional body.

For British Columbia, all civil and criminal court decisions contained in "reasons for judgment", estimated at 1,200 per annum out of approximately 100,000 decisions[1], are summarised and published approximately six weeks later in "B.C. Decisions", published by Western Legal Publications Ltd. Broad topical classifications are used in "B.C. Decisions" including "Teaching Profession" which, unfortunately, does not include other cases concerning the public schools as they are categorised under such headings as "Negligence", etc. It is not possible to cite in court a case from "B.C. Decisions", its reports being summaries, but Western Legal Publications will supply a copy of the "reasons for judgment"

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[1] June 17 interview with Stewart Morrison, manager of Western Legal Publications Ltd., Vancouver, B.C. The 100,000 figure includes civil, criminal and small debts courts.

for a charge, and it may then be cited in court by its name, court registry number, date, court and jurisdiction. One advantage of a digest like "B.C. Decisions" is that it quickly alerts persons with a particular interest so that they may obtain copies of relevant cases. The alternative is to wait six to nine months, until approximately 350 "leading" cases per annum appear in full in the "unofficial" British Columbia Law Reports (B.C.L.R.), published by the Carswell Co. Ltd.

This question of law reporting in B.C. is of considerable relevance to the study, and will be returned to later when reports on school law are being analysed. It is currently being reviewed by the Attorney General's office and the Canadian Law Information Council.

Looking abroad, reports of leading judgments in English courts appear in the "semi-official" (published by the lawyers' professional association) Law Reports, and the "unofficial" Weekly Law Reports and All England Law Reports, and their various predecessors (Yogis & Christie, 1974, p.92). In the United States there is a plethora of reporting services: at the federal level United States Reports is the official series on decisions of the Supreme Court, Federal Reporter covers other federal courts, while at the States' level the National Reporter System provides seven regional reports (with special supplements for the litigious States of California and New York) which are tending to supplant any "official" state reports (Yogis & Christie, 1974, p.108).

With regard to the number of judicial decisions rendered, and the number reported, few comprehensive statistics appear to be available. It was estimated (Cohen, 1969, p.11) that approximately 30,000 precedent decisions made by United States' judges are added each year "to a corpus

of some three million decisions in the whole of Anglo-American jurisprudence." Doubtless, these figures have increased since 1969.

Canadian statistics on law reporting were collected for 1977 by the Canada Law Information Council. Although not yet published, the following facts were supplied for this study by the Council's Director of Research[1]:

(a) the number of civil cases in Canada for 1977 reported in digests or law reports - 4,860

(b) the number of civil cases in British Columbia for 1977 reported in digests or law reports - 959

(It is interesting to note that British Columbia, with approximately 10% of Canada's population in 1977, generated nearly 20% of the reported civil cases in that year).

This overview of law reporting has concentrated so far on what are known as "primary" sources of case law, the largely unedited reports of judges' "reasons for decisions." But in addition there are "secondary" sources available, mainly abridgments of cases under topical headings, or reviews of the law on particular topics which quote the relevant cases. As research of the "secondary" sources is often a necessary preliminary before consulting the law reports, and as "secondary" sources were used extensively in this study, it is thought that a basic review of them would be appropriate here.

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[1] June 16 and 26 correspondence with Ms. Shirley Lounder, and telephone conversation of September 15, 1981.

The most helpful of the "secondary" sources for basic legal research in Canada are the Canadian Encylopedic Digest which reviews the law topically in separate volumes for Ontario and the Western Provinces, and also the Canadian Abridgment which purports to contain digests of every reported Canadian judgment, under topical headings. In addition there are Case Citators and Statute Citators which show which cases have been used as precedents in courts and what statute law has been interpreted by the courts. Other works of guidance include dictionaries of legally defined "words and phrases," and sometimes of relevance are articles in legal periodicals such as the "Canadian Law Review", the "Law Quarterly Review" and the "Modern Law Review" in England, and the "Harvard Law Review" in the United States. British Columbia has a lawyers' magazine, the "Advocate."

In England an outstanding "secondary" source is Halsbury's "Laws of England." For example, volume 15 of the fourth edition (1977) contains a clear 200 page statement of the law in England on "Education," statute and common, with references to the appropriate sections, regulations and cases. There are many topical headings within "Education" such as "provision for handicapped pupils" (paragraph 174). Also there is a "Canadian Convertor" available which shows the extent to which the law stated in Halsbury is applicable in Canada, and under what authority. One of the suggestions made for improving Canadian law reporting (Department of Justice, 1972, p.70) was for a legal encyclopedia of the quality of Halsbury; it is believed that Butterworth's, the publishers of Halsbury, are preparing a Canadian version, which would greatly facilitate topical legal research.

The United States has an outstanding citation service in Shephard's Citations, but its major encyclopedias, Corpus Juris Secundum, and American Jurisprudence, suffer from "over reliance on case law and neglect of statute law" (Yogis & Christie, 1974, p.110). As discussed in Chapter II of this study, however, there are many excellent texts which provide a comprehensive review of U.S. school law in the manner, if not the style, of a legal encyclopedia, in particular Valente's 1980 epic, "Law in the Schools."

## Conclusion

Law reporting in British Columbia, the rest of Canada, and in many of the other common law countries, is clearly characterised by its complexity and apparent lack of co-ordination. Yet the system appears to work.

Despite the obvious subjectivity in the process of selection, despite the duplication of cases in different reports, law report publishers, judges and lawyers apparently manage to keep track of developments in the common law resulting from changes in statute law and new developments within society generally. The layman is reminded of Lindblom's theory of partisan mutual adjustment (1965, p.3) which suggests that co-ordination in many segments of society's operations is achieved by a body of decisions motivated by individual self interest and not intended to co-ordinate. Some additional comments and recommendations appear later in this study.

## Quasi-Judicial Bodies

It has been contended by some political scientists that there are only two basic functions of government: making law and applying

it (Van Loon and Whittington, 1976, p.139). Under this concept, a variation upon the classical views of the Baron de Montesquieu, the judiciary and the executive are perceived as applying the law to specific cases, but in a different manner. Nowhere perhaps is this similarity in role between the judicial and executive functions more clearly demonstrated than in the activities of quasi-judicial bodies, created by legislatures to perform specific, administrative tasks basically of a judicial nature. Nevertheless the essential distinction between the judicial and the executive roles is still visible both in the composition and the operations of these bodies, when compared to government departments or ministries.

Dawson suggests (1970, p.264 et seq.) that the growth in the number of bodies exercising quasi-judicial powers in Canadian government is largely the result of the transformation of the "negative laissez-faire state" into the "positive state which is continually recognizing a greater and greater responsibility for the welfare of its citizens."

In Dawson's opinion (1970, p.266):

> Parliament discovered that it could not take over all the additional burdens which fell to its lot under this new conception of state activity, and the judiciary was also unable to bring its functions into perfect harmony with the new demands which were made upon it. Parliament had neither the time nor the special knowledge to enact adequate legislation on many of these complex topics, nor, indeed, could such legislation always be drafted in sufficient detail or be made flexible enough to cover the widely varying conditions which it encountered. The courts, for their part, if given extensive powers of deciding disputes arising out of this type of legislation, would not only be inundated with cases, but they would also lack the specialized knowledge which is necessary to do the work acceptably, and there would be little assurance that they would approach their task with the sympathy and understanding which is an indispensable part of proper administration in some of these newer fields.

Chandler (1979, p.131) adds that not only are quasi-judicial bodies created to apply general rules to specific cases where technical expertise must be brought to bear, but also to ensure an "arm's-length" relation with the executive where the decision making needs to be "insulated from partisan political forces."

Educational administration studies in the purpose and functioning of quasi-judicial bodies as they affect the legal status of Canadian teachers have been undertaken by McCurdy, who appears to be in basic agreement with the political scientists quoted above when he comments (1968, pp.10-11) that "the quasi-judicial procedure is a part of the apparatus of law which exists to adjudicate." McCurdy also states that while characterised by "expeditiousness, accessibility, expertise and economy of operation", quasi-judicial bodies need to strive for "openness, fairness and impartiality," and this requires care in appointments and "clear cut rules and procedures for operation."

The major principles that characterise quasi-judicial bodies, therefore, 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, is required. It must be emphasised, however, that while the wisdom of a quasi-judicial body's decision may not be questioned, its procedures are under the supervision of the courts to ensure compliance with natural justice.

These principles become apparent, in varying degrees, when studying the composition and functioning of the quasi-judicial bodies which operate as part of the British Columbia public school system. Details of their distinctive operating procedures are best reviewed

when describing and assessing their decisions.

The technical scene having been set, both for courts of law and for quasi-judicial bodies, the study now moves on to a review of the methodology followed in locating and evaluating the relevant judicial decisions.

# CHAPTER IV

# METHODOLOGY

## Introduction

The study's primary objective 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 school system's current operations, and of the relevant 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 this study are 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 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, Chap. 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. These two potential sources are reviewed in Chapter V "Findings".

As a result of the investigation into current school operations and governing statute law, it became evident that each of the above actual sources of judicial decisions would require a research procedure tailored to its statutory mandate and its operating practices. In addition, the procedures for measuring and evaluating the various classes of decisions would need to be individually fashioned so as not to distort and oversimplify the overall picture of judicial decisions to be presented. The Procrustean method was clearly inappropriate, and was formally abjured.

The dangers of seeking certainty rather than understanding in broad, general studies have been eloquently described by Conquest (1981). He warns of "academic systems...which take a subject of great complexity, and devise a set of formulae which can be applied to some of its more apparent and superficial elements, taking care that the terms are flexible enough to fit whatever happens." He also condemns

(1981) "the search for final solutions where these are not really available".

There is, of course, a limit to the eclectic, descriptive approach. In studies such as this some structure, some numbers, some categorisation is essential, if a comprehensive and accurate picture which will serve as a credible basis for conclusions and recommendations is to be prepared. It is believed that the structure and categories described below are adequate to meet rigorous academic standards, while responsively reflecting the individual functions and operations of the judicial decision-making bodies reviewed. Like Odysseus, this study has a Scylla and a Charybdis to steer between.

## Courts of Law

It was apparent that the majority of judicial decisions affecting the Province's public school system issue from courts of law in British Columbia, and in other Provinces and other countries with common law legal systems and similar school statute law. The method for this major section of the study was based on the four part procedure proposed by Yogis and Christie (1974, p.2) for legal research:

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 Bargen, Volente and other 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 reflects 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, forty sub-classifications were established, to provide comprehensive coverage of operating areas in which legal problems have or might arise; a list of these sub-classifications appears as Appendix "A" to this study. This detailed list, to be used during part II "research" of decisions of courts of law, was based in part upon the works of Bargen, Volente, etc., partly on the writer's own experience with the B.C. public school system, and partly on suggestions from officials of the B.C. School Trustees Association, the B.C. Teachers' Federation and the Ministry of Education.

Part II of the procedure, the research aspect, followed the steps advocated by Yogis and Christie (1974) for research of case law, involving both "primary" and "secondary" materials as reviewed in Chapter III of this study. Firstly, 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 trustees' and the teachers' associations, and of the Ministry of Education, and by searching "legal files" at the Vancouver office of the B.C. School Trustees Association which cover the last decade of B.C. school districts' operations. Also, information concerning, and citations to, relevant cases were obtained from the various texts and articles mentioned in Chapter II of this study and listed in its bibliography.

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 identifying and assessing of each case's *ratio decidendi* and its *obiter dicta,* but also consideration of the degree to which any implications for school operations are "significant." This feature of the study provided perhaps the greatest difficulty - how to define and measure "significance." Various criteria were considered, such as the establishment by a judicial decision of new principles of law, or where a decision leads directly to changes in school operations; also considered were the cost implications of a judicial decision, for example a court order to accept a severely handicapped child into the regular school system, or the quantum of damages awarded in a negligence

case. But this process appeared to be merely identifying the manner in which the significance of decisions demonstrates itself, and individual criteria or levels would still be required for each of these manifestations. Every reported decision advances the law in some respect, in order to be reported, and few such decisions would have no effect upon school operations or upon school expenditures.

After lengthy consideration, and consultation with officials of the trustees' and teachers' associations, and of the Ministry of Education, it was concluded that there are no clear cut, basic criteria for significance, and that although some judicial decisions that affect the B.C. public school system are more significant than others this will most likely be due to a unique combination of the legal, operational and cost features outlined above. Significance is demonstrated when the decision's particular combination of features is brought to the attention of educational policymakers and administrators and it influences their subsequent thoughts and actions. But as it is clearly impossible to measure accurately this influence, only subjective assessments may be made of it.

Having recognized this limitation, and accepted that there is no functional definition of significance, it was decided to work with the three features identified. What decisions are deemed "significant" in this study, therefore, is a subjective matter determined by the writer on the basis of the decisions' legal, operational and cost features. A review of forty-nine "significant" decisions appears as Appendix "B" to the study. Each decision review carries the name, citation and legal nature of the decision, together with the decision's school operations classification under Appendix "A" categories; in addition, there is

a statement of the decision's reasons for significance, as well as a resume of the facts of the case.

In this way the writer's assessment of why each decision selected is significant for B.C.'s public school operations is set out for consideration. Nevertheless, the precaution was taken of consulting with the same triumvirate of officials on whether they believe particular decisions to be "significant;" and, taking into consideration organizational interests, a satisfying if not surprising similarity of opinion was expressed in almost all cases.

Part IV of Yogis and Christie's four-part procedure, the careful expression of findings and conclusions, has its application in chapters V and VI of this study. It should be reiterated that the emphasis in this expression is on educational administration and not, to borrow Shakespeare's phrase, the "nice sharp quillets of the law." Legal treatises are believed best left to the lawyers.

## Other Sources of Judicial Decisions

The other actual sources of relevant judicial decisions listed earlier in this chapter were studied in turn as to their legal mandates and operating patterns, in order to determine appropriate study procedures. It would be gratuitous to review in detail here the legal commission and functioning of each of these judicial agencies; that is best done when describing and assessing the findings on their decisions. Nevertheless, a short outline may assist appreciation of the procedures followed in locating and measuring their relevant decisions. In all cases the evaluation of their decisions had to be, as with courts of law, on the basis of "significance" for British Columbia public school operations.

The Human Rights Code, R.S.B.C. 1979, Chap. 186, applies directly to the admittance of students and to staff hiring practices in the public school system. Enforcement requires a complaint, which automatically results in an enquiry by the Director of Human Rights. This is followed, if thought necessary, by a Board of Inquiry appointed at the discretion of the Minister of Labour, which may issue a legally enforceable order.

Consultation on the frequency and outcome of orders directed to school districts took place with Professor James McPherson of the University of Victoria Law Faculty until July, 1981, an acknowledged authority on the Human Rights Code, and with the Human Rights Branch of the Ministry of Labour. Copies of all "education" decisions of Boards of Inquiry, together with a copy of "reasons for judgment" where an order was appealed to the Supreme Court of B.C., were obtained and studied. The writer also had the opportunity to review at the publishers, Gregson and Graham, Ltd., the final draft of an overview of human rights decisions made in Canada to date, which assisted in assessing the potential for decisions affecting B.C. public schools.

Review Commissions are appointed by the B.C. Minister of Education under section 123, School Act, upon appeal by a teacher who has been dismissed by a school board for incompetence. The Commission consists of three persons who are or have been "actively engaged in the practice of education" in B.C. Following its review of the events leading up to the dismissal, 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 certain "significant" decisions, including copy of "reasons for judgment" on an appeal to the Supreme Court of B.C. concerning the functions of Review Commissions, were obtained from the B.C. School Trustees'Association and the B.C. Teachers' Federation.

Boards of Reference are appointed by the B.C. Minister of Education under section 122, School Act, upon appeal from a teacher who, for wrongdoing, has been suspended without pay for more than ten days, or has been dismissed. The Board has three members, and the chairman is a member of the Law Society of B.C.; the hearing of the appeal and the handing down of a decision is "essentially a legal process" (Nicholls, 1980, p.84). Either the teacher or the school board may appeal the decision to a County Court or the Supreme Court.

Information concerning the Boards' decisions was obtained from the Ministry of Education, and the teachers' and trustees' associations; also from "B.C. Decisions" and "B.C. Law Reports" where Boards' decisions had been appealed to the courts.

Arbitration Boards, appointed pursuant to section 136 of the School Act, must establish teachers' salaries and direct financial benefits not specified by 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 and one by the teachers' local associations,with the third member, the chairman, selected by the two members. A decision must be made by the Arbitration Board before

January 1, failing which the chairman alone hands down a settlement on or before January 5.

Apart from the budgetary effects of the decision - teacher's salaries and benefits comprise approximately 70% of school districts' operating budgets - it may include rulings on whether a benefit or "working condition" is arbitrable or not. Such rulings are sometimes appealed to the courts. Information concerning the number and content of Arbitration Board awards, and court decisions on them, was obtained from the Ministry of Education, the teachers' and trustees' associations, and from law reports.

Arbitration Boards appointed under the Labour Code, R.S.B.C. 1979, Chap. 212, have a relatively minor effect upon public schools, 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 only to disputes over the terms of agreements currently in force; there is no compulsory arbitration when a new contract is being negotiated.

Information regarding arbitrations under the Labour Code was obtained from the Arbitration Branch of the Ministry of Labour, and from the B.C. School Trustees Association. Also secured for study were copies of some relevant decisions.

## Delimitations of the Study

The sheer volume of Canadian and foreign judicial decisions which might affect the B.C. public school system makes comprehensive research difficult; it was necessary in this study 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 materials.

Decisions on the "significance" of the various judicial rulings were the responsibility of the writer, and may be more or less limiting than those made by another, although attempts to ensure objectivity were made through consultations with knowledgeable and experienced education officials.

# CHAPTER V

# THE FINDINGS

## Introduction

Findings from the research and synthesis procedures described in Chapter IV, Methodology, are described below. There are four major divisions or sub-sections of these findings:

(1) the overall number of reported court decisions which are relevant to the B.C. public school system;

(2) the number and nature of the court decisions, reported and unreported, that are believed to be of significance for the B.C. public school system;

(3) the number and nature of relevant decisions made by quasi-judicial boards and commissions in British Columbia;

(4) other salient findings which are of relevance to this study and warrant comment in its conclusions, informed speculations or recommendations.

## The Overall Number of Court Decisions

Any numerical delineation of the reported court decisions relevant to the B.C. public school system must rely to a considerable extent upon legal encyclopedia and abridgements for Canada, England and the United States.

The Canadian Encyclopedic Digest is published in two related sets: the Canadian Encyclopedic Digest (Ontario), cited as C.E.D. (Ont.), which "consists mainly of cases from Ontario and federal courts, with close attention to cases from courts in the Maritimes" (Yogis & Christie,

1974, p.22); and the Canadian Encyclopedic Digest (Western), cited as C.E.D. (Western), which concentrates on cases from the four Western Provinces and the federal courts. Both include occasional references to leading English cases. A major problem with both sets is updating. Although C.E.D. (Ont.) is now in its third edition with the relevant volume for "Education," Volume 10, effective to October, 1975, the relevant volume of C.E.D. (Western), Volume 20, is still in its second edition and covers up to December, 1968. Both sets are up-dated by annual cumulative supplements, but their contents appear incommensurate with actual developments in school law and, as Yogis and Christie state (1974, p.23) "the scarcity of textual changes in the supplements suggests that both sets suffer to some extent from lack of currency."

C.E.D. (Ont.) includes 140 cases in Volume 10, third edition, on public schools, pupils, school boards, teachers and finances, but only adds ten new cases in the supplement for the period November, 1975, through to February, 1980. C.E.D. (Western) contains nearly 200 cases in basically the same categories in Volume 20, second edition, adding twenty-eight in its permanent supplement for the years 1969-1976 inclusive, and twenty-two in its supplement for 1977-1980.

In total therefore the Canadian Encyclopedic Digest includes close to 400 court decisions from across Canada relevant to this study. There are doubts, however, concerning the comprehensiveness of its coverage, particularly for recent years.

A more complete picture of the overall number of relevant, reported court decisions in Canada was obtained from the Canadian Abridgement,

second edition, cited as Can. Abr. 2d. This is "perhaps the most generally useful secondary tool available to the Canadian lawyer" (Yogis and Christie, 1974, p.26). It claims to contain digests of every reported Canadian court decision, except those of historical interest only or where based on the Quebec Civil Code. The title page reads:

> A digest of reported decisions of the Supreme, Exchequer and Federal Courts of Canada, and of all Courts of the Common Law Provinces, and also decisions from the Courts of Quebec of universal application.

The relevant volume of Can. Abr. 2d is Volume 35, which contains digests of cases up to December 31, 1972, under the general classification of "Schools." There are several sub-classifications, but these do not appear appropriate for this study being centred mainly on educational functionaries. Consequently, the "Schools" cases were regrouped under the seven major sub-classifications listed in Appendix "A" to this study, in order to achieve an improved appreciation of the cases' contents.

Annual cumulative supplements to Can. Abr. 2d have been issued since 1972, based on the monthly issues of Canadian Current Law (C.C.L.), and also two permanent supplements; in order to update Can.Abr. 2d, therefore, required a five stage process of consulting Volume 35, the first and second permanent supplements, the 1980 cumulative supplement, and January-April, 1981, editions of C.C.L. Overall totals were obtained by adding all cases under the classification "Schools", except the sub-classification "separate schools". A grand total of 625 relevant cases was obtained in this manner:

| | |
|---|---|
| Can. Abr. 2d, -1972 | 539 reported cases |
| First permanent supplement, 1973-74 | 21 reported cases |

| | |
|---|---|
| Second permanent supplement, 1975-79 | 42 reported cases |
| Cumulative supplement, 1980 | 17 reported cases |
| C.C.L., January-April, 1981 | 6 reported cases |
| | 625 reported cases. |

The regrouping of the cases under the study's Appendix "A" seven major sub-classifications shows:

| | | |
|---|---|---|
| I | Role of school boards | 193 reported cases |
| II | Provision of education | 78 reported cases |
| III | Educational environment, | 168 reported cases |
| IV | Students' rights and responsibilities, | 20 reported cases |
| V | Teachers' responsibilities and rights | 122 reported cases |
| VI | Management of schools, | - reported cases |
| VII | Teachers' Salary Negotiations | 44 reported cases. |

The absence of any cases under category VI, management of schools, suggests subject overlapping in the classification system contained in Appendix "A", not that the management of schools is so legally certain that lawsuits are unknown.

