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A STUDY OF TEACHER INCOMPETENCE
AND DISMISSAL IN BRITISH COLUMBIA

by

Edward Raymond Spetch

B.Sc.(Honors), Simon Fraser University, 1979

P.D.P., Simon Fraser University, 1979

A THESIS SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF MASTER OF ARTS

in the Faculty

of

EDUCATION

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APPROVAL

ii

NAME Edward Spetch
DEGREE Master of Arts
TITLE A Study of Teacher Incompetence and
Dismissal in British Columbia

EXAMINING COMMITTEE:

Chair Wanda Cassidy

Mike Manley-Casimir
Senior Supervisor

Stuart Piddocke
Member

Judith Anderson
Adjunct Professor
Faculty of Education, SFU
External Examiner

Date: February 28, 1994

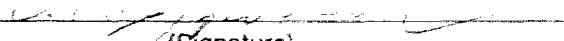
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A Study of Teacher Incompetence and Dismissal in British Columbia

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Edward Spetch

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ABSTRACT

The major purpose of this project was to conduct a study of teacher incompetence and dismissal in British Columbia. This study examined British Columbia Board of Reference and Review Commission summaries within the period from 1962 to 1987 in terms of a typology of "teacher failure" developed by Bridges (1974). In this typology teacher incompetence is broken into 5 categories of administratively defined failure: technical failure, bureaucratic failure, ethical failure, productive failure, and personal failure. The British Columbia Board of Reference and Review Commission decisions were inventoried to find cases falling within these definitions of teacher failure. The cases were then studied in fine detail to determine the issues present.

The subsidiary purposes of this study were: 1) to locate and examine specific cases of bureaucratic failure, in order to determine whether there is any uniform way that this type of teacher failure has been recognized and managed successfully, and, 2) to produce a tabular historical perspective of teacher certificate cancellations and suspensions in British Columbia from 1891 to 1987.

The results indicated:

- a) that there are problems in the enabling legislation for teacher discipline and its accompanying regulations, with respect to the actual implementation of the legislation versus the rules of natural justice; and
- b) that there are some differences in results between the parent study of teacher incompetence performed by Bridges and Gumpert, 1984 on United States Court Report Summaries and the present replicative study done on British Columbia quasi-judicial Review Commission and Board of Reference summaries.

DEDICATION

To my wife Liese and our three children Jennifer, Jonathan,
& Sarah for without their love, patience, and understanding
this project could not have been completed.

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CHAPTER 1**BACKGROUND AND STATEMENT OF THE PURPOSE**

The major purpose of this thesis was to conduct a study of teacher incompetence and dismissal in British Columbia by classifying teacher dismissal cases appealed to British Columbia Boards of Reference and Review Commissions in terms of a typology of teacher failure developed by Bridges (1974). This study replicates, with some differences, a study by Edwin Bridges and Patricia Gumpert at Stanford University's School of Education for the Institute for Research on Educational Finance and Governance. The results of this study should promote a better understanding of the termination of continuing¹ teacher contracts in British Columbia, and elucidate the types of issues leading to disputes that result in the attempted² termination of teachers.

In Bridges' typology of teacher failure, teacher incompetence is broken into 5 categories of administratively defined failure: technical failure, bureaucratic failure, ethical failure, productive failure, and personal failure. The definitions of these terms as determined by Bridges, 1974 are:

1. Technical failure,

The teacher's expertise falls short of what the task requires. Technical failure is indicated by deficiencies in one or more of the following: discipline, teaching methods, knowledge of subject matter, explanation of concepts, evaluation of pupil performance, organization, planning, lesson plans, and homework assignments;

2. Bureaucratic failure,

The teacher fails to comply with school/district rules and regulations or directives of superiors. Bureaucratic failure is indicated by the teacher's failure to follow suggestions for improving his or her performance, to adhere to the content of the district's curriculum, or to allow supervisors in the classroom for purposes of observing the teacher's performance;

3. Ethical failure,

The teacher fails to conform to standards of conduct presumably applicable to members of the teaching profession. Violations of these standards commonly take the form of physical or psychological abuse of students, negative attitudes toward students or colleagues, and indifferent performance of one's teaching duties;

4. Productive failure,

The teacher fails to obtain certain desirable results in the classroom. Productive failure is indicated by the academic progress of students, the interest of students toward school, the respect of students for the teacher, and the climate of the classroom;

5. Personal failure,

The teacher lacks certain cognitive, affective, or physical attributes deemed instrumental in teaching. Indicators of personal deficiencies include poor judgement, emotional instability, lack of self-control, and insufficient strength to withstand the rigors of teaching (Bridges, 1974, p.1-4).

This author tended to interpret the definitions of the above terms somewhat more broadly than possibly even Bridges himself had considered³. The current national study being conducted by Piddocke, Magsino and Manley-Casimir on instances of conflict arising between communities and their values, and unconventional teacher behavior, as well as the personal experiences of the author in the two case studies below, prompted the author to interpret the terms more broadly to include not only incompetence but also, worksite misconduct, misconduct of teachers not related to the worksite, insubordination, neglect of duty, and neglect or failure to obey a lawful order of the Board, all under the general headings in Bridges typology of ethical and personal teacher failure.

Case A below, although a clear case of insubordination, was also considered by the author to fit neatly within the category of teacher failure defined by Bridges as bureaucratic failure. Case B below was found by the author to fit into Bridges typology, (although not so precisely), under the categories of bureaucratic failure and ethical failure specially since the teacher involved was well known in the school district as not being able to get along with any of her superiors. This resulted in her being given the 'turkey trot' treatment, an administrative escape hatch discussed more thoroughly in the next chapter.

The author considered the terms within Bridges' typology to cover a multitude of teacher behaviors or teacher reactions to administrative behaviors which, in other documents such as teacher tenure laws, are defined under headings such as worksite

misconduct (-ethical failure), misconduct or gross misconduct unrelated to the worksite, (-ethical and personal failure), insubordination (-bureaucratic failure), failure or neglect to follow a lawful order of the school board (-bureaucratic failure), incompetence (-technical and productive failure), and 'cause' for involuntary medical leave until certified remediated by district medical officer (-personal failure). Terms which do not appear to be covered under the Bridges and Gumpert typology such as neglect of duty, and breach of contract, which have been shown to be 'cause' for teacher termination in British Columbia, could be covered under the combined titles of both bureaucratic and personal failure.

SUBSIDIARY PROBLEM:

BUREAUCRATIC FAILURE. HOW IS IT MANAGED?

In my experience in education I have found that the statement, "A teacher cannot be dismissed for insubordination" is perfectly true. It is not, however, for lack of procedures that this is true; it is for lack of experience, knowledge, and determination by the parties involved (Grosse & Melnick, 1985).

A few inexperienced and experienced administrators face situations similar to the cases described below in their careers, and the difficulties inherent in the resolution of the situation are faced by each individual administrator often in isolation, without sufficient preparation, and without adequate assistance and resources.

One of the realizations that a new administrator must come to grips with is that his or her staff are a miniature community of human beings, and that within that community there will be

personality clashes, strained interpersonal relations, and all of the social problems that occur generally within any human population. If they find that they are experiencing a difficulty with a particular teacher they must try to define the difficulty they are experiencing with that teacher and attempt to find the source of the problem. If the source of the problem is external to the worksite, then they may be able to suggest that the teacher seek help from an employee assistance program, if such a program has been set up between the school district and the teachers union. If the source of the problem is internal, then they must ascertain whether the problem is the result of a deficiency in themselves, the organization, or the teacher.

If, however, as is the situation in case B below, the problem between the teacher and the administrator exists as a result of an inability of the teacher to have any sort of administrator directing her, (an apparent personality disorder), then the administrator can set about trying to have her involuntarily transferred, (giving his problems to another administrator, a common practice), or the administrator can begin trying to secure a voluntary resignation, or the administrator can begin planning ahead for a professional dismissal that will take place after he has accumulated sufficient evidence (Grier & Turner, 1990) to prove in court that the teachers behavior is truly irremediable. The latter response to the problem, will take longer, will take more planning in advance (Beebe, 1985), will require a superior documentation system (Frels & Cooper, 1986), and must take into

account the principles of natural justice (Harrison, 1982) and administrative fairness (Anderson, 1979).

Teacher failure in the area of bureaucratic failure constitutes a major source of administrator vs. teacher frustration in the schools where it occurs. It often results in either resignation, transfer, or dismissal of one or both parties. In one historical case in British Columbia this type of teacher failure resulted in the cancellation of a teaching certificate (see Table 4(3), pg. 127).

The resulting conflict between the administration and the teacher exacts a terrible toll on the parties involved and the school (subsidiary problem). It does not remain confined to the people involved, but extends to the students, their parents, and to the community at large. It destroys the collegial working relationship among the staff within the school and disrupts the lives of all who are even remotely involved with the situation.

QUESTIONS TO BE ANSWERED:

To analyze and understand the termination of continuing teacher contracts in British Columbia, the following questions served to focus the investigation:

- (1) What is the incidence of dismissal of tenured teachers in British Columbia?
- (2) What are the characteristics of dismissed teachers?
- (3) What is the nature of the teacher's incompetence?
- (4) What types of evidence are used by school officials as proof of incompetence?

- (5) How successful are school districts when their dismissal decisions are contested in forums such as the Board of Reference or the Review Commission?
- (6) What are the grounds for reversal when districts are unsuccessful?
- (7) What proportion of cases proceed from quasi-judicial tribunal to judicial review, and under what specific circumstances are they reviewed?

BACKGROUND AND AUTHOR'S MOTIVATION

My interest in bureaucratic and ethical teacher failure derives from my experience with two totally isolated cases which, despite their isolation have a number of important similarities. In the first case I was a member of the staff and I observed the ongoing situation. In the second case, however, I was the administrator involved in the situation. To maintain confidentiality I use the early nineteenth century novelist's convention of using letters of the alphabet, such as; A--- or L-- M---, for persons and places. These letters will not be the actual initials of the persons and places mentioned in the cases⁴.

Case A

This case involves F--- L----- an easy-going elementary teacher from a cosmopolitan area in southern British Columbia. His first administrative position was Principal of a small K-12 school in a remote mining town in northern B.C.

August 197X

His initial introduction to the north was an extremely arduous journey by car from the southeastern corner of the

province to its northwestern extremity. The trip took over 4 days and 1500 miles, one third over gravel road. Mr. L. later remarked that he had never seen such incredibly beautiful, yet astoundingly desolate scenery in his life.

F--- was met at an imposing edifice labelled "Town Administration Building" by R-----, the district's Director of Instruction who showed him to his teacherage and who did his best to orient F--- to the town, the school district and the school. The district was a satellite district of the B--- Q----- School District. It had its own Director of Instruction but it shared B--- Q-----'s school board, superintendent, central office staff, and maintenance staff. The large distances of separation involved were an inconvenience and at times an annoyance; this left the school-site administrators of the district, however, with considerable autonomy within their own schools.

F---'s school consisted of a 17 room, semi-panabode, semi-permanent, semi-prefabricated structure, that had been added on to in several stages over the past 25 years. There were 22 full time equivalent staff with 306 students concentrated mainly in grades Kindergarten through grade 7. The pan-abode section of the building dated back some 22 years, the permanent section in the centre which included a gymnasium was 7 years old and the prefabricated section which included shops, library, science laboratory, textile room and computer facility was only 3 years old. The addition of senior secondary to the school had been as a result of the addition of the prefab wing. F---'s predecessor M--- had opposed the addition of the wing and the senior

secondary subjects on the grounds that "everything had been working well for a number of years why change anything? The majority of these miners' kids and indian kids only need grade 9. Anyone else who wants more can go out for it."

September

R----- introduced F--- to the staff during the last week in August. A few of the staff had not yet returned from their annual (2 month) exodus from the town, but most had returned to begin preparing their courses for the next year. Ten of the staff were brand new to the school, the town, and the north, and most of those were first year teachers. The impression that F-- received from the staff was that they were mainly young and enthusiastic with an average teaching experience of about two years. They were generally friendly but a little apprehensive about their assignments. While the reception from the majority of the staff was congenial, the reception F--- received from the most senior member of the staff (12 years experience in that school) was cold, even rude. R----- said as they approached the I. E. Shop that X--, the shop teacher had been one of M----'s best friends. When they entered the shop F--- noted that the shop was well organized, clean and extremely well equipped.

The shop's sole occupant was a figure working with an arc welder on the underside of a tow truck, which was raised on the hydraulic lift. When they approached the man, R----- introduced F--- as the new principal. X-- stopped his welding, gave F--- a steely-eyed stare and said "Huh...another one." He ignored F---'s outstretched hand and proceeded to quiz R----- about the maintenance staff delivery schedule. When he found

that R----- didn't know anything about the schedule, he began to examine his welding job on the truck. R----- attempted some small talk, received only one word answers and then decided that they should visit some of the other staff members. After mumbling an ignored goodbye to X--, who had started welding again, R----- and F--- left the shop. Outside the shop F--- asked R----- what X--'s problem was. R----- replied that X-- had been upset about M---'s forced departure and he did not elucidate further.

During his search of the main office and principal's office F--- was surprised to find that no school timetable had been drawn up the previous year, the teachers did not know what their assignments would be, and no one had any idea of what secondary school courses were going to be offered that year. On top of this many of the textbooks and other supplies for the school had not yet been delivered from B--- Q-----, the electrical and audio-visual equipment had not been maintained over the summer, the library and resource rooms were a disaster area, and the carpets in a number of the rooms and hallways were still in the process of being replaced. When he inquired about secretarial help, F--- was informed that one of his first jobs was to hire one!!

Several of the teachers, during their initial introduction, had informed F--- that they would assist on a timetabling committee, therefore with a crew of 5 volunteers and the course selection forms from last April he managed to draw up an acceptable elementary school timetable and a secondary school timetable complete with teacher and student assignments in two

days. The work had to be done on the table tennis table in the staffroom as it was the only flat spot large enough to hold all of the papers needed and any staff member who walked in during this time usually had an input to the process. In order to expedite hiring a secretary he phoned the mine personnel office and got them to send over the best secretary from their auxilliary personnel list. The secretary was immediately put to work searching for the absent supplies and equipment needed for Sept. 6. He asked the volunteer librarian to come in early and organize the library and resource rooms for school opening, he instructed the company installing the carpet that the carpet had to be installed in two days and he told the maintenance company to come in and clean the school around the workmen if necessary.

Everything seemed to be coming together until the staff meeting on the afternoon of the first day. X--, the I. E. teacher was not in attendance. F--- requested that X-- come, over the P. A. system, and then asked another teacher to check on X-- while he started the meeting. When the other teacher returned he was informed that X-- still had a class working in the room on various I. E. projects. After the meeting F--- went down to see X-- and inquired why he had kept a class in during the meeting. X--, surly as usual, told F--- that under previous principals he had always started his classes on the first day and that it was an established procedure that he assumed would not change. F--- informed him that this was not the way that he intended to run the school and that staff meetings were to be observed. X--'s reply was "Yeah sure".

October

School was progressing well, however X-- did not attend the second staff meeting and when F--- went to the shop to find him before the meeting, he found the shop empty. Repeated phone calls to X--'s home went unanswered. In questioning X-- the next day he revealed that he had taken a student with an injured arm to emergency at the hospital. At this point F---'s only recourse was to remind X-- of correct school procedures for school based accidents and suggest that he follow them. The student's father backed up X--'s story, however the student showed no effect of an injury and the hospital had no record of treating the student on that day. In questioning X-- further, X-- became angry and accused F--- of harassing him and of suggesting that he was lying. F--- countered this on the grounds that it was not harassment, he wished only to make a full medical report of the incident and clear up any inconsistencies in the details. X--'s parting comment was "Who cares, nobody will read it anyway".

November - December

During the next two months F--- became increasingly uneasy about X--'s teaching style and mental attitude. X-- was uncooperative and belligerent in his dealings with the rest of the staff. He was loud in the hallways and occasionally swore in front of the students. Through discussions with the school counsellor and various students F--- learned that X-- occasionally spoke in a derogatory manner about other teachers in front of the students and within the town. He also learned that X-- had occasionally roughed up misbehaving students, but

no parental complaints had ever been filed. Discussions of this with X-- were futile, he was very defensive, denied saying anything in class about other teachers and stated that there was no way for F--- to prove that he was saying anything in the community. He again accused F--- of harassing him and stated that he wanted to be left alone to do his job. F--- had even received a phone call from a parent about a student being thrown against a wall during a class. X-- denied this had happened and the parent later retracted his statement saying that it had been a mistake. F--- suspected that the retraction had something to do with X-- owning the only towing service, garage and gas station for 86 miles in any direction of town.

