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CHARTER AND LEGAL CONSIDERATIONS IN THE
PROVISION OF EDUCATIONAL SERVICES
TO SPECIAL NEEDS STUDENTS

by

L. Michelle LeBaron
B.A., Chapman College, 1977
LL.B., University of British Columbia, 1980

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE
of MASTER OF ARTS (EDUCATION)
in the Faculty
of
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Charter and Legal Considerations in the Provision of Educational Services to Special Needs Students.


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ABSTRACT

The rights of handicapped children in education are in flux since the coming into force of the equality provisions in the Canadian Charter of Rights and Freedoms. Must a handicapped child be only physically accommodated in the classroom, provided with a beneficial educational program, or assisted in reaching his or her potential? The issues of degree of integration and level of service entitlement have not yet been considered by the Supreme Court of Canada. In this paper, the case method is used to trace legal and policy developments in the United States and Canada through legislation and judicial interpretation.

American jurisprudence is voluminous, and the decisions hard to reconcile. In Canada, there is less certainty due to many cases before the courts at various stages of completion. The first of the Ontario cases in which parents are seeking to compel mainstreaming for a handicapped child will proceed to trial in the fall of 1990. It will be years before any such case reaches the Supreme Court of Canada. Uncertainty about the responsibilities of boards for provision of service to the handicapped is problematic for students, parents, teachers, administrators, school boards, and ministries of education.

This uncertainty is addressed through a discussion of Canadian cases in progress according to the principles of Charter interpretation, Supreme Court of Canada decisions interpreting the equality provisions, and the possible application of American precedents. The posture of the Supreme Court of Canada in interpreting provincial education legislation and the equality guarantees of the Charter is examined. Recent Charter litigation has defined the equality provisions broadly, lending credence to
plaintiffs' hopes that the Supreme Court will shake its traditional reticence to review decisions of an educational administrative nature. The policy implications of such a shift are addressed.
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CHAPTER ONE

Introduction

Until accommodation for the disabled is seen as regular, normal, and expected, it will be seen instead as special. As long as it is special, it will be, by definition, unequal (Biklen, 1985).

There is a desk set up on the school lawn. A woman works with a child in a wheelchair, reading from a book with oversize pages. All around them, there is the usual bustle of the start of another school year. Students with new lunch kits, renewing acquaintances as they laugh past, send curious looks in the direction of the child. Photographers and reporters focus on the scene. The child in the chair is unable to walk, talk, read, or control elimination. Is she entitled to receive an education? If she is so entitled, does she have the same rights as those pushing past her into the school, or something less?

Becky Till belongs in her school with all the other kids in her neighbourhood, not just because it is sound educational practice, nor because it will enrich Becky's life, nor just because it will enrich the lives of all students and faculty at the school, which it will - but because it is right (Huber, 1990, p. 20).

The Ontario case of Becky Till is only one of several that have focussed attention on the rights of the disabled to integration in regular classrooms. Only three decades ago there was little debate; the rights, whether moral or legal, were largely unrecognized. While a great deal has changed in the intervening decades, the questions of the right to education, and the quality of that experience are far from settled.
The Right to Receive an Education

The fundamental importance of education is recognized by the citizens of both Canada and the United States. Few would take issue with the observation of the U.S. Supreme Court that

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities... It is the very foundation of good citizenship. Today it is a principal instrument in awakening a child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken it, is a right which must be made available to all on equal terms (Brown v. Board of Education, p. 691).

No Canadian case has imposed an absolute right to an education. Only in the provinces of Saskatchewan, Manitoba, Ontario, and Quebec is a general right to education acknowledged by statute. Even in these jurisdictions, however, there is no recognition of an appropriate or minimal educational standard. Most Canadians, however, assume that some such right exists. Cruikshank acknowledges this, observing that "most Canadians cling to an article of faith that their children have a right to public education and a right to equal treatment by government education systems" (1986, p. 51). Such a right is constitutionally recognized in a number of countries including the U.S.S.R., China, Egypt, and Venezuela.

This right is well recognized at international law in documents to which Canada is a party. For example, education as a right is bestowed by Article 26 of the Universal Declaration of Human Rights, which was accepted by Canada. It reads

1. Everyone has the right to an education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
This is reaffirmed by the Declaration of the Rights of the Child, also accepted by Canada. Section 7 reads:

7. The child is entitled to receive education which is 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 the basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

The International Covenant on Economic, Social, and Cultural Rights was the final product of a series of United Nations declarations on this subject. Article 13 of this document now supercedes both of the previous declarations. It is similar to its predecessors in recognizing universal rights to education:

Article 13

1. The States parties to the present Covenant recognize the right of everyone to an education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the request for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among nations.

Canada is required by international convention to observe United Nations declarations, but they have no automatic legal impact. Unless they are explicitly translated into domestic law, they can be used at most as one of many interpretive guides when Canadian statutes dealing with education are being judicially considered.

Education is generally available in Canada as required by these international provisions. The classification of access to education as a right rather than a privilege is critical, however, for if education is only a privilege, it can be taken away or diminished without the operation of law. It is merely discretionary. If it is a right, it does not exist by virtue of common law. There is no right existing at common law in Canada, meaning that judges have not developed a recognition of such a right through our system of precedent. (This system is explained in Chapter Two.)
The only remaining sources are statutes of either the provincial or federal governments, and the Constitution.

The Constitution Act, 1867, (formerly the British North America Act, 1867), gives jurisdiction over education to provincial legislatures. Most provincial statutes confer a right to attend school (see, for example, section 31(1) of the Ontario Education Act that reads "A person has the right, without the payment of a fee, to attend a school [in a district in]... which he is qualified to be a resident pupil"). The right is usually defined according to age (in Ontario, persons from age six to twenty), and does not extend to attendance at any specific school. The right to attend school, of course, is not tantamount to a guarantee of education. Some provinces (eg. Nova Scotia, Education Act s. 48(2)) also impose on boards the duty to provide an education. In other jurisdictions (eg. Newfoundland), children are entitled to be accommodated, but no more.

Entitlement to special education services is different in each province, and schemes range from the elaborate Ontario provisions for placement and review to the scanty directives of the British Columbia School Act. These provisions may be mandatory or permissive. In seven provinces (Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Quebec, and Saskatchewan), legislation requires the provision of educational services to all students regardless of their special difficulties. In British Columbia, Alberta, and Prince Edward Island, the legislation is permissive only. The ramifications of this difference are discussed in detail in Chapter Four, which deals with Canadian special education legislation and cases.

The Constitution of Canada provides for denominational, separate, and dissentient schools. It also recognizes minority language educational rights. MaKay
(1984) argues that the sections recognizing specific rights of linguistic minorities and others in education implicitly and necessarily contemplate a general right to education. This argument is logically compelling, but even if some general education right is included by virtue of these specific sections, the parameters of that right are unknown. Also, as long as the right is not explicitly conferred, it can just as easily be found not to exist by a court.

Two provinces have human rights legislation conferring the right to an education; those of Saskatchewan and Quebec. The Saskatchewan Human Rights Code reads as follows:

13. (1) Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of their race, religion, colour, marital status, physical disability, nationality, ancestry, or place of origin.

The Charter of Human Rights and Freedoms of Quebec provides the following:

40. Every person has the right to the extent and according to the standards provided for by law, to free public education.

The Civil Code of Quebec also implicitly recognizes the right to an education through provisions applying to children:

33. Every decision concerning a child shall be taken in light of the child's interests and in respect of his rights.

Consideration shall be given, in addition to the moral, intellectual, emotional, and material needs of the child, to the child's age, health, personality and family environment, and to his other circumstances.

The Alberta Bill of Rights does not guarantee such a right, but it is the only province to legislate generally for "equality before the law and the protection of the law" (section 1 (b)). Human rights codes in some other provinces have been interpreted to apply to education as being a service customarily available to the public. If education is so-defined, then any rights conferred under provincial education
statutes must extend equally to all regardless of mental or physical disability. *The Minister of Labour v. The Board of School Trustees and Human Rights Board of Inquiry, David Atias, Human Rights Commission, Department of Education, Malcolm Ross, and Brian D. Bruce* (the Ross case) is the latest example of such an interpretation. This decision, rendered in September 1989 by the New Brunswick Court of Appeal, confirms the applicability of human rights provisions to education legislation. The judgment recognizes that

"to hold otherwise would seem to...frustrate the legislative intent of the Human Rights Act and its preamble and amount to a rejection of the broad purposive approach to the interpretation of antidiscrimination legislation adopted by the Supreme Court of Canada."

The relevant British Columbia legislation, the *Human Rights Act* (1984), is worded identically to the New Brunswick legislation considered in the Ross case. Section 3 of the B.C. Act provides that "no person shall be denied accommodation, services, or facilities customarily available to the public because of...physical or mental disability".

There is no consensus on the applicability of such provisions to education, however. In Manitoba and Alberta, there are cases in which the opposite was held, i.e. that education is not a service covered by human rights legislation. In *Winnipeg School Division No. 1 v. McArthur*, it was held that schools are not services or facilities customarily available to the public. Therefore, no complaint of discrimination in education could be brought by way of a human rights tribunal. In *Schmidt v. Calgary Board of Education*, the same conclusion was reached. The lack of a clearly defined right to education in Canada generally and in Alberta and Manitoba specifically made it possible for judges to exclude education as a protected service. If
education was a right enjoyed by all, not a privilege, it would be very difficult to maintain such restrictive interpretations.

Zuker (1989) maintains that once an educational system is established, any opportunities existing under it must and should be made available to all students on equal terms. To the extent that children have a right to an education, the Canadian Charter of Rights and Freedoms guarantees the extension of this right to all equally, regardless of mental or physical disability. The rights of the disabled to equality in education stem from sections 15 and 7 of the Charter which read as follows:

7. Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
(2) Subsection (1) does not preclude any law, program, or activity, that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental disability.

These sections do not refer explicitly to education, so the educational rights of the handicapped must be derived from more general education rights. Section 7 of the Charter is argued to include the right to an education by MacKay (1987b, p. 108). He explains that

without an education there is no right to a quality of life, liberty, or security of the person. Since other sections of the Charter expressly recognize rights to denominational education and education in one's minority language, it would seem strange to deny a more general right to education in the Charter. Furthermore, a right to education is a prerequisite to an effective exercise of other Charter rights such as the right to free expression and the right to vote.

This argument is supported by the majority decision in Jones v. R, where LaForest assumed without deciding that education was one of the "life, liberty, and security of
the person’s interests. Madame Justice Wilson, in dissent, dealt with the question directly, deciding that education was encompassed in section 7 of the Charter. If section 7 is found to guarantee this right, then section 15 can be invoked to ensure that the right is available to all irrespective of physical or mental limitation.

Who are the Disabled?

There is no uniform understanding concerning who "handicapped" children are. According to Thurman and Widerstrom (1985), special needs include anything that causes the child to need assistance beyond that normally required to assure the best developmental outcome (for instance physical, mental, or sensory impairment, family situation or social background). Hahn (1986) identifies the definition of disability as fundamentally a policy question. There is increasing pressure on legislators and educational policy-makers to ensure that no definition is used as a barrier to the inclusion of children in the schools.

Children may be excluded physically (by being unable to access facilities, for example), or otherwise. Once access is possible in a physical sense, the question emerges of what level of service must be provided. There is a spectrum of possibilities, from simple physical access, to programming that allows the child to maximize his or her potential. As the U.S. Supreme Court observed in the case of Lau v. Nichol, "There is no equality of treatment merely by providing students with the same facilities, teachers, textbooks, and curriculum; for students who do not understand...are effectively foreclosed from any meaningful education (p. 574)."
Mainstreaming v. Integration

Current trends dictate the education of the handicapped in the least restrictive environment. The literature is full of references to both integration and mainstreaming as implementation strategies. These terms are defined as follows:

Integration of handicapped children requires that they have ongoing opportunities to interact with their non-handicapped peers. This means that education programs for handicapped students should be located in school settings where such interaction is possible. It also involves a concerted effort to ensure that both groups of students do, in fact, develop ongoing relationships.

Mainstreaming is a type of interaction which implies the specific placement of a handicapped child in a "regular" class as opposed to a "special" class. The primary teacher responsible for the education program of the student is thus the regular classroom teacher. (Bagnall, 1985, p. 1-2).

It can be seen from these descriptions that a student who is mainstreamed is also integrated but that integration does not necessarily require mainstreaming. This continuum of service delivery makes the question of "equality" in education a complex one.

Mainstreaming

The wisdom of placing disabled students in segregated classes has been questioned on empirical, moral, and legal grounds (Reynolds, Brandl, & Copeland, 1983). Wang and Baker (1985-86) reflect that the current trend is "a movement away from questioning whether or not to mainstream and toward broadening the knowledge base and understanding of how to provide effective special education services within the context of regular classes (p.504)."

In their meta-analysis of a decade of American mainstreaming studies, Wang and Baker (1985-86) report that there is "support for the effectiveness of mainstreaming in improving performance, attitudinal, and process outcomes for
handicapped students....The finding of positive effect sizes across all three categories is particularly noteworthy (p. 517).

There is support in the Canadian literature for this conclusion as well. Though much of the writing is in the form of case studies (Kunc, 1984; Stainback & Stainback, 1986), the positive outcomes attributed to mainstreaming include increased efficiency (operation of a single system of education rather than a dual system) and benefits for the disabled child and the other children alike. For the former, self-esteem improvement, learning of appropriate social behavior, and improved academic progress are reported. For the latter, there is the advantage of getting past appearances and the baggage of stigma leftover from another generation.

**Historical Background**

The story of education for the handicapped is largely told by listing the names of nineteenth century institutions set up to assist them: Hospice des Incurables in France, the Pennsylvania Training School for Idiots, and the Physiological School for Weak-minded and Weak-bodied Children in New York City. Jean Marc Itard was one of the first reported professionals to work with mental retardation. He is best known for his work with the "wild boy of Aveyron", Victor, who had been found in the woods, reportedly raised by animals. Through five years of intense work, he was able to teach Victor to identify objects and letters of the alphabet, as well as to understand the meaning of some common words (Kanner, 1964).

Itard's work challenged the presumption that mentally retarded individuals were unteachable. Others followed his direction, notably Maria Montessori and Grace Fernald in the early 1900s. Despite their work, however, negative attitudes to the
handicapped and their education prevailed. Taylor and Sternberg (1989) suggest this was because the work was new and the economic climate unreceptive to the provision of "extra" services. Institutions became dumping grounds for the unwanted.

In 1914, Henry Goddard published his study of the Kallikak family in a book titled Feeblemindedness: Its causes and consequences (Goddard, 1914). Having traced a family for five generations of a man who had both a "legitimate" and an "illegitimate" child, he "showed" that the descendants of the latter were largely retarded, while those of the former were of above-average intelligence. Though this study has been severely criticized since (Smith, 1985), it was instrumental in perpetuating negative stereotypes.

In 1949, Paul Fuller published Operant conditioning of a human vegetative organism in American Psychologist. He reported the use of reinforcement procedures to train a man with multiple handicaps to raise his arm. While this seems simple by today's standards, it powerfully influenced the development of appropriate educational programs for students with severe disabilities (Sobsey, 1988). The "experts'" opinions that those with severe disabilities were incapable of learning were shown to be incorrect.

Policy and legislative documents dealing with children with special needs followed. They included the Commission on Emotional and Learning Difficulties in Children (CELDIC) in Canada (Lazure, 1979) and the Warnock Report (Department of Education and Science [DES], 1978) and the Education Act (1981) in the U.K. In the United States, the response was P.L. 94-142 (1975), also known as the Education for All Handicapped Children Act.
Programs were implemented to address the educational needs of handicapped children. Following Fuller's lead, the programs were based almost entirely on behavioral psychology. These techniques, while useful, have been seen in recent years to have limitations as well. Educators have come to adopt what is known as an "ecological model of curriculum" (Sobsey, 1988). This model recognizes the usefulness of behavioral techniques, but stresses the facilitation of normal, age-appropriate behavior and transitions to less restrictive environments.

The question of what constitutes an appropriate education for handicapped students has been the focus of much research and discussion. There is currently a clear direction toward integration in regular schools and mainstreaming in regular classrooms. Many lawsuits have been brought to compel integration when it has been resisted by school boards. Since the advent of the Charter, Canadians have been increasingly willing to litigate, encouraged by Supreme Court of Canada decisions interpreting equality provisions broadly. Exactly what standard of service the law will require of educators is unclear. It is the purpose of this thesis to explore this question in the light of Canadian educational legislation, Supreme Court of Canada interpretations of the Charter, and relevant American jurisprudence.

American Jurisprudence: An Historical Perspective

In the United States, the lack of educational opportunity for handicapped children began to change with the case of Brown v. Board of Education (1954) in which the Supreme Court recognized the importance of education and that it should be available on equal terms to all. With this departure from a previously reserved approach to educational litigation, the U.S. Supreme Court triggered judicial and
legislative activism with far-reaching consequences. The Brown case dealt with the question of assignment of students to schools based on race, but had implications far beyond that subject. It opened the door to questions of equality not limited to race, but also to equality of educational experience. Thus, the question of equality for handicapped children came to be addressed.

Brown was followed by two important decisions that were the catalyst for federal legislative action on behalf of handicapped children. The first, Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, involved a challenge brought by the parents of seventeen retarded children. The plaintiffs maintained that a Pennsylvania law allowing for the exclusion of severely handicapped children if they were determined to be "ineducable and untrainable" and "incapable of benefitting" from education, was unconstitutional. The Supreme Court upheld their claim, remarking that "all children are capable of benefitting from instruction, if only in the sense that they can be rendered relatively less dependent on others."

Shortly after, the decision in the leading case of Mills v. Board of Education of the District of Columbia followed. At issue was a District of Columbia law requiring educational services to be provided to all children between the ages of seven and seventeen. Parents of 18,000 handicapped children who were denied any education in 1972-73 claimed that the failure to provide service to their children was a constitutional violation under the Fourteenth Amendment. The federal court for the District of Columbia agreed. The combined effect of these two decisions was to spark many lawsuits in other American jurisdictions. Legislative action was the response.
The Education for All Handicapped Children Act (1975) was a federal law requiring school boards to provide education to all handicapped students. This law mandated a "free appropriate education and related services" to be provided to all handicapped children between the ages of five and eighteen. Individual education plans were to be developed for each student. The Act further stipulated that students should be educated in the "least restrictive environment", or mainstreamed, and enforced due process at every stage of the placement and review process. Judicial interpretations of the Education For All Handicapped Act have been disappointing to those who hailed it as a breakthrough, but it brought the United States to a recognition of at least a minimal standard of human and education rights for the disabled.