It is interesting to note that the average of 10.5 cases per annum in 1973-74 declines to 8.4 in 1975-79, and then increases to 17 for 1980 and 18 for 1981 calculated on the basis of its first four months. Nevertheless, even if valid conclusions could be drawn from such short periods, there are several complicating factors which must be kept in mind; in particular, that as the number of precedent cases which warrant reporting increases, the opportunity or "space" for further precedents diminishes, unless there are major changes in relevant statute law or significant, new developments in educational practice. Certainly it

should not be assumed from the above figures only, that the schools arena has become more litigious in the last two years; there is no way of checking that question other than an exhaustive search of court registries to record all schools' disputes resolved in court, and also the "out of court" settlements after legal proceedings had commenced. Such a search would be physically impossible.

Almost all that may be induced from the above figures, therefore, is that there are many Canadian court decisions which are relevant to B.C. public school operations. Not necessarily 625 of them, because approximately ten percent are based on superceded provincial statute law or statute law radically different from that in effect in British Columbia. On the other hand, it must be remembered that the 625 figure does not include relevant,unreported cases, the number of which is impossible to determine. Some of these unreported cases heard in British Columbia courts appear in the next section of this chapter.

Unfortunately, it is impossible to check the 625 figure against a total obtained by analyzing Canada's various series of law reports. The Supreme Court Reports have a topical index (Butterworth's Supreme Court of Canada Reports Service), but the Dominion Law Reports have no separate, topical classification of cases. To review all of the current total of 382 D.L.R. volumes (it is estimated that they contain 60,000 cases) would be a labour fit for Hercules - certainly only a god would have the required longevity.

Western Weekly Reports includes a total of twenty-four cases under "Schools and School Districts" for the years 1951-70, and nineteen for 1971-79; but these are "the cases of value" only, emanating from the

four Western Provinces. Provincial law reports also present problems for numerical analysis of cases, for they tend to appear and disappear like the Cheshire Cat in "Alice in Wonderland" - as Yogis and Christie more diplomatically state, "all provinces have at one time or another had their own report series" (1976, p.88). For example, British Columbia Reports (B.C.R.) ceased publication in 1947, and there was a thirty year hiatus before British Columbia Law Reports (B.C.L.R.) appeared in 1977.

Some comparative figures may be obtained from the few available texts on Canadian school law, none of which is up to date:

(i) Bargen's "The Legal Status of the Canadian Public School Pupil" (1961) cites 117 cases (41 of these concern the tort of negligence);

(ii) Enns' "The Legal Status of the Canadian School Board" (1963) cites 192 cases, many of which appear in Bargen's book;

(iii) McCurdy's "The Legal Status of the Canadian School Teacher" (1966) cites 129 cases, a few of which appear in Bargen and Enns.

(iv) Lamb's "Legal Liability of School Boards and Teachers for School Accidents" (1959) cites 83 Canadian cases and 25 English.

(v) Thomas' "Accidents Will Happen" (1976) cites 37 cases.

Perhaps the most valuable comparative figure from textbook and reference sources is one that will be available from a book not yet published. During the course of this study it was learned that the Canadian Teachers' Federation (C.T.F.) is preparing a topical abridgement of selected, Canadian courts' school law judgments. A draft copy was obtained which, omitting its "separate schools" section, cites 423 cases, 21 of which are unreported. At this time, however, completion and publication

dates for the C.T.F.'s "Schools, Teachers and the Courts" are unknown, and the final number of cases may be different. The broad scope of the book's coverage will make it a valuable reference for educational administrators, although evidently being written for teachers, some areas of public school operations, such as school boards, appear to be omitted.

With regard to English cases, Halsbury's "Laws of England" contains 193 citations to English judicial decisions which are of relevance to public school operations. This total was compiled from Volume 15, Fourth Edition (1977), the Cumulative Supplement for 1978-79, and the Monthly Reviews through to March, 1981. All sub-sections under "Education" were included in this count except those referring to religious instruction, universities, "public" schools (England's private schools), etc. As stated in earlier chapters of this study, not all English decisions would apply in British Columbia because of differences in statute law and the fact that the *stare decisis* rule is not applicable; English cases may be cited in Canadian courts only as "persuasive" precedents. It is estimated that approximately 100 of the English cases are relevant to public school operations in British Columbia. Some of these are included in the second section of this chapter - the significant cases for the B.C. public school system.

The two major United States legal encyclopedias, Corpus Juris Secundum and American Jurisprudence 2d, are extremely detailed in their coverage of school law. Corpus Juris Secundum, Volumes 78 and 79, plus cumulative supplements to 1980, contains 1,363 pages on "schools and

school districts" which cite literally thousands of cases drawn from courts in the individual States as well as the U.S. Federal and Supreme Courts. American Jurisprudence 2d appears more selective in its citation of cases. In the 349 pages devoted to "Schools" in its Volume 68, plus cumulative supplement to 1980, approximately 3,500 leading cases are cited, including some English and some Canadian. It is also interesting to note that Valente's 1980 text on U.S. school law cites almost 2,400 cases, of which 164 are decisions of the United States Supreme Court.

In view of the differences in statute law between the United States and the individual States, and Canada and British Columbia, it is believed unlikely that more than five percent of the leading U.S. cases are of relevance here as "persuasive" precedents. Some of these appear in this chapter's next section, on "significant" cases.

To summarize this first part of Chapter V, the research findings described above suggest that there are 750-800 reported court 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.

Despite the many, dusty hours devoted to this law library research on the overall number of relevant decisions, the difficulties encountered in establishing clear cut criteria for the inclusion or exclusion

of the various cases located makes the resultant statistics indefinite. As far as can be ascertained this particular field of research has never 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 which are relevant to public school operations in British Columbia.

The logical, next question is just how relevant are these 750-800 court decisions. This is answered in part by the next section of this chapter, which reviews the study's findings on the decisions deemed to be "significant."

## Identifying the Significant Court Decisions

The court decisions identified as significant are individually described in Appendix "B", together with reasons for their significance. This section outlines the study's findings which resulted during the process of identifying them from among Canadian, English and United States decisions relevant to public school operations in British Columbia, and reviews the contents of Appendix "B". It is therefore, perhaps the kernel or principal outcome of the study, as it combines all four parts of the legal research procedure adopted and is centred on school operations in British Columbia.

The determination of significance was established in conformity with the procedure outlined in Chapter IV, Methodology. Some of the significant decisions from courts in British Columbia are unreported, but for these the court registry numbers and dates, together with reasons for judgement, were located.

Research of the many relevant court decisions to identify those considered significant, was based on the analysis of public school operations contained in Appendix "A", with its seven major categories and forty sub-classifications. Notes were taken of possible, significant decisions during the research of legal encyclopedia and abridgements. Also some preliminary identifications were made during review of the school law texts by Bargen, etc. Several unreported, significant decisions came to light through correspondence, and the meetings held with officials of the B.C. School Trustees Association and the B.C. Teachers Federation. Others were located during the search of "legal files" at the trustees' association's offices.

Particular attention was paid during this part of the study to Statute Citators, which list court decisions that have interpreted or "constructed" sections of the School Act of British Columbia. The supposition was that as the School Act is the principal source of school law in the Province, specific refinements of its meaning by the courts are likely to be of significance for school operations. This supposition proved correct; based on a review of the four citators available for British Columbia, there have been forty such decisions since 1872, the date of the first School Act, and sixteen of these are included in Appendix "B". Research indicates, however, that there have been additional court decisions which have refined the meaning of particular sections of the School Act, and are not included in the citators; some of these also appear in Appendix "B". It is difficult to ascertain what criteria the various citators use for a decision to be included in their pages, and

there are some interesting variations in listings between the four citators:

(1) Carswell's "The Canadian Abridgement," second edition, provides special volumes entitled "Statutes Judicially Considered." Volume 2 covers the Provinces and Territories, and it shows that during the period 1872 until December 31, 1974, thirty-one judicial interpretations of sections of the Act were made in twenty-five court decisions. A total figure, to date, was calculated as follows:

| | | |
|---|---|---|
| Volume 2 | 1872-1974 | 25 decisions |
| Appendix | 1975-1979 | 6 decisions |
| Appendix | 1980 | 4 decisions |
| Appendix | January-March, 1981 | -- decisions |
| | | 35 decisions. |

Each decision above is referenced to the abridged report of the case in Carswell's Can. Abr. 2d or supplements.

(2) "The British Columbia Statute Citator," issued by the Canada Law Book Company Limited, covers the period 1960-1980 only, and it shows five decisions interpreting sections or sub-sections of the School Act which do not concern community colleges. All five are included in (1) above.

(3) Burroughs and Company has issued a volume entitled "Statutes of British Columbia Judicially Considered, 1960-1978," also a supplement for January, 1979-April, 1980. These include fifteen decisions, again all included in (1) above. A refinement is added by including three Regulations issued pursuant to the School Act which have also been judicially interpreted by these decisions.

(4) "British Columbia Decisions Statute Citator" has been prepared by

Western Legal Publications Ltd. since 1978. It shows the following number of decisions which judicially interpret sections of the School Act:

| | |
|---|---|
| 1978 | 2 decisions |
| 1979 | 6 decisions |
| 1980 | 2 decisions |
| 1981 (January-May) | 2 decisions |

Included are some unreported decisions, a feature shared by none of the other citators.

In summary, the findings concerning British Columbia statute citators are that they provided a useful research tool during this study's search for significant court decisions, but that they appear not to be comprehensive or consistent in their coverage.

The fruits of the total research regarding significant decisions appears in Appendix "B". The major statistical features of the forty-nine decisions reviewed are:

(1) 33 decisions originated in British Columbia.
5 decisions originated in Ontario.
1 decision originated in Alberta.
1 decision originated in Manitoba.
1 decision originated in Saskatchewan.
4 decisions originated in England.
4 decisions originated in the United States.

(2) (a) All 49 decisions accord with at least one of the 40 classifications of school operational areas identified in Appendix "A". This area is shown as the first, or primary classification.

(b) 25 of the 49 also show a secondary classification, as these decisions concern two areas of school operations.

(c) Decision #4 has a tertiary classification.

(3) The primary, secondary and tertiary classifications accord with the seven basic divisions in Appendix "A" as follows:

| | | |
|---|---|---|
| I | Role of school boards: | 11 primary classifications |
| | | 6 secondary classifications |
| II | Provision of education: | 9 primary classifications |
| | | 2 secondary classifications |
| III | Educational environment: | 6 primary classifications |
| | | 5 secondary classifications |
| IV | Students' rights and responsibilities: | 2 primary classifications |
| | | 5 secondary classifications |
| V | Teachers' responsibilities and rights: | 11 primary classifications |
| | | 5 secondary classifications |
| | | 1 tertiary classification |
| VI | Management of schools: | 3 primary classifications |
| | | 2 secondary classifications |
| VII | Teacher salary negotiations: | 7 primary classifications. |

(4) (a) "Interpretation of statute" is shown as the "nature" of 26 decisions.

(b) "Interpretation of statute and application of common law" is shown as the "nature" of 5 decisions.

(c) "Application of common law" is shown as the "nature" of 14 decisions.

(d) Decisions #16, #17 and #19,all originating in the United States, show no "nature." #16 and #17 appear to be based as much on a public policy decision by the courts not to venture into pedagogical issues, as on any interpretation of statute or application of common law. Decision #19 appears more clearly based on statute, but again contains elements of a public policy decision.

(e) Decision #12 shows no "nature," as the court ruled that there was no basis for legal action.

The following explanatory comments may help in assessing the importance of these statistics. Primary reliance in Appendix "B" is upon decisions originating in British Columbia courts, but some important operational areas for public schools have not been the subject of litigation in this Province. In such a situation, where a judicial decision originating in another Province was available, it was included in Appendix "B"; it not, then decisions in England and the United States were researched for possible inclusion.

While the primary purpose of Appendix "A" (the seven basic divisions and forty sub-classifications) is to serve as a research tool, an auxiliary benefit is that it draws attention to those areas of public school operations which have generated several significant decisions, and those which have not. This in turn prompts speculation, and further study, for the reasons, such as vague or specific statute law, or that

while an operational problem area exists it has not reached the courts. A caveat needs to be stated, however, for as the study progressed it became apparent that there is some overlapping in the category system adopted in Appendix "A"; for example category I (f), legal liability of the school board, overlaps category III (e), health and safety of students. Provided that this potential for overlapping is kept in mind, however, it does not reflect on the validity of any conclusions drawn from the clustering or absence of decisions in relation to the categories. Should this research method in B.C. school law ever be replicated, it might be possible to draw tighter definitions of the operational areas classified in order to reduce such duplication, without omitting any areas.

Within the "interpretation of statute" category for the "nature" of the forty-nine decisions, there are many variations between generality and specificity. For example, in decision #12 (Perepolkin) the courts ruled on the broad implications of the British North America Act, and British Columbia's Terms of Union, with regard to the Province's authority and rights in public education, whereas decision #41 rules on the specifics of teachers' sick leave formulae. The basic function of the courts in both cases is the same, however, and further categorization in this study of the nature of these decisions appears to be pointless. The "application of common law" category ranges from learned rulings on such highly legalistic subjects as the law of torts, to enforcement of the general requirement that school boards must conform with the principles of natural justice when functioning in a judicial capacity. Again, further categorization appears to be unrewarding.

The true nature and significance of the decisions in Appendix "B", therefore, can perhaps only be recognized by study of the individual cases. When reviewing the decisions, it will be noted that, for ease of comprehension, all references are to current sections of the School Act, even where a relevant section number and title of the Act (formerly the Public Schools Act) was different at the time of the court action and the decision.

Some of the more obvious "findings" which emerge from a review of Appendix "B" are:

(1) Decisions #1 and #2 help define the status of school boards generally, while #3 and #4 establish the boards' range of specific duties under current B.C. statute law. Together, the four decisions provide a comprehensive and illuminating picture of the role and functions of school boards as adumbrated in the School Act.

(2) Decisions #5 and #6 help refine the obtuse statutory provisions concerning who may serve as a school trustee; in particular whether a teacher's spouse has "any interest in a contract" with the school board, and what specifically is meant by an "employee or salaried officer" of the board.

(3) Decision #7, the Shrimpton case, establishes the principle that a school board may be vicariously liable for the wrongful acts of its employees; that is why the school board, with its "deep pockets" and access to the taxpayer, is almost invariably included as a defendent in any action in tort against a teacher or other employee. Decision #8, however, shows that the school board may not be vicariously liable where the employee was clearly acting outside the scope

of his employment, while Decision #9 establishes that the board is not liable for wrongful acts of independent, medical practitioners acting on behalf of the board.

(4) The Bogness decision, #10, clarifies in part a formerly confusing section of the School Act concerning the exemption of trustees and school boards from actions for "anything done...under the authority of this Act..." On the other side of the coin, decision #11 demonstrates that trustees may be personally liable if they act unreasonably, or *mala fide* - in bad faith.

(5) The constitutionally important Peripolkin decision, #12, asserts the power of the Province to require attendance of children at public school, and to establish what shall be taught. Decision #13, the Bader case, confirms these entrenched rights of the Province over those of the parents' wish to select the education to be state financed, so consequently any provincial support of alternative or "independent" schools is at the Province's discretion. As the Federation of Independent Schools stated when it condemned the Baders' legal action, the matter "needs to be resolved by the political process."

(6) Decision #14 partially resolves the apparent lacuna in statute law concerning community schools, although leaving legally undetermined the question of social and recreational programs.

(7) Decision #15, to the effect that a child who does not attend school is not a juvenile delinquent, shows how the courts resolve an apparent conflict between two statutes - in this case the Juvenile Delinquents Act and the Public Schools Act.

(8) Two United States' decisions, #16 and #17, suggest that public schools owe no legal duty to educate a child effectively, under the existing tort law of negligence. These are contentious decisions, however, which reach to the heart of the school system's "contract" with society. While non-feasance, or failure to educate, may currently create no legal liability, some lawyers (Campney and Murphy, 1980, p.4) believe that clear misfeasance in this area might be held to incur liability in Canadian courts.

(9) Decisions #18 and #19, which originated in Alberta and the United States respectively, concern the right of handicapped students to public educational services, an issue which has twice threatened to reach the B.C. courts in recent years. This legal question may be resolved in British Columbia, however, when Regulations are issued to "prescribe programs for children with exceptional educational needs," as provided for in amendments to the School Act contained in section 101 of the Miscellaneous Statutes Amendment Act (No. 2) 1981.

(10) Decision #20 establishes the important principle that a child's right to a public school education in British Columbia may only be denied if provided for by the Legislature and where the required procedures are followed meticulously, whereas decision #21 affirms that the spirit of the statute law should be observed where a literal interpretation of it would lead to absurdity or injustice.

(11) The significant influence of other statutes than the School Act (specifically the B.C. Human Rights Code and Labour Code) upon public school operations, even where this appears to be in conflict with accepted educational requirements and practice, is revealed in

decisions #22 and #23.

(12) Two matters on which statute law is silent, the teacher's and school board's responsibility for children travelling to and from school, and what is considered as "adequate" supervision in a school playground, are established to some extent by decisions #24, #25 and #26.

(13) That the student's right to attend school is dependent upon residency, and not because the parents pay taxes in the district, is confirmed in decision #27.

(14) Decision #28 identifies the legal principles which govern the powers of school officials to search students and, in the enterprising manner of the United States courts, specifies factors governing what sort of search is "reasonable."

(15) School "accident" cases are covered by decisions #29 - #33, and they demonstrate how the 1893 enunciation in Williams v Eady of the "careful parent" test, founded upon that pillar of the common law the "reasonable man," has flourished under the care of the courts to provide today the "ordinarily competent instructor" test, and the tentative assertion in the James case of a "duty to instruct properly." Nevertheless, the Myers and Thornton cases suggest some uncertainty in the courts as to whether the "ordinarily competent instructor" test replaces or merely supplements the "careful parent" test.

(16) Decision #34, the "Verchere decision" in the Sederberg case, strongly reasserts the courts' claim to review the work of quasi-judicial tribunals in all matters of law and of jurisdiction (McCurdy,

1968, p.167). The B.C. Supreme Court unexpectedly extended the jurisdiction of Review Commissions into pedagogical questions, in addition to judicial.

(17) The scope of decision making by a Board of Reference is the subject of court decisions #35, #36 and #37. It is interesting to note that all three decisions led to subsequent clarifications in the statute law governing the terms of reference and methods of operation for Boards of Reference.

(18) The principle that the rule of law and the precepts of natural justice must prevail in teacher dismissal proceedings, unless expressly supplanted by the relevant statute law, is confirmed in decisions #38 and #39.

(19) Decision #40 affirms that the protection of qualified privilege against actions for defamation extends to school administrators who must write and distribute reports on teachers, provided that there is no "malice" shown - an intention or desire to harm an individual (Robinson, 1978, pp.36-37) - and that the distribution is reasonably required. Decision #41 adds a further caveat for the report writers - statements in the report should concern only the learning situation in the teacher's class or classes.

(20) The necessity of <u>specific</u> delegation of school board responsibilities to each employee so intended is established in decision #42.

(21) What may or may not be included in teacher salary and bonus agreements with school boards is established in decisions #43 - #47. Excluded are variations on the sick leave formula contained in the School Act, advance preparation time for teachers, leave of absence,

retirement gratuities and maternity leave. Included are rates of pay for substitute teachers, who are persons not mentioned in statute law.

(22) Who may serve as an arbitration board member, to adjudicate on teacher salaries and bonuses, is established in decision #48. Excluded are teachers, school trustees and staff members of the B.C. School Trustees Association and the B.C. Teachers Federation. It is interesting to note how in this decision the courts move to fill the vacuum left by statute law, when Munroe J. states, "for the future guidance" of the teachers and trustees, who he believes should be excluded from being an arbitrator, over and above the specific functionaries in the case. This is an apparent example of the courts making abstract law, of a regulatory nature, which affects the public school system.

(23) Decision #49 affirms that teacher salary agreements, including those established by arbitration, may not bind the parties for future years, even where the original agreement says that it does so. To reach this conclusion the courts followed the apparent intention of the School Act as a "remedial" statute.

To conclude this "findings" section on the significant court decisions, it should be reiterated that the primary purpose of Appendix "B" is to demonstrate the extent to which public school operations in British Columbia are affected by the courts. In addition it may represent the desirable level of familiarity with judicial decisions which the competent school administrator in British Columbia should have.

The Appendix is essentially a statement of certain, operational principles in B.C. public schools, illustrated by the relevant judicial decisions which established or confirmed them. It is not a legal work of reference for application to specific circumstances which may arise - needless to say, when a potential legal problem emerges, the wise administrator consults the school district's lawyer. But when read and mentally digested, the Appendix could assist the administrator to function more rationally and effectively, and thus help prevent such legal problems arising.

Decisions by Quasi-Judicial Bodies

The social purpose and legal status of quasi-judicial bodies have already been reviewed in Chapter III. The criteria for inclusion of such a body's decisions in this study are contained in Chapter IV, also a list of the bodies whose decisions meet these criteria. This section reviews the study's findings concerning the number and nature of these decisions. The quasi-judicial bodies concerned are:

Boards of Inquiry, appointed under the Human Rights Code of B.C.;

Review Commissions, appointed pursuant to section 139 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.

Two potential sources of relevant decisions are also considered: the Ombudsman and the Provincial Cabinet.

The Human Rights Code of British Columbia, R.S.B.C. 1979, Chap. 186, is designed to prevent discrimination - defined (MacPherson, 1978, p.23) as "to treat a minority differently, with adverse consequences for the minority." The Code is administered by the Human Rights Commission; its main function is educational, helping individuals and organizations to understand the basic rights that are protected in British Columbia. Enforcement requires that there be a specific complaint to the Director of Human Rights, by or on behalf of the person who believes he is being discriminated against. The Director is required by the Code to investigate all such complaints, and she has a staff of Human Rights Officers to do this. If the complaint is unfounded, that is the end of the matter. If not, then the Human Rights Officer attempts to conciliate. Should the Officer be unable to resolve the complaint, then under section 16 of the Code the Director must make a report to the Minister of Labour who "may refer the allegation (that the Code has been contravened) to a board of inquiry" (underlining added). It has not been the practice of recent Ministers of Labour to refer every such allegation to a Board of Inquiry. Where a Board is appointed, its ruling is enforceable as though a court order.

