THE LEGAL RIGHTS OF STUDENTS IN THE PUBLIC SCHOOLS IN MANITOBA

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by

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ABSTRACT

The purpose of this study was to examine the legal rights of students in the public schools of Manitoba. A number of aspects of individual rights were selected; specifically, those in relation to school attendance, suspension, expulsion, corporal punishment, academic punishments, procedural due process, police investigations, student records and privacy, verbal and symbolic expression, dress and personal appearance, and the possession or use of tobacco, alcoholic beverages, and restricted drugs.

Both statute law and case law at the federal and provincial levels were considered, as well as a wide variety of published material. Because there has been considerable activity in the field of students' rights in recent years in the United States, some consideration was also given to developments in that country.

It was found that school law in general in Canada has not been a topic of much research or writing. More specifically, it was discovered that the matter of students' rights, which has been the object of considerable attention in the United States, has not received much attention in Canada.

It was discovered that the vagueness of the education statutes in Manitoba, as well as a lack of court cases, make it difficult to state in definite terms what rights are presently possessed by Manitoba public school students.

FOREWORD

The field of students' rights is not an area about which it is easy to be objective. Students, and those people who are involved with them, especially as parents or as educators, often have strong views about the place of students, and of young people generally in our society. I hope that my own opinions in this field do not significantly interfere with the presentation, in the first five chapters of this thesis, of an objective picture of the current state of students' rights in Manitoba. The last section of Chapter VI, it should be pointed out, is admittedly and deliberately written to reflect my own opinions.

I wish to express thanks to a number of individuals and organizations who have helped with this study:

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This thesis is respectfully dedicated to Larry Bachinski, whose sincere and steadfast concern for the rights of students has served as an inspiration for the selection of this topic and the writing of this thesis.

Russ Gourluck

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CHAPTER I

THE PROBLEM OF STUDENTS' RIGHTS

A. INTRODUCTION

During the past few years, the concept of human rights has received a great deal of public attention. Civil rights movements, human rights organizations and legislation, and a general sensitivity to the rights of the individual have helped to make the public very conscious of the question of rights.

At the same time, we live in a society that is significantly youth-oriented. The desire for youthfulness and the related fear of aging are indications of the high premium we place on being young. Widely-publicized youth activities, including the development of a youth sub-culture and the rise of student militancy, have kept young people very much in the minds of the public. More permissive child-rearing and educational practices and a willingness to tolerate forms of behaviour, especially by the young, that were considered quite unacceptable a few years ago are indications of a general recognition that children should be considered as individuals.

It should not be surprising, then that in the past few years, increasing attention has been paid to a combination of these two concepts - the rights of the young.

The lowering of the age of majority to nineteen or eighteen in all

parts of Canada[1] is one sign of our society's willingness to recognize and extend the rights of the young. Recent court decisions, particularly in the United States, have recognized that children are individuals with many of the same basic rights as adults.

Any consideration of the rights of young people is bound to take into account the rights they possess in schools. With school attendance compulsory, usually up to the age of sixteen, and with the strong pressures our society places on young people to remain in school, almost every young person from the ages of six to eighteen is a student for eight to ten months of the year. The more specific matter of students' rights, then, is an integral part of the larger question of children's rights.

B. THE PROBLEM

The field with which this study is concerned is the legal rights of students. It focuses on Manitoba, although many of the findings may be generalized to other provinces. Besides discussing the field in general terms, it selects a number of specific aspects to examine in some depth.

The problem, then, can be phrased in the form of a question:

What, at the present time, are the

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[1]Harold M. Kenny, "Some Implications of the Lowering of the Age of Majority on Secondary School Administration" (unpublished Master's thesis, University of Toronto, 1972),

legal rights of public school students in the Province of Manitoba, particularly in such aspects as:

- attending school and receiving an education (including the status of married and pregnant students)
- suspension and expulsion
- corporal punishment
- academic punishments
- procedural due process
- police in the schools
- student records and privacy (including search and seizure)
- verbal and symbolic expression
- dress and personal appearance
- possession or use of tobacco
- possession or use of alcoholic beverages
- possession or use of restricted drugs.

C. SIGNIFICANCE

Many writers in the field of school law have pointed out the importance of school personnel having a good working knowledge of the laws governing schools. Ignorance of the law can lead to disagreements, confrontations, and legal battles. Perhaps more important, acting contrary to the law can lead to the very injuries or hardships that the law was designed to prevent.

Drury and Ray are among the many writers who stress the importance of this kind of knowledge:

> Although the more esoteric legal aspects of education require long-term study and are properly the concern of the specialist, a basic knowledge of school law is essential to the personal security and professional confidence of every classroom teacher and administrator. Indeed anyone, including school

> employees, parents, and the general public concerned with our schools, should be alert to the legal rights, duties, privileges, and responsibilities entailed in the educational enterprise.[1]

This is certainly true of the laws concerning the rights of students. Ignorance or confusion on the part of school personnel can lead to denials of justice or the provision of privileges which leave the school legally vulnerable. Confusion or misconceptions on the part of students concerning their own rights can lead to resentment or confrontation. A clarification of the legal rights of students may be helpful in preventing these undesirable results.

Very little has been written in Canada about students' rights, or, for that matter, about school law in general. As Chapter II indicates, the small amount that has been written tends to be rather dated and to place emphasis on the legal status of students and the powers of schools, with little said about the rights of students in a positive sense.

In Manitoba, it would appear that very little attention has been paid to the identification of the rights of students. This may be related to the facts that there have been relatively few confrontations or

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[1]Robert L. Drury and Kenneth C. Ray, Essentials of School Law (New York: Appleton-Century-Crofts, 1967), p. iii.

disruptions in the schools of Manitoba and that the students' rights movement as a militant force is very weak in this province.

If experiences of the past five years in most parts of the United States and some parts of Canada can be taken as predictive of what may happen here, there may prove to be a very definite need for a clarification of the legal rights of students. Should student militancy increase, should watchdog organizations take up the cause of children and students, and, should demands for printed codes of students' rights in schools become more prevalent, it is quite possible that the rights of students as set down in Manitoba's laws may prove to be an important matter.

A final consideration is an ethical one. If, as this thesis assumes, students do possess certain legal rights, a clarification of these rights may help to determine whether students are being allowed to exercise their rights. Surely school personnel, and students themselves, should be aware of what basic rights students possess and have a responsibility to see that these rights are not being denied.

This study attempts to provide this clarification of the legal rights of public school students.

D. THEORETICAL ASSUMPTIONS

This thesis is based on the assumptions that students in the public schools of Manitoba do possess certain rights, and that these rights can be determined by a careful examination of the relevant laws and literature.

E. LIMITATIONS

This study confines itself to an examination of the legal rights of students in public schools in Manitoba. While much that is said can probably be generalized to cover students in private schools and beyond the secondary level, these areas are not specifically taken into consideration. While there are many references to other provinces and other countries (primarily the United States), the focus of this study is Manitoba.

Only the selected areas of individual rights listed on page 3 are considered. There are other types of individual rights (such as freedom of religion) as well as various group rights (on an ethnic or religious basis for example) that are not included. Another major area that is not included is the field of tort liability. The areas that have been selected and are discussed are primarily individual rights and are considered to be typical examples of the kinds of rights students might possess.

Presumably, any one of the areas of rights included in this study is of sufficient depth to justify an entire study. The present study does not attempt to analyze each aspect in any great depth, due largely to limitations of time and space. Rather, it is intended to present in this work only an overview of each area.

Another factor that prevents a detailled analysis of the selected areas of rights is that this is primarily an education thesis, not a legal

treatise. The emphasis, therefore, is on implications for schools and not on a complex analysis of legal implications. A further reason for this, of course, is that the training and experience of the writer are in education rather than in law.

This study undertakes to determine students' rights through an analysis of pertinent law at the federal and provincial levels, including both statute and case law. No survey is made of current policies or practices at the divisional or school level.

Similarly, no attempt is made to determine how people feel about the rights of students, or what they believe these rights should be, in an ideal sense.

Because the law is constantly changing, the findings of this study will not necessarily be valid for a long period of time. This limitation, however, is faced by all written material in the field of law.

F. DEFINITIONS

A glossary of the legal terms which are used in this thesis is found in Appendix "A". Any other terms that are used in an unusual sense are explained when they are first used.

It would perhaps be useful at this point, however, to discuss one very basic term - "rights". This word is used in everyday speech with many different meanings and with many different modifiers. "Legal rights", "human rights", and "civil rights" are perhaps the most common.

Black's Law Dictionary defines "rights" generally as "powers of free action."[1] A longer general definition can be found in Ballentine's Law Dictionary, which defines the noun "right" as:

> That to which a person has a just and valid claim, whether it be land, a thing, or the privilege of doing something or saying something, such as the right of free speech. Property, interest, power, prerogative, immunity, and privilege.[2]

The term "natural rights" is a fundamental one. Black defines these rights as "those which grow out of the nature of man and depend upon personality, as distinguished from such as we created by law and depend upon civilized society."[3]

Bouvier's Law Dictionary, on the other hand, maintains that "all the rights which man has received from nature have been modified and acquired anew from the civil law"[4] and therefore divides rights into "political" and "civil" rights.

A useful definition of "political rights" is given by Black:

> Political rights consist in the power to participate, directly or indirectly, in the establishment or administration of

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[1]Henry Campbell Black, Black's Law Dictionary (fourth edition: St. Paul, Minnesota: West Publishing Co., 1951), p. 1486.

[2]James A. Ballentine, Ballentine's Law Dictionary (third edition: Rochester, N. Y.: The Lawyer's Co-operative Publishing Company, 1969), p. 1118.

[3]Black, Law Dictionary, p. 1487.

[4]William Edward Bodwin (ed.), Bouvier's Law Dictionary (Cleveland: Bouks-Baldwin Law Publishing Co., 1948), p. 1073.

> government, such as the right of citizenship, that of suffrage, the right to hold public office, and the right of petition.[1]

Both Black and Ballentine define "civil rights" in terms of the rights granted to a person by the laws of a country. Bouvier's Law Dictionary points out that even an alien possesses civil rights.[2]

The term "legal rights" is given a very broad interpretation by Black: "Natural rights, rights existing as a result of contract, and rights created or recognized by law."[3]

Ballentine defines "legal rights" as "claim recognizable and enforceable at law."[4]

The term "legal rights", which is the one used in this study, can be taken then as a broad one, including natural rights and all other forms of rights which are recognized (but not necessarily created) by law.

A useful distinction is made by Wise and Manley-Casimir[5] between "option-rights" and "welfare-rights". Expanding on an earlier

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[1]Black, Law Dictionary, p. 1487.

[2]Bodwin (ed.), Bouvier's Law Dictionary, p. 1073.

[3]Black, Law Dictionary, p. 1042.

[4]Ballentine, Law Dictionary, p. 721.

[5]Arthur E. Wise and Michael E. Manley-Casimir, Law, Freedom, Equality - and Schooling," Freedom, Bureaucracy, and Schooling (Washington: Association for Supervision and Curriculum Development, N. E. A., 1971).

article by Golding,[1] they define option-rights as "spheres of autonomous action."

> "The heart of option-rights is the idea that the individual possesses a limited sovereignty over property, things and himself. The individual's person sovereignty is limited by the sovereignty others can claim over him, by his duty toward others, and by his duty to himself. Otherwise the individual may act at his option."[2]

Welfare-rights, on the other hand, are defined as "the rights of community members to an equitable share of the material goods and services of the community."[3]

In rather simplified terms, option-rights are the rights to act freely within certain limits, while welfare-rights are the rights to certain privileges, goods, or services.

Some examples of option-rights in the context of this thesis would be the rights of dress, personal appearance, and expression. Examples of welfare-rights are the right to an education and to attend school.

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[1]M. P. Golding, "Towards a Theory of Human Rights," The Monist 52(4): 521-49; October 1968.

[2]Wise and Manley Casimir, "Law Freedom, Equality - and Schooling", p. 48.

[3]Ibid.

CHAPTER II

REVIEW OF RELATED LITERATURE

A. AN OVERVIEW OF THE LITERATURE

Although many general books on school law contain sections on the control of pupil personnel, these are of limited usefulness to this study.

A great deal has been written, mainly during the last five years, about the rights of students, but the bulk of this material has been written in the United States and discusses situations in that country. Most of this has appeared in journal articles and monographs. While some Canadian articles have been published, there is still relatively little available on this topic.

Very few theses or dissertations have been written on students' rights, or even on school law in general, in either Canada or the United States.

This literature is reviewed, and the observations made above are explained, in the sections that follow. Material from the United States is discussed first, followed by Canadian literature.

B. LIMITATIONS OF THIS REVIEW

The review that follows is general in scope. While much of the material that has been written, particularly in the United States, deals

with specific court cases, a detailed discussion of these cases is being postponed until Chapter V, so that the total situation in regard to each aspect of students' rights with which these cases and this thesis are concerned can be discussed with greater unity. Many of these articles are cited in Chapter V.

C. BOOKS ON SCHOOL LAW

Many books devoted to the field of school law have included sections or chapters on the legal status of pupils.

In their book, Hamilton and Mort[1] include a chapter titled "The Rights and Responsibilities of Pupils and Parents", and covering such aspects as compulsory school attendance, residence for school purposes, the classification of pupils, the right to attend a particular school, expulsion and suspension, grounds for exclusion, married pupils, membership in fraternities, control of pupils outside of school hours, corporal punishment, and the right of school authorities to withhold diplomas. Drury and Ray[2] discuss corporal punishment, married and pregnant students, and suspension and expulsion in a

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[1]Robert R. Hamilton, and Paul R. Mort, The Law and Public Education (second edition; Brooklyn: The Foundation Press, 1959), pp. 506-63.

[2]Robert L. Drury and Kenneth C. Ray, Essentials of School Law (New York: Appleton-Century-Crofts, 1967), pp. 40-50.

chapter titled "Pupil Discipline". Gaurke[1] deals with "Laws Affecting The Pupil" in very general terms, with references to admission, attendance, discipline, and pupil records.

A much more detailed treatment of "Control of Pupil Conduct" can be found in Peterson, Rossmiller, and Volz,[2] including sections on suspension and expulsion, detention of pupils, searches, control of pupils off school grounds, membership in fraternities, sororities and other secret societies, control of pupil dress, marriage and pregnancy, exclusion for immorality, regulations requiring haircuts, control of protests, denial of credit for poor deportment, and the destruction of school property. A chapter is devoted by Johnson[3] to "The Admission, and Rights and Responsibilities of Students", which includes some consideration of the rights of students to admission, compulsory attendance, discipline for non-scholastic causes, attendance relating to married students, and membership in secret student organizations.

Reutter's[4] chapter titled "Controlling Pupil Conduct" deals with symbolic expression, dress and appearance, conduct off school grounds,

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[1]Warren E. Gaurke, What Educators Should Know about School Law (Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1968), pp. 43-61.

[2]LeRoy J. Peterson, Richard A. Rossmiller, Marlin M. Volz, The Law and Public School Operation (New York: Harper and Row, 1969), pp. 401-27.

[3]George M. Johnson, Education Law (East Lansing: Michigan State University Press, 1969), pp. 77-89.

[4]E. Edmund Reutter, Jr., Schools and the Law (third revised edition; Dobbs Ferry, N. Y.,: Oceana Publications, Inc., 1970), pp. 63-9.

and punishments (including suspension, expulsion, corporal punishment, and academic punishment). A thorough treatment of relevant U. S. court cases can be found in Reutter and Hamilton.[1] A chapter titled "Pupil Personnel" covers compulsory education, rules of student conduct (including political expression and buttons, dress and appearance, secret societies, and student marriages) and punishment (suspension, expulsion, and corporal punishment).

All of the above are books of general school law. Some more specialized publications deal with school law as it affects teachers, and some of these include consideration of pupil rights. The Teacher and the Law,[2] a research monograph of the National Education Association, devotes one chapter to "Relationship with Pupils", which includes discussions of corporal punishment and liability for pupil injuries. Garber and Edwards[3] present a more general discussion of legal principles and court decisions affecting pupil personnel. Barrell,[4] a British writer,

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[1]E. Edmund Reutter, Jr., and Robert R. Hamilton, The Law of Public Education (Mineola, N. Y.: The Foundation Press Inc., 1970), pp. 501-61.

[2]The Teacher and the Law (School Law Series-Research Monograph. Washington, D. C.: National Education Association, Research Division, 1959), p. 74-9.

[3]Lee O. Garber, and Newton Edwards, The Law Governing Teaching Personnel (School Law Casebook Series, Number 3. Danville, Illinois: The Interstate Printers and Publishers, 1962).

[4]G. R. Barrell, Teachers and the Law (London: Methuen and Co., 1966), pp. 183 ff.

devotes two chapters to "Punishment" and "Children in Trouble". Later sections in the same book deal with school rules and police interrogations.

Other books have addressed themselves to pupils and school law. Flowers and Bolmeier[1] deal with secret societies, married and pregnant students, dress and personal appearance, rules and regulations pertaining to health, and willful misconduct. Garber and Edwards,[2] as part of the School Law Casebook Series, devote one volume to pupils and the law.

All of these publications, both books of general school law and those dealing with school law as it affects teachers or pupils, are useful in understanding the field of students' rights in general terms. As the titles of the various chapters and sections tend to indicate, however, the emphasis is on the control of pupils. Because these books are addressed primarily to teachers, administrators, and school boards, they approach the subject from the general perspective of people in these positions. It is perhaps not too much of an oversimplification to suggest that these publications deal with what schools can do to and with

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[1]Anne Flowers, and Edward C. Bolmeier, Law and Pupil Control (Cincinatti: The W. H. Anderson Company, 1964).

[2]Lee O Garber and Newton Edwards, The Law Governing Pupils (School Law Casebook Series, Number 4. second edition; Danville Illinois: The Interstate Printers and Publishers, 1969).

pupils.

The emphasis of this thesis, however, is rather different. This study approaches the topic of students' rights more from the point of view of students.

It assumes that students possess certain basic rights and that they are protected by law in their exercise of those rights. Its emphasis then, is on what students are entitled by right to do and to receive (both option-rights and welfare-rights).

A second limitation of some of these publications is that they were written before some of the recent landmark court decisions in the United States in the area of students' rights. Any materials published prior to 1968 or 1969 suffer from this limitation.

D. ANALYSES OF THE STUDENT POWER MOVEMENT

While it is not within the scope of this thesis to analyze in detail the origin and nature of the student power movement, a full understanding of the legal rights of students necessitates some understanding of the context in which the current concern for the rights of students has arisen.

Much writing has been devoted to the present sub-culture of youth in North American society. Among the most notable writers are Charles A. Reich[1] and Edgar Z. Friedenberg.[2] These writers see today's

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[1]Charles A. Reich, The Greening of America (Toronto: Bantam Books of Canada Ltd., 1971).

[2]Edgar Z. Friedenberg, Coming of Age in America (New York: Random House, 1965).

children and adolescents as a significantly different group within the general culture. Their attitudes, values, opinions and general style of life are, according to these and other writers, distinctive from those of their parents.

Other writers have attempted to analyze why youths rebel within and against the schools. Many of these explanations are written from the point of view of the students and are highly critical of the present school system. Jerry Farber's article "Student As Nigger"[1] is a bitter indictment of the schools' alleged dehumanization of students. Friedenberg[2] has also been an outspoken and radical critic of the way schools treat young people. Friedenberg sees schools as demeaning and stultifying influences on young people. Ira Glasser[3] believes that there are only two institutions in the U. S. A. that deny that the Bill of Rights applies to them - the military and the public schools. Another book that is useful for understanding the attitudes and situations

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[1]Jerry Farber, "Student As Nigger," This Magazine is About Schools (Winter, 1968), pp. 107-16.

[2]Edgar Z. Friedenberg, "Our Contemptuous Hairdressers: Ceremonies of Humiliation in School" and "The Principal's Authority: An Interview," This Magazine Is About Schools (August, 1966), pp. 8-18 and (Spring, 1968), pp. 43-58.

[3]Ira Glasser, "Schools for Scandal: The Bill of Rights and Public Education," Phi Delta Kappan, Vol. LI, No. 4 (December, 1969), pp. 190-4.

that have led to the student power movement is The High School Revolutionaries,[1] which is a collection of articles by and interviews of students.

The student movement in the United States had its first manifestations at the college level, and later began to appear in secondary schools. One analysis of the origins of university student militancy is that of Vaughn.[2] Another similar analysis of an article published by the National Education Association.[3] Gonzalez[4] and Young and Gehring[5] have examined laws and court cases relating to student dissent at the post-secondary level. A review of cases in the more specific area of speakers is that of Chambers.[6]

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[1]Marc Libarle, and Tom Seligson (eds.), The High School Revolutionaries (New York: Vintage Books, 1970).

[2]Harold A. Vaughn, The U. S. Student Movement: A Cross Cultural and Historical Perspective (New York: Syracuse University, 1969) ERIC document EDP 32005.

[3]National Education Association, "Special Feature on Campus Unrest," Today's Education, Vol. 58, No. 8 (November, 1969), pp. 25-33.

[4]Joseph E. Gonzalez, Jr., State Laws of 1969 Dealing with Student Unrest (Washington, D. C.: National Association of State Universities and Land-Grant Colleges, 1969), ERIC document EDO 34505.

[5]D. Parker Young, and Donald D. Gehring, Briefs of Selected Court Cases Affecting Student Dissent and Discipline in Higher Education (Athens, Georgia: University of Georgia, 1970), ERIC document EDO 51730.

[6]M. M. Chambers, The "Speaker Ban" Furor (Illinois State University, 1971).

When it became clear that the wave of student militancy in American colleges and universities in the late 1960's would soon spread to the high schools, a number of writers attempted to forecast, analyze, and prescribe solutions to the phenomenon.

Brammer,[1] writing in 1968, foresees a protest in high schools against school regulations as well as against "the broader issues of society - civil rights, war, voting, employment, and personal freedom in dress, drink, drugs, and sex."[2] Gudridge,[3] writing for the National School Public Relations Association in 1969, analyzes the cause of student revolt and suggests methods of anticipating and avoiding conflict. A number of answers are proposed to the question "What's Bugging the Students?": race, dress and hair, smoking rules and cafeteria dissatisfactions, assembly programs, choice of club speakers, censorship of school newspapers, underground newspapers, scheduling of sporting events, and social events. Other writers who

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[1]Laurence W. Brammer, "The Coming Revolt of High School Students," N.A.S.S.P. Bulletin, Vol. 52, No. 329 (September, 1968), pp. 13-21.

[2]Ibid., p. 13.

[3]Beatrice M. Gudrige, High School Student Unrest: Education U. S. A. Special Report: How to Anticipate Protest, Channel Activism, and Protest Student Rights (Washington, D. C.: National School Public Relations Association, 1969), ERIC document EDO 35112.

examine student activism include Shoben,[1] Chesler,[2] Garai,[3] Hentoff,[4] Wynne,[5] Fergusson,[6] McKenna,[7] Lipset,[8] Flemmings,[9] Bailey,[10] and Elseroad.[11]

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[1]Edward Joseph Shoben, Jr., "Student Unrest: Some Forms Within the Chaos," N.A.S.S.P. Bulletin, Vol. 52, No. 329 (September, 1968), pp. 1-12.