History of Canadian Initiatives for the Disabled in Education

In Canada, too, the rights of minorities in education and in other contexts were ignored. Racial discrimination was rampant during Canada's first century as a nation. The early cases of Union Colliery and Tomey Homma are evidence that outright racial discrimination was constitutionally permissible. Even the Canadian Bill of Rights (1960) did not recognize the rights of the mentally and physically handicapped to equality and protection from discrimination. The prohibited grounds for discrimination were race, religion, national origin, colour, religion, and sex (section 1). If it had done so, it is doubtful the protection would actually have been extended. In the twenty five years between the adoption of the Bill of Rights and the proclamation of the equality provisions of the Charter, only one case ever resulted in a finding of discrimination under the Bill of Rights. In the celebrated decision of R.
v. Drybones, it was held that a section of the Indian Act making it an offence to be intoxicated off a reserve was more stringent than any provisions applying to non-Indians and thus denied Indians the right to equality under the law.

In education, little service was provided to the handicapped prior to forty years ago. A chronology of the service-provision since 1950 illustrates the progression toward recognition of the rights of the handicapped to receive an education, though the right to receive a meaningful education is still by no means established. Forty years ago, almost all students with severe disabilities were excluded from educational settings. Less disabled students received some training, but levels of service varied and many were completely excluded. Thirty years ago, the handicapped were educated in completely segregated settings. Twenty years ago, some schools were beginning to provide services, and ten years ago, integration meant a self-contained classroom in a regular school. Today, there is more pressure from parents and professionals in education (Little, 1985; Forest & Mayer, 1987) to integrate special needs children with non-handicapped peers as much as possible.

This pressure from parents follows international recognition of the failure of Canada to address the rights of the disabled. The Organization of Educational and Cultural Development of the United Nations reflected in 1976 that "...the problem of providing full educational opportunities to handicapped children is a task that has, with few honourable exceptions, been grievously neglected in Canada." Canada and the provinces subscribed in 1976 to the International Covenant on Economic, Social, and Cultural Rights, but little action was taken to implement its provisions. Article 13, which deals with education, is not specific to persons with disabilities, nor does the anti-discrimination clause (Article 2.2) mention disabilities. Canada was a
party to the Declaration of Rights of the Mentally Retarded (1971), but this
document is declaratory only, and so not binding on nation states. Canada, in any
event, does not recognize international law as part of its internal law (Castel, 1976,
Ch.1).

Increased awareness of the educational rights of the disabled was paralleled
by the emergence in the 1970's of the student rights movement. This movement is
concerned with rights and liberties students have or do not have in schools (Mackay,
1984). As due process and human rights are explored as they apply to all students,
the anomalous situation of the handicapped becomes conspicuous. Here is a group of
students concerned with whether they have a right to an education at all, and if so,
how meaningful that education is to be (Cruikshank, 1983).

Following the International Year of Disabled Persons in 1981, the 1982
repatriated Constitution entrenched recognition of equality rights for the first time.
Section 15 of the Charter of Rights and Freedoms provides protection against
discrimination for those with physical or mental disabilities. The extent of
protection afforded to handicapped children in respect of education by this section has
been widely debated (Poirier, Goguen, & Leslie, 1988). In addition to uncertainty
about the right to an education per se, the interpretation of section 15 to education
may be broad or, following pre-Charter interpretations of education legislation,
disappointingly narrow. Some early cases where rights were restrictively
interpreted are discussed in Chapter Four. There is currently no uniform, minimum
standard for service provision to the handicapped in education.
Level of Service Provision to Special Needs Children

Equality in an educational setting is an elusive concept. The spectrum of possibilities range from the American standard of education in the "least restrictive environment" to the contention of some Canadian plaintiffs that their children are entitled to be integrated in a regular class in their neighbourhood school. Litigation has also been initiated by those who want more specialized services and segregation for their child (Antonsen v. Board of School Trustees District No. 39 (Vancouver) et.al.). Until the Supreme Court of Canada considers this issue, there will be no authoritative pronouncement on which to rely. The research questions to be addressed in this thesis flow from this uncertainty.

The Questions

1. How does United States constitutional law and education litigation inform the process of determining rights here in Canada?

   The Rowley case was the first heard by the U.S. Supreme Court under the Education for All Handicapped Children Act, and was widely viewed as disappointing to the disabled. This decision is analyzed and traced as it influences later American cases. The applicability of U.S. caselaw in special education litigation in Canada is discussed.

2. How does the Canadian Charter of Rights and Freedoms affect the quality of programming required for exceptional pupils according to provincial legislation and policy?
The legislative schemes of the provinces relating to special education are examined, with a primary focus on the legislation in Ontario and British Columbia; the former because it is there that the majority of cases have arisen including those with the most likelihood of reaching the Supreme Court of Canada in the near future, and the latter because it is the British Columbia legislation which is most important to educators in this province.

The question of the applicability of the *Charter* to the acts of school boards and school officials is discussed. Assuming *Charter* application, Supreme Court decisions interpreting section 15 of the *Charter* are surveyed. The reasoning in those cases is discussed as it may apply to special education cases now before the courts in various provinces.

3. What are the previous and ongoing Canadian cases in this area?

This section will involve an analysis of Canadian cases in process or recently decided. Due to the long delays inherent in the system, it takes years for a case to proceed to the appellate level. Many interlocutory, or interim, applications may be dealt with before the merits of the case are considered. Some cases are settled before they are adjudicated. Due to expense and the sheer energy required to pursue such litigation, many cases are not appealed beyond the administrative tribunal or trial court level. Cases such as the *Antonsen* decision in British Columbia (decided by the B.C. Supreme Court and not appealed) are described and analyzed as precedents. Cases from other provinces are discussed. The applicability of these decisions in British Columbia is addressed.
4. What practical implications flow from the legal analysis that should guide both school boards in formulating and executing policy and consumers of education services in what they can reasonably expect?

The question of the practical implications of this discussion is canvassed. Service delivery and program design as functions of legislation and Charter-responsive policy are explored. Several recommendations to policy-makers follow.

Method

The method in use here is known as the case method. Arising from the Canadian system of stare decisis, the case method involves analyzing decisions in order to extract basic legal principles which are of broad application in similar circumstances. The case method is used here to describe the cases in process in Canada generally, with reference to the provincial legislation on which they are based. These are contrasted with legal developments in the United States as they may apply in the shaping of Canadian law. Finally, recent Supreme Court of Canada decisions in Charter matters are discussed. From selected cases, the orientation of the Court is explored in order to extrapolate the possible outcome of the cases currently in process.

Limitations

The limitations involved in carrying out such a project are obvious: since the cases have not yet been heard, there can be no decisive certainty in the analysis. The composition of the Supreme Court is subject to change, as is the number of judges who may sit on any one case. Some cases will be settled, others will not progress all
the way to the Supreme Court of Canada due to limitations of time and budget. As with any form of prediction, this exercise is not an exact science. There are too many factors which cannot be calculated, including the actions of the parties, the amendment of legislation, the changing of policies, the changing of interpretation or implementation of policies, and many other human factors.

Adjudication by the Supreme Court of these issues may be several years away. Nonetheless, this exercise does have merit. In the interim, educators need some guidance to inform their policies. Parents of disabled individuals need to know what, under the law, it is reasonable to expect. Teachers need to know the standard of service both handicapped and non-handicapped students are entitled to when mainstreaming and integration are practiced. Above all, handicapped individuals themselves are entitled to have the strongest possible case put forward on their behalf for the broad interpretation of the guarantees of the Charter.

Organization of the thesis

Chapter one is devoted to an introduction and an historical description of the treatment of handicapped students in educational settings. Chapter two describes methodology in detail, including a discussion of the applicability of American constitutional litigation to Canadian Charter litigation. The third chapter reviews American caselaw in this area, particularly since the Rowley decision of 1982. Chapter four canvasses Canadian education legislation and Canadian caselaw as it is developing in various provincial jurisdictions. Chapter five concludes the thesis, with reasoning by analogy using other cases in which the courts have applied the
Charter to educational litigation. The question of how these decisions inform the provision of service requirement is addressed.
CHAPTER TWO

The Charter: Background and Interpretation

Wherever the real power in a government lies, there is a danger of oppression. In our governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of constituents...Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by an interested prince.

John Madison in a letter to Thomas Jefferson, October 17, 1788.

The Charter has been heralded as a check on the "tyranny of the majority" referred to by Madison. Its interpretation and application by the judiciary will determine its effectiveness in this role. Given the disparate nature of provincial schemes regarding education in general and special education in particular, the Charter is the best hope for those who advocate a minimum standard for the provision of service to the mentally and physically handicapped. In this chapter, an historical context of the Charter is provided as a context for the discussion of its probable application to educational equality claims. Rules of constitutional interpretation arising from Canadian precedent and theoretical foundations as they may influence Charter interpretation are discussed. Charter cases are canvassed for clues to the stance of the judiciary in Charter interpretation. The use made by Canadian judges of American constitutional precedents is explored as it may indicate possible paths for decision-making. The case method is explicated as the vehicle for investigation.
Emergence of the Charter

Study of the Charter is best informed by an understanding of the historical context in which it was born, given that it did not emerge in a vacuum. The effect of the Charter on societal evolution and direction is fundamental to an understanding not only of the law, but the roles and relationships of groups and individuals in society. It has the potential to have a profound influence on the rights of those less powerful groups in society through interpretations of the equality guarantees it contains, though the available evidence to date suggests that its greatest impact has been on white middle class males (Brodsky & Day, 1989).

The confederation of Canada was more an act of unification in reaction to the prospect of American annexation than a deliberate creation of a nation based on shared ideals and values. Thus, the British North America Act (1867) (now the Confederation Act, 1867) was concerned mainly with the division of powers between the federal parliament and provincial legislatures. Canadians waited 115 years after confederation for a statement of shared values and ideals, unlike the Americans, whose traditions were rooted in the fundamental freedoms guaranteed by their Constitution. In Canada, the provincial and federal legislatures were charged with the responsibility of ensuring that individual rights and freedoms were protected within their respective spheres of authority. The judiciary relied on the doctrine of the separation of powers and parliamentary sovereignty in dealing with questions of rights. The approach was largely unsatisfactory (Gibson, 1990).

Until the late 1940's and early 1950's, there was little momentum in Canada for the adoption of a Bill of Rights. Then, the Nazi domination of Germany and the Canadian willingness to curtail rights of minorities in cases such as the treatment of
Japanese Canadians during World War II underlined the need for action. This led to a "temporary flush of judicial egalitarianism [that] faded after a while [in which] concerted discrimination against members of the Jehovah's Witness faith in the Province of Quebec was suppressed by a series of innovative Supreme Court decisions" (Gibson, 1990, pp. 11-12). The Diefenbaker government passed the Canadian Bill of Rights in 1960, but not without a struggle resulting in compromise. These compromises restricted the Bill's effectiveness.

Problems with the Bill of Rights included the following: it did not have the status of a constitutionally entrenched instrument like the Charter, but was subject to amendment by a simple majority of Parliament; it was not binding on the provinces; and it was ultimately considered by the judiciary largely as an interpretive tool for statutes rather than a license to uphold fundamental rights and freedoms. One of the most troublesome sources of difficulty was the fact that the rights and freedoms listed in the Bill, including those that protect equality, were not stated to be new legal entitlements. The Bill only recognizes that the rights and freedoms "have existed and will continue to exist".

Under then Prime Minister Trudeau, the repatriation of the Constitution and the entrenchment of the Canadian Charter of Rights and Freedoms was accomplished. Since this event in 1982, Parliament and the provincial legislatures are no longer supreme within their jurisdictional fields. Section 52 of the Charter admonishes: "The Constitution of Canada is the supreme law of Canada." Section 32(1) of the Charter requires all legislative bodies to respect the rights and freedoms listed in the Charter. These two sections combine to underline the supremacy of the
Constitution, a supremacy, the courts are mandated to enforce through judicial review.

The rights acknowledged within the Canadian Charter of Rights and Freedoms may be categorized as follows: 1. fundamental freedoms such as freedom of religion, freedom of the press; 2. democratic rights ensuring the rights of citizens to elect representatives to government; 3. mobility rights; 4. legal rights such as those protecting against unreasonable search and seizure and those guaranteeing the presumption of innocence; 5. equality rights incorporating the principles of natural justice; 6. language rights; 7. language rights in education.

This era in Canadian jurisprudential history is unique: the Charter has been in operation for less than a decade, the equality section for an even shorter period. A fundamental shift away from the British tradition of parliamentary supremacy, so dominant in the Canadian legal culture, has been modified by the adoption of a domestic, written Constitution. It is a change with important implications for the recognition of fundamental rights and freedoms in Canadian society.

The Judiciary and the Charter

The enactment of the Canada Act (1982) heralded a new era for the Canadian judiciary. While formerly, social policy changes emerged from the rubric of the doctrine of the separation of powers, judges since 1982 have been charged with the responsibility of upholding fundamental freedoms. They have had fuller and more explicit participation in elaborating and refining the values which shape and reflect Canadian society. Judge-made law is unique in the speed and extent of change it may orchestrate. It functions as what some view as an essential check on the actions of
the executive and legislative arms of government by putting the onus on these bodies to justify actual or potential inequality of treatment.

Charter rights and freedoms are limited only by section 1 which reads "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Dickson, C.J. in the Big M DrugMart case, proposed that the test for reasonable limits on an identified right should be: "[w]hether the means adopted to achieve the end sought to do so by impairing as little as possible the right or freedom in question". With such an onerous test for respondents to meet, the Charter facilitates wide and independent review of legislative and executive actions. Courts have accomplished this review largely through the application of established legal doctrines and precedent.

The passage of the Charter, as Hart (1990) observes, has changed the judicial framework to one in which legislation and acts of government are viewed through a prism of clearly enunciated, guaranteed principles. The only possible exemptions from its application are cases where limits are found to be reasonable and justifiable in a free and democratic society pursuant to section 1 of the Charter. In their scrutiny, courts will look to both the purpose and effect of the legislation challenged: R. v. Big M Drugmart Ltd, R. v. Turpin, and Irwin Toy Ltd. v. A.G. of Quebec. Thus, a law with a valid purpose may infringe the Charter if its effect or impact interferes with a guaranteed right or freedom. The inquiry into substance as well as process means that Courts now examine the structures through which government policies are both formed and applied.
An example of the use by courts of substantive due process is the decision of Wilson v. Medical Services Commission of British Columbia (Schwartz, 1990). The B.C. Court of Appeal incorporated the well-established doctrine of equitable estoppel in interpreting section 7 of the Charter (guaranteeing the right to life, liberty, and security of the person). In doing so, the Court relied upon long-recognized principles of common law. Regulation of our activities is commonplace, acknowledged the Court, but this regulation may not eliminate or deprive one of liberty if this involves, or may involve, a violation of the principles of fundamental justice. The necessity and willingness to look beyond the structural characteristics of legislation to substantive issues and possible effects is a dynamic result of the adoption of Charter principles.

Since 1982, the approach taken by the Canadian judiciary to construction of the Charter has been broad, even bold in contrast to the restrained mode of the previous hundred years. The judgment of Dickson, CJ in the Operation Dismantle decision, for example, affirmed the willingness of the judiciary to inquire into whether the executive branch of government acted in accordance with the Charter in any given situation. In that case, a request was made for the courts to prohibit testing of the Cruise missile in Canada because it posed a risk to the security of Canadians and thereby violated section 7 of the Charter. Though the Supreme Court turned down the application because it was not convinced that there was a causal link established between cruise testing and the threat of nuclear war and threats to the security of the people of Canada, it did leave open the possibility that courts may scrutinize cabinet decisions to establish whether they have been taken in violation of the Charter.
The need to maintain the independence of the judiciary in the face of its increased role is clear. Judges have argued that independence is only guaranteed if they are involved as administrators of justice, not only dispensers of the same. If judges have no control over the resources by which justice is dispensed, they are dependent to a large extent on the very branches of government from whom they are by definition independent. The quality of judicial decisions relates to the resources available in their formulation. Decision-quality also relates to the ease with which the judiciary assumes the mantle of arbiter of fundamental freedoms. (See Valente v. The Queen)

The independence of the courts is ultimately protected by a community consensus that it is worth protecting. Under the Canada Act (1982), this independence may be more difficult to maintain. When judges function as interpreters of entrenched guarantees of human rights and as law makers, they may become vulnerable to the forces which prevail to elect governments and to influence policy in a democratic society. Interest groups affected by court decisions, for example, may launch media attacks which could combine to erode community consensus of support for an independent judiciary. Politicians may be inclined to seek out candidates with "appropriate" political and personal convictions (Bindman, 1986).

Former Chief Justice Laskin wrote this rebuttal in reply to the idea that the Canadian judiciary might be vulnerable to any interests except the achievement of justice:

I have to be more sad than angry to read of an insinuation that we are "acting as spear carriers for the federal prime minister" or to read of a statement attributed to a highly respected member of the academic community that "the provinces must have a role in the appointment of members of the Supreme Court in order to ensure that
they have confidence that it can fairly represent the interests of the provincial governments as well as any federal government...I owe no allegiance, as a judge, to any person or to any interests; my duty, ...is only to the law and to the impartial and expeditious administration of justice under the law....I know no better way to destroy [the judiciary] than to give currency to the view that the judiciary must be a representative agency (1978, pp. 120-121).

**Charter Interpretation: General Principles**

*Charter* interpretation necessarily involves weighing values in a broad sense. In recognition of the enormity of this task and of the many perspectives that exist within the Canadian mosaic, Canadian courts have been willing to entertain intervention by diverse interested groups in *Charter* litigation. These groups may make submissions even if they do not have an identified cause of action. McDonald (1989) lists several interpretative aids used by the courts in the application of *Charter* provisions:

1) the context,
2) the preamble, headings, and marginal notes of the *Charter*,
3) legislative history surrounding the adoption of the *Charter*,
4) interpretation of the Canadian Bill of Rights,
5) international treaties,
6) foreign constitutions and legislation,
7) interpretive directions in the *Charter* such as section 27 (multicultural section), and
8) legal commentaries and reference books.

There are also general principles of constitutional interpretation which apply to the *Charter* arising from Canadian and American precedent, and from the conventions of
international law. Some of these are discussed here as they have been applied in the relatively short time the Charter has shaped Canadian law.