There are two sections of the B.C. Human Rights Code which are of particular relevance to the public school system: section 3, which prohibits denial of any "accommodation, service or facility customarily available to the public, unless reasonable cause exists"; and section 8 which prohibits discrimination "in respect of employment or a condition of employment...unless reasonable cause exists."

A search of all Board of Inquiry decisions since the Code was proclaimed in 1974 (these are available at the University of Victoria Law Library as well as the Human Rights Branch of the Ministry of Labour) revealed that there have been no Boards of Inquiry appointed to consider allegations of discrimination in the public schools under section 3; nevertheless it is believed that schools are a "facility customarily available to the public," and that education is a "service" (MacPherson, 1981, p.37).

In August 1976, a Board of Inquiry ruled that the Vancouver Vocational Institute contravened section 3 of the Code when a fifty-six year old female, Carol Wilson, was refused attendance at classes in the graphic arts department. The Institute, established under Part XI (Colleges) of the School Act, did not dispute that it is a "service or facility customarily available to the public."

In September, 1980, the South Cariboo school board stated, (Nyman, 1980) that Warren Lowe, a profoundly retarded, autistic and blind child, was not educable in the public school system, which was not therefore required to accommodate him. Lowe's parents filed a complaint with the Director of Human Rights alleging discrimination under section 3 of the Code. The complaint was not pursued, however, as the school board subsequently admitted Warren Lowe. The legal question remains unanswered, therefore, whether severe physical and/or mental handicap is "reasonable cause" for denial or discrimination in such a situation. (For a review of the legal arguments concerning financing of educational services in such a case see Decision #19, Appendix "B").

Turning to complaints under section 8 of the Code, there have been two Board of Inquiry rulings to date which directly related to the

B.C. public school system:

June 10, 1977: Georgina Anne Bremer against Board of School Trustees, School District #62 (Sooke) and Percy M. Pullinger.

June 11, 1978: Kerrance B. Gibbs and the Surrey Teachers' Association against Board of School Trustees, School District #36 (Surrey) and Robert J. Bowman.

In May, 1975, Mrs. Bremer applied for a teaching position in the Sooke School District, but was advised by the Superintendent of Schools, Mr. Pullinger, that she did not have sufficient experience in elementary schools in British Columbia. Mrs. Bremer filed a complaint under section 8 of the Code, alleging discrimination because her husband, John Bremer, had been fired by the Province in 1974 from his position as Commissioner of Education, and had subsequently sued the Province. The Board of Inquiry, while expressing doubts over the expressed reason for not hiring Mrs. Bremer and calling it a "shallow justification," concluded that "there is insufficient reliable evidence which could persuade the Board that Mrs. Bremer's application was rejected because of her name or her husband's dispute with the government." The complaint was dismissed, with the Board stating that while the District Superintendent's assessment of Mrs. Bremer's qualifications "may not reflect the best judgment...the Code is not intended to prohibit mistaken judgment." The Board further stated that a complainant under section 8 needs to do more than demonstrate an element of arbitrariness or unfairness, but must show that factors specified in sub-section 8(2) (basically race, religion, age, sex and political belief) have been involved.

Although the complaint failed, it illustrates issues and complexities which, to paraphrase Shakespeare, "are such stuff as administrators' nightmares are made on." Nevertheless they are responsible,

legal and enforceable requirements, which every school administrator should be conscious of when he meditates on the field of candidates for a position.

Prior to July, 1978, it was the policy of the Surrey School Board, implemented by its Director of Community and Employee Relations, Mr. Bowman, to deny sick leave benefits, accumulated in accordance with section 125(2) and (3) School Act of British Columbia, to employee teachers when absence was caused or aggravated by pregnancy. It was contended that pregnancy is not a "sickness," and that maternity benefits are already being provided. The President of the Surrey Teachers' Association, Mr. Gibbs, and the Surrey Teachers' Association lodged a complaint that the policy discriminated against certain employees without reasonable cause, contrary to section 8 of the B.C. Human Rights Code. The Board of Inquiry turned to the language of the School Act (as would a court in interpreting a statute) and concluded that "there is nothing that states that pregnancy-related illness should be treated in any way different from any other illness." In consequence the Board ruled that there was discrimination which, being without reasonable cause, violated section 8 of the Code. The Surrey school board changed its policy.

This decision thus provides a clear cut example of a quasi-judicial body looking over a shoulder of the public school system, interpreting the School Act, and effecting a change in public school operations.

A further Board of Inquiry decision, concerning the "reasonable cause" provision in section 8 of the B.C. Human Rights Code, is relevant to the public school system, although based on a complaint against an

"independent" school. This is the Margaret Caldwell decision of July 6, 1979, which was appealed on a point of law to the B.C. Supreme Court - its ruling is the subject of Decision #22 in Appendix "B". As Decision #22 relates the facts and the ruling of the Board of Inquiry, as well as those of the Supreme Court case, they are not repeated here. Suffice it to say that the Board's decision is of interest and relevance to public school policy makers and administrators.

To summarize, the Board of Inquiry rulings reviewed above are to date the only "school" quasi-judicial decisions under the B.C. Human Rights Code. These decisions have "significance" for the Province's public school system, through their effects upon its operations; all policy makers and administrators need to be aware of them. The potential for further rulings from this source, however, appears uncertain in view of the Ministerial discretion incorporated into the controlling legislation. It appears that the philosophy of a particular Minister of Labour, or Government, is a factor to be considered when assessing the future degree of significance for the B.C. public school system of quasi-judicial decisions made under the B.C. Human Rights Code.

A more certain picture is presented by a review of the quasi-judicial decisions of Review Commissions and Boards of Reference, appointed under the School Act of British Columbia to hear teachers' appeals against dismissal. After the preliminary procedural steps have been taken, a teacher dismissed may appeal to the Minister, and the Minister must appoint the Commission or Board, which then hands down an authoritative ruling within thirty days of appointment or it may be replaced by the Minister. (Sections 129 and 130 School Act, and Regulation 69B).

Figures provided[1] by the Teacher Services Branch, Institutional Affairs Division, of the Ministry of Education show the following numbers of Commissions and Boards appointed in recent years:

| | Review Commissions | Boards of Reference |
|---|---|---|
| 1974 | 2 | 2 |
| 1975 | 3 | 1 |
| 1976 | 1 | 1 |
| 1977 | - | 4 |
| 1978 | 2 | 5 |
| 1979 | 4 | 6 |
| 1980 | 2 | 2 |
| 1981 (Jan-July) | - | 3 |
| | 14 | 24 |

The approximate annual averages, therefore, are two Review Commissions and three Boards of Reference, although both appear to have "lean" and "fat" years with no obvious direct causes for these. A "score card" of decisions, for and against school boards, or for and against teachers, shows no preponderance either way, and is believed of no relevance to this study.

Before reviewing the functions of the Boards and Commissions, and the nature of their decisions, it is desirable to clarify the role of the Minister of Education in their operations. He acts through the Teacher Services Branch which, according to information obtained by a review of the School Act and Regulations, and verified at the August 7 interview:

(1) maintains rosters of the names of suitable persons to serve

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[1]August 7, 1981, meeting with Mr. W. Hawker, Executive Director of Institutional Affairs, and Dr. B. Andrews, Director of Teacher Services, Ministry of Education, British Columbia.

on the Boards and Commissions, the majority of such names being nominated annually by the B.C. School Trustees' Association and the B.C. Teachers' Federation;

(2) makes the administrative arrangements for hearings before the Boards and Commissions, and ensures that no member knows the appellant and that there is no geographical proximity of the members' school districts to that of the appellant;

(3) pays the necessary fees and expenses;

(4) keeps a record of the decisions, and of the evidence presented.

It appears, therefore, that the desirable "arms length" relationship between the executive branch of government and quasi-judicial decision making, as considered in Chapter III, is maintained.

Following is an outline (Nicholls, 1980, pp.80 & 81) of the procedure specified in the School Act and Regulations leading up to the appointment of a Review Commission:

(1) The school board must have received at least three reports issued over a period of at least one year, but not more than two, by the school principal and/or senior school district officials, indicating that the learning situation is "less than satisfactory" (Regulation 62) in the teacher's classes.

(2) The school board may then give notice to the teacher of its intention to give him notice of termination, and provide for a meeting between the teacher and the board prior to issuing the notice of termination.

(3) If the board then proceeds with giving notice of termination, a report must be made to the Minister of Education, and the

teacher may request the Minister to appoint a Review Commission.

(4) The Minister must comply, and he appoints a chairman, and then appoints two members - one from among persons nominated annually by the Provincial Executive of the B.C. School Trustees' Association and the other from persons nominated annually by the Provincial Executive of the B.C. Teachers' Federation. The chairman and the members must be persons who are, or in the case of the chairman have been in the last five years, "actively engaged in the practice of education" in British Columbia. (All chairmen in recent years have been retired District Superintendents).

The teacher and the school board must both provide a deposit of $150; the deposit of the party who "loses" the ruling is paid to the Province, the other's is returned. Presumably the purpose of the deposit was to reduce frivolous appeals, but its amount has remained unchanged for years.

The teacher may be accompanied before the Review Commission by another teacher or by a staff member of the B.C. Teachers' Federation who may advise or represent the teacher. The B.C. Teachers' Federation has a lawyer on staff who almost invariably performs this function. The school board is also usually represented at the hearing by a lawyer, and the procedures followed are quite formal and legalistic, including the examination and cross examination of witnesses by counsel. A Review Commission has the power to sub-poena witnesses under the Inquiry Act. Having reviewed the documents, and heard the evidence, the Review Commission must then confirm or reverse the dismissal of the teacher, and its decision is "final and binding on the teacher and the board" (section 130(3), School Act).

Two of the recent years' Review Commission decisions warrant comment here, as they establish precedents: the decision confirmed by the Honourable Mr. Justice Verchere of the B.C. Supreme Court, which is reviewed in Decision #34 of Appendix "B"; and a decision of December 13, 1979, involving the Greater Victoria School District and one of its teachers. (The B.C. Ministry of Education believes[1] that to publish the names of teachers involved in hearings before Review Commissions and Boards of Reference, unless the decisions are appealed to the courts, is a breach of privilege; this opinion is not shared by the B.C. School Trustees Association).

The "Verchere decision" affirmed a Review Commission decision of March, 1979, which reinstated a teacher, Mrs. Sederberg, following her dismissal by the Merritt (#31) School District. The salient facts of the March, 1979, hearing, and of its decision, are reviewed in Appendix "B" and do not warrant repetition here. The operational significance of the decision bears restatement, however; the extent to which a Review Commission may examine the manner and nature of a school board's decision to dismiss a teacher under section 130 School Act is not circumscribed by the School Act or pursuant Regulations, and the Commission may overrule the board's decision if it finds either that the statutorily required procedure was not followed, or that the board had erred in its assessment of the learning situation in the teacher's classes. Thus, while the courts may only review procedures and may not question the wisdom of a school board's decision

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[1] August 7, 1981, interview with Mr. W. Hawker and Dr. B. Andrews

(see Decision #1, Appendix "B"), according to the "Verchere decision" a Review Commission may do both.

The December, 1979, Review Commission decision concerning a teacher dismissed by the Greater Victoria school board referred to the "Verchere decision", when it stated (p.9) that:

> this Review Commission, established as a tribunal of educators, views its role as having the purpose that its members shall use the educational background they bring to the tribunal in order to consider the decision of the School Board in its total context.

The Commission then proceeded to order reinstatement of the teacher, not because of disagreement on the learning situation in the teacher's classes (there was general agreement, including the teacher's, that this was less than satisfactory), but because the school board had not acceded to the teacher's request earlier in the year for a year's leave of absence on medical grounds. The Commission also "commended" to the school board the nature and duration of the leave, and the type of assignment the teacher should be given upon her return to duty.

Clearly such decisions of Review Commissions, which concern not only the wisdom of school boards' and their administrators' assessments of teachers' competency, but also the administrative and personnel policies and practices followed in a school district, are of considerable "significance" for the operation of the B.C. public school system.

An outline (Nicholls, 1980, pp.82-84) of the procedure specified in the School Act and Regulations leading up to the appointment

of a Board of Reference is as follows:

(1) A teacher may be suspended by a school board immediately following misconduct, neglect of duty, refusal or neglect to obey a lawful order of the board, or the laying of a criminal charge.

(2) Following a meeting with the board the teacher may be reinstated, suspended without pay, or dismissed, except that in the case of a criminal charge no dismissal may take place until after the courts' final decision.

(3) If a teacher is suspended without pay for more than ten days, or is dismissed, he may appeal to the Minister who must appoint a Board of Reference to hear the appeal. The Minister appoints the chairman from among members of the Law Society of B.C. nominated by the Chief Justice of B.C., one member from among persons nominated annually by the Executive of the B.C. School Trustees' Association (often a lawyer-trustee), and one from among persons nominated annually by the Executive of the B.C. Teachers' Federation.

Both parties appearing before a Board of Reference are usually represented by legal counsel, and the Board has the necessary powers under the Inquiries Act in order that witnesses may be summoned, examined and cross examined; the whole procedure is conducted in a court-like manner and atmosphere.

Having considered the matter, the Board may allow or disallow the appeal, or make any decision it considers appropriate in the circumstances. Its decision may be appealed to the County Court or the Supreme Court of B.C. $150 deposits are impounded and refunded in the same manner as with Review Commission decisions.

Three appeals to the courts against decisions of Boards of Reference are included in Appendix "B" (Decisions #35, #36 and #37). The salient facts of the matters before the Boards of Reference are reviewed, and the Boards' decisions given in Appendix "B". It should be noted that all three were followed by changes in the School Act which clarified the statute law in accord with the courts' decisions. Apparently the courts had, in the opinion of the Legislature, interpreted the legislation correctly.

Most other recent appeals to Boards of Reference have been against dismissal for "misconduct", a broad term ranging from striking a pupil in violation of the Regulations and with excessive force, to deliberately misleading a school board by withholding relevant information. The role of the Board of Reference was in all these cases to ascertain the facts, guage the severity of the misconduct, and consider, confirm or adjust the propriety of the penalty. Few decisions of a precedental nature appear to have been made, however, although the two following are of consequence in the light of Decision #37, Appendix "B", concerning the effect of a conditional or absolute discharge following a criminal offence committed by a teacher.

In an August, 1979, decision of a Board of Reference, the dismissal of a teacher for misconduct by the Vancouver School Board was upheld. In March, 1978, the teacher had pleaded guilty to a charge of gross indecency in the public washroom of a department store, and was given a conditional discharge. These facts did not come to the school board's attention until February, 1979, when the teacher was suspended and subsequently dismissed. The school

board contended, and testified through three of its senior administrators before the Board of Reference, that "the teacher's involvement in such an incident could weaken public confidence in the school system generally and has impaired his usefulness to the school and his employer." The Board of Reference concurred, stating that "the opinions expressed by the witnesses called on behalf of the school board are those of the appellant's professional brethren." The teacher's appeal was unanimously dismissed. It appears, therefore, that although a school board may not dismiss a teacher who is found guilty of a criminal offence and given an absolute or conditional discharge, dismissal for misconduct may follow and be upheld by a Board of Reference, depending on the circumstances of the case.

In an undated, but believed to be April or May, 1980, decision of a Board of Reference, the dismissal of a teacher by the Kettle Valley school board for misconduct was upheld. The teacher had failed to disclose in his July, 1979, application for employment, that in May of that year he had pleaded guilty to a charge of indecent assault and had been given a conditional discharge. The Board of Reference "distinguished" the decision in the Vasalenak case (Decision #37, Appendix "B") and stated that "there was here a wilful failure to disclose facts that would work against his acceptance as an employee." In the opinion of the Board of Reference this constituted misconduct, and it unanimously dismissed the teacher's appeal.

To summarize the findings on Boards of Reference, their quasi-judicial decision making appears, within the Boards' specialised field of jurisdiction, to be procedurally similar to that of the lower courts. The Boards' specific decisions are relevant to the

operations of the public school system, and occasionally of "significance" where they establish precedents on such matters as the dismissal of a teacher guilty of a criminal offence, but who has been given an absolute or conditional discharge.

An appreciation of the findings concerning the decisions of teacher salary arbitration boards requires some understanding of the boards' statutory judisdiction and of their operating methods. Section 134(1) of the School Act of British Columbia provides that every Fall each of the Province's seventy-five school districts may negotiate with its local teacher association on the teachers' "salaries" and "bonuses" for the following calendar year. Salaries are defined in section 131 as:

> the basic salary received from the employer, and includes the allowance paid by the employer for supervisory or administrative duties or special qualifications, but does not include any other allowance except those approved for inclusion in salary by regulation.

No record could be found of any current regulations of this nature.

A bonus is defined in section 131 as "money paid or a financial benefit or benefits provided in lieu of money."

The only exceptions to these annual negotiations are school districts in which multi-year settlements will still be in effect next year, or where both parties agree to maintain the current year's agreement. Few multi-year settlements exist, and no example of joint concurrence to maintain an existing agreement was located.

Section 137 of the School Act provides that if there is no agreement through negotiations or conciliation by November 15, the dispute is referred to binding arbitration. There is one arbitration

board which hears all the disputes in each zone in the Province. The zones are established annually by the Minister of Education for salary bargaining purposes; in 1980 there were 14 such zones. One member of each zonal arbitration board is appointed by the school boards of districts within the zones that are without settlements by November 15, and one member by the teacher associations in those districts. The chairman is appointed by these two members. If either the school boards or the teachers do not appoint their member, or the members do not appoint a chairman, the Minister of Labour makes the appointment(s). Neither trustees, teachers, their employees, nor staff members of the B.C. School Trustees' Association or the B.C. Teacher's Federation, are eligible to serve on the arbitration boards (Decision #48, Appendix "B").

Each arbitration board must make a unanimous or majority award by January 1 on matters submitted to it by either party to the dispute. The award is "final and binding on the board and association to which it applies" (section 137(3), School Act). Failing such an award, the chairman alone hands down an award on or before January 5.

Although there appear to be few specified requirements concerning the arbitration boards' methods of operation, research of written awards indicates that the boards usually hold two or more "hearings" at which they receive and question submissions made by the "advocates" for each party to the dispute. The submissions contain the claims, supporting arguments and counter arguments of the parties concerning the proposed adjustments for next year's

salaries and other benefits. The arbitration board has then to decide whether each adjustment sought is for an item within the board's jurisdiction and therefore arbitrable, and only where it so rules does it decide on a specific amount or a detailed provision. Basically, a benefit already provided and specified by the School Act, such as sick leave, is not arbitrable.

Decisions #43 - #47, Appendix "B", concern appeals to the courts against arbitration boards' decisions on what items are arbitrable. The arbitration boards tend to follow these court decisions in their awards, but court precedents are not always available. In the absence of a relevant precedent the authority and responsibility for a decision rests upon the arbitration board's understanding of the School Act, or on what the board may believe appropriate. For example, the advocate for the Hope (School District #32) Teachers' Association claimed for 1980 a "preparation time bonus", but this was rejected in the arbitration board's award (p.10), not on the ground of lack of jurisdiction but because "such a provision is unprecedented." It appears therefore that quasi-judicial decisions of an authoritative nature, but appealable to the courts, are being made by the arbitration boards concerning what is arbitrable.

How arbitration boards establish a specific amount or a detailed provision for an item which it believes is arbitrable is less certain. According to the B.C. School Trustees Association (1980, section VI):

> Arbitration boards, in making salary awards, rely most heavily on the settlements arrived at through negotiations. Other criteria that arbitrators have found useful are the settlements that have occurred in the area of non-teaching employees of school districts and other public sector groups. This reliance on the "going rate" overshadows all but the most telling local arguments.

On the basis of this statement it appears that the arbitration boards are not involved deeply with deciding what are fair wages and benefits for specific teaching positions in a school district, but mainly with maintaining the agreement's comparability with other teacher and public sector agreements.

The awards tend mainly to be percentage increases across the scale or "grid" of salaries and administrative allowances already in existance. Such decisions are truly authoritative (there is no appeal against them, even to the courts) and are made in a quasi-judicial manner.

The number of teacher salary arbitration board awards has varied considerably in recent years. During the mid-1970's forty or fifty arbitrations were not unusual, caused in part by teachers' resistance to the applicability of Federal wage controls, and then their determination to "catch up" for the increases denied to them by the controls. But the number has declined recently: nineteen school districts had their 1980 teacher salaries determined by arbitration boards, and for 1981 there were fifteen such districts. In addition to salary and allowance scale increases of approximately 9.5 percent for 1980 and 12.5 for 1981, the following "bonuses" were adjusted in the 1980 and 1981 arbitrations: dental plan, extended

health, medical coverage, salary continuance plan and group life insurance. Pay for substitute teachers was also determined by some arbitration boards.

To summarize the findings on teacher salary arbitration board decisions, they are numerous, quasi-judicial and authoritative, and relevant to the operations of the B.C. public school system. Also, there is little doubt that many of the decisions are significant, for teacher salaries and benefits comprise approximately 70 percent of the school districts' operating budgets and, if nothing else, the decisions on them affect the amount of spending on other budget items. Looked at from this economic perspective, the arbitration boards' decisions may influence the thinking and actions of educational policy makers and administrators as much as any significant court decision considered earlier in this study.

Almost all school districts in British Columbia have collective agreements with non-management members of their staffs who are not certified teachers, and these agreements come under the jurisdiction of the B.C. Labour Code, R.S.B.C. 1979, Chap. 212. The staff members are in many districts represented by the Canadian Union of Public Employees (C.U.P.E.), but some union certifications are held by the International Woodworkers Association of America (I.W.A.) or the International Union of Operating Engineers (I.U.O.E.).

Under section 93(2) of the Labour Code, arbitration must be used to resolve any dispute concerning the "interpretation,

application, operation or alleged violation "of any collective agreement, including a question as to whether a matter is arbitrable." Industrial action over such disputes is illegal.