[2]Mark A. Chesler, Dissent and Disruption in Secondary Schools (Detroit, Mich.: Metropolitan Detroit Bureau of School Studies, Inc., 1969), ERIC document EDO 33462.

[3]Joseph E. Garai, The Message of Youth in an Age of Revolutionary Change (Brooklyn, N. Y.: Pratt Institute, 1970), ERIC document EDO 36837.

[4]Nat Hentoff, "Why Students Want their Constitutional Rights," Saturday Review, Vol. LIV, No. 21 (May 22, 1971), pp. 60-3.

[5]Edward Wynne, "Student Unrest Re-Examined," Phi Delta Kappan, Vol. LIII, No. 2 (October, 1971), pp. 102-4.

[6]Donald G. Fergusson, The New Morality of Teenagers - The New Student Voice (Washington, D. C.: American Association of School Administrators, 1970), ERIC document EDO 37768.

[7]Bernard McKenna, "Student Unrest - Some Causes and Cures," N.A.S.S.P. Bulletin, Vol. 55, No. 352 (February, 1971), pp. 54-60.

[8]Seymour Martin Lipset, American Student Activism (Santa Monica, California: Rand Corporation, 1968), ERIC document EDO 52724.

[9]Vincent C. Flemmings, Student Unrest in the High Schools, A Position Paper (New York: Center for Urban Education, 1970), ERIC Document EDO 43052.

[10]Stephen K. Bailey, Disruption in Urban Public Secondary Schools - Final Report (New York: Syracuse University Research Corporation, 1970), ERIC document EDO 14186.

[11]Homer O. Elseroad, Secondary School Student Activism - An Up-Tight Communication Problem (Rockville, Maryland: Montgomery County Public Schools, 1970), ERIC document EDO 39536.

The upsurge of student militancy led to a variety of commissions, committees, and task forces to study the phenonenon. Two representative examples are the Governor's Commission for Youth Involvement in the State of Washington,[1] and the Task Force on Human Rights established by the National Education Association.[2]

E. DISCUSSIONS OF U. S. COURT CASES AND THEIR IMPLICATIONS

The courts of the United States have a long history of influence on the schools of that nation. An early work that describes the influence of the Supreme Court on education until the mid-1950's is that of Spurlock.[3]

The great bulk of writing, however, and the writing that is most relevant to this thesis, has been published since the landmark students' rights court cases of the late 1960's and early 1970's which will be discussed in Chapter V. A research bulletin of the National Education Association[4] briefly reviews court cases in the field of students' rights

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[1]Toward a New Activism: Youth's Role in a Changing Society - Final Report (Olympia, Washington: Governor's Commission for Youth Involvement, 1970), ERIC document EDO 49374.

[2]Report of the Task Force on Human Rights (Washington, D.C.: National Education Association, 1968), ERIC document EDO 35082.

[3]Clark Spurlock, Education and the Supreme Court (Urbana, Illinois: University of Illinois Press, 1955).

[4]"What the Courts Are Saying about Student Rights" (National Education Association Research Bulletin, October, 1969), pp. 86-9.

to 1969. Fellman,[1] Hudgins,[2] Maready,[3] Edwards,[4] Knowles,[5] and La Morte[6] have discussed recent court decisions in varying degrees of detail. A 1971 article by Hudgins[7] reveals a significant reduction in the number of students' rights cases appearing in the courts, compared to the three or four previous years.

A number of publications have outlined the legal rights of public school students as they are presently constituted in the United States. Probably one of the best known and most useful is Ackerly's Reasonable

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[1]David Fellman (ed.), The Supreme Court and Education (revised and enlarged; New York: Columbia University Teachers' College Press, 1969).

[2]H. C. Hudgins, Jr., The Warren Court and the Public Schools: An Analysis of Landmark Supreme Court Decisions (Danville, Ohio: The Interstate Printers and Publishers, Inc., 1970).

[3]William F. Maready, "The Courts as Educational Policy Makers" (speech presented at National School Boards Association Annual Convention, April 1971), ERIC document EDO 51574.

[4]Newton Edwards, The Courts and the Public Schools: The Legal Basis of School Organization and Administration (Chicago: University of Chicago Press, 1971).

[5]Laurence W. Knowles, "Student Rights Find a Friend in Courts," Nation's Schools, Vol. 87, No. 3 (March, 1971), pp. 46-8.

[6]Michael W. La Morte, "The Courts and the Governance of Student Conduct," School and Society, Vol. 100, No. 2339 (February, 1972), pp. 89-93.

[7]H. C. Hudgins, "Action Not as Heavy on Student Rights," Nation's Schools, Vol. 89, No. 3 (March, 1972), pp. 46-7.

Exercise of Authority.[1] This booklet analyzes court decisions and proposes legally defensible policies on ten basic issues: freedom of expression, personal appearance, codes of behaviour, student property, extracurricular activities, discipline, student government, the student press, the right to petition, and drugs. The American Civil Liberties Union[2] has published a booklet addressed to students and advising them of their civil rights. A useful review of court cases on an annual basis is The Pupil's Day in Court, (later The Student's Day in Court),[3] an annual compilation of court decisions published by the National Education Association. Another source of court cases in school law, published annually, is The Yearbook of School Law.[4] One of the most active agencies in the United States in clarifying and publicizing the legal rights of students is NOLPE, the National Organization on Legal Problems in Education. Two educators who have recently outlined and

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[1]Robert L. Ackerly, The Reasonable Exercise of Authority (Washington, D. C.: National Association of Secondary School Principals, 1969).

[2]American Civil Liberties Union, Academic Freedom in the Secondary Schools (New York: American Civil Liberties Union, 1969).

[3]The Pupil's Day in Court (Title changed in 1970 to The Student's Day in Court) (Washington: Research Division - National Education Association, published annually).

[4]The Yearbook of School Law (Danville, Ohio: The Interstate Printers and Publishers, Inc., published annually).

discussed the rights of students are Dolce[1] and Crider.[2]

The more general field of children's rights and the courts has been examined by Wadlington[3] and, more recently, by Time Magazine.[4]

A large number of articles and monographs have been published since the late 1900's dealing with specific aspects of students' rights and with specific court decisions. Rather than dealing with these publications and with these cases at this point, a review of these materials will be found in Chapter V. Since many of these publications discuss the same cases, and since these cases relate directly to the specific aspects of students' rights with which this thesis is concerned, they will be considered as a unit in Chapter V.

As a result of the landmark court decisions of the late 1960's and early 1970's in the United States, (to be discussed in Chapter V)

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[1]Carl J. Dolce, "A Sensible Assessment of Student Rights and Responsibilities" (paper presented at the Annual Convention of the American Association of School Administrators, Atlantic City, New Jersey, February, 1971), ERIC document EDO 50447.

[2]Irene P. Crider, "Students' Rights Under the Law," Delta Kappa Gamma Bulletin, Vol. XXXVIII, No. 1 (Fall, 1971), pp. 17-23.

[3]Walter Wadlington, "A New Look at the Courts and Children's Rights," Children, Vol. 16, No. 4 (July-August, 1969), pp. 138-42.

[4]"Children's Rights: The Latest Crusade," Time (December 25, 1972), pp. 42-3.

a variety of articles have appeared that are directed to a rather specialized readership. Articles by Griffiths,[1] Vacca,[2] and Panush and Kelley[3] are directed to principals. Other articles, such as one by Lewis and Lewis,[4] have presented to counsellors some of the implications of the current emphasis on students' rights. A number of articles have been addressed to school board members, including a series of six articles by Chester M. Nolte[5] in The American School Board Journal.

One of the results of the current concern for the rights of students has been the development of new board level and school-level policies outlining the rights, privileges, and responsibilities of the students within their jurisdictions. One collection of such policies, originally

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[1]William E. Griffiths, "Student Constitutional Rights: The Role of the Principal," N.A.S.S.P. Bulletin, Vol. 52, No. 329 (September, 1968), pp. 30-7.

[2]Richard S. Vacca, "The Principal as Disciplinarian: Some Thoughts and Suggestions for the 70's," The High School Journal, Vol. LIV, No. 6 (March, 1971), pp. 405-10.

[3]Louis Panush and Edgar A. Kelley, "The High School Principal: Pro-active or Reactive Roles?" Phi Delta Kappan, Vol. LII, No. 2 (October, 1970), pp. 90-2.

[4]Michael D. Lewis and Judith A. Lewis, "The Counsellor and Civil Liberties," The Personnel and Guidance Journal, Vol. 49, No. 1 (September, 1970), pp. 9-13.

[5]Chester A. Nolte, "The Do's and Don'ts of Due Process," The American School Board Journal, Vol. 159, Nos. 1, 2, 3, 4, 5, 6 (July to December, 1971).

published in 1970,[1] and updated in 1972,[2] by the National School Boards Association, contains samples of policies from various parts of the United States. Probably one of the best known and most imitated codes is The Statement of Student Rights and Responsibilities[3] of the Board of Education of the City School District of the City of New York. An outline of students' rights in a particular state has been published for the State of New Jersey.[4] A useful set of guidelines for school boards considering the development of a code of students' rights has been prepared by Phay and Cummings.

F. CANADIAN PUBLICATIONS

Compared to the tremendous volume of articles, monographs, brochures, and handbooks that have been published in the United States

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[1]Policies that Clarify Student Rights and Responsibilities Waterford, Connecticut: National School Boards Association, 1970).

[2]School Board Policies on Student Rights (Waterford, Connecticut: E.P.S./NSBA Policy Information Clearinghouse, 1973).

[3]"Statement of Student Rights and Responsibilities," (excerpt from the New York City Code of Rights), School and Community, Vol. LVIII, No. 7 (March, 1972), p. 25. ERIC document EDO 47362.

[4]New Jersey Association of High School Councils and New Jersey Association of Secondary School Principals, A Guide to Student Rights and Responsibilities in New Jersey (Trenton: New Jersey Association of High School Councils and New Jersey Association of Secondary School Principals, 1972).

on the topic of students' rights during the past few years, very little has been produced on the Canadian scene. This is probably not only a function of the relative size of the two nations, but also a result of the fact that there has been less student activism in Canadian schools and universities, and those events that have taken place have generally been less dramatic in nature.

One examination of the causes and manifestations of student power in Canada is a 1969 article by Masse.[1] A similar analysis has been written by Flanagan.[2] Conway's[3] article is in support of the general concept of student power. Three 1969 articles, by Hobart,[4] Tillemans,[5] and Willis,[6] examine the causes and implications of Canadian student power at the secondary level.

An early attempt to discover some of the causes of student discontent can be found in a 1968 Youth Study project of the Winnipeg

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[1]Denis Masse, "Student Protest: The Real Issue," The C.S.A. Bulletin, Vol. VIII, No. 5 (June, 1969), pp. 29-43.

[2]J. D. Flanagan, "The Current Wave of Student Unrest and Student Activism," The Teacher's Magazine, Vol. L, No. 247 (November, 1969) pp. 38-46.

[3]J. Harold Conway, "I Believe in Student Power," Monday Morning, Vol. 3, No. 10 (June-July, 1969) pp. 17-18.

[4]Charles Hobart, "The Implications of Student Power for High Schools," Education Canada, Vol. 9, No. 2 (June, 1969), pp. 21-32.

[5]Tom Tillemans, "Dealing with Student Unrest," B. C. Teacher, Vol. 48, No. 7 (April, 1969), pp. 252-3.

[6]H. L. Willis, "Student Power - Are We Ready to Use It?" B. C. Teacher, Vol. 48, No. 5 (February, 1969), pp. 172-4.

School Division.[1]

Other articles dealing with more specific aspects of students' rights are those of Smookler,[2] Shack[3] and The Educational Courier.[4] Similarly, Pengally,[5] and Shroff,[6] examine specific aspects of the legal rights of students.

A 1972 publication of the Toronto Alternate Press Service is a Student Rights Handbook,[7] which is designed to inform students in the Metropolitan Toronto area of their rights.

A book edited by Tim and Julyan Reid[8] deals primarily with

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[1]Louisa Loeb, "Winnipeg Study Probles Juvenile Unrest," The Manitoba Teacher, Vol. 47, No. 1 (May-June, 1968), pp. 3-8.

[2]Kenneth M. Smookler, "Can You Legally Make Rules About Long Hair and Short Skirts?" School Progress, Vol. 38, No. 1 (January, 1969), pp. 60-2.

[3]Sybil Shack, "Pupils Have a Right to Privacy," Monday Morning, Vol. 3, No. 4 (December, 1968) pp. 8-9.

[4]"The Strap" (A Courier Commentary) The Educational Courier, Vol. XXXIX, No. 4 (March-April, 1969), pp. 71-72.

[5]John R. Pengally, "Corporal Punishment in Schools, "Monday Morning, Vol. 3, No. 7 (March, 1969), pp. 20-1.

[6]K. B. Shroff, "Legal Implications in Guidance," The Bulletin of the O.S.S.T.F., Vol. 51, No. 6 (December, 1971), pp. 317-21.

[7]Student Rights Handbook: For Students in the Metropolitan Toronto Area (Toronto: Toronto Alternative Press Service, 1972).

[8]Tim Reid, and Julyan Reid, Student Power and the Canadian Campus (Toronto: Peter Martin Associates, Ltd., 1969), pp. 175-226.

student unrest at the university level, but it also includes twenty-eight articles related to high schools.

As was the case with the articles from the United States described earlier, no attempt is made at this point to discuss the details of these articles in relation to the aspects of students' rights with which this thesis is concerned. Some discussion is incorporated within the detailed examination of these aspects in Chapter V.

G. RESEARCH, THESES, AND DISSERTATIONS

A thorough search of Research Studies in Education,[1] the Bibliography of School Law Dissertations,[2] the Review of Educational Research,[3] and Master's Theses in Education[4] has not proved fruitful. While there have been a few theses and dissertations in American universities dealing with the legal status of students, none of these appear to be recent enough or sufficiently relevant to the Canadian scene to be of significant assistance to this study.

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[1]Research Studies in Education (Bloomington, Indiana: Phi Delta Kappa, Inc.), checked from 1957 to 1970.

[2]Chester M. Nolte (Comp.), Bibliography of School Law Dissertations (Eugene, Oregon: ERIC Clearinghouse on Education Administration, 1969), ERIC document EDO 27646.

[3]Review of Educational Research (Washington, D. C.: American Educational Research Association), checked from 1964 to 1971.

[4]Master's Theses in Education (Cedar Falls, Iowa: Research Publications), checked from 1951 to 1972.

The lack of scholarly writing in the field of school law in Canada has been pointed out by the few writers who have ventured into this field.

An examination of the listings of Canadian theses in education[1] has revealed that not only is the matter of students' rights given scant attention, but indeed, the whole field of school law has hardly been touched.

Perhaps the best known works in Canadian school law are those of Bargen,[2] Enns,[3] and McCurdy.[4] These doctoral dissertations were subsequently published as books, an indication of the tremendous need for information in this field. While these volumes are still quite useful, they are, unfortunately, becoming rapidly dated.

Bargen's work on the legal status of pupils suffers from the same problem, as far as usefulness to this thesis is concerned, as many of the American school law books described earlier. The

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[1]Registry of Canadian Theses in Education (Series I and II). Education Studies in Progress in Canadian Universities, (1964-66). Education Studies Completed in Canadian Universities (1967-68), and Directory of Education Studies in Canada (1968-72). (Toronto: Canadian Education Association, Research and Information Division).

[2]Peter Frank Bargen, The Legal Status of the Canadian Public School Pupil (Toronto: The Macmillan Company of Canada Ltd., 1961).

[3]Frederick Enns, The Legal Status of the Canadian School Board (Toronto: The Macmillan Company of Canada Ltd., 1963).

[4]Sherburne G. McCurdy, The Legal Status of the Canadian Teacher (Toronto: The MacMillan Company of Canada Ltd., 1968).

emphasis is on the status of the pupils and on the rights and powers of the schools to control pupils. The more positive concept of students as individuals possessing basic rights is not given any significant emphasis

An early study by Ross examines the role of the courts in Canadian public education.[1] Another study, dealing with the legal status of students, is that of Chisolm.[2] A 1964 M. Ed. thesis by MacKay,[3] updated in 1967 to take legislative changes into account and subsequently published by the University of Saskatchewan, analyzes the rights, privileges, and responsibilities of public school students in that province. Again, however, this emphasis tends to be on the school's right to control pupils.

A more recent study by Kenny[4] examines the implications for

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[1]George John Ross, "The Courts and the Canadian Public Schools" (unpublished Doctoral dissertation, University of Chicago, 1948). (Microfilmed.)

[2]Winston G. Chisolm, "The Status of the Nova Scotia Teacher in Regard to the Disciplinary Control of Pupils" (unpublished Master's thesis, Dalhousie University, Halifax, Nova Scotia, 1966)

[3]Ivan L. MacKay, The Legal Rights, Privileges, and Responsibilities of Pupils in the Publicly-Supported Schools of Saskatchewan (Saskatoon: University of Saskatchewan, 1967).

[4]Harold M. Kenny, "Some Implications of the Lowering of the Age of Majority on Secondary School Administration" (unpublished Master's thesis, University of Toronto, 1972).

the schools of the lowering of the age of majority to nineteen or eighteen across Canada. While the findings are rather nebulous, this is one of the first attempts to describe students' rights in a positive sense.

Another recent thesis, by Boulet,[1] looks at the legal implications of students' cumulative records in Manitoba and discusses some of the rights of students in this regard.

Two pieces of research that relate to some extent to the topic of this investigation have been published by the Canadian Teachers' Federation[2] and by the Canadian Education Association.[3]

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[1]Francois Xavier Boulet, "Student Cumulative Records: Some Legal Implications for Current Practices in Manitoba Schools" (unpublished M. Ed. thesis, the University of Manitoba, Winnipeg, 1970).

[2]Robert L. Lamb, The Canadian School Trustee - In and At Law (Ottawa: Canadian Teachers' Federation, Research Division, 1966).

[3]Canadian Education Association, Corporal Punishment in Canadian Schools (Toronto: Research and Information Division, Canadian Education Association, 1967).

CHAPTER III

RESEARCH PROCEDURES

A. INTRODUCTION

As suggested earlier[1] in the discussion of the limitations of this study, it is not within the scope of this thesis to analyze current policies and practices in Manitoba schools in relation to students' rights. Because the major focus is on statute law and case law as they affect the selected individual rights of Manitoba public school students, a wide range of sources have been utilized. These are described in this chapter.

B. STATUTE LAW

Because a number of federal statutes have some influence on the topic of this study, the following have been considered:

- The British North American Act[2]
- The Manitoba Act[3]
- The Criminal Code[4]
- Canadian Bill of Rights[5]

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[1]See above, pp. 6-7.

[2]British North American Act, 1867).

[3]The Manitoba Act, 1870.

[4]Criminal Code, R. S. C. 1970, c. C-34 and amendments.

[5]Canadian Bill of Rights, 1960, c. 44.

- Juvenile Delinquents Act[1]

- Narcotic Control Act[2]

- Food and Drug Act[3]

At the provincial level, the following Manitoba Statutes have been considered:

- The Public Schools Act[4] (and Regulations)

- The Education Department Act[5] (and Regulations)

- The Human Rights Act[6]

- The Child Welfare Act[7]

- Liquor Control Act[8]

C. CASE LAW

Since many principles concerning the rights of students are not made clear by statute law, some consideration has also been given to

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[1]Juvenile Delinquents Act, R. S. C. 1970, c. J-3.

[2]Narcotic Control Act, R. S. C. 1970, c. N-1.

[3]Food and Drug Act, 1952-53, c. 38, s. 1.

[4]The Public Schools Act, R. S. M., c. 215.

[5]The Education Department Act, R. S. M., c. 67.

[6]The Human Rights Act, S. M. 1970, c. 104.

[7]The Child Welfare Act, R. S. M., c. 35.

[8]Liquor Control Act, S. M., 1956, c. 40.

cases which might help clarify the picture. Since most of the significant Canadian cases prior to 1960 have been cited and discussed by Bargen[1] and MacKay,[2] this study has emphasized more recent cases. This emphasis can be further justified on the basis that many of the questions concerning individual students' rights have been given significant attention only during the last decade.

In order to discover any pertinent Canadian cases, the following sources have been explored:

- The Canadian Abridgement (First Edition)[3]
- The Canadian Abridgement Consolidation[4]
- The Canadian Abridgement - Annuals[5]
- The Canadian Abridgement (Second Edition)[6]

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[1]Bargen, Legal Status of Canadian Pupils.

[2]MacKay, Legal Rights, Privileges, Responsibilities of Pupils.

[3]The Canadian Abridgement (First Edition) (Toronto: Burroughs and Company Eastern Ltd., 1943), Vols. 13, 22, 32.

[4]The Canadian Abridgement Consolidation (Toronto: Burroughs and Company Eastern Ltd., 1956), Vols. 3, 6, 9.

[5]The Canadian Abridgement - Annuals (Toronto: Burroughs and Company Eastern Ltd., 1956-65) (Toronto: The Carswell Co. Ltd., 1966-71), Annuals from 1955 to 1971 have been checked.

[6]The Canadian Abridgement (Second Edition) (Toronto: The Carswell Co. Ltd., 1970), Vols. 9, 10, 11, 19.

- Canadian Current Law[1]

- Dominion Report Service[2]

In these listings, cases were sought from other provinces, if they might have a bearing on the Manitoba situation, as well as cases originating in Manitoba.

In addition to these published sources, two organizations that would probably be aware of any recent Manitoba cases have been consulted. Searches of the pertinent central office files of the Manitoba Teachers' Society have revealed very little information. Similarly, consultation of the provincial office of the Manitoba Association of School Trustees has not proven fruitful. As one M. A. S. T. official has indicated,[3] no cases involving students' rights (settled in court or before reaching court) have come to the attention of that organization within the past two years.

Besides an exploration of Canadian case listings, a search of British sources has been made to discover any relevant litigation. The following have been examined:

- The English and Empire Digest[4]

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[1]Canadian Current Law (Toronto: The Carswell Co. Ltd., 1961 - 1973), Volumes from 1960 to May, 1973 have been checked.

[2]Dominion Report Service (Don Mills, Ontario: C. C. H. Canada Ltd., 1955 - 1972), Volumes from 1954 to 1971 have been checked.

[3]Statement by Mr. Peter Coleman, personal telephone interview, July 20, 1973.

[4]The English and Empire Digest (London: Butterworth and Co. Ltd., 1970).