The number of sources of authority make Charter cases challenging for the judiciary and the bar, as well as for the groups involved in the challenge. The 1990 decision of the Manitoba Court of Appeal in Canadian Mental Health Association v. City of Winnipeg contains these comments by Chief Justice Monnin:

I have often complained about the volume of unnecessary material, affidavits, exhibits, reports, statements of so-called experts, provincial civil servants, private citizens, university professors and directors of social planning associations which are produced, apparently en masse, in Charter challenges. Hopefully a more appropriate and efficient method of case management will soon be devised....Since the Supreme Court of Canada opened the floodgates to this mass of material, and indicated that it was prepared to allow and receive various and sundry expert testimony as well as sociological and historical material, we have been inundated with reams of paper, most of its pointless (pp. 6-7).

Notwithstanding these remarks, the disposition of courts to hear from all interested parties is clear and, given the importance of the issues, appropriate.

Charter interpretation is informed by a mere eight years of direct experience. The Supreme Court has observed that the rights and freedoms guaranteed therein are primarily "a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended, or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land" (Quebec Association of Protestant School Boards v. A.G. Quebec, p.79). Given the approach of Canadian legislatures and courts to civil liberties in the pre-Charter period, which were restrictive at best, such a statement gives the reader pause (Pitsula & Manley-Casimir, 1989-90).
Since the adoption of the Charter, judges no longer feel constrained by principles of judicial deference for the enactments of legislative bodies (McDonald, 1989). They are freed from the earlier presumption of validity for legislation considered. The extent to which judges will look at the substance and effect of legislation, however, is a key determinant in the ultimate result. Lamer, J.(as he then was), speaking for six of seven members of the Supreme Court in Reference re s. 94(2) of Motor Vehicle Act (British Columbia) addresses this issue:

The truly novel features of the Constitution Act, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values. Content of legislation has always been considered in constitutional adjudication. Content is now equally to be considered as regards new constitutional issues.

In neither case, be it before or after the Charter, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in Armax Potash Ltd. et al. v. Government of Saskatchewan, [1977] 2 S.C.R. 576 at p. 590, continue to govern:

"The Courts will not question the wisdom of enactments....but it is the high duty of this Court to ensure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."

While Parliament is free to determine public policy, this freedom has limits that will be enforced by the judiciary.

Judicial review pursuant to the Charter has extended its scope to new issues, but the Constitution defines only minimum standards of such protection. Courts will not supplant legislatures in deciding levels of service to be provided in excess of the constitutional minimum. One judge explained this as follows:

"We must appreciate the limited function of constitutional protection. The Charter governs maximum government restraint on minimum fundamental interests; it is not a pass to a sneak preview of paradise and it does not purport to legislate the ideal. Mere compliance with the Charter is no more a matter for pride than mere compliance with the Criminal Code is a badge of honour. Imperfect laws may be"
perfectly valid and many inadequate and unfair laws will survive the basic test of constitutionality. The Charter is not the panacea for all the ills of law or living. Society must still look to the traditional political processes for most social improvement and legislative reform. The ideal which is conceived by the philosopher may be sought by the legislator but must not be imposed by the judge (Thwaites v. Health Sciences Centre Psychiatric Facility, per Scollin, J., p. 558; This decision was later reversed, but not on these points).

These comments stand in contrast to the willingness demonstrated in Andrews to scrutinize the substance and effect of laws when they are, prima facie, unfair.

McIntyre, J. writes

Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that section 15 provides a guarantee (p. 16).

In applying principles of constitutional interpretation to decisions involving the Charter, the judiciary will engage in the "fine and constant adjustment process of constitutional provisions [in an effort to] balance flexibility with certainty" (Law Society of Upper Canada v. Skapinker per Estey, J., p. 366). They will take a generous and liberal approach. This was recognized by Dickson, J (as he then was) in Hunter v. Southam Inc. when he quoted Lord Wilberforce of the Privy Council with approval. Lord Wilberforce said that a constitution is a document "sui generis calling for principles of interpretation of its own" and that when a Bill of Rights is included, there should be "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give individuals the full measure of the fundamental rights and freedoms referred to" (from Minister of Home Affairs v. Fisher). There is a presumption in favour of the Charter's application. If there are doubts as to whether a Charter right or freedom applies, or whether an exception should be allowed, they "must be resolved in favour of the Charter and not the
Despite the preceding statements concerning liberalism in interpretation, courts may apply a literal approach to Charter interpretation. If the language of the Charter is clear, then it must be applied literally without recourse to a more liberal interpretation. A balance must be struck between liberal interpretation resulting in extravagance and the need to abandon a literal approach when it "defeats the nature and purpose of the section and furthermore leads to absurdity" (Dubois v. R. per Lamer, J., p. 363).

Dickson, C.J.C. (as he then was) stated that the proper approach to Charter interpretation is a purposive one. In R. v. Big M Drug Mart, he said:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated in the text of the Charter. The interpretation should be ...a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, ...be placed in its proper linguistic, philosophic, and historical contexts (p. 524).

In addition to considering the purpose of the relevant Charter provision, the effect of impugned legislation will be examined in Charter litigation. This principle is expressed in Quebec Association of Protestant School Boards v. A.G. Quebec and in the very recent Quebec case of Irwin Toy Ltd. v. A.G. of Quebec. It is also evident in both R. v. Big M Drug Mart and R. v. Edward Books and Art Ltd. Dickson, C.J.C. in Big M Drug Mart explains that "if a law with a valid purpose interferes by its impact,
with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity" (p. 334).

The court will not amend legislation that is found to be inconsistent with the Charter. Dickson, C.J.C. (as he then was) has stated "it is not the role of this court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable" (Hunter v. Southam Inc., p. 169). A court will not look for the worst case scenario in order to impugn legislation. If the effect of legislation may occasionally infringe Charter guarantees, the legislation will not necessarily be held invalid. If only a portion of the legislation offends, it may be severed from the remainder and declared invalid (per Mme. Justice Wilson in R. v. Edward Books and Art Ltd.).

Judges may take what is called "judicial notice" of certain community mores or shared assumptions in making judicial pronouncements. Even where there is relative consensus in society about an issue, however, the judiciary may choose to decide it differently. In the Bales case discussed in Chapter Four, for example, the Supreme Court of British Columbia recognized that mainstreaming special needs children is widely recognized as appropriate, but still decided that it was not incumbent upon school districts to implement this policy given provincial legislation then in force. Academic or scholarly writing may be persuasive in judicial decision-making, and also incorporated into our law. Traditionally, Canadian judges have been conservative about accepting or relying upon such evidence. In constitutional law, and particularly Charter interpretation, the writings of academics are given more credence. An example of the use of academic writing is the case of Connell v. the
University of British Columbia. The British Columbia Court of Appeal, considering the constitutionality of mandatory retirement policies, quotes at length from Professor Riddell, stating that he "places the issue of mandatory retirement in its proper perspective" (p. 5).

The door to Canadian liberalization of judicial review of educational decisions and legislation is arguably open wider since the Charter, though it is still early to assess directions. Plaintiffs are faced with the traditional reluctance of the Canadian judiciary to venture into the arena of educational policy or administration. Potential may be there for increased judicial involvement in the educational policy debate, but many commentators are less than optimistic (Pitsula & Manley-Casimir, 1989-90; MacKay, 1984). MacKay writes: "It is easy to overstate the likely impact of the Charter of Rights in the school context. All rights guaranteed by the Charter are subject to the "reasonable limits" clause, which is likely to be writ large in the school setting" (p. 294).

Recent judicial willingness to venture into substantive review of administrative matters and policy under the auspices of Charter interpretation may give cause for more optimism: Andrews v. Law Society of B.C. From the judgment of McIntyre, J., it is clear that those seeking to rely on section 1 must show "a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights" (p. 25). Wilson, J. also imposes a substantial burden on those who would seek an exemption from the operation of the Charter. "Given that section 15 is designed to protect those groups who suffer social, political, and legal disadvantage in our
society, the burden resting on Government to justify the type of discrimination against such groups is appropriately an onerous one" (p. 34).

**American precedents in Charter interpretation**

The use of American constitutional and legislative precedents is particularly relevant to the discussion of educational rights of the handicapped. Given the limited Canadian experience with constitutional equality provisions and no precedents for their application to education for the handicapped, the American cases provide a tempting starting point, if nothing more. Their application is governed by the nature of the question and the constitutional context surrounding it. The differences between the two documents and legal systems must also be considered. These differences are both structural and substantive.

In the U.S., there is a dual judicial system in contrast to the more unitary system in Canada. Federal courts consist of U.S. District Courts, U.S. Appeal Courts for eleven judicial circuits, and the U.S. Supreme Court in ascending order of jurisdiction. State courts have a parallel system, with a mandate as the final arbiters of state and municipal laws. Cases reaching the Supreme Court of the United States must be decided in accordance with constitutional principles or federal laws that apply, but the Court cannot disturb state courts' interpretations of state or municipal laws. In Canada, the Supreme Court has the jurisdiction to overturn provincial appeal courts' interpretations of all laws. This difference means that courts in the two countries apply constitutional principles in different contexts.

Another distinguishing point relates to the allocation of power under the respective federal structures. In the United States, there is nothing analogous to the
ultra vires concept that stems from the division of powers under the Constitution Act (1867). This is because there is concurrent power rather than the strict division of power that exists in Canada. States have sovereignty unless the federal government has exercised authority in a given area. Powers of the federal government are broadly defined, so rarely, if ever, would the U.S. federal government be found to have exceeded its powers. Both states and the federal government have constitutional authority to regulate virtually any activity. One of the consequences of this constitutional arrangement in the U.S. is that legislation limiting individual rights cannot be invalidated on the grounds that it is ultra vires the enacting level of government. All legislation must be analyzed to determine whether it violates civil rights guarantees under the U.S. Bill of Rights; if it does, it will not stand.

The distribution of powers between state/provincial governments and the federal government also differs in the two countries. The federal government in the United States can directly exercise power to a greater degree than its Canadian equivalent. This is because of the concurrent jurisdiction in the dual system. In Canada, one level of government only gets powers at the expense of the other. These structural differences lead to different judicial results. For example, since section 91 of the Canadian Constitution Act (1867) gives the federal government primary responsibility for criminal law, provincial laws interfering with individual rights may sometimes be invalidated as ultra vires the province as they are "in relation to criminal law". (Westendorp v. The Queen). This approach, because it does not deal explicitly with individual rights, may result in a "muddying of the waters".
American courts may not issue advisory opinions as the Canadian Supreme Court has done in many "reference" decisions. U.S. practice dictates that there must be two or more parties with adverse interests with the result that standing is more difficult to obtain in U.S. courts. U.S. Chief Justice Burger (as he then was) stated "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing" (Schlesinger v. Reserves Committee to Stop the War). Contrast this with the view of Laskin, J. (as he then was) in Thorson v. Attorney-General of Canada:

Where all the members of the public are affected alike, and there is a justiciable issue respecting the validity of legislation, the court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on its merits.

In cases where it might be difficult to find a plaintiff who qualifies as having standing, constitutional review is more accessible in Canadian courts.

Structurally, U.S. and Canadian constitutional provisions differ markedly. The American Bill of Rights lacks an express limitations clause and thus many U.S. decisions deal with "the intermingling of the definition and limitation stages of analysis" (Beaudoin & Ratushny, 1989, p. 59). The U.S. Bill also lacks some key equivalent sections. Charter sections which have no American component provide for:

1) the exclusion of evidence if its admission could bring the administration of justice into disrepute [section 24(2)];

2) opting out of certain Charter provisions, the now-famous notwithstanding clause [section 33];

3) the application of the Charter equally to men and women [section 28];
4) interpretation of the Charter in accordance with the multicultural heritage of Canada [section 27];

5) the limitation of rights if justified [section 1].

Despite these differences, U.S. precedents have been imported into Canadian law more frequently since the passage of the Charter than at any other time. Heavy reliance was placed on the American Bill of Rights, for example, in Hunter v. Southam Inc., a case dealing with search and seizure. La Forest, J. (as he then was) refused to place much emphasis on American precedents, however, in Reference re's. 94(2) of Motor Vehicle Act (British Columbia). Discussing the issue of how procedural and substantive elements contribute to an interpretation of section 7 providing for security of the person, he dealt with the American experience saying:

[to rely on American precedent would] import into the Canadian context American concepts, terminology, and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, while ignoring the truly fundamental structural differences between the two constitutions (p. 498).

La Forest, J. stated it this way:

Why we should follow American precedents, when these have led judges to avoid redressing unreasonable delay and scholars to scurry to find ways of limiting the application of the only remedy there, I fail to understand, particularly when the Charter expressly provides a flexible remedy to avoid these consequences. While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances, particularly given the substantive implications of both s. 1 and s. 24(1) of the Charter. Canadian legal thought has at many points in the past deferred to that of the British; the Charter will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor. American jurisprudence, like the British, must be viewed as a tool, not as a master (R. v. Rahey, p. 638-39).
In interpreting section 15, the equality provisions, courts have been reluctant to adopt American experience. The Ontario Court of Appeal in *McKinney v. University of Guelph* warned that "at this early stage", "Canadian courts should be extremely wary of encumbering it [section 15 interpretation] with complicated rules of interpretation derived from United States constitutional experience" (p. 42).

There is another reason to exercise caution in applying U.S. precedents to the educational arena. Not everyone agrees that the increased involvement of American courts in educational matters since the *Brown* decision has been positive. Wise (1986) contends the contrary. His argument is that judicial or legislative policies have been imposed at the expense of local initiatives. This has resulted in a system where bureaucracy and rigidity are featured and inappropriate methods of schooling are strengthened because their bureaucratic aspects are overemphasized. "What distinguishes legislative and judicial policies from locally-generated policy is that their principles are drawn more from legal than from educational imperatives", according to Wise (p. 209). Yudof (1984b) supports this thesis. Judges and educators function in fundamentally different contexts, so increased judicial involvement leads to increased uncertainty, he asserts.

...Schools frequently interpret legal mandates and rules in ways that surprise legislators or judges, even when the latter two groups do not accuse educators of bad faith. These surprising interpretations may stem from the fact that legal mandates and rules are given meaning in the particular community inhabited by policy makers and lawyers. Educators are not a part of the legal and policy community; thus they may instead interpret mandates and rules in the social context of educational institutions and their own professional norms (p. 459).

Can local decisionmakers be relied upon to keep the values of equality and fairness uppermost in their minds? Many other items compete for local priorities,
including budgetary and political forces. If not, then the courts are the last resort for those advocating the establishment of a minimum standard for equality in education in Canada. The ideal would be a marriage between the practical understanding of educators and the temperance of the Charter as interpreted in the Andrews decision (see Chapter Five) to achieve a balance. The American attempt to balance the requirements of a federal law with the practical limitations of local boards has not always provided a model of success.

All of the above begs the question of the desirability of using American caselaw as precedent or even highly persuasive in the interpretation of our Charter. Pitsula and Manley-Casimir (1989-90) and McConnell & Pyra (1989-90) have debated this question. McConnell & Pyra argue that there is sufficient constitutional similarity and socio-political similarity to justify such a use. They assert that it is becoming commonplace to so apply it. Pitsula and Manley-Casimir reply that this point of view does not take stock of "our distinctive legal, political, ethnic, religious, and linguistic traditions (p. 221)". They further point out that there are important differences in the legal and social structures of the two nations which should be acknowledged in Charter interpretation. To argue that a practice should continue because it is "becoming commonplace" is hardly persuasive.

It has been argued that Canadian elitism and the historically slow recognition of civil liberties bode ill for Charter interpretation (Pitsula & Manley-Casimir, 1989-90). Pre-Charter decisions in the realm of education law evidence deference to authority, the delegation of parental authority to teachers, and the subjugation of due process to administrative efficiency. Pitsula & Manley-Casimir contrast
Canadian and American judicial pronouncements relating to freedom of expression to illustrate these points.

The American position is illustrated by the case of *Tinker v. Des Moines School District*: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate". This is contrasted with a 1981 Canadian case upholding a student suspension for wearing t-shirts and blue jeans in Canada where Milvain, J. stated "it would be just as senseless to create a school system without the power of disciplining the students, as it would be to build a schoolhouse without a door through which to enter it" (*Choukalos v. Board of School Trustees of St. Albert Protestant Board*).

Other Canadian cases are similar in their deference to authority and abrogation of civil rights. In *Ward v. Blaine Lake School Board*, the Court upheld the board's decision to refuse to lift the suspension of an eleven year old boy until he had his hair cut in conformity with the board policy. This 1971 decision "falls in with a line of Canadian authorities dating back to the mid 1800s which hold that disciplinary action is a matter of discretion for teachers and local boards, and that courts should be very reluctant to interfere with the reasonable exercise of this discretion" (*Pitsula & Manley-Casimir, 1989-90, p. 59*).

The Canadian cases also evidence the assumption that educational administrators rarely act in a "capricious, arbitrary, or unreasonable manner" (*Pitsula & Manley-Casimir, 1989-90, p. 59*). The recent case of *Hawreluk v. Bd. of Education of Shamrock School Division No. 38* involved acknowledgement by the Court that provincial legislation appropriately grants broad-based powers to schools to regulate and administer educational affairs. In that case, three students who were
charged with sexual assault were restricted in their movements in the school. This was held to be a reasonable exercise of discretion by the school officials. Pitsula and Manley-Casimir conclude that "the Ward line of reasoning appears to be as valid today as it was in 1971 since the reasoning has never been applied to or considered in any other case" (1989-90, p. 60).

Regardless of how the Charter is ultimately applied to the questions of rights for the handicapped in education, the comments of Beaudoin & Ratushny (1989, p. 62) are most apt. They describe Charter interpretation as an art as much as a science: "...[I]nterpretation of the Charter should not be left to judges and lawyers, though both professions will undoubtedly continue to dominate the field. The Charter's meaning can and should be examined by people from other disciplines and backgrounds, whose unique experience may shed new light on its content." In deciding issues relating to integration and level of service in the field of education, the input of educators, parents, students, and the community is valuable in determining where lines should be drawn.

The Case Method

The case method has been used as a vehicle for legal analysis in both Canada and the United States for many years. It involves the study of law through the examination of lines of cases in a given area. In the study of rights in Canada to education for the handicapped, it involves looking at Supreme Court interpretations of relevant Charter provisions for clues as to the possible stance of the judiciary toward these issues. Use of the case method depends on a basic understanding of the Canadian judicial system, its structure and substance.
Canada is a bi-jural society; its laws arise from two separate and distinct traditions. Common law, stemming from English tradition, was brought by settlers from England. It is in force in all Canadian provinces and territories except in relation to civil (non-criminal and non-constitutional) matters in Quebec. The origins of common law lie in judge-generated precedent and pragmatism. Droit civil, based on logic and derived from Roman tradition, governs civil matters in Quebec. The historical and philosophical differences in the traditions are substantial, requiring different methods of study and analysis. In the common law tradition, "what judges think is regarded as more centrally important than what legislators or scholars think" and "no systematic code of law exists" (Llewellyn, 1989, p. 1). Charter provisions, by nature broad and sweeping, can best be understood through judicial interpretation. As the Charter is interpreted, principles evolve to govern subsequent applications. Judges apply legal principles, or precedents, to new cases with analogous facts to those already adjudicated by a superior court.