January

R-----, the director of instruction who resided in the town expressed the feeling that without student or parental backing F--- had very little evidence to proceed further. Even the rest of the staff were afraid or unwilling to support F---'s position against X--. The superintendent in B--- Q----- (300 miles distant) had stated that F---'s predecessor had had no problems with X-- and the board would be unwilling to take any action on F---'s reports as they had never received any complaints about X--. He also pointed out that F--- had very little corroborating evidence. The superintendent suggested that it would probably be a good idea for F--- to observe a few of X--'s classes over the next couple of months to see how X-- performed in the classroom.

February

Performance in the classroom was exactly what F--- received during his observations. X--'s classes ran like clockwork, his register daybook and markbook were all in excellent order and up to date. All ordering and other extraneous paperwork were done three months prior to the deadline. The students in the classes were extremely well behaved, seemed to know exactly what they were learning and why they were learning it. Students workbooks were all well organized and tidy. X--'s lectures and demonstrations were precise, to the point, assisted by various A.V. aids and were backed up by subsequent hands-on practice by the students. F--- also noticed a significant difference in X-- himself. X--'s rapport and attitude with the students was considerably better than his rapport with the staff.

March

The observations of X--'s classroom behaviour and his obvious success with student achievement (especially difficult students) left F--- unsure of how to proceed. X-- was an effective classroom teacher but he regularly committed breaches of the code of ethics and the school act. Parents and other teachers would not complain about these indiscretions therefore X-- considered his actions to have general support and he was not willing to change his "style".

The conflict between F--- and X-- which was visibly affecting staff relations came to a head in early March. R----- (the director of instruction) had come to the school to see X-- about a new I. E. curriculum to be introduced in the fall. F-- in the meantime had taken an urgent phone message for R-----

and proceeded to the shop to deliver it. It was just after class change at the time and there was an entire class of students waiting outside the shop door. As F--- entered he could see that R----- and X-- were in a heated debate. He had just entered when X-- grabbed his arm and propelled him back out the door into the hallway with the words "One f--king idiot in here at a time is enough !!!". F--- was furious, he immediately telephoned the superintendent with an account of the event. R--- --- arrived a short time later and confirmed F---'s account whereupon the Superintendent agreed with F---'s suggestion that X-- be immediately put on medical leave pending an investigation and report.

Within days the board reached a decision. X--'s employment with the district was terminated and a new I. E. teacher was to be hired for the position. It was only then that F--- realized the level of support, not fear, that X-- held in the community. A groundswell of petitions, phone calls from indignant community members, and delegations deluged the school and the board office. With only two months to the next school board elections, the board began to get nervous.

Epilogue

After about a month the board caved in under the pressure and reinstated X-- to his old position. X-- however, was a much changed person, he began to cooperate with the staff and F---. His demeanor within the school changed and he was civil to the rest of the staff. F--- and X-- operated under a form of truce for the next three years, at which time F--- was promoted to Assistant Superintendent, a position he held for two years. He

then accepted a superintendency in a school district in southern B. C.

X-- remained in his position as I. E. teacher in F---'s old school and teaches there to this day, while a steady stream of administrators flows in and out of the school at roughly two year intervals. The staff turnover in the school is still roughly 50% per year.

CASE B

YEAR 1

This case involved another inexperienced administrator in his first position as principal. It also took place in an isolated region of the country (southern Alberta), and involved a teacher under his direction, who was also a solidly embedded member of the community. In this case, however, the teacher did not have a very large support group within the community or within the school district office. There was a long history of insubordination-related transfers for this teacher within the district, and the teacher had a history of requiring occasional psychiatric counselling (factors only discovered after the principal's first year in the position, in discussions with other district administrators).

Other factors complicating the situation were:

- 1) an aging superintendent with very poor health, who greatly controlled the central office and the school board, who was in his second to last year before retirement, and who had a history of using bluffs to manipulate people,
- 2) an assistant superintendent with very little decision making authority,

- 3) the principal's inability to obtain any historical information from the divisional office personnel with respect to his predecessors, the staff, the school, or the community,
- 3) well-separated schools far from the district office in the rural outback of Alberta's Palliser Triangle,
- 4) poorly maintained teacher duplexes only a few feet away from the school building which forced the teachers to live within a six inch cement block wall of each other,
- 5) and an extremely "redneck"⁵ ranching population of various Christian faiths⁶, scattered over a several million acre area (comparable in size to the Netherlands). The size of this population as estimated by the Christmas concert attendance was not in excess of approximately 150 persons.

The administrator began his year with a mandate from the central administration to return academic credibility to the small rural school. His two predecessors were fired from the position for failure to obtain desirable results in the classroom or the school, and excessive drinking on the job respectively. The staff consisted of three female teachers, (an intern, a primary teacher, and an intermediate & P.E specialist). They were young (0-12 years experience), enthusiastic and relatively friendly. The primary teacher and her husband helped the principal and his family move in to the recently completed duplex on the school grounds and put them up at their house overnight as the plumbing for the duplex was not connected yet. The teacher intern and her fiancée also were friendly as they invited the principal and his family over for

dinner the next day. The intermediate teacher, seemed openly friendly but did not wish to help the new principal get settled in to his home as she wished to live in the side of the duplex that was nearest the school. Her first odd reaction was to phone a supporter of hers on the school board to try to get the assignment of teacherages reversed. Failing this she tried to get the principal to change houses against the superintendent's wishes and proceeded to tell the principal about the moronic attitude of the administrators in the district.

During the first staff meeting (in August before school opened) it became apparent that the intermediate teacher was prepared to ruin the renewal of the school. She had very specific opinions about how to improve the schools morale and academic record. The principal found many of the suggestions by the staff to be quite logical as they were standard operating procedure at many of the schools he had known. During the course of the next month he implemented many of the suggestions. The initial improvements such as;

- 1) a school policy handbook for parents,
- 2) a parent advisory committee,
- 3) preschool, lunch, and afterschool playground supervision by teachers,
- 4) a note policy for student absences,
- 5) grading guidelines for staff,
- 6) playground rules,
- 7) a visitor's policy,
- 8) a late policy,
- 9) a homework policy,

10) a fire drill policy,

11) a student union, and

12) a speed limit for the parking lot,

were met with ambivalence by most of the community. One segment of the community, however, (a fundamentalist baptist sect called "two-by-two's") expressed anger about them. They had never had a principal send rules home to the parents and they found all of the rules to be unduly restrictive. Most of these parents had themselves gone to this school and also some of their grandparents. Two particular parents (from this sect) were unwilling to be contacted by the school with respect to their objections or with respect to their children's behavior in school. They even went to the extent of vandalizing the principal's vehicle one night, an event that they were subsequently charged with by the R.C.M.P. Also during this time a number of events were occurring within the school that were making the principal very uneasy about the intermediate teacher, such as:

1) statements made during staff meetings were being leaked into the community;

2) confidential information on a human resources investigation of one of the families in the area was leaked into the community;

3) the intermediate teacher would deliberately disobey or embarrass the principal and the other staff members only in front of students or community members. Alone or with the rest of the staff she appeared cooperative, almost friendly;

- 4) the school's secretary (a friend of the intermediate teacher) was constantly doing work for the intermediate teacher and not for the rest of the staff. The work that she did do for the other staff members was of such poor quality that the other teachers refused to give her work. (the principal approached the superintendent to fire the girl but was told that she was a member of the community and that it would create an unfavorable situation); and
- 5) discussions with the intermediate teacher about these problems were futile as she would either deny having anything to do with them or would become hysterical and the conversation would end with her leaving the room screaming threats.

The principal was in a dilemma, he had collected a large amount of evidence against this teacher, but the superintendent did not appear to want to act on it. He did suggest however that the teacher could be transferred to the single-room Hutterite colony school nearby.

The parents from the fundamentalist religious sect had continued to keep the pressure up on the superintendent and towards the end of the first year he reacted by asking for an independent review of the schools operation by the Education department's Lethbridge Regional Office. He informed the principal (one day in advance of the regional office representative's arrival) that this was to provide an independent assessment of the school for the community as they distrusted the divisional office, and he wanted irrefutable and

demonstrable proof of the principal's competence in running and renewing the school.

The conclusions of the Regional Office Representative were;

- 1) the community at large was reasonably pleased with the improvements in the school,
- 2) staff and student morale were higher than they had been in years,
- 3) the parents were pleased with the increased communication from the school,
- 3) the parents were pleased with the new curricular offerings (computer science, data processing, swim program, enhanced science program etc.),
- 4) the changes had perhaps been implemented too quickly, and
- 5) the principal should be more cognizant of minority demands within the community.

Having established that the principal was competent to continue the academic credibility plan that the superintendent had for the school, he then reversed his decision to have the intermediate teacher transferred to the Hutterite colony as it was too close to the end of the year and he wanted to avoid any further changes in the school that would possibly upset the community (the assistant superintendent later confided to the principal that the notice of transfer sent to the intermediate teacher had been a bluff on the part of the superintendent).

YEAR 2

The second year proceeded much like the first year except that;

- 1) a majority of the fundamentalist religious group were now supporting the principal and were complaining about the treatment their children were receiving from the intermediate teacher,
- 2) the students behavior within the school was markedly improved (grade 9 behavior problems had graduated),
- 3) the primary teacher was on maternity leave until February and her replacement was a friend of the intermediate teacher,
- 4) the intermediate teacher was now being less open in her defiance of the principal,
- 5) some of the equipment in the school was being stolen or vandalized on weekends when the school was locked,
- 6) keys were stolen from the principal's locked filing cabinet (one of which was found on the intermediate teacher's key ring, but the principal was told by the assistant superintendent to ignore it),
- 7) the intermediate teacher would order the principal's children off the playground during her supervision.
- 8) arguments erupted between the principal's wife and the intermediate teacher about whether the principal's wife should be in the school during school hours, about the principal's dog barking, about the principal's children coming too close to her fence, and

9) the principal was continuously finding small pieces of broken glass in his backyard where his children played (the backyards of the principal and the intermediate teacher were only separated by a chain link fence.)

The situation came to a head when the intermediate teacher and her husband left for the weekend and left their stereo on at a high volume. In consultation with the R.C.M.P. and the chairman of the school board at 2:00 A.M. in the morning the principal was instructed to break in to the adjoining duplex and unplug the unit. Upon entering the premises the stereo unit was found facing the wall that joined the two units, only inches away from the wall. The intermediate teacher confronted the principal with the breakin during school on Monday morning. She was hysterical and was making wild statements about the principal being arrested for his actions. The principal calmed her down and gave her (as per R.C.M.P. instructions) directions to phone the school division office. After school that day she and her husband raced into the school division office. The next day she was directed to attend a meeting with a Vice-chairperson of the Alberta Teachers Association where she was instructed in the purpose and meaning of the Association's Code of Professional Ethics.

The aforementioned meeting seemed to eradicate her overt acts of insubordination for approximately four months. In May/June of that year she again became caustic toward the staff. During this time two parents of students in her class complained of strange reactions from their children when they returned home, such as nausea and vomiting. The children did not wish

to return to school the next day but would not explain why. Other parents complained of her being violently angry on the school grounds or in her class. None of the parents however wanted this information to go any further than the principal's office as this teacher was married to the youngest son of the strongest and wealthiest family in the vicinity, and they all depended in some way on the benevolence of this family.

The superintendent would not do anything about this problem unless some of the parents came forward. The superintendent's health during this time became increasingly fragile. He was admitted to hospital several times, underwent stomach, colon, and liver surgery, and eventually resigned in July.

The principal who was becoming increasingly worried about the continued good health of his children and his marriage, felt that he had had quite enough of this situation and resigned his position in June of that year.

CLARIFYING THE PROBLEM

In neither of the cases above is the question of the teacher's professional competence a factor in the difficulties that the teacher was having in the school. In fact the teachers involved do not seem to be having any problem in the school other than having an administrator above them. Case A seems to be a case of pure insubordination, although there were some unsubstantiated reports of professional misconduct. Under the typology defined by Bridges and interpreted by this author the 'incompetence' of this teacher would fit the definition of bureaucratic failure almost perfectly. One additional note to add to this case is that the town where this occurred no longer

exists as of 1992, since the supporting mine went bankrupt. The whereabouts of the teacher now are unknown by the author.

The case B falls somewhat short of the extreme insubordination of case A. That the teacher was uncooperative and in some instances may even have been harmful to students was obvious (ethical failure?). Lack of cooperation by itself is not, however, a strong base for an insubordination charge and any harm caused to students was unsubstantiated by sufficient evidence.

The key wording in insubordination charges is willful: It implies an obstinate and perverse determination to follow one's own will, despite arguments and advice to the contrary. Court definitions of insubordination vary from one jurisdiction to the next but in most cases a consistent, intentional refusal to obey a reasonable order, or persistent, willful, and intentional defiance of (or contempt for) authority usually constitutes insubordination. Not only must the teacher's misconduct be willful, defiant, continual, and prolonged, but in order to substantiate the charge the courts must see that the teacher has been admonished repeatedly regarding the action, and the action has continued long after the teacher was warned to stop (Grosse & Melnick, 1985, 37)⁷.

Lack of cooperation falls into the middle ground. In one case a teacher was fired on the basis of insubordination because he was late for class and failed to cooperate with the school administration. The court concluded that his failure to cooperate was defiant and contemptuous of authority, and this pattern of behavior threatened working relationships that were vital to maintaining school operations.

In a separate case, however, the court ruled that another teacher could not be dismissed for lack of cooperation when the charge against the teacher did not

allege that he had violated any specific rule or regulation --nor had the board claimed that the teacher refused to obey the authority of the superintendent or principal. (Grosse & Melnick, 1985, 41).

Given the actions of the teacher in case B above (always just short of outright insubordination) and the lack of meaningful assistance from the central office administration, a case of insubordination against this teacher even with a large amount of supporting documentation, would have been difficult to uphold in court.

UTILITY OF THIS STUDY

This study is designed to promote a better understanding of the termination of teacher contracts in British Columbia. If administrators can examine the instances where the courts or quasi-judicial tribunals have reversed teacher dismissals, then they may be able to avoid the same errors when they face similar fact situations. Teachers may also be able to examine instances of controversial teacher behavior resulting in discipline or dismissal by school boards and thus avoid placing themselves in a similar position by modifying their own behavior.

This study may also be useful in education law classes at both the undergraduate and the graduate levels to familiarize prospective teachers and prospective administrators with the statutory rights of the people they supervise, their own statutory rights and responsibilities, and the statutory rights and responsibilities of their superiors. Cases that are described within this study may increase the awareness of both prospective teachers and prospective administrators of the subsidiary problem mentioned at the beginning of this chapter; "the social conflict that arises when teacher behavior (on and

off the job) conflicts with the expectations of the school community" (Siracusa, 1991, p.2) and/or any of the stakeholder groups with a vested interest in the school.

This study is not, however, an end in itself. It is merely a preliminary study to a more controlled research study that could be conducted on various types of responses to teacher failure categories and their respective success rates.

LIMITATIONS OF THE STUDY DESIGN

One limitation of this study is that this study misses the teachers who leave the profession voluntarily, are counselled out of the profession by a respected confidant, or are induced to resign through a negotiated settlement agreement. Some examples of teachers who leave the profession in the ways suggested above are: A) Young teachers with one to six years experience who find that they cannot take the class management or bureaucratic aspects of the profession but like the subject material, or, B) older teachers who find that their health, stamina, or teaching skills are no longer up to the stress level required by the profession, or, C) teachers who are facing dismissal due to charges of teacher misconduct, incompetence, insubordination, or neglect of duty. In addition a large number of teachers who take advantage of such employee assistance programs like Voluntary Resignation, Outplacement Counselling, Early Retirement Plans, Salary Indemnity Plans, Long Term Disability, or Career Transition Incentive Plans are not accounted for, nor analysed by this study. For example, McLaughlin (1988) analyzed 4 California school district's whose evaluation systems encouraged gracious withdrawal from teaching.