The arbitration board usually consists of two members, each appointed by a party to the dispute, and a neutral chairman. The board "has the authority necessary to provide a final and conclusive settlement of a dispute" (section 98), and if its decision is not complied with within fourteen days the decision may be enforced as a court order (section 110). Appeals are permissable, however, on points of law, to the B.C. Court of Appeal (section 108), and on all other matters to the B.C. Labour Relations Board "whose decisions are final" (section 107).

A review of the few such arbitration decisions directly involving school districts in the last two years provided the following, typical examples:

(1) A decision of October 24, 1980, dismissed a grievance by C.U.P.E. Local 727 against School District No. 70 (Alberni), concerning the purchase of two "mini-buses" by the school district and their transfer to an extra-curricular school society. The union argued that the driving and maintenance of the buses should be performed by school district employees.

(2) A decision of March 12, 1981, dismissed a grievance by a C.U.P.E. Local 1040 member against School District No. 29 (Lillooet), that as a member of the union she should have been given precedence when a teacher aide position became vacant and was filled; the employee had been working on an occasional basis as a school custodian.

It appears that while such decisions are made in a quasi-judicial manner, and are authoritative, they have a relatively minor influence on the overall operations of the B.C. public school system. Although not out of the question, it is difficult to envision a situation where such decisions, being based on the interpretation and application of existing agreements covering minority groups of school district employees, could be of significance to the operation of the public school system.

The Ombudsman Act, R.S.B.C. 1979, Chap. 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, and there is provision in section seven of the schedule to the Act for the inclusion by proclamation of public schools and boards of school trustees. In his 1980 Annual Report to the Legislature (1981, p.7) the Ombudsman urges the inclusion under his aegis of public schools and school boards, municipalities and regional districts, due to "popular demand for proclamation" of the relevant sections of the schedule to the Act.

Although the public school system is currently an "unproclaimed authority", the Ombudsman states (1981,p.70) that "I have received a number of complaints over the past year directed against authorities listed in the schedule to the Ombudsman Act but not yet proclaimed in force", and among these are twenty-seven complaints between October 1979, when the Ombudsman's office began operations,

and December 1980, concerning the public schools and boards of school trustees. The Ombudsman has attempted to resolve these complaints, where found valid, on an informal basis, and the 1980 annual report shows (p.90) the following disposition of the twenty-seven complaints:

| | |
|---|---|
| No assistance necessary or possible | 13 |
| Information provided/referral arranged | 8 |
| Inquiries made and resolution facilitated | 6 |

It appears, therefore, that the Ombudsman already has some influence on public school operations at the school district and individual school level, although lacking the legal authority to demand documents and sub poena witnesses which would accompany proclamation.

With regard to the operations of the Ministry of Education, the Ombudsman's 1980 report shows (p.88) the following disposition of complaints closed between October 1979 and December 1980:

| | |
|---|---|
| Declined, withdrawn or discontinued | 8 |
| Resolved, or corrected during investigation | 6 |
| Substantiated, and corrected after investigation | 1 |
| Not substantiated | 5 |
| | 20 |

The specific nature of the complaints is declared by the Ombudsman Act to be confidential (section 9), although one complaint against the Ministry of Education is outlined (p.32) in the Annual Report. It concerns the dismissal of a part-time instructor working for the Correspondence Branch of the Ministry;

following investigation by the Ombudsman, the Ministry "expressed concern with its own procedures used in terminating this contract" and offered the complainant a new contract.

There are some doubts whether decisions of the Ombudsman should be included in this study. Firstly, the Ombudsman's office is not strictly a quasi-judicial body as it does not demonstrate the essential characteristics of openness, fairness and impartiality, with clear cut operating roles and procedures which are subject to review by the courts - these characteristics are reviewed in Chapter III. The investigations are essentially private (section 9(5) Ombudsman Act), although with every appearance of fairness and impartiality, while the rules and procedures followed may vary and "shall not be challenged, reviewed or called into question by a court, except on the ground of lack or excess of jurisdiction" (section 27, Ombudsman Act). Moreover, the decisions of the Ombusdman are not authoritative; he may only report his opinion and the reasons for it to the authority, and make the recommendations he considers appropriate (section 22, Ombudsman Act).

Nevertheless, there is a strong judicial aura surrounding the Ombudsman's work, and while his decisions do not have the force of law they have considerable impact for public bodies such as the Ministry of Education and the school districts; it should be noted that section 30(2) of the Ombudsman Act provides that the Ombudsman:

> where he considers it to be in the public interest or in the interest of a person or authority, may make a special report to the Legislative Assembly or comment publicly respecting a matter relating

> generally to the exercise of his duties under this Act or to a particular case investigated by him. (underlining added).

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 his office flourish and receive the necessary funding, and should section seven of the schedule be proclaimed, then some might be significant. It should be noted that complaints to the Ombudsman concerning school districts and school boards will not reduce the volume of judicial and quasi-judicial decisions already experienced, but add a supplementary source of near quasi-judicial decisions which will concern specific rules, procedures and practices in the public school system alleged to be unjust, oppressive or improperly discriminatory. The extent of this future potential may be decided by the philosophy of successive Provincial Governments, and their enthusiasm for the Ombudsman's operations as expressed in funding and proclamation of scheduled authorities.

One other potential source of quasi-judicial decisions was included in this study. This is the authority provided to the Provincial Cabinet by section 20 of the School Act so that, upon the recommendation of the Minister of Education, it may:

(a) determine all cases of appeal arising from decisions of (school) boards, which decisions are not in conformity with the provisions or intent of this Act, and make the orders the Lieutenant Governor in Council (in effect the Cabinet) thinks proper; and

(b) adjudicate cases where it is alleged by a person aggrieved by an act of a (school) board that the board has acted without jurisdiction.

Clearly such Cabinet decisions would be of a judicial nature and, in view of the decision in Coyle v Minister of Education (Decision #38, Appendix "B"), they might be subject to court review concerning the procedures followed in arriving at the decision. The decisions themselves would appear to be authoritative, and of relevance if not significance for the public school system. However, no records of any such Cabinet decisions can be found in recent years, and it is believed that this method of judicial decision making is reserved for matters in which no other avenue of appeal is possible.

The section remains in the School Act, however, and apparently provides the Provincial Cabinet with considerable discretionary power on whether to adjudicate in disputes concerning school board decisions, or leave them to the courts and the existing quasi-judicial bodies, and potentially to the ombudsman.

## Other Salient Findings

This section reviews additional information gathered during the study's research which is believed sufficiently important to warrant observations in the next chapter, "Summary, Conclusions, Informed Speculations and Recommendations."

There are four additional findings of this nature:

(1) the indeterminate legal status of Ministry of Education administrative rulings and policy statements;

(2) the informed views encountered during the study's interviews

concerning current strengths and inadequacies of the School Act and pursuant Regulations;

(3) the inadequacies observed in the current system of reporting court decisions of relevance and significance to B.C. public school operations, and in the communication to educational policy makers and administrators of information concerning those decisions;

(4) the proposed system for future case law reporting in British Columbia, including the system for establishing dissemination criteria.

It is widely recognised, and confirmed by this study, that statute law provides the basic structure of school law, with judicial decisions filling in the interstices. But where do the numerous administrative rulings and policy statements of the Ministry of Education fit in this edifice? Are they statute law, like Regulations, and therefore enforceable by the courts and quasi-judicial bodies, or are they merely suggestions or desirable goals which cannot be so enforced on behalf of, or against, a concerned party? For example, an enriched program for gifted students was developed by the Ministry of Education during 1978 and implemented in selected school districts in September 1979 (Ministry of Education, 1980, p.22); could the parent of a gifted child in another school district have demanded a similar program by arguing that "sufficient school accommodation and tuition," as required by section 155 (1) (a) School Act, was not being provided in that district? The proposed Administrative

Handbook for Elementary and Secondary Schools, two drafts of which have been circulated at the school district level, contains many rulings and policy statements; could a school board, school administrator or teacher be legally forced to follow all of these procedures, described in the foreword as "Ministry expectations?"

It is recognised that section 3(e), School Act of B.C., empowers the Minister of Education to issue rules and orders required to administer the Act or pursuant Regulations, but under what circumstances may an administrative ruling or policy statement be legally enforceable as a "rule or order?"

During interviews with officials of the B.C. School Trustees Association, the B.C. Teachers' Federation and the Ministry of Education, there appeared to be considerable uncertainty concerning the answers to these questions. One comment was that possibly the Minister's responsibility for "the maintenance and management of all Provincial schools established under this Act" (section 3(b) School Act) vested in him broad legal powers to state rulings and policies, but again this appears uncertain.

This study's conclusion is that somewhere between formal Regulations, such as that which empowered the Minister to set the conditions under which school boards may approve local courses and texts (Regulation 123B, Order-in-Council #719, March 23, 1978), and what are clearly ministerial suggestions only, such as that recently (September, 1981) made to school boards that they consult more with their local teachers' associations, there is a grey area of Ministry of Education circulars, bulletins, policy statements,

etc., the legal status of which is indeterminate. Should some of these in fact be part of statute law, and enforceable through the courts, they could be of relevance to this and other studies concerning school law in British Columbia.

During the interviews conducted as part of this study, several comments concerning the strengths and weaknesses of the current School Act were encountered. These opinions do not relate to the intent or purpose of the educational and fiscal policies contained in the Act, but to the efficacy of the Act and Regulations in providing clear and certain directions to the public school system. Areas which generally appear specific, certain and intelligible include the Act's sections on education finance, school property, and the appointment, transfer and dismissal of teachers. Those areas not perceived to be so certainly and clearly stated include who may serve as a trustee, the powers and responsibilities of school boards, community schools, what is "sufficient" school accommodation and tuition, and "bonuses" for teachers.

It is perhaps unsurprising to note that the first group of subject areas have specific, detailed statements provided by the Act and Regulations, and that there are few judicial decisions interpreting their intent. Subject areas in the other group, however, tend towards hazy, broad statute law, that has produced uncertainties in its application and apparently helped to generate numerous, judicial decisions concerning its application. It is perhaps also unsurprising to note that in this latter group of areas of public schools' operations

there have been few changes in the governing statute law in recent years, although the climate of opinion or public expectations concerning them have changed, as have actual practices in the areas.

From the viewpoints of the educational policymaker and administrator the current system of law reporting has inadequacies both with regard to primary and secondary sources. The existing method for selecting certain judicial decisions for inclusion in law reports, thus making them widely available for study and consideration, rests largely in the hands of commercial law reporting firms whose major customers are lawyers interested in legal precedents. Not only is this primary reporting at times spasmodic, for example the gap in reporting of British Columbia civil cases between 1947 and 1977, but not all decisions of relevance or significance to B.C. public school operations are included when law reporting is functioning fully. In Appendix "B" thirteen of the forty-nine decisions deemed significant are unreported, while Grady holds[1] the opinion that a majority of decisions of significance for B.C. public school operations go unreported, and that keeping track of them has become "a private preserve" of the B.C. Teachers' Federation, the B.C. School Trustees Association, and their respective legal firms (neither the Ministry of Education nor the Attorney General's Office keep files or records of these decisions). Grady further stated that some court decisions of importance to teachers do not appear even

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[1]June 16, 1981, meeting with Mr. D. Grady, staff lawyer with the B.C. Teachers' Federation.

in an abridged format in B.C. Decisions, because no written reasons for judgment were prepared. The B.C. School Trustees' Association became aware of two decisions of importance to trustees (#6 and #42 in Appendix "B") when the local school boards forwarded copies of transcripts of court proceedings.

With regard to secondary sources, the absence of a comprehensive, up-to-date legal encyclopedia in Canada has already been noted, as has the uncertain nature of the four statute citators available that include B.C. court decisions.

It also became apparent during the study that there is no comprehensive and consistent information system available to educational policy makers and administrators in Canada which reviews current developments in school case law. In the United States the National Organization on Legal Problems of Education (N.O.L.P.E.), based in Topeka, Kansas, issues bi-monthly copies of the "School Law Reporter," which reviews current issues and decisions in U.S. school law for the non-lawyer. It also publishes annually "The Yearbook of School Law," described in the preface of the 1980 edition as:

> a comprehensive reference to recent state appellate and federal court decisions affecting the operation and governance of public schools in the United States.

There are also broader, more general problems concerning case law reporting in Canada, and some proposals for reforms have been made under the auspices of the Canada Law Information Council. Specific to British Columbia was the September, 1980, report to the Deputy Attorney General entitled "Draft Report on a Judgment

Handling System for B.C." It states (Dick, 1981, p.197) that the present system of law reporting in B.C. is marked by:

(1) an unknown and uncontrolled "informal" filtering system for deciding which decisions are relevant;

(2) the possibility of an information overload due to the large number of decisions being handed down by the courts;

(3) the development of local and specialized information networks to meet "special needs" (a statement which appears to support in general terms Grady's "private preserve" remark).

The draft report proposes a judgment handling system whereby all court decisions would be transcribed, and a selection committee would decide on the basis of dissemination criteria, created and monitored by an advisory committee, which decisions would be appropriate for publication. Only these published decisions would then be permitted to be cited in future court cases.

The selection committee would consist of representatives of the two legal publishing firms currently reporting B.C. court decisions, while the advisory committee would include representatives of the judiciary, the barristers, the legal publishers, law librarians and "other potential users."

These committees would appear to have, as a result of the "no publication - no citation" proposal, the potential power to mold developments in the law according to their concepts of what decisions would warrant publication.

The proposal, which is of considerable potential importance to the development of school law in British Columbia, is believed

to be still under consideration by the Attorney General's office.[1]

This concludes the reporting of the major findings from the study. The next, final chapter contains the conclusions, informed speculations, and recommendations which arose from the findings.

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[1] September 15, 1981, telephone conversation with Ms. S. Lounder, Director of Research, Canada Law Information Council.

# CHAPTER VI

# SUMMARY, CONCLUSIONS, INFORMED SPECULATIONS AND RECOMMENDATIONS

## Introduction

Public schools are open-system organizations subject to numerous pressures and influences exerted by society. One of the major channels by which society exercises its supremacy is school law. While statutes and regulations are school law's major constituent, judicial decisions are important in the interpretation of the statute law and in the application of the common law to public school operations. Compared to statute law, however, relatively little is known by public school policy makers and administrators about the nature of these judicial decisions or their significance for public school operations.

The basic objective of this study was to provide a comprehensive overview of the judicial decisions which affect the B.C. public school system. To achieve this goal, six specific objectives were established which directed the study towards the major, identifiable premises concerning the nature of judicial decisions and their effects upon B.C. public school operations.

The study was not intended to produce an analysis of legal principles, although it does provide some useful insights for the layman into the workings of the judicial system, but rather to help improve general understanding of the significance and effects of judicial decisions for public school operations, providing examples from specific decisions. A particular use of the study could be to assist in the evaluation of total school law preparatory to the planned 1982 rewrite of the B.C. School Act.

The methodology followed required the location and study

of relevant judicial decisions made by:

Courts of Law;

Boards of Inquiry appointed pursuant to the Human Rights Code of B.C.;

Review Commissions appointed pursuant to section 130 of the B.C. School Act;

Boards of Reference appointed pursuant to section 129 of the B.C. School Act;

Teacher salary arbitration boards appointed pursuant to section 136 of the B.C. School Act; and

Arbitration boards appointed pursuant to the B.C. Labour Code.

Consideration was also given to the potential for relevant decisions made by the Provincial Ombudsman, and by the Provincial Cabinet pursuant to section 20 of the School Act.

Judgements had to be made on what judicial decisions are relevant to public school operations, which presented some definitional problems, and what decisions are significant. The judgments on significance were made subjectively, on the basis of each decision's potential to influence the thoughts and actions of educational policy makers and administrators. This potential may result from the decision establishing a new principle of school law, by it directly changing school methods, or by the amount of damages awarded - or any combination of such features.

The major delimitation for the study was the volume of potentially relevant judicial decisions; research was limited to reported Canadian cases and certain unreported B.C. cases, plus

landmark English and United States cases. The reliance on the writer's subjective judgement as to what decisions are significant was reduced by consultations with various educational officials.

The preceding chapters describe in detail this attempt to survey and analyse the judicial decisions which influence and affect B.C. public school operations. As far as can be ascertained no similar type of study has previously been undertaken. The findings provide, therefore, a singular overview of an important constituent of school law, which previously has been considered only in a partial or fragmentary manner. The study also provides specific information on forty-nine significant court decisions, and also eight significant decisions made by quasi-judicial bodies.

This final chapter summarises the twelve major findings of the study, states conclusions on its six specific objectives, outlines some informed speculations on future developments concerning judicial decisions and the B.C. public school system, and concludes with a series of recommendations for specific actions including additional studies.

## Summary of Findings

(1) The study's research demonstrates that there are 750-800 reported court of law decisions which are relevant to public school operations in British Columbia. Approximately 550 of these decisions are from Canadian courts, 100 from English courts, and 100 from courts in the United States. In addition there may be some relevant decisions from courts in New Zealand,

Australia and other "common law" countries, but these are believed to be few and of little significance.

While the statistics are indefinite, due to definitional problems, they do provide evidence of a substantial body of court decisions relevant to public school operations in British Columbia.

(2) The study identified forty-nine court decisions as "significant" for public school operations in British Columbia. Of these forty-nine decisions, forty-one originated in Canada (thirty-three in British Columbia), four in England and four in the United States. Thirteen of the British Columbia decisions identified are unreported - that is, not included in law reports.

The primary classifications of school operational areas affected by these forty-nine decisions are:

| | | |
|---|---|---|
| role of school boards | - | 11 |
| provision of education | - | 9 |
| educational environment | - | 6 |
| students' rights | - | 2 |
| teachers' responsibilities | - | 11 |
| management of schools | - | 3 |
| teacher salary negotiations | - | 7 |

(The detailed classification system for school operational areas used in the study appears as "Appendix A").

Twenty-six of the forty-nine decisions identified show for their basis the interpretation of statute law, fourteen show the application of common law, five both the interpretation of

statute law and the application of common law, while four are non-classifiable.

The forty-nine decisions are individually described in "Appendix B", together with statements on the reasons for their significance; further aspects of the significance for public school operations are considered in Chapter V. The primary purpose of "Appendix B" is to review the most significant examples of how public school operations in British Columbia are affected by the courts. It also represents a body of desirable knowledge for public school policy makers and administrators in British Columbia.

(3) Boards of Inquiry appointed under the Human Rights Code of British Columbia have made three quasi-judicial decisions of significance to the operations of the Province's public school system. The potential for further rulings from this source appears uncertain, however, owing to the discretion vested in the Minister of Labour concerning the appointment of a Board of Inquiry. When an investigation by a Human Rights Officer fails to resolve a complaint, the Minister of Labour makes the decision whether to set up a Board, and recently few have been appointed.

(4) Approximately two relevant quasi-judicial decisions are made each year by Review Commissions, and three by Boards of Reference. Two recent decisions of Review Commissions are judged as significant for the operations of the B.C. public school system, as they concern the veracity of school boards' assessments of teachers'

competency, and the administrative and personnel policies and practices followed in the school districts. In this respect the Review Commissions have greater authority than the courts which may not question the wisdom of a school board's decision if legally arrived at.

Boards of Reference make decisions which, within their specialized field of jurisdiction, appear procedurally similar to those of the lower courts. Three of the Boards' decisions, concerning dismissals of teachers guilty of criminal offences but given conditional discharges, are believed to be significant.

(5) Teacher Salary Arbitration Boards make numerous quasi-judicial decisions relevant to the operations of the B.C. public school system. Five of these decisions, concerning what items are arbitrable, are deemed as significant, while from an economic viewpoint many more concerning the amount of teacher salary increases significantly affect school board decisions on other budget items. These latter arbitration board decisions are also truly authoritative, there being no appeal procedure against them.

(6) Quasi-judicial decisions made by arbitration boards appointed under section 93(2) of the Labour Code of B.C. appear to have a relatively minor influence on B.C. public school operations. Being based on the interpretation and application of existing agreements covering minority groups of school district employees, they have little potential for significance to overall school operations.

(7) Decisions of the Ombudsman, although not truly quasi-judicial, already have some relevance for the operations of B.C.'s public schools. The potential here depends, however, on whether public schools and boards of school trustees are formally added to the Ombudsman's jurisdictional area, and his office is adequately funded to handle complaints that may arise. Should this occur, the Ombudsman could become a source of near quasi-judicial decisions concerning specific decisions, procedures and practices in the public school system alleged to be unjust, oppressive or improperly discriminatory.

(8) No record could be found of quasi-judicial decisions being made by the Provincial Cabinet pursuant to section 20 of the School Act of B.C. The authority for such decisions, however, continues to be included in the School Act, presumably as an optional or reserve method of adjudicating on appeals against school board decisions.

(9) There is uncertainty concerning the legal status of many Ministry of Education directives and policy statements. A grey area apparently exists, between formal Regulations and overt suggestions, consisting of Ministry of Education circulars, bulletins, policy statements and handbooks, the legal status of which is indeterminate. Should some of these prove to be part of statute law, and enforceable through the courts, they could be relevant to this and other studies concerning school law in British Columbia.

(10) There is some evidence to suggest that specific sections of the School Act concerning public school operations provide clear and relatively certain directions to the school system, while others tend towards broad, hazy, statute law. For the former sections, there appear to have been few judicial decisions, and the legislation is in tune with current practice; the latter sections, however, have generated many judicial interpretations concerning them, and appear in some instances to have become outdated.

(11) Not all court decisions of relevance to B.C. public school operations are included in 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.

No up-to-date legal encyclopedia exists in Canada, and the nature of the statute citators that include decisions on the B.C. School Act is uncertain. Moreover, there is no comprehensive, regular information system on recent developments in Canadian school law, such as that provided in the United States by the National Organization on Legal Problems of Education, located in Topeka, Kansas.

(12) A proposal is currently 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, dated September, 1980, was developed with the assistance of the Canada Law Information Council, and is of considerable, potential importance to the development of school law in British Columbia.

## Conclusions on the Study's Specific Objectives

The purpose of establishing the six specific objectives listed in Chapter II was to identify the primary issues concerning judicial decisions which affect B.C. public school operations; also to indicate in general terms the areas in which it was intended to direct the study. It would now be appropriate to address these issues in the light of the study's findings:

(1) School law in British Columbia develops in a "functional," evolutionary manner, in response to developing societal needs and expectations.