Precedent is the central feature of common law jurisprudence. When a previous decision is binding, a judge may either apply or distinguish it, meaning that unless a substantial difference in the facts can be elucidated, the principle of the former case must govern the latter. If a decision is only highly persuasive, a judge may feel constrained to explain a difference of opinion, but has more flexibility to decide a subsequent case in a novel way. This is why it is important to understand the rules of precedent and the relationship among levels of courts. Decisions of the Supreme Court of Canada are said to be binding on the courts of all of the provinces. In British Columbia, decisions of the Court of Appeal are binding on the Supreme and
Provincial courts of the province. Previous decisions of the Supreme Court of Canada are persuasive but not binding on the Supreme Court itself. American decisions are never binding on Canadian courts, even if directly on point, though they may be used as a starting point or for comparative analysis.

The issue of precedent or stare decisis is somewhat different when a constitutional document is involved. While interpretations of any law are subject to change, the objectives of constitutional interpretation are explicitly to reflect the plural goals and values of society. Levi observes

A change of mind from time to time is inevitable when there is a written constitution. There can be no authoritative interpretation of the Constitution. The Constitution in its general provisions embodies the conflicting ideals of the community. Who is to say what these ideals mean in any definite way? Certainly not the framers, for they did their work when the words were put down. The words are ambiguous. Nor can it be the Court, for the Court cannot bind itself in this manner; an appeal can always be made back to the Constitution... But this is to say no more than that a written constitution, which is frequently thought to give rigidity to a system, must provide flexibility if judicial supremacy is to be permitted" (p. 59).

The case method of studying law fits well with common law reliance on precedent, as it reflects the flexibility referred to by Levi. Cases are examined as they relate to the body of law emerging in a given area. Predictions of future decisions are made using precedents as a guide to future interpretations of the Charter. McConnell and Pyra (1989) contend, however, that "the doctrine of binding precedent is weakening over much of the common law world" (p. 211). As evidence for this argument, they observe that neither the Supreme Court of the United States and the High Court of Australia have invariably followed their own previous decisions. Hogg has suggested that the Canadian Supreme Court may be more liable to overrule itself in constitutional cases, since, in cases where no legislative remedy is available, the only alternative to an unwanted precedent would be a
difficult-to-obtain constitutional amendment (1983). As precedent becomes even marginally less important, "cogent and persuasive" reasoning takes on new importance in the context of Charter interpretation. The case method takes into account the reasoning process used by the court. This emphasis on process, according to Levi (1948), is well placed.

He points out that reasoning by the case-law method is different in several respects from the application of statutes. Case-law reasoning is primarily inductive, proceeding from the particular to the general. Statutory interpretation is deductive, seeking to discover the intention of legislators. Case-law reasoning, concludes Levi, is more flexible: "All concepts suggest, but case-law concepts can be reworked. A statutory concept, however, is supposed to suggest what the legislature had in mind; the items to be included under it should be of the same order" (p. 30). The flexibility of the caselaw method is useful in dealing with the always-uncertain business of predicting future actions of the judiciary.

The case method involves the application of four concepts: holding, ratio decisioni, dicta, and the rule of the case (Llewellyn, 1989, p. 14). The holding is the decision that court must make based on its consideration of the facts before it. It is properly restricted to the facts at bar, or the material brought before the court in the pleadings and evidence. Generally, it can be described in a single sentence; either the court finds for the plaintiff or the defendant. Examination of the reasoning employed in reaching the conclusion is essential to understanding a case. The ratio decisioni is "the legal rule stated by the court itself as controlling the case before it" (Llewellyn, 1989, p. 15). This generally applicable rule of law is the principle on which the holding rests. In complex cases, the ratio may embody several legal
principles. For subsequent cases raising similar issues, the *ratio* forms a binding precedent.

Anything in the case that is not the *ratio* is referred to as *obiter dicta*. These comments, too, can be important indicators of future actions by a court, though they are not binding. Llewellyn (1989, p. 14) points out that *dictum* can actually have second-order precedential value because of the respect it commands. It is technically only an expression of opinion, however. Cardozo recommends viewing *dicta* with caution: "A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition....There is a constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent" (p. 29-30).

The rule of the case is defined by Llewellyn as "the principle for which a case stands" (p. 15). It is distinguished from the *ratio* because it "may be an entirely different rule ascribed to the earlier case by another court in a later lawsuit" (p. 15). The later court may decide a similar case on a narrower principle than was applied in an earlier case. As Llewellyn explains:

The original judge, later courts will say, did not have the other possible sorts of cases in mind; now we have one of those cases not foreseen by him before us for decision, and we must reconsider the overbroad wording he employed; in the case actually before him, the following narrower version would have been perfectly adequate, and so on (p. 15).

Thus, the common law evolves with each interpretation of a statutory provision or application of a common law principle.

With the components of a case elucidated, it is possible to apply them to cases not yet heard. Combined with the rules of constitutional interpretation, they form a
foundation for discussion and prediction. This method is used to discuss the lines of authority emerging through cases in both the U.S. (Chapter Three) and Canada (Chapter Four). Applying the doctrine of precedent, previous cases in British Columbia and Ontario are described as they may influence future decisions. Supreme Court of Canada pronouncements are examined for their precedential value relating to the interpretation of Charter rights in education. It is useful to analyze the American situation as it serves as a model in both negative and positive senses. On the plus side, a comprehensive federal law regulates the provision of service to the disabled in education. American courts have also been more willing than their Canadian counterparts to take an activist position in reviewing educational administrative decisions. The interpretations, however, have at times been narrow and literal rather than exhibiting the broad and expansive approach the handicapped had hoped for.
CHAPTER THREE

American Cases and Practice After PL 94-142

The American experience of service provision to the handicapped traced through the caselaw is, at first glance, difficult to reconcile. U.S. federal legislation confers the right to a free, public education for all handicapped children, but plaintiffs with similar claims are treated differently, with different end results. The guarantee of service to all handicapped children begs the question of entitlement to a meaningful level of equality and access to the appropriate services in the educational setting. This discussion is best understood in the context of the cases which directly precipitated the enactment of the law conferring universality of rights to special education.

Caselaw

In the PARC case (1972) and the Mills decision (1972), advocates for education for the handicapped saw a long-awaited victory. They had finally received some support from the courts in their endeavour to convert ethical demands into legal rights. The Supreme Court decisions in these cases rested on the equal protection and due process guarantees in the Fourteenth Amendment to the U.S. constitution. Judges held that school administrators were bound to admit previously excluded handicapped children and to accord them due process in respect of any changes in their classification. The U.S. Supreme Court decision in 1973 in the Rodriguez case gave further support to the principle that exclusion of any selected group of children from public education could not withstand constitutional scrutiny.
Although stating that the right to an education is not an inherent fundamental right, the Court recognized that "some identifiable quantum of education" may be constitutionally guaranteed.

In 1975, the United States Congress enacted the *Education for All Handicapped Children Act* (PL 94-142). The law required the provision of "free appropriate education and related services" for all handicapped children, and its adoption was optional for states. All states but one opted in. The federal government provided only small funding amounts under the scheme, but required no specific programs. This made the program very attractive: states could take advantage of federal funding to facilitate recognition of rights already acknowledged by the Supreme Court in the *Parc* and *Mills* cases, and apply it freely according to local priorities respecting education for the handicapped.

The highlights of this legislation are discussed by Sussel and Manley-Casimir (1987):

A central feature of the federal legislation is that to the fullest extent possible, handicapped youngsters are to be educated in the "least restrictive environment" namely in classes with the nonhandicapped (a process also known as "mainstreaming"). The Act affirms the principle that a regular classroom setting with appropriate supplemental services is preferable to special, segregated classes; special classes are preferable to separate special schools; and special schools are preferable to private institutions in a home setting. In addition, P.L. 94-142 provides that where no public facilities are available, private schools supplemented by public funds may be used as an alternative.

The legislation also features built-in procedural safeguards requiring an individualized education program for each child that must be re-evaluated annually. In other words, a uniform minimum standard for education of handicapped children was established at last. The education was to be meaningful: regulations to the Act provided for the provision of related services such as medical services for those who
could not otherwise take advantage of the guarantee of a "free appropriate education" for everyone. Much litigation followed, as consumers of special education services sought to compel local authorities to provide the level of service they thought to be required by the Act. Only sometimes were they successful. Yudof (1984a) reports that close to 300 cases were decided involving the law from its enactment until 1982, a period of seven years. Some of the questions courts grappled with included: What is an appropriate education? How much money should be spent on a child's education? What sort of "related" or supportive noneducational services must be provided? Under what circumstances is it permissible or impermissible to educate handicapped students in isolation from other students? (Yudof, 1984a).

Part of the reason for the seemingly inconsistent application of the Act may lie in its construction. The law was celebrated as a legislative breakthrough, but contains some inherent inconsistencies. PL 94-142, according to Fulcher (1989), "is informed by competing theories: by a medical model, by the covert politics of the theme of needs, by a submerged theme of professionalism and by the overt politics of a discourse on rights "(p. 106). Milofsky (1976) comments that the law contains a major contradiction: "[While] on the surface, special education is a sham and a source of considerable injustice and racism in schools, ...special educators use the very inadequacies and injustices of their programs to ameliorate the central crisis in schools today; the eroding legitimacy of the institution in urban areas" (pp. 163-165).
The law seemed to contain safeguards for the handicapped, but it was worded in language imprecise enough to make a court's interpretation difficult to predict. In the first major interpretive challenge, the U.S. Supreme Court refused to construe the law as requiring more than instruction aimed at achieving a beneficial result. It was not held to require maximizing the potential of the handicapped student commensurate with non-handicapped students.

In the Rowley case, parents of a girl in the New York Public School system challenged the Individual Education Plan (IEP) developed for their daughter. Specifically, they claimed that the failure to provide Amy Rowley with a qualified sign language interpreter for all of her classes was a denial of the "free appropriate public education" guaranteed by the Education for All Handicapped Children Act. Amy Rowley had been born deaf to two deaf parents. She had been taught to communicate using the Total Communication Method. The federal district court found that without an interpreter, she could discern about half of the oral proceedings in the classroom. With an interpreter, she would be able to understand 100% of what was said. The court held, therefore, that she was not receiving an education commensurate with her peers who were not hearing-impaired. An appropriate education was described as one which provided the "handicapped student an opportunity to achieve his full potential commensurate with the opportunity provided to other children" (p. 534).

The School District and the State Commissioner appealed the decision to the Court of Appeals for the Second Circuit. In a two-to-one decision, the appeal was
dismissed and the trial decision affirmed. The case then proceeded to the U.S. Supreme Court. Noting Amy's satisfactory academic progress (evidence at trial established that she was very bright), the Court found that the education offered her must be appropriate. While observing that the standard set by the lower court was a desirable goal, the Supreme Court held that this was not the standard intended by Congress for those states receiving funding under the Act. The Court concluded that the "basic floor of opportunity" provided by the Act provided only access to special education services, not more.

In rejecting the lower court's construction of "appropriate", the Supreme Court did not provide a substantive educational standard, but did note that access should be meaningful. The reasoning of the Court was that "the intent of the Act was more to open the door of public education than to guarantee any particular level of education once inside" (p.192). Accordingly, the Rowley legacy is a two-pronged test: 1) Did the state comply with the procedures and due process as required by the Act?, and 2) Is the individualized program developed as required by the Act one which will reasonably enable the child to receive educational benefits? This "educational benefit test" resulted in more authority for state and local educational administrators to set policy and limited parental authority to challenge educational plans proposed by boards. It also restricted the scope of review by imposing a relatively less onerous duty on boards than many had thought the legislation to contemplate.
Cases following Rowley


While Rowley as the critical first Supreme Court interpretation of PL 94-142 offered a narrow interpretation of the law, it was followed with more liberal constructions. Some of the subsequent decisions are difficult to reconcile with Rowley. While Amy Rowley was held not to be entitled to the services of an interpreter in the classroom that could enhance her understanding by 50%, Sherry Grace who was also deaf was entitled to attend her local school and to be supplied with the services of a certified teacher for the deaf.

As the Supreme Court decided the Rowley case, the Springdale case was proceeding through the courts. The appeal court used the "commensurate opportunity" test from the lower court in Rowley to determine that Sherry Grace should be entitled to attend her neighbourhood school and be provided with a teacher for the deaf in order to have an opportunity commensurate with non-handicapped peers. When the school district appealed to the Supreme Court, the appeals court was directed to reconsider its decision in the light of the Supreme Court pronouncement in Rowley. The appeal court did this, applying the "beneficial education standard". Again, the decision was made that the most appropriate placement for Sherry was in her neighbourhood school. The court justified this result by finding that the "least restrictive environment" provision of the Act must take preeminence where the choice is between the best and the most appropriate education (Broadwell & Walden, 1988). Thus, this case stands for the proposition that when a student has the opportunity to receive an "appropriate" education at a
local school, the system must opt for mainstreaming as provided by the "least restrictive environment" section of the Act.

2. *Brookhart v. Illinois State Board of Education* (7th Circuit Court of Appeals 1983)

In this case, the two-step process outlined in *Rowley* was applied to the advantage of the handicapped plaintiffs. At issue was the implementation of the school district's minimum competency test that all students had to pass before being granted a diploma. Handicapped students protested that they had not been given sufficient notice of this requirement, nor enough time to prepare. They argued that the disallowance of diplomas for not passing constituted a denial of a "free appropriate public education". The court examined the district's conduct, asking whether the due process requirements of the Act had been complied with. Both parties agreed that the students' educational programs had been appropriate and beneficial. In question was the compatibility of the minimum competency test with the individualized education they had received. Applying *Rowley*, the court held that the district had not given enough notice of the changes in requirements to the students. This constituted a breach of the obligation to provide a free appropriate public education. *Rowley* therefore stands for the narrow proposition that only an educational benefit need be proffered, but in a manner consistent with due process.

It was held in this case that where parents find a private program that is more beneficial, school districts will not be liable to reimburse them for the expenses incurred as long as the district-proposed program would have benefitted the child educationally. The school district was not required to provide a program which could maximize Max's potential. The narrow standard of a beneficial program rather than one truly aimed at achieving equality for the handicapped, the legacy of Rowley, was applied in this case and many others. The case does not mean, however, that reimbursement is never possible for costs incurred in securing private schooling. Inevitably, costs are frequently raised as an impediment by boards in actions of this kind. While the Act specifies that the educational services are to be provided "free", there have been numerous instances where boards have either sought not to provide services based on cost, or have attempted to pass these costs directly to parents or guardians (Broadwell & Walden, 1988). Plaintiffs in turn are themselves hampered in bringing actions by the costs to them of initiating and sustaining expensive proceedings. This was recognized in Burlington, a decision which reached the Supreme Court in 1985.

4. Burlington v. Department of Education of Massachusetts (U.S. Supreme Court, 1985)

This case, along with Rowley, is important as one of the few interpretations by the Supreme Court of PL 94-142. The Act provides that public school boards must place handicapped children in private facilities if an appropriate public placement is unavailable. The Chief Justice wrote the opinion for the Court, dealing
with two questions that are, as Broadwell and Walden (1988) report, "essential and long-argued" (p. 42):

1) When parents move a student to a non-public school placement before a hearing, have they forfeited their entitlement to reimbursement for tuition and related expenses, and

2) Does the Act bar reimbursement to parents who reject the educational program and placement offered to their child and unilaterally initiate another placement?

The action involved a student who had been diagnosed as learning disabled. The parents rejected the placement offered by the public board and requested a review by state special education administrators. Prior to this hearing, they moved the student to a private school for handicapped students. It was held that expenses for education in a private school could be reimbursed by the public school board if a court determined that this placement was appropriate, recognizing that the final determination of the adequacy of a board's offering might take years. Recovery was not precluded simply because the placement in a private school took place before final adjudication by the court.

Broadwell and Walden (1988) argue that this decision could encourage parents to change the educational placement of their handicapped child, gambling that a court would agree with their choice of placement rather than the board's. This presupposes the willingness of the court to carefully weigh the alternatives and make educational placement judgments. As Broadwell and Walden conclude: "Whether *Burlington* serves to negate the emphasis on the role of the school administrator in determining where a handicapped child is placed will be for future courts to decide" (p. 43).
It is unlikely that the role of the school administrator will be significantly eroded by cases applying *Burlington*. Few parents have the stakes to gamble with such uncertainty and such a large downside if they are unsuccessful. Given the time and monetary barriers to maintaining an action to the appellate court level, such a gamble would hardly seem worth it. Parents who sue to recover private school fees as part of an action to compel the provision of meaningful service by public school boards are far more likely to be sincere than to have engaged in a judicial "throw of the dice".

5. *A.W. v. Northwest R-1 District* (Eighth Federal Circuit Court, 1987; leave to appeal to the Supreme Court refused)

Litigation in this area stretches the resources of both parents and boards. Placements requested by parents may put financial pressure on boards to allocate funds in ways they find unworkable, unfair, or out of step with local priorities. Should questions of financial implications be considered by courts in their determination of education rights? It can be argued that rights are inherent and the costs of providing service in conformity with them are not the business of courts. This is not the view taken, and implicitly endorsed by the Supreme Court, in *A.W. v. Northwest R-1 District*. It was held that states are not required to mainstream every handicapped child, and costs may be viewed as a factor in determining the appropriate placement. After canvassing the cost to the state and local schools of placing the child in a public school and assessing whether the severely mentally retarded plaintiff would benefit from the same, the court decided that "mainstreaming" this child would not be appropriate.
PL 94-142 uses the language "to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, must be educated with children who are not handicapped", so there is an explicit bias toward mainstreaming. By considering cost as a factor in reviewing the appropriateness of a placement decision, courts have balanced the rights of the disabled with "practical limitations", no doubt a familiar scenario for the handicapped who, it is hoped, are entitled to more.


Again the question of costs arose here, this time, costs of the plaintiffs. The appeals court in this case dealt with the question of whether parents could be reimbursed for legal fees incurred in pursuing administrative remedies regarding placement. It turned on an interpretation of the Handicapped Children's Protection Act (1986) that amended the Education for All Handicapped Children Act. Many regional courts had awarded costs to parents in similar situations pursuant to this amendment. In this case, however, the court refused to allow reimbursement where the suit was brought only to attain such fees and not to contest any substantive issues.