- The English and Empire Digest - Continuation Volume A[1]

- The English and Empire Digest - Continuation Volume B[2]

- The English and Empire Digest - Continuation Volume C[3]

- The English and Empire Digest - Cumulative Supplements[4]

- Halsbury's Laws of England (Third Edition)[5]

- Halsbury's Laws - Canadian Converter[6]

- Halsbury's Laws - Cumulative Supplement[7]

Besides Canadian and Commonwealth cases, some consideration has been given to a number of cases originating in the United States. These have been gleaned from a number of sources, including The

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[1]The English and Empire Digest - Continuation Volume A (London: Butterworth and Co. Ltd., 1965). (Cases of 1952-63).

[2]The English and Empire Digest - Continuation Volume B (London: Butterworth and Co. Ltd., 1967. (Cases of 1964-66).

[3]The English and Empire Digest - Continuation Volume C (London: Butterworth and Co. Ltd., 1971). (Cases of 1967-70).

[4]The English and Empire Digest - Cumulative Supplements (London: Butterworth and Co. Ltd., 1970-72). (Volumes from 1970-72 have been checked.)

[5]Halsbury's Laws of England (Third Edition) (London: Butterworth and Co. Ltd., 1966), Vol. 13.

[6]Halsbury's Laws of England - Canadian Converter (Toronto: Butterworth and Co. Canada Ltd., 1972), Vol. 15A - Third Replacement.

[7]Halsbury's Laws of England - Cumulative Supplement, 1972, to Volumes 1-19 - Canadian Edition (London: Butterworth and Co. Ltd., 1972).

Pupils Day in Court[1] and The Yearbook of School Law.[2]

D. ACADEMIC STUDIES

In order to locate any pertinent academic studies, the following have been consulted:

- Research Studies in Education[3]
- Review of Educational Research[4]
- Master's Theses in Education[5]
- Bibliography of School Law Dissertations[6]

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[1]The Pupil's Day in Court (Title changed in 1970 to The Student's Day in Court) (Washington: Research Division - National Education Association, 1966-71). Reports from 1965 to 1970 have been checked.

[2]The Yearbook of School Law (Danville, Ohio: The Interstate Printers and Publishers, Inc., 1957-71). Volumes from 1957 to 1971 have been checked.

[3]Research Studies in Education (Bloomington, Indiana: Phi Delta Kappa, Inc., 1953-70). Volumes from 1953 to 1970 have been checked.

[4]Review of Educational Research (Washington: American Educational Research Association, 1964-71). Volumes from 1964 to 1971 have been checked.

[5]Master's Theses in Education (H. M. Silvey, ed.) (Cedar Falls, Iowa: Research Publications, 1951-72). Volumes checked from 1951 to 1972).

[6]Bibliography of School Law Dissertations, 1952-68 (Eugene, Oregon: ERIC Clearinghouse on Educational Administration, 1969). Chester M. Nolte, comp.

- Directory of Education Studies in Canada[1]

E. PUBLISHED MATERIALS

As indicated in Chapter II and Chapter V, a wide variety of published materials has been considered in carrying out this study. The following sources have been utilized in a search for relevant journal articles:

- Current Index to Journals in Education[2]
- Education Index[3]
- Educational Administration Abstracts[4]
- Canadian Education Index[5]
- Index to Canadian Legal Periodical Literature[6]

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[1]Directory of Education Studies in Canada (Toronto: Canadian Education Association, Research and Information Division, 1955 to 1971). Formerly titled Registry of Canadian Theses in Education (pre-1955-62); Education Studies in Progress in Canadian Universities (1963-66); Educational Studies Completed in Canadian Universities (1966-68).

[2]Current Index to Journals in Education (New York: CCM Information Corp., 1969-72). Checked from 1969 to November, 1972.

[3]Education Index (New York: The H. W. Wilson Co., 1963-1972). Volumes 14 (1963-64) to 22 (1971-72) checked.

[4]Educational Administration Abstracts (Columbus, Ohio: The University Council for Educational Administration, 1968-71). Volumes 3 to 6 have been checked.

[5]Canadian Education Index (Ottawa: Canadian Council for Research in Education, 1966-72) Volume 1 (1966) to Volume 8, Number 1 (Jan. - Mar., 1972) checked.

[6]Index to Canadian Legal Periodical Literature (Montreal: Canadian Association of Law Libraries, 1970-73). Checked from 1961 to February, 1973.

CHAPTER IV

THE LEGAL FOUNDATIONS OF PUBLIC SCHOOLS IN MANITOBA

A. INTRODUCTION

The legal status of public school students is a small part of the much larger field of school law. Although it is not a purpose of this study to analyze in depth the legal structures governing public school operation in Manitoba, this chapter presents, as background information, a brief description of the legal foundations of the public school system in the province. Since this study is concerned only with students in public schools, the legal status of private or parochial schools is not discussed.

Similar discussions of the legal bases of education can be found in the works of Bargen,[1] Enns,[2] McCurdy,[3] MacKay,[4] and Kenny.[5] Although none of these is specifically concerned with Manitoba, many of the statements in these works can be generalized to the Manitoba situation.

This chapter first outlines the legislation governing public schools at the federal, provincial, and divisional levels. Provincial

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[1]Bargen, Legal Status of Canadian Pupil.

[2]Enns, Legal Status of Canadian School Board.

[3]McCurdy, Legal Status of Canadian Teacher.

[4]MacKay, Legal Rights, Privileges, Responsibilities of Pupils.

[5]Kenny, Lowering of Age of Majority.

legislation and regulations that have some direct bearing on students' rights are particularly mentioned. In addition, some federal and provincial statutes that are not directly concerned with education but nonetheless have some relationship to students' rights, are discussed. Some consideration is then given to the role of the courts in relation to law, including courts outside of Manitoba and outside of Canada.

B. LEGISLATION AFFECTING PUBLIC SCHOOLS IN MANITOBA

1. FEDERAL STATUTES

Education in Manitoba, as in all other Canadian provinces, is almost entirely under provincial jurisdiction. Section 93 of the British North America Act of 1867 clearly designates education as a provincial responsibility, with only one condition added - that the interests of religious schools be protected.

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions: -
>
> 1. Nothing in any such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
>
> 2. All the Powers and Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
>
> 3. Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is

established by the Legislature of the Province, an Appeal shall lie to the Governor-General-in-Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

4. In case any such Provincial Law as from Time to Time seems to the Governor-General-in-Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General-in-Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor-General-in-Council under this section. [1]

When Manitoba entered Confederation in 1870, the Manitoba Act, a statute of the federal government, contained similar provisions concerning education in the new province.

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:

(3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due

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[1] British North America Act, 1867, sec. 93.

> execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council or any appeal under the proper Provincial Authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section. [1]

Although some special schools are under the jurisdiction of the federal government, such as Indian schools and schools for the children of Canadian servicemen, the public school system as it is generally conceived is a provincial responsibility. Although the British North America Act and the Manitoba Act give Parliament the power to disallow provincial laws, this power has rarely been exercised. [2] Instead, as the section titled "The Role of the Courts" will indicate, the courts have been called upon in recent years to assess provincial legislation that may be contrary to the provisions of the B. N. A. Act.

2. PROVINCIAL STATUTES AND REGULATIONS

Aside from designating education as a provincial responsibility, with the conditions noted earlier, the B. N. A. Act, the Manitoba Act, and the other acts admitting provinces to Confederation do not contain any description of the school systems. This means that each province

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[1] Manitoba Act, 1870, sec. 22.

[2] One of the last examples of this was during the Manitoba School Question, at the end of the last century.

is at liberty to determine the character of education within its boundaries. These details are to be found in the statutes and regulations of the various provincial governments.

In Manitoba, the main Acts governing education are commonly known as The Education Department Act, The Public Schools Act, The School Attendance Act, and The Teachers' Pension Act.[1] The first three of these contain provisions that are pertinent to the topic of this study, and these are discussed shortly.

Because acts of the Legislature are frequently phrased in generalized terms and usually do not indicate how their provisions are to become operational, the Minister of Education and the Department of Education are given the authority to make regulations pursuant to the Acts. Although such regulations are not passed by the Legislature, they are generally considered to have the full force of law. It is expected, of course, that regulations be related to and consistent with the particular Act.

The Education Department Act outlines a number of the functions of both the Minister of Education and the Department of Education. The powers given to the Minister are sweeping, and include the following:

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[1]The more formal names are An Act Respecting the Department of Education, An Act Respecting Public Schools, An Act Respecting School Attendance, and An Act to Provide Pensions and Disability Allowances for Teachers.

6(1) The Minister may:

(c) prescribe the classification, organization, discipline, and government of teacher training institutions and model, secondary, and public schools;

(d) make regulations authorizing the superintendent of schools of a district, or the principal, or a teacher deemed to be the principal, of any school to suspend a pupil for conduct injurious to the welfare of the school;

(dd) enter into any agreement with any person, corporation, or government, respecting any educational matter or thing;

(ee) order a public school to be closed in an emergency or where he deems it in the best interests of the community in which the school is located, and cancel the order;

(ff) make regulations respecting steps to be taken and things to be done, and prohibiting acts with respect to schools in the event of certain emergencies;

(hh) generally make regulations respecting all matters having to do with education.[1]

As these provisions indicate, the Minister is given wide discretionary powers, including the authority to make regulations concerning discipline. Some of these regulations will be examined later.

The Public Schools Act, which is by far the longest and most detailed statute concerning education in Manitoba, includes a number of provisions that are pertinent to this study.

Although the present version of the Act contains many out-of-date references to boards of trustees of "school districts",[2] "rural

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[1]The Education Department Act, sec. 6(1) Am. S. M., 1958, (1st Sess.), C. 11, secs. 3 to 10; S. M., 1959, (2nd Sess.), C. 17, s. 2; S. M., 1962, C. 13, s. 1; am; Am. S. M., 1970, C. 85, s. 1.

[2]Sec. 147.

school districts",[1] "consolidated school districts",[2] and "urban school districts",[3] despite the fact that most schools are not under the jurisdiction of unitary school divisions, a number of powers of school trustees can be found. These will be considered under the section titled "Divisional Powers".

The duties of teachers are also outlined in this Act. Section 283 includes the following requirements:

> 283 Every teacher shall
> (c) maintain proper order and discipline in the school according to the regulations;
> (h) notify the medical officer of health of the municipality or of the area in which the school is situated, or, where there is no medical officer of health, the board of trustees, in any case where he has reason to believe that a pupil attending the school
> (i) is affected by, or has been exposed to, a communicable disease as defined in The Public Health Act or any other communicable skin disease; or
> (ii) is infested with vermin;
>
> (i) prevent the attendance at the school of any pupil who is affected or is infested, or has been exposed, or whom he believes to be affected or infested, or to have been exposed, as mentioned in clause (h), until furnished with
> (i) the written statement of the medical officer of health or other duly qualified medical practioner [sic] that the pupil is not so affected or infested, or has not been so

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[1]Sec. 149.

[2]Sec. 153(3).

[3]Sec. 155(3).

exposed, or, if so exposed, that the relative regulations under the Public Health Act have been obeyed: or

(ii) the written authority of the board of trustees directing that the pupil be allowed to attend school;

(o) seize and take possession of any rifle, gun, or other offensive or dangerous weapon, that is brought to school by a pupil, and hand over any such rifle, gun, or other offensive or dangerous weapon, to the parent or guardian of the pupil who brought it to school, with a warning that the pupil will be suspended or expelled from the school if the offence is repeated, and suspend the pupil if the offence is repeated.[1]

These are the only provisions that could be located in provincial statutes that deal with specific offences on the part of students.

Sections 364 to 367 of The Public Schools Act deal with "Rights of Teachers and Employers." It is perhaps significant that there is little specific reference in any present legislation to the rights of students.

One of the few sections that deals with right of a student is Section 255(2) of The Public Schools Act.

255(2) Every person between the ages of six and twenty-one years shall have the right to attend a school.[2]

There are certain restrictions on this right, however, which will be discussed in Chapter V under the topic "Attending School and Receiving an Education."

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[1]The Public Schools Act, sec. 283.

[2]Ibid., sec. 255(2).

The School Attendance Act deals mainly with compulsory attendance at school. This Act requires that children between the ages of seven and sixteen attend school and prescribes penalties for parents or guardians of children who do not attend. These provisions are discussed later as part of "Attending School and Receiving an Education."

Of the various regulations of the Department of Education, Regulation 106/70, under The Education Department Act, contains sections most related to this study.

Part VI

Duties of Teachers

32 Subject to the provisions of The Public Schools Act, these regulations, the instructions of the school board and of the school inspectors, the principal shall be in charge of the school in respect of all matters of organization, management, discipline, and instruction.

37 (1) The principal of any school may suspend, for a period not exceeding six weeks a pupil who persists in conduct which the principal deems injurious to the welfare of the school; provided that in any school district, or division having a superintendent of schools, the board of trustees for such district, by resolution duly passed and recorded in its minutes, may provide that a suspension by a principal of any of its schools shall not be effective for a period in excess of one week unless approved by such superintendent of schools.

(2) Where any school district, or division, has a superintendent of schools in charge of schools within the district, or division, the superintendent shall have authority and power, if so authorized by the board of trustees of the district or division by resolution duly passed to suspend, for a period not exceeding six weeks, a pupil who persists in conduct

that he deems injurious to the welfare of the school.

(3) In all cases of suspension by a principal or superintendent, the suspending officer shall within twenty-four hours, report, in writing, the suspension to the board of trustees, and shall, in the report, set out the name of the pupil, the period of suspension and the acts or conduct for which said pupil was so suspended.

(4) The board of trustees may review any suspension and may revoke or amend the same as it may see fit.

38 The principal shall be responsible for the supervision of pupils, buildings and grounds during school hours.

43 The principal shall exercise disciplinary authority over the conduct of each pupil of his school from the time of the pupil's arrival at school until his departure for the day, except during any period when the pupil is absent from the school premises at the request of his parent or guardian.

44 (1) The principal shall have disciplinary authority over all pupils of his school in their conduct towards one another on their way to and from school, and, in districts or divisions which provide transportation, the principal shall have disciplinary authority over the conduct of the pupils while they are in the conveyance.

(2) The driver of a school bus shall report to the principal any misconduct of children while entering, leaving or being conveyed in a vehicle under his charge. [1]

These regulations clearly bestow considerable authority on school principals, and even on bus drivers. The implications of this authority will be discussed in Chapter V.

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[1]Manitoba Regulation 106/70. Under The Education Department Act. Manitoba Gazette, Vol. 99, No. 31 (Aug. 1, 1970), p. 301.

3. DIVISIONAL POWERS

Most parts of North America have long recognized the advantages of having education influenced, to at least a certain extent, by conditions at the local level. To achieve this sensitivity to local needs and wishes, Manitoba, like many other jurisdictions, has established a system of locally-elected boards of public school trustees. These boards are responsible for making a wide variety of decisions affecting education.

One point that must be made clear, however, is that although the provincial government, through statutes and regulations, delegates some of its authority to local boards, it still retains ultimate control over this authority.

> The delegation of authority, however, should not be construed as a surrender on the part of a province of its authority over school matters. On the contrary, the supreme authority of a province is evidenced by the fact that its legislature prescribes the scope of local control. The delegated authority is not acquired by the choice of the local community; it is obligatory rather than permissive, and when the province deems it expedient, that authority may be rescinded. [1]

School boards in Manitoba, as well as their superintendents and principals, have been given increasingly greater authority over the past few years. Such areas as examinations, promotions, and recommending permanent certification of teachers, which were once the responsibility

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[1] Bargen, Legal Status of Canadian Pupil, p. 10.

of the Department of Education, have now been delegated to divisional authorities. It must be kept in mind, however, that boards can carry out only those powers delegated by the province. These powers, though, are often phrased in broad terms, so a considerable amount of room is frequently left for board discretion.

McCurdy distinguishes between "mandatory" and "discretionary" powers assigned to school boards.[1] Mandatory powers are duties which the board must carry out. Discretionary powers involve areas in which the board may use its discretion, hopefully with sensitivity to local needs and conditions.

Board policies, properly passed at duly constituted board meetings, have the full force of law. Like Departmental regulations, these policies must not go beyond the powers granted by higher authorities. This means that school boards are often "caught in the middle" between provincial government requirements and the wishes of local residents. MacKay has observed:

> The dual aspects of the school board in that it is legally responsible to the province while it is practically responsible to the residents of the school district, occasionally causes misunderstandings between board members and district residents when the board exercises its discretionary powers.[2]

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[1]McCurdy, Legal Status of Canadian Teacher, pp. 20-1.

[2]MacKay, Legal Rights, Privileges, Responsibilities of Pupils, p. 27.

Before consideration is given to some specific board powers related to student rights, it should also be observed that not only do board policies have the force of law, but so do school rules. Again, the rules of a school must be consistent with the provisions of higher authorities (in this case, with board policies, Departmental regulations, provincial legislation, and federal laws), and must be within the school's power; but unless these violations can be proven, a school rule is legally valid.

As mentioned earlier, The Public Schools Act at the present time refers to a confusing variety of types of school boards of "districts". A comparison of the powers assigned to these boards, however, shows considerable similarity, and it is probably safe to assume that these provisions also apply to divisional school boards.

The following are some selected powers and duties which pertain to boards of trustees:

> 147(1) A board of trustees may
>
> (u) on the recommendation of a principal of a secondary school, order that any designated pupil to whom subsection (4) of section 255 applies be not allowed to enroll again in a secondary school grade from which he has failed to pass;[1]

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[1]Section 255(4) states "In the case of a pupil over the age under which he is required by law to attend school, the board of the district, area, or secondary school area, in which he is attending school may make an order under clause (u) of subsection (1) of section 147." The implications of this power are discussed in Chapter V under "Attending School and Receiving an Education."

(x) suspend, or expel from any school of the district any pupil who carries to school a rifle, gun, or other offensive or dangerous weapon, after a warning by the teacher or trustee not to do so;

(y) cause notices to be sent to parents or guardians, and to be posted up in the school district, warning against pupils carrying to school rifles, guns, or other offensive or dangerous weapons;

(z) suspend or expel from any school any pupil who, upon investigation by the board of trustees, is found to be guilty of conduct injurious to the welfare of the school.

149(1) The board of trustees of a rural school district shall[1]

(d) provide adequate school accommodation for the children resident in the district who are between the ages of six and sixteen years;[2]

The implications of these statutory provisions are discussed in Chapter V in connection with the particular aspect of students' rights to which they relate.

4. OTHER LEGISLATION

As suggested earlier there are both federal and provincial laws which are not specifically concerned with education but do have some bearing on students' rights.

At the federal level, The Criminal Code (which, incidentally,

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[1]It might be noted that the verb used in 149(1) is "shall" (a mandatory power) while 147(1) uses "may" (a discretionary power).

[2]The Public Schools Act, secs. 147(1), 149(1).

is supreme among the laws of Canada) contains a reference to corporal punishment that is frequently cited:

> 43 Every school teacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.[1]

This brief section is an extremely important factor in all cases concerning corporal punishment and is discussed in this regard in Chapter V.

Another piece of federal legislation that has some relevance to this study is the Canadian Bill of Rights. This 1960 statute guarantees a number of freedoms for Canadians:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
> (b) the right of the individual to equality before the law and the protection of the law;
> (c) freedom of religion;
> (d) freedom of speech;
> (e) freedom of assembly and association; and
> (f) freedom of the press.[2]

The extent to which these provisions apply to students in schools

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[1] The Criminal Code, R. S. C. 1970, c. C-34 as amended to 1971, sec. 43.

[2] Canadian Bill of Rights, 1960, c. 44, part I, sec. 1.

is a crucial question. It will be shown later that a number of court decisions in the United States have clearly indicated that similar guarantees in that nation do apply to students. One important section of the Canadian Bill of Rights, however, clearly indicates that only matters within the jurisdiction of the federal government are affected by the Bill of Rights.

> (3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.[1]

Because, as discussed earlier, education is exclusively a provincial affair, it is unlikely that the provisions of the Bill of Rights can have any influence on educational matters.

A similar piece of legislation at the provincial level is the Manitoba Human Rights Act.[2] This legislation, however, deals with discrimination on the basis of race, religion, creed, sex, colour, and ethnic or national origin only in employment, housing and public facilities. It is unlikely that most of its provisions apply to schools, and it does not deal with discrimination on the basis of age.

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[1] Canadian Bill of Rights, part II, sec. 3.

[2] S. M. 1970; c. 104.

C. THE ROLE OF THE COURTS

Statute law and related regulations play an important role in setting out in legal terms, the character of schools. Sometimes, however, laws are unclear or ambiguous, conflicts appear to exist between different laws, or groups or individuals feel that they are not being treated within the intent of the law. It is in situations like these that the role of the courts becomes important.

MacKay[1] has outlined three functions which courts generally fulfill. These might be summarized as follows.

(1) arbitration of jurisdictional disputes (conflicts between different levels of government or situations where governing bodies overstep their authority and pass measures which are subsequently declared ultra vires. Most federal-provincial conflicts of this nature are now placed before the courts to avoid direct conflict between the governments.

(2) interpretation of legislation (where statutes are unclear).

(3) origination of legal principles that serve as precedents.

It is this last function that is perhaps the most important as far as this study is concerned. The works of Bargen and Enns are clear indications that many of the principles that guide educational decision-making have been developed not just through statute law, but also through case law.

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[1]MacKay, Legal Rights, Privileges, Responsibilities of Pupils, pp. 40-50.

> ... the legal aspects of school operation are not to be found in statutes alone. Of at least equal importance are the findings of the courts as set forth in their decisions and accumulated in judicial precedents. Although public education derives its structure from constitutional and statutory enactments, it gets a large measure of its operational pattern from the principles formulated in court decisions. [1]

While it is outside the scope of this study to describe in detail the concept of precedent in law, there are a few points which should be made to clarify the discussion of cases which comes later.

Basically, the concept of precedent means that the decision of a court in a particular case will influence the decisions subsequently made by other courts (or itself) in similar cases. While a precedent may be binding on another court, a number of factors determine the strength of a precedent.

The similarity of the circumstances in cases is one of the most important factors. If the material facts in a case are virtually the same as in a previously-decided case, then the decision of that previous case will strongly influence the later decision. The less the similarity, the less one case is likely to influence the decision of a later one.

The status of the courts concerned in the judicial hierarchy is also an important factor. Generally speaking "a judge must follow the

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[1]Enns, Legal Status of Canadian School Board, p. 6.

principles established by a judge of equal or higher standing in earlier cases dealing with similar circumstances."[1] This also means that a case that is decided at one level, can be appealed to the next highest level, so that, in a sense, all but the lowest courts can serve as appeal courts.

The Supreme Court of Canada is the highest court in our nation. Decisions of the Supreme Court bind all provincial courts, and even bind the Supreme Court itself, except in rare cases where the Supreme Court decides that a previous decision was wrong.[2]

The Manitoba Supreme Court, which is federally appointed, has both a trial division and an appellate division. Decisions in both divisions are binding on all other Manitoba courts.

The question of precedents from courts outside of Manitoba is complex. Aside from the Supreme Court of Canada, no other courts outside this province will necessarily have an influence on Manitoba courts. This does not mean, however, that a Manitoba court will completely ignore a decision made under similar circumstances in Saskatchewan or Ontario, or Great Britain, or even the United States.