In one district 10% of the districts teachers, (those evaluated as ineffective) were induced to resign over a four year period. In a second district 3% of the districts teachers were induced to resign in a manner similar to the first district over a ten year period. In a third district 86 out of the districts 350 provisional teachers over a seven year period voluntarily resigned, in large part due to the extensive feedback generated by the district's evaluation system. Given these statistics from California school systems and the lack of known statistics, from British Columbian sources, the author believes that induced or voluntary resignation may play a very significant role in some British Columbia school districts. This factor is not taken into account within the defined limits of this study.

A second possible limitation in this study is the inadvertent introduction of a subjective bias by the author due to the extreme situation that the author was involved in during his first administrative position. (see case B above)

A third limitation in the design of this study is the absence of those tenured teachers dismissed from their teaching positions but who did not appeal to a Board of Reference or a Review Commission. This study does not take these teachers into account as the only places to find detailed enough information on their dismissals would be with the school boards who dismissed them or with the Ministry of Education or with the College of Teachers.⁸ The author's initial expectation after compiling the data for table 4(9) was that the number of teachers who accepted termination of their employment without

putting up a struggle would be a large proportion in comparison to the number who appealed their dismissal.

A fourth limitation of this study results not from a design limitation but an access limitation as required by the Ministry of Education and the College of Teachers non-disclosure agreements (appendices I & M). In the Bridges and Gumpert study of teacher dismissal in the United States, the reliability of coding was checked by using two different investigators, rating the cases under the same teacher failure coding system. This was performed on two different occasions by both investigators, four months apart. Since the cases studied by the Bridges and Gumpert study were public documents they were able to use two different investigators at two different times. This author did not, however, have that luxury as the documents examined in this study were closed files requiring only a single researcher at only one specified time when many of the staff at the College of Teachers had holidays scheduled (so that an office and a microfiche reader were available for the author to use). This lack of a reliability check on the author's coding of cases introduces another possible source of error into this study.

A fifth limitation of this study is its current relevance. Due to the legislative basis of Boards of Reference and Review Commissions, this study had applicability to British Columbia, prior to the January 1, 1988 changes to the Public Schools Act. However, its applicability is lessened somewhat due to the introduction of Bills 19 and 20, and the creation of the College of Teachers. The appeal of a dismissal after January 1, 1988 in B.C. is now subject to "the grievance provisions of the

collective agreement [between a teachers union local and a school board] and Part 6 of the *Industrial Relations Act*" (s. 122 (2) R.S.B.C. Chap 375).

A sixth limitation of this study is its general applicability to other provinces or countries. Due to the legislative basis of Boards of Reference and Review Commissions, this study has applicability to British Columbia, but only limited applicability to other provinces or countries. The general questions raised by the issues in this study may, however, be applicable to other jurisdictions.

Notes

¹ the term in British Columbia used to describe a teacher that has been granted tenure by a school district.

² in this study examples of dismissals by school boards that have been reversed on appeal by quasi-judicial tribunals (Review Commission and Board of Reference) or judicial review will show that school boards often do not take into account situational incompetence, extraneous factors that cause temporary incompetence, or do not provide enough evidence to show beyond a doubt that the teachers conduct is irremediable.

³ This typology of "teacher failure" should not encompass only failure within the teacher but as we shall see later in this treatise, should encompass failure within the organization to recognize situations which, if ignored or not perceived by administrators can lead to situational incompetence, frustrated insubordination, neglect of duty, excessive absenteeism, or even frustrated misconduct.

⁴ A similar practice was followed by Pidocke, (1989).

⁵ *noun*. Derogatory slang. a very conservative person whose attitudes and reactions are characterized by bigotry and philistinism. (Gage Canadian Dictionary, 1984). -- this definition fit many of the local residents in that part of southern Alberta quite well.

⁶ The area included a Hutterite colony, Roman Catholics, 7th Day Adventists, Lutheran, and a fundamentalist baptist sect with no formal name known to outsiders. They are only known by the name of "two-by-two's".

⁷ This definition and the quotation below by Grosse and Melnick are derived from American jurisprudence, however, it is applicable in this case due to the fact that even a Canadian court would require a record of continual and prolonged defiance of authority to substantiate an insubordination charge.

⁸ s. 126 of the former Public School Act (pre-Jan. 1, 1988) stated:

The board shall without delay report to the ministry a termination, dismissal or suspension of a teacher in the school district, with reasons for it.

s. 126 of the current Public School Act (after-Jan.1, 1988) states:

(1) Where a board dismisses or disciplines a teacher or an administrative officer it shall, without delay, report it to the ministry and the council of the college, giving reasons.

(2) Where a teacher resigns, the board shall inform the council of the college of the circumstances of the resignation where the board considers that it is in the public interest to do so.

CHAPTER 2**PERTINENT BACKGROUND LITERATURE**

Teacher incompetence and dismissal is by its very nature a very broad realm of study covering a large number of social issues. To provide some structure to the literature search and make the sheer volume and variety of documents on the subject a little more comprehensible, a modification of the exploratory case study method for reviews of multivocal literatures (Ogawa and Malen: 1991) was used. The following categories were used to illustrate the various facets of the issue of teacher dismissal;

- 1) Legislative basis and reasons for teacher dismissal,
- 2) Legal terms and definitions from the perspective of education law litigation decisions,
 - a) administrative procedural fairness,
 - b) arbitrary actions,
 - c) capricious actions,
 - d) declaratory judgement actions,
 - e) procedural due process,
 - f) substantive due process,
 - g) error of law on the face of the record,
 - h) immorality,
 - i) incompetence,
 - j) insubordination,
 - k) natural justice (Canada/England),
 - i) audi alteram partem,
 - ii) nemo iudex in causa sua potest
 - l) neglect of duty,

- m) precedent,
 - n) sources of law,
 - o) stare decisis,
 - p) subordinate legislation,
 - q) summary judgement,
 - r) tenure,
 - s) types of law,
 - i) administrative law,
 - ii) legislative or statute law,
 - iii) procedural law,
 - iv) substantive law,
 - t) writ of certiorari,
 - u) writ of mandamus,
- 3) Uncertainty and unpredictability in legal analysis,
- 4) Factors influencing teacher dismissal,
- a) substantive due process,
 - b) reasons for using American litigation examples,
 - c) procedural due process,
 - d) natural justice,
 - e) evolving trend in legal interpretation of natural justice and due process
 - f) other important due process considerations,
 - i) preannounced policies, rules, and regulations,
 - ii) aspects of reasonable notice in administrative tribunals,
 - iii) arbitrary and capricious actions of school boards,
 - iv) reasons for termination to be based on a thorough

- inquiry,
- v) situational incompetence in teachers deemed to be 'at risk',
 - g) correct and incorrect responses to the problem of teacher dismissal,
 - h) immorality and misconduct,
 - i) incompetence,
- 5) Educational administrators duty

LEGISLATIVE BASIS FOR TEACHER DISMISSAL

In Canada, with the exception of British Columbia, all provincial public school legislation has combined teacher misconduct and incompetence under one section concerned with cause for teacher dismissal. British Columbia public school legislation [was] unique in the provision for a separate statutory procedure for dismissal for the cause of misconduct and for termination of a continuing teacher contract for the cause of incompetence. (Marshall, 1986, p.10)

The legislative basis and various reasons for teacher dismissal in British Columbia are to be found in Part 7 of the 11 part British Columbia Public School Act (P.S.A.), Chapter 375 of the Revised Statutes of British Columbia (R.S.B.C. Chap. 375). Part 7 is the section of the legislation that deals with the appointment and dismissal of teachers, the certification of teachers and cancellation of certificates, and salary negotiations. Specifically section 122 of the P.S.A. provides the statutory procedure for discipline or dismissal of teachers for just and reasonable cause¹. Prior to the amendments included in Bill 20 (s. 57-58), the previous School Act (s. 122.1(1)) defined terminations for cause as gross misconduct,

neglect of duty, refusal or neglect to obey any lawful order of the board, or (s. 122.2(1)) as criminal offence charges.

122. (1) A board may at any time suspend a teacher with or without pay from the performance of his duties

- (a) for misconduct, neglect of duty or refusal or neglect to obey a lawful order of the board; or
 - (b) where the teacher has been charged with a criminal offence and the board believes the circumstances created by it render it inadvisable for him to continue his duties.
- (2) A board that has suspended a teacher shall
- (a) appoint a date within 7 days of the suspension when the teacher shall have the opportunity of meeting with the district superintendent of schools and the board, or the district superintendent of schools and a committee of the board; and
 - (b) where the teacher is suspended under subsection (1)(a), within 7 days of the meeting, reinstate the teacher without loss of salary, or, after the notice required by the regulations, dismiss him on the same grounds on which he is suspended or take other action permitted by the regulations....

The corresponding subordinate legislation (P.S.A.

Regulations) which facilitated the implementation of the former section 122 were regulations 66 and 67;

66. [122](1) Where a board suspends a teacher under section 122 of the Act, it shall send by registered mail addressed to the teacher at his last known address, a notice of suspension, and shall state therein the grounds for the suspension.

(2) Where a board dismisses a teacher under section 122 of the Act, it shall send, by registered mail addressed to the teacher at his last known address, a notice of dismissal that shall be effective not longer than 30 days following the date that the notice is mailed.

(3) Where a board has suspended a teacher under section 122(1)(a) of the Act it may, within 7 days of the interview under subsection 2(a), direct that the teacher

- (a) be further suspended for such period of time as the board may decide, terminating not later than the end of the term next following the term during which the teacher was suspended, and may also direct that there shall be partial or complete loss of salary and benefits during all or part of the past or future part of the suspension, or both; or
- (b) be reinstated immediately subject to the loss of salary and benefits for any portion or all of the period of suspension.

and the teacher shall, unless he resigns in accordance with the provisions of the Act, resume his regular duties at the end of the period of suspension.

67. [122] The provisions of section 122 of the Act for suspension and dismissal apply to every teacher, whether on probationary or temporary appointment, or continuing contract.

Sections 123 and 130² [repealed 1987-19-65] of the former P.S.A. dealt with matters of teacher competence. Specifically the termination of teacher contracts for incompetence was dealt with in section 123. D. J. Marshall, 1986 p. 61 described this section in the following manner; "In stark contrast to the statutory provision for dismissal for misconduct, section 123 of the School Act is very vague, indefinite and gives little if any indication of its intended use. Section 123 reads as follows:

123. (1) Subject to section 120(9), and the regulations, either party to a continuing contract under section 119(2) may terminate the contract by giving in writing at least 30 days' notice to the other party, and the termination shall take effect at the end of a school term, or, by agreement, at an earlier date.

(2) Except as otherwise provided in this Act, a board shall, at least 30 days prior to the issue of a notice of termination of a contract, give the teacher a written notice of its intention to give a notice of termination and shall set a time for a hearing within 20 days of the issue of the notice of intention, at which the teacher shall have the opportunity to meet with the district superintendent of schools and the board, or with the district superintendent of schools and a committee of the board.

(3) the teacher may be accompanied by another teacher or by a member of the staff of the British Columbia Teachers' Federation, who may represent him or advise him during the interview referred to in subsection(2).

Section 120(9), to which s. 123(1) is subject, says very simply that a teacher transferred from one assignment to another may resign immediately by notice in writing to the board if he does not wish to comply with the transfer order. This is of no real assistance in interpreting the section....But under what circumstances may a board terminate a continuing contract

under this section?... The answer is to be found not in the statute itself, but in regulation 65 (see Appendix T: Procedural handbook for Review Commission Chairmen) which provides that a board may terminate a continuing contract of a teacher only after receipt by the board of at least 3 reports, issued in accordance with the regulations, indicating that the learning situation in the teacher's classroom or the performance of the teacher is 'less than satisfactory.'" (Marshall, 1986, p.61)

Section 130² of the former P.S.A. was directly relevant to the appeal from termination of the 'less than satisfactory' teacher, it stated;

130. (1) Except in the case of a teacher on a probationary appointment, a teacher whose appointment or contract has been terminated by a board under section 123 of this Act may, within 10 days of receipt of notice of termination, and in accordance with the regulations, request the minister to direct that a review commission review the termination.
- (2) On receipt of a request under subsection(1), the minister shall direct the chairman of one of the review commissions established under this Act to proceed without delay with a review of the termination.
- (3) The review commission designated under subsection(2) shall, in accordance with the regulations, investigate and review the matters referred to it, and confirm or reverse the action of the board; and the decision of the review commission is final and binding on the teacher and the board.
- (4) Where a review commission directs that the action of the board be reversed, the board shall promptly reinstate the teacher.
- (5) The minister shall appoint, when required, the number of review commissions he considers necessary.
- (6) Each review commission shall consist of
- (a) a chairman appointed by the minister, from among persons qualified under paragraph(b) within the 5 years immediately preceding the date of his appointment;
 - (b) 2 members appointed by the minister, one of whom shall be from among persons nominated by the executive of the British Columbia Teachers' Federation and one of whom shall be from among persons nominated by the executive of the British

Columbia School Trustees' Association, and each of whom shall be

- (i) actively engaged in education in the Province, as evidenced by appointment to the staff of a board, college, provincial institute, university or some other educational institution established under this Act, the College and Institute Act or the University Act; and*
- (ii) not a member of the staff of either the British Columbia Teachers' Federation or the British Columbia School Trustees' Association.*

The aforementioned excerpts from the P.S.A. and the P.S.A. regulations existed in the legislation relatively unchanged from their inception to their repeal on Jan. 1, 1988 (see Appendix A). They dealt with the ability of a board to terminate a teacher on a continuing contract for reasons that have been described in education law literature as 'cause'. Adequate cause for dismissal of tenured faculty has had a number of different connotations over the past few decades. The American Association of University Professors (A.A.U.P.) in its 1940 Statement on Academic Freedom and Tenure acknowledged incompetence and moral turpitude as the two specified causes for termination (A.A.U.P., 1977). More recent literature (Hendrickson, 1988; Lovain, 1984) suggests three subcategories of the term incompetence as generally described in A.A.U.P. documents: incompetence, insubordination, and neglect of duty. Most American "tenure statutes typically define cause for dismissal broadly as including immorality, incompetence, insubordination, physical or mental incapacity, neglect of duty, or other sufficient cause." (Citron, 1985).

Another area of 'cause' in British Columbia legislation where a school board would be authorized to terminate a teachers continuing contract is section 107. In this section

the board, on the advice of a school medical officer may require a teacher to undergo a medical examination. If the teacher fails or refuses to be examined, he may be summarily dismissed (s.107(2)). In the event that the medical examination of the teacher shows that the physical, mental, or emotional health of the teacher is such as to be injurious to the pupils of the school, then the board is required to suspend the teacher for as long as the disability continues. The teacher cannot be dismissed because of this disability, but will also not be allowed to return to his duties until he delivers to the board a certificate signed by the school medical officer permitting his return (Marshall, 1986, p.58).

The three grounds above which constitute 'cause' for termination of a teachers continuing contract are not the only reasons outlined in the statutory legislation for termination of a teacher's contract. Although it is the responsibility of the school board to hire teachers, they may only hire teachers who have the two³ main qualifications of teachers as set out in the Act (s.119(2)). These qualifications are;

- 1) that a teacher must be a member of the College of Teachers and hold a valid B.C. teaching certificate, (s. 145), (limited exceptions), (previously issued by the Ministry of Education, but as of Jan. 1/88, these duties were given to the College of Teachers).
- 2) that a teacher has not attained the age of 65 years, (ministerial exceptions may be allowed if the teachers services are required in the interest of education, or if a school board annually requests the re-engagement of the teacher up until 70 years of age, (s. 147).

If a teacher no longer fulfills either of these qualifications, a board may be required or authorized to terminate his contract. With respect to the first qualification, if a teacher's certificate is cancelled or suspended that person may not be employed as a teacher in a public school until the suspension is lifted. Such a cancellation or suspension may occur pursuant to a disciplinary action by the Council of the College of Teachers; or pursuant to s. 35.1 of the Teaching profession Act; the Lieutenant Governor in Council may, for just and reasonable cause, cancel or suspend a certificate of qualification of a person who is not a member of the College of Teachers.

With respect to the second qualification for employment as a teacher in British Columbia, this provision seems ripe for a court challenge under the equality provisions of the charter of rights and freedoms.