The relevant provision, s. 1415 (e) (4) (B) reads as follows: "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorney's fees as part of the cost to the parents or guardian of a handicapped child or youth who is the prevailing party."

In a lengthy decision, the majority canvassed the proceedings of committee hearings when the amendment was passed and refused the reimbursement. The dissenting judgment contends that the amendment does not make sense unless it is
read to mandate reimbursement even if that is the sole purpose of the action. The narrow interpretation of this amendment is however consistent with Supreme Court interpretations of the Education for All Handicapped Children Act.


Then Chief Justice Burger wrote the decision for the Court, finding that providing an "appropriate education" pursuant to the Rowley test meant that educational services should not only be accessible, but that such access should be meaningful. In this case, the board was required to provide nursing personnel who could assist in frequent catheterization of Amber, who was born with spina bifida. The decision emphasizes that such services are "no less related to the effort of education than are services that enable a child to reach, enter, or exit the school" (p. 891). The Court looked to its previous decision in Rowley for the intent of Congress in passing PL 94-142, finding that Congress had intended access to be meaningful. Three conditions were set out in Tatro for qualification for a service such as catheterization:

First, to be entitled to related services, a child must be handicapped so as to require special education....Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless of how easily a school nurse or lay person could furnish them.....Third, the regulations state that nursing services must be provided by a nurse or other qualified person....(p. 931).

Amber met all three of the tests and was therefore granted the service. The key to the question of why Amy Rowley was denied the specialized personnel requested on her behalf while Amber Tatro was not can probably be attributed to the way the cases were framed. The Tatros brought their claim under regulations requiring boards to provide related services to special education students; the Rowleys brought their
case under the free appropriate public education section of the Act. Even though this distinction can be made, the results are anomalous. If Rowley had been decided after Tatro, it may well have been decided in the Rowley's favour.

The Bottom Line

Applying the Rowley test, courts have generally found for school boards when the two-step test has been satisfied. As long as boards have been able to show that they complied with the procedural due process requirements of the Act and that they formulated an individual education plan which responded in a beneficial way to the specific needs of the child, they have generally been successful in these actions. It has not been necessary for boards to provide an education commensurate with the academic potential of students. Further, when a district has claimed that the provision of special services is likely to cause it undue financial hardship, the courts have frequently been sympathetic. In the view of Yanok (1985),

...further litigation will be needed to compel the Supreme Court to address the broader question of what are the minimum legal enforceable levels of opportunity and benefit to which all handicapped children are entitled. Only when this matter is resolved unequivocally will the meaning of free appropriate education be comprehended fully (p. 53).

Practice and Policy in the 1980's: The Legacy of PL 94-142

The cases are only one side of the story. For each case reaching court, many more situations remain unlitigated. A wider measure of the impact of the Act is found in surveying the research concerning its implementation. Studies show that PL 94-142 (Education for All Handicapped Children Act) has had a number of effects that, while significant, have failed to guarantee a "free appropriate education for all
handicapped students". Noel et al. (1985) argue that progress is occurring toward a meaningful application of this idea:

...the definition of services as well as questions regarding what constitutes "appropriate" education remain to be clarified within the structure of special education policy. This clarification is occurring through a complex interaction involving the state and federal courts, the Congress, state legislatures, and the Executive Branch of government. Throughout the process, the scope of some concepts has been expanded, such as the right to an extended year program, and others proscribed (e.g., Hendrick Hudson District Board v. Rowley...). In addition to the court decisions, administrative proposals for regulatory changes have been made that would have substantially altered the implementation of PL 94-142. Thus, special education policy cannot be seen as an alternative set of laws, or blueprints, but rather is best described in terms of a set of guidelines which are continually being changed by those who must put them into practice (p. 13).

Guidelines must continue to evolve if the policy objectives of PL 94-142 are to be attained. Inequities remain. In Massachusetts, for example, about half the decisions under the law have resulted in a child being placed in a more, rather than less, restrictive environment (Bloom & Garfunkel, 1981). Noel et al. (1981) suggest that improving local practices is difficult due to a lack of precise guidelines and requirements for meeting the law. Interpretations of the Act by the judiciary have not resulted in the imposition of strict standards for service provision according to its stated priority, mainstreaming.

The number of children identified and placed in special classes since the passage of PL 94-142 has increased dramatically. This increase has not been uniform across categories: Fulcher (1989) reports a decrease in the number of students labelled mentally retarded, but a 11.9 per cent increase in the number declared learning disabled (p. 117). Tweedie (1983) reports that several hundred thousand handicapped children have been brought into the public schools. Over 4 million children receive special education and related services in public schools. There has been an increase in placements of handicapped children in regular classrooms. More handicapped children are being given individualized
education programs. Federal, state, and local expenditures for special education have rapidly increased (p. 65).

Economics may be a factor in these statistics: under PL 94-142, districts are provided a greater amount of money for students in special education programs than those in regular classrooms. More money is received for students in "pull-out" education programs than for mainstreamed students. Still more is received for students in whole day programs. This additional source of revenue actually provides an incentive for districts to identify more students as handicapped.

Another effect of PL 94-142 has been increased regulation and bureaucratization of schools and districts. Mehan et al (1981) suggest that referral practices have become more formalized while rates of reporting have varied widely. Referrals in schools increased sharply initially, but fell off as teachers began to feel the administrative weight of the practice. This pattern is not unique. It has been identified in the implementation of other federal education legislation. Berman (1986) comments:

Despite some successes, the frustrating cycle of implementation has often unfolded: legislation, regulations, or court decisions are met at the local level by confusion, resistance, or painfully slow and half-hearted compliance; judges, agencies, and regulators eventually respond by tightening rules and toughening enforcement; and local institutions 'comply' by adhering narrowly and legalistically to the letter of the law, which has become by then exceedingly intricate (p. 46).

The legalistic interpretations of PL 94-142 have not resulted in pervasive structural change. Students in lower socioeconomic brackets or minority groups have benefitted less than others. In fact, Shapiro (1980) reports "In Massachusetts, four years after the introduction of the state special education reform law, .... minorities are two or three times more likely than whites to be enrolled in special education classes" (p. 218-19). Many commentators have pointed out that educational legislation is not effective in achieving substantive change in the
education system. Fulcher (1983) writes: "Effective teaching or a free appropriate education are beyond legislative reform. Such matters belong to teachers who are the key policy-makers in educational reform (p. 151). Ysseldyke (1986) suggests that identification and classification of handicapped students required by the Act actually take away from the fundamental question of how to teach. He writes: "I think it may be time for professionals to quit arguing about how to best identify types of students and to get on with the job of teaching students who experience academic and behavior problems" (p. 18). He implicitly criticizes the medically-based model from which special education practices have evolved. His solutions focus on instruction. He suggests a "major shift in the ways in which special educators are now trained: away from learning the characteristics of different types of students to learning about how best to assess and instruct those who experience difficulty in school" (p. 18).

Wise (1986) contends that judicial activism is not desirable in implementation decisions. He writes "that courts and high-level policymakers are well equipped to deal with equality and not well equipped to deal with quality in education" (p.206). According to this thinking, the question of what constitutes an appropriate education should only be addressed by the courts as it relates to the allocation of resources in the educational system. The effectiveness with which these resources are used should be the concern of schools.

Another by-product of PL 94-142 is the increased politicization of issues surrounding the provision of a free, appropriate public education. The proliferation of litigation since its enactment is proof of this phenomenon. Politicization is perpetuated because even where the law is complied with, social integration does not
necessarily take place. As Fulcher (1989) points out, the teaching practices required by IEP's are highly individualized; barriers to integration are heightened, not dissolved.

Compliance with the legal requirements of PL 94-142 does not necessarily mean that the substantive aims of the legislation (a "free, appropriate public education", however this is defined) are attained. As Fulcher (1989) concludes, "...constitutional, legislative, and economic conditions intersect and increasingly regulate practices concerning handicap at various levels of educational apparatuses but not in the sense of determining or achieving key, substantive practices and aims of the legislation" (p. 113).

Legal strategies have been the main means in the United States for advancing educational reforms for the handicapped. Fulcher (1989) comments that the increase in bureaucracy to regulate the implementation of educational legislation conflicts with the American value of democratic control. As the growth of regulation moves issues from democratic control to bureaucratic administration, dissonance is inevitable. To what extent the Supreme Court will contribute to a resolution of this dissonance is not yet clear. Saddled with the unwieldy PL 94-142, the Court must continue to choose between respecting local autonomy and educational expertise (more a Canadian phenomenon) and a more activist role. Curbing the growth of bureaucratic structures by giving effect to broad democratic guarantees does not address the problems of those thousands of students on whose behalf litigation is not the route to resolution of the problem. At least a partial solution may lie in the amendment of PL 94-142 to specifically mandate a meaningful level of service in
accordance with the value of equality, as otherwise the restrictive precedent of the
Rowley case will be felt in decades to come.
CHAPTER FOUR

The Canadian Context: Cases and Legislation

Legislative Guidelines

In contrast to the American situation, legislation regulating the placement of handicapped children is a provincial matter in Canada. Cases therefore reflect the different requirements of provincial legislation that varies significantly in its provisions for the handicapped. Poirier, Goguen, & Leslie (1988, pp. 47-53) discuss these different legislative approaches and their ramifications. Not all provinces require service for handicapped children; only Saskatchewan, Ontario, Quebec, New Brunswick and Manitoba have mandatory provisions. Of these, some set minimum standards for service; others do not. New Brunswick and Manitoba do not require services provided to be "appropriate". The new British Columbia School Act (1989) and regulations are silent on this question. Nothing mandates the provision of special services, an appropriate education, or the development and implementation of an individual education plan (IEP). The educational program provided to all students is to be an organized set of learning activities that is designed to enable learners to develop their individual potential and to acquire the knowledge, skills, and attitudes needed to contribute to a prosperous and sustainable economy. No exclusions from this programming requirement are outlined in the Act.

Ministerial Order 13/89 reads as follows:

"1. (2), Unless the educational needs of a handicapped student indicate that the student's educational program should be provided otherwise, a board shall provide that student with an educational program in classrooms where that student is integrated with other students who do not have handicaps." (italics mine)
Ministerial Order 12/89 provides for specialized services such as catheterization, suctioning, and the administration of oxygen to be provided by specialized personnel in schools where required. The provision for service by ministerial order allows the government of British Columbia to make changes without amending the Act by the exercise of executive prerogative. The School Act provides that ministerial orders shall have the same force and effect as legislation, but because they are not gazetted, they do not meet the same criteria: they are not easily accessible and, because they are not well known to the public, they can be summarily changed without necessarily attracting public attention. Aside from this policy statement in favour of integration where possible, there are no guidelines given to boards as to the level of service which must be provided. Since the School Act was only proclaimed in the summer of 1989, no cases concerning special education have yet been heard under its provisions. The Bales and Antonsen decisions, governed by the previous Act, are discussed in detail later in this Chapter.

In Ontario, the legislation is completely different. An elaborate scheme is set up with processes for determining placement and review procedures. It was May, 1980 when the Honourable Betty Stevenson, then Minister of Education, introduced Bill 82, the Education Amendment Act, in the legislature of Ontario. The Bill varied the provision of service requirements for exceptional pupils in two important ways. First of all, the Bill provided for universal access, guaranteeing the right of all "children, condition notwithstanding, to be enrolled in school" (Hansard, 1980). Secondly, school boards were charged with the responsibility of providing suitable programming for all children. Suitable programming includes the provision of special education programs and special education services for exceptional pupils. A
student is entitled to be served in the district in which his or her parents are resident, but not necessarily the neighbourhood school in that district. The Act defines an exceptional pupil as "a pupil whose behavioral, communication, intellectual, physical, or multiple exceptionalities are such that he is considered to need placement in a special education program by a committee". There is a provision for the "hard to serve pupil", defined as a pupil who is determined to be unable to profit from instruction offered by the Board. If the parent agrees, the board must assist in locating a suitable placement for the child and the government must pay the costs of this placement.

The Education Act of the Province of Ontario was amended in December of 1980 to reflect the new requirement for universal access, as of right, for exceptional pupils. Passed in connection with this amendment was the Education Amendment Act, known as Bill 82, conferring the right to ongoing assessment. Appeal procedures were provided for review of placement and identification decisions. The development of an individualized education plan (IEP) for each handicapped student was mandated. IEPs were required to include specifics as to placement and programming, with provisions for review and updating. The intent of the legislation was not to impose universal integration. Rather, it was recognized that some exceptional pupils will need access for varying periods of time to the services of paraprofessional and professional support staff within a variety of educational settings... It is the position of the Ministry that the placement of exceptional pupils into either regular classes or special classes on the basis of a philosophical principle, without due consideration of each situation, is directly counter to the best interest of individual pupils (Hansard, 1989).

These provisions were phased in during 1985. Special Education Identification, Placement, and Review Committees (IPRC) were established by boards.
to make assessment and placement recommendations. If a parent disagrees with these recommendations, there is an appeal to a Special Education Appeal Board (SEAB). The SEAB is comprised of two appointees of the board and one of the parents or parents' organization. If a parent disagrees with the decision of a SEAB, then an appeal may be made in writing to a Special Education Tribunal (SET). The SET may grant leave to appeal to a regional tribunal, or may hear the appeal. The SET or the regional tribunal may dismiss the appeal or grant the appeal with an order to the board regarding classification or placement. This decision is final and binding. If parents disagree with the conclusion, they may bring an application for judicial review. Some parents have chosen to proceed instead via a complaint to the Ontario Human Rights Commission, as the cases discussed later in this Chapter show.

In an implementation study of Bill 82 (Silverman, Wilson & Seller, 1987), a wide variation in IPRC organizations and procedures was found. Significant differences in practice were identified between urban and rural boards and between boards in the north and the south. Eva Nichols, Executive Director of the Ontario Association for Children and Adults with Learning Disabilities, writes:

Has Bill 82 improved matters for exceptional students or not? Looking at the whole province, I would say there are many students who are now identified and being served who were not prior to Bill 82. Similarly, there are many boards, educators, and families who have a level of awareness significantly higher than before 1980. The process ensures some key rights for families and for Associations such as ours.

On the other hand, there are some individual students who are worse off than before. In this group are students who, prior to Bill 82, were funded to attend private schools for the learning disabled, and now have to be in the public school system or attend private schools without provincial funding (1987, pp. 3-4).

For parents who are dissatisfied, there is no provision under the legislation for reimbursement of costs incurred in the review process. It can be lengthy and
costly, so it is not surprising that five years after the amendments, few of the cases have made it to court.

**Ontario Precedents: Many in Process; Few Decided**

One of the earliest cases was *The Lanark, Leeds, and Grenville County Roman Catholic Separate School Board v. The Ontario Human Rights Commission; Mary Beth Hickling by Diane and John Hickling; Paige Horbay by Irene and Henry Horbay; and Maureen Legris by Marian and Harry Legris* (Supreme Court of Ontario, 1987). An Ontario human rights tribunal had decided that a Catholic board had discriminated when it failed to provide full-time educational facilities for trainable mentally retarded students in its catchment area. The tribunal had stated "Roman Catholic Schools are inherently discriminatory on the basis of religion, but that does not give them the right to be discriminatory on other grounds." (p.38).

The Court in *Lanark* overturned the finding of discrimination. Rosenberg, J., recognized that "...Separate Schools do not have the appropriate amenities, either physically in terms of special rooms for appropriate classes or special personnel." (p.12) Noting that the Board served a relatively small number of students (less than 4000) in a widely disbursed area, the judge found it unreasonable to expect special services to be provided. The action of the Board in contracting with the public board to provide service (as contemplated by the Act) was upheld. Further, since the students had been schooled in the public system with part-time attendance in the Catholic schools, there was no finding of discrimination.

When the decision was rendered, Henry Horbay, a parent, expressed disappointment. The decision, however, was largely academic. His daughter Paige
was by then eligible to attend high school. The family of another plaintiff had actually moved from the area in order to improve their daughter's education. Plaintiffs bringing cases of this kind must be willing to maintain them for the principles involved, since results may come too late to assist their own children. The Court of Appeal, when asked to review the decision of the divisional court in this case, observed "not only have the facts changed, but also, has the law, [Bill 82 had been phased in since the case was initiated].... A declaration of the meaning and effect of the former law applied to the former facts would be of no practical benefit to the parties or the public" (p. 480).

The Lanark case arguably supports the proposition that courts will take a board's resources into account in considering a claim of discrimination. This is contrary to the American view as expressed in Mills v. Board of Education (See Chapter three). There, the Court said that the District of Columbia's interest in educating the excluded children must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

This discussion is important as it relates to section 1 of the Charter. Section 1 permits legal limitations on Charter rights if these "can be demonstrably justified in a free and democratic society". If Canadian courts consider the limited resources of districts as justification for not providing a given level of service, plaintiffs are less likely to be successful.
The case of Rowett v. The York Region Board of Education and the Minister of Education (Ontario Supreme Court, not yet adjudicated, commenced 1987) is touted as the one most likely to reach the Supreme Court of Canada. The Rowetts base their claim for placement in a regular class on s. 2(d) of the Charter (freedom of association) and s. 15 of the Charter (the equality provisions).

The chronology of the Rowett case is as follows: Jaclyn Rowett, a Down's Syndrome child, was classified as "educable mentally retarded". She was assessed by a placement committee and assigned to a self-contained classroom in a school twenty minutes by bus ride from her home. The school was to provide opportunities for Jaclyn's integration with her non-exceptional age-peers. Jaclyn's parents wanted her placed in the neighbourhood school in a regular classroom with a teaching assistant assigned to her. They believed that all disabled pupils should be mainstreamed into regular classrooms. The Board policy, like that of the Ministry of Education, was that the "degree of integration for any student must be considered on an individual basis and furthermore it must be of benefit to all pupils concerned". Many students served by the Board are integrated and served through resource and/or withdrawal support. The Board and the Special Education Tribunal convened in the Rowett case, however, refused to condone the "wholesale integration of exceptional pupils into regular classes solely on the basis of philosophical principle (Mackinnon, 1989)."