The evidence basically supports the above statement. School statute law in British Columbia has not proved rigid and unchangeable, and there are many examples of amendments being made to accommodate new developments and attitudes in society and in the public school system. Examples in the last decade are amendments concerning education finance, the dismissal of teachers, and the provision of a core curriculum. Nevertheless the statute law has apparently lagged behind, or at least lacked topical specificity, in certain operational areas such as the provision of education for the handicapped, community schools, and the powers and responsibilities of school boards. In consequence, the courts have provided the mechanism here for school law to respond

to current needs and expectations, by developing new interpretations of the statute law, and by applying common law principles to new situations. Creaking and groaning slightly, the system followed in British Columbia for adapting school law to changes in societal needs and expectations, and to new developments in education, has generally fulfilled its function.

(2) Judicial decisions form a significant part of school law in British Columbia, and directly affect educational operations within the B.C. public school system.

This statement is strongly endorsed by the study's findings. The evidence lies in the forty-nine significant court decisions reviewed in Appendix "B", and the eight specific quasi-judicial decisions described in Chapter V. Each of these decisions has had identifiable consequences for B.C. public school operations.

(3) Judicial decisions have a significant effect upon the organizational structure of the B.C. public school system.

The study neither confims nor denies this statement. There is a basic presumption that judicial decisions concerning the educational environment, the responsibilities of teachers, and the role of school boards, would have some effect upon organizational structures, but no direct evidence of this was encountered. A more detailed study, which sought out any organizational changes in a school district following a significant judicial decision concerning its operations, would likely provide a more definitive answer.

(4) Judicial decisions made in the courts which affect the B.C. public school system may be categorized as either the inter-

pretation of statutes or the application of common law.

The study's findings broadly support this assertion. Analysis of the basis for the forty-nine court decisions in Appendix "B" shows:

26 decisions in the interpretation of statute category;

14 decisions in the application of common law category;

5 decisions in both categories;

3 decisions of United States' courts in a "public policy" category;

1 decision where the B.C. Supreme Court ruled there was no basis for a legal action, and consequently there was no judicial decision per se.

(5) There are more judicial decisions in public school operational areas where B.C. school statute law is unclear or unspecific.

The study's findings indicate that there is a tendency for judicial decisions to cluster around hazy or indefinite legislation. A prime example here is the many (five in Appendix "B") interpretations required of the phrase "salaries and bonuses", which describes in the School Act what teachers may negotiate with their school boards. A less convincing example is the two decisions in Appendix "B" concerning who may serve as a trustee, one of which addresses the complex issue of what is "an interest in a contract" with the board. Another hazy statute law phrase which has attracted less judicial interpretation than might have been anticipated is "sufficient school accommodation and tuition"; in view of current societal developments, however, particularly with regard to the handicapped student and possibly the gifted, there may be more judicial activity concerning the interpretation of this phrase in the near future.

(6) Judicial decisions will likely continue to play a significant role in the formulation of future school law in British Columbia, although continuing to be limited primarily to the operational aspects of the school system.

All indications are that the above statement is correct, unless a major policy decision is made by the Legislature for the School Act and Regulations to provide detailed and unambiguous instructions for many more operational areas within the public school system. At present the statute law provides the framework for many such areas, with judicial decisions filling in the intestices. If detailed legislation and regulations filled these gaps there would be less need for significant judicial decisions.

Assuming, however, that the existing extent of operational area coverage in the School Act and Regulations remains unchanged, there may well be more significant judicial decisions should Canadian society continue to change its needs and expectations rapidly, and should it become more litigious, as well it may (this possibility is addressed under "informed speculations"). Also of consequence here is the future role of quasi-judicial bodies which may interact with the school system, in particular Boards of Inquiry under the B.C. Human Rights Code, and the Ombudsman.

Regardless of the number of judicial and quasi-judicial decisions, however, it is believed that the decisions will significantly affect only operational aspects of the public school system. The basic structure and organization of the system will continue to be established by statute law in the foreseeable future - unless Canada's proposed

Charter of Rights, in particular section 32, which may make any other law which is inconsistent with the Charter inoperative, has some unprecedented consequences for the role of the judiciary in establishing school law.

## Informed Speculations

In addition to the formal findings and conclusions of the study, the knowledge and perspectives acquired lead inexorably towards speculations upon:

(a) whether the school "arena" in British Columbia is likely to become more litigious;

(b) whether education problem solving in British Columbia is likely to change even more from a political and/or pedagogical process to a judicial function;

(c) the extent to which courts and quasi-judicial bodies are the best way for society to make decisions about education; and

(d) whether teachers and school boards are over exposed to litigation for injuries to students, with inhibiting effects upon educational programs.

These critical questions cannot be fully considered in this study but, like Coleridge's Ancient Mariner, they hold one with a glittering eye and demand to be heard. A brief outline here of these basic issues may help stimulate needed further studies.

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, and all three suggest that more litigation may be experienced in British Columbia during the next few years.

Much of the School Act and pursuant Regulations was written in a different social climate to 1981. This is evidenced by the authoritarian tone of the statute, by its use of such outmoded terms as "pupil", by its requirements for scripture readings and school prayers coupled with the injunction that "the highest morality shall be inculcated" (section 164), and by its provisions for school assemblies to make "appropriate references to the Canadian flag" (regulation 94), and for a teaching certificate to be issued only to a person who "is of good moral character and a fit and proper person to be granted a certificate" (section 146). However worthy and timeless some of these preceptive requirements may be, they indicate a body of law not attuned to the times; as stated by Andrews[1] "a School Act, like natural justice, is a concept at a point in time." If left unchanged this outdated and basically authoritarian body of statute law could instigate more litigation in British Columbia. The current Minister of Education

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[1] Interview with Dr. Bruce Andrews, Director of Teacher Services, Ministry of Education, August 17, 1981.

has recognized the situation, and has proposed not only a rewrite of the Act and Regulations but also specific measures to provide for more parent (Smith, 1981, pp.72 & 160) and teacher (pp.53-59) involvement in local decision making, plus regional appeal tribunals (p.73).

The current temper, or frame of mind, of parents, taxpayers and teachers suggests an increased determination to question authoritarian decisions and to secure their "rights". The superintendent of the Greater Victoria School District has stated (Stables, 1981):

> Parents are demanding excellence. Parents are letting us know when they are not happy with teaching situations. They are demanding more services for their children and I suspect we will be into, in the next five years in education, parents suing school districts for not fulfilling their expectations.

During the study's interviews with education officials this possibility was discussed, and generally concurred with. The likely litigable areas suggested were standards of instruction and failure to educate, services for handicapped students and the gifted, and the possibility of actions on behalf of students who allegedly have been neglected because of teacher attention being focussed on handicapped students.

Taxpayers also seem less averse to challenging costly educational decisions in the courts, for example Decision #13 in Appendix "B", while some like-minded taxpayers in districts such as North Vancouver have banded together. The teachers of the Province have displayed little reluctance in recent years to go to court, as a review of B.C. Law Reports or Appendix "B" illustrates. Society's access to the courts and to quasi-judicial bodies appears to be becoming psychologically

easier, with possibly some influence here from the United States, and also the necessary funds appear to be more readily available. It may be relevant to note that certain trade unions in British Columbia, for example the Teamsters, provide their members with legal cost insurance.

Whether education problem solving in British Columbia is likely to change even more from a political and/or pedagogical process to a judicial function depends largely on the skills, determination, and intestinal fortitude of the Province's politicians and educational administrators. As stated 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 centers of decision-making to achieve a political or ethical concensus on solutions." This type of situation, but on a more limited scale, has been projected as a possibility for British Columbia; in an open letter to the Premier the B.C. School Trustees Association stated (Begin, 1981):

> There is a great lack of public policy relative to the education of special needs of children. Your party's (sic) unwillingness to take a stand has created a real possibility of making lawyers rich at the expense of handicapped students. Do you really want to have the judiciary perform the duties of elected people in this area of public policy?

The B.C. School Trustees Association contends[1] that the political process should determine the levels of services to public school students, and that the judiciary could then concentrate on allegations of failures to provide the determined level.

Unfortunately, public school education problems appear never ending, and few of them have clear cut and broadly acceptable solutions. Whatever statutory solutions are proposed in British Columbia, they frequently bring protests from one interest group or other. But if the politicians and educational administrators are not capable of resolving the problems, then eventually the courts will have to provide solutions as best they can.

The extent to which the courts and quasi-judicial bodies are the best means for society to make any decisions about public school education is another pressingly important issue. There is strong antipathy in Canada towards judges determining what the law ought to be, rather than what it is. This feeling is shared apparently by the judges. As the Honourable J.V. Clyne, former Justice of the B.C. Supreme Court, stated (Clyne, 1981):

> ...judges should not be called on to make political decisions. The adversary system of judicial proceedings, limited to the facts of a particular case and restricted by rules of evidence and procedure, is ill-equipped to deal with complex social problems.

In the United States, where judges are making educational

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[1] July 7, 1981, telephone conversation with Graham McKinnon, Coordinator of Education and Government Relations, B.C. School Trustees Association.

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

It is apparent that the law courts are inevitably distanced from the social realities of educational policy issues, and just 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. The judiciary is in the best position to do this because of its independence and neutrality, as compared to the executive branch of government. As Dawson states (1970, p.409):

> The judge must be made independent of most of the restraints, checks and punishments which are usually called into play against other public officials... The judge is placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that his best efforts will be devoted to the conscientious performance of his duty.

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 rule of law. The implications of the rule of law for the public school system are considered in Chapter III; 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.

That teachers and school boards in British Columbia are highly exposed to litigation for physical injuries to students resulting from negligence is certain. Indeed, this has virtually become a special branch of the law of tort, with its own established standards of care - which is the reason it is considered a part of school law and included in this study. As reviewed in Chapter V, the courts appear slowly to be developing a special standard of care for professional teachers, known as the "ordinarily competent instructor" test, and there has been one judicial assertion of a "duty to instruct properly." In consequence, more and more teachers will tend to observe the doctrine of "approved general practice" in their work with students, 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 is being extended in 1981 to cover

"professional malpractice," the trauma of a negligence action 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-0.1, 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 factual 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)

## Recommendations

(1) That in view of the demonstrated pervasiveness and significance of judicial decisions for British Columbia public school operations, school policy makers and administrators should be encouraged to study such decisions and their practical implications, in order to achieve consistency in educational services and practices and to reduce unnecessary and costly litigation. This would be assisted by the preparation and distribution of a basic text outlining in non-legal language the significant judicial decisions, and by the provision of a comprehensive and regular information service on developments in school law, geared to the proposed readers. One model to be considered here should be "The Yearbook of School Law" published annually in the United States by the National Organization on Legal Problems of Education, and its bi-monthly "School Law Reporter."

Who should prepare and produce the text and bulletins is a dilemma not readily resolved. Ideally it should be a neutral, independent organization, or a joint enterprise of teachers, trustees and the Ministry of Education. Possibly one of the Province's universities could provide a base for the service, which would likely be financially self-sustaining, or a reputable legal publishing firm.

(2) That those persons charged by the Minister of Education with drafting a revised B.C. School Act during 1981-1982, review and consider the current functioning of the relevant judicial and

quasi-judicial bodies, and their significant decisions. A specific example of a potential benefit from this review is the relevance of decisions #1 - #4 in Appendix "B", concerning the role, powers and responsibilities of school boards, to the proposal made by the Minister relating to "shared management" of the school system in his "outlines of a general mandate" (Smith, 1981, p.10).

It is suggested that there are three separate purposes to any rewrite of the School Act:

(a) to alter the Act's existing intent or purpose in specific subject areas, such as sources of funding, teacher salary bargaining procedures, or the provision of tuition;

(b) to extend or contract the scope of the Act's coverage in specific subject areas - in effect what is covered by statute law, and what by common law and judicial decisions;

(c) to clarify and co-ordinate the Act's contents, for example along functional lines, in order to improve the readers' comprehension, and the Act's implementation.

The purpose of recommendation (2) would be to assist purpose (b) above.

(3) Associated with recommendation (2), it is proposed that the B.C. Legislature be asked by the Minister of Education to make a major policy decision on the nature of the School Act and

pursuant Regulations, called here the Act. This decision to be whether the Act will provide either:

(a) essentially a mandate for school boards and the Ministry of Education to achieve certain broad objectives, with the courts and quasi-judicial bodies overseeing the boards' and the ministry's methods and ensuring the equity of the services provided; or

(b) a series of detailed prescriptions on how the boards and the ministry will achieve the Province's educational objectives, with a concomitant reduction in the role of the courts and quasi-judicial bodies.

As outlined in Chapter V, the Act's present contents provide a mixture of broad commissions and detailed prescriptions for the various public school operational areas. The existing combination likely developed in response to actual operating circumstances over the last century, and it may represent the practical ideal or optimum. No rationale nor definite pattern of evolution, however, is readily evident.

(4) Dependent in degree upon the decision made concerning the nature of the Act - a broad commission, a detailed prescription, or some combination - it is recommended that the Act more certainly define the powers and functions of school boards and of the Ministry of Education. At present there are uncertainties concerning them, particularly with regard to the ministry which has experienced

few lawsuits - until recently it was immune, as a Crown agency.[1]

Not only would this reduce the possibility of costly and divisive legal actions, but also produce more certainty and efficiency in the operations of school boards and the ministry - being certain of one's role or function is a pre-requisite for providing high performance.

(5) That each future school board resolution, and Ministry of Education policy statement or directive, makes mention of the specific statutory authority (section of the Act or Regulation number) upon which it is based. The objective would be to promote legitimacy in all resolutions, policy statements and directives, and to reduce litigation.

(6) That during the 1981-1982 rewrite of the School Act and Regulations, specific attention be paid to clarifying those public school operational areas which are particularly uncertain, as presently written. For example:

(a) "sufficient accommodation and tuition" (section 155(1)(a), School Act);

(b) "salaries and bonuses" (section 131, School Act);

(c) "any contract or interest in a contract" (section 59(d), School Act);

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[1] June 23, 1981, interview with Mr. L. Canty, former Superintendent of Legislative Services, Ministry of Education.

(d) procedures to be followed by a teacher salary arbitration board when making an award (section 136(2), School Act).

The purpose of this clarification would be to reduce uncertainties and the likelihood of future litigation. Even should it be difficult to foresee and provide statutory coverage for future developments in these operational areas, the legislation could incorporate and "confirm" the judicial decisions which have attempted to interpret them; this has been done in the case of Boards of Reference (see Decisions #35-37), Appendix "B"), thus clarifying their terms of reference and methods of operation.

(7) That detailed consideration be given to either confirming or overturning, by an amendment to the School Act, the implications for public school operations and for the status of school boards of the "Verchere decision" (Decision #33, Appendix "B"). As pointed out in Chapter V, the "Verchere decision" has resulted in Review Commissions not only reviewing the legality of the specific procedures followed by a school board and its administrators in reaching a legally authorized decision, (which is the limit of a courts' authority), but also in the power to question the wisdom of the decision and to "commend" how the board and the administrators ought to perform their functions.

It is believed that the radical nature of this decision has not yet been fully considered by the B.C. Legislature and those who provide it with advice.

(8) That the Ministry of Education, the B.C. School Trustees' Association and the B.C. Teachers' Federation support in principle the need to rationalize and simplify law reporting procedures and practices in Canada. Further, that the three organizations help to stimulate and encourage proposals for a more adequate and up-to-date legal encyclopedia in Canada of a similar standard to Halsbury's "Laws of England," as reviewed in Chapter III, and for a more comprehensive and rationalized British Columbia statute citator, as outlined in Chapter V.

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 formation and application. If only from self-interest, those responsible for operating the public school system should encourage attempts to improve access to, and the ready comprehension of, school law.

(9) That the Ministry of Education, the B.C. School Trustees' Association and the B.C. Teachers Federation take an active interest in the proposals currently before the Province's Attorney General for a "Judgment Handling System for B.C." as outlined in Chapter V. In particular, that the three organizations review the dissemination criteria proposed to be used to determine which future judicial decisions are to be published. Also, that they consider seeking representation on the proposed Advisory Committee as "potential users."

In view of the proposal's "no publication - no citation"

rule, and because many decisions of significance to the B.C. public school system currently go unpublished, the proposed system is of considerable, potential importance to the development of school law in British Columbia. Educational input would appear to be essential.

(10) That further, specific studies into the significance of judicial decisions for the public school system be undertaken in British Columbia and other provinces.

This, initial broad overview of public school judicial decisions confirms that the subject is worthy of further time and effort. In addition, improvements could now be made in the methodologies to be followed, as a result of the experience with this study.

It would also be interesting, and potentially useful, to compare the British Columbia findings on the number and significance of judicial decisions which affect its public school system with the findings from other Provinces.

(11) That there be regular opportunities provided for public school policy makers and administrators to familiarize themselves with legal principles and practices, and to improve their comprehension of the significance of school law, and of judicial decisions in particular. There already are examples of such learning opportunities being provided - the B.C. School Trustees' Association has sponsored several seminars on school law for

trustees, while in 1978 and in 1981 the University of Victoria's Faculties of Education and Law provided conferences on the subject for school district superintendents.

The objective here is not to make pseudo-lawyers, but to provide a base of knowledge from which to consider the implications of school law and of professional lawyers' opinions. Public school policy makers and administrators should be in a position to understand relevant legal facts and principles, and then make appropriate educational decisions. Ideally, they should follow Edmund Burke's dictum:

> It is not what a lawyer tells me I may do; but what humanity, reason and justice, tell me I ought to do.

The current mystique and uncertainty surrounding school law for many of British Columbia's public school policy makers and administrators needs to be reduced.

It is hoped that this study has contributed towards that objective.

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# APPENDIX A

## BASIC AREAS OF SCHOOL OPERATIONS IN WHICH LEGAL PROBLEMS AND QUESTIONS ARISE

I. Role of School Boards - responsibilities and powers in relationship to the provincial government, to the local electorate and to its employees.
- who may serve as a trustee.
- functions at board meetings (corporate status).
- by-laws and resolutions.
- delegation of authority.
- legal liability of board and individual trustees.

II. Provision of Education - who may attend and who must attend.
- enforcement of attendance.
- "sufficient school accommodation and tuition".
- the handicapped student.
- expulsion and dismissal.

III. Education Environment - finance and borrowing.
- staffing.
- school buildings and land.
- travel to and from school by students.
- health and safety of students.

IV. Students' Rights and Responsibilities - placement in the school system.
- equality of opportunity.
- availability of special programs.
- conduct and personal appearance.

- discipline.
- student records.
- search and seizure.
- attendance and residence requirements.

V. Teachers' Responsibilities and Rights
- in loco parentis.
- provision of educational advice and instruction.
- terms and conditions of employment.
- appointments, probation, suspension and dismissal.
- assignments and transfers.
- certification.
- B.C.T.F. membership.
- working conditions.
- extra-curricular activities.
- negligence.

VI. Management of Schools
- responsibilities and powers of superintendent and district supervisors.
- responsibilities and powers of principals, vice-principals and head teachers.
- responsibilities and powers of secretary-treasurer.

VII. Teachers Salary Negotiations -what may be negotiated.

- who may serve as arbitration board member.
- implementation of arbitration awards.

# APPENDIX B

## THE "SIGNIFICANT DECISIONS"

(N.B. All references are to current sections of the School Act, even where the section number and title of the Act was different at the time of the decision).

Decision #1

Classification: I (a) Role of school boards - responsibilities and powers.

I (e) Role of school boards - delegation of authority.

Name and Citation: MacKell v Ottawa Separate School Trustees. (1914) 18 D.L.R. 456. (1915) 24 D.L.R. 475. (1917) 32 D.L.R. 1.

Nature of Decision: Interpretation of statute and application of common law.

Reasons for Significance: An historic decision, affirmed by the Ontario Supreme Court and the Judicial Committee of the Privy Council[1], which established that:

(a) a school board must act within the laws of the Province in fulfilling its functions;

(b) a school board may not delegate those of its duties and obligations that require discretion or judgment;

(c) the courts may only interfere where a school board decision is taken in bad faith, or the Provincially required procedure was not followed.

Facts of the Case: A majority of the Ottawa Separate School Board approved a resolution purporting to delegate to the board chairman the power to hire and fire teachers. The chairman dismissed all of the existing teachers, and attempted to hire others who did not comply with the requirements in Ontario Provincial Regulations.

The courts ruled that the dismissal of the original teachers was illegal, as the school board did not have the authority to delegate its duty in this respect.

In his 1914 reasons for judgment, Lennox J. stated that:

> In matters relating to the schools under their control the defendants (the school trustees) are clothed with wide discretionary and quasi-judicial powers. Assembled at a properly constituted meeting of the Board, regularly conducted, dealing with matters within their jurisdiction, and acting in the bona fide discharge of their duties and in harmony with the laws of the Province, the regulations of the Department (of Education), and any existing judgment or order of the Court affecting them, the conclusions they reach, whether thought to be wise or unwise, cannot be interfered with by a Court... In all matters involving discretion or judgment, the whole question must be presented to the Board, should be weighed and considered by the Board, and must be determined upon by the Board.

[1]Until 1949, the Judicial Committee of the Privy Council in London was the court of final appeal for Canada in all but criminal cases.

Decision # 2

Classification: I (a) Role of school boards - responsibilities and powers.

II (a) Provision of education - who may attend.

Name and Citation: McLeod v Board of School Trustees of School District No. 20 (Salmon Arm). [1952] 2 D.L.R. 562, 4 W.W.R. 385.

Nature of Decision: Application of common law, and interpretation of statute.

Reasons for Significance: The decision ruled on three important issues:

(a) a school board must perform its statutory duties;

(b) if it does not and there is no remedy provided in the statute, then the common law may be used to enforce performance;

(c) all pupils must be provided with an education as required by statute.

Facts of the Case: As a result of a shortfall in funding, the Salmon Arm school board decided to close its schools in the district municipality, thus depriving the students in that part of the school district of an education.

The B.C. Court of Appeal decided that "impossibility" is not a valid reason for not performing a statutory duty, and that the school board must either reopen the schools, or resign and hand back the responsibility to the Legislature.