With respect to a qualification for employment which was present in the former P.S.A. from 1973 to 1987, the stipulation that a teacher in British Columbia hold membership in the B.C.T.F., (s. 140-141 amended Jan. 1, 1988); this stipulation although repealed is still very much in effect. All collective agreements negotiated between British Columbia school districts and their local unionized teachers associations require a "closed shop" which in effect requires that teachers in a district are members of the local teachers association in order to teach in that school district, and all local teachers associations along with all their members have membership in and pay dues to the B.C.T.F. This collective agreement language has

been challenged in the courts. However, thus far, it has been upheld, and therefore membership in the B.C.T.F. although vicarious through the union locals, is still a hidden requirement of employment for a teaching position in public schools in British Columbia. This is not the case for all Administrative Officers (vice-principals up to superintendents) who are designated by the current school act to be management and thus not part of any locally negotiated collective agreement.

In her discussion of the reasons for contract termination of teachers in British Columbia, D. J. Marshall in 1986 (prior to the 1988 amendments) stated the following about the B.C.T.F.'s powers to expell members:

The B.C.T.F. may in accordance with its by-laws, which must be approved by the Lieutenant Governor in Council, expel a teacher from membership in the federation. By-law #7 of the federation provides for the termination of the membership of any member who has been guilty of conduct harmful or prejudicial to the interests of the B.C.T.F., or guilty of a breach of the code of ethics of the federation that articulates general rules of conduct in relation to pupils, colleagues, and the federation. To date, according to information obtained in an interview with the past-president of the B.C.T.F., two teachers have had their membership suspended as follows: one suspension was the result of 'conduct harmful to the federation' and the other was for child abuse. Also, in 1954, a teacher's certificate was suspended because she failed to pay her fees to the B.C.T.F.

A teacher who is expelled from membership in the B.C.T.F. has a right of appeal to the Lieutenant Governor in council (s. 142(2)). Some leeway is granted to the board in dismissing a teacher expelled by the B.C.T.F., since the statute provides that where the board so determines, an expulsion shall not have the effect of terminating employment in a school before a date to be fixed by the board, although that date shall not be later than the end of the then current school year (s.142(5)). (Marshall, 1986, p.54)

There are two remaining sections of the Act which authorize school boards to terminate continuing contracts. The first is section 130.1 (1) which was an amendment to the Act May 30, 1985 (Royal assent received on May 24, 1985). It was classified as School Amendment Act, S.B.C. 1985, c.40 and states (in part);

in s.1 of the amending act;

Reductions in force

- 130.1 (1) in this section
'association' means an incorporated or unincorporated association of teachers in a school district;
- 'layoff' means to terminate, under an agreement referred to in subsection (2), a continuing contract of a teacher.
- (2) In addition to those matters that may be negotiated under Division (2) of this part, a board and an association may enter into an agreement for layoff of teachers in the school district due to:
- (a) a discontinuation or reduction in the level of a program, activity, or service,
 - (b) a change in the organizational structure of the school district, or
 - (c) the amount of available operating funds.
- (3) An agreement made under subsection (2) shall include provisions respecting
- (a) procedures by which layoffs will be implemented,
 - (b) recall rights
 - (c) severance pay, and
 - (d) the manner of resolving disputes that may arise under the agreement.
- (4) An agreement made under subsection (2) expires on June 30 of the year after the year that it was entered into.
- (5) Where a board and an association do not reach an agreement under subsection (2) by May 15 in any year to cover the next fiscal year, there shall be deemed to be an agreement between the board and the association covering that next fiscal year and containing terms in the Schedule, and that deemed agreement is binding on the board, the association and all teachers employed under a continuing contract with the board.

in s.3 of the amending act

Interpretation

1. In this Schedule
'association' means an incorporated or unincorporated
association of teachers in a school district;

'layoff' means to terminate, in section 2 of this Schedule,
a continuing contract of a teacher.

Rights to lay off

2. In addition to any other powers of a board, the
board may lay off a teacher in accordance with this
Schedule due to

- (a) a discontinuation or reduction in the level of a
program, activity, or service,
- (b) a change in the organizational structure of the
school district, or
- (c) the amount of available operating funds.

* * *

Determination of layoff

5. (1) In determining which teachers in a school
district should be laid off and which teachers should be
retained, the board shall take into account

- (a) current demonstrated ability,
- (b) qualifications, and
- (c) service seniority,

for available positions.

(2) Where in respect of an available position,
current demonstrated ability and qualifications are met by
2 or more teachers, service seniority shall prevail.

* * *

Disputes

7. (1) Where a difference arises between an
association and a board respecting the interpretation,
application, operating, or alleged violation of this
Schedule, including a question as to whether a matter is
arbitrable under this section, either of the parties may
notify the other party in writing of its desire to submit
the difference to arbitration.

(6) The arbitrator shall hear and determine the
difference and issue a decision that is final and binding
on the parties and any teacher affected by it.

(7) An arbitrator has the authority necessary to
provide a final and conclusive settlement of the dispute.

(12) The decision of the arbitrator is binding on

- (a) the parties, and
- (b) the teachers bound by this Schedule who are
affected by the decision,
and they shall comply in all respects with the decision.

(14) The Arbitration Act does not apply to an arbitration under this Act. (West Vancouver Teachers Association v. The Board of School Trustees of School District #45)

In her discussion of this additional subsection which was added to section 130 of the Act, D. J. Marshall, 1986 concluded "Any academic tenure consideration in the concept of a continuing contract was undermined in May 1985 with the addition of section 130.1 to the School Act". Predictably, a test of misuse of this recently added section of the Act came on July 15, 1985 with the dismissal of a 17 year veteran of the West Vancouver School District. The case was taken to arbitration by the West Vancouver Teachers Association in September 1985 where the arbitrator's decision found in favour of the school board's decision. The case then went forward to judicial review in the British Columbia Supreme Court on April 21, 1986 with the West Vancouver School Board as respondent and the British Columbia Attorney-General as co-respondent. In her decision Madam Justice Southin stated

"The Act, which enables school boards to lay off teachers for certain limited reasons, has but one purpose: the control of expenditure. It was not the object of this Act to enable school boards to terminate incompetent teachers although that may be an incidental effect here there was evidence upon which the arbitrator could reasonably have concluded that the Board used the new Act to rid itself of a troublesome pedant Mr. Callow, despite his long years of service, has been a thorn in the side of the West Vancouver School Board The procedure for terminating a teacher for incompetence is complex I have given this dreary recital of the statutory requirements for termination to show how difficult it is for a school board to fire a teacher. I find the Board must have been painfully aware of the difficulties it would face if it attempted to use those powers in Mr. Callow's case No minute was adduced in evidence to show that the Board ever intended to lay off a certain number of teachers under the new statute From all this, I conclude that an arbitrator who instructed himself properly could reasonably have determined that the board used the

new act for an improper purpose; i.e., he could reasonably have held that the lay-off was not 'due to' any of the factors, but due to the Board's desire to terminate this man who was a trouble to it. Had the arbitrator found a purpose outside the statute, his duty would have been to reinstate Mr. Callow Counsel for the respondents argues that Clause 7 of the Schedule prevents judicial review.

I do not agree. First, the arbitrator was not a mere private tribunal, see Port Arthur Shipbuilding Company v. Arthurs et al [1969] S.C.R. 85. Secondly, not to ask the threshold question arising on a statutory power embodied in an agreement between a statutory tribunal, i.e., the Board and an association representing persons who have themselves statutory rights, i.e., teachers under the School Act is to be 'patently unreasonable'. 'Unreasonable' in that context does not mean that failure to ask was silly or foolish. The error of law which was made, in my judgement, in this case goes to the very root of the whole process established by the amending Act of 1985. Whether wisely or no, the Legislature, by s. 123, has put stringent safeguards on termination. A teacher has a right to the protection of the procedures for termination in the Act and the regulations I have quoted.

The final question is what order I should make. I have the power under the Judicial Review Procedure Act R.S.B.C. 1979 ch. 209, s.5 to remit this matter to the arbitrator. My inclination is to do so."

Having given instructions in her decision as to what a reasonably informed arbitrator would do in this case, then remitting the case back to the arbitrator was a moot point. The decision of the arbitrator and of the West Vancouver School Board was quashed. This effectively plugged the loophole in the legislation that boards would have used to terminate teachers deemed incompetent through the mechanism of financial exigency.

The last sections of the Act requiring the termination of a teacher's continuing contract are s. 150 and reg. 58 where the appointment of a teacher as an officer in the Ministry of Education requires that the teacher be released from contract on 24 hours' notice.

In **summary**, pursuant to the Public School Act as it existed before the introduction of bills 19 & 20, the statutory

framework for the termination of continuing teacher contracts in British Columbia as set down in the British Columbia Public School Act and the School Act Regulation was;

- a) s.107 - failure to pass or receive a medical examination required by the board,
- b) s.122 - misconduct, neglect of duty, refusal or neglect to obey a lawful order of the board or criminal offence charges, (just and reasonable cause since 1987 amendments),
- c) s.122.1 - less than satisfactory learning situation or administrative performance,
- d) s.130.1 - reduction in force due to program elimination, organizational structure change, or financial exigency,
- f) s.145 - cancellation of a COT member's teaching certificate by the council of the COT, or cancellation of a non-members teaching certificate by the Lieutenant Governor in Council,
- g) s.147 - mandatory retirement,
- g) s.150 - appointment as an officer in the Ministry.

Legal Terms and Definitions

In continuing this review of recent education law literature, I need to define a number of rather legalistic terms which are going to start popping up like weeds. These definitions will not for the most part, be the strict legal definitions as delineated in Black's Law Dictionary. They are defined, however, in terms of the common law definitions arising

from education law litigation, both in the United States and Canada. Many of these definitions come from education law reviews and actual court decisions which add meaning and relevance in an education law context to otherwise broad or vague terms. The following discussion outlines these definitions and the controversies in education law litigation decisions regarding some of these terms and reviews their relevance to teacher incompetence and dismissal.

Absolute Discharge

- a judicial disposition of a criminal case wherein the accused is found guilty of the offence but is discharged without any conditions and is deemed in law not to have been convicted of the offence (Proudfoot, 1988, p.367).

Administrative Procedural Fairness

- is a concept similar to natural justice in that it guarantees certain procedural safeguards such as providing an opportunity to be heard. The concept of fairness resembles natural justice and is involved with the notion of fair play. It was considered necessary, even in the absence of statutory provisions and a finding that the act of dismissal was an administrative act, to observe 'fairness'. In other words, a backdoor approach was used to provide for the application of fair procedure to all acts of dismissals of public office holders, no matter if classified as administrative or quasi-judicial or judicial. The case in which this concept is enunciated is *Nicholson v. Haldiman-Norfolk Regional Board of Commissioners of Police et al.* Pronounced on October 3, 1978 in a five to four decision, the majority of the Supreme Court of

Canada decided that the act of dismissing a police constable was an administrative act. It took the concept of natural justice, which admittedly applied to judicial or quasi-judicial acts only, and effected a concept called "fairness" to be applied to administrative acts (Anderson, 1979, 18).

Arbitrary

- means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequate determining principle; not done according to reason or judgement, but depending upon the will alone, -absolute in power, tyrannical, despotic, non-rational, -implying either a lack of understanding of or a disregard for the fundamental nature of things (Phay, 1984, 14).

Capricious

- means freakish, fickle or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.... Arbitrary and capricious in many respects are synonymous terms. When applied to discretionary acts, they ordinarily denote abuse of discretion, though they do not signify nor necessarily imply bad faith. (Phay, 1984, 14)⁴

Conditional Discharge

- a judicial disposition of a criminal case wherein the accused is found guilty of the offence but is discharged upon certain conditions. If the conditions are fulfilled then the accused is deemed in law not to have been convicted of the offence (Proudfoot, 1988, p.370).

Declaratory Judgement Action (U.S.)

- an action defined by statute that allows courts to declare rights, status, and legal relations to relieve uncertainty regarding those rights. It permits a wider scope of judicial review because of the nature of the action as a de novo proceeding (Popovich, 1991, 539).

De Novo (Trial)

- a latin term meaning to try a case again as if the first trial did not exist (West's Legal Thesaurus/Dictionary, 1985)

Due Process - Procedural (U.S.)

- similar to the Canadian concept of Natural Justice. Procedural due process provides protection against actions by public officials which are fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within their jurisdiction, or are based on an error of law (Popovich, 1991; Foesch v. Independent School Dist. No. 646 Minn.).

Due Process - Substantive (U.S.)

- a constitutional guarantee which provides the protection of such basic rights as speech, press, religion, assembly, and equal protection as listed in the First, Thirteenth, and Fourteenth, Amendments to the U.S. Constitution (Dolgin, 1981, 18).

Error of Law on the Face of the Record

- this is ground for judicial review. This ground has to do with whether a tribunal or lower court made a mistake about how the law or the evidence should be used, and whether the mistake was obvious. A court can examine the record of a hearing to see what evidence the decision was based upon. If

the court finds from the record that there was no obvious evidence to reasonably support the decision, then it will find that decision was incorrect in that there was an error of law on the face of the record. In such a case, the court may grant a writ of certiorari and quash the tribunal's decision (Harrison, 1982, 241).

Immorality

- contrary to good morals; inconsistent with rules and principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise (Black's Law Dictionary, 1979).

Incompetence

- the inability or unfitness to discharge required duties (Black's Law Dictionary, 1979).

Insubordination

- the failure to comply with the policies or directives of a superior or the institution, or some form of uncooperative and disruptive behavior (Black's Law Dictionary, 1979).

Jurisdiction

- The extent of a court's authority to hear a case; also the geographical area within which a court has the right and power to operate. Original jurisdiction means that the court will be the first to hear the case; appellate jurisdiction means that the court reviews cases on appeal from lower court rulings (Proudfoot, 1988, p.373).

Natural Justice (Canada/England):**(a) Audi Alteram Partem**

- Latin term describing the first of the two rules of natural justice which in literal translation dictates that both parties to a dispute must be heard. One requirement under this rule is that there must be a fair hearing. Included therein are the related notions that each party has a right to receive notice of a hearing, and, during the course of a hearing, each party has the right to rebut the evidence adduced, to cross-examine witnesses, and to obtain legal representation, if desired (Gall, 1977, 265).

(b) Nemo Judex in Causa Sua Potest

- Latin term describing the second of the two rules of natural justice that includes, essentially the notion that all forms of bias , or the apprehension of a likelihood of bias, (Anderson, 1979, 8) must be excluded from the considerations of administrative tribunals (Gall, 1977, 265).

Neglect of Duty

- the failure to meet an obligation specified by the employer (Black's Law Dictionary, 1979).

Precedent

- after a case is heard and a decision is reached, that decision becomes a precedent for judges in lower courts in dealing with similar fact situations (Harrison, 1982, 239).

Quasi-Judicial

- the case-deciding function of an administrative agency following its own procedure and rules of natural justice as

distinct from a judicial decision of the courts following strict legal procedure (Proudfoot, 1988, p.376).

Quash

- to annul; set aside; make void (Proudfoot, 1988, p.376).

Sources of Law

- the derivation of all Canadian law specifically court judgements, legislative statutes, or subordinate legislation (Marshall, 1986, 31).

Stare Decisis

- a Latin term that means 'to stand by previous decisions' of the courts (Smyth, 1983, 45). Judges in a common law system have to follow precedent cases decided in a higher court (Harrison, 1982, 239). "let the decision stand"; a legal rule stating that when a court has decided a case by applying a legal principle to a set of facts, that court should stick by that principle and apply it to all later cases with clearly similar facts unless there is a good reason not to. This rule helps promote fairness and reliability in judicial decision-making and is inherent in the common law system (Proudfoot, 1988, p.377).

Subordinate Legislation

- the laws or regulations made according to statute, but not made by the legislature. Subordinate legislation 'derives from authority granted by statute to various administrative agencies of government to make rules and regulations in order to carry out the purposes for which the legislation was passed (Smyth, 1983, 47). Such subordinate legislation, then, often determines the powers and procedures of administrative bodies constituted by statute (Marshall, 1986, 32).

Summary Judgement

- when a party requests summary judgement, it admits the truth of all well-pleaded facts presented by the other party and the untruth of its allegations insofar as they are controverted by the plaintiff but maintains that the law nevertheless supports it and asks the court to find in its favor. (Phay, 1984, 12).