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[1]F. A. R. Chapman, Fundamentals of Canadian Law (Toronto: McGraw-Hill Company of Canada Limited, 1968), p. 13.

[2]Enns, Legal Status of Canadian School Board, p. 20.

As a matter of fact, British case law can be extremely influential in Canadian decisions. Technically, all British cases prior to the entry of a province into Confederation can serve as precedent. In the case of Manitoba, of course, this means that only those principles derived before 1870 in Great Britain must serve as precedent. This would obviously be a much more important consideration in the case of a province like Newfoundland, which entered Confederation considerably later.

All Canadian provinces except Quebec (whose legal system is based on the Napoleonic Code) share a common legal heritage of British Common Law. In addition, the great similarity of the social conditions and the educational systems in all Canadian provinces means that a case in school law decided in one province of Canada can and should be influential in helping a judge to arrive at a decision in another province.

There is no question about the status of United States court cases in terms of precedent in Canadian courts: American cases most definitely are rarely cited as precedent in Canada. This is not to say, however, that American cases cannot and do not influence Canadian decisions. United States court decisions may not serve as precedent, but they can be <u>persuasive</u>. On occasion, a U. S. case may

even be mentioned in the judgement of a Canadian case.[1]

As Chapter V will reveal, there have been hundreds of cases in recent years in the United States concerning the legal rights of students, some decided by as high a court as the United States Supreme Court. In Canada there have been relatively few cases.

Kenny, in his investigation of the implications for schools of the lowering of the age of majority, explains why his study discusses so many United States cases:

> The question might be validly raised as to why the writer has referred at such length to United States cases and precedents when the issue under study concerns Canadian school law and Canadian school personnel. In any study predicated upon investigative analysis of similar criteria in roughly parallel social and economic circumstances, and in countries sharing a common heritage in language and law, it seems that awareness of recent trends and experiences would be an invaluable aid. The clear-cut differences, which many of the more chauvinistic Canadian educational and legal nationalists think they see, simply do not exist.[2]

It may prove useful, from the point of view of this study, to compare recent Canadian and American decisions in students' rights to see if there are similarities. If there are, it might be speculated

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[1]Part of the judgement in State v. Pendergrass, 2 Dev. & B., (N. Car.) 365, 31 Am. Dec. 416, an American corporal punishment case, was quoted in Rex v. Metcalfe, (1927) 3 O. L. R. 194, at p. 198. Cited in Bargen, Legal Status of Canadian Pupil, p. 127.

[2]Kenny, Lowering of Age of Majority, p. 69.

that areas of students' rights which have not come before the courts in Canada may, when they do, lead to similar decisions to those which already have been made in the United States. This question is discussed again near the end of this study.

CHAPTER V

THE LEGAL RIGHTS OF MANITOBA PUBLIC SCHOOL STUDENTS

A. INTRODUCTION

This chapter examines the legal rights of students in the selected areas listed in Chapter I. Each area of individual rights is discussed in a separate section of this chapter, although it becomes clear that there are inter-relationships among these areas.

Each section includes some general discussion of the area of rights that is under consideration. Where an examination of similar situations in the United States is of some relevance, these are considered. As explained earlier, there have been a number of significant developments in recent years in the field of students' rights in the United States. Because these might be indicative of future trends in our own country, because some American developments might influence our own future situations and because there may be value in comparing the status of students in that country to the status of Manitoba students, some consideration is given to American developments. In those areas of students' rights which have not become issues in Canada, although they have in the United States (such as procedural due process), particular emphasis is placed on the American picture.

Considerably greater attention, however, is given to Canadian statutes and cases, where these are available. Because most of the

significant cases prior to the early 1960's have been discussed in some detail in the works of Bargen[1] and MacKay,[2] and because little has been written about more recent developments, some emphasis is placed on cases that have been reported in the past ten years.

In addition to these discussions of statute law and case law, some consideration is given to published material on these topics. Again, Canadian writing is given greater emphasis than that concerning other countries.

B. ATTENDING SCHOOL AND RECEIVING AN EDUCATION

1. ATTENDANCE AS A RIGHT

Perhaps one of the most fundamental questions in the field of students' rights is whether or not students possess the right to attend school and receive an education. It is very clear that school attendance by children of certain ages is required by law. It is less clear, however, to what extent school attendance is a basic right of a child.

Analysis of school law in the United States points out that school attendance is not a right guaranteed by the federal constitution. While school attendance may be guaranteed by legislation at the state level, it is generally more in the realm of a privilege than a right. Like most privileges, it is subject to certain conditions which are made

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[1]Bargen, Legal Status of Canadian Pupil.

[2]MacKay, Legal Rights, Privileges, Responsibilities of Pupils.

clear by statutes and the precedence of cases.[1]

In Canadian school law, a similar principle applies. Both Bargen[2] and Kenny[3] have pointed out that school attendance is not a basic right in Canada. In addition, the concept of education as an obligation or duty is applicable in this country.

The decision of a judge in a Manitoba case in 1937 clearly articulates this principle:

> The [Public Schools] Act sets up a common school system, designed to afford to all children educational facilities that are virtually free; it goes further and insists that children have not only the privilege of attending school, but the obligation to do so. In other words, that school children should not only have the right to attend, but duty to attend school at all reasonable times. The underlying principle is that education is necessary, not only for the good of children, but is good for the present community and future society.[4]

As in many other aspects of school law, the welfare of society is seen as more important than the freedom of the individual. The attendance of children at school is considered highly desirable, if

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[1]Peterson, Rossmiller, Volz, Law and Public School Operation, p. 333; Drury and Ray, Essentials of School Law, p. 31.

[2]Bargen, Legal Status of Canadian Pupil, p. 60.

[3]Kenny, Lowering of Age of Majority, p. 56.

[4]Rex ex rel. Kowalski v. Oak Bluff School District, [1937] 3 D. L. R. 500, av. p. 504. Also quoted in MacKay, Legal Rights, Privileges Responsibilities of Pupils, p. 53.

not essential, for the welfare of society. To attain this end, many countries have established compulsory attendance laws.[1] At the same time school attendance is not seen in most parts of Canada or the United States as a guaranteed right in the same sense as freedom of speech or religion. While it is true that even these rights, as far as laws are concerned, are restricted, it is perhaps safe to suggest that school attendance is qualified to the point where it hardly qualifies as a right.

Principle Seven Of The United Nations Declaration of the Rights of the Child outlines the policy of that organization concerning a child's right to be educated:

> The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him on a basis of equal opportunity to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.[2]

It is significant that this policy suggests that the compulsion is part of the right.

Probably one of the most important aspects of a student's entitlement to attend school is that he or she must qualify, and continue

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[1]U. N. E. S. C. O. Rights and Responsibilities of Youth (Paris: U. N. E. S. C. O. -, 1972), pp. 27-8.

[2]Quoted in Ibid., p. 27.

to qualify, for it. In order to enter school, students must generally meet certain requirements. In order to remain in school, the students must continue to meet certain requirements, including conducting themselves in a manner satisfactory to the school. These requirements may be imposed by provincial authorities, school boards, or even the schools.

The Public Schools Act of Manitoba clearly gives people of certain ages the right to attend a school.

> 255(2) Every person between the ages of six and twenty-one years shall have the right to attend a school.[1]

It might be noted in passing that these ages do not coincide with the present compulsory attendance ages of seven to sixteen years.[2] This means that six-year-olds, and students between the ages of seventeen and twenty-one, have the right to attend school, but are not compelled to do so. MacKay[3] has pointed out that a similar situation exists in Saskatchewan.

Related to the concepts of compulsory school attendance and of attendance as a right is the obligation of school boards to provide school accommodation for students. This has been discussed in some detail

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[1]The Public Schools Act, Sec. 255(2).

[2]The School Attendance Act, Sec. 2(1) (c).

[3]MacKay, Legal Rights, Privileges, Responsibilities of Pupils, p. 107.

by Enns.[1] This obligation is described for Manitoba boards in The Public Schools Act.

> 155(1) The board of trustees of a city, town, or village, school district shall
>
> (a) provide adequate school accommodation for the children resident in the district who are between the ages of six and sixteen years;[2]

It is not pertinent to this study to discuss in depth the provisions for compulsory attendance which are contained in The School Attendance Act. There are, however, a few aspects of compulsory school attendance that do relate to the rights of students. While attendance is generally required of students between the ages of seven and sixteen, there is a certain amount of flexibility in the Act. Section 6(1), for example, indicates that the children may attend private schools, or be educated elsewhere, and still meet the requirements of the Act.

> 6(1) No parent, guardian or other person, is liable to any of the penalties of this Act in respect of any child or other person required by this Act to attend school regularly if
>
> (a) the child is in regular attendance at a private school in respect of which
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> (i) a report has been made within one year previous under section 5, that the private school affords an education equal to the standard of the public schools in the province; and

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[1]Enns, Legal Status of Canadian School Board, pp. 111-9.

[2]The Public Schools Act, s. 115(1).

> (ii) a report has been made regularly as required by section 19; or
> (b) he produces a certificate of a school inspector that in his opinion the child is being educated at home or elsewhere in a manner equal to the standard of the public schools of the province.[1]

This same section provides for non-attendance without penalty on grounds of "illness or other unavoidable cause,"[2] being excused by the principal, a justice of the peace or a magistrate for husbandry or household duties,[3] distance of the school from the child's home where no transportation is provided,[4] or, if the student is fully fifteen years of age, having obtained a certificate excusing him from attendance and signed by his parent or guardian, the school attendance officer, and the superintendent or inspector.[5]

Another legal reason for missing school is a religious holiday.

> 39 No penalty shall be imposed in respect of the absence of any child from school on any day regarded as a holy day by the church or religious denomination to which the child belongs.[6]

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[1] The School Attendance Act, Sec. 6(1), An Act Respecting School Attendance, Am. S. M., 1963, C. 74, ss. 2, 7; S. M., 1968, c. 56, s. 1; am.

[2] Ibid., Sec. 6(1)(c)

[3] Ibid., Sec. 6(1) d. Also Sec. 8(1)

[4] Ibid., Sec. 6(1)(f)

[5] Ibid., Sec. 6(1)(g)

[6] The School Attendance Act, Sec. 39.

It is quite clear in other Canadian provinces as well as Manitoba that the student or his parents do not normally have the power to choose which particular school the student may attend.[1] The privilege of making this choice may be given to a student if a school board wishes, but this privilege is at the discretion of the board, and may be changed or withdrawn at any time.

As suggested earlier, while The Public Schools Act describes school attendance as a "right", it is a right with the element of compulsion added. Enns has aptly described it as an "imperative right."[2] In addition a student must qualify to benefit from this right. In order to enrol in a school, a child must generally meet certain standards "concerned with age, residence, tuition and health."[3] In order to remain as a student, he must continue to meet certain requirements including the demonstration of conduct that is satisfactory to the school. Pupils who do not meet this requirement may be suspended or expelled. This matter will be considered in some detail in the next section of this chapter.

As indicated earlier,[4] a pupil may also forfeit his right to

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[1]Bargen, Legal Status of Canadian Pupil, p. 58.

[2]Enns, Legal Status of Canadian School Board, p. 113.

[3]Bargen, Legal Status of Canadian Pupil, p. 61.

[4]See above, p. 46.

attend school if he has been exposed to or is affected by vermin, or a communicable disease, or if he brings a gun or some other offensive weapon to school.

Another provision of The Public Schools Act, which does not appear to be very well known, indicates that a student who has failed a secondary grade may be refused re-admission to the same grade if he is over the age of sixteen.

> 255(3) Subject to subsection (4), a pupil enrolled in a secondary school grade who fails to pass to a higher grade may enroll again in the grade from which he has failed to pass;
>
> (4) In the case of a pupil over the age under which he is requested by law to attend school, the board of the district, area, or secondary school area, in which he is attending school may make an order under clause (u) of subsection (1) of section 147;[1]
>
> 147(1) A board of trustees may
> (u) on the recommendation of a principal of a secondary school, order that any designated pupil to whom subsection (4) of section 255 applies be not allowed to enroll again in a secondary school grade from which he has failed to pass;[2]

It would appear that this provision is rarely if ever invoked in the province at the present time. One reason may be that, with subject rather than grade promotion in secondary schools, and with many students enrolled in courses at more than one grade level, it is often difficult

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[1] The Public Schools Act, Sec. 255(3)(4)

[2] The Public Schools Act, Sec. 147(1)(u)

to say whether a student has passed or failed a grade.

2. DOES SCHOOL ATTENDANCE EQUAL EDUCATION?

This section refers to attending school and receiving an education. While these two concepts may be used interchangeably in many contexts[1] it could be suggested that a student may attend school but not necessarily receive an education. This is a distinction fraught with controversy, and it will not be discussed in this study. Section 255(2) of the Manitoba Public Schools Act uses the term "attend a school," so that it is clearly only school attendance that is granted as a right.

Some recent attempts by students in the United States to bring suit against their schools on the grounds that the schools had failed to educate them properly or to prepare them for employment do not appear to have been successful.[2]

3. MARRIED AND PREGNANT STUDENTS

A number of questions arise in this context. Is a child of compulsory school age who becomes married, pregnant, or both, still required to attend school? On the other hand, can a married or pregnant student be suspended or expelled from school on these grounds? Can a married or pregnant student be excluded from extra-curricular activities?

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[1] These have thus far been reported only in the news media and are too recent to appear in any legal reports.

An examination of Manitoba statutes and of Canadian cases has not yielded any useful principles. It might be kept in mind, however, that "sickness or other unavoidable cause" are legal grounds for not attending school.

In contrast to the Canadian picture, there has been considerable activity in these matters in the United States. On the basis of a number of court decisions, the National Association of Secondary School Principals has made the following generalizations:

- The right to an education is a fundamental property right not to be denied unless an overriding public interest is served.
- Marriage is not sufficient grounds for exclusion of a student from regular academic or extracurricular activities.
- Pregnancy, whether the girl is married or unmarried, does not appear to be sufficient grounds for exclusion from the regular academic curriculum and probably even extra-curricular activities.[1]

The implications of marriage and pregnancy for school attendance have been discussed recently in American publications. Three articles in the Phi Delta Kappan,[2] each one year apart, have considered various

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[1]National Association of Secondary School Principals, A Legal Memorandum Concering Student Marriage and Pregnancy (Washington National Association of Secondary School Principals, January, 1973), p. 6.

[2]Joe Huber, "Married Students vs. Married Dropouts," Phi Delta Kappan, Vol. L II, No. 2 (October, 1970), pp. 115-6.

[3]B. B. Brown, "Redefining the Status of Married High School Students," Phi Delta Kappan, Vol. L III, No. 2 (October, 1971), pp. 126-7.

Donald R. Warren, "Pregnant Students/Public Schools," Phi Delta Kappan, Vol. L IV, No. 2 (October, 1972), pp. 111-4.

aspects of the question. Another recent article on this subject has been written by Hudgins.[1]

Generally, then, American courts have held that education is of sufficient importance to an individual, and sufficiently in the nature of a right, that married or pregnant students cannot be excluded from curricular or extracurricular activities, even temporarily. On the other hand, compulsory attendance laws cannot be applied to a married student.

As suggested earlier, no cases of this type could be discovered in Canadian reports, and Manitoba statutes are silent in this matter. For these reasons, it is difficult to say what attitude a Canadian court would adopt in such cases.

4. SUMMARY

It can be said that people between the ages of six and twenty-one in Manitoba have the right to attend school. It must be added, however, that this is a qualified imperative right - with both the necessity to meet certain requirements, and the element of compulsion. While school boards have a legal obligation to provide school accommodation, they clearly have the right to impose certain requirements on their students and to exclude those students who do not meet the requirements.

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[1]H. C. Hudgins Jr., "Davis v. Meek: Marriage Can't Bar Extracurricular Activities," Nation's Schools, Vol. 91, No. 3 (March, 1973), p. 37.

Although compulsory attendance is established by legislation, there are certain grounds upon which students may be temporarily or even permanently excused by law. Although the status of married and pregnant students has been the subject of extensive litigation in the United States in recent years, this does not appear to be a concern at the present time in Canada.

C. THE CONTROL OF STUDENTS BY SCHOOL AUTHORITIES

1. THE CONCEPT OF PUPIL CONTROL

As mentioned in Chapter II, many books and articles have devoted some attention to the concept of pupil control. It has become an accepted and rather important aspect of our school system that teachers and other school personnel should exercise a certain amount of control over the pupils in their charge. This may be justified on the basis of the relative immaturity of young students and their tendency to "misbehave", or it may be explained in terms of numbers, where a ratio of twenty, thirty, or more pupils to one teacher might be said to necessitate some measure of disciplinary control to permit some degree of order, presumably to facilitate learning and to assure the physical safety of those concerned (in some cases the teacher's as much as the students'!)

As Bargen has pointed out, this kind of control is an infringement on the personal freedom of the individual student for the sake of the effectiveness of the school system.

> In general it would seem that the overall legal framework within which the schools control their pupils is based on the principle that education is a privilege afforded by the state to the individual. For the sake of this privilege the individual must sacrifice a measure of personal freedom in order to insure that the educational system achieves its maximum usefulness and effectiveness.[1]

More critical observers of the schools might also suggest that some formalized system of external control is needed to compensate for the failure of the schools to motivate and interest their pupils through curricula.

2. IN LOCO PARENTIS

Basic to the principles of pupil control is the concept in loco parentis. This means that some individuals, such as teachers, may, in certain situations, stand in the place of the parent to the child, and that they may exercise certain powers that are normally considered the prerogative of parents.

The concept is described in Corpus Juris Secundum in the following terms:

> As a general rule a school teacher, to a limited extent at least, stands in loco parentis to pupils under his charge, and may exercise such powers of control, restraint, and correction over them as may be reasonably necessary to enable him properly to perform his duties as teacher and accomplish the purposes of education, and is subject to such limitations and prohibitions as may be defined by legislative enactment . . .[2]

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[1] Bargen, Legal Status of Canadian Pupil, p. 113.

[2] "Control of Pupils and Discipline," Corpus Juris Secundum, 79 C. J. S. No. 493 (1952). Also quoted in Bargen, p. 114 from 56 C. J. No. 1088 (1932).

To ensure that the school may accomplish its objectives with the majority of students, school personnel such as teachers and principals (and, in some cases, even school bus drivers)[1] are authorized by law to use whatever force is reasonable. This may involve the temporary or permanent removal of the student from the school, physical punishment, or other reasonable means.

This does not mean, though, that school authorities have unlimited power to do whatever they wish with students. Bargen has outlined three questions that courts generally consider in cases involving the discipline of pupils.

> 1. Was the teacher acting within the scope of his legal authority? This question involves the statutory authority of the teacher as well as his authority in loco parentis.
> 2. Was there cause for punishment? In answering this question the courts have indicated their reluctance to set aside a teacher's judgment.
> 3. Was the punishment reasonable under the circumstances? This question generally constitutes the heart of any litigation and must be answered on the basis of precedent and common law.[2]

As the following sections on suspension and expulsion and on corporal punishment reveal, these considerations are fundamental when the authority of school personnel to control the actions of students through sanctions is called into question.

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[1]See below, pp. 90-91.

[2]Bargen, Ibid., p. 117.

In recent years, the concept of loco parentis has been considerably eroded in the United States through a series of court decisions. It has also been suggested that this principle is not as strong in Canada as it once was. This question is further discussed in Chapter VI.

3. LEGAL AUTHORITY FOR THE CONTROL OF STUDENTS IN MANITOBA

In Manitoba, the principal is designated as one of the key people in the discipline of students.

> Regulation 106/70 Part VI
> 31. Where two or more teachers are employed in one school the school board shall designate one to act as principal and for purposes of these regulations a teacher of a one-room school shall be considered a principal.
> 32. Subject to the provisions of The Public Schools Act, these regulations, and instructions of the school board and of the school inspectors, the principal shall be in charge of the school in respect of all matters of organization, management, discipline, and instruction.
> 38. The principal shall be responsible for the supervision of pupils, buildings and grounds during school hours.
> 43. The principal shall exercise disciplinary authority over the conduct of each pupil of his school from the time of the pupil's arrival at school until his departure for the day, except during any period when the pupil is absent from the school premises at the request of his parent or guardian.
> 44. (1) The principal shall have disciplinary authority over all pupils of his school in their conduct towards one another on their way to and from school, and, in districts or divisions which provide transportation, the principal shall have disciplinary authority over the conduct of the pupils while they are in the conveyance.
> (2) The driver of a school bus shall report to the principal any misconduct of children while entering, leaving or being

conveyed in a vehicle under his charge.[1]

In addition, The Public Schools Act (includes discipline as one of the duties of a teacher

> 283 Every teacher shall
> (c) maintain proper order and discipline in the school according to the regulations.[2]

4. SUMMARY

It is a generally accepted principle, in terms of tradition and law, the school personnel may control the actions of their students within reasonable limits and may use reasonable forms of punishment to encourage acceptable behaviour. While this clearly restricts the freedom of the individual student, the effectiveness of the school system is considered of sufficient importance to justify this restriction. In the eyes of the law teachers stand in loco parentis to their students.

D. SUSPENSION AND EXPULSION

1. INTRODUCTION

One of the most common methods used by schools to correct the behaviour of individual students and to ensure that the majority of students receive the appropriate benefits from their school experience is to remove

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[1]Manitoba Regulation 106/70. Under The Education Department Act. Manitoba Gazette, Vol. 99, No. 31 (August 1, 1970), p. 301.

[2]The Public Schools Act, Sec. 283, An Act Respecting Public Schools, R. S. M., c. 215, s. 265.

misbehaving or unfit students from the school. In this chapter, the term "suspension" is used to mean a temporary exclusion of a student from a school (in Manitoba, up to six weeks), while long-term removal (for the remainder of the school year, or even permanently) is referred to as "expulsion".[1]

Both Bargen[2] and MacKay[3] have discussed in some detail the matter of suspension and expulsion for reasons of disobedience and misconduct, damaging school property, truancy, and mental retardation. Because this subject and the relevant cases until the time those studies were carried out have been adequately covered in those studies, it is perhaps sufficient for the purposes of this thesis to include the principles derived by Bargen.

> From an analysis of the cases involving suspension and expulsion the following principles can be deduced:
> 1. Teachers and school boards have the power to suspend or expel a pupil for just and reasonable cause.
> 2. A valid reason for suspension or expulsion is any offence that interferes with the efficient operation and purposes of the school.
> 3. Some indication that he desires to reform may be required of a pupil as a condition of his readmittance to school.
> 4. Malice must be proven, not only implied, before a Court will use it as grounds for interfering with a reasonable decision of a teacher or board in matters of suspension or expulsion.

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[1]Bargen, Legal Status of Canadian Pupil

[2]Ibid., pp. 118-25.

[3]MacKay, Legal Rights, Privileges, Responsibilities of Pupils, pp. 134-44.