The Court ruled that there is an imperative statutory duty "to provide sufficient school accommodation and tuition" (section 155 (1)(a) School Act) for all resident

children of school age.

In his reasons for judgment, O'Halloran, J.A., said:

> It is the Province which is directly and primarily responsible as the agency which enacted the legislation. In coming to a decision I am compelled to regard the interests of the children as paramount. That is inherent in the Public Schools Act; and all its provisions, even if some of them seem to conflict, must be read in that light.

Decision # 3

Classification: I (a) Role of school boards - responsibilities and powers.

Name and Citation: William Clancy v Board of School Trustees of School District No. 45 (West Vancouver). Supreme Court of B.C. No. X 520/69 Vancouver Registry, July 14, 1969.

Nature of Decision: Interpretation of statute

Reasons for Significance: This is one of the two important judicial decisions which attempts to delimit B.C. school boards' field of authority and actions. It establishes that although school boards are creations of the School Act, their activities are not limited to those expressly ordered or permitted in the Act. Rather, they may include any purpose reasonably required for "the effective and efficient operation of the schools in the school district."

The decision thus confirms that school boards are accountable only to the local electorate for their discretionary decisions properly made in good faith.

Facts of the Case: The West Vancouver school board decided that certain renovations, alterations and additions were required to some of the schools in the district and, as required by the School Act at that time, submitted a referendum to the owner-electors for approval of the planned expenditure. The board also expended $211.68 of public money on an advertisement in the local newspaper, urging the owner-electors to vote "yes". The referendum was in due course approved.

One of the owner-electors, William Clancy, sought to

have the referendum declared illegal, stating that a school board has no express authority in the School Act to spend money on advertising its referenda.

The Honourable Mr. Justice Munroe turned in his reasons for judgment to section 88(b) of the School Act. This directs B.C. school boards to "determine local policy in conformity with this Act for the effective and efficient operation of schools in the school district" - a requirement which warrants many necessary and incidental powers said Munroe J., including the discretionary authority to spend public money to urge owner-electors to approve an expenditure the board believes necessary.

In his *obiter dicta*, Munroe J. stated:

> Being an elected body, the members of the Board are accountable to taxpayers for their policies and management of public funds when the next election occurs. To accede to submission of the applicant herein (William Clancy) would mean, for instance, that a School Board could not spend public funds administered by it for such necessary things as attracting new teachers or renting a hall or publishing an advertisement for a public meeting called by the Board to consider and discuss a question arising out of "the effective and efficient operation of the schools" - none of which is expressly authorized by the Act. That cannot have been the intention of the Legislature when it entrusted to school boards the administration of physical assets and public funds involving millions of dollars. Those and many other incidental powers must, by necessary implication, be attributed to a school board whilst acting, as this Board was, properly and in good faith.

Decision # 4

Classification: I (a) Role of school boards - responsibilities and powers

I (d) Role of school boards - by-laws and resolutions

V (d) Teachers' responsibilities and rights - appointments, probation, suspension and dismissal.

Name and Citation: Mary Ann Johnston and Doris Ferry v The Board of School Trustees, School District No. 35 (Langley). (1979) 12 B.C.L.R. 1.

Nature of Decision: Interpretation of statute, and the application of common law.

Reasons for Significance: A wide ranging decision which affirmed that the School Act of British Columbia establishes a school board's function as supervising generally the educational process within the school district. Also that the board is not to run the schools and discipline teachers on a day-to-day basis, as these functions are established by the Act as being within the superintendent's domain. The board may "interfere" with the day-to-day operations of the schools, therefore, only as set out in the Act and in accordance with the principles of natural justice.

Facts of Case: The school board, concerned over problems at one of the elementary schools in the district, summoned two teachers to appear before it to explain their involvement. Neither teacher attended, and disciplinary action was taken against them by the board.

The Supreme Court of B.C. ruled that the board did not have the power under the School Act to order the teachers

to appear; moreover, the order and the suspension of the teachers was in contravention of natural justice, as no particulars of the conduct in question has been given to the teachers prior to the planned meeting. In his reasons for judgment, Fulton J. stated that:

> The members of the Board are laymen who for the most part have no experience in these matters (day-to-day operations of schools). The Board members know what objects the school system should fulfill and indeed, they are the proper body to determine this general policy. However, the Superintendent and the other educational administrators must structure the day-to-day practices within the schools so that these objects can be met.

Decision # 5

Classification: I (b) Role of school boards - who may serve as a trustee.

Name and Citation: Heinz Korsch v Clarence Kruschel. Provincial Court, Kelowna, B.C. October 29, 1965. (Unreported).

Nature of Decision: Interpretation of statute.

Reasons for Significance: The court clarified a contentious issue when it ruled that the spouse of a teacher employed in a school district may be nominated for election as a school trustee in that district, provided that the spouse does not have a legal interest in the teacher's salary.

Facts of the Case: Mr. Korsch, married to a teacher, filed nomination papers for election as trustee in the district where his wife was employed. The Returning Officer, Mr. Kruschel, refused to accept the nomination papers on the grounds that section 59(d) of the School Act disqualifies any person "who has, directly or indirectly, by himself or through another person, any contract or interest in a contract with or for the board of the school district."

His Honour R.J.S. Moir stated in his reasons for judgment that:

> While Mr. Korsch may well have an interest in the welfare of his wife, in her success as a teacher, in her health, in many aspects of her life, he does not have an interest, direct or indirect, in her contract (of employment) with the School District. He cannot force the school district to pay his wife's benefits, or any part of them to him, he cannot lawfully in any event, force his wife to pay the benefits she receives, or any part of them to him.
>
> The Court holds that the interest contemplated by the statute is a legal interest, not one arising out of a relationship unconnected with the activities of the School District or the work performed by his wife.

Decision # 6

Classification: I (b) Role of school boards - who may serve as a trustee.

Name and Citation: Eleanore Mullen v Marvin Carpenter. Provincial Court, Prince George, B.C. November 24, 1972. (Unreported).

Nature of Decision: Interpretation of statute.

Reasons for Significance: Further clarified the question of who may be nominated for election as a trustee, by ruling that a substitute teacher's contract with the school board makes the substitute teacher an employee of the board regardless of the number of days actually taught.

Facts of the Case: Eleanore Mullen, a substitute teacher in school district #57 (Prince George), filed nomination papers for election as a trustee in the district. The returning officer, Marvin Carpenter, refused the documents on the basis that section 59(a) School Act disqualifies "a person who is an employee or salaried officer of the board." His Honour Judge F.S. Perry concurred with the decision of the returning officer.

Decision # 7

Classification: I (f) Role of school boards - legal liability.

III (d) Educational environment - travel to and from school.

Name and Citation: Shrimpton v Hertfordshire County Council. (1911) 104 L.T. 145.

Nature of Decision: Application of common law - vicarious responsibility.

Reasons for Significance: An House of Lords decision which has been the foundation for many English and Canadian court decisions concerning liability for accidents to students. The unanimous decision confirmed the principle that a school board may be liable for unauthorised acts of its contractors or employees, where their actions appear to be part of the course or scope of employment and therefore might reasonably be assumed to have been authorised.

Facts of the Case: The Hertfordshire County Council, through its school attendance officer, arranged transportation to school for students living two miles or more from Croxley Heath School. The attendance officer also allowed Miss Shrimpton, who lived one mile from the school, to use the transportation.

Miss Shrimpton was injured due to the negligence of the driver and the non-provision of a conductor (the vehicle was horse drawn).

The House of Lords held that the Hertfordshire County Council had agreed to carry Miss Shrimpton to and from school, and that consequently they had a duty to provide a reasonably safe mode of conveyance.

The Lord Chancellor stated that as the parents had been advised by the attendance officer their daughter might use the conveyance:

> it was reasonable that the parents should suppose, as I have no doubt that they did suppose, that the only education officer whom they saw was acting by the authority of the education committee, who were themselves acting by the authority of the county council. I think, therefore, that when he sanctioned or permitted the conveyance of this child in this vehicle he thereby bound the county council.

Classification: I (f) Role of school boards - legal liability.

V (i) Teachers' responsibilities and rights - extra curricular activities.

Name and Citation: Beauparlant v Appleby Separate School Trustees. [1955] O.W.N. 286, 4 D.L.R. 558.

Nature of Decision: Application of common law.

Reasons for Significance: This Ontario High Court decision illustrates that a school board may not be vicariously liable for the tort of an employee, where the employee was acting outside the scope of his employment.

It does appear, however, to have been a somewhat exceptional decision that has not yet been judicially considered at a higher level of the court system.

Facts of the Case: A school excursion to a concert was organized by teachers without the permission or knowledge of the school board. Sixty-six pupils were loaded into a truck; a few miles down the road one side gave way, and some of the pupils were injured.

The court ruled that as the school board had not authorised this or similar trips, the teachers had acted outside the scope of their employment; consequently the board was not vicariously liable for the teacher' negligence.

Decision #9

Classification: I (f) Role of school board - legal liability

II (d) Provision of education - the handicapped student.

Name and Citation: Davis v London County Council. (1914) 30 T.L.R. 275.

Nature of Decision: Application of common law.

Reasons for Significance: There is a further exception to the common law principle that a school board is vicariously responsible for the tortious acts of its employees or contractors. This occurs where the board hires competent, qualified professionals as independent contractors to perform legally authorized duties of the board, and the board does not exercise direct control over the contractor in the carrying out of those duties.

The Davis case established this precedent in 1914, in England's King's Bench Division. It appears potentially applicable in British Columbia where a school board hires an independent, medical service organization or practitioner to provide treatment to pupils authorized under Part 5 (School Health) of the School Act. Whether the principle would also extend to self-employed, qualified psychiatrists and psychologists providing services authorized under Part 5, or under the 1981 amendments to Section 15 of the School Act which concern children "with exceptional educational needs," appears to be a matter of legal uncertainty - see Decision #17 (Hoffman v Board of Education, New York)

and, for persons specifically interested in the issue of negligent counselling and placement of pupils, see Wuester, 1980, pp. 11-27.

Facts of the Case: The London County Council's Board of Education had an agreement with the Islington Medical Centre, operated by a group of medical practitioners, to provide medical treatment for school children where this was believed necessary by the school doctor who regularly examined the school children. The provision of medical services, including surgery, was authorized by the Education Acts of 1907 and 1909.

Following an examination of Miss Davis, the school doctor recommended that she have her adenoids and tonsils removed. The mother gave written consent for the operation, which was conducted by two doctors and two nurses. During the operation some anaesthetic containing chloroform was apparently spilled on Miss Davis' face. The resultant burns caused a facial disfugurement, as well as pain and suffering.

Miss Davis sued the Board of Education, arguing that it was legally responsible for the negligent actions of its contractors, the medical practitioners. The jury, for unstated reasons, found that the medical practitioners had not been negligent, and the judge dismissed the case. But in giving his judgment, Mr. Justice Lush said that even if the jury had found

the medical practitioners guilty of negligence, the school board would not have been vicariously liable, as it had fulfilled its duty towards Miss Davis when it hired competent professionals to perform the operation

Decision # 10

Classification: I (f) Role of school boards - legal liability.

Name and Citation: Robert Bogness v Board of School Trustees, School District #37 (Delta). Supreme Court, New Westminster, B.C. #1160/75. January 25, 1978, Kirke-Smith J. (Unreported).

Nature of Decision: Interpretation of statute, and application of common law.

Reasons for Significance: The School Act of B.C. gives exemption to trustees and school boards from legal actions for "anything done... under the authority of this Act or a regulation, rule or order made under it" (section 95 (1)). The intent of this exemption was clarified by the Bogness decision, which states that the exemption does not apply in the case of vicarious liability arising from the tortious act of one of the school board's employees.

Facts of the Case: Bogness, a student, was injured as a result of negligent design, construction and inspection of a school playground backstop. The school board pleaded exemption from vicarious liability under section 95(1).

The Honourable Mr. Justice W. Kirke Smith stated, in his reasons for judgment:

> As I conceive the language and intent of this legislation, it protects the Trustees and the Board from actions done by them in person or co-operatively pursuant to their statutory obligations. It has no relevance whatever where the claim advanced, as here, against a School Board, is based on vicarious liability because of the tortious act of one of the Board's employees.

Decision # 11

Classification: I (f) Role of school boards - legal liability of individual trustees.

IV (a) Students' rights - placement in the school system.

Name and Citation: Wilkinson v Thomas. [1928] 2 WWR 700.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This King's Bench, Saskatchewan, decision illustrates that trustees who do not act reasonably and in good faith may be held personally liable.

Also that children of school age have the right to attend school and receive instruction where the governing statute provides for this.

Facts of the Case: Without obtaining legal advice, the school board decided to postpone admittance to school of a child who had reached school age. The court ruled that denial of the child's statutory right to an education made the trustees personally liable for the costs of the action.

In his reasons for judgment Taylor J. stated that:

> I think it should be very clearly laid down that in matters of law, matters so vital as the right of a child to receive education in the school and such matters as that, school trustees should not undertake to proceed without consulting their solicitor and counsel, and if they wish to do so, they must take the risk of having to pay costs if they are wrong.

Decision # 12

Classification: II (a) Provision of education - who must attend.

IV (h) Students' responsibilities - attendance.

Name and Citation: Perepolkin v Superintendent of Child Welfare. (1958) 23 W.W.R. 592, 11 D.L.R. (2d) 417.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision established that the British North America Act and British Columbia's "Terms of Union" gives the Province the right to require compulsory attendance at school, even where this offends against the parents' religious beliefs; also, that the Province has the authority to establish agencies to decide what form the compulsory education shall take.

Facts of the Case: The son of the appellant, a Doukhobor, had been taken into custody by the B.C. Superindendent of Child Welfare because of non-attendance at public school. The father objected on religious grounds to the public schools' curriculum.

The B.C. Court of Appeal ruled that *bone fide* legislation on education may indirectly affect religion without losing its validity, as "in the circumstances of this case the general powers of the Province to legislate on education under s.93 (British North America Act) must be taken to be unqualified."

Decision # 13

Classification: II (a) Provision of Education - who must attend.

Name and Citation: The B.C. Association of Parents for Independent School Rights v W.A.C. Bennett, Premier of B.C., et al. B.C. Supreme Court #8164/71, September 28, 1971.

Nature of Decision: Theoretically there was no decision, as Mr. Justice Munroe struck out the writ and statement of claim, but the case does illustrate the entrenched legal rights of the Province of British Columbia in education.

Reasons for Significance: This case demonstrates that the courts will not entertain a claim that has no basis in positive law and which contends that the Province of British Columbia, by providing public school education only, is guilty of discrimination.

Facts of the Case: The B.C. Association of Parents for Independent School Rights, represented by Mr. and Mrs. David Bader and children, issued a writ against the Premier, the Minister of Education, the Department of Education and the Vancouver school board, alleging:

> monetary and educational discrimination against parents of children who are prevented from attending an independent school of the parents' choice, due to financial inability to do so, as practiced in the Province of British Columbia, to be declared unconstitutional according to the Canadian Bill of Rights, the B.C. Provincial Bill of Rights, the B.N.A. Act - Section 93 - and the universal declaration of Human Rights of the United Nations - article 26.

The plaintiffs claimed reimbursement for the fees paid to independent schools in order to exercise their right to choose their children's education.

The defendants' joint motion that the writ and statement of claim be struck out succeeded, and the B.C. Supreme Court dismissed the action.

Decision # 14

Classification: 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. (Underlining 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").

Decision # 15

Classification: II (b) Provision of Education - enforcement of attendance.

IV (h) Students' responsibilities - attendance requirements.

Name and Citation: Regina v Miller. [1967] 1 C.C.C. 383

Nature of Decision: Interpretation of statute.

Reasons for Significance: A child of school age in British Columbia who does not attend public school and is not "being educated by another means satisfactory to the justice or tribunal" (section 113(1) School Act) is not guilty of an offence under the Summary Convictions Act. Rather, it is the parents who are guilty of an offence under the terms of the School Act.

Facts of the Case: The dismissal of a charge of juvenile delinquency against the Miller child by the Family and Children's Court in Vancouver was upheld by the British Columbia Supreme Court, on the grounds that the B.C. Legislature did not intend to make the child guilty of an offence if he failed to attend school. (Under section 2 of the Juvenile Delinquents Act a child is a "delinquent" upon "violation of a provincial statute"). McDonald J. ruled that the Miller child had not violated the School Act by not attending school, adding that:

> The basis for creation of this offence on the part of the parent or guardian must be the view of the Legislature that the matter of the attendance or non-attendance by the child at school is one under the control of the parent or guardian. It is my view that the Legislature did not intend to make the child guilty of an offence if he failed or neglected to attend school.

Decision # 16

Classification: II (c) Provision of education - "sufficient school accommodation and tuition."

V (b) Teachers' responsibilities - provision of educational advice and instruction.

Name and Citation: Peter W. v San Francisco Unified School District. 131 Cal. Rptr. 854 (1976).

Reasons for Significance: The important issue of the adequacy or "sufficiency" of education provided in public schools appears to have been addressed to date only in the United States courts. This decision ruled that school boards are not legally obliged to be certain that pupils attain basic education skills - there is no guarantee of results.

The California decision here was reinforced in 1978 in New York by a similar decision on an almost identical case (Donahue v Copiague Union Free School District, 407 N.Y.S. 2d 874). Canadian lawyers believe that similar rulings would be made in this country's courts, to the effect that there is no legal duty on a school board to ensure minimal student competency, not withstanding its statutory obligations to provide education.

Facts of the Case: Peter W. graduated from high school after twelve years public school education, and was found to be functionally illiterate. Negligence in teaching, and misrepresentation in reporting progress, were alleged.

The California appeal court concluded that "unlike the activity of the highway or market place, classroom methodology

affords no readily acceptable standards of care, or cause or injury." It ruled that the school district owed no duty of care to the plaintiff within the existing interpretations of negligence.

Decision # 17

Classification: II (d) Provision of education - the handicapped student.

I (f) Role of school boards - legal liability.

Name and Citation: Hoffman v Board of Education of City of New York. 410 N.Y.S. 2d 99 (1980).

Reasons for Significance: The emerging educational issues of misdiagnosis and negligent diagnosis of mentally handicapped students have been addressed by courts in the United States only, to date. The Hoffman decision, although apparently discerning negligence on the part of the psychologist and his employer, the New York Board of Education, ruled that "educational malpractice" had occurred, and dismissed the case on the grounds that it would be against the public interest for the courts to oversee and evaluate the work of professional educators.

Lawyers in Canada have pointed out, however, that courts in this country have traditionally ruled on medical malpractice suits, and that negligence in diagnosing a student could lead to a successful action against a psychologist and the school board which employed him.

Facts of the Case: The plaintiff upon entering kindergarten was wrongly diagnosed by a school district psychologist, and placed in a class for children with retarded mental development; moreover, Hoffman was not re-evaluated periodically by the school district as had been recommended by the psychologist.

Later in life, when his true intellectual status was

established, Hoffman sued for negligence in the original evaluation and in the failure to retest, claiming injury to his intellectual and emotional well-being, and reduced ability to obtain employment.

Although lower courts ruled in Hoffman's favour, the New York Court of Appeals decided that the negligence was not discernable affirmative negligence, as frequently alleged against medical practitioners, but "educational malpractice" and that:

> the court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs...to do so would open the door to an examination of the propriety of each of the procedures used in the education of every student in our school system.

Decision # 18

Classification: II (d) Provision of education - the handicapped student.
IV (b) Students' rights - equality of opportunity.

Name and Citation: Carriere v County of Lamont. No 30. Trial Division, Supreme Court of Alberta, Judicial District of Edmonton. Mr. Justice M.B. O'Byrne. August 15, 1978.

Nature of Decision: Interpretation of statute.

Reasons for Significance: There have been no court decisions in British Columbia to date on the right of handicapped children to attend public schools. Lawyers believe that a school board would have to prove that a handicapped child is unable to benefit from any instruction before legally refusing to provide instruction. This Alberta case, based on similar but not identical statute law to that in British Columbia, appears to confirm that opinion.

Facts of the Case: The County of Lamont had difficulty in providing suitable school accommodation and tuition for Shelley Carriere, a ten-year old with cerebral palsy. She was temporarily "excused" from attendance at school.

O'Byrne J. ruled that the time had passed for such an exemption - "something must be done and done immediately." He directed the school board to accept the plaintiff into its schools, or to fund her attendance at a suitable school in another school district.

Decision # 19

Classification: II (d) Provision of education - the handicapped student.
IV (b) Students' rights - equality of opportunity.

Name and Citation: Peter Mills v Board of Education of District of Columbia. 348 F. Supp. 866 (D. Dist. of Col. 1972).

Reasons for Significance: The law concerning the provision of special education services for the handicapped is uncertain in British Columbia, although it has been suggested that the principle in McLeod v Salmon Arm ( decision #2) should be followed. This United States District Court decision appears to follow that principle, and some lawyers believe that it might be "persuasive" in Canadian Courts. (Two years ago the Vancouver school board was threatening to refuse admittance to handicapped students because of lack of Provincial funding).

Facts of the Case: The District of Columbia's Board of Education excluded certain handicapped children from its schools, contending that sufficient school funds were not available to finance the special services and programs needed by them. A "class" or group action was brought in the name of one of the excluded children, Peter Mills.

The Court ruled that the Board had violated its controlling statutes requiring universal education, by failing to provide children "who had been labeled as behavioural problems, mentally retarded, emotionally disturbed or hyperactive," with publicly supported,

specialized education. The Court said that:

> the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

The District of Columbia was ordered to:

> provide each child of school age a free and suitable publicly supported education regardless of the degree of the child's mental, physical, or emotional disability or impairment. Furthermore, defendants shall not exclude any child resident in the District of Columbia from such publicly supported education on the basis of a claim of insufficient resources.

Decision # 20

Classification: II (e) Provision of education - expulsion and dismissal.

I (a) Role of school boards - responsibilities and powers.

Name and Citation: John W. Warnock and Valerie R. Folk v Board of School Trustees of School District No. 15 (Penticton). (1979) 17 B.C.L.R. 374 (S.C.)

Nature of Decision: Interpretation of statute.