Tenure

- a set of rights conveyed and protected by law whereby a teacher cannot be dismissed from his position except under provisions laid down by statute (McCurdy, 1968, 23). The basic purpose of tenure is to protect teachers who have successfully completed their probationary period from unjust termination of contract for unfounded personal, political, or religious reasons during *competent* performance of their duties. A tenured teacher has rights conveyed by law and cannot be terminated except under procedures contained in statutes, regulations, or collective agreements (Harrison, 1982, 238). Tenure in B.C. terms and in the P.S.A. may be equated to the term 'continuing contract' (authors emphasis).

Types of Law;**(a) Administrative Law**

- a field of law that deals with the situations in which a court will set aside the decision of an administrative body. Generally, unless a statute has provided for an appeal, the court will not deal with the merits of a decision but will intervene only if the particular administrative body somehow has exceeded its jurisdiction or has not proceeded in accordance

with certain basic principles of fairness developed over the centuries by the courts (Gall, 1977).

(b) Common law

- the basis of the Canadian system of law, dates back to feudal England at the time of the Norman conquest. The decisions of judges in reported court cases form the basis of common law. It provides for consistency and predictability before the law through the theory of precedent (Marshall, 1986, 31).

(c) Legislative or Statute Law

- consists of statutes passed by parliament/congress and by Provincial/State Legislation that override all the common law dealing with the same point (Smyth, 1983, 49). In a dispute that involves a section (s.) of a statute, the courts are called upon to interpret the statute. In turn, the court's interpretation of the statute becomes common law (Marshall, 1986, 32).

(d) Procedural Law

- assumes a secondary or adjectival role 'concerned with the protection and enforcement of the rights and duties' as laid out in the Charter(Can.)/Constitution(U.S.), (Smyth, 1983, 43). Procedural law then, focuses on the issue of whether or not all the right steps were taken to ensure the protection and enforcement of the rights and duties prescribed in the substantive rule of law (Marshall, 1986, 31).

(e) Substantive Law

- refers to the legal rule itself that defines the 'rights and duties which each has in society' (Smyth, 1983, 43; Marshall, 1986, 31)

Ultra Vires

- beyond their powers. In constitutional law it denotes actions which are outside the legislative authority of the government in question. For example it would be ultra vires for the federal government to make legislation pertaining to education as that is exclusively a provincial matter (Proudfoot, 1988, p.378).

Writ of Certiorari

- a legal order that allows a court to perform a judicial review, (even when a statute prohibits appeal), of a tribunals decision where there is evidence of a breach of the rules of natural justice. Courts will intervene if tribunals lack or exceed jurisdiction. Courts establish criteria for determining breaches of procedural requirements. Failure to comply with a statutory duty to give prior notice, or hold a hearing or make due inquiry or consider objectives in the course of exercising discretionary powers affecting individuals rights will always be reviewed by the courts (Harrison, 1982, 240). The courts have consistently held that they have no power under a writ of certiorari to rule on the merits of a lower tribunal's decision, only whether a decision was properly reached (MacKay, 1984, 260).

Writ of Mandamus

- a legal order used if a public official, whether serving on a tribunal or otherwise, is not performing or refuses to perform a statutory duty. A writ of mandamus may be made to compel that person to perform a required duty (Harrison, 1982, 241).

Uncertainty and Unpredictability in Legal Analysis

Continuing with this aside, I would also like the reader to consider the following somewhat 'off-the-cuff' comparison. In the field of ballet there are only 6 basic movements that the dancers can use, and yet when they are choreographed together with accompaniment, sets, costumes, and a script, we end up with classic ballets like the Nutcracker Suite or Swan Lake. In education law we also have a few basic tools like substantive due process, procedural due process, audi alteram partem, nemo iudex in causa sua, stare decisis, and various rights and freedoms as defined in the Charter of Rights and Freedoms. In teacher dismissal cases there are also some classic concepts like teacher incompetence, moral turpitude, insubordination, neglect of duty, etc. and each time a case is acted out in court, like each new production of a classic ballet, the participants, (judge, litigants, et. al.), produce a slightly different interpretation of the classic case. Even though the concept may be the same, each legal case like each ballet production is considered on its own merits, apart yet similar to its predecessors (stare decisis). I am trying not to let this simile go too far or it will get ridiculous, however from my analysis of education law articles it seems that the field of

law is nowhere close to an exact science. It is much closer to an art form where one tribunal's interpretation of a set of facts can be substantially different than the next tribunals interpretation.

An American case which typifies the point above is the case of Jean Arline, who in 1957 at 14 years of age contracted tuberculosis. She recovered and went on to college to obtain a teaching certificate. In 1966 she was hired by Nassau county School District in Jacksonville Florida. In 1969 she was awarded a continuing contract and in May 1977 was again stricken with tuberculosis. Relapses occurred in March and November of 1978 and in June 1979 the School Board held a hearing and terminated her contract. Her appeal to state officials and her lawsuit in U.S. District Court for the Middle District of Florida were both unsuccessful. District Judge John Moore found it "difficult ... to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." (Sect. 504 of the Rehabilitation Act of 1973). Arline then appealed to the U.S. Court of Appeals for the 11th Circuit, which reversed the decision of the district court, and found that her condition fell "neatly within the statutory and regulatory framework" of Section 504⁵. The School Board then appealed to the U.S. Supreme Court, where the Reagan Administration, the National School Boards Association, and others got involved. They filed briefs which argued that, when Congress outlawed discrimination on the basis of handicap, it did not intend to prohibit employers from terminating workers with contagious diseases. The briefs also argued that it is possible for a person to transmit a disease without having a physical impairment or suffering from any other symptoms associated with the disease. Thus, discriminating solely on the basis of contagiousness is not discrimination on the basis of a handicap.

On March 3, 1987 in a split 7-2 decision the Supreme Court wrote "Arline suffered from a handicap that gave rise both to a physical impairment and to contagiousness.... It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.... Nothing in the legislative history of Section 504 suggests that Congress intended such a result."⁶

By this time 8 years had gone by since the dismissal, she had not worked since 1978 and although Arline was now classified as being handicapped, the case was now remanded by the Supreme Court back to the District Court to determine whether the contagiousness of tuberculosis might render her unqualified as an elementary teacher, and

whether she can be reasonably accommodated with other job arrangements within the school district. (Flygare, 1987)

This case above was in 1987 still not resolved by the courts and it points out the different interpretations that different tribunals or courts can give to a given set of facts, and it also demonstrates how slowly a legal system can move to resolve contentious issues.

FACTORS INFLUENCING TEACHER DISMISSAL

U.S. Freedoms Guaranteed or Substantive Due Process

The Right to Privacy	14th Amendment ⁷
The Right to Property	14th & 5th Amendments ⁸
The Right to Liberty	14th & 5th Amendments ⁹
The Freedom from Unreasonable Search and Seizure	4th Amendment ¹⁰
The Right to Equality Free from Discrimination and Harassment on the Basis of Race, Religion, Sex, Age, Marital Status, or National Origin	1rst & 14th Amendments ¹¹
The Right to Freedom of Speech	1rst Amendment ¹²
The Right to Freedom of Association	1rst Amendment ¹³
The Right to Free Exercise of Religious Practice	1rst Amendment ¹⁴
The Right to Marry	basic civil right ¹⁵
The Right to Bear Children	Title VII Rights ¹⁶

The above list of Rights and Freedoms were taken from recent U.S. Education Case Law literature reviews and were all the basis of successful defenses against teacher dismissals. In each case a teacher had been deprived by his/her school board of

their employment due to a constitutionally protected right or freedom.

The U.S. legal reviews studied for this chapter overflowed with examples of violations of substantive due process. Of the various constitutional (and other) rights listed above, cases involving the right to freedom of speech, predominated: such as prohibiting the teachers within the school from discussing the teacher's organization, mentioning it in private mail communications, or using billboards dedicated to the personal message use of teachers¹⁷; a letter to the editor of a local newspaper attacking the school board's handling of a bond issue proposal and its allocation of funds between the schools' educational programs and their athletic programs¹⁸; complaints by a Mexican-American teacher that Mexican children were being placed in classes for the mentally retarded on the basis of tests administered in English rather than their native language¹⁹; the use of sex education films previously approved by the principal, and the board, and provided by the county health department²⁰; or making a telephone call to a local radio station to discuss a teacher's dress code.²¹

In all of the cases mentioned above the interests of the teacher as a citizen in commenting on matters of public concern were protected by the First Amendment. The Supreme Court of the United States, however, also recognized that the teacher's interests "must be balanced against the interests of the school board, as an employer, in promoting the efficiency of the public services it performs through its employees."²² This balancing of the interests of one party vs. the interests of another is

performed by every court subordinate to the Supreme Court as well as the Supreme Court itself, and it is made very difficult due to "the enormous variety of factual situations in which critical statements by teachers may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal,...".²³ The Supreme Court in the *Pickering v. Bd. of Educ.*¹⁸ situation did not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements could be judged, however it did indicate some general guidelines for evaluating the conflicting claims of constitutional protection and the need for orderly school administration. The Guidelines included the following:

- Whether the statements were directed toward a person with whom the employee would normally be in contact in the course of his daily work as a teacher and would, therefore, seriously undermine the effectiveness of the working relationship between the two, raise a question of maintaining discipline by immediate superiors, or adversely affect the harmony among co-workers;
- Whether the employee's position is one in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal;
- Assuming it could shown that the employee's statements were false, whether the statements were per se harmful to the operation of the schools;
- Whether the employee has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful effect on the public would be difficult to counter because of the teacher's presumed greater access to the facts;
- Whether a teacher's public statements were so without foundation as to call into question his fitness or competence to perform his duties in the classroom; and
- Whether the employee's comments addressed a matter of legitimate public concern.²⁴

These guidelines are quoted throughout the many case law reviews studied for this chapter as the basis for determining

whether an employee's conduct or criticism was protected by the First Amendment.²⁵

Reasoning for Use of Primarily American Litigation Examples

Why use American litigation examples, you ask? The answer is twofold: firstly, after reviewing an extremely large number of articles on teacher dismissal, one comes to the realization that almost all of the articles have been written in the United States. They are very well delineated and documented, and have a long history of supporting literature, due to their familiarity with and intimate knowledge of their own 'Made in America' constitution. Whereas in Canada the lack of sufficient time to examine ourselves and our common practices in the light of our own 'Made in Canada' Constitution and Charter of Rights and Freedoms, puts us a few years behind in terms of interpretive litigation. We can use their cases for examination and analysis however, to see how similar education law litigation might work in the Canadian paradigm.

Additionally, some concepts or basic premises are almost indistinguishable between the American and the Canadian models, and thus some American cases can be analyzed to provide illustrative or informative examples, or even persuasive arguments. As an corollary I will use a statement by Todd A. DeMitchell, Jan. 1984; "these rights are often thought of as freedoms which are *absolutely guaranteed* by the Constitution. But the fact is,.... rather than a constitutional guarantee, (these freedoms), are concepts which have evolved through government actions and

judicial decisions. And as such, are open to changing interpretation and evaluation."

An American example of this growth or evolution of legal interpretation of constitutional guarantees is discussed by McConnell and Pyra where they state:

On the manner of the type of speech protected by the Constitution, the Court distinguished the speech protected in *Tinker*²⁶ from the speech exhibited in student newspapers by stating that the former "addresses educators' ability to silence a student's personal expression that happens to occur on the school premises," while the latter question "concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."²⁷ The latter activities, the Court considered, "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, as long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."²⁸ The Court asserted that educators are entitled to exercise greater control over the second form of activities to assure appropriateness of materials, to ascertain that they do not substantially interfere with the work of the school or impinge on the rights of other students, to set standards, and, generally, to ascertain that the goals of education are attained.

Essentially, then, the *Tinker* standard was not applied: "Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."²⁹ With this rationale, the Court established that prior restraint of student publications does not offend First Amendment rights, as long as the actions are "reasonably related to legitimate pedagogical concerns." (McConnell and Pyra, 1989, p.33)

Between the above two decisions, (*Tinker*, 1969 and *Kuhlmeier*, 1988), one can see a reflection of the changes that were occurring in the societal views of the general United States population. In the *Tinker* decision can be seen the

broadening of personal freedoms in a decade when the broadening of the civil rights of the individual was seen as part of the solution to many of the problems of that day. Whereas, in the *Kuhlmeier* decision almost two decades later there was a resurgence of the necessary controls on personal freedoms that were out of control, as this was now seen as part of the solution to the problems of the present day.

With respect to the Canadian Charter of Rights and Freedoms, however, and the changing legal interpretation of its constitutional guarantees, the Charter has been in existence for far too brief a length of time to determine the net effect of the interaction between itself and Canadian society versus the effect that changing societal views have had on the legal interpretation of its guarantees. The Charter is itself an instrument of societal change.

Some academics have attempted to predict the future course of Edu-political legal change that will be produced by prospective judicial decisions in subsequent litigations from as yet unknown disputes, in light of the constitutional provisions in the Canadian Charter of Rights and Freedoms. On one side of this speculative argument:

Pat Pitsula and Michael Manley-Casimir argue that Canada has a different socio-legal context from that of the United States and that this difference will result in a lesser influence of U.S. case law here and a different type of educational administration than that found in the United States.³⁰ The greater traditional deference of Canadians to authority, they argue, as evidenced by our concession of larger powers to school administrators to discipline students, and Canadian educational administration based on "elite accommodation" rather than ringing affirmations of fundamental rights will result in a lesser impact of constitutionalized rights on the education process here than in the United States.

Pitsula and Manley-Casimir argue that with the cultures, histories, political and legal systems of Canada and the United States differing markedly, American law can be of little relevance to Canada: "Canadian law reflects the distinctiveness of the Canadian experience. U.S. case law is not now nor can it ever (under existing political arrangements) serve as 'precedent' for the Charter of Rights and Freedoms. The situation, in fact, is quite the reverse, as Canadian courts are forging a distinctive Canadian jurisprudence, grounded in the Canadian historical, social and legal tradition. Canadian courts do refer to the U.S. experience -- as illustrative, informative, in some cases as persuasive, but not as precedent." (McConnell and Pyra, Aug, 1989, 209-210).

Whereas on the other side of the argument, Howard McConnell and Joe Pyra suggest that there is a different meaning in the following statement; "*much American case authority will be followed in Canada*" (*Ibid.* p. 210). They argue that:

.... With the rise of contemporary technology and communications, western industrialized countries are becoming increasingly like one another in social experience and attitude. We can learn much from one another. The social and legal problems reflected in our respective court dockets are similar and the solutions of those problems by courts also are often very similar. Moreover, our inherited Anglo-American doctrine of *stare decisis*, or "precedent", was never adopted by civil law jurisdictions, and in our own distinctive legal context it is only about a century or so old. As Lloyd and Freeman observe: "Indeed, the modern common law doctrine [of precedent] could hardly have arisen until there was in existence an established hierarchy of courts and an efficient system of law reporting."³¹ Hogg mentions that unlike the House of Lords, the Privy Council "never regarded itself as bound by its own prior decisions," and that the Canadian Supreme Court, which no longer regards itself as so bound, should be more ready to overrule itself in constitutional cases, since those cases, where a legislative remedy is not available, if the Court does not agree to vary an inconvenient past decision, an unwanted precedent could only be changed by an often difficult-to-obtain constitutional amendment.³² In addition, neither the Supreme Court of the United States nor the High Court of Australia has invariably followed its own past decisions.

In a context in which the doctrine of binding precedent is weakening over much of the common law world, the judicial focus inevitably shifts to what reasoning is most cogent and "persuasive" in particular fact situations. In such situations Canada can, and does, draw on the judicial reasoning of the European Court of Human Rights in

Strasbourg and the Supreme Court of the United States, but particularly on the latter tribunal. This is especially so, we would suggest when the Canadian judiciary is interpreting Charter provisions only 10 years old when there exists much accumulated judicial experience and wisdom by the United States Supreme Court in interpreting analogous Bill of Rights Provisions. (McConnell and Pyra, Aug, 1989, p.211).