5. The Courts are reluctant to interfere with the manner in which school authorities use their discretionary powers, unless such powers are abused.
6. A teacher cannot be compelled by a board of trustees to suspend or expel a pupil unless the teacher has a reasonable complaint against the pupil. [1]

2. SUSPENSION AND EXPULSION IN MANITOBA

In Manitoba, The Public Schools Act gives school boards the authority to suspend or expel students while The Education Department Act and a regulation under that Act authorize principals and superintendents to suspend students for limited periods of time. The grounds for suspension and expulsion are also mentioned.

147(1) A board of trustees may

(x) suspend, or expel from any school of the district any pupil who carries to school a rifle, gun, or other offensive or dangerous weapon, after a warning by the teacher or trustee not to do so;

(z) suspend or expel from any school of the district any pupil who, upon investigation by the board of trustees, is found to be guilty of conduct injurious to the welfare of the school. [2]

Regulation 106/70 outlines the powers given to principals and superintendents

37. (1) The principal of any school may suspend, for a period not exceeding six weeks a pupil who persists in conduct which the

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[1] Bargen, Legal Status of Canadian Pupil, p. 124.

[2] The Public Schools Act, Sec. 147.

> principal deems injurious to the welfare of the school; provided that in any school district, or division having a superintendent of schools, the board of trustees for such district, by resolution duly passed and recorded in its minutes, may provide that a suspension by a principal of any of its schools shall not be effective for a period in excess of one week unless approved by such superintendent of schools.
>
> (2) Where any school district, or division, has a superintendent of schools in charge of schools within the district, or division, the superintendent shall have authority and power, if so authorized by the board of trustees of the district or division by resolution duly passed to suspend, for a period not exceeding six weeks, a pupil who persists in conduct that he deems injurious to the welfare of the school.
>
> (3) In all cases of suspension by a principal or superintendent, the suspending officer shall within twenty-four hours, report, in writing, the suspension to the board of trustees, and shall, in the report, set out the name of the pupil, the period of suspension and the acts or conduct for which said pupil was so suspended.
>
> (4) The board of trustees may review any suspension and may revoke or amend the same as it may see fit.[1]

As this Regulation indicates, a principal in Manitoba is empowered to suspend a student for as long as six weeks, unless this is limited to one week by the board of trustees. Similarly, a superintendent may suspend a student for as long as six weeks, if he is so empowered by the board. This would mean that a superintendent does not have any power of suspension unless granted this power by the school board.

It is significant that, while principals and superintendents in Manitoba may suspend students, the power of expulsion is given only to school boards. The fact that only school boards can decided to

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[1]Regulation 106/70., Sec. 37.

expel a student is presumably an indication of the seriousness of this punishment.

The general grounds for suspension or expulsion are the same in each provision: "conduct injurious to the welfare of the school." As pointed out earlier, statutes and the courts have traditionally indicated that the efficient and effective operation of the school is of greater importance than the welfare or freedom of any individual student, and these Manitoba provisions are in keeping with this emphasis.

The term "conduct injurious to the welfare of the school" is obviously very broad and in itself places considerable responsibility on the discretion of the school officer. It might be noted however, that the regulation authorizes suspension for conduct that the principal or superintendent deems injurious to the welfare of the school. This places even further emphasis on the educator's judgement. Similarly, The Public Schools Act authorizes a school to suspend or expel any student whom the board finds guilty of injurious conduct. The implications of these provisions will be discussed further in the section of this chapter that considers procedural due process.

One other significant aspect of the regulation is that the pupil must "persist" in injurious conduct. Again, this may be taken as an indication of the seriousness of suspension (it must be used only after a series of offences) and it would appear to place some responsibility on school officials to be able to prove that the behaviour has been persistent

(presumably through keeping specific records of offences).

Subsection 4 of Section 37 of Regulation 106/70 authorizes a board of trustees to review any suspension and to "revoke or amend the same as it may see fit." This implies that a school board can act as a board of appeal for a suspended student. The implications of this provision also will be considered in the discussion of procedural due process.

3. SUMMARY

Suspension or expulsion as a means of disciplining students is clearly established by statute law in Canada and has been supported by the courts. The power to suspend or expel is generally granted to local school officials. Generally students may be suspended or expelled if they interfere with the effective operation of the school.

In Manitoba, principals and superintendents generally may suspend students, but only school boards have the power of expulsion.

E. CORPORAL PUNISHMENT

1. INTRODUCTION

The use of physical force by teachers to discipline students probably dates back as far as 2500 B. C., if not earlier.[1] Of all of

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[1]Canadian Education Association, A Report on Corporal Punishment in Canadian Schools (Toronto: Canadian Education Association, Research and Information Division, 1967), p. 1.

the traditions of education, corporal punishment is undoubtedly one of the most fruitful sources of discussion and disagreement. While there appears to be considerable and growing opposition to the practice,[1] corporal punishment continues to be used in most Canadian provinces[2] and continues to be supported by both statute and case law.

While the federal statute authorizing the use of force is rather general, the practice generally takes the form of chastisement across the palms of the hands with a rubber or leather strap.

2. LEGAL AUTHORITY FOR CORPORAL PUNISHMENT

It is perhaps worthy of note that, although education is almost exclusively a provincial responsibility, the authorization for the use of force by teachers is found in the federal Criminal Code.

> 43. Every school teacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.[3]

This section permits teachers and others in loco parentis to use reasonable force. The same amount of force used by others, who are

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[1]John R. Pengelly, "The Strap," Monday Morning (March, 1969) pp. 20-1.

[2]C. E. A., Report on Corporal Punishment, pp. 3-6.

[3]Criminal Code, Sec. 43. An Act Respecting the Criminal Law, Revised Statutes of Canada, 1970. Chapter C-34 and amendments.

not in loco parentis, or unreasonable force used by teachers, could constitute common assault, which carries definite penalties.

> 26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.
>
> 244. A person commits an assault when without the consent of another person or with consent, where it is obtained by fraud,
> (a) he applies force intentionally to the person of the other, directly or indirectly,
> or
> (b) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose.
>
> 245. (1) Every one who commits a common assault is guilty of
> (a) an indictable offence and is liable to imprisonment for two years, or
> (b) an offence punishable on summary conviction.
> (2) Every one who unlawfully causes bodily harm to any person or commits an assault that causes bodily harm to any person is guilty of an indictable offence and is liable to imprisonment for two years. [1]

Because of the supremacy in this field of federal laws in general and of the Criminal Code in particular, most provincial statutes have only brief and very general references to corporal punishment.[2]

The statutes of Manitoba are extremely general, and deal with discipline only in very broad terms:

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[1] Criminal Code, Secs. 26, 244, 245.

[2] C. E. A., Report on Corporal Punishment, pp. 3-6.

283. Every teacher shall
(c) maintain proper order and discipline in the school according to the regulations.[1]

32. Subject to the provisions of the Public Schools Act, these regulations, the instructions of the school board and of the school inspectors, the principal shall be in charge of the school in respect of all matters of organization, management, discipline, and instruction.[2]

Because such provisions are so general, many school boards or specific schools have chosen to develop their own policies on corporal punishment. While this study has not undertaken to survey boards or schools to determine current policies or practice, the C. E. A. report on corporal punishment has suggested a number of areas which are often included in board-level policies:

- who is entitled to authorize corporal punishment
- who is entitled to administer corporal punishment
- the need for witnesses
- the exact form the punishment should take (e.g., strapping on palms of hands)
- the necessity to record reasons, dates, times, extent of punishment.[3]

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[1] Public Schools Act, Sec. 283.

[2] Regulation 106/70, Sec. 32.

[3] C. E. A., Report on Corporal Punishment, pp. 10-13.

An interesting question is whether a school board, or even a provincial government, has the power to ban corporal punishment in schools. A recent case in point is the decision of the Winnipeg School Board to abolish corporal punishment in its schools.[1] While it is not possible to change the fact that the Criminal Code authorizes the use of reasonable force, it is possible that a teacher who uses corporal punishment in a school where it has been officially abolished may at least be taken to task for acting contrary to board policy, especially if such a policy is understood as a condition of employment.

3. REASONABLE FORCE

It is made very clear in Section 26 and 43 of the Criminal Code that only "reasonable force" is authorized. A key question, then, is "What constitutes reasonable force?"

Both Bargen[2] and MacKay[3] have examined a number of cases to determine what kinds of force have been considered reasonable and unreasonable by the courts. Again, because these cases have been adequately discussed in these works, only the general principles emanating from them will be discussed here. Three recent cases,

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[1]Winnipeg Free Press, June 12, 1973, pp. 1 and 17.

[2]Bargen, Legal Status of Canadian Pupil, pp. 129-33.

[3]MacKay, Legal Rights, Privileges, Responsibilities of Pupils, pp. 154-65.

which were tried after the publication of the two studies, and which reveal the policies of the courts on corporal punishment will then be considered.

Bargen has derived the following principles from his examination of corporal punishment cases, including some criteria of reasonable punishment.

> 1. The authority for inflicting punishment upon their pupils is discretionary to the teachers.
> 2. Corporal punishment may be administered only in the teacher-pupil relationship.
> 3. When corporal punishment is administered the Courts will presume that the teacher acted without criminal intent to injure, and the chastisement will be considered reasonable and for sufficient cause until the contrary is shown.
> 4. Punishment is considered reasonable when:
> a. It is for the purpose of correction and without malice.
> b. There is sufficient cause for punishment.
> c. It is not cruel nor excessive and leaves no permanent mark or injury.
> d. It is suited to the age and sex of the pupil.
> e. It is not protracted beyond the child's power of endurance.
> f. The instrument used for punishment is suitable.
> g. It does not endanger life, limbs, or health, or disfigure the child.
> h. It is administered to an appropriate part of the pupil's anatomy.[1]

Similarly, MacKay has identified a number of principles, derived largely from British and American cases:

> (1) The teacher has the authority to administer moderate corporal punishment.

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[1]Bargen, Legal Status of Canadian Pupil, pp. 128-9.

(2) The conditions under which corporal punishment is to be administered is left to the discretion of the teacher.
(3) The use of force by a teacher does not constitute assault and battery except when such force is used in excess under the circumstances.
(4) The courts consider corporal punishment administered by a teacher to be reasonable until the contrary is shown.
(5) Teachers are authorized to make regulations that pupils are to obey.
(6) Ignorance on the part of parents of the existence of a school regulation does not limit or qualify the teacher's authority to administer corporal punishment.
(7) A teacher may punish a child for his actions off school premises.
(8) Excessive punishment cannot be excused on the grounds that that the motives of the individual administering such punishment were good. [1]

MacKay's consideration of Canadian cases concerning corporal punishment brings out the following criteria of unreasonable punishment.

1. The punishment is maliciously administered.
2. The punishment is administered to satisfy passion or rage.
3. There is no causal connection between the behavior and the punishment.
4. The reason for the chastisement is insufficient.
5. It is unsuitable to the age, sex, and condition of the pupil.
6. It is prolonged beyond the pupil's power of endurance.
7. The instrument employed for punishment is unsuitable.
8. The punishment results in permanent injury.
9. There is a risk of serious damage to the body part to which the punishment is applied.
10. An inappropriate body part is inadvertently struck while administering punishment to an appropriate body part. [2]

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[1]MacKay, Legal Rights, Privileges, Responsibilities of Pupils, pp. 153-4.

[2]MacKay, Legal Rights, Privileges, Responsibilities of Pupils, pp. 167-8.

4. SOME RECENT CASES

Three cases, all of which came to the courts in 1970, illustrate the kinds of considerations that are taken into account in arriving at a decision.

One case[1] concerned a Saskatchewan vice-principal who was supervising in the school yard one Friday afternoon and saw three pupils leaving by school bus. The three boys allegedly shouted names at the vice-principal, so on the following Monday the vice-principal, on seeing the three boys in the school yard, slapped them across their faces. At a trial that was held, the Judge determined that one of the boys had not called the accused names, and the vice-principal was convicted of assault. There was an appeal, however, which found that the vice-principal had reasonable cause to believe that all three boys had shouted at him and that the force used was reasonable. It is significant that the appeal court considered a slap on the face to be reasonable punishment and that the lapse of three days between the offence and the punishment did not make the punishment unreasonable.

A Yukon Territories school bus driver[2] was charged with assaulting a seven-year-old boy. The boy had apparently been disturbing

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[1] R. V. Haberstock (1970), C. C. C. (2d) 433 (Sask. C. A.) in [1971] C. C. L. 631, p. 12.

[2] R. V. Trynchy, (1970) 73 W. W. R. 165 (M. C.)

and punching other passengers. The driver stopped the bus, after warning the boy, admittedly picked him up by the arms, and asked him if he would "smarten up." When the boy agreed, the driver allegedly dropped the boy on the seat, and the boy later claimed to have hit his head on the side of the bus.

The court determined that the bus driver stood in loco parentis to the child and had used reasonable force. The charge was therefore dismissed.

It is significant that school officials other than teachers and principals may be in loco parentis. It is also worth noting that the force used in this case was hardly the traditional strapping, and it was nonetheless considered to be reasonable under the circumstances.

A recent Manitoba case[1] saw an elementary school principal from the Winnipeg School Division charged with assault causing bodily harm after the strapping of a twelve-year old male student. The boy apparently had marks and bruises on his body following the strapping, and it was alleged that these had been caused by the strapping. Because it was not shown in court that the punishment was excessive (it was questionable that the marks had been caused by the strapping), the principal was found not guilty and the charged was dismissed.

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[1]The case of William Alexander Dueck, City Magistrate's Court, April 8, 1970. (Magistrate A. Pilutik).

Because this is a recent case, and because it took place in Manitoba it may be considered relevant to this study to examine the judgement of this case.[1]

The magistrate, in his judgement, considered one main question: whether the punishment was excessive. In considering this question, reference was made to several cases which established precedent in this matter. A second question was whether the principal acted with malicious intent or was simply acting in consideration of his duty. In both questions, the principal was not found to be at fault, and he was subsequently found not guilty.

5. SUMMARY

The use of reasonable force by teachers and others standing in loco parentis to a child is authorized by the Criminal Code. While the criteria for "reasonable force" vary with the circumstances of the case, a number of guidelines can be discovered by reference to court decisions.

F. ACADEMIC PUNISHMENTS

One aspect of students' rights which has received very little attention in both Canada and the United States is the use of academic punishments for non-academic offences.

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[1]The complete text of the judgement is contained in Appendix.

Examples of this would be the withholding of mark statements or credits (academic punishments) for behaviour infractions, failing to return or pay for damaged textbooks, or failing to pay library or parking fines (non-academic offences).

The experience of this writer, and other educators who have been consulted, indicate that such practices are not uncommon in public schools or at the university level. While this would appear to be an area of school authority over students that might be the cause of some conflict, no precedents could be discovered in Canadian or American reports. Certainly there are no statutes or regulations in Manitoba to deal with such matters.

G. PROCEDURAL DUE PROCESS

1. INTRODUCTION

The concept of due process of law is probably one of the most fundamental and important aspects of our legal system, yet one of the most difficult to define in precise terms.

One of the major difficulties in defining the concept is that it is a very general principle. Ballentine's Law Dictionary offers a number of definitions:

> Law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights.
>
> 'Due process of law' implies and comprehends the administration of laws equally applicable to all under established rules which do

> not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding by hearing upon notice.[1]

Basically, due process is a traditional and important safeguard which is designed to protect the individual from the arbitrary exercise of state power. A Canadian source has made the following observation:

> Conceived by the common law, nourished by the Criminal Code, and sanctified by the Bill of Rights, the due process safeguards stand as a legal barricade against the arbitrary exercise of state power. The central factor uniting these safeguards is a concern for the liberty and dignity of the accused person. Recognizing that the protection of all requires some periodic encroachment on some, our law has sought to limit such encroachment. If there must be intrusions, only the proven guilty should suffer them. And if the guilty must suffer, they should suffer no more than is absolutely necessary.[2]

Both the American Constitution and the Canadian Bill of Rights contain guarantees of due process:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[3]

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[1]Ballentine, Law Dictionary, p. 380.

[2]Canadian Civil Liberties Education Trust, Due Process Safeguards and Canadian Criminal Justice - A One Month Inquiry (Toronto: Canadian Civil Liberties Education Trust, 1971), p. 45.

[3]Constitution of the United States of America, Fourteenth Amendment.

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the rights of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law

(b) the right of the individual to equality before the law and the protection of the law. [1]

The Bill of Rights describes some of the specific safeguards involved in due process:

2. ... no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained
(i) of the right to be informed promptly of the reason for his arrest or detention,
(ii) of the right to retain and instruct counsel without delay, or
(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

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[1] Canadian Bill of Rights, 1960, c. 44.

> (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause;
> or
>
> (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted. [1]

A distinction is sometimes made between "substantive due process" and "procedural due process." Substantive due process of law is a broader term, and refers to the concept of an individual's receiving all the rights to which he or she is entitled by law. Procedural due process refers more specifically to the procedures used in a discipline situation; such matters as a fair hearing, the right to call witnesses, and the right to a reasonable penalty form parts of this aspect of due process. [2]

It can be seen that the concept of due process of law underlies virtually all the aspects of students' rights that are under consideration in this thesis. Both substantive and procedural due process are matters of concern in all situations where the state, or any arm of the state, attempts to control the activities of individuals. While both substantive

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[1] Ibid.

[2] The Yearbook of School Law, 1971, p. 253.

and procedural due process are therefore related by students' rights, it is the procedural aspect that is emphasized in this section.

2. DUE PROCESS IN THE UNITED STATES

A number of cases in the United States in recent years have established some significant principles concerning the rights of children generally and of students particularly to procedural due process. It is important to keep in mind, when considering these American findings, that, as discussed earlier, the application of principles of United States law to Canadian law is always open to question. This is particularly true where procedural matters are concerned, since the Constitutional basis of American law cannot be transplanted into a Canadian context.

One of the most important court pronouncements in the field of juvenile rights in the United States is a 1967 decision of the U. S. Supreme Court. In re Gault[1] is a juvenile rights case, but it has important implications for school discipline as well. Probably the most important principle to emerge from this case is that the safeguards of procedural due process apply to juveniles just as much as to adults, including the right to a fair hearing and, in court proceedings, to be represented by counsel. An often - quoted statement from the

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[1]387 U. S. 1, 13 (1967).

judgement clearly indicates that children must be accorded due process of law:

> Whatever may be their precise impact neither the Fourteenth Amendment nor the Bill of Rights is for adults along.[1]

An earlier landmark case concerning college students, with some implications for public school students, is Dixon v. Alabama State Board of Education.[2] This case concerned six Black students at Alabama State College who were expelled after taking part in a sit-in at a lunch counter. The court of appeal that gave the final word in the case established the principle that students at a tax-supported institution of learning who face expulsion or lengthy suspension are entitled to a fair hearing, including an opportunity to testify on their own behalf and to present witnesses.

In 1967, the Supreme Court of New York was informed that a senior high school student who had been accused of cheating confessed in writing to the acting principal while she was in a highly excited condition. Although she retracted the confession the next day, the acting principal notified the state department of education and the girl's examination privileges were suspended. The court declared

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[1]Ibid., cited by Michael Abbot, "Demonstrations, Dismissals, Due Process, and the High School: An Overview," The School Review, Vol. 77, No. 2 (June, 1969), p. 129.

[2]294 F. 2d 150, 157 (5th Cir.), cert. denied 368 U. S. 930 (1961).

that in a serious matter like this (the student would not have been able to receive a state diploma) a fair hearing must be held. Because no such hearing had taken place, the court ordered the reinstatement of her examination privileges and required that all references to the alleged cheating incident be removed from school and state records.[1]

Although these and other cases have indicated that public school students are entitled to procedural due process, there have also been judgements in the other direction. No clear principles have yet emerged in regard to such aspects as the type of hearing (if any), notice, the right to call witnesses, and the use of an attorney.[2] Perhaps the only generalization that can be made at this point is that there has been more of a tendency recently in the United States to accord to students the rights of procedural due process in discipline cases involving serious consequences.

An indication of the general concern in American education about the emergence of this tendency can be seen in the number of articles that have been published on the topic in a variety of journals.

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[1] Goldwyn v. Allen, 281 N. Y. S. (2d) 899.

[2] Sandman, Students and the Law, pp. 138-44.

Typical of these articles are those of Abbot,[1] Voelz,[2] Mallios,[3] and Triezenberg.[4]

3. PROCEDURAL DUE PROCESS IN MANITOBA

As discussed earlier, the Canadian Bill of Rights guarantees that no person can be deprived of certain basic freedoms except by due process of law, and the Bill outlines some details of procedural due process. While this seems to be similar to the provisions of the Fourteenth Amendment to the American Constitution, it is actually much narrower. The American Constitutional provision is applicable to any state government, as well as the federal government. The Canadian Bill of Rights, however, applies only to those matters that come under the jurisdiction of the federal government.

> Part II (3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.[5]

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[1]Abbot, "Demonstrations, Dismissals, Due Process," pp. 128-44.

[2]Stephen J. Voelz, "Expulsion Laws Confront Due Process in Federal Courts," The Bulletin of the National Association of Secondary School Principals, Vol 55, No. 352 (February, 1971), pp. 28-36.

[3]Harry C. Mallios, "Due Process and Pupil Control," School and Community, Vol. LVII, No. 7 (March, 1971), p. 34.

[4]George Triezenberg, "How to Live with Due Process," The Bulletin of the National Association of Secondary School Principals, Vol. 55, No. 352 (February, 1971), pp. 61-8.

[5]Canadian Bill of Rights, 1960, c. 44.

Since education is very clearly a provincial responsibility, it is highly unlikely that the provisions of the Canadian Bill of Rights could have any application in educational matters.

Another important difference that must be considered is in the field of juvenile rights. In Canada, the juvenile offender is dealt with under the Juvenile Delinquents Act. The basic emphasis of this Act is significantly different from the normal provisions for trial.

> 3(2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.[1]

In keeping with this philosophy, provision is made for trials to be private, publication of details, including names, is forbidden, and proceedings may be informal, Juvenile court trials, then, are more in the nature of hearings than formal adversary proceedings, and attorneys are generally not involved. This is clearly different from the kind of procedure that is implied by the Gault decision.

Attempts to locate any Canadian cases that involve the principles of procedural due process in relation to public school students have been unsuccessful.

In Manitoba, the statutes and regulations governing education make

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[1] An Act Respecting Juvenile Delinquents, R. S. C. 1970 c. J-3.

little reference to the procedures involved in the discipline of students. As the earlier sections in this chapter on pupil control, suspension and expulsion, and corporal punishment have illustrated, the provincial provisions for student discipline are phrased in very broad terms. While the powers and rights of school authorities are specifically outlined, almost no reference is made to the procedures to be followed in disciplining students and virtually nothing is said about the entitlement of students to a fair hearing or to any of the other aspects of procedural due process.