Reasons for Significance: There is an apparent conflict between a student's statutory right to "sufficient accommodation and tuition free of charge" (section 155(1)(a) School Act), and the school board's power to suspend or prohibit the attendance of certain pupils (section 117 School Act). This is the only British Columbia case located which addresses the issue - it rules that if the required procedures are followed, a school board has the necessary jurisdiction to suspend, etc. It is therefore in accord with the principle that student exclusion may take place only if provided for by the Legislature which created the student's statutory right to education.

Facts of the Case: The sons of the petitioners were suspended by the Penticton school board for almost a whole term, following an "incident" at McNicholl School. An appeal was made to the courts to overthrow the decision of the board, on the ground that it acted without jurisdiction.

The Supreme Court of British Columbia closely examined

the content of the School Act and the procedures followed by the board, and ruled that in both cases the board had jurisdiction. The Honourable Mr. Justice Trainor stated that:

> consideration of the legislative purpose is important to a full and proper understanding of the School Act and the role of a board...it is evident that the legislators intended to provide for a public school system in which there would be a safe and proper environment conducive to learning.

Decision # 21

Classification: III (a) Educational environment - finance.

Name and Citation: City of Victoria v District of Oak Bay. (1918) 1 W.W.R. 158.

Nature of Decision: Interpretation of statute.

Reasons for Significance: An historic decision of the B.C. Court of Appeal, in which it was decided to interpret the School Act to mean that public school education should be available throughout the Province and that its cost should be evenly distributed.

Facts of the Case: Students from the district municipality of Oak Bay attended public school in the city municipality of Victoria. Oak Bay refused to pay a contribution towards their cost of schooling, however, claiming that section 15 of the School Act at that time obliged it to make such payments only to another district municipality, and not to a city municipality. The Court held by a two-to-one majority against Oak Bay.

Chief Justice Macdonald suggested that to interpret section 15 literally would lead to injustice and absurdity:

> In construing the section the scheme of the Act must be understood and borne in mind; it is that education in the Province shall be universal, and that its cost should be equitably distributed.

Decision # 22

Classification: III (b) Educational environment - staffing.

Name and Citation: Margaret Caldwell v. St. Thomas Aquinas High School. (1981) 24 B.C.L.R. 225.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This Supreme Court of British Columbia decision determined that the employment qualifications proscribed in section 8(2)(a) of the British Columbia Human Rights Code are not subject to the "reasonable cause" exemption contained in section 8(1) of the Code. On the basis of this decision, therefore, at no time may a school board, or any other employer, discriminate in its staffing policy on any of the following bases: race, religion, colour, age (defined in the Code as 45 to 65 years), marital status, ancestry, place of origin or political beliefs.

In the hiring of teachers, for example, an applicant's age if between 45 years and 65 years cannot under any circumstances be taken into consideration unfavourably, even should the school board be attempting to strike an appropriate balance of youth and senior teachers in its teaching force.

It is understood that the Caldwell decision is being appealed to the B.C. Court of Appeal; it is due to be heard in late 1981.

Facts of the Case: Margaret Caldwell, a teacher at a Catholic high school, St. Thomas Aquinas, married outside the Church to a divorced Methodist. Subsequent to this marriage her teaching contract

was not renewed.

Mrs. Caldwell appealed against this non-renewal to a Board of Inquiry appointed under the Human Rights Code of B.C. She alleged discrimination on the basis of religion and marital status. Even though such discrimination is declared illegal in section 8(2)(a) of the Code, the Board ruled that it was permissable in this case under section 8(1), as the school had "reasonable cause" to discriminate.

An appeal was made to the courts that the Board of Inquiry had misinterpreted the legislation. The Supreme Court of B.C. upheld the appeal, when it determined that Mrs. Caldwell had been discriminated against on the basis of qualifications proscribed in section 8(2)(a) of the Code which, in the opinion of the Court, are always illegal.

The Honourable Mr. Justice Toy stated in his reasons for judgment:

> It is my view that to give effect to the Respondent's submission would be giving undue emphasis to the opening words of Sec. 8(1) and in effect rendering the objective reasonable cause test envisaged in the concluding words of Sec. 8(1) and the apparent prohibitions in Sec. 8(2)(a) completely meaningless. I have no doubt that the Legislature could have brought about such a result but on a reading of the whole Section I am not prepared to hold that that is what the Legislature intended when it enacted Sec. 8 in its present form.

Decision # 23

Classification: III (c) Educational environment - buildings and land.

Name and Citation: Greater Victoria School District v Canadian Union of Public Employees. (1976) 71 D.L.R. (3d) 139.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This B.C. Supreme Court decision ruled that a general provision of the Labour Code of B.C. could override a specific requirement of the School Act, provided that the two statutes are not deemed by the courts to be antipathetic. Specifically, informational picketing of schools by non-teaching employees is permissable and does not violate section 118 of the School Act of B.C. which provides penalties for "any person who disturbs, interrupts or disquiets" school proceedings.

A school is not therefore an educational sanctuary free of picketing by striking non-teacher employees, despite the prohibition in the School Act of strikes by teaching employees. Rowdy picketing, however, might be held to violate section 118.

Facts of the Case: Members of the Canadian Union of Public Employees, employed by the Victoria school board, picketed certain schools in furtherance of a legal strike as permitted under the Labour Code of B.C. The Code governs all non-teaching public school employees, although teachers are specifically excluded from it.

Evidence was given and accepted by the Supreme Court that the picketing, although limited to "two pickets at each school entrance, virtually silent and peaceful," did

disquiet students and teachers in the school and adversely affect the learning process.

McKenzie J. held, however, that the general freedom to picket contained in the Labour Code is not repugnant to the prohibition against disturbing schools contained in the School Act. He stated that:

> If a special category is to be made for school employees, exempting them from the exercise of freedoms available to others, then the Legislature must express that intention with clear language, and I can find no such expression in the School Act.

Decision # 24

Classification: III (d) Educational environment - travel to and from school.

Name and Citation: Patterson v North Vancouver Board of School Trustees. [1929] 3 D.L.R. 33.

Nature of Decision: Application of Common Law.

Reasons for Significance: Because students in British Columbia are subject to the school's code of conduct while travelling to and from school (School Act Regulation 34) it is sometimes stated, incorrectly, that the school board and its employees are responsible for the students' safety and care when so travelling. Only if student transportation is provided by the school board is it responsible for the students' safety and care.

This B.C. Court of Appeal decision establishes that school authorities do not have a responsibility to exercise supervision outside school grounds.

Facts of the Case: A student walking home from school was struck by a falling tree, just outside the Roche Point School property. The tree was growing on the Robert Dollar Company's land, and was clearly decayed; some of the tree fell on the school property.

An action for damages against the school board was dismissed, when a majority of the Court found that no duty of care existed. Chief Justice MacDonald stated:

> I have been unable to find any case and we have been referred to none, which would impose upon the school board the duty of protecting the plaintiff from injury on the highway after he had left the school premises.

One Justice dissented. McPhillips J.A. contended that there had been a breach of duty by the school board - a duty that not only school grounds but "the approaches thereto should be reasonably safe for the children who were under compulsion of law required to attend the school." (This appears to be a moral rather than a legal duty).

Decision # 25

Classification: III (d) Educational environment - travel to and from school.

V (a) Teachers' responsibilities - *in loco parentis*.

Name and Citation: Barnes v Hampshire County Council. [1969] 3 All E.R. 746.

Nature of Decision: Application of common law.

Reasons for Significance: The Barnes' case establishes an exception to the common law general rule that a school board and its employees are not responsible for a child released from school and injured off school property - the House of Lords held that in certain situations, such as premature release of infants, the child is still the board's and teacher's responsibility. The decision also illustrates at what point the teacher's *in loco parentis* responsibility ends, and that of the parent commences.

Facts of the Case: It was established practice at Chandler's Ford Infant School for the children to be released from school at 3:30 p.m., and those parents who wished to meet their child to escort him home waited outside the gates at that time.

On the last day of term the children were released at 3:25 p.m., and Sandra Barnes, a five-year old, walked 170 yards alone to the main highway where she was knocked down by a lorry at 3:29 p.m. The child's mother arrived at the scene of the accident at 3:31 p.m. - she would have met Sandra before she reached the main road had the children been released at 3:30 p.m.

In a unanimous decision the House of Lords held that

there had been negligence on the part of the teachers allowing the children to leave the school premises before 3:30 p.m., and that this premature release had caused the accident.

Lord Pearson stated:

> It was the duty of the school authorities not to release the children before the closing time. Although a premature release would very seldom cause an accident, it foreseeably could, and in this case it did.

Decision # 26

Classification: III (e) Educational environment - safety of students.

Name and Citation: Higgs v Toronto Board of Education. (1960) 22 D.L.R. (2d) 49, S.C.R. 174.

Nature of Decision: Application of common law.

Reasons for Significance: A school board has two basic, common law responsibilities regarding the safety of the students as invitees, indeed "compulsees", upon school property: that the grounds and equipment shall be reasonably safe, and that adequate general supervision of the children shall be provided.

This Supreme Court of Canada decision helped establish what degree of supervision is adequate. It overturned a jury decision that four teachers in a school yard measuring 400 feet by 250 feet was inadequate.

Facts of the Case: A fellow student picked up Higgs during recess, and dropped him on an ice sheet in the school yard. None of the four teachers supervising in the school yard saw the incident take place.

Higgs appeared hurt but refused assistance from one of the teachers; he was then ordered into class along with the other students, despite a noticeable limp.
It was subsequently discovered that Higgs had displaced his hip bone, and that making him walk into class had aggravated the injury.

The Supreme Court held that the supervision provided had been adequate - but awarded Higgs $10,000 for aggravation of the injury.

In his reasons for judgment Ritchie J. stated that the duty of supervision should not be measured or determined by the happening of an extraordinary accident. The burden of proving that the system was defective lay upon the plaintiff, said Ritchie, and the principal:

> had no reason to believe that the four teachers allocated to the various areas of the playground specified by him constituted anything less than a reasonably safe system of supervision having regard to the number and ages of the children at the school...

Decision # 27

Classification: IV (a) Students' rights - placement in the school system.

Name and Citation: Patterson v Victoria School Board. [ 1917] 1 W.W.R. 526, 24 B.C.R. 365.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision established that residency, not the payment of taxes, is the essential requirement for children of school age to attend school in British Columbia.

Facts of the Case: Plaintiff and his children lived in Oak Bay Municipality, which had public schools, but Patterson sought to have his children attend school in the City of Victoria where he was a ratepayer.

Murphy J. ruled in the Victoria County Court that there was no obligation on the City of Victoria to accept non-resident children into its schools, even when the father was a ratepayer there.

Decision # 28

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 Doe 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 to 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.

Decision # 29

Classification: V (a) Teachers' responsibilities - *in loco parentis*.

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

Name and Citation: Williams v Eady. (1893) 10 T.L.R. 41.

Nature of Decision: Application of common law.

Reasons for Significance: This classic decision of the English Court of Appeal is the source from which much of Canadian school law concerning teacher responsibilities and standards of care has developed. It established the "careful parent" test for the adequacy of general supervision of students, which is a higher standard than that of the mythical but indispensable (to the common law) figure of the reasonable man.

Facts of the Case: Eady operated a boarding school at Kenley, in Surrey. Some phosphorus, used in the school to make hockey balls luminous, was left in the conservatory. A student opened the bottle and inserted a lighted match. In the subsequent explosion Williams, who was standing nearby, was injured.

The Court unanimously found Eady guilty of negligence through leaving a dangerous object like phosphorus accessible to children. In perhaps the most frequently quoted phrase in school law Lord Esher said:

> The school master was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a school master. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way.

Decision # 30

Classification: V (a) Teachers' responsibilities - *in loco parentis*.

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

Name and Citation: Gard v Board of School Trustees of Duncan. [1946] 2 D.L.R. 441.

Nature of Decision: Application of Common Law.

Reasons for Significance: This case established that lack of supervision alone is not sufficient basis for the courts to find negligence when an accident occurs to a student. (But see decision #31). The "careful parent" test may be tempered by "reasonableness," when the risk of injury inherent in the activity is not great and could not be reasonably foreseen.

Facts of the Case: An eleven-year-old boy was struck in the eye during a momentary violation of the rules in a grass hockey game. No referee, nor direct supervision of the game, was provided by the school; the teacher in charge of grass hockey was absent at a staff meeting when the accident occurred.

The British Columbia Court of Appeal, in a split decision, overturned a Supreme Court decision ([1946] 1 D.L.R. 352) which had found the teacher and school board guilty of negligence. The Court of Appeal held that there was not sufficient risk of injury in a grass hockey game to warrant continuous supervision and that the presence of a supervisor would not have prevented the accident.

Speaking for the majority of the Court, Robertson J.A. stated:

> Danger may eventuate in any game, and in that sense injury to one of the players might be foreseen, yet that danger is one of the risks of the game, which every parent knows goes with the game; and I would think the chances of any risk eventuating in a game of grass hockey played by children would be very slight. The possibility of danger emerging was only a mere possibility which would never occur to the mind of a reasonable man; and therefore there was no negligence.

Decision # 31

Classification: V (a) Teachers' responsibilities - *in loco parentis*.

III (e) Educational environment - health and safety of pupils.

Name and Citation: Myers v Peel County Board of Education. 5 C.C.L.T. 271 (Ont. C.A.). Supreme Court of Canada decision June 22, 1981 - not yet included in law reports.

Nature of Decision: Application of common law.

Reasons for Significance: This Supreme Court decision determined that it is not necessary for a gymnastics student, injured during the absence of the instructor, to prove that the instructor's presence would have prevented the accident. All the injured student need do is prove that the absence of supervision contributed to the cause of the accident.

The decision also reaffirmed the "careful parent" standard of care, reinforced by the specialized knowledge expected of a qualified instructor. (See Decision #32).

Facts of the Case: Permission was given by the instructor during a Grade XI physical education class for some of the boys to practice gymnastic maneuvers in an exercise room. Proper training had been given.

The exercise room could not be seen from the gymnasium and, without supervision, Gregory Myers attempted a straddle dismount from the rings for the first time. He landed on his head and was seriously injured.

The Supreme Court found twenty per cent contributory negligence on the part of Myers, but major responsibility lay with the instructor and the Peel County Board of

Education due to lack of supervision. The Hon. Mr. Justice McIntyre stated in the Supreme Court's reasons for judgment:

> It cannot be said that the presence of a teacher among six to eight students in the exercise room would not have had a restraining effect upon the students which could have influenced the course of events and prevented the accident. The defendant should have anticipated reckless behaviour...

Decision # 32

Classification: V (b) Teachers' responsibilities - provision of educational advice and instruction.

V (j) Teachers' responsibilities - negligence.

Name and Citation: Thornton v Board of School Trustees of School District No. 57 (Prince George). (1975) 57 D.L.R. (3d) 438, (1976) 5 W.W.R. 240, (1978) 2 S.C.R. 267.

Nature of Decision: Application of common law.

Reasons for Significance: This decision is significant on two accounts:

(a) for the amount of damages awarded ($1,500,000 reduced to $859,628, following appeals to the B.C. Court of Appeal and the Supreme Court of Canada), which stimulated concerned interest in educational administration and insurance circles in Canada;

(b) because it employed the "ordinarily competent instructor" (O.C.I.) test in addition to that of the "careful parent."

The O.C.I. test recognizes that in certain circumstances the teacher, because of his expertise, should be able to foresee damages which a careful parent might not be aware of.

The decision also established what has come to be known as the Carrothers formula, which provides criteria for the standard of care appropriate to school gymnastic and athletic activities.

Mr. Justice Carrothers stated in the B.C. Court of Appeal that:

> There would be no negligence or breach of the duty of care in permitting a student to perform an aerial front somersaultoff a springboard:
> (a) if it is suitable to his age and condition (mental and physical);
> (b) if he is progressively trained and coached to do it properly and avoid danger;
> (c) if the equipment is adequate and suitably arranged;
> (d) if the performance, having regard to its inherently dangerous nature, is properly supervised.
> These are the component criteria constituting the appropriate duty or standard of care which is saddled upon the school authorities in a case of this kind and upon which we are to judge whether there has been observance sufficient for the school authorities to avoid a finding of negligence and its consequential liability.

Facts of the Case: The gymnastics teacher at the Kelly Rd. Secondary School in Prince George wanted to spend class time writing student report cards, and offered Grade X a choice of activities. The fifteen-year old Thornton, with six or seven other students, set up a springboard, a box horse and some foam mats and proceeded to attempt aerial somersaults. One student, Karlson, hurt his wrist in landing and reported this to the teacher. The teacher placed more mats on the floor and returned to his report writing.

Shortly afterwards Thornton, in attempting a somersault, overshot the mats and landed on his head, suffering injuries which left him paralyzed for life.

It was held that the gymnastics instructor had only complied with (a) and (b) of the Carrothers formula, and had not followed the standard of care required of an "ordinarily competent instructor" nor of a "careful parent." In the Supreme Court of B.C. judgment, Andrews J. stated:

It was the physical education instructor's duty to recognize the configuration (of gymnastic equipment) as an inherently dangerous one. He was in breach of that duty when he permitted these youngsters to use it to perform maneuvers when he knew, or ought to have known, there was considerable danger for novices somersaulting on that configuration. In any event it seems to me that the instructor failed in what might be described as a lesser duty of a careful parent not to foresee the risks of further injury once he learned of the injury to Karlson.

Decision # 33

Classification: V (b) Teachers' responsibilities - provision of educational advice and instruction.

V(j) Teachers' responsibilities - negligence.

Name and Citation: James v River East School Division, #9. [1976] 2 W.W.R. 577.

Nature of Decision: Application of common law.

Reasons for Significance: This Manitoba Appeal Court decision extended the "ordinarily competent instructor" test into the laboratory, by establishing a "duty to instruct properly" where there is danger of physical injury. (To date there has been no attempt in Canada to apply this duty in the case of economic injury arising from poor or ineffective instruction in the classroom - see decision #16).

The decision also ruled that the defence of "common practice" is invalidated if the teaching practice or procedure is found defective by the courts. "Common practice" is a commonly used defence which attempts to prove that the same method is followed by all or a large majority of teachers.

Facts of the Case: Joni Lou James, an eighteen year old student, correctly followed verbal and written instructions provided by her teacher for a chemistry experiment. There was an explosion, however, and Joni was seriously injured around her eyes.

Even though the procedure followed in the experiment was the same as used in other schools, and thus "common practice" was proved, the Court found that the instructions

were defective in view of the element of danger in the experiment, a danger which was reasonably forseeable.

It was ruled by the Court that the teacher had a duty to instruct properly, and this he had violated.

Decision # 34

Classification: V (d) Teachers' rights - dismissal

Name and Citation: Board of School Trustees of School District No. 31 (Merritt) v Sederberg. [1980] 1 W.W.R. 517. (1979) 16 B.C.L.R. 149 (S.C.).

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision, by the Honourable Mr. Justice Verchere, in effect established that Review Commissions (section 130 School Act of B.C.) may provide not only a judicial review of the procedures followed by a school board when dismissing a teacher in accordance with section 123, School Act, and Regulation 126, but also may consider and rule upon the whole question of whether the learning situation in the teacher's classes was less than satisfactory.

Consequently, what has become known as "the Verchere decision" established that Review Commissions may perform both judicial and pedagogical functions. This was a new concept for many school boards and their administrative staffs.

Facts of the Case: The petitioner had received the three statutorily required reports indicating that the learning situation in her classes was less than satisfactory. She was dismissed by the school board.

Upon appeal, the Review Commission proceeded to consider all the evidence presented to it, including such matters as apparent failue by an administrator to take into account results achieved by the students when appraising the learning

situation for report purposes, difficulties caused by a "problem" student prior to the period of the reports, the teacher's long retention at one school despite her request for a transfer. The Commission ruled that "the case against Mrs. Sederberg has not been proven by the testimony and evidence presented to it."

The school board petitioned the courts under the Judicial Review Procedure Act, to have the Review Commission's decision declared invalid on the ground that the Commission had exceeded its jurisdiction. The school board argued that the School Act and Regulations only empowered the Review Commission to consider whether the opinions expressed in the three reports were justified.

The Supreme Court held that a Review Commission may consider the same broad questions as the school board - was the learning situation in the teacher's classes satisfactory? Verchere, J. stated in his reasons for judgment:

> It does not seem to me that in seeking to determine that question, a Commission, and in particular the Commission here, is circumscribed by the Act or the Regulations. Therefore, in my view, it would be wrong to say that a Commission's investigation and review must be confined entirely to the consideration of what seems to me to be only an interlocutory matter, namely, whether the opinions expressed in the reports before it were justified.

Decision # 35

Classification: V (d) Teachers' rights - dismissal.

Name and Citation: Board of School Trustees of School District No. 92 (Nishga) v Board of Reference in respect of appeal by Donna Caplette. Supreme Court of B.C. Vancouver Registry No. A781738, November 24, 1978.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision confirmed that a Board of Reference (section 129 School Act of B.C.), appointed to hear an appeal against dismissal of a teacher for misconduct, might express the unanimous view that misconduct had taken place but, because it believed dismissal to have been too severe a penalty, decide that the teacher should be reinstated.

The decision led to changes in the School Act (section 10, School Amendment Act, 1980), which empowered Boards of Reference to vary the disciplinary penalty imposed by a school board in such circumstances - for example, impose suspension without pay. Previously a Board of Reference had either to confirm the teacher's dismissal or reinstate him.

Facts of the Case: A transfer in assignment for the teacher caused her to write in protest to the school board. The letter was of a nature which led to her dismissal for misconduct.

Upon appeal to a Board of Reference, the Board considered the letter and was "of the unanimous view that Exhibit 1 (the letter) constituted misconduct." Nevertheless, the Board held that the penalty was too severe and, as its

jurisdiction was limited to "To allow or disallow the appeal", it reinstated the teacher.

The school board appealed the Board of Reference's decision to the courts, on the point of law that the Board's decision was in contradiction to its finding of misconduct. The Supreme Court ruled that there was no contradiction, and upheld the Board of Reference's decision.