In terms of which of the above viewpoints is going to prove to be correct, I believe the "jury is still out". A final answer to the question posed by the above discussion will have to await further "made in Canada" decisions. I do believe, however, that whichever way we go, the choice will be uniquely Canadian. In the case of political change, we as Canadians tend often to follow the suggestion of the 1977 United States Supreme Court: "As protection against abuses by legislatures, the people must resort to the polls not to the courts". We Canadians tend to express our dislike of our government's international or domestic policies, not through revolution or civil disobedience, but through political protest vote as evidenced by the recent provincial N.D.P. wins in Ontario and British Columbia and by the recent federal gains by both the Partie Quebecois in Quebec, and the Reform Party in Western Canada. If, as suggested by Pitsula and Manley-Casimir, we tend to practice "elite accommodation" to the elites which represent the major subcultural groups in society, then this elite accommodation must have a limit, at which point deferred protest results in protest votes at the polls going to any extremist right, left, or way out in space political parties.

Secondly, education law cases which are based on either; the U.S. concepts of due process of law or the equivalent Canadian/English concept of natural justice, cannot be

differentiated and examined independently, due to the historical relationship between the two concepts. The most persuasive argument for this was presented by Chester Nolte in 1985 where he stated;

By way of background, U.S. legal standards of fundamental fairness -- that's what due process of law really means -- come down to us from the English courts. That legal system required that due process consist of two essential elements: first, that no person shall be condemned unheard; and second, that every judge (that is, every tribunal) shall be free from bias. This dual guarantee, incorporated in the United States Constitution, has become the cornerstone of American jurisprudence and has been the key to much of the civil rights legislation of the last 25 years.

It plays a vital role in your board's actions, too. School boards have executive, legislative, and judicial powers, but these powers are not unlimited. A board may enact rules and regulations and enforce them, sometimes sitting in judgement on a person charged with violating one or more of these edicts. In its judicial capacity -- the area that causes the most board litigation -- your board is expected to act within the limits of the Constitution: You must condemn no person unheard (that means a hearing probably is indicated), and you must act entirely without bias or premeditation to deprive anyone of a civil right guaranteed under the Constitution (that means you must be impartial). These two guarantees mean an impartial hearing is mandatory; otherwise, due process is lacking, and the board will fail.

The field of education law in Canada is expanding, there is "a marked growth in the scholarly literature concerned with the intersection of law with educational policy and practice, and in the professional discussion of legal issues in education."³³ In fact a new journal dedicated to education law in Canada called the "Education & Law Journal" by Carswell Legal Publications and a group of Canadian educators called the Canadian Association for the Practical Study of Law in Education has recently been established. There will soon be no need, except for comparison purposes to quote American examples of education law litigation

cases. For this paper however, at this time in Canada's history, (1988-1993), Canadian examples of all the situations where teacher dismissals have violated the judicial interpretations of The Charter of Rights and Freedoms are not available.

Procedural Due process (U.S.)

The legal phrases and terminology defined earlier in this chapter were largely defined in absolute terms as if they were "written in stone". However, now comes the nebulous part, many of these terms are imprecise and subject to constant fluctuation due to changing interpretation. With respect to the term "due process" for instance, it has been stated by Bittle, 1986 pg. 6 that

"There is no rigid standard of due process. The United States Supreme Court has stated that 'due process' unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place, and circumstances. The clear rule is that, the minimum procedural requirements, necessary to satisfy due process depend on the circumstances and the interests of the parties involved.³⁴ The courts have often balanced the need for procedural protection for a party against the cost to government of providing a hearing."

In *Conley v. Board of Education of the City of New Britain*, (1956), the court reviewed the termination of a teacher. The court noted that the board of education is an administrative agency before which proceedings are necessarily informal. The court stated: "It was not necessary for it (the board) to follow technical rules of pleading and procedure The test of the action of the board is whether the plaintiff had a reasonable opportunity to hear and to be heard upon the charges preferred against him and whether the proceedings were conducted in a fair and impartial manner Furthermore, administrative agencies

are not bound by the strict rules of evidence The only requirement is that the conduct of the hearing shall not violate the fundamentals of natural justice. That is, there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary or to be fairly apprised of the facts upon which the board is asked to act."

In *Hannah v. Larche*³⁵ Chief Justice Warren described the flexibility of due process as one of its qualities by stating:

Due Process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts As a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtained in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Natural Justice

The Canadian equivalent of due process is the concept of natural justice. It "is a fundamental legal concept that is rooted in the common law, in biblical reference, and was enshrined in the *Magna Carta* Although the existence and extension of the rules of natural justice are accepted by the Canadian judiciary, its definition and application defies simple explanation Both concepts (rules of natural justice) are undefinable in exact terms and usually are defined according to the circumstances of a particular situation." (Anderson, 1979, 2). The rules and procedures that "constitute a proper hearing are open to judicial review. One point that is consistently applied is that non-legal bodies such as school boards, are not

expected to apply strict rules of procedure and evidence that one is entitled to expect in a court of law." (Anderson, 1979, 3).

Evolving Trend in Interpretation of Natural Justice (Can.) and Procedural Due Process (U.S.)

The trend in the past couple of decades has been toward a wider and more general application of the rules of natural justice to all tribunals, although this has given rise to a lot of conflict and controversy with regard to various judicial interpretations. Earlier in this century the rules were applied uniformly to judicial acts, but did not apply to administrative acts. Gradually, however, the courts recognized administrative decisions as "quasi-judicial" and new interpretations were brought forward to assist in determining appropriate procedures in these cases. For example; "In 1955, the Supreme Court of Canada reviewed the question of teacher rights in dismissal and concluded that a teacher was not the holder of a public office so that the rules of natural justice did not apply." (Anderson, 1979, 13; LaCarte v. Board of Education of Toronto, 1955). In 1978 however, the Supreme Court of Canada under the guidance and leadership of Chief Justice Laskin extended the use of the rules of natural justice into the area of administrative acts by referring to a similar concept known as administrative fairness (Anderson, 1979, 17; Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, 1978). This decision effected the future application of fair procedure to all acts of dismissals of public office holders, no matter if classified as administrative, or quasi-judicial or judicial.

A similar trend can be seen in U.S. education litigation. In the *Conley v. Board of Education of New Britain*, (1956), case mentioned above, administrative proceedings were defined as being informal. Whereas in 1985 the U.S. Supreme Court, in *Cleveland Board of Education v. Loudermill*, ruled "that a public employee who is entitled under state law to expect continued employment has a property interest in the employment which cannot be terminated without due process unless there is just cause for dismissal.... .and that a public employee cannot be deprived of either a liberty or property interest without due process of law under the fifth and fourteenth amendments to the United States Constitution." (Bittle, 1986, 3).

Whether an employee has a property interest is to be determined by the courts. If the property or liberty interest is established however, the minimum requirements of due process are generally recognized to be: "(1)clear and actual notice of the reasons for termination in sufficient detail to enable the employee to present repudiating evidence; (2)notice of names of those who have made allegations against the employee and the specific nature and factual basis for the charges; (3)reasonable time and opportunity to present testimony in his own defense; (4)a hearing before an impartial board or tribunal; (5)written statement by the fact-finder as to the evidence relied upon and the reasons for the action taken; (6)notice afforded and the opportunity to be heard must be appropriate to the nature of the charges made; and (7)right to have counsel in some cases." (Bittle, 1986, 3; *Brouillette v. Board of Directors of Merged Area*).

Other Important Due Process Considerations

Some due process considerations which have not yet been discussed and yet can be determining factors in a court judgement as to whether a board's responses to the problem of tenured teacher dismissal have been correct or incorrect are; (a) the existence of preannounced rules; (b) some aspects of advance notice of reasons for termination; (c) arbitrary and capricious actions on the part of school boards; (d) the legal requirement that the reasons for termination be based on an inquiry; and, (e) the possibility of situational incompetence in a teacher deemed to be "at risk".

(a) Preannounced Policies, Rules, and Regulations

An important element of due process is "the existence of preannounced rules. Through preannounced rules, the student or employee is put on notice that their actions may be the basis for disciplinary actions. Preannounced rules should be the first step in any procedural due process system. The rules must be sufficiently definite to provide prior notice to students or employers or others that certain standards of conduct or behavior or performance are expected, and that failure to comply with those standards may result in sanctions, discipline, or discharge. No discipline can be imposed except on the basis of substantial evidence of violation of one or more specific rules or policies."³⁶ (Bittle, 1986, 6).

(b) Aspects of Reasonable Notice in Administrative Tribunals

"A fundamental concept of due process is that the "accused" be aware of the charges against him. Once an investigation or inquiry has yielded evidence of misconduct, incompetence,

insubordination, or neglect of duty, the next requirement of due process is to advise the 'offender' of the charge and by whom it is made, and to grant the offender an opportunity to confront the accuser."³⁷ (Bittle, 1986, 15). What constitutes 'reasonable' notice depends on the circumstances of the case. In one Canadian Labour Relations Board Case, one day was considered to be reasonable notice, whereas in other decisions, two weeks has been held to be unreasonable. (Anderson, 1979, 7). Other questions arise under the rubric of reasonable notice such as the question of access to information before the hearing, and requests for adjournment. The governing factor is whether a full opportunity to be heard is being given.

With respect to access to information, "the Alberta Board of Reference has repeatedly accepted the legal right of either party appearing before it to have prior access to all documents being presented in support of, or in defence of the termination of a teacher's contract of Employment. This right to disclosure extends only to documents that are relevant to the issue at hand." (Anderson, 1979, 8).

With respect to requests for adjournment, "when adjournments are denied, the question of a breach of natural justice occurs. According to the rules of natural justice adjournments are to be granted if it would be reasonable in the circumstances to do so. In *Wigby v. Pearson, Spray, and Board of Inquiry*,³⁸ the Yukon Supreme court quashed a decision of the medical Board of Inquiry for failing to grant an adjournment of its quasi-judicial hearing." (Anderson, 1979, 6).

Other examples from American education law reviews indicate various specific errors in school board or board of education hearings. Such as; "a note with only the date and time of the hearing stated³⁹ or a teacher faced with dismissal for insubordination, failure to report to work without appropriate approval for absence, and other due and sufficient cause, not being provided with a fair summary of the reasons and evidence for dismissal⁴⁰ or cases where the reviewing court could not tell from the record if sufficiently detailed notice was given⁴¹ or the several cases where decisions had to be reversed because notice was not given in a timely manner."⁴² (Sorenson, 1987, 21).

(c) Arbitrary and Capricious Actions of School Boards

The terms arbitrary and capricious as defined above in the legal terminology section of this review were relatively synonymous. Terminations of teachers by school boards have been found by courts to be 'arbitrary and capricious' if the decisions were; "made in bad faith,⁴³ based on the teacher's exercise of First Amendment or other constitutionally protected rights,⁴⁴ unrelated to the educational process or to a reasonable educational objective,⁴⁵ justified by reasons that were wholly unsupported in fact,⁴⁶ based on reasons that were frivolous or trivial,⁴⁷ or were found to be an abuse of discretion"⁴⁸ (Phay, 1984, 15). One of the most illustrative cases of arbitrary and capricious actions by a school board is that of *Memphis Community Schools v. Stachura*²⁰ where;

"The teacher Edward Stachura was to teach a unit on human reproduction to seventh graders in the life science

course in Memphis Middle School. All possible precautions seemed to be in place; the school board had approved the text and the curriculum, the audio/visual materials in the course and the teaching methods had been preapproved by the principal, the teacher prescreened the two films: "From Boy to Man" and "From Girl to Woman", the county health department normally provided these two films for showing by life science teachers to grade seven students, the principal directed Stachura to show the two films, the films were shown separately to boys and girls, and the students needed signed parental permission to see the films. (author's note. I have shown these two films to grades seven through nine students in Southern Alberta where the parents and the students found them to be clinical and tame.)

Despite these precautions a few parents complained after the films were shown. The superintendent warned Stachura that he was in "a heck of a lot of trouble" and advised him to stay away from an upcoming school board meeting to avoid a run-in with the "angry hot-heads" who might attend. During the heated school board meeting -some people threatened to picket the school- the superintendent announced that Stachura would be suspended with pay to keep peace in the school system.

The next day, the superintendent suspended Stachura and told him "he would never see the inside of a Memphis classroom again." The board subsequently confirmed the suspension and included a letter of reprimand from the superintendent. This triggered a round of correspondence between Stachura and the board whereupon the board informed Stachura that he would be terminated unless he accepted the letter of reprimand.

Stachura filed suit in federal district court against the board, board members, the superintendent (and his successor), the principal, and the two citizens who had been active in the campaign against him. He claimed violations of procedural due process and the right to academic freedom under the Free Speech Clause, of the First Amendment. The upshot of the huge monetary award by the trial court against the board and the school officials, and the smaller award against one of the parents, was a trip to the Sixth Circuit Court of Appeals, this time on behalf of the board. The Court of Appeals denied the \$18,250 award against the parent involved because her right to petition the board was shielded by the First Amendment, but the \$321,000 award against the school board and the school officials was upheld.

Judge George C. Edwards pointed out that the administrative officials and the board fell short of both procedural and substantive due process by 'failing to give Stachura even a minimal hearing before it effectively dismissed him' and by 'failing to defend the embattled teacher, or publicly assume responsibility for their own decisions' when the public outcry arose." (Sendor, 1985, 26,48).

(d) Reasons for Termination Must be Based on a Thorough Inquiry

In April 1986 Bailey and Wear summarized U.S. Federal and State Court Statistics in the area of education law by stating "approximately half of all attempts to dismiss an employee are decided in the teacher's favor -provided the case reaches the courts." The critical factor as stated by the above authors was the "ability to defend your allegations with adequate documentation." The onus then in dismissal hearings to have well prepared cases where the "preponderance of credible evidence" supports your allegations, rests with the administrators.

In his ERS Spectrum article (spring 1985) entitled "Planning Ahead for Professional Dismissals", R. J. Beebe suggests five concrete summer activities to improve the likelihood of success in the pursuit of professional dismissals. Beebe suggests that administrators can use the summer to plan for systematic and appropriate action during the subsequent school year. In his article a balance that I have not seen in other articles is reached between a dispassionate listing of the steps necessary to win a dismissal case keeping due process in mind, and, the emotional impact that this process will have on both the administrator and the staff member involved. Beebe starts the article with a listing of the negative emotions that the process of dismissal can prompt, and then systematically outlines the background preparation that the plan will entail. The steps briefly are;

- 1) Study and plan compliance with the statutory requirements for teacher dismissal in your state (province),

- 2) Review and revise the existing local system for teacher performance evaluation and dismissal,
- 3) Make concrete plans for addressing the teacher's most serious job-related problems,
- 4) Focus efforts for monitoring teacher performance, and
- 5) Take meaningful action to reduce negative pressures on weaker teachers.

In his article Beebe states that "the administrator's goal is to provide quality instruction to each student, and the preferable option is to accomplish this goal without the necessity of dismissal." (Beebe, 1985, p.18).

In addition to Mr. Beebe's approach an attorney in the firm of Bracewell and Patterson in Houston, Texas whose practice is concentrated in the area of education law has delineated an excellent documentation system for teacher termination or improvement. One of its advantages is that it has been developed to be used in conjunction with virtually any school district's evaluation system. Its goal is to humanize the evaluation and documentation process with the ultimate objective of improving a teacher's performance to an acceptable level. It involves the use of several types of written memoranda, such as;

- 1) memoranda to the principal's file which are used sparingly to record less significant infractions or deviations by a teacher,
- 2) specific incident memoranda which are used to record conferences with a teacher concerning a more significant event,

- 3) summary memoranda which are used to record conferences with a teacher in which several incidents, problems, or deficiencies are discussed,
- 4) visitation memoranda which are used to record observations made of a teacher's on-the-job performance, and
- 5) an assessment instrument which is used to evaluate the teacher's overall performance. (Frels & Cooper, 1986, p.2).

When administrators then, have the responsibility for preparing a "preponderance of credible evidence" to support dismissal actions the above summer pre-preparation as well as an adequate documentation system should be useful.