Finding themselves in fundamental disagreement with the decision of the Special Education Tribunal, the Rowetts launched an action for judicial review. The relief sought includes Jaclyn's placement in a regular classroom in the neighbourhood school, and a declaration that the board's failure to provide an
appropriate education violated Jaclyn's rights under the *Charter*. In the fall of 1989, the Board brought a motion to strike large portions of the Rowett's statement of claim on the basis that they were seeking to re-litigate the decision of the review tribunal which is designated as a final arbiter of placement decisions under the Ontario legislation. If the school board had been successful in this application, the court would have been in the position of reviewing the alleged *Charter* violation without hearing evidence as to the substance of the allegations from which it arose. The Rowetts maintained that a court could not rule on the *Charter* infraction without hearing evidence of the placement and identification process. Their argument was ultimately successful. The Ontario Supreme Court granted the application of the board, with the effect that the placement decision could not be reconsidered at trial. A tribunal decision, the Court held, was final and binding and its "appropriateness" could not be the subject of review. The Rowetts then appealed to the Ontario Court of Appeal. The appeal was allowed, leaving the Rowetts' full statement of claim intact. The Court of Appeal ruled that the "factual and legal issues are inextricably intertwined and can be dealt with more efficiently when the evidence is adduced at trial" (p. 767).

It is difficult to interpret the ruling of the appeal judge in this interim application. While the Rowetts acknowledge that they cannot re-litigate the placement decision, they argue that they need all of these facts in evidence in order to support their Charter argument. It is unclear to what extent evidence, regarding Jaclyn's abilities or suitability for mainstreaming can be adduced. The very brief ruling of the Appeal Court does not discuss the question at all, but may indicate a new willingness by the judiciary to re-examine the longheld Canadian tradition that only
educators can make educational decisions. The effect of this important interim ruling will only be known after a full hearing of the issues. Before this can occur, discoveries must be set and a trial date obtained. Discoveries are expected in the fall of 1990.

Another Ontario case concerns a child considerably more disabled than Jaclyn Rowett. Becky Till is currently 15 years old, and was institutionalized for some years until adopted by Linda Till and her husband. She was assessed by a placement and review board (IPRC) and placement was recommended in a multihandicapped class at a public school. The Tills refused to comply with the placement decision, and refused to appeal to a review tribunal because the appeal body would be limited to applying the board's criterion for placement. The proper target of legal action is the legislation itself, the Tills maintain. They assert that integration is best for Becky since it was institutionalization which made her weak in social skills to begin with.

Becky is involved in Brownies and swimming lessons, and is, in her adoptive parents' opinion, capable of performing adequately in a regular class. The Board and the Tills negotiated, with the Board offering to place Becky in a different school in a multihandicapped class. This school is equidistant from her home and the neighbourhood school her parents wanted her to attend. Her parents refused the placement offered by the board, and instead, "taught" Becky during the first week of school on the front lawn of the neighbourhood school amid considerable attention from the media. A complaint was brought under Ontario Human Rights legislation. Becky now attends a school administered by the Separate School Board, whose policy is one of integration.
Ironically in the light of the *Lanark* case, many parents of students in Ontario who prefer integration are now placing their children with Catholic school boards as the Tills have. This also happened in the case of *Gerald Bujold, Linda Bujold, and Daniel Bujold by his litigation guardian, Gerald Bujold v. The Ottawa Board of Education and Her Majesty the Queen in the right of Ontario as represented by the Minister of Education for the Province of Ontario* (commenced in 1988; discontinued without a trial). In this case, parents of a Down's Syndrome boy sued to compel integration in the neighbourhood school. The board had refused such a placement. In November of 1989, the lawyer for the defendant board was notified that the Bujolds had changed their school support. With the cooperation of the Ottawa Roman Catholic School Board, the parents enrolled their son in a regular class at the neighbourhood school. The action was discontinued since the public board no longer had any jurisdiction over Daniel. The question remains whether parents should have to change their religious affiliation in order to obtain "equal" treatment for their children.

In a pretrial conference before the *Bujold* case was settled, the judge raised an important question: Should Daniel Bujold have counsel to represent him? Both the parents and the educators claimed to have the best interests of Daniel as a primary focus, yet the views of the parties differed significantly. It was resolved that the Official Guardian should be apprised of the case, with the choice of whether to become involved left to him or her. This question was also raised in the *Elwood* case (Nova Scotia) by Chief Justice Glube. Since neither of these cases proceeded to trial, the question has not been settled. One of the counsel representing the Elwoods (McKay, 1987a, p. 106) concedes that although the settlement reached before trial
was in the child's best interests, "there is an element of disappointment that the
planned three week trial...will never take place". Had the trial occurred, Luke would
not have been represented independently, since Mr. Justice MacLeod Rogers
determined at the pretrial hearing in Elwood that this was not necessary, though he
reserved the option to appoint counsel for the child during the trial if it seemed
appropriate. The Elwood case was, according to MacKay, a "once in a lifetime
opportunity and as close as a Charter advocate is likely to get to a perfect set of
facts". While the setting of precedents is an important by-product of Charter
litigation, independent representation of children may be indicated when a child is
the focal point of a "test case".

Other complaints have been laid in Ontario via the human rights route. The
viability of bringing an action in this way ultimately awaits a Supreme Court of
Canada ruling, since provincial cases go in both directions on the question of whether
human rights legislation applies to prevent discrimination in education. This
question is discussed in detail in Chapter One. In Fripp v. The Nipissing Board of
Education, the parents requested placement for their daughter in a grade one class in
a neighbourhood school with a teacher's aide or a Special Resource Teacher for at
least 50% of the school day. The regional tribunal concluded that Lynn Fripp "in
terms of both verbal and non-verbal skills would [be] set apart in a grade one class.
Although this was the age-appropriate placement, it was not in her best interest to
so place her.

In Lewis v. The York Region Board of Education, a similar placement to the
one desired by the Fripps was requested. Katie Lewis cannot stand or walk, does not
speak, can sit up with support for 15-20 minutes, does not dress herself, and is not
toilet trained. The tribunal refused to order integration for Katie, stating: "Socialization and peer group stimulus are important but not the sole objectives of elementary education." The Lewis family accepted the decision of the tribunal and placed Katie in the recommended multi-handicapped class, but did file a complaint with the Human Rights Commission claiming discrimination and denial of access by the Board.

**Proceedings in British Columbia**

The legislative context earlier discussed is completely different in British Columbia. Courts rather than human rights tribunals have been the forum of choice by plaintiffs seeking "appropriate" education for special needs pupils. The lack of specific mechanisms provided by the B.C. *School Act* means that it is easier in some ways to bring some an action in B.C. than in the Province of Ontario. There is no possibility of procedural barriers being encountered such as the Rowetts experienced, because there are no statutorily constituted bodies for review.

The leading case in British Columbia is *Bales*. It was decided before the equality provisions of the *Charter* came into force, under the previous B.C. *School Act*. While recognizing the validity of the mainstreaming argument, the court held for the school board: *Bales v. Board of School Trustees School District 23 (Central Okanagan)* (BC Supreme Court, 1984). Arron Bales was a mentally handicapped boy who had attended public school in a regular class for three years. He was reassigned at age eight to a special school for the handicapped against the wishes of his parents. Mr. Justice Taylor recognized that, based on expert evidence given at the trial, "segregated schooling for handicapped students such as Arron has come to be regarded
by the majority of educators in the field as unwarranted and outmoded." Using reasoning reminiscent of Rowley, Mr. Justice Taylor decided that the Board had discharged its duty of providing "sufficient school accommodation and tuition" and that the board had adhered to rules of procedural fairness in dealing with the case. Therefore, the action of the parents failed. The Rowley case had been decided two years earlier than Bales, but Mr. Justice Taylor did not refer explicitly to it, though he did discuss the American legislation and other cases, according them substantial weight.

This decision was disappointing, since it went against the plaintiffs in the face of the recognition by Mr. Justice Taylor that mainstreaming is an approach with merit and wide acceptance. Though it was decided pre-Charter, it could be a barrier to actions under the equality provisions in its restrictive interpretation of provincial education legislation. This likelihood is remote, however, in the face of decisions such as Wilson v. Medical Services Commission of B.C. in which the court reviewed both procedural and substantive aspects of the legislation challenged. As well, the case of Reference re: Section 94 of the Motor Vehicle Act demonstrates the willingness of courts to widely interpret fundamental justice, using a purposive analysis to ascertain the interests it was meant to protect (See the judgment of Lamer, J. at pp. 42, 43, 44, and 45). These cases are significant because an action to compel equality in education would rely at least in part on section 7 of the Charter.

The Bales case is representative of cases across the country in which the issues raised are discrimination, the right to attend neighbourhood schools, the assignment of personal teaching assistants, and mainstreaming versus integration. In another B.C. case, however, a family sued to compel segregation and a higher level
of specialized service. The case was brought by Mark Antonsen and Barbara Antonsen against the Board of School Trustees for Vancouver (Supreme Court of B.C., July 14, 1989).

In the Antonsen case, the parents claimed that the IEP developed for their daughter Deidre was inadequate because it did not recommend her placement in a segregated class for learning disabled children in a separate facility. Deidre had been diagnosed as dyslexic and had been awaiting assessment at a diagnostic centre of the board. She was receiving, in the interim, one-on-one instruction for at least forty minutes per day by trained support teachers and was otherwise in an integrated setting. Before the assessment occurred, she was placed by her parents in a private school. They sued the Board for the tuition fees paid and requested that an "appropriate education" be provided their daughter in a segregated setting.

Mr. Justice Trainor refused to find the board in breach of its obligation. He found that the board policy of integrating children of special needs in a program in a regular school whenever possible is "of immense value to both the handicapped child and his peers" (p.50). He also recognized that in certain circumstances, it would be appropriate for a separate school facility to be used, with the decision left to the discretion of the Board.

Trainor, J. cited the Rowley decision from the U.S. in discussing whether the accommodation offered by the Vancouver School Board was sufficient. The reference to American law was made as a matter of course, without discussion of the weight of U.S. cases in Canadian jurisprudence, nor the different legislative scheme from which they arose. After finding that the meaning of the duty to provide tuition under the School Act does not include a duty to provide either the best education possible
nor the obligation to ensure that every child entering the system achieves his full potential, Justice Trainor discussed the standard of appropriateness as defined by the U.S. Supreme Court. He found a minimal standard for the board to meet:

Sufficient accommodation must mean a facility in which ordinary bodily comforts are available and which is designed to permit teachers to attend to the business of instruction. A duty to provide accommodation does not mean a duty to provide the best education possible. There is no obligation on the Board to assure that every child who enters the system achieves his full potential (pp. 31-32).

He was willing to go further than the Rawley decision in this respect:

However, for a child with a handicap, an individualized education program in my opinion must do more than provide educational benefits...the handicapped child must be given an opportunity to understand and participate in the classroom which is substantially equal to that given to non-handicapped classmates. The granting of that opportunity is subject to the qualification that it must be reasonably possible (p.32).

Trainor, J. concludes that the discretion invested in the board is a broad one, subject to review according to the above standard. How far a court will inquire into what is reasonably possible is an unanswered question. Will a court look to see if a board has the funds at its disposal to create the kind of programming sought? Arguments in these cases turn as much on financial considerations as they do on philosophy.

While the Antonsen decision is one of the only precedents in this area in British Columbia, it has limited application for the following reasons:

1. Charter arguments were not pleaded nor were they raised at any point at trial. When the writer inquired of the counsel for the defendants why this had not been done, counsel replied that he did not know, but found it very surprising (Bland, 1989).

2. The case was brought under the previous B.C. School Act, but the new legislation came into force during its hearing. The judgment was given, but it was conceded by counsel that under the new legislation, the action could not have arisen.
3. The Antonsens were disputing the board policy of integration wherever possible. Since most cases aim for opposite results, the decision is arguably not of broad application. It may be used, however, to argue that the restrictions in the Rowley case should apply in British Columbia.

**Other Provincial Jurisdictions**

1. Quebec

In *Macmillan v. Commission Scolaire de Ste-Foy* (1981), the judge ordered an autistic child to remain in a regular class to enjoy a normal relationship with the world around him. The judge also recommended the services of an aide who was familiar with the child. Contrast this decision with the Court of Appeal judgment in *Dore v. Commission Scolaire de Drummondville* (1983). This was a case appealing the exclusion of an autistic child from a special class where he was disruptive to other pupils. The Court upheld the exclusion. Education must be provided to every student, the judgment concedes, but the duty to offer special education services is not absolute. The provision of these services depends upon whether a child is able to profit from special education services. No duty to provide any medical care or therapy is imposed, even if these are necessary for the comfort and adaptation of the child to the classroom.

The province of Quebec has widely drafted legislation, mandating education for handicapped children in the least restrictive environment. It is one of two provinces employing a universal rights approach endorsed by Cruikshank (1983, pp. 41-43). Yet, as Poirier, Goguen, & Leslie (1988, p. 59) point out, the Dore decision shows that a universal rights interpretation is not always applied by Quebec courts. This
can be traced to the legislation which provides that the Board need not provide service if the student or special education service is not within the scope of programs offered by the board. Where services are provided, they must be available for handicapped students until they turn 21.

2. New Brunswick

In a recent decision (Le Conseil Scolaire Numero 39 v. Joseph Robichaud, Anne Robichaud, et Nathalie Robichaud, June 30, 1989), the New Brunswick Court of Appeal dealt with effect of interim applications on the placement of a handicapped student. The New Brunswick legislation provides for mandatory service to the handicapped. It does not specify that education should be appropriate nor that it should be suited to the needs of the child. The legislation does direct the Board to place exceptional children so they will receive special education programs and services within regular classroom settings to the extent practicable having due regard to the educational needs of all pupils.

Nathalie is an exceptional child who is 15 years old. She first attended school in 1978 and repeated that grade the following year. Subsequently, she attended school in a different district in a special class. She attended very few days of school during the 1987/88 school year. Nathalie's parents commenced action against the school board, requesting that Nathalie be integrated into a regular class with an individualized education plan and other services as required. The Board replied that they had tried on two occasions to integrate Nathalie, but that these attempts had been unsuccessful because Nathalie was disruptive to other students. They offered a limited integration class for the 1988/89 school year.
The Robichauds sought an injunction mandating the placement of Nathalie in a regular grade eight classroom pending the outcome of trial. They argued that to refuse would result in irreparable damage to Nathalie. The New Brunswick lower court ordered complete integration pending the airing of all the issues and the decision of the trial judge. The Court of Appeal overturned the injunction. The Appeal justices stated that the aim of an interim order is to maintain the status quo, not to give Nathalie a chance to prove she could be successfully integrated.

The chronology in this case raises an important problem: as trial and appeal courts review placement decisions, the plaintiff student may find his or her education disrupted. In the Robichaud case, for example, the injunction had been granted in January 1989 at which time Nathalie was transferred from a setting offering limited integration to a regular class. On April 28, 1989, the appeal judgment overturning the injunction was handed down. The appeal justices did not want to further complicate the situation by causing Nathalie to withdraw from the integrated class she had been in since January. They therefore made the order overruling the injunction effective June 30, 1989. The Justices commented that in order to avoid disruption to Nathalie, the school board should have applied for a stay of proceedings pending the hearing of the appeal.

3. Alberta

The leading case in Alberta is  *Carriere v. County of Lamont No. 39*. This pre-Charter case involved the interpretation of provincial education legislation mandating the admission of all children to school by virtue of residence. No mention is made of particular obligations in the case of exceptional pupils. The court ordered
the board to accept a child with cerebral palsy into a regular classroom. Once she was admitted, however, Judge O'Byrne acknowledged that he did "not have authority to direct the board as to what must be done or the manner in which the order is to be complied with". Accordingly, Shelley Carriere was enrolled in an elementary program, but the victory was incomplete. Although she was not retarded, she was required to take some classes with children who were retarded. The board claimed that this was the best service it could provide. The Carriers lobbied for legislative change in view of this situation. Provincial law in Alberta now provides for entitlement to a special education program when the board determines a need for it. If a special needs student's needs cannot be met by the board, then the matter is referred to a Special Needs Tribunal. Where the Tribunal confirms the inability of the board to provide service, then the Tribunal is charged with developing a plan for meeting the needs of the student. The Tribunal also has responsibility for adjudicating who has responsibility for delivery and funding of the plan.

4. Manitoba

Manitoba, like Quebec, has adopted the universal rights approach to provision of services (Cruikshank, 1983). The legislation, unlike Quebec's, does not require education in the classes to be appropriate to the needs of the child. It does include provisions for "adequate accommodation" for resident students or payment of expenses incurred if students must be served out of district. In the pre-Charter case of Damus v. Board of Trustees (1980), the judge was explicit about the need to pursue reform through legislative rather than judicial channels: "The plaintiffs are men and women of conviction and integrity....They have turned to the courts as their
last resort. I think that their remedy, if they have one, lies not in the legal process, but in the democratic political arena and through the ballot box."

5. Nova Scotia

Nova Scotia figures prominently with the case of Elwood v. Halifax County Bedford School District in this discussion. Legislation in Nova Scotia provides that it is the duty of the teacher to report to the inspector the names of children who are incapable of receiving instruction in a public school. Boards must provide special education programs and services prescribed by the Minister. There is no mandatory provision of service where the child is not capable of benefitting from such programs and services.

Action was commenced in 1986 by the Elwoods who sought to compel integration for their developmentally delayed son, Luke. The Halifax County-Bedford School District was not totally opposed to the integration of children with mental disabilities. It accepted the cascade model which identifies integration as the least restrictive environment for the mentally disabled child. MacKay (1987a, p. 105) reports, however, that "in reality, very few children once labelled and placed in a class for the moderately or severely mentally disabled ever moved out of that class and into the mainstream".

The legal arguments put forward in the case fall into three categories: the constitutional right to education, due process and fundamental justice, and equality and integration. The plaintiffs claimed that the Charter guarantees an implied right to education in section 7 that states "[e]veryone has the right to life, liberty and security of the person and the right no to be deprived thereof except in accordance
with the principles of fundamental justice.* MacKay, one of the plaintiffs' counsel, (1987, p. 108) argues that section 7 must include a general right to education given the context of the *Charter* and the importance of education to "liberty".

The Elwoods also said their rights to due process had been violated by administrative and board hearings concerning placement. They were denied access to documents, refused the opportunity to ask questions of board members, and given short notice of important meetings. These process issues are important, and are sure to surface again in some of the cases proceeding to trial.

The question of equality is one of the most controversial raised by the trial. Much of the expert testimony would have been addressed to this issue: Does equality for Luke necessitate integration? The Elwoods did not claim that integration was the constitutional right of all mentally handicapped children. They argued that Luke would only received the equal benefit of the law as guaranteed by section 15 of the *Charter* if he were integrated.

Lawyers for the board argued that to determine whether section 15 had been violated, the judge should compare Luke to all "similarly situated" individuals. If Luke was treated like other mentally handicapped students, no discrimination would be found. This approach from early cases was clearly rejected in the subsequent Supreme Court decision in the *Andrews* case in which a broader test was applied (see Chapter Five). Board lawyers also argued that a special placement was an affirmative action program, designed to ameliorate the conditions of a disadvantaged group as contemplated by section 15(2) of the *Charter*. Finally, they said that if there was a violation of section 15, it was saved under the reasonable limits section (section 1) of the *Charter*. 