The Honourable Mr. Justice Gould stated in his reasons for judgment:

> There is no contradiction here. It is preposterous to think that a Board (of Reference) when it is hearing an appeal from wrongful dismissal cannot consider the degree of wrong in relation to the dismissal.

Decision # 36

Classification: V (d) Teachers' rights - dismissal.

Name and Citation: Lange v Board of School Trustees of School District No. 42 (Maple Ridge). (1978) 9 B.C.L.R. 232 (S.C.).

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision confirmed that, following the reinstatement of a teacher by a Board of Reference because of a procedural error by a school board when dismissing a teacher for misconduct, the school board is not "estopped" or legally precluded from reconsidering the matter properly.

Facts of the Case: The teacher was dismissed by the school board on the basis of three allegations of misconduct. Upon appeal to a Board of Reference it was found that although the teacher's dismissal was justified, the school board's decision "was not, by reason of the denial of natural justice, properly arrived at." (The teacher had not been given the opportunity for a hearing on one of the three allegations). The teacher was ordered reinstated by the Board of Reference.

Following reinstatement, the school board commenced new hearings on the three allegations. The teacher, relying upon the School Act's statement that a Board of Reference's decision "shall...be final and binding upon the teacher and the Board", petitioned the courts under the Judicial Review Procedure Act to have the school board accept the Board of Reference's decision as final and binding.

The Supreme Court ruled that the school board, having

reinstated the teacher as ordered, could then reconsider the matter. The Honourable Mr. Justice MacFarlane stated in his reasons for judgment:

> I do not think that the Legislature, having in mind that persons elected to School Boards are usually people without legal training, contemplated that one procedural error no matter how fundamental, would have the effect of barring a School Board from taking justified disciplinary action against a teacher. Such an absurd intention should not, in my view, be attributed to the Legislature.

NOTE: The phrase that a "Review Boards' decision shall be final and binding upon the teacher and the Board" was dropped from the School Act under changes contained in section 10, School Amendment Act, 1980.

Decision # 37

Classification: V (d) Teachers' rights - dismissal.

Name and Citation: Board of School Trustees of School District No. 37 (Delta) v Vasalenak. (1977) 82 D.L.R. (3d) 509.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision established that, under the wording at that time of section 122 of the School Act, where a teacher is guilty of a criminal offence but is given a conditional discharge the school board may not dismiss the teacher, as the teacher has not been "convicted."

Facts of the Case: Frank Vaselenak, a counsellor and guidance teacher at Delview Junior Secondary School, was charged with the criminal offence of possession of marijuana. At his trial he pleaded guilty and was given a conditional discharge.

Section 122, School Act, provided that upon acquittal of a criminal charge, where the teacher had been suspended pending the trial, he should be reinstated, but if convicted the school board might dismiss him. The Delta school board dismissed the teacher.

Upon appeal to a Board of Reference it was ruled that the teacher had not been convicted, and therefore should be reinstated. The school board appealed to the Supreme Court, arguing that when the relevant section of the School Act had been approved in 1972 by the Legislature, "convicted" meant, under the Criminal Code of Canada, an adjudication that an offence had been committed whether sentence was

passed or not - in other words a plea of guilty meant "convicted." The appeal was dismissed, on the ground that the Criminal Code had been subsequently amended to provide for conditional or absolute discharge, as well as conviction, where the accused pleaded or was found guilty.

The Honorable M. Justice Macdonald stated in his reasons for judgment:

> The legislators (the B.C. Legislature) were leaving it to the Criminal Code to say whether in a particular case there had been a conviction, and the clear answer in the case of a person conditionally discharged is that he shall be deemed not to have been convicted of the offence to which he pleaded guilty.

NOTE: Section 6, School Amendment Act, 1980, amended the School Act so that a teacher who is "acquitted of the charge or given an absolute or conditional discharge" shall be reinstated.

Decision # 38

Classification: V (d) Teachers' rights - dismissal.

Name and Citation: Coyle v Minister of Education [B.C.]. [1978] 6 W.W.R. 279.

Nature of Decision: Application of common law and interpretation of statute.

Reasons for Significance: The decision in this somewhat tedious and complex case illustrates that the rule of law applies in the public school system, and that everyone including the Crown must observe that rule. Specifically, the decision establishes that a teacher's rights in dismissal procedures depend upon the legislation in effect at the time of the dismissal regardless of any subsequent amendments to the legislation; also, that an order-in-council confirming a teacher's dismissal may be quashed by the courts, if an error is proven in the decision of the Board of Reference on which the order-in-council is based.

Facts of the Case: John Coyle, a Burnaby school teacher, was dismissed for incompetence in 1966. At that time the Schools Act provided for an appeal to an investigation committee, and then to the Council of Public Instruction - a committee of the Provincial Cabinet chaired by the Minister of Education. In practice, the Council of Public Instruction referred the appeal to a Board of Reference, and then confirmed its recommendation in an order-in-council.

All of Mr. Coyle's appeals were dismissed, and an order-in-council confirming the decision of the Board of Reference was signed by the Premier on August 18, 1966, in the presence of the Executive Council.

In 1975 Mr. Coyle obtained a court order quashing the recommendation of the Board of Reference because of a technical error on its part. He then requested a re-hearing, which was refused by the Minister of Education.

Mr. Coyle appealed to the Supreme Court of B.C., and the Honourable Mr. Justice Proudfoot held that the 1966 order-in-council was of a quasi-judicial nature and could, and should, be quashed. He also held that Mr. Coyle should be granted a re-hearing in accordance with the 1966 legislative provisions concerning Boards of Reference, but with no opportunity to appeal the Board's decision to the courts as this proviso was not approved by the Legislature until 1972.

Decision # 39

Classification: V (d) Teachers' rights - dismissal

Name and Citation: Young v Board of School Trustees of School District No. 47 (Powell River). Supreme Court of B.C. Powell River Registry No. Y16/80. February 23, 1981.

Nature of Decision: Application of common law.

Reasons for Significance: This recent decision illustrates that even when a detailed procedure is established by statute law for quasi-judicial proceedings, the precepts of natural justice may need to be observed.

Facts of the Case: The Powell River School Board suspended Thomas Young, one of its teachers, and invited him to attend a meeting with the Board to discuss his alleged misconduct. The invitation specified that the meeting was being held in accordance with requirements specified in the School Act, and that Mr. Young could be accompanied by another teacher or by a member of the B.C. Teachers' Federation staff. Mr. Young requested permission to call witnesses at the meeting, to testify on his behalf. The request was refused by the School Board.

Upon appeal to the Supreme Court of B.C. it was argued by the school board that the School Act establishes a detailed procedure for such meetings which renders it unnecessary to comply with requests to call witnesses. The Honourable Mr. Justice Murray held, however, "that in the circumstances of this case, the Applicant was denied

a fair hearing by reason of having been refused the right to call witnesses."

The decision of the school board was quashed.

Decision # 40

Classification: VI (a) & (b) Management of schools - responsibilities and powers of superintendents, district supervisors and principals.

Name and Citation: Lacarte v Board of Education of Toronto. (1959) 17 D.L.R. (2d) 609.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This Supreme Court of Canada decision confirmed that where school administrators are required to give reasons for dismissal of a teacher they are protected by qualified privilege, provided no malice is shown, against actions for defamation. Moreover, the qualified privilege is not lost by the publication of the alleged libel to others, such as stenographers and filing clerks, when acting in accordance with the usual and reasonable course of conducting business.

Facts of the Case: Meriza Lacarte was dismissed "on the ground of lack of co-operation with the principal and certain members of the staff." As required by Ontario statute law, this reason was stated in the school board's letter of dismissal, copies of which went to the school at which she had taught, and to the Ministries of Education and of the Attorney-General.

Ms. Lacarte sued for defamation, and her case eventually reached the Supreme Court of Canada. In a majority decision, the Supreme Court held that the persons responsible for the

letter were not actuated by any motive other than that of performing their duties; also that there was "no wrongful motive or intent on anyone's part in dealing with the dissemination of the reasons for the appellant's dismissal."

NOTE: In 1975 the courts awarded a Kamloops, B.C., teacher substantial damages for libel and slander against four school principals for statements made in reports on the teacher. A jury determined that the statements were defamatory, false, and were motivated by malice which nullified the defence of qualified privilege. (Haight v Robb et al.)

Being a jury trial no reasons for judgment were given, so it is not possible to conclude what evidence prompted the jury to conclude that malice existed.

In a joint statement on the Haight judgment, issued by the Department of Education, the B.C. School Trustees Association and the B.C. Teachers' Federation, it was stated that:

> The prescriptions of the Public Schools Act and Regulations must be followed, and the authors of reports must be scrupulously introspective to ensure that their comments are valid and fair and free from any taint of animus toward the recipient of the report. The efficient and effective operation of the public school system demands some form of reporting system. This isolated and unusual decision of a court of law should be viewed for its positive contribution in stressing the obligation for fairness in the system.

Decision # 41

Classification: VI (a) & (b) Management of schools - responsibilities and powers of superintendents, district supervisors and principals.

Name and Citation: Raison v Board of School Trustees, School District No. 45 (West Vancouver). B.C. Court of Appeal. Vancouver Registry CA 800341, January 23, 1981.

Nature of Decision: Interpretation of statute.

Reasons for Significance: Administrators in British Columbia's public school system may be required under Section 123 and Regulation 62, School Act, to make reports on teachers. These reports may then be the basis of a school board resolution to dismiss a teacher. Such reports are granted qualified privilege against an action by the teacher for defamation, provided that the report was made honestly and without malice or improper motive - see Decision #40.

This B.C. Court of Appeal decision added another consideration for school administrators, when it held that no action may be brought for defamation based on statements that the learning situation in the teacher's classes is less than satisfactory, provided that the Review Commission has confirmed that the learning situation is less than satisfactory. Such estoppel, or legal barrier, to an action does not apply, however, to any statements made in the reports which are incidental to the learning situation.

Facts of the Case: On the basis of reports written in accordance with Section 123 and Regulation 62, School Act, a teacher was dismissed by the West Vancouver school board. The teacher's appeal to a Review Commission against the board's decision was dismissed.

The teacher then sought to bring an action for defamation against the writers of the reports. The B.C. Court of Appeal, in a two to one decision, held that those parts of the reports concerning the learning situation in the teacher's classes could not be the basis of an action, as the Review Commission had upheld the opinion in the reports. Nevertheless, a statement in one of the reports concerning the teacher having wrongly accused a student of plagiarism could be considered by the courts as a possible basis for an action, said the Court of Appeal.

The Honourable Mr. Justice Hutcheon stated in his reasons for judgment, as endorsed by the Honourable Chief Justice:

> In my opinion, the allegation against the plaintiff that, wrongly, he had accused a student of plagiarism is an allegation quite distinct from the other allegations in the three reports. These allegations are concerned, in the main, with the charge that the plaintiff used inadequate and inferior methods of instruction. The essay allegation concerns not only incompetency but also the ethical standards of the plaintiff.

Decision # 42

Classification: VI (b) Management of schools - responsibilities and powers of principals, vice-principals and head teachers.

Name and Citation: Regina v George Razzo. Provincial Court of B.C., Victoria. Judge L.F. Goulet. September 1, 1978.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision established that where a power or responsibility is delegated to an employee of a school board in accordance with the School Act of B.C., that employee may not further delegate the power or responsibility. In other words, any authorized delegation by a school board of specific, administrative duties must name, in the relevant school board resolution, every employee to whom it is intended to delegate the duties, and only those so named may perform the duties.

Facts of the Case: Section 118, School Act, makes it an offence to disturb any public school class or school function; it also makes it an offence to refuse to leave school property when directed to by "anyone authorized" by the school board.

George Razzo intruded upon a school dance and refused to leave when ordered to do so by the teacher in charge. The Crown charged Mr. Razzo with refusing to leave when so ordered by an authorized person, but the charge was dismissed by Goulet J. on the ground that the teacher who had given the order had been authorized only by the principal, and not by the school board.

Decision # 43

Classification: VII (a) Teacher salary negotiations - what may be negotiated.

Name and Citation: Re Vancouver Island West Teachers' Association and Board of School Trustees of School District No. 84 (Vancouver Island West). (1969) 10 D.L.R. (3d) 99.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This B.C. Court of Appeal decision established that the provisions of the School Act concerning teacher sick leave are mandatory, and that the formula set out in section 125 (2) & (3) of the Act is the only provision with respect to sick leave that may be included in a teacher salary agreement.

Facts of the Case: The Vancouver Island West school board appealed against a B.C. Supreme Court decision, which had held that a teacher salary agreement could grant teachers extra sick days. (The School Act limits negotiations to salaries and bonuses; the B.C. Supreme Court said that extra sick days could be considered as a "bonus" provided that the maximum number of 120 days sick leave in any one year, as specified in the School Act, is not exceeded).

The B.C. Court of Appeal overturned this decision, ruling that the sick leave formula in section 125, School Act, cannot be varied. Taggart J.A. stated in the Court's reasons for judgment:

It is true that s. 134 in broad terms authorizes the parties to negotiate with respect to "...teachers' salaries and bonuses or teachers' salary and bonus schedules..." but ... the parties must act within the purview of the Act...where a section is mandatory in its terms as s. 125 is, it must prevail and will limit the extent to which the parties can go in their negotiations. The arbitrators could do no more than s. 125 permits and accordingly would have no jurisdiction to make an award with respect to sick leave except in the terms set out in the section.

Decision # 44

Classification: VII (a) Teacher salary negotiations - what may be negotiated.

Name and Citation: Anderson et al. v Board of School Trustees of School District No. 47 (Powell River). Supreme Court of B.C. Vancouver Registry No. A761968. December 13, 1976.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision confirmed that the following matters, when the subject of a dispute between a school board and the local teachers' association, may not be determined by arbitration:

advance preparation time for teachers

leave of absence for teachers

payment of retirement gratuities to teachers.

The methods of determination for these matters are included in the School Act, and to determine them by arbitration would be in violation of the Act.

Facts of the Case: Salary and bonus agreements between the Powell River School Board and the Powell River District Teachers' Association since 1971 had included a section on "working conditions", which provided that where agreement on conditions of employment could not be reached the matters should be settled by arbitration.

In late 1976 the teachers applied to the courts for the appointment of an arbitrator under the Arbitration Act of B.C., to decide matters which had not been agreed for 1977. The Honourable Mr. Justice Munroe pointed out that the

method of determination of the matters in question were all specified in the School Act and Regulations:

advance preparation time for teachers - Regulation 91;

leave of absence - Section 125;

retirement gratuities - Section 139.

Munroe J. held, therefore that the arbitrator had no jurisdiction in these matters, and dismissed the application.

In his reasons for judgment, Munroe J. stated:

> I do not say that the respondent (school board) may not enter into a separate agreement with the applicants (local teachers' association) pertaining to matters other than teachers' salaries and bonuses. I say only that in so doing it must "abide by the provisions of this Act and the regulations" as is provided by Section 88 (a) of the School Act and may not agree to arbitrate matters in breach of the provisions of the Act.

Decision # 45

Classification: VII (a) Teacher salary negotiations - what may be negotiated.

I (a) Role of school boards - responsibilities and powers.

Name and Citation: Langley Teachers' Association v Board of School Trustees of School District No. 15 (Langley). Supreme Court of B.C. Reg. No. A801171, Vancouver Registry. October 21, 1980.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision ruled that a school board's power to grant leave to teachers under section 125 (1) School Act is discretionary, and that such leave is not a financial benefit; consequently the board's authority in this matter is not subject to review or award by an arbitration board.

Facts of the Case: A salary arbitration board, appointed under the provisions of section 136, School Act, ruled that it had no jurisdiction to arbitrate maternity leave without pay as provided for under section 125 (1) School Act. The teachers' association appealed the arbitration board's decision to the courts, under the Judicial Review Procedure Act.

In the Supreme Court of B.C., Mr. Justice Munroe held:

> that section 125 (1), read in conjunction with the other sections of the Act, grants to the School Board a discretion which, if exercised fairly and without bad faith or fraud is not subject to review or award by a Board of Arbitration.

Decision # 46

Classification: VII (a) Teacher salary negotiations - what may be negotiated.

Name and Citation: Board of School Trustees of School District No. 42 (Maple Ridge) v Maple Ridge Teachers' Association. Supreme Court of B.C. Vancouver Registry A770989, April 15, 1977.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision ruled that a teacher salary arbitration board may not award a retirement bonus based on unused sick days.

Facts of the Case: A teacher salary arbitration board included in its 1977 award for the Maple Ridge school district a teacher retirement bonus based upon the teacher's number of unused sick days. (The School Act provides for sick days to accumulate at the rate of one day per month of service prior to April 1, 1968, and one and one-half days per month subsequently, less those days used for sick leave by the teacher).

The Maple Ridge school board petitioned the courts for a review of the arbitration award, on the ground that the arbitration board exceeded its jurisdiction.

The Supreme Court of B.C. held that it was not open to the parties, or an arbitration board, to deal with the issue of "negative sick pay." The Honourable Mr. Justice Anderson stated in his reasons for judgment:

> The Legislature has established a specific policy with respect to "sick pay" and it seems to me that it is not

open to an arbitration board to approve the payment of financial benefits which are tied directly to the issue of "sick pay."

The legislative policy as contained in section 125 of the Act is that all teachers are to receive "sick pay" on a definite basis. It makes no provision for the building up of financial credits by not using "sick days." Surely such a marked departure from legislative policy in this sphere is not open to an arbritration board.

Decision # 47

Classification: VII (a) Teacher salary negotiations - what may be negotiated.

Name and Citation: Greater Victoria Teachers' Association v Board of School Trustees, School District No. 61 (Greater Victoria). (1979) 17 B.C.L.R. 4 (S.C.)

Nature of Decision: Interpretation of statute.

Reasons for Significance: This decision determined, in effect, that substitute teachers are "teachers" for the purpose of establishing their salaries, and that the daily rates of pay for substitute teachers may be determined by an arbitration board if necessary.

Facts of the Case: The Greater Victoria Teachers' Association and the Greater Victoria school board were unable to agree on substitute teachers' rates of pay, and other teacher salary matters, for 1979. The arbitration board established under section 136, School Act, ruled that it had no jurisdiction to deal with substitute teachers' rates of pay, as substitute teachers do not meet in all respects the definition of "teacher" contained in the School Act.

The teachers' association petitioned the courts for an order that the arbitration board had erred in its decision. The Supreme Court agreed with the teachers' association when it held that the arbitration board "misconducted itself at law and erred in refusing or neglecting to accept and deliberate upon the matter of the daily rates of pay for substitute teachers..."

The Honourable Mr. Justice Legg accepted that substitute teachers do not meet the School Act's definition of "teacher", but concluded that:

> If the reasoning of the majority of the (Arbitration) Board was correct, substitute teachers, not being teachers as defined under the Act, would be entitled to organize and apply for certification under the Labour Code (of B.C.). In my view it was not the intention of the Legislature to...exempt substitute teachers' salaries from arbitration under the Act.

Decision # 48

Classification: VII (b) Teacher salary negotiations - who may serve as arbitration board members.

Name and Citation: Board of School Trustees, District No. 15 (Penticton) v Proudfoot et al. Board of School Trustees, District No. 71 (Courtenay) v Chown et al. Sangera et al. v Board of School Trustees, District No. 83 (Portage Mountain). (1969) 71 W.W.R. 703.

Nature of Decision: Application of common law.

Reasons for Significance: This 1969 Supreme Court of B.C. decision, resulting from three actions similar in principle, established that neither teachers and B.C. Teachers' Federation staff, nor trustees and B.C. School Trustees Association staff, may serve on salary arbitration boards appointed under section 136 of the School Act of B.C.

Facts of the Case: In two of the three actions a school board sought a declaration that a school teacher, employed by another school district, and who had been nominated by the local teacher association as its appointee, should be disqualified from serving on the school district's salary arbitration board. The other action was by a school district's teachers to have the school board's appointee, a trustee from another district, disqualified.

The Honourable Mr. Justice Munroe held that as the arbitration boards "sit in judgment", and "because it is important that justice should not only be done but be seen

to be done", all three applications for disqualification should be granted.

In his *obiter dicta* Munroe J. added:

> For the future guidance of the school trustees association and of the B.C. teachers' federation, I express the opinion that a trustee of any school board in British Columbia and the members of the trustees association executive committee and salary committee, as well as any teacher who is employed by or whose salary is paid in whole or in part by any of the 82 (1969) school boards in this province, as well as the members of the B.C. teachers federation executive committee, its representative assembly and provincial agreements committee, and all other employees of the trustees association and of the teachers federation are disqualified from serving as arbitrators upon boards of arbitration established pursuant to the School Act.

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Title of Thesis/Dissertation

THE SIGNIFICANCE OF JUDICIAL DECISIONS FOR THE BRITISH COLUMBIA PUBLIC SCHOOL SYSTEM

Author [redacted]
Signature

Alan Clifford Nicholls
Name

December 18 1981
Date

Decision # 49

Classification: VII (c) Teacher salary negotiations - implementation of arbitration awards.

Name and Citation: Owen et al. v Board of School Trustees of School District No. 65 (Cowichan). (1967) 63 D.L.R. (2d) 331.

Nature of Decision: Interpretation of statute.

Reasons for Significance: This Supreme Court of B.C. decision established that an arbitration board award for one year does not bind the parties for future years, even where the original award says that it does so bind.

Facts of the Case: In late 1965 an arbitration board established the requisite teacher salary and bonus schedule in the Cowichan school district for 1966. One section of the award concerned administrative staff and principals' allowances, and it stated that the allowances established were to be in effect until December 31, 1970.

In late 1966 the annual teachers' salary ritual produced an arbitration award for 1967. In it there was no change in the administrative staff and principals' allowances, as the arbitration board ruled that under the terms of the previous year's award it had no jurisdiction.

The Cowichan teachers sought a court declaration that the arbitration board had erred in believing that it could not change the allowances for 1967, and the Honourable Mr. Justice Macdonald held in favour of the teachers.

He pointed out, in his reasons for judgment, that

the School Act provided that a salary and bonus agreement between school board and teachers' associations continued to be effective until "in accordance with this Act, the agreement is modified or a new agreement is made for the following calendar year or years." He then stated that an "agreement" included an arbitration board award, as:

> the Act is deemed to be remedial and is to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act...