In order to govern the front line administrator, the causes for dismissal of teachers are enumerated by state or provincial statute. As indicated in the analysis of British Columbia legislation above the procedural and substantive requirements for teacher dismissal are often well described but vague in content. The reason for this is well stated by Citron, 1985, pg.301;

"Tenure statutes, like other types of laws, must be written clearly enough to give a person of ordinary intelligence notice of what kinds of conduct are forbidden. However, the courts have generally found that terms like 'immorality,' 'incapacity,' or 'incompetence' are sufficiently precise to indicate what conduct is proscribed. These relatively broad terms also provide valuable flexibility in dealing with a wide range of unforeseeable circumstances. If the broad terms were replaced with enumerations of specific types of misbehavior, there would probably not be a valid statutory basis for terminating the tenure of a teacher who behaved in some troublesome way not listed in a statute."

In order to increase the direction for administrators some states have added fair dismissal provisions to their tenure statutes which include;

- "1. Each school district should develop its own objective system of evaluation.
2. A school district must observe, evaluate, and confer with a non-tenured teacher three times per year. During the conference, deficiencies must be identified and help must be extended to correct teacher deficiencies." (Dolgin, 1981, 19)

In addition to these fair dismissal provisions it has been suggested by Munelly, 1979 that at least four supervisory substantive due processes be included in the inquiry stage of any dismissal proceeding. These are;

- "1. A teacher knows the standards of professional performance expected.
2. A teacher has received continuous feedback and notice of his strengths and weaknesses.
3. A teacher has been provided with help in overcoming his deficiencies.
4. A teacher was given reasonable time to improve competencies."

Two more steps could be added to the above as suggested by Gephart, 1979 and Beebe, 1985. Firstly, a concrete shift in evaluation purpose, making it clear to the teacher when the extra attention becomes the beginning of a dismissal action. Such as a notification in writing that a curtain will be drawn on a given date and none of the formative data previously generated will be used in administrative decision making about retention or dismissal (Gephart, 1979). Secondly, The taking of meaningful action to reduce negative pressures on weaker teachers. As stated by Beebe, 1985 " Most people want to succeed in their work. But such factors as physical or emotional illness, domestic difficulty, new job demands,

excessive teaching loads, professional burnout, and other forces can over time weaken the performance or conduct of the most exemplary teacher.... Methods for reducing the negative pressures on weaker teachers such as the careful assignment of classes and students to these teachers,and the enlistment of the assistance of other teachers for professional support." can all provide evidence of the administrator's supportiveness and inquiry fairness that will add to his or her professional credibility, should a dismissal hearing become necessary.

(e) Situational Incompetence in Teachers Deemed to be "At Risk"

The statement by Beebe, (1985), above brings up a point also mentioned in other articles, that of situational incompetence. Czuboka (1986, p.276) has maintained that "all teachers and administrators are competent or incompetent in varying degrees, and they cannot be put into two clearly-defined categories." I would like to add to this by stating that in my career I have been described as an excellent teacher, a good teacher, a thorough and reliable laboratory instructor, a capable administrator, an improving teacher, a committed college instructor, etc. All of these ratings indicate a different level of competence and in all of these descriptions according to Bridges, 1986, p. 27. there is an element of ceremonial congratulations and inflated performance ratings. But also in each of these ratings is a different teaching situation. I'm sure that every educator reading this remembers the particular class that he once labeled "the class from hell". This was the class that he/she never seemed to get settled down, never seemed

to be able to create a rapport with, never seemed to be able to get past their flippant belligerent attitude, so that meaningful conversation, much less meaningful learning could take place. I remember mine vividly, and it seems to me that as I read administrative accounts of the indicators that are used to identify incompetence, I find that I have experienced almost every one of their incompetence indicators at least once in my career if not more. This is especially true when you remember your most difficult class. Education systems must have sufficient supervisory due process steps built into their teacher evaluation, that they account for incompetence that may be situational, systemic, or temporary in nature.

In his text on The Incompetent Teacher, 1986, Edwin Bridges states;

"Rarely, is a teacher's poor performance due solely to a single cause like effort, skill, or ability. More commonly, unsatisfactory performance stems from other sources as well, such as personal disorders, marital problems, and inadequate supervision. Under these conditions, efforts to improve the performance of such teachers represent a formidable challenge and undertaking. It is unlikely that something akin to a miracle drug or an organ transplant will ever suffice as a cure for the problem of incompetent teaching. The extent of the teacher's difficulties in the classroom and the causes which underlie these difficulties are simply too far-reaching."

He then goes on to discuss the administrative desire to avoid conflict and discomfort, the administrative tolerance of the poor performer, and the use of escape hatches such as: (a) transfer within or between schools, (b) placement in a 'kennel' (home-teaching staff or roving substitute pool), and reassignment to non-teaching positions. The escape hatches

being used to simultaneously protect the incompetent teacher and minimize the destructive forces on the organization. (Bridges, 1986, 13,31).

It is at this juncture that my research has indicated a necessary departure from Bridges' logic. In British Columbia review commission reports, failure to account for situations which are responsible for the incompetence of an otherwise competent teacher have resulted in the reversal of some school board's dismissal decisions. In two similar cases in 1979 denial of a teacher's two requests for transfer out of a school where the administration had recently changed, but she had served in for 17 years; failure to remove a problem student that had been in her class for two years and was causing most of the pupil control problems, failure to grant a medical doctors request for a leave of absence to cope with the care of a chronic schizophrenic mentally handicapped brother who was placed in the teacher's care due to the death of her parents, failure to notice the teacher's deteriorating emotional condition, failure to provide adequate assistance from the Supervisor of Instruction, and failure to ensure that the teacher was assigned to a situation in which she could best utilize her skills were all reasons that were interpreted by the commissions involved as situational incompetence that had not been taken into account by the school boards when considering dismissal.⁴⁹

Not all of the attempts by administrators to transfer teachers to other teaching situations with different teaching loads, different administrators, and different staffs should be

construed as 'the turkey trot or the spring dance of the lemons' (Bridges, 1986, 31). Some of these transfers may be real attempts to take into account situational incompetence. Robert Beebe in his article called "Planning Ahead for Professional Dismissals", 1985, states; "If a teacher has been unsuccessful with a given section or course of study, little will probably be gained by repeating the assignment for yet another term. If a teacher is known to experience difficulty controlling certain classes, there is little point in assigning him or her these hard-to-handle students." Beebe calls the careful assignment of certain classes to weaker teachers and certain students to these teachers, a method for reducing negative pressures in the system. This reduction of negative pressures is another example of attempts to take into account situational incompetence. If an administrator or a school board marches headlong into a dismissal hearing, education department appeal, or judicial review without taking into account the possibility of extraneous or situational factors in an incompetence case they risk the judgement that their dismissal actions are indefensible.

Correct and Incorrect Responses to the Problem of Dismissal

When I first read Edwin Bridges book "The Incompetent Teacher: The Challenge and the Response", I mentally labelled it as a gung-ho, **get in there and do your job!! Dismiss the Bums!!**, kind of text. In his treatise he discusses;

"The inclination of administrators to tolerate and protect, rather than confront, the incompetent teacher [which] is shaped by a combination of situational and personal factors. Two of the most important situational factors are the legal employment rights possessed by the majority of

California teachers and the difficulties inherent in evaluating the competence of classroom teachers. The most important personal factor is the deeply-seated human desire to avoid the conflict and unpleasantness which often accompany criticism of others. These three factors jointly exert a potent influence on administrators to be lenient with the poor performers. Administrators manifest their tolerance and protection of the poor performer in five ways: (i) using classroom observation reports as occasions for ceremonial congratulations; (ii) using double-talk to cover their criticisms; (iii) providing inflated performance ratings; (iv) relying on escape hatches to skirt the problems; and (v) making minimal use of the sanction of dismissal."

However since I first read his book I have been teaching in one of the bedroom communities surrounding Vancouver British Columbia where I have experienced my first taste of inner city schools. In this context I have seen vandals, drug traffickers and muggers who have to leave your class at 1:30 to attend appointments with their parole officer, students whose only reason for attending school is that its part of their parole conditions, teachers whose enthusiastic attitude at being selected as the starting staff for a brand new school, -burns out in six months, and naive administrators with novel approaches towards progressive discipline who become disenchanted at trying to deal with conditions over which they have absolutely no control. It is under these conditions that I have seen teachers whose competence is marginal and whose classes are rarely under control, get rave reviews because everyone in their classes seems to be passing, and at the other extreme I have seen teachers, whose planning, class control, and student rapport is excellent, get parental complaints because not everyone in their classes, passes the course. It is also in this context that I have seen the type of informal organizational structures to control for aspects of teacher

behavior that are explicitly stated in Brieschke's, 1986 article on "The Administrative Role in Teacher Competency".

"In inner-city public schools, many teachers are able to spend years not teaching as long as they keep up appearances. A properly socialized teacher learns which [educational mistakes] are allowed, even sanctioned, and which deviations will bring swift repercussions. in this study educational mistakes were committed repeatedly by teachers who got to work on time, kept their students quiet, refrained from asking questions, refrained from criticizing practices (even constructively), and kept their classrooms closed. In exchange for such "favours," principals tacitly agreed to stay out of classrooms, to provide extra paper and special materials, to assign classrooms that were sunny and warm over cold and drafty ones, and to overlook incomplete lesson books on occasion. In severe cases, principals even agreed to have children labeled learning disabled or socially maladjusted in order to remove them from teachers' classrooms. In short, teachers who kept a low profile often were sanctioned to commit educational mistakes behind the closed classroom door."

Having experienced some of what Bridges was trying to state in a inner city situation it appears to this author that marginal performers are occasionally, not only tolerated, but if they are never the basis of parental complaints, they may actually be systemically rewarded.

In Chapter six Bridges summarizes his text with a reasoned consideration of personnel policies and practices in school districts. The approach stresses the importance of the tenure decision to school districts and includes a redesign of teacher evaluation systems that is "hard on the standards but soft on the people." It abandons the 'sink or swim' philosophy that is traditional in the socialization of probationary teachers (Lortie, 1975, p71). It includes features which involve the redeployment of district and administrator resources, the inclusion of comprehensive due process protections, and a

recognition of situational incompetence in teachers or systemic incompetence in the district as a whole. (Bridges, 1986).

Immorality and Misconduct

In most state education legislation and provincial school acts there are sections which list the possible grounds for discharge of teachers. Within these sections will be found the term immorality or its synonymous term misconduct. These terms are purposely vague for the reasons described above by Citron, July 1985, p.301. What constitutes 'immorality' then, as it relates to the dismissal of a teacher is inherently subjective and therefore must be dealt with case by case. The courts have struggled and are still currently struggling to find a satisfactory legal definition for these terms but for the most part have been unsuccessful. The subjectivity of these terms is one reason that courts require that dismissal on the grounds of immorality or misconduct include a showing that the offending conduct has affected classroom performance, (McCormick, 1985, 9) or an indication that the teacher's conduct was likely to bring his employer into disrepute, (Pidcocke, 1989, 29) or evidence of a 'rational nexus' between the conduct performed outside of work and work-related duties. (Sorenson, 1987, 26).

Since the terms immorality and misconduct cover of a necessity, such a broad range of conduct, it is helpful to look at cases which have been found to warrant dismissal and cases which have not.

"Acts that have been considered sufficient grounds for dismissal because of immorality include sexual advances to a pupil,⁵⁰ criminal conviction for homosexual

solicitation,⁵¹ homosexual activism,⁵² known homosexuality,⁵³ false statements on an application,⁵⁴ conviction for prostitution,⁵⁵ transsexuality,⁵⁶ cohabitation,⁵⁷ misappropriation of funds,⁵⁸ and submission of false documents to the Internal Revenue Service.⁵⁹

Acts that have been adjudged immoral, but did not sufficiently affect teaching performance to warrant dismissal include discrete homosexuality,⁶⁰ use of profane language in classroom instruction,⁶¹ conviction of driving while intoxicated,⁶² indictment on felony drug charges,⁶³ unwed motherhood,⁶⁴ and apparent promiscuity.⁶⁵" (McCormick, 1985, 10)."

The broad range of the term immorality has even been the basis of court challenges that assert that the statutes involved are "void for vagueness", covering such a range of behaviors that some behavior which is constitutionally protected may also be covered under them. And thus the statutes may be unconstitutional:

"one court has found a statute similar to North Carolina's to be unconstitutionally vague and unenforceable; it held (a) that the statute under which a teacher was dismissed on grounds of immorality was impermissibly vague because it fails to give fair warning of what conduct is prohibited and because it permits erratic and prejudiced exercises of authority,⁶⁶ and (b) the dismissal was invalid because the potential for arbitrary and discriminatory enforcement is inherent in such a statute." (McCormick, 1985, 10).

However hazy the boundaries of the definition of immorality are, the courts have clearly shown that they will "support the school's right to dismiss a teacher on grounds of immorality", (McCormick, 1985, 11), if the said act is determined to have an adverse effect on the classroom or on the operations of the school. Nine factors are commonly used by courts to determine what constitutes a sufficient adverse effect:

- "(a) Where did the act take place?
- (b) What is the status of any other person involved?
- (c) How recently did the conduct occur?
- (d) What was the effect of the conduct on students and fellow staff?
- (e) What is the teacher's past history?
- (f) What extenuating or aggravating circumstances, if any surround the conduct?
- (g) Is it likely that the conduct will recur?
- (h) How praiseworthy or blameworthy are the motives involved?
- (i) To what extent will disciplinary action inflict an adverse or chilling effect on the constitutional rights of the teacher or other teachers?

Not all of these factors are relevant in each case and many of them are closely related Nevertheless, these factors are predominant in case law." (McCormick, 1985, 12).

Incompetence

As was the case with immorality and misconduct above, so it is with incompetence or one of its equivalent terms inefficiency, unfitness, incapacity or inadequate performance. Once more most state education legislation and most provincial school acts list one or more of these terms as possible cause for teacher dismissal, but again few states or provinces have attempted to define them, due to the difficulty in finding suitable terminology that will fit all past, present and possible future scenarios. Bridges, 1986, states that "only two states, Alaska and Tennessee have attempted to define the terms", but even then "neither state supplies any criteria or

standards for determining what constitutes incompetent performance in the classroom." Even the courts have been loath to "specify the criteria and the standards by which incompetence can be evaluated." (Bridges, 1986, 5). With the legislatures and the courts reluctant to jump in and define the terms, and therefore no established or clear-cut standards for judging whether a teacher has satisfied any criteria for competence, much less incompetence, the task is deferred to each "school district to establish its own evaluative competency criteria, jointly with its teacher's association or union, its administrators, and its supervisory staff." (Dolgin, 1981, 19). This is becoming a necessary step in many states due to the continuing evolution of tenure laws. In some state tenure laws, a dismissal decision involving teacher competence is not "subject to review by the courts *unless* the local board of education or the state board of education abused its authority by denying the dismissed teacher procedural or substantive due process by *not providing evaluative criteria concerning classroom performance.*"⁶⁷ (Dolgin, 1981, 19).

The research performed in the early part of the last decade by the research group that included Edwin Bridges, Patricia Gumpert, Barry Groves, and others at Stanford University's School of Education "sheds some light on how administrators"⁶⁸ cope with the definitional uncertainty inherent in using incompetence as a reason for weeding teachers out of local school districts. Incompetence, as reflected in the personnel decisions of the administrators, (that were studied)

appears to mean persistent failure in one or more of the following respects:

- (1) failure to maintain discipline;
- (2) failure to treat students properly;
- (3) failure to impart subject matter effectively;
- (4) failure to accept teaching advice from superiors;
- (5) failure to demonstrate mastery of the subject matter being taught; and
- (6) failure to produce the intended or desired results in the classroom.

.... (I)ncompetency ordinarily manifests itself in a pattern of recurring instances, rather than in a single egregious incident (Tigges, 1965; Rosenberger and Plimpton, 1975). Because there are no clear-cut standards or yardsticks for determining whether a teacher has failed to meet a particular criterion, supervisors must accumulate numerous examples of a teacher's shortcomings to demonstrate that a pattern of failure exists." (Bridges, 1986, 5).

A statement exemplifying the extent to which the courts will defer to a "professional or expert" judgement by an administrator was quoted from Clark v. Whiting by Citron , 1985, 300. It states;

"A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests. These determinations are in an area in which school officials must remain free to exercise their judgement Courts are not qualified to review and substitute their judgement for these subjective, discretionary judgements of professional experts...."