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The Elwoods were successful in obtaining a mandatory interlocutory injunction from Chief Justice Glube of the Nova Scotia Supreme Court which effectively integrated Luke for the full year before the trial. The case was settled by negotiation on the eve of trial, and the agreement incorporates the idea that special placement must be justified as a reasonable limit on rights defined in section 15 of the Charter. If a segregated placement cannot be justified on the facts, then integration should follow. The agreement is "an important precedent in practical terms and it is a classic illustration of the out of court uses of the Charter of Rights as an important negotiating tool for students and parents" (MacKay, 1987a, p. 110).

MacKay (1987a) asserts that the Charter is the catalyst without which such a settlement would not have been reached. He concedes (p. 106) that Luke is a plaintiff who "was well-liked by his peers in school. The parents of his fellow students supported the Elwoods by supplying supportive affidavits at the injunction hearing and stood behind the Elwood family through their long and sometimes difficult conflict with the ...board." Such favourable facts no doubt assisted the plaintiffs in the negotiation of a settlement.

Highlights of the settlement are as follows: The Elwoods and the Board must agree to any change of the educational plan developed for Luke. If the Board wishes to change the plan from that agreed upon, the Board will pay the costs of arbitration. Resources such as special personnel or materials shall be provided by the Board as required. The program developed for Luke is to be reviewed every twelve months. A team is to be formed to monitor Luke's progress, always consisting of Luke's parents and the classroom teacher.
6. Other provinces

Saskatchewan has some of the most wide-ranging legislation for provision of service to the handicapped. There, every pupil must be provided with a program which is consistent with his needs and abilities so far as it is practicable within the policies and programs of the board. The principal must, and a parent may request that a special needs pupil be referred to a school official responsible for assessment if that pupil appears unable to profit from instruction provided. The official must investigate the matter and recommend action based on conferral with the principal, teacher, and parent. No requirement is outlined for involving the student in psychoeducational placement decisions.

In Newfoundland, the board must provide service unless a child cannot reasonably be accommodated in a school appropriate to his or her own faith. Boards are directed to organize education for children who for any physical or mental reason require special services. These classes may be in schools of the board or elsewhere.

In Prince Edward Island, services must be provided within regular schools except for students who are entitled to special programs approved by the Minister. These include services for students who are deaf, blind, or suffering from cerebral palsy.

Conclusion

This is a representative list of cases previously and currently before Canadian courts. More cases are on the horizon; there is also a backlash response to the equality litigation for special needs students as parents of non-handicapped students have organized in some jurisdictions to oppose mainstreaming and integration on the grounds that it takes away teachers' time and resources from their
children. The future holds more of the same, at least until there is some national direction concerning placements and the application of the equality provisions to special education.
CHAPTER FIVE

And Where From Here? Steps in the Direction of Equality

Judicial precedents from the United States and Canadian cases in progress illustrate the complexity of issues involved in education for the handicapped. Questions of degree of integration, level of service, and whether the Charter requires that a child be offered a placement in the neighbourhood school are all unanswered. Those issues are considered here, in the context of a discussion of Supreme Court precedents in education generally and those interpreting section 15 of the Charter.

In the United States, a federal statutory scheme made a significant difference in providing at least a minimum standard for service to the handicapped and due process. The diversity among provinces with respect to educational legislation means that a minimum standard can only be set through either federal legislative action or constitutional interpretation. Any federal enactment, even under the rubric of a designated federal power, could be perceived as possibly eroding provincial control over education. Thus, the battleground is almost inevitably constitutional. The development of a set of minimum standards of service for handicapped children is years away, and may or may not be the outcome of Charter litigation.

Given recent Supreme Court of Canada decisions, judges may apply equality provisions in the Charter quite broadly. They may do so reluctantly, having conscientiously avoided the domain of activism during the pre-Charter period. The comments of Monnin, C.J. of the Manitoba Court of Appeal may be representative: "I realize that the consequences of this ruling [striking down civic exclusionary zoning
by-laws] are serious and will give rise to enormous difficulties for the City of Winnipeg. Prior to the decision of the Supreme Court in Andrews, I would not have reached the conclusion I have now arrived at (p. 25, exclusionary zoning case).

In the United States, there has typically been more willingness to review decisions of this nature, though not always with positive results for plaintiffs. Canada has a tradition of reluctance to second-guess the decisions of educators. In the case of Re:Dolmage v. Muskoka Board of Education, brought during the phase-in period of Bill 82 in Ontario, Eberle, J. observed it was not for the court to meddle with the details of implementation of government policies nor with the rate of progress of their implementation. Those are administrative, financial, and policy matters primarily. Equally I do not think it is for the court to attempt to take over control of such matters even though our American brothers have done so in some instances. I am not at all tempted by their example. It is my firm view that matters of that kind are for elected officials and not for judges and I readily confess to possessing no aptitude for such a role.

Canadian judges have said that courts do not concern themselves with the implementation of rights; they are only mandated to declare them. This position was taken by Judge Purvis in the case of Mahe et al. v. Province of Alberta (1985) when he wrote:

The court should not become involved with preparing or drafting methods of achieving the required objectives. The courts have attempted to provide guidance in interpreting the Charter, but must not interfere by decreeing methods or becoming involved in ongoing supervision or administration. It should restrict its function to recognizing and declaring a denial or rights created or recognized by the Charter (pp. 55-56).

The position enunciated by Judge Purvis arises from a long line of cases. In an early Quebec case, Bouchard v. Commissaires d'Ecoles de St. Mathieu-de-Dixville, two students with learning problems were expelled because their behavior and requirements interfered with the learning of the other students. The Supreme Court
of Canada refused to order the school to re-admit the students. The decision stated that in the absence of compelling reasons to the contrary, the court should not interfere with the decision-making of educational authorities.

Wilson (1985), in reviewing cases in the light of section 15 of the Charter, concludes "...it is hoped that subsection 15(1), together with section 1, will go some way toward preventing the bench from largely delegating its review responsibilities to the parent or state agency, as has traditionally been the case" (p. 322). A recent decision in the Ontario Court of Appeal in the Rowett matter gives some cause for cautious optimism. The statement reportedly made by an Appeal Court Justice in Rowett was "...that the Charter has created a new era in which questions of pedagogical philosophy are extremely pertinent to the determination of an individual's constitutional right to an appropriate education" (unreported). If this is an indicator of a post-Charter shift in judicial attitude to questions of this nature, the question of how widely it is shared becomes central.

The jurisdiction of the Charter over questions of school board policy has been questioned. Section 32 provides that the Charter governs the actions of governments, federal and provincial, in respect of all matters within their authority. As education is a matter within provincial authority, the Charter arguably applies. The question arises whether school boards are creatures of the provincial legislature such as to be caught by section 32. MacKay (1986) disposes of the question summarily: "Certainly the Cabinet, ministers of education, school boards, administrators, and teachers in a public school system are acting as agents of the state" (p. 306).
Educational administrators and policy makers should not be relied upon to broadly define the rights of the handicapped. There are not enough inherent rewards built into the system to guarantee this; in fact, integration programs are perceived to be expensive especially at the outset when teacher training and material costs are high. Therefore, if the handicapped are to receive "equal" treatment, some judicial intervention is necessary and desirable. One need only examine education legislation across Canada to see the wide variation in service mandated, with some jurisdictions making little provision for programming according to need, and others making so much provision that they run the risk of becoming mired in their own bureaucracy. A Supreme Court of Canada interpretation of the application of section 15 to educational equality could set a minimum standard of service. Even if some minimum standard is set, it is likely that the minimum will become the rule rather than a starting point for easier and more meaningful access to integration.

Judicial Trends

In the past year, two seminal decisions have been handed down by the Supreme Court interpreting section 15, the equality provisions. Andrews and Turpin combine to stand for the proposition that section 15 is intended to protect the disadvantaged groups in Canadian society, the "insular" minority who tend to be socially and politically vulnerable. Previous decisions dealt with equality issues by applying the "similarly situated" test. This test stipulates that those "similarly situated" should be treated similarly. It was applied by the British Columbia Court of Appeal in Rebic v. Collier. The Ontario Court of Appeal elaborated on the test in
R. v. Century 21 Ramos Realty Inc., stating that similarities and differences must be assessed according to the purposes of the legislation to be applied.

In Law Society of B.C. et al v. Andrews et al (1989), the Court struck down a section of the B.C. Barristers and Solicitors Act which purported to restrict the right to practice law to Canadian citizens. The court decisively rejected the "similarly situated" test that had resulted in narrow interpretations of the equality provisions. This test, according to the Court, was seriously deficient. Under it, persons who are "similarly situated" are to be treated similarly, and those who are differently situated must be differently treated. If literally applied, such a test could be used to justify Nazi laws against the Jews. Thus, this test could result in the upholding of the most glaringly discriminatory legislation simply because all of a particular group are treated the same. Maclntyre, J., (dissenting but concurring with the majority regarding section 15) refused to apply this test, using instead a purposive approach as enunciated by the Court previously. He therefore defines discrimination as follows:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to the individual solely on the basis of association with the group will rarely escape the charge of discrimination, while those based on the individual's merits and capabilities will rarely be so classed (p. 19).

Maclntyre, J. goes on to state that discrimination is unacceptable in a democratic society. He emphasizes that discrimination reinforced by law is particularly repugnant: "The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a
guarantee" (q.16). The judgment points out that not all distinctions and
differentiations created by law are discriminatory. If a provision or a program
looks discriminatory on its face, it will be examined as to its effect on the
complainant. If a discriminatory effect is found, the question then becomes whether
that discrimination is acceptable under section 15(2) or s.1. Section 15(2)
permits programs or policies that have as their object the amelioration of
disadvantaged groups. Section 1 provides for reasonable limits on the freedoms
guaranteed by the Charter to the extent such limits are justifiable in a free and
democratic society. If discrimination is found by a court, the burden of proof to
establish that section 1 should apply shifts to the defendant.

Wilson, J., writing for the majority, also comments on the persons section
15 is intended to protect. Her comments pertain equally well to mentally
handicapped individuals as to non-citizens who wish to practise law:

Relative to citizens, non-citizens are a group lacking in political power and as such
vulnerable to having their interests overlooked and their rights to equal concern and
respect violated. They are among "those groups in society to whose needs and wishes
elected officials have no apparent interest in attending". Non-citizens, to take only
the most obvious example, do not have the right to vote. Their vulnerability to
becoming a disadvantaged group in our society is captured by John Stuart Mill's
observation in Book III of Considerations on Representative Government that "in the
absence of natural defenders, the interests of the excluded is always in danger of
being overlooked..." (p. 32).

The "reasonable and fair" test applied by the B.C. Court of Appeal in the
Andrews case was also rejected by the Supreme Court. That test, according to the
Supreme Court, avoided the problem of finding any distinction to be a violation of
section 15, but did not leave an adequate role for section 1. It provided that if
inherently discriminatory provisions were found "reasonable and fair" in the
circumstances of a given case, they would not be impugned. The "enumerated and
analogous grounds test" was seemingly approved. This test requires an assessment
under section 15(1) of:
1) whether the alleged ground of discrimination is either enumerated or analogous;
2) whether the plaintiff is not receiving equal treatment before and under the law;
3) whether the plaintiff is impacted differently by the law or somehow denied its
   benefit; and
4) whether the legislative effect of the law is discriminatory (Black & Smith, 1989).

It is significant that Wilson, J. does not rule out the use of a differential test
for disadvantaged groups. She states that the determination of whether a group is
analogous to those specified in section 15
is not only to be made in the context of the law which is subject to challenge but
rather in the context of the place of the group in the entire social, political, and legal
fabric of our society. While legislatures must inevitably draw distinctions among
the governed, such distinctions should not bring about or reinforce the disadvantage
of certain groups and individuals by denying them the rights freely accorded to
others (p. 3).

The formulations of what constitutes discrimination by Wilson and McIntyre, JJ.
arise from the identified shortcomings of the Canadian Bill of Rights and from the
Canadian Human Rights Act. They are predicated on the recognition that the named
grounds in section 15 are not exclusive, but are representative of the most common,
and probably the most socially destructive and historically prevalent kinds of
discrimination, and therefore deserving of particular attention (Andrews v. Law
Society of B.C. and Turpin v. R.). Analogous grounds, however, may also be used as
indeed they were in Andrews (section 15 does not specifically protect non-citizens).

Of particular interest to advocates for exceptional children is the R. v. Turpin
interpretation of section 15. In that case, the Court considered a Criminal Code
provision which requires a jury trial for murder charges in Ontario and elsewhere in Canada, but not in Alberta, where an accused can elect to be tried by judge alone. The Court found that this did constitute a denial of equality before the law contrary to section 15(1), but that this was not discrimination. Accused persons, according to the Court, do not constitute a disadvantaged group within Canadian society as envisioned by the Charter. The unanimous judgment by six Supreme Court justices, however, stresses the relevance of the larger social, political, and legal context in a section 15 case. The Court goes on to suggest that some of the following may be indicia of discrimination: stereotyping, historical disadvantage, or vulnerability to political and social prejudice (pp. 39, 41). These are, of course, unquestionably associated with the experience of the exceptional child. If discrimination is found, the application of section 1 becomes an issue.

The Andrews case clarifies the relationship between section 15 and section 1. Section 1, as stated, permits reasonable legal limitations to be placed on the rights guaranteed by the Charter if these limitations are demonstrated as justifiable in a free and democratic society. Under s. 1, it must be shown that the legislative objective relates to concerns which are "pressing and substantial" in a free and democratic society (R. v. Oakes). The Oakes test was applied by three of the Justices in Andrews, but arguably qualified by three others. McIntyre, J. comments that "the standard of 'pressing and substantial' may be too stringent for application in all cases" (p. 25). He suggests that the process to be followed by a court in assessing section one should be:

...[T]he first question the court should ask must relate to the nature and purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective.
which would warrant overriding constitutionally protected rights. The second step in a section 1 inquiry involves a proportionality test... (p. 25).

The proportionality requirement has three aspects which were outlined by the Chief Justice in the Edwards case:

1) the limiting measures must be carefully designed, or rationally connected, to the objective;
2) they must impair the right as little as possible; and
3) their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgement of rights (p. 768).

It will not be easy to satisfy this test. Wilson, J. in Andrews stated: "Given that s. 15 is designed to protect those groups who suffer social, political, and legal disadvantages in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one" (p. 34).

LaForest called noncitizens a group whose interests are likely to be compromised by legislative action. Like children, they are therefore entitled to rigorous scrutiny by courts of allegations of discrimination.

The standard against which educational opportunities for the disabled may be measured is unknown. However, given the interpretation of ss. 1 and 15 in the Andrews and Turpin decisions, the standard is arguably a high one. Canadian courts are challenged to determine an appropriate balance between the rights of the individual and the rights of the collective. The Chief Justice acknowledges that this balance is important in the case of R. v. Oakes where he writes

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, section 1 provides criteria of justification for limits
on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification especially when understood in terms of the contextual considerations discussed above, namely, 1) a violation of a constitutionally guaranteed right or freedom, and 2) the fundamental principles of a free and democratic society (P. 335).

However the balance comes to be struck, the combined effect of the Andrews and Turpin decisions is unequivocal. Section 15 is clearly to be construed as a provision for the protection of those groups in Canadian society who are disadvantaged in the social or political sense. To prove a case, the complainant must show unequal treatment and discrimination as defined by McIntyre in Andrews, i.e. as a legal burden or limitation based on personal characteristics. All factors that might be advanced by respondents by way of justification are to be reserved for hearing under section 1, where the onus remains on the respondent to justify the scrutinized provisions.

Application to a Hypothetical Case

Many of the Canadian cases now before the courts have a common theme running through them: a child with a handicap (Down's syndrome, for example), parents committed to the ideas of integration and mainstreaming, school services being offered in a segregated or semi-integrated setting in a school other than the neighbourhood school where special personnel and/or programs are available. When parents wish to initiate change in placement or service, there may be a requirement that they exhaust all administrative remedies before applying to the court (Harelkin v. University of Regina; Smith v. Robinson [U.S.] ). Some Ontario parents have brought actions without exhausting nor even using these remedies, but the success of these actions is as yet unknown.
When a claim is filed based on the equality guarantees of the *Charter*, the precedent set by *Andrews* will be pivotal to the claim. Applying *Andrews* to the hypothetical case, the mentally handicapped child falls within an enumerated ground. Is she receiving equal treatment before and under the law? Prima facie, applying the test set out by McIntyre, J. in *Andrews*, she is not. She is experiencing disadvantages not imposed upon others solely because of her disability. She is being denied the opportunity to interact socially with other children; she is being denied the opportunity to "belong" to the mainstream, to model appropriate behavior, and to attend school with her neighbourhood peers.

The equal benefit requirement of section 15 is different than the U.S. equivalent (the Fourteenth Amendment) and arguably places a higher standard on conduct. It was added, according to Sussel and Manley-Casimir, in "an attempt to encourage a broader interpretation of 'equal protection' (than was given in *Bliss v. Attorney General for Canada*, a decision under the Bill of Rights) (p.60)". The plaintiff seems to satisfy the "benefit of the law" criteria as set out in *Andrews*. She fits well within the rubric of McIntyre, J.'s comments: "The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee" (p.16).

Finally, the question arises whether the legislative impact, or effect, of the law is discriminatory. A British Columbia plaintiff has the legacy of *Antonsen* and the pre-Charter Bales case to contend with. In the former, Mr. Justice Trainor of the B.C. Supreme Court had little difficulty in dealing with the argument of the plaintiffs that the programming offered by the board did not recognize and foster the critical development of self-esteem for learning disabled children. He dismissed the
argument summarily: "The evidence shows that the Board and its teachers are alert to this responsibility. Their conduct in this regard does not amount to a failure" (p. 52).

In Bales, Taylor, J. reported that

Expert evidence given at the trial establishes that "segregated" schooling for handicapped students such as Arron has come to be regarded by the majority of educators in the field as unwarranted and outmoded. The evidence also suggests that the costs of establishing and operating special schools for the handicapped are no less, and may indeed be greater, than those involved in educating children within the ordinary school system with the assistance of specially trained personnel and instruction where necessary in special classes.

Taylor, J. referred to American cases and PL 94-142, acknowledging that "those decisions were reached under a different legal system, but it does not follow that general principles applicable in Canada will necessarily differ from those recognized by Court in the United States" (p. 217). Later, he found that it does not follow "that these United States Courts would have found that the operation of a properly-run, publicly-supported separate school for moderately mentally handicapped students was unacceptable" (p. 218). Since education in a segregated environment does not necessarily cause harm to children, he found it was not unreasonable.