As the earlier discussion of suspension and expulsion[1] has indicated, principals and superintendents may generally suspend students for conduct which they deem to be "injurious to the welfare of the school." It is clear that a great deal of importance is attached to the judgement of school officials, and no attempt is made in the statutes or regulations to define what kind of conduct qualifies as "injurious" or what exactly is meant by "the welfare of the school."

Some provision is made for a school board to review any suspension and to amend or revoke it. It would seem that this suggests a kind of appeal procedure which a student (or his or her parents) might utilize. It might also be kept in mind that a principal or superintendent is required to notify the board within twenty-four

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[1]Above, pp. 78-80.

hours of the details of any suspension.

The power of expulsion as indicated earlier, is granted only to school boards. The section of The Public Schools Act that grants this power does make reference to some investigation by the school board.

> 247(1) A board of trustees may
>
> (z) suspend or expel from any school of the district any pupil who, upon investigation by the board of trustees, is found to be guilty of conduct injurious to the welfare of the school. [1]

A possible reason for the mention of investigation is that a board of trustees is assumed to be less familiar with day-to-day events in a school and less acquainted with individual students than a principal or even a superintendent. Thus an investigation by a board may be desirable to determine whether a suspension or expulsion is desirable. A second possible reason for the investigation is that expulsion is, by its nature, a very serious punishment, and merits some inquiry before it is imposed.

It is perhaps significant that the form this investigation is to take is not described. How does a board investigate? May a student or his parents be involved? Such details are not mentioned.

No provision can be found in the Acts or regulations for appeals beyond the board level. While, in actual practice, parents have been known to appeal on their children's behalf to school inspectors,

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[1] The Public Schools Act, Sec. 147.

Department of Education officials, or even the Minister of Education, there is no specific provision for such appeals. While the authority of Departmental officials below the ministerial level to force schools or boards to change or reconsider decisions is not clear (the Minister himself has almost unlimited powers) it is quite probable that even informal intervention by such "outsiders" can lead to a mutually-agreeable settlement.

Beyond this of course, there are always the courts. The relatively small number of school law cases, particularly those involving students' rights, not only in Manitoba but in Canada generally, is a definite indication that Canadians are not inclined to take their school grievances to court.

3. SUMMARY

While there have been a number of court cases in the United States involving the concept of procedural due process for students, and while there appears to be a definite tendency towards extending to juveniles and public school students at least some aspects of due process, there are still several aspects which are not clear.

Although the Canadian Bill of Rights guarantees procedural due process, it is unlikely that these provisions have any necessary bearing on school discipline cases. The statutes and regulations concerning education in Manitoba suggest some form of investigation in some cases

of suspension and expulsion, but on the whole they make little reference to the procedures to be taken in discipline cases involving students.

H. POLICE IN THE SCHOOLS

1. INTRODUCTION

In the past ten years, the presence of police officers in schools has probably become a more common occurrence than previously. In some parts of the United States and Canada, police officers are located in public schools on a regular basis. Although the emphases in such programs are generally on establishing a better relationship between students and police and on crime prevention and counselling, there is little doubt that increased incidents of violence in schools, problems of drug abuse and trafficking, and the potential for student unrest have helped to bring about the establishment of police-school programs.[1]

While such programs in Canada, at least in smaller communities, do not appear to be common at present, it is not unusual for police officers to visit schools on occasion, for a variety of reasons. They may be called in by school officials to investigate crimes in relation to the school (e.g., break-ins, vandalism, theft, drug trafficking). On other occasions, police may come to schools in the process of

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[1]John G. Miller and Edward L. Stribley, "Cops in Your Schools: If You Must, You Must - But Make It Pay Off in a Better Break for Kids," The American School Board Journal, Vol. 159, No. 10 (April, 1972), pp. 32-5.

investigating offences which may have taken place outside the school, in which students are believed to have some involvement. In such circumstances, they may request the principal to arrange for them to interview students, and occasionally they may even arrest students in schools.

The idea of police in schools raises a number of questions. Are police officers entitled to enter schools during school hours? Can they insist on seeing certain students, or can they do this only with the permission of the principal? What rights does a student possess with respect to questioning and arrest? What role does the school play when a student is being questioned? Are police officers entitled to see school documents or records containing information about students?

2. THE LEGAL STATUS OF POLICE OFFICERS

The definitions and powers of peace officers largely come under the jurisdiction of the federal Criminal Code.

> 2. In this Act
>
> > "peace officer" includes
> > (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process, [1]
>
> 25. (1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

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[1] Criminal Code, R. S. C., 1970, Chapt. c-34.

(a) as a private person,
(b) as a peace officer or public officer,
(c) in aid of a peace officer or public officer, or
(d) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose. [1]

Supported by this provision of the Criminal Code, as well as by many court pronouncements, police officers are able to exercise considerable discretion in carrying out their duties.

Another important consideration is that it is an offence to resist or obstruct a peace officer in the execution of his duty.

118. Everyone who
(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

is guilty of an indictable offence and is liable to imprisonment for two years.

3. POLICE OFFICERS IN MANITOBA SCHOOLS

While the matter of police officers entering schools for the purpose of investigation or arrest does not appear to be a major concern in Manitoba, it was considered of sufficient importance in 1968 by the Provincial Executive of the Manitoba Teachers' Society that the Ideals and Practice Committee of that organization was assigned the task of studying and reporting on the matter of police interrogation of students.

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[1] Ibid.

Although the report subsequently issued by that Committee[1] and a resulting opinion by a Crown Attorney on behalf of the Attorney General's Department[2] reveal some disagreements, it is possible to make some observations based on these sources.

As the Society's report points out, it is made clear in the Public Schools Act[3] that anyone who "wilfully disturbs or interrupts" the proceedings in a public school is guilty of an offence and is liable to a fine of no more than twenty dollars or imprisonment up to thirty days. It is unlikely, however, that this clause could ever be invoked in the case of a police officer who enters a school in the process of carrying out his duties.

As pointed out earlier,[4] Part VI of Regulation 106/70 (under the Education Department Act) places the principal in charge of "organization, management, discipline, and instruction" in a school. It would appear, however, that the powers of peace officers as granted under the Criminal Code would supercede the principal's authority. If a police officer wishes to see a student, it is unlikely that a principal has the authority to refuse.

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[1]Ideals and Practice Committee, Manitoba Teachers' Society, "Report Re Police Interrogation of Students," Winnipeg, 1969 (Mimeographed.)

[2]Letter from H. E. Wolch, Crown Attorney to Howard J. Loewen, Director of Personnel Services, The Manitoba Teachers' Society, December 15, 1969).

[3]Sec. 308.

[4]See above, p. 77.

In fact, it is conceivable that a principal who did so could be charged with obstructing the police officer.

Although the report of the Teachers' Society refers to a Winnipeg School Division Policy requiring that the principal be present while a student is being interviewed, it is questionable that the principal is legally entitled to do so. Further, there is no specific requirement that any person be cautioned or advised of his or her rights before giving evidence, as is the case in the American "Miranda warning."[1]

As far as records and documents are concerned, it would appear that it is within the power of school officials to withhold them unless a warrant is presented.

Students in school, then, appear to possess no special rights in relation to being dealt with by the police. The provisions of the Criminal Code and the wide discretionary powers that are generally granted to police officers probably take precedent over the provincial and divisional provisions which outline the powers of school authorities.

As both the M. T. S. report and the letter from the Attorney-General's Department point out, there has always been a high level of

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[1]As a result of a 1966 Supreme Court Case [Miranda v. Arizona, 384 U. S. 43686 S. Ct. 1602 (1966)] a policeman making an arrest must advise the individual that he has the right to remain silent, that anything he says may be used in court against him, and that if he cannot afford an attorney, one will be appointed for him before questions are asked.

co-operation between police and school officials. While such co-operation might be considered to work to the detriment of students on occasion (where schools may be extremely willing to provide information or turn over students) it can also be of benefit to students in granting to students some privileges to which they are not really entitled in a strict legal sense.

4. SUMMARY

The federal Criminal Code grants to police officers wide discretionary powers. It appears that these powers supercede the authority of the school in relation to the pupil, so that students in school are in no special position. Police officers probably have the same wide powers of investigation and arrest in relation to students in schools as outside schools. Students need not be cautioned before giving evidence, there is no legal requirement that a school official be present while a student is being interviewed, and school records can be obtained by police with a warrant. Perhaps the most positive feature of the question of police in schools is that a spirit of co-operation generally exists which may lead to students' receiving special concessions.

I. STUDENT RECORDS AND PRIVACY (INCLUDING SEARCH AND SEIZURE)

1. INTRODUCTION

The concept of respect for the individual is one of the basic

elements of a democratic society. An essential outcome of this respect is that high value is placed on the privacy of the individual and the freedome from unjustified search or seizure of personal property.

This right is guaranteed by the Bills of Rights of both the United States and Canada. The Fourth Amendment to the American Constitution guarantees the privacy of the individual.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

Similarly, the first article of the Canadian Bill of Rights guarantees this right.

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;[2]

The idea of personal privacy raises a number of questions in relation to students in public schools. To what extent is a student, who is usually a child, entitled to personal privacy? Are school records

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[1]Constitution of the United States of America, Fourth Amendment (Ratified 1791).

[2]Canadian Bill of Rights, 1960, c. 44.

which contain information about students confidential? To whom may schools disclose information about students?

How secure are the "person and property" of students in school? May a student's person be searched, and under what circumstances? Is a student's locker immune from search, or may a school official, or a police officer, open and search it? These are some of the kinds of concerns that arise in connection with the question of privacy for students, and it is these areas that are examined in this section.

2. STUDENT PRIVACY IN THE UNITED STATES

There has been a great deal of activity in the United States in recent years in the area of student privacy, including search and seizure, particularly in relation to student lockers.

One of the major concerns has been the records which students keep about their students. Some observers have raised questions about the kinds of information contained in these records, the length of time the information is retained (for example, do a student's behavior or personal problems in elementary school remain in his record through high school?) the availability of information (e.g., to school officials, government agencies, police, prospective employers, parents, and the student himself), and the possible damaging consequences to the student of the release of such information.[1]

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[1]Thomas W. George, "The Law and Pupil School Records: Issues and Views," The Bulletin of the National Association of Secondary School Principals, Vol. 56, No. 365 (September, 1972), pp. 132-41.

A number of cases in United States courts at various levels have led to some principles concerning student records. One of the basic questions to whether school records are private or public in nature, since such a designation would help to determine their availability.

> Whether student records are private or public has not been clearly decided by the courts. As a matter of fact, the term "quasi-public" has been employed to explain their legal status. Public records are generally defined as those being open to all with "lawful, proper, and legitimate interest," e.g., police, researchers, journalists, employers, etc. Quasi-public records are usually defined as those open to "real parties in interest," e.g., the pupil, parent, legal counsel, or physician.[1]

As a result of several litigations,[2] the principle has been established in the United States that parents are entitled to see the records of their youngsters.

Two cases on the question of the student's entitlement to see his or her own records have been found in favour of the student.[3]

Because school records have generally been considered quasi-

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[1] Ibid., p. 135.

[2] e. g. Van Allen v. McCleary, 211 N. Y. S. 2d 501 (1961); Johnson v. Board of Education of City of New York, 220 N. Y. S. 2d 362 (1961).

[3] Valentine v. Independent School District, 191 Iowa 1100, 183 NW 434 (1921); Johnson v. Board of Education, 220 N. Y. S. (2d) 362 (1961).

public in nature, they are open to inspection by police, but only with a proper warrant.

A related issue is the matter of confidentiality. School personnel are often in possession of a great deal of information, written and unwritten, about students. This is particularly true of guidance counsellors. Although school officials or counsellors might use their discretion in most situations as to whether or not they will disclose certain information about a student, usually no such freedom exists when the inquiry comes from a court. Generally speaking, the concept of privileged communication is not recognized for teachers and counsellors. There are some states where this right has been legislated,[1] but generally educators can be required in court to disclose any information they have about a student. Refusal to do so could result in a contempt of court charge.

Another aspect of disclosing information concerns instances where students believe that they have been harmed by the school's release of damaging information. A survey of the few cases that have considered this matter[2] suggests that unless malice is demonstrated or unless the school officials clearly acted outside of their official capacity, a libel or slander suit will be unsuccessful.

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[1]George, "Law and Pupil Records," p. 135.

[2]Sandman, Students and the Law, pp. 193-6.

The question of searches of students' persons or of their lockers has also been considered in a number of court cases. A Legal Memorandum of the National Association of Secondary School Principals, published in 1972, discusses some of these cases and points out some principles that have emerged. Generally, it appears that in loco parentis still has considerable weight in matters of search and seizure. In two cases[1] involving searches of students by school personnel, the courts declared that such searches are legal and that evidence gained in this matter is admissable in court in criminal proceedings. One important consideration, though, is that there must be some "probable cause" for the search.

Disagreements over locker searches have also led to some court decisions. On the basis of these decisions, the N. A. S. S. P. Memorandum on this topic concludes:

> ... school officials may search a student's locker when there is reasonable grounds for such a search without a warrant or the student's permission. Additionally it seems clear that police have a right to conduct a search when they have "reasonable grounds" to believe that a crime has been committed and that such action would aid in the resolution of the crime.[2]

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[1]National Association of Secondary School Principals, A Legal Memorandum Concerning Search and Seizure: Right to Privacy (Washington: National Association of Secondary School Principals., September 11, 1972).

[2]Ibid., p. 3.

This does not mean, however, that unlimited searches of lockers can take place

> Although the law generally allows administrators to search lockers, this should not be viewed as a carte blanche right. As we have seen, students do have some ownership rights, particularly with regard to other students. School officials are charged by the state with operating the schools and safeguarding the health, welfare, and safety of students and school personnel; therefore, when drugs, weapons and other dangerous materials are suspected the principal not only has the right but duty to make a thorough investigation. Fishing expeditions as a matter of school policy are not advised. A general search of all lockers in reaction to a bomb threat or widespread drug abuse can be justified as a proper exercise of school authority.[1]

An indication of the attention this whole matter has received in the United States is the variety of publications that have discussed student privacy. Among them are those of Huckins,[2] Hudgins,[3] Olson,[4], School and Society,[5] and Laurence W. Knowles.[6]

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[1]Ibid., p. 6.

[2]Wesley Huckins, Ethical and Legal Considerations in Guidance (Boston: Houghton Mifflin Company, 1968).

[3]H. C. Hudgins, Jr., "Are Student Lockers Off Limits to Principals?," The Bulletin of National Association of Secondary School Principals, Vol. 54, No. 347 (September, 1970), pp. 101-4.

[4]Eric Olson, "Student Rights - Locker Searches," The Bulletin of the National Association of Secondary School Principals, Vol. 55, No. 352 (February, 1971) pp. 46-53.

[5]School and Society, "Privacy: Guidelines on Pupil Records," Summer 1971, pp. 283-5.

[6]Laurence W. Knowles, "Frisking Students for Drugs: How Far Can You Go?," Nation's Schools, Vol. 89, No. 1 (January, 1972), p. 84.

3. STUDENT PRIVACY IN MANITOBA

The question of student privacy has not received the kind of attention in Canada that it has in the United States. Although there have been some articles on the subject, such as those of Shroff,[1] Shack,[2] and the Educational Courier,[2A] there appear to have been no court cases. For this reason, there are many areas where there are no clear principles.

Boulet[3] has examined the whole field of the legal implications of student cumulative records in Manitoba. On the basis of legal advice, this study arrived at a number of principles. It must be kept in mind that these express legal opinion, since the statutes are vague in this area and there are as yet no reported cases in Canada relating to student records.

- While parents may have no legal right to demand the inspection of a school record on his child, they may have a strong moral right depending on the circumstances. In such cases, a

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[1]K. B. Shroff, "Legal Implications in Guidance," The Bulletin of the Ontario Secondary School Teachers Federation, Vol. 51, No. 6 (December, 1971), pp. 317-21.

[2]Sybil Shack, "Pupils Have a Right to Privacy," Monday Morning, Vol. 3, No. 4 (December, 1968), pp. 8-9.

[2A]The Educational Courier, "Information on O. S. R. Ontario School Record Cards is Confidential to Teachers," March-April, 1969, pp. 10-12.

[3]Boulet, Cumulative Records - Legal Implications.

mandamus may be available to the parent to require the production of a school record.

- A student cannot compel a counsellor to show him the student's record. This is at the discretion of the counsellor.[1]

- A court or a police officer may see student records if an appropriate order is issued. A teacher's personal notes may also be demanded in court proceedings.[2]

The area of confidentiality is one that has led to a certain amount of misunderstanding in Canada. Because the right of privileged communication has been recognized for school personnel, particularly counsellors, in some American states, it has sometimes been assumed that a similar right exists here. This is not the case. In a court situation, a counsellor or teacher may not withhold information, even if that information has been obtained from a student with a clear understanding that it would remain confidential. A refusal by a teacher or counsellor to disclose information could result in a contempt of court charge. In Canada at the present time, the right of privileged information in court proceedings is recognized only for lawyers and, in some provinces, clergymen.[3]

The matter of searches of students or their lockers is another

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[1]This principle may, however, be different where the student is eighteen or over, and hence an adult.

[2]Ibid., pp. 71-3.

[3]Shroff, "Legal Implications in Guidance," p. 318.

matter that has not been tested in Canadian courts, and hence is not very clear. There are, however, some statutes that speak to this matter.

As noted earlier in this section, the Canadian Bill of Rights guarantees the individual's right to "security of the person and enjoyment of property" and provides that a person will not be deprived of these "except by due process of the law."[1]

The "law", in this case is the Criminal Code, which contains the following provisions.

> 443. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is a building, receptacle or place
>
> (a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
>
> (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to the law.
>
> (2) Where the building, receptacles, or place in which any thing mentioned in subsection (1) is believed to be in some other territorial division, the justice may issue his warrant in like form modified

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[1] Above, p.

according to the circumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in Form 25, by a justice having jurisdiction in that territorial division.

(3) A search warrant issued under this section may be in Form 5.

(4) An endorsement that is made upon a warrant pursuant to subsection (2) is sufficient authority to the peace officers to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to take the things to which it relates before the justice who issued the warrant or some other justice for the same territorial division.

444. A warrant issued under section 443 shall be executed by day, unless the justice, by the warrant, authorized execution of it by night.

445. Every person who executes a warrant issued under section 443 may seize, in addition to the things mentioned in the warrant, anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence, and carry it before the justice who issued the warrant or some other justice for the same territorial division, to be dealt with in accordance with the section 446. [1]

Even more permissive legislation exists in relation to search and seizure where narcotics are concerned.

10. (1) Search and seizure. A peace officer may, at any time,
(a) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed;

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[1] Criminal Code, R. S. C. 1970, c. C-34.

(b) search any person found in such place; and
(c) seize and take away any narcotic found in such place, any thing in such place in which he reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which he reasonably believes an offence under this Act has been committed or that may be evidence of the commission of such an offence.

(2) Warrant to search dwelling-house. A justice who is satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics. [1]

As noted earlier, [2] teachers are required by The Public Schools Act to "seize any rifle, gun, or other offensive seapon" that a student brings to school.

Another provincial statute than contains provisions for search and seizure by teachers is The Child Welfare Act.

134(1) A person who sells or gives to, or causes to come into the possession of, a child under the age of sixteen years, any of the following articles; that is to say,
(a) cigarettes or cigarette paper; or
(b) tobacco; or
(c) intoxicating liquor, or
(d) any obscene book or other written obscene matter; or
(e) any obscene picture, photograph, model, or other object; or
(f) any drug or article intended, or represented, as a means of preventing conception;

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[1] Narcotic Control Act, R. S. C. 1970, C. N-1.

[2] See above, p.

is guilty of an offence and liable, on summary conviction, to a fine not exceeding two hundred dollars and, in default of payment of the fine, or in addition thereto, to imprisonment for a term not exceeding one year.

134(2) A peace officer, school attendance officer, or officer of the director or of a society, or a school teacher may seize any article mentioned in clauses (a) to (f) of subsection (1) which he finds in possession of a child apparently under the age of sixteen years in a public place, including a school buildings or school grounds.

134(3) Where an officer or teacher to whom subsection (2) applies has made a seizure as authorized by that subsection, or suspects on reasonable grounds that a child to whom that subsection applies is in possession of any such article, he may take the child to the home of the child, or to a detention home or shelter, for the purpose of having the child searched to ascertain if it is in possession of any such article; and any such article found in possession of the child may be confiscated or destroyed. [1]

On the basis of these statutes, the following principles can be suggested:

- Police officers, with a warrant may presumably search students or their possessions, including school lockers. Where there is reasonable cause to believe that illegal drugs are hidden, then police may search and seize without warrant.

- Teachers are clearly empowered by law to carry out searches for or to seize, certain specific articles: weapons, tobacco, liquor, obscene materials, or contraceptives where children of certain ages are involved.

- Since American courts, invoking in loco parentis, have upheld the right of school personnel to search students' lockers "upon probable cause," and since the concept in loco parentis is, of anything, stronger in Canada than in the United States, it is probable that

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[1] The Child Welfare Act, R. S. M., c. 35.

searches of lockers by school officials would be upheld in court. This would be particularly so where the "forbidden items" outlined in the statutes may be concealed.

- As mentioned in connection with American findings, this freedom does not necessarily legitimize "fishing expeditions." While school personnel may open lockers to search for illegal items, there should be some reasonable grounds to suspect they are in a particular locker. An important consideration is the understanding that exists about the possession of the locker. If the school states or implies that lockers may be searched for certain reasons, the school's right is strengthened. If, as is the case in some schools, the student's right to locker privacy is guaranteed in a "Code of Rights and Responsibilities," then school officials would presumably be entitled to open a locker only under exceptional circumstances (e.g., a bomb scare, or in response to a police officer with a warrant).

4. SUMMARY

The area of student privacy, which includes the use of student records and search and seizure is a matter that has been the cause of considerable litigation and discussion in the United States, but does not appear to be a major source of concern in Canada.

Student records, which are generally considered to be quasi-public documents, are generally available to school officials, and may be made available to parents under some circumstances. It appears that students have no legal right to see their records, but may be shown them at the discretion of school officials.

Students and their lockers may be searched by school officials if there is reasonable cause to believe illegal items are being concealed. Police personnel may certainly search students or lockers if they have been provided with a warrant, and may search lockers without a warrant

if there is reason to believe drugs are concealed.

J. VERBAL AND SYMBOLIC EXPRESSION

1. INTRODUCTION

Of all the forms of freedom that have been protected by laws, curtailled by government, and discussed with conviction and heated emotion through the ages, the right to free expression is probably one of the most contentious.

Expression can, of course, take many forms, which can be roughly divided into verbal and non-verbal (or symbolic) forms. It is a right that is valued highly in democratic societies, and both the United States and Canada are among the many nations that have statutory provisions to protect this right.

The First Amendment to the Constitution of the United States specifically guarantees freedom of speech and freedom of the press.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble and to petition the Government for a redress of grievances. [1]

The Canadian Bill of Rights also guarantees these two aspects in its first section.