Bales was decided before the equality provisions of the Charter came into effect. Its precedential value in the face of Andrews and Turpin is diminished. Bales also predates the new British Columbia School Act. The integration of special needs children is not mandated by the new Act, but is required by a Ministerial Order. While the Order has the same force and effect as legislation according to Part 9 of the Act, section 182(2), it is subject to easier modification and/or rescission than legislation. There is wide discretion to segregate children if the board finds this is
indicated: "Unless the educational needs of a handicapped student indicate that the
student's educational program should be provided otherwise, a board shall provide
that student with an educational program in classrooms where the student is
integrated with other students who do not have handicaps" (Ministerial Order
13/89, italics added).

The impact of this provision mandating only consultation and not provision of
service could well be found to be discriminatory. Arguably, the practice of
segregation violates the mission statement for the schools of British Columbia "to
enable learners to develop their individual potential and to acquire the knowledge,
skills, and attitudes needed to contribute to a healthy society and a prosperous and
sustainable economy" (italics added). Programming to enable learners to develop
individual potential is reminiscent of the standard of service sought by (but not
achieved) the Rowleys in the United States.

There is considerable Canadian authority for the proposition that a legislative
scheme which is manifestly unfair in substance and effect is not in accordance with
the principles of fundamental justice (see Wilson v. Medical Services Commission of
B.C.). It can therefore be argued that the B.C. legislation, with its absence of
definitions of material terms and inadequate guidelines for decisionmakers, is flawed
in a way which cuts to the heart of the principle of fundamental justice pursuant to
section 7 of the Charter (see Morgenthaler v. The Queen, at pp. 30-31).

Section 7 can assist the plaintiffs as is clear from the expansive
interpretations given it by the judiciary. In Mia v. Medical Services Commission of
British Columbia, the word 'liberty' was construed to mean much more than mere
lack of physical encumbrance. McEachern, C.J. quotes with approval the United States case of *Myers v. Nebraska*, where liberty was defined as follows:

...without doubt it connotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge...and generally to enjoy those privileges long recognized at common law as essential to the ordinary pursuit of happiness by free men (p. 264).

McEachern, C.J. also adopts the reasoning of Nemetz, C.J. who states

I adopt those American authorities which do not confine the definition of liberty to mere freedom from bodily restraint...Chief Justice Warren said, in part, 'Liberty under law extends to the full range of conduct which the individual is free to pursue and cannot be restrained except for proper Governmental objective.' I am in respectful agreement with this doctrine...accordingly, such liberty constitutes a right under the *Charter* and a person cannot be deprived except in accordance with the principles of fundamental justice (*R. v. Robson*, p. 206).

McEachern finally goes on to say that

fundamental justice is a concept that transcends procedural fairness or natural justice. It includes the substance of the practice. (See *Reference re: Section 94 of the Motor Vehicle Act of B.C.*). Thus the Court has been given the onerous new mandate of construing laws...which are said to offend against section 7. We must have regard not just to procedural fairness, but also to the content of the law or practice in review, and the conduct or activity in question (p. 265).

The Supreme Court of Canada has reaffirmed this position in the strongest terms in the *Morgenthau* decision. Chief Justice Dickson makes it clear that section 7 imposes a duty on courts to review legislation once it has been found to infringe an individual's right to life, liberty and security of the person. Dickson refers to the case of *R. v. Videotllicks* as authority for the proposition that section 7 rights relate to one's physical or mental integrity, and to one's control over these. Extending section 7 to the concept of the right to mental integrity is of vital importance to the case of the plaintiffs.

Section 7 can also be used to support a claim that the rights of such a student to economic self-sufficiency are violated by inadequate education. The social and
economic conditions of special needs children are well documented. In *Mills v. R.*, Lamer, J. states

Security of the person is not restricted to physical integrity. Rather it encompasses protection against overlong subjection to the vexations and viscidities of the pending criminal accusation....[These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors including possible disruption of family, social life and work, legal costs, and uncertainty as to the outcome and sanction (pp 919-920):]

These consequences are arguably analogous to those experienced by a special needs child whose needs are not met. In addition, there is judicial recognition of the psychological dimension of security of the person (Dickson, C.J. refers to *R. v. Therens* on this point). This is also of crucial importance to exceptional children for whom the negative psychological effects of segregation cannot be ignored.

Section 7 has been extended to a recognition of the dignity and worth of the human being (*R. v. Fequet*). It can be strongly argued that special needs children as an affected class are deprived of security of the person and benefits which flow from normalized learning environments. They are obstructed by rules and regulations (and, in the case of B.C., a lack of procedural and substantive guarantees) which segregate them with the result that their self respect and dignity is deeply affected.

The words of Wilson, J. in *R. v. Morgenthaler* bear repeating:

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormich in *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy* (1982) speaks of liberty as 'a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life'. He says at page 41:

To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately
denied the opportunity of self-respect and that contentment, he would suffer deprivations of his essential humanity (p. 14).

Section 7 can also be used to argue that the differentiation and segregation of special needs children, or the failure to provide an appropriate education will exclude them from enjoying the economic benefits most other Canadians will enjoy. The Supreme Court of Canada has expressly declined to exclude such economic rights from section 7: A.G. Québec v. Irwin Toy Ltd., p. 84. There is, then, a very strong argument that section 7 provides plaintiffs with the right to an education at least as beneficial as that experienced by non-handicapped children, and more: they must be respected, treated with dignity, and given the mental and psychological encouragement to develop to the best of their abilities.

There is also an argument, although less convincing, for the application of section 2(d) of the Charter guaranteeing freedom of association. In Reference re: Public Service Employees Relations Act, Chief Justice Dickson defines freedom of association as follows:

[It is] the freedom to combine together for the pursuit of common purposes or the advancement of common causes. It is one of the fundamental freedoms guaranteed by the Charter, a sine qua non of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society. In every area of human endeavour and throughout history individuals have formed associations for the pursuit of common interests and aspirations. Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms (pp. 592-593).

Surely, exceptional children and their parents can rely on this precedent to argue that there should be integration, and that they should have meaningful input into psychoeducational decisions that concern them.

The plaintiff's case is further assisted by recent appellate court decisions in education. In the case of Re Zylberberg et al. and Director of Education of Sudbury
Board of Education, the Ontario Court of Appeal considered the provisions of the Ontario Education Act which read:

50. (2) No pupil in a public school shall be required to read or study in or from a religious book, or join in an exercise of devotion or religion, objected to by his parent or guardian, or by the pupil, where he is an adult.

Parents of various faiths sought to challenge the recitation of the Lord's Prayer in the classroom. The lower court found that, since recitation of the Prayer was not compulsory, the practice did not offend the Charter provisions guaranteeing freedom of religion.

The Ontario Court of Appeal held that minorities should not be subject to the "tyranny of the majority". In looking at the effect of the practice on non-Christians, the Court commented that the freedom to refuse to participate could not save the practice because students exercising this option would be unfairly stigmatized. This view of the effect of legislation is quite broad, separating it from the narrow, constructionist approach under which it is technically acceptable because it allows students to opt out.

Applying the same posture to the hypothetical case, it could be argued that students who are barred from the mainstream also suffer from what the court in Zylberberg termed "peer pressure and classroom norms to which students are acutely sensitive". As self esteem and the right to retain dignity are implicitly recognized by the court in the Zylberberg case, they are arguably even more central to the case of special needs students.

If discrimination is found pursuant to section 15(1) in our hypothetical case, the question becomes whether the Board can justify a segregated placement under section 15(2). This section permits programs that are discriminatory, but
that seek to ameliorate the conditions of a disadvantaged group. Under detailed schemes such as the Ontario legislation, there is a better argument that section 15(2) applies. In British Columbia, there is no statutory scheme set out to "ameliorate" these conditions. It is difficult in the absence of evidence of careful and concerted effort to ameliorate conditions to argue for the application of section 15(2).

The onus then shifts to the board to justify the discrimination pursuant to section 1 of the Charter. As was stated in Andrews, the standard is an onerous one. A defence frequently raised by boards is scarcity of resources. This defence may not succeed, as illustrated by the Quebec case of MacMillan c. Commission Scholaire Ste-Foy. In granting an injunction compelling the special education of an autistic child in his own community, the court recognized that the decision would place an administrative and financial burden on school boards. These were held to be irrelevant considerations in determining the rights and obligations of the parties at law.

Applying the Edwards criteria used by the court in Andrews, the board would have to establish that the limiting measures were carefully designed, or rationally connected, to the legislative objective. There is little substantive material in the British Columbia legislation on which the board may rest its case. If the legislative objective involves assisting students to reach their individual potential, then the board would have to show that segregated or semi-integrated placements are the best route, at least in some cases, to reach this goal. Next, the board would have to establish that the segregation impairs the rights of the student as little as possible. Finally, the board would have to adduce evidence to show that the effects of the
placements did not so severely trench on individual rights that the legislative objective was outweighed by the abridgement of rights.

This claim would likely involve educational experts speaking to provision of service, integration, and programming. The central question is the standard of service a court would require. Antonsen rejects the Bales requirement that programming is acceptable if it is not harmful, imposing a higher standard than the Rowley court in the United States:

However, for a child with a handicap, an individualized education program in my opinion must do more than provide educational benefits...the handicapped child must be given an opportunity to understand and participate in the classroom which is substantially equal to that given to non-handicapped classmates. The granting of that opportunity is subject to the qualification that it must be reasonably possible.

The provision of services for a hearing impaired child such as Amy Rowley would probably be covered by this language. It does not speak to degree of integration at all, nor to whether equality requires as much contact with age-peers as possible. Of course, it also contains the subject clause that the opportunity must be "reasonably possible". In Charter cases, the "reasonably possible criteria" may not be applied to restrict rights. Then Dickson, C.J. in the Mahe case acknowledged: "Cost...is not usually taken into account in determining whether or not an individual is to be accorded a right under the Charter" (p. 29).

Does the requirement that the board justify the impairment of rights as the minimum necessary enable the argument for entitlement to education in the neighbourhood school? Arguably, it does. The School Act, of course, confers on no one the right to attend the neighbourhood school, but only the right to attend school. Even if full integration is not appropriate in a given case, however, justification does not automatically follow for further distinctions based on an elaborated ground
in section 15. If 99/100 students attend the neighbourhood school and the one mentally handicapped child does not, then the social disadvantage may be actionable.

Courts are more likely to be deferential to educators about matters of substance than matters of process. As MacKay (1990) points out, courts consider themselves to be experts in the latter arena. A challenge to placement is therefore more likely to succeed in a jurisdiction where the statute is less detailed (e.g. British Columbia) than where a legislative scheme is adopted with procedural safeguards (e.g. Ontario). Challenges may be most successful when framed as reviews of due process in addition to section 15 claims. This is particularly true in the light of the substantive due process precedent set by the *Wislon v. Medical Services Commission of B.C.* case.

**Implications for Policy**

Until the Supreme Court deals with these issues, there will be uncertainty regarding service provision for handicapped children. Some uncertainty may be desirable, allowing educators the flexibility to meet individual needs without inflexible rules. A basic entitlement to meaningful access, however, is long overdue. The following are some proactive steps districts can take to minimize their vulnerability to Charter challenges:

1) Based on cases reviewed, it is incumbent on boards to provide adequate diagnostic facilities to assess children. Trained specialists should be involved in formulating individual education plans which are concrete and well rationalized. Such services should be available in a relatively short time. There was a suggestion in *Antonsen*
that, given the waiting list for assessment, the case for the plaintiffs was strengthened (though it was ultimately unsuccessful).

2) While the legal challenges to placement rest on the *Charter* and provincial legislation, boards may also be sued at civil law for negligence. To be found negligent is to be found in breach of a legal duty owed to another. As boards provide diagnostic services, they expose themselves to potential liability in this area. Negligence suits have been brought successfully in the United States for medical misdiagnosis, but never for failure to educate: *Hoffman v. Board of Education*.

3) As the B.C. directive mandates integration, B.C. school boards should implement policies to adopt this pedagogical philosophy. Though it is not an area free of controversy, the trend across North America is emphatically toward integration. It is unclear which factors might make a student an unsuitable candidate for integration under the B.C. Ministerial Order. If integration is contraindicated, it still may be unacceptable under the *Charter* to have completely segregated classes and/or schools. Integration should be the policy to the extent possible in each case.

4) The question of whether a child is entitled by virtue of the *Charter* to attend the neighbourhood school remains unanswered. There is an argument under the "equal protection, equal benefit" section of the *Charter* (section 15) that this is an entitlement (MacKay & Krinke, 1985). Certainly, given the reasoning in *Andrews*, a court will carefully scrutinize any legislation restricting the rights of a group not politically or socially powerful. Attending the neighbourhood school is arguably an
"advantage available to other members of society" and therefore available relief under section 15.

5) One comment made at preliminary proceedings before judges in Ontario decisions is that the process of exhausting the means of appeal available under the Ontario legislation is time consuming and may result in prejudice or discrimination for the handicapped student. Given that delay may result in a finding of Charter violation, it is important that whatever means are provided for review of placement decisions be expedient and accessible.

6) In defining grounds for appeal, care should be taken that they not be so restrictive as to preclude a perception of fairness on the part of the complainants. For example, under the Ontario provisions for appeal, the following grounds may not be used:

- programme effectiveness
- location of the class
- teacher qualifications
- category of exceptionality (in some boards)
- amount of time
- ancillary services needed such as speech/language therapy.

The potential result of limiting grounds which often are a source of parental discontent is to polarize the parties and incite more complaints through human rights tribunals and the courts.
7) If regular class placement is provided for exceptional students with the idea that program modifications will take place, it is important that these be individualized and appropriate. If these modifications are only easier work, less of it, lower standards, social promotion, and streaming into basic level courses at secondary school, this is not enough.

8) It is probably most appropriate for boards to provide, as much as possible, a spectrum of services. Frequent (at least yearly) review of individual education plans is indicated, since the educational programs may need to be adjusted based on new information or unpredictable results. As the Antonsen case illustrates, there is no formula for the provision of an appropriate or adequate education. Provision of an adequate education is not a linear process, but needs continual reassessment and adjustment to serve the needs of the child.

9) Decisions relating to promotion, in line with the new primary program, should be based on a system of continuous progress and continuous assessment. Some variation of this process should be carried through into the secondary level, such that appropriate modifications of time, evaluation, programming, and reasonable accommodation of special needs are included. To fail is potentially devastating for the self esteem of individuals.

10) In accordance with legal and ethical principles, parents and students over age twelve should be kept informed of decisions, procedures, and processes which concern them. As the judge in the Gillick case in the U.K. recently observed,
parental rights are diminishing rights, existing for the benefit of children and not of parents. Therefore, as a child is able to participate in placement and/or psychoeducational decisions, he/she should be encouraged to do so. Research shows that children who have been involved in these decisions report higher levels of success and satisfaction with placements.

11) Systematic screening for learning disabilities should be carried out at the outset of a child's educational career. Difficulties which are not identified cause delay, maladjustment, and compounded difficulties for students. Some districts have placed ESL students in classes for the learning disabled or educably retarded students. This practice is clearly a violation of Charter rights.

While courts have been traditionally reluctant to second-guess the decisions of educators, there is a trend to more activist decisions led by the Supreme Court of Canada (Sussel & Manley-Casimir, 1986). This is laudable, particularly to those of us who do not share the optimism of Magsino (1989, p. 236) when he writes "...the absence of definitive court-imposed decisions on student rights allows educators to seize the initiative in establishing a regime of law and justice in school consistent with its role as a place of learning". Provincial education schemes are influenced by more than these ideals; they are subject to political expediency, budgetary restrictions, lobbying, old prejudices and the changing tide of pedagogical philosophy.
Discrimination, meanwhile, is systemic and continuing. Penny Kitchen, a student with cerebral palsy and a recent high school graduate, describes her experience this way:

Gillis [a school board executive] uses the word "co-operation" in describing the way teachers and program aides employed by the school board worked together to assist me with my education. Confrontation is the word I would use to describe it...In the four years I attended [high school] I was supposed to be "integrated". All that meant to me was that I was allowed to sit in on classes, four periods a day. The rest of the time I was in my so-called "study" - a 12 ft. by 8' ft. room off the corner of the girl's locker room. I jokingly referred to it as my prison cell.....I was never allowed to eat my lunch in the cafeteria with the other students and I was only allowed to have liquids, even though it was explained to the school by experts that this was not appropriate for me....I was also embarrassed and humiliated over my personal needs (Dickinson & MacKay, 1989, p. 205).

Magsino concludes that "[d]espite evidence of activism in the courts, it is still fair to assume that, in general, they are not eager to act as educational policy-makers or school administrators" (p. 236). This is probably correct. Flagrant disregard of section 15 guarantees may invite closer scrutiny and increased judicial direction. Educators can take proactive steps to ensure that the placement process is fair and open to input from those affected, that individualized assessment and programming is available, and that programs are monitored and adjusted as necessary. The best defense to a legal challenge is to have provided the best programming possible within the budgetary and other limitations faced by boards.

Future Developments

It will be many years before the equality guarantees are definitively explored as they apply to education for special needs students. After many more years of opportunity to consider of equality provisions of the United States constitution, the
U.S. Supreme Court has failed to develop a clear blueprint for the process. Paul Bator comments

You would think that we have developed some deep theory about the rules of this judicial trumping game that would enable one to give a satisfying account of the situations in which courts are or are not allowed to trump. What are the general features of the legal topography that enables one to recognize when one is and when one is not permitted to overrule the decisions of the political system about where to draw lines and how to frame distinctions? I do not find in the jurisprudence a satisfying account of this (1986).

It may be that blueprints are not the product of judicial processes. Even the outline of general features of the Canadian legal topography of equality await time. Judicial decision-making may create change, even radical change, on occasion. It may be a catalyst for a more just result for special needs children than they now experience in some settings. MacKay (1984) has predicted such results: “Special education is on the front line of education rights and will likely blaze the judicial trail in respect to constitutional rights to education” (p. 120).

These cases may become “battles of the experts” (MacKay, 1990), in which questions of pedagogical philosophy as addressed by educators are important in shaping outcomes. As the term “special needs” indicates, handicapped children have particular and individual needs. These cannot be met in a wholesale or “formula” manner. What is appropriate in one circumstance may not serve anyone in another. To import American language, however, there should be at least a “basic floor of opportunity” defined for special needs children. This opportunity must be broader than U.S. courts have defined it; it must require not only access, but meaningful access. The imposition of such a standard is consistent with the interpretation of section 15 in Andrews. It is overdue.
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