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely

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[1]The Constitution of the United States of America, First Amendment (Ratified 1791)

(d) freedom of speech

(f) freedom of the press.[1]

There are, of course, restrictions on this kind of freedom in both nations. In Canada, sections of the Criminal Code deal with libel (Sections 260-281), hate propaganda (Section 281.1) and obscenity (Sections 159-165).

The matter of freedom of expression in schools, as it applies to students, has been the subject of some controversy. A basic question is whether a student, who is usually below the age of majority, is entitled to the same freedom of expression as an adult.

The kinds of expression that can become the object of concern in schools can take many forms. Verbal expression may be spoken or written. It may be critical of the school, or its staff, or it may express opinions about society outside the school which are unpopular or distasteful. The form of written expression that often leads to conflict between students and educators is the newspaper - both "official" school papers and, and a more recent development, underground newspapers.

Symbolic expression is closely related to the area of dress and personal appearance. Long hair for example, may be considered a form of symbolic expression, since it is often intended (and taken) to

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[1] Canadian Bill of Rights, 1960, c. 44.

reflect an identification with the youth culture and a rejection of certain features of "the establishment." The wearing of armbands or buttons, as will be discussed shortly, is another form of symbolic expression that has been the cause of significant litigation in the United States. Another area of expression is the demonstration, which may take such forms as strikes, boycotts, and sit-ins.

These aspects of expression are considered in this section, first in the American context, then in terms of Canadian developments.

2. VERBAL AND SYMBOLIC EXPRESSION IN THE UNITED STATES

One of the landmark cases in the history of school law in the United States centres on symbolic expression. This case had had, and continues to have, far-reaching implications for all forms of student expression, for the dress and personal appearances of students, and for due process.

Tinker v. Des Moines Independent Community School District[1] started in December, 1965, when a group of Iowa students wore black armbands to school to express mourning for those who had died in Viet Nam and to express their general opposition to the war. The students were sent home to remove the armbands. As a result, the students sought an injunction to stop the school officials from dis-

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[1] 89 S. Ct. 733.

ciplining them, as well as seeking some nominal damages. Although the students were unsuccessful at first, the case finally reached the Supreme Court of the United States in 1969. The Supreme Court found in favour of the students.

From this case emerged a number of important principles. The Supreme Court found that the mere apprehension of a disturbance (no disturbance actually took place) was not sufficient cause for school authorities to restrain students from expressing their views.

The judgement in this case also expressed some significant principles on the control of students by school authorities.

> School authorities do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the States. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. [1]

Tinker is generally regarded as one of the most significant cases in recent American school law, and has been the subject of much public discussion. Some typical articles are those of The School Library Journal, [2]

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[1]Quoted in The Pupil's Day in Court: Review of 1969, p. 53.

[2]The School Library Journal, "The Courts and the Child," Vol. 16, No. 5 (January, 1970), pp. 21-31.

Klahn,[1] Knowles,[2] and Olson.[3]

Another case with similar results, but decided by a lower court and hence not as strong a precedent as Tinker is Burnside v. Byars.[4] In this case, the parents of a group of high school students in Philadelphia, Mississippi sought a court injunction to prevent enforcement of a school policy that prevented the young people from wearing to school Student-Non-Violent Co-ordinating Committee "freedom buttons" with the words "SNCC" and "One Man-One Vote." As in the later Tinker case, the Court of Appeals found that the wearing of these buttons did not actually cause disruption and declared the school's policy to be unreasonable and arbitrary.

Another very similar case,[5] decided by the same court on the same day and involving the very same kind of "freedom buttons" upheld the authority of the school to forbid the wearing of the buttons. The critical difference is that in this situation the wearing of the buttons did result in disturbance and disruption in the school.

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[1]Richard P. Klahn, "The Tinker Case: A Principal's View Ten Years Later," The Bulletin of the National Association of Secondary School Principals, Vol. 55, No. 352 (February, 1971), pp. 69-73.

[2]Laurence W. Knowles, "High Court Uses Picketing to Truker with Tinker," Nation's Schools, Vol. 90, No. 5 (November, 1972) p. 17.

[3]Ronald K. Olson, "Tinker and the Administrator," School and Society, Vol. 100, No. 2339 (February, 1972), pp. 86-9.

[4]363 F. (2d) 744.

[5]Blackwell v. Issaquena County Board of Education, 363 F. (2d) 749.

An essential consideration, then, in U. S. cases involving freedom of expression is whether the form of expression in question causes actual disruption in the school. While a simple anticipation that disruption might take place on the part of school officials has not been considered sufficient cause to proscribe an activity, clear proof that significant interference with the order or effectiveness of the school will result has generally been considered by the courts to justify restrictions on free expression.

A number of cases involving the distribution of newspapers, both school-sponsored and underground, have come before American courts. In some of these cases,[1] the courts have upheld the right of students to distribute newspapers that are critical of school and society, as long as no significant disruption of the school's activities takes place. In such cases, Tinker has generally been cited as an important precedent.

In other cases,[2] where the reality of disruption as a result of the publication has been demonstrated, or where vulgarity or profanity are clearly in evidence, the courts have upheld schools' prohibition of publications.

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[1]Eisner V. Stamford Board of Education, 314 F. Supp. 832; Scoville v. Board of Education of Joliet Township High School District 204, 425 F. 2d 10, Certiorari denied, 91 S Ct. 51, October 12, 1970; Sullivan v. Houston Independent School District 307 F. Supp. 1328.

[2]e.g., Baker v. Doroney City Board of Education, 307 F. Supp. 517.

Another form of symbolic expression that has been prevalent in recent years in public schools and universities is the demonstration. Compared to the number of cases involving relatively peaceful symbolic expression there have been very few cases related to demonstrations, and most of these have been at the college level. Because such events as protest rallies, sit-ins, strikes, and walk-outs are by their very nature disruptive, the general opinion of the courts has been that schools are permitted to prohibit such activities and to take punitive action against student participation in them. Again, the principle found in Tinker - whether an action actually causes disruption - is a basic consideration.

3. VERBAL AND SYMBOLIC EXPRESSION IN MANITOBA

While there have undoubtedly been similar questions raised in Canadian schools about the right of students to free expression, these questions do not appear to have been taken to the courts.

Regina v. Burko et al[1] concerns a group of six university students who entered Eastwood Collegiate in Kitchen, Ontario in October, 1968 to distribute newspapers to students. No permission was sought to distribute the material, and the students refused to leave when requested to do so by the vice-principal. As a result, the police were called and

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[1] [1969] 1 O. R. 598 (M. C.)

the six were charged with unlawfully trespassing on school property.

> ... I have come to the conclusion that the public has not got an unrestricted right to use corridors of a school. A member of the public only has the right to use the corridors of a school in an ordinary and reasonable manner, namely: a manner consistent with the purpose for which the school is maintained.
>
> . . .
>
> I find, as a fact, that the distribution of newspapers is not an ordinary and reasonable usage of the corridors in Eastwood Collegiate. It has nothing to do with the furnishing of an education to students in accordance with the curriculum as laid down by the state.
>
> . . .
>
> Further, one of the accused said in effect that the accused did not approve of the education the collegiate students were getting and they were trying to further the education of the students by distributing this newspaper. Therefore, in this case, the actions of the accused were not merely inconsistent with the purpose for which the school was erected, ... but were actions opposed to the purpose for which the collegiate is being maintained, namely: education in accordance with a curriculum set up by the state. [1]

This case clearly indicates that, in Ontario, (and it is likely this case would at least be taken into account should a similar matter come before a Manitoba court) outsiders may not enter school property to engage in activities that are deemed to be contrary to the purposes of the school. A further statement from this case might be interpreted even more broadly, to include the students of the school as well.

> I find that it is contrary to the public good to permit individuals on public or secondary school property without the permission

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[1] Ibid., at p. 602.

> of the proper authorities for the purpose of disseminating information or ideas, particularly when such information or ideas may not be in accordance with the curriculum established by the state for the public good. [1]

This is obviously a much more rigid stance than the decisions of many American courts. There is a significant difference between ideas that "may not be in accordance with the curriculum established by the state for the public good" and activities that are clearly disruptive of the school's activities.

In Manitoba, no cases have been located in the area of student expression, and there is no specific reference to this in the education statutes or regulations of Manitoba.

As is shown in the next section of this chapter, where a Saskatchewan case involving hair length is discussed, the principle of in loco parentis is still quite strong in Canadian school law, and the provisions of the Public Schools Act which place the principal in charge of discipline in a school would probably allow him or her to use considerable discretion in cases involving verbal or symbolic expression.

An incident which will be mentioned here because it took place recently in Manitoba, because it attracted considerable attention, and because this writer was personally involved, is the student strike which

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[1] Ibid., at p. 604.

took place in October, 1971 at West Kildonan Collegiate. This three-day event saw approximately half of the seven hundred students of the school, under the leadership of a group known as the Student Socialist Movement, boycott classes in support of an optional attendance policy. During this period, students refused to heed the principal's requests to return to classes, there was disturbance of those who were in classes by some students who were using "bullhorns" in the hallways, unauthorized printed materials were distributed on school property, and a march was organized to the office of the Minister of Education. During the march, students from at least two other high schools (Garden City Collegiate and St. John's High School) was encouraged to walk out of their schools.

There is little question that many of the participants seriously disrupted the regular activities of the school (and, possibly, the two others) and engaged in action that might be "deemed injurious to the welfare of the school." It would seem, then, that the leaders, and possibly the participants, could have been suspended or even expelled with ample legal justification.

There is little doubt that current law in Manitoba prohibits any form of demonstration or disruption in schools if it interferes with the orderly operation of the school.

4. SUMMARY

Some significant cases within the past fifteen years in the United States have determined that students in public schools are possessed of the basic Constitutional rights of citizens, including the right to free expression. As a result, schools are legally permitted to restrict only those expressive acts that are clearly disruptive of the educational processes of the school.

In Canada, only one case has dealt to any extent with this issue. It would appear, on the basis of this case, the strength of in loco parentis, and the broad powers given to school authorities by the education statutes of the province, that Manitoba students are not legally entitled to express, verbally or symbolically, ideas that might be considered injurious to the school or contrary to its basic purposes.

K. DRESS AND PERSONAL APPEARANCE

1. INTRODUCTION

Very closely related to the concept of freedom of expression is the matter of dress and personal appearance. While it is not uncommon aspect of the generation gap for young people to wear clothing or adopt styles of appearance that are displeasing to their elders (a tendency that seems to increase with the amount of displeasure demonstrated), this problem seems to have become particularly pronounced during the last decade.

One practice that seems to have especially strong emotional overtones, for both the young and their elders, is the wearing of long hair by boys. Since the Beatles in the early 1960's popularized long male hair styles, the hair of boys has tended to become longer and longer and the disputes with parents and school officials more and more heated.

There are a number of aspects of dress and personal appearance that have become matters of conflict and disagreement (as well as the object of dress codes) in schools, including wearing of blue jeans by both sexes, slacks and brief outfits by girls, certain types of shoes (or no shoes at all), and the wearing of long hair and beards by boys.

Although there seems to be less of a tendency for schools to become concerned with unconventional dress or appearance in the last few years than ten years ago, there are still many schools with dress codes and many school officials with strong feelings about what students wear.

Because, to some extent, a person's choice of clothing or hair many be considered a matter of personal expression, it is not surprising that the principles affecting this area are somewhat similar to those governing verbal and symbolic expression.

2. DRESS AND PERSONAL APPEARANCE IN THE UNITED STATES

In view of the relative triviality of such matters as dress or hair styles, in comparison with some of the major issues of school law, a relatively large number of cases on this issue has reached American courts. An analysis of Pupil's Day in Court, for example, from 1967 to 1970 resulted in a listing of about fifteen cases.

Perhaps because there is some serious question about whether dress or appearance are really matters of free expression, the cases in these areas have tended to go in both directions, some supporting the school's authority to impose regulations on the matter, others upholding the students' privilege to dress or wear their hair as they wish. An extensive survey and discussion of such cases has been compiled by Von Brock and Bailey.[1] This report lists ninety-six hair style cases, fifty-four of which were found in favour of the school board and forty-two of which supported the student.

While it is difficult to make generalizations in areas where the courts appear to be divided, the following criteria are often taken into account when matters of dress or personal appearance are in dispute American courts:

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[1]Robert C. Von Brock and James G. Bailey, A Survey of Court Decisions Affecting Student Dress and Appearance (Baton Rouge: College of Education, Louisiana State University, 1972).

- whether the policy is reasonable
- whether actual disruption of the school's activities is caused by the appearance in question
- whether the regulation is vaguely worded (e.g., "extreme hair styles")
- whether the regulations have been framed with the participation and general acceptance of students.

If the considerable litigation of this matter has not resulted in clear precedents, it probably has at least caused school authorities to examine the regulations that exist concerning students' appearance and to re-consider those rules that might be considered arbitrary or unreasonable.

3. DRESS AND PERSONAL APPEARANCE IN MANITOBA

Once again, a search of Canadian case reports has failed to reveal much litigation in a field that has led to a large number of cases in the United States. A 1969 article by Sweezey[1] has indicated that no cases on dress or grooming had reached Canadian courts at that point, and a more recent search for the purposes of this study has yielded only one case.

This case[2] concerns an eleven-year-old grade six pupil in

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[1]Gilmour G. Sweezey "Free Speech and the Student's Right to Govern his Personal Appearance," Osgoode Hall Law Journal, Vol. 7, No. 3 (1969), pp. 293-310.

[2]Ward et Al v. Board of Blaine Lake School Unit No. 57, [1971] 4 W. W. R. 161 (Q. B.).

Saskatchewan who was suspended for a violation of a school board policy on hair length. The parents sought to have their son reinstated.

The application was dismissed by the court on the grounds that a school board has the power to prescribe such matters as cleanliness and hair length as part of its statutory authority to administer the general affairs of the school district and to exercise supervision and control over students.

Some observations on this case and its applicability to Manitoba have been made by Buhay.

> The court then looked to the act (which is comparable to Manitoba's Public School Act) and found the power of the Board to regulate hair length as being contained in the provision giving the Board authority in "administering and managing the educational affairs of the school district" and "exercising general supervision and control over the schools of the unit." The court found that the general supervisory capacity of the Board would include not only "care, cleanliness, and covering of various parts of the body, but also prevention of unusual types of dress and hairstyling which might be calculated to distract the pupils from their work in the classroom or adversely affect a proper and reasonable air of discipline in the school." Thus, the court upheld the validity of the resolution as being a bona fide exercise of the Board's powers, although nothing was said as to whether the hair length in this case actually affected cleanliness, or actually distracted the other pupils from their work, or actually affected adversely the discipline of the school. Rather, the court adopted [the stance that] if it is possible that hair length may cause such distractions, the regulation is valid. As have many American courts in the past, the Saskatchewan court accepted the judgement of the School Board without questioning whether in fact the regulation was necessary.
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> The Ward case, the only one of its kind to date in Canada, will no doubt present persuasive authority in any similar situation. As Manitoba has almost identical provisions in the Public Schools Act as were dealt within the Ward case, it will be of particular relevance

to Manitoba.[1]

It would appear, then, that if Ward v. Blaine Lake can be taken as a significant precedent, that Canadian courts are more likely to emphasize to school's authority to maintain discipline and to act in loco parentis than to emphasize their responsibility to demonstrate that prohibited behaviour is actually disruptive to the school.

L. POSSESSION OR USE OF TOBACCO

1. INTRODUCTION

An activity that has traditionally been discouraged by schools for several decades is smoking. It is not always clear on what rationale a school's anti-smoking policy is based; there are usually at least three areas of concern: (1) moral considerations - the belief that smoking is morally undesirable, particularly for young people; (2) safety reasons - the danger of fire in school buildings and, related to this, the chance of higher fire insurance rates in buildings where smoking is generally permitted; (3) health reasons - an area that have been increasingly emphasized since medical discoveries that smoking can be a significant health hazard. These kinds of concerns have led many schools to forbid or restrict smoking by students within school buildings, as well as within a certain distance of the school, and to impose dis-

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[1]Shelley Buhay, "Kids is People," an unpublished paper submitted as a term paper to the Faculty of Law, University of Manitoba, 1972. (Typewritten).

ciplinary measures on offenders.

An illustration that smoking regulations are still imposed and enforced by Manitoba school boards can be found in a recent news article,[1] which reported that the area's smoking restrictions have been considerably extended by one board. According to the article, student smoking is restricted to specific areas outside the school building. Otherwise student smoking is generally prohibited in school buildings and on school grounds. The penalties for students who do not adhere are reported to be a one-day suspension for a first offence, a two-day suspension for a second offence, and a three-day suspension and consultation with parent and principal for a third offence.

While there are some indications of a loosening of restrictions on student smoking,[2] this still appears to be an area in which many schools still impose strict controls on students.

2. THE LEGAL POSITION

Some early cases in the United States clearly establish that smoking by students in both private schools[3] and public schools can legally be forbidden.

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[1]"Smoking Rules Tightened," Winnipeg Free Press, April 7, 1973, p. 10.

[2]"Tec Voc Students Get Okay to Smoke," Winnipeg Free Press, February 9, 1973, p. 3.

[3]Sandman, Students and the Law, p. 216.

Although no such cases could be located in Canadian reports, it would appear that statutory provisions definitely support school or board level policies prohibiting or restricting student smoking.

In addition to the provisions of the Public Schools Act which give principals general authority in the area of school management and discipline, The Child Welfare Act, as indicated in the earlier section on search and seizure[1] empowers a teacher to seize cigarettes, cigarette paper, or tobacco from students under the age of sixteen. These provisions clearly indicate that children under the age of sixteen should not be in possession of tobacco of any kind.

While students overthe age of sixteen may legally purchase and possess tobacco products, it would appear to be well within the powers of school authorities to forbid any students (including those who are eighteen years of age) to make use of these articles as long as they are under the control of the school.

M. POSSESSION OR USE OF ALCOHOLIC BEVERAGES

Another area of student behaviour that has traditionally been subject to considerable control by school authorities is the possession or use of alcoholic beverages by students.

The same section of the Child Welfare Act[2] that permits teachers

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[1]See above, p.

[2]See above, p.

to seize tobacco products also applies to "intoxicating liquor."

Generally the legal provisions for the sale and use of liquor in Manitoba are found in the Liquor Control Act.[1] This Act prescribes definite penalties for underage people who possess or consume liquor.

> 176(5) Any person under the full age of twenty-one years who has in his possession or consumes liquor, other than as permitted by this Act, is guilty of an offence and is liable on summary conviction to a fine not exceeding one hundred dollars.[2]

It should be pointed out that the age of twenty-one indicated in this section would now automatically be changed to eighteen years as a result of The Age of Majority Act, whereby all references to "twenty-one years" in acts or regulations under provincial jurisdiction are to be read as "eighteen years."[3]

It could be maintained, however, that many grade twelve students do reach the age of eighteen while they are still in school and are thereby possessed of all of the rights of adulthood, including the right to purchase and consume liquor.

While this raises some interesting questions about students who are eighteen or over and come to school after legally consuming liquor

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[1]An Act to Provide for the Control, Purchase, and Sale of Liquor, S. M., 1956, c. 40, s. 1.

[2]Ibid., Am. S. M., 1956, c. 40, s. 170; am.

[3]The Age of Majority Act, S. M., 1970, c. 91, s. 4(1).

(after a so-called "liquid lunch"), there is no question that school authorities may forbid the possession or use of alcohol on school property or by students when under the direct control of the school. It appears probable that student consumption of liquor on school premises, or the presence of students under the influence of alcohol in a school could be deemed "conduct injurious to the welfare of the school."

In addition, The Liquor Control Act stipulates where liquor may be kept or consumed.

> 61(1) Subject as herein expressly otherwise provided liquor legally purchased by any person shall be had, kept, given, or consumed, only
> (a) in the residence of a person who may, under this Act, lawfully purchase and consume liquor; or
> (b) in the case of liquor purchased on a permit, in the place shown in the permit as the place to where the liquor may be lawfully delivered or kept and used or consumed; and not elsewhere, and there according to this Act, and not otherwise.

Students then, of any age, can be legally prohibited by school authorities from possessing or consuming liquor on school premises or from being under the influence of alchohol while under the control of the school.

N. POSSESSION OR USE OF RESTRICTED DRUGS

The recent increase in the use of restricted drugs among young people has created new problems for schools. The use of drugs by students and the possession and sale of drugs on school property have

become matters of real concern for many school administrators.

This is an area where no one, including a student, has any rights to possession or use. Both the Narcotic Control Act[1] and the Food and Drugs Act[2] are federal statutes that list forbidden drugs and outline procedures and penalties to be used in the enforcement of their provisions.

As noted earlier,[3] the provisions of the Criminal Code relating to search and seizure are supplemented by provisions in the Narcotic Control Act which give police officers wider powers of search and seizure where drugs are concerned. As was also noted earlier, a student's locker (or the student personally) can be searched without a warrant by a police officer who has reason to believe that narcotics are concealed.

Although there are indications that there may be some liberalization of Canada's drug laws in the future, these laws at present prescribe strict penalties, and students are as subject to their provisions as anyone else.

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[1]R. S. C. 1970, C. N-1.

[2]1952-53, C. 38, s. 1.

[3]See above, p.

CHAPTER VI

CONCLUSIONS, IMPLICATIONS, AND RECOMMENDATIONS

A. INTRODUCTION

On the basis of the information contained in the previous chapters, a number of conclusions can be reached about the present legal rights of public school students in Manitoba. Because most sections of Chapter V include a summary of the current picture in each area of rights selected for this study, this section deals only with some general conclusions.

Based on these conclusions, a number of implications can be suggested both for further research and for various areas of jurisdiction in education.

The final section of this chapter contains a number of recommendations. These recommendations are related to the conclusions and implications that precede it and, to a considerable extent, reflect the opinions of this writer.

B. CONCLUSIONS

The data of the first five chapters of this study suggests a number of general conclusions.

(1) The entire field of school law appears to be a relatively unexplored area in Canada. The small amount of academic writing in the field and the relatively small number of articles and other publications on school law in a Canadian context suggest that comparatively

little attention has been focussed on this area.

(2) The matter of the legal rights of students, in Canada generally and in Manitoba specifically, is one where there are many unanswered questions. Because relatively little attention has been given to the subject, there are very few sources of information or commentary.

(3) The statutes and regulations that presently govern education in Manitoba contain few references which can be related specifically or clearly to students' rights. In addition to this, the fact that there has been almost no litigation in this field in Manitoba, or indeed in all of Canada, in recent years means that the legal principles affecting students' rights are very unclear. As a result, most discussion on the subject at the present time must be largely speculative.

(4) Because of this lack of clear principles, because the present legislation tends to give wide power and discretion to school authorities, and because the few cases there have been tend to place considerable weight on the judgement of educators and the concept in loco parentis, it is perhaps fair to say that Manitoba public school students at the present time possess very few clear individual rights.

(5) By contrast, students' rights in the United States of America has been a field of considerable activity during the last decade. There have been literally hundreds of court cases, some reaching the highest court in the land, as well as a wide variety of

published commentary and discussion. Some of these published materials have contained advice and suggestions for students and educators. Probably related to the litigation and the general interest in students' rights are a number of state and school board policy changes specifically related to students' rights, as well as a variety of "codes of rights" developed at the board or school level. As a result, the rights of American public school students are generally more clearly defined and more numerous than those of their Canadian counterparts.

(6) The implications of this activity in the United States for Canadian students is unclear at the present time. Because there have been very few recent Canadian court cases on students' rights, it is difficult to say what, if any, influence American decisions might have on Canadian decisions.

(7) While there has clearly been a reduction in the strength of in loco parentis in the United States, this still appears to be a major factor in any legal consideration of the school-student relationship in Canada.

C. IMPLICATIONS

(1) FOR FURTHER RESEARCH

This study has endeavoured to analyze the current legal rights of Manitoba public school students only in terms of federal and provincial statutes and regulations, as well as related court cases. There

are several other related possibilities for further research:

- An analysis might be made in areas of students' rights not selected for this study. The rights of students, as individuals or as groups, in relation to religion is one possibility. Another possible area is the status of the student in relation to tort liability. These and a variety of other areas have not been included in this study.

- Because this is a thesis in the field of education, rather than a legal study, because each of the selected areas of rights could undoubtedly be examined in much greater depth in terms of legal foundations and implications, and because the background and training of this writer are not in the legal profession and hence have limited the depth of technical legal analysis, an intensive legal study might be carried out in the various areas of students' rights.

- A useful complement to the present study would be a survey of current policy and practice at the divisional and school level. Such a survey could give an indication of what rights and privileges students have in actual practice at the present time.

(2) FOR EDUCATIONAL JURISDICTIONS

- It would appear that the present legislation governing education in Manitoba is in need of some revision and clarification by provincial authorities. While there is presently a committee of the Department of Education preparing some revisions for the consideration of the Cabinet and, eventually, the legislature, it is not clear what changes will actually result.

- Because little attention has been focussed on students' rights in Manitoba and because many educators have a rather limited knowledge of school law, it is possible that some present policies and practices in schools are of questionable legality. One implication for current practice, then, is that school officials might well examine their policies and practices that relate to the individual rights of students to assess their advisability in terms of those legal principles which can be determined.

D. RECOMMENDATIONS

This section is based on the conclusions and implications that precede it and admittedly reflects the personal views of this writer.

(1) There is little doubt that schools that see one of their major goals as preparing students to function in a democratic society cannot achieve this purpose very effectively if they themselves practice undemocratic methods. We have reason to believe that the structures of the educational system can teach as much as the content of the curriculum, and students who are treated in an unreasonable and unfair manner (even though the necessity of fairness, a regard for human dignity, and the value of democratic principles are being "taught") will come to develop undesirable (and undemocratic) attitudes towards themselves and other people. If students are to come to comprehend the importance of the individual and to value the rights of themselves and others, they must see these concepts being genuinely

valued, both in word and in deed, in the schools they attend.

(2) Because of the vagueness and the authoritarian tone of the current acts and regulations governing education in Manitoba, it is clear that some major revision is needed.

In the opinion of this writer, the education statutes at the present time reflect a society and a set of values that have now significantly changed. The rigid and authoritarian tone of the acts and regulations hardly seem consistent with the spirit of a great deal of recent legislation in Manitoba, which appears to have as an underlying principle an emphasis on the worth and dignity of the individual. Legislation dealing with consumer protection, landlord-tenant relations, compensation to victims of crime, the lowering of the age of majority, and the establishment of the office of ombudsman demonstrate a clear regard for the rights of the individual and the importance of protecting citizens from any intrusion on their rights by government, business, or other individuals.

Such developments, it might be maintained, reflect a society that has become progressively more concerned with human rights and the autonomy of the individual.

This change in values has already had some influence on educational practice, with the granting of greater independence to school divisions, schools, and classroom teachers. Perhaps a next step, which might be supported through enabling legislation, is to

recognize the autonomy and integrity of the student. There are at least two areas which need particular attention.

As the section dealing with due process has indicated, the criteria for disciplinary action against students and the appeal procedures that might be followed when it is believed an injustice has been done are not clearly defined at present. This is an area where some specific guidelines are needed.

Closely related to the concept of students' rights is the question of control of students by schools. One of the major justifications for control at present is that school authorities and the boards for which they act can be held responsible for any harm that may befall students. Some consideration must therefore be given to the field of tort liability of schools. Perhaps one of the first steps to "freeing" the student is to "free" the school from being held strictly responsible for a student's welfare through the institution of "hold harmless" provisions.

(3) A related recommendation for legislation is based on the limited influence of the Canadian Bill of Rights, and the Manitoba Human Rights Act. The first guarantees many fundamental rights, but only in those matters under the jurisdiction of the federal government; and education is clearly not one of those matters. The present Human Rights Act in Manitoba is also very limited; it prohibits discrimination on the basis of sex, race, religion, creed, and ethnic origin (but not age) and only in employment practices and the use of public facilities.

It would seem that some legislated guarantees of individual rights, with broad scope and jurisdiction, is needed. Two possibilities are a broadened federal Bill of Rights or an extensive provincial Bill of Rights. Because the political difficulties of the first are undoubtedly even greater than those of the second, it is recommended that a Bill of Rights, by which the Government of Manitoba guaranteed the fundamental rights of Manitobans of all ages, would be a desirable and progressive piece of legislation.

(4) Because there has been a tendency of the provincial government and the Department of Education to allow school divisions and school staffs greater autonomy during the past few years, it is possible that attempts to legislate students' rights at the provincial level might be resented by local authorities as an infringement on their authority to determine their own directions in response to local conditions.

For this reason, it might be preferable for school divisions or individual schools to examine their own policies and practices in dealing with students and to consider establishing codes of rights at the local level, preferably through co-operative efforts of school authorities and students.

(5) One of the reasons that legal principles in Canada and Manitoba in the area of students' rights are unclear at present is that there has been little litigation to establish principles on the basis of precedent.

Although Canadian courts may not, at least at first, be as sympathetic to students as the American courts presently are, there is little doubt in the mind of this writer that there are events in Manitoba schools that are serious violations of the rights of students as individuals, and that successful cases could be launched.

Another factor that might be kept in mind is that educators are often reluctant to have school affairs examined in court. This may be based, at least in part, on an aversion to the publicity that will probably result, a lack of familiarity with school law, a desire to avoid the expenditure of time and money involved, and the possibility of an unsatisfactory settlement. As a result, students, parents, and others who are concerned with students' rights (such as students' organizations and those interested in civil liberties) would be well advised to consider the possibility of court action where it appears that a student's individual rights have been seriously violated. It is possible that the mere suggestion of litigation might cause many school authorities to reconsider their decisions, leading to a satisfactory settlement without court involvement. Litigation should not, of course, be used as a threat. If it is suggested, then the initiator should have full intentions of carrying it out.

This may appear, to some readers, to be an extreme recommendation. It should be remembered, however, that the court system is an established and responsible means of solving disputes in a democratic

society. The educators of the United States who have had to contend with student strikes, riots, and violence would undoubtedly prefer the courts as a means of settling disputes.

And, it could be maintained, the effects of repressive measures on students are of sufficient importance to justify and reasonable means to eliminate such measures. The courts of the land are, without doubt, both a reasonable and a lawful means.

(6) Another possibility is the development of some methods to make students more aware of those rights they do possess and of avenues and sources of help whereby they might endeavour to obtain their rights and have apparent injustices. The development of a handbooks for students, or some other forms of communication, might be a useful project.

The concept of rights should be kept in its proper perspective, for along with rights go responsibilities. If students are to have their rights formally recognized, then corresponding responsibilities must also be recognized. At present, however, it is the opinion of this writer that there is considerable emphasis on the responsibilities of students, but very little mention of their rights.

In conclusion, this writer believes that the legal rights of students in Manitoba's public schools at present are unclear and inadequate. Schools must come to recognize that they cannot be effective in serving a democratic society if the schools themselves demonstrate

undemocratic means of dealing with their clients. Any reasonable means should be used to see that young people generally (including students) are given their due recognition as valued individuals, with guaranteed and protected fundamental rights.

APPENDIX AND SELECTED BIBLIOGRAPHY

APPENDIX A: GLOSSARY OF LEGAL TERMS

The following is a list of terms that may help to clarify some aspects of this study. The definitions are not intended to be complex legal explanations; rather they are general and are expressed in everyday language.

Several sources have been utilized in arriving at these definitions, including the following:

Ballentine, Ballentine's Law Dictionary

Black, Black's Law Dictionary

Enns, The Legal Status of the Canadian School Board

Kenny, "Some Implications of the Lowering of the Age of Majority on Secondary School Administration"

Madaline Kinter Remmlein, School Law (second edition, Danville, Illinois: The Interstate Printers and Publishers Company, 1962).

action - an ordinary proceeding in a court by which one party prosecutes another for the enforement or protection of a right, the redress of a wrong, or the punishment of a public offence. In common language, a "suit" or "lawsuit". See "case".

appelate court - a court having the power to hear an appeal or to review an earlier court decision. Some courts serve both "trial" and "appeal" functions.

assault - an offer or threat to inflict unlawful corporal injury on another person under circumstances where the person making the threat has the apparent present ability to carry it out, if not prevented. See "battery".

battery - related to assault. Battery is an unlawful beating or other physical violence inflicted on a person without his consent. A threat to commit a battery is an assault; when the threat is actually carried out, it is a battery.

case - a judicial proceeding which has the main purpose of settling a controversy between parties, wherein rights are enforced or protected, or wrongs are prevented or redressed.

case law - an accumulation of reported cases, which may serve to establish legal precedents where statutes are unclear or silent. See "precedent", "statute law".

civil law - the law dealing with relations between private persons and with civil rights, as distinguished from criminal law.

digest - a collection of legal cases classified under headings. The cases are usually summarized. A digest is useful in determining precedent in a particular area of law.

gazette - an official publication of a government; evidence of acts of state.

illegal - contrary to law.

injunction - a prohibitive writ issued by a court of equity forbidding a defendant from carrying out some act he is contemplating or from continuing some act in which he is already engaged. See "mandamus".

in loco parentis - in place of a parent; charged with some of the parent's powers and duties.

in re - concerning. When used in a case, it designates a type of case.

landmark case - a case which, because of its uniqueness, or because of the level of the court from which it emanates, is given a great deal of attention in future cases and strongly influences the direction of subsequent decisions in similar situations.

majority - full legal age; the period during which a person is recognized by law as an adult.

mandamus - a writ to compel an organization or its officers to carry out some duty. In simple terms, an injunction stops an action from being carried out, a mandamus make it compulsory to carry it out.

minority - the period during which a person is under the age of legal competence, an infant.

precedent - a decision considered to serve an an authority or example to guide decisions in subsequent cases that are identical or similar in nature.

procedural law - that which prescribes a way of enforcing rights or obtaining redress for their invasion.

quasi-judicial - applies to the action and authority of public administrative officers who are required to investigate facts, draw conclusions from them, and exercise discretion of a judicial nature.

reasonable man - a person who thinks, speaks, and acts according to the dictates of reason; not immoderate or excessive; synonymous with rational, honest, equitable, fair, suitable, moderate.

right - a power or privilege in one person against another.

sanction - a penalty or punishment provided as a means of enforcing obedience to a law.

statute law - the body of law based on acts of legislatures. See "case law".

tort - a wrong or injury committed against the person or property of an individual, a violation of a duty imposed by general law.

trial - a judicial examination, in accordance with the law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it.

ultra vires - outside the scope of authority of a person or organization.

warrant - written authorization to perform a certain action.

APPENDIX B - DUECK CASE

(Judgment in the case of WILLIAM ALEXANDER DUECK, charged with Assault cause bodily harm, before and by Magistrate Pilutik at the City of Winnipeg Magistrate's Court on Wednesday 8th day of April 1970 in "A" Court)

Magistrate: This matter is for decision this afternoon. It certainly has been a rather difficult case to decide and I don't intend to review all the facts of the matter, as they were well put before the Court. I did have an opportunity to read certain case law in connection with the matter, and to which I have been referred to - In the case of Rex vs Metcalfe which is reported in Volume 49 of Canadian Criminal cases, and as well the case of Campeau vs The King, reported in Volume 103 Canadian Criminal Cases, page 355. The facts as presented to the Court in the Dueck matter appear very simple. We had a case of a very young boy, 12 years old, who appeared to be a reasonably intelligent individual, for his age, and who appeared to be a difficult child to deal with, and this was brought out in the evidence by all of the witnesses brought on behalf of the defence. The child, as I have stated, was difficult, at times belligerent, and certainly did disrupt the educational system in his classroom, and appeared to be the type of

2.

(Judgment re: Dueck, continued):

individual who harassed and molested his school mates, as was brought out by the defendant or the accused Mr. Dueck. We then get to the question of whether Mr. Dueck exceeded Section 43 of the Criminal Code where it says - "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction towards a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances" , and its the Court's unfortunate position to decide whether the authority given to the accused Mr. Dueck, did, in fact, exceed what was reasonable under the circumstances. There's no question that on the date in question Mr. Dueck was called upon to discipline the child, and there's no question that he did, in fact, discipline the child with an instrument used for punishment, which apparently is the instrument prescribed by the Winnipeg Public School Board, as a standard strap to be used to punish children, and therefore, as dictum in the Rex vs Metcalfe case, I have to find that the instrument by which the punishment was inflicted, was a proper one to use under the circumstances. Mr. Dueck was given this instrument, and he did, in fact, use it.

3.

(Judgment re: Dueck, continued):

I as well find that the child that was punished, appeared from all the evidence to be a disobedient and provocative child. Well, we then get to the question of whether Mr. Dueck did, in fact, having regard to all these facts, use the instrument in an improper manner. We have the evidence of the child who stated when he was punished by Mr. Dueck it did appear that Mr. Dueck, perhaps, lost control of himself, and rather than only striking the child on the hands, he did, in fact, inflict punishment on other parts of his body. We have, of course, this evidence refuted by the accused Mr. Dueck, who stated that he did strap the young lad, and that on one occasion missed, and, in fact, did strike himself. We, as well, have the evidence of one of the witnesses, who stated that when she admonished the pupil for playing outside, that he, in fact, stated he had already injured his shoulder, or ran into a flag pole, or some such thing. We then get down to the question of credibility. We have the evidence of the young lad, who stated that he did, in fact, scream and cry out whilst he was being punished by Mr. Dueck. However we

4.

(Judgment re: Dueck, continued):

then have the evidence of the caretaker, and the teachers-aid, who both stated they didn't hear any screaming coming from the principal's office, and the caretaker was quite clear when he stated he could hear the sounds of strapping. I then find, that Mr. Dueck did, in fact, strap this individual, and I go back now to Campeau vs The King case where they refer to the case of Lander vs Seaver, wherein it quotes this case, as follows: "If the punishment is clearly excessive, then the master should be held liable for such excess, though he acted from good motives in inflicting the punishment, and, in his own judgment, considered it necessary and not excessive; but, if there is any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt" - And, in this particular case I find that Mr. Dueck certainly felt he had good motives to punish this child. Then we have to bring ourselves to the question of whether, in fact, there was any malicious intent by Mr. Dueck towards this young lad, or whether, in fact, he was only doing what he considered it his duty to do. In the case of Rex vs Metcalfe, they quote the case of The State vs Pendergrass, which is a United States decision, and the

5.

(Judgment re: Dueck, continued):

and the judgment of Judge Gaston, in that case, in part reads, as follows:

"It is not easy to state with precision, the power which the law grants to schoolmasters... with respect to the correction of their pupils. It is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutory sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.

The law has not undertaken to prescribe stated punishments for particular offences, but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments, within the limits of this grant, to the

6.

(Judgment re: Dueck, continued):

discretion of the teacher. The line which separates moderate correction from immoderate punishment, can only be ascertained by reference to general principles. The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorised. But any correction, however severe, which produces temporary pain only, and no permanent ill, cannot be pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare" - - -

We can then get into various discussions as to whether its proper, in this day and age, to administer punishment to children. I don't intend, in this decision, to go into that particular discussion. I think the law is clear, that school masters, boards and teachers can use certain corrective measures. They are given this authority under the Criminal Code, and, as well, they are given this authority by their employers, in this particular case, the Winnipeg Public School Board,

7.

(Judgment re: Dueck, continued):

and they require various types of reports that have to be filed once they have administered corporal punishment. We then get back to the present case, and we have here, a child, and there's medical evidence to the effect there were certain welts on this child, and there were certain bruises. The origin of these bruises, perhaps, maybe somewhat nebulous. He was, certainly a very active and rough individual, as boys go, and the fact that (quotes from page 360 C.C.C.) Vol-

> "That the punishment naturally may cause pain hardly needs to be stated, otherwise its whole purpose would be lost. If in the course of the punishment the pupil should suffer bruises or contusions it does not necessarily follow that the punishment is unreasonable" - - -

I find therefore that Mr. Dueck, under Section 43 of the Criminal Code had the right to inflict corporal punishment on the pupil, and secondly that the punishment, as was disclosed in the evidence before the Court, was not excessive, and therefore I find Mr. Dueck not guilty, and the charge is dismissed.

8.

I, Hohn N. E. Williams, an official court reporter, in and for the Province of Manitoba, do hereby certify that the foregoing pages of Judgment in the case of William Alexander Dueck charged with assault cause bodily harm, is a true and correct transcript of my shorthand notes taken of said judgment.

Dated at the City of Winnipeg this 8th day of April 1970.

. . . . . .

201 - 2130 Main Street
Winnipeg, Manitoba R2V 3E8
December 12, 1972

Mr. Emerson Arnett, General Secretary
Manitoba Teachers' Society
191 Harcourt Street at Portage Avenue
Winnipeg, Manitoba R3J 3H2

Dear Emerson:

I am presently on sabbatical leave and am enrolled as a full-time M. Ed. student at the University of Manitoba.

The topic I have chosen for my thesis concerns the legal rights of Manitoba public school students in a number of areas, including corporal punishment, suspension and expulsion, dress and hair codes, and the presence of police in the schools. I am sure you will agree that this is a field of growing interest and that it needs study and clarification.

I have had a brief preliminary discussion with Howard Loewen, and it would appear that a great deal of significant information can be found in records of cases that have involved M. T. S. members, both cases that were settled before reaching court and those that did go to court.

I am therefore writing to ask permission to see the relevant files in McMaster House. In addition, it would be very helpful if I were allowed to see the files of the M. T. S. solicitors. I intend to make similar requests of the Department of Education, M. A. S. T., and some of the larger school divisions.

If anonymity of the individuals involved is a concern, I am sure that we can arrive at a mutually satisfactory understanding.

Because access to these files will be of considerable value to my study, I hope that it will be possible to make these arrangements.

If you wish to discuss this matter with me, my home telephone number is 338-2643.

Yours sincerely,

Russ Gourluck

RG:el

Manitoba Teachers' Society

AREA CODE 204

McMASTER HOUSE 191 HARCOURT ST. AT PORTAGE AVE., WINNIPEG, MANITOBA R3J 3H2 TELEPHONE 888-7961

January 5, 1973.

Winnipeg, Manitoba,
R2V 3E8.

Dear Russ:

I have your letter of December 12 regarding your thesis on the rights of public school students in a number of areas. I see no problem in making the files available to you so long as the anonymity of individuals is preserved and so long as the files are used on the premises. With these thoughts in mind we would be happy to have you come down and look them over and wish you well in your good work. As Howard has already given it some thought he might be a good person to contact to get the relevant files. Perhaps your best bet is to phone him in advance. However should he not be available for some reason, I am sure that other members of the staff, including myself, would be more than pleased to help you.

Perhaps we should make one stipulation and that is that when you complete the thesis, you present one copy to the MTS library!

Yours fraternally,

E. L. Ahrens,
General Secretary.

ELA/jph

201 - 2130 Main Street
Winnipeg, Manitoba R2V 2E8
February 2, 1973

Executive Director
Manitoba Association of School Trustees
216 - 1120 Grant Avenue
Winnipeg, Manitoba R3N 2A6

Dear Mr.

I am a teacher in the Seven Oaks School Division presently on sabbatical leave and enrolled in a full-time M. Ed. program at the University of Manitoba.

The topic I have chosen for my thesis concerns the legal rights of Manitoba public school students in a number of areas, including corporal punishment, suspension and expulsion, dress and hair codes, and the presence of police in the schools. I hope you will agree that this is a field of growing interest and that it needs study and clarification.

I have obtained the permission of the Manitoba Teachers' Society to see files in McMaster House or in the offices of the Society solicitors that might pertain to this topic. I am primarily interested in cases that either went to court or, as is frequently the case, were settled before reaching court. This permission was granted by Emerson Arnett on three conditions: that the anonymity of individuals be preserved, that the files are used on the premises, and that, when the thesis is completed, a copy be given to the M.T.S.

I assume that similar files exist in the M.A.S.T. offices and those of the association's solicitors. I am writing to ask your permission to see such files, on the same conditions as I have outlined above, or on any other mutually satisfactory conditions.

Because access to this kind of information will be of considerable value to this study, I hope that it will be possible to make these arrangements.

If you wish to discuss this matter, my home phone number is 338-2643.

Yours sincerely,

Russ Gourluck
Graduate Student

RG:el

MAST THE MANITOBA ASSOCIATION OF SCHOOL TRUSTEES
ROOM 216-1120 GRANT AVENUE, WINNIPEG, MANITOBA R3M 2A6, TELEPHONE 452-3143

A. C. ANDERSON
EXECUTIVE DIRECTOR

February 7th, 1973

Mr. [illegible]
201-2130 Main Street
Winnipeg, Manitoba
R2V 2E8

Dear Mr.

Mr. Norm Harvey has asked that I reply to your letter of February 2nd, regarding your proposed M. Ed. program at the University of Manitoba.

The topic you have chosen for your thesis is certainly an interesting one and delves into an area that will likely concern us more and more in the future. We note with some nervousness, what is happening south of the border - such things as police in the schools to maintain law and order. With things such as dress and hair codes, we see problems right here in Manitoba.

Wherever possible, our Association has attempted to cooperate with people undertaking studies and we will offer our support for your thesis in whatever means possible. A copy of this letter is going to our solicitor, Mr. Hugh Parker. We do not really have much on file here, but that which we do have and that which Mr. Parker has on the subject could be made available to you.

This information will be made available on the same conditions that were outlined by MTS, namely that: the anonymity of individuals be preserved, the files and information be used directly on the premises, and, a copy of the final thesis is given to M.A.S.T.

I would suggest that you give me a call and also talk to Peter Coleman of our office so that we might determine exactly what information you want, and if indeed we have what you require.

Good luck in your study.

Yours truly,

[illegible]
Director of Special Services

cc H. Parker

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