A slightly different approach is taken by Harrison, 1982, 255 in his discussion of the "Termination of Teacher Contracts in Canada". He suggests that appeal to the courts should only be on the basis of matters of law and not of fact. He also suggests that there be additional due process steps in the supervision, evaluation, and appeal for teachers facing termination on the basis of incompetence. In his model, termination for alleged incompetence would be handled by means of a different process than termination for other reasons.

"The process would include the following features: adherence to the rules of natural justice; several evaluations by more than one person over a period of time; at least one evaluator from outside the school system; a panel of educators to rule on the alleged incompetence; and appeal to the courts on matters of noncompliance with proper procedures.

When an evaluation was written about a teacher, the teacher would have the opportunity to rebut information contained in the evaluation. Application of the rules of natural justice would allow teachers to state their reactions to an evaluation report.

In order to assure validity and reliability, evaluations would be made by more than one person on more than one occasion. To eliminate the possibility of bias an external evaluator would be utilized.

A panel comprised entirely of peers would be in a good position to assess the alleged incompetence. The decision of the panel of peers would be final and binding with the exception of an appeal to the courts on the basis of noncompliance to procedures."

Although this model appears to be due process overkill, it has inherent within it a number of steps which virtually ensures both procedural and substantive fairness and eliminates the possibility of arbitrary and capricious actions on the part of any one evaluator.

Educational Administrators' Duty

A large number of articles reviewed were position statements or quasi-legal opinion statements that emphasized the

responsibility of the administrators to 'rid the system of incompetent or immoral teachers'. These were found in a number of administratively based journals such as; The American School Board Journal, The Canadian School Executive, School Law Bulletin, or The Executive Educator.⁶⁹ An especially vehement article in the Executive Educator, 1986, by Bailey and Wear stated;

"When it's necessary to weed out incompetent teachers, you (the superintendent) must be the gardener the decision to fire a tenured teacher is up to you Three good reasons exist for ridding schools of inferior teachers: First, you're responsible for ensuring high-quality instruction in each and every classroom Second, it's your responsibility to protect students' rights to learn and to be physically safe. Those rights can be abridged in unruly, disruptive, poorly organized classrooms. In fact, the failure to maintain classroom discipline is the most common charge leveled at teachers for dismissal under the rubric of 'right to learn.' Third, it's your responsibility to upgrade the school system's education program."

With respect to immorality there can be no doubt that "a school teacher's influence on children is a matter of great importance to society as a whole and a source of special concern to parents and school administrators." (McCormick, 1985, 9) A good Canadian example of this would be Alberta's Keegstra affair in 1982 where a well-liked teacher, described by his superiors as a good disciplinarian, and an effective teacher, was dismissed from his teaching position for "refusing to follow the authorized curriculum and for ignoring the lawful instructions of his school board." (Schwartz, 1986, 26) This dismissal charge may appear unusual when you consider that Mr. Keegstra was teaching his students hatred of the Jews. He taught his students that an international Jewish conspiracy existed, which

was responsible for the Great Depression, the French Revolution, the First and Second World Wars, and the Vietnam war. He told his students that the Nazi Holocaust never occurred; it was merely a Zionist plot to gain sympathy. He told his students that this international conspiracy controlled the world economy, controlled all textbook publishers, and distorted the contents of all authorized texts and standard reference books. His students were rewarded with good marks for returning to him the material he presented in class, and they got bad marks and warnings about propoganda, if they used standard references. (Bercuson and Wertheimer, 1985) The effectiveness of Mr. Keegstra's teaching can be shown by the testimony of former students and by reports of interviews with them. He inculcated his personal beliefs in many that he taught over the decade that he taught in Alberta and he left others unsure about just what to believe. (Lee, 1985, 38-46).

As stated by McCormick, 1985; "The teacher's influence on his or her pupils goes beyond the subject matter of the lesson. The teacher cannot teach without conveying some of his or her attitudes on society, politics, and ethics. Because of this sensitive role, the teacher has always been subject to the closest regarding his or her fitness to teach. Traditionally, this scrutiny has included an examination of the teacher's private life as well as his or her classroom competency."

In discussing the historical status of the teacher's social position from the inception of teaching in America to the present, Dan Lortie, 1975, p 11 stated "The texts and materials used(in teaching) were heavily religious in content.

The usual non-teaching work of teachers consisted of marginal (even menial) tasks in the domain dominated by the clergy. Teachers rang the church bells and swept up and, on the other hand, taught Bible lessons and occasionally substituted for an ailing pastor. *Those who wished to teach had to accept stern inspection of their moral behavior,*⁷⁰ and more often than not the inspector was a clergyman--we have noted that ministers were usually represented in the visiting committees which evaluated the teacher's work. It appears that some young men aiming toward the ministry took on teaching duties along the way. For such persons, teaching can be seen as an apprenticeship to be discarded after one acquired credentials for a more significant position."

In view of the historical status of the teaching role, it is no longer any wonder to this author that the traditional freedom that society has had to scrutinize a teachers' private life runs headlong into the 'right to privacy' as interpreted from provisions in the United States constitution. It is also no wonder that these conflicting rights of society vs. the individual have spawned so much controversy and so many inconsistent court decisions.⁷¹

In Canada not only is there an expectation by parents, school boards, and education departments that teachers will set an academic and moral example for students, but in some provinces there is also a legislative edict. According to Section 74 of Nova Scotia's Education Act, teachers are to promote moral conduct by both precept and example. (Mackay, 1984, p.269)

"It is the duty of a teacher in a public school to (f) encourage in the pupils by precept and *example* a respect for religion and the principles of Christian morality, for truth, justice, love of country, humanity, industry, temperance and *all other virtues*;"⁷²

Summary

Out of the multitude of articles reviewed covering the period from 1966 to 1993, a large number of articles (in whole or in part) dealt with substantive and procedural due process protection for teachers (natural justice in Canadian terms). An equally large number of articles written with administrators in mind dealt with the administrative perception that it is the responsibility of competent administrators to rid the education system of incompetent or immoral teachers. A smaller set of articles were reviews of litigation involving teachers in their relation to the public school system. These reviews were often summarized with an overview of the legal principles involved in various litigation cases that were intended to clarify the options open to policy makers at various levels; school, school district, or legislative, to help them avoid legal pitfalls. Often short papers were position statements or legal opinion statements based on one or two case studies of litigated cases that typified some particular legal viewpoint. Very few articles were systematic investigations that provided empirical data, identified the conceptual perspectives that guided the research, specified the methods used to carry out the research, explained the procedures employed to address validity and reliability, and offered explanations for the findings of the research. There appeared to date to be only one published study of this type that dealt with teacher dismissal in British

Columbia, see Diane J. Marshall, 1986. In the U.S. the most prominent study of this type was Project Report No. 84-A1 (Feb. 1984) from the Institute for Research on Educational Finance and Governance by Edwin M. Bridges and Patricia J. Gumpert, entitled The Dismissal of Tenured Teachers for Incompetence. This current Masters project is modelled after the Bridges and Gumpert study done for the Stanford University, School of Education.

The definitive texts on teacher incompetence and dismissal of teachers were written by Edwin Bridges and Barry Groves (1984) with a follow-up text by Bridges alone in 1986. In these two texts the various facets of the problem are discussed in detail: a) Evaluation and identification of incompetence, b) provision of necessary resources for remediation, c) proving teacher failure, d) accountability and competence of supervisors, e) induced exits, and f) providing fair hearing prior to dismissal. In both of these texts as well as a large number of the articles reviewed however, there is not a large amount of discussion of the state board of education appeal or arbitration hearing which may follow the dismissal of a teacher and the attendant school board hearing, especially if any of the dictates of natural justice or administrative fairness have not been followed properly in the School Board hearing. A possible reason for this is that Arbitration Board Hearings, Board of Reference hearings and Review Commission hearings⁷³ are not public and therefore arbitration board decision records are not public documents, which makes access to them quite difficult. A second possible reason for lack of appeal board or arbitration

board hearing studies is the U.S. preference for judicial review of school board decisions rather than submitting to a quasi-judicial tribunal where rules of evidence, rules of cross-examination, stare decisis, etc. are not statutorily guaranteed and therefore are not rigorously applied.

I end this review of the current literature on teacher incompetence and dismissal with a statement by Citron, (July 1985) which was made with respect to tenure laws in the United States but also has application to the equivalent legislation in Canada. "The statutory requirements for dismissal are designed to protect due process (natural justice -Can.) rights based on the Constitution, so they must be met exactly."

Notes

¹ no longer defined in the act or the P.S.A. Regulations.

² Bills 19 & 20 which became effective Jan. .1, 1988, repealed these sections, replacing the appeal procedures (Review Commission and effectively Board of Reference also) with contractually defined access to arbitration boards under the control of the grievance provisions of the local collective agreement and Part 6 of the Industrial Relations Act.

³ this was also changed by bills 19 & 20 to include compulsory membership in the College of Teachers, and exclude compulsory membership in the British Columbia Teachers Federation which had been a condition of employment since 1973.

⁴ re Housing 235 N.C. 463, 70 S.E.2d 500 (1952). Condemnation by the city of Salisbury of property on the Livingstone College Campus - property that the city sought for public housing.

⁵ 772 F.2d 759 (11th Cir. 1985).

⁶ 55 U.S.L.W 4245

⁷ Littlejohn v. Rose ___, F. Supp. ___ (6th Cir. App. 1986).

⁸ Perry v. Sinderman, 1972. Supreme Court of the United States, 408 U.S. 593, 92 S. Ct. 269, 33 L. Ed. 2d 570.

⁹ Board of Regents of State Colleges v. Roth, 1972. Supreme Court of the United States, 408 U.S. 564. 92 S. Ct. 2701, 33 L. Ed. 2d 548.

- 10 Patchogue-Medford Congress of Teachers v. Board of Educ., 505 N.Y.S.2d 888 (App. Div. 1986).
- 11 Wygant v. Jackson Bd. of Educ. 106 S. Ct. 1842 (1986); Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985); Smithtown Cent. School Dist. v. Beller, 502 N.Y.S.2d 781 (App. Div. 1986); Wantagh Union Free School Dist. v. New York State Div. of Human Rights, 505 N.Y.S.2d 713 (App. Div. 1986).
- 12 Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 276 (1977).
- 13 Kercado Melendez v. Aponte Roque, 641 F. Supp. 1326 (D.P.R. 1986).
- 14 Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. at 372; Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985). See discussion of this opinion in the Yearbook of School Law 1985 at 5-6.
- 15 Hall v. Board of Education, 639 F. Supp. 501 (N.D. Ill. 1986).
- 16 Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986). see also Eckmann v. Bd. of Educ. of Hawthorn School Dist., 636 F. Supp. 1214 (N.D. Ill 1986).
- 17 Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985).
- 18 Pickering v. Board of Educ. 391 U.S. at 570.
- 19 Bernasconi v. School Dist., 548 F.2d 857 (9th Cir. 1977).
- 20 Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).
- 21 Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 276 (1977).
- 22 Punger, Douglas S., (April, 1983). Teacher speech and the first amendment, School Law Bulletin, Vol. 14, No.2; Pickering v. Board of Educ., 391 U.S. at 568 (1979).
- 23 Id. at 569
- 24 Id. at 570-573.
- 25 For further discussion of litigation exemplifying the various categories of substantive due process see The Yearbook of School Law published by the National Organization for Legal Problems in Education (U.S.), and the Journal of the Canadian Association for the Practical Study of Law in Education (Can.).
- 26 Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).
- 27 Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988).
- 28 *Ibid.* at 570.
- 29 *Ibid.* at 571
- 30 Pat Pitsula and Michael E. Manley-Casimir, "The Charter, Educational Administration and U.S. Case Law: Contrasting Legal Norms and Traditions" (1989) 2 Education and Law Journal 49 at 51.
- 31 Lord Lloyd of Hampstead and M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 5th ed. (London: Sweet & Maxwell, 1985) at 1102.
- 32 P.W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985) at 184.
- 33 Review of E. L. Hurlburt and M. A. Hurlburt, School Law Under the Charter of Rights and Freedoms, University of Calgary Press, 1989, by Michael E. Manley-Casimir.

- ³⁴ Cafeteria & Restaurant Workers Union Local 473, *AFL-CIO v. McElroy*, 367 U.S. 886, 895, (1961); *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 155 (5th Cir. 1961); *Booher v. Hogans*, 468 F. Supp. 28, 32, *aff'd without opinion*, 588 F.2d 830 (6th Cir. 1978); *Graham v. Knutzen*, 351 F. Supp. 642, 664 (D. Neb. 1972); *In re Monica Schnoor*, 1 D.P.I. App. Dec. 136 (Iowa 1977).
- ³⁵ *Hannah v. Larche* 363 U.S. 420, 422 (1960).
- ³⁶ *Sullivan v. Houston Ind. School Dist.*, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969); *Texarcana Indep. School Dist. v. Lewis*, 470 S.W.2d 727, 737-738 (Tex. 1971).
- ³⁷ See *Goss v. Lopez*, 419 U.S. at 579; *Kendall v. Bd. of Educ. of Memphis City*, 627 F.2d at 5; *Brouillette v. Bd. of Directors of Merged Area IX*, 519 F.2d at 128; *Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977); *Weyenberg v. Town of Menasha*, 401 F. Supp. at 803; *Graham v. Knutzen*, 351 F. Supp. at 665.
- ³⁸ *Wigby v. Pearson, Spray, and Board of Inquiry*, 2. W.W.R. 654 (1977).
- ³⁹ *Stein v. Board*, 792 F.2d 13 (2d Cir. 1986)
- ⁴⁰ *Zanavich v. Bd. of Educ.* 513 A.2d 196, 197 (Conn. App. Ct. 1986).
- ⁴¹ *Wells v. Dallas Indep. School Dist.*, 793 F.2d 679 (5th Cir 1986).
- ⁴² *Salinas v. Central Educ. Agency*, 706 S.W.2d 791 (Tex. Civ. App. 1986) -notice and hearing must precede adverse employment action; *Koerner v. Joppa Community High School Dist. No. 21*, 492 N.E.2d 1017 (Ill. App. CT. 1986) -dismissal ineffective where notice not given within 60-day statutory period; *Steinway v. Bd. of School Trustees*, 486 N.E.2d 1045 (Ind Ct. App. 1985) -written notification of intent to dismiss required not more than 40 nor less than 30 days prior to consideration; *Kehoe v. Brunswick City School Dist. Bd. of Educ.*, 493 N.E.2d 261 (Ohio Ct App. 1983) -timely notice of intent not to reemploy waived by acceptance of position as substitute teacher; *Miller v. Culver Community Schools Corp.*, 493 N.E.2d 181 (Ind. Ct. App. 1986) -receipt of timely notice unsupported by evidence where secretary testified notice was on principal's desk.
- ⁴³ *Jinkerson v. Lane County School Dist.*, 20 Or. App. 174, 153 P.2d 289 (1975)
- ⁴⁴ *Stoddard v. School Dist No. 2*, 590 F.2d 829 (10th Cir. 1979); *Shatting v. Dillingham School Dist.*, 617 P.2d 9 (Alaska 1980).
- ⁴⁵ *Drown v. Portsmouth School Dist.*, 451 F.2d 1106 (1st Cir. 1971); *Lewis v. Tucson School Dist. No.1*, 23 A.iz. App. 154, 531 P.2d 199 (1975). See *Berger, Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 999 (1969).
- ⁴⁶ *Kieth v. Community School Dist.*, 262 N.W.2d 249 (Iowa 1978).
- ⁴⁷ *Shatting v. Dillingham School Dist.*, 617 P.2d 9 (Alaska 1980); *Dobervich v. Central Cass Public School Dist.*, 302 N.W.2d 745 (N.D. 1981).
- ⁴⁸ *Fay v. Board* 298 N.W.2d 345 (Iowa App. 1980).
- ⁴⁹ *Board of School Trustees of School District No.31 (Merritt) v. Sederberg* (1979), 16 B.C.L.R. 149 (B.C.S.C.).
- ⁵⁰ *Kilpatrick v. Wright*, 437 F. Supp. 397 (M.D. Ala. 1977).
- ⁵¹ *Moser v. State Bd. of Educ.*, 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972).
- ⁵² *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).

- ⁵³ Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (1977).
- ⁵⁴ Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974).
- ⁵⁵ Governing Bd. v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974).
- ⁵⁶ Grossman v. Bd. of Educ., 127 N.J. Super. 13, 316 A.2d 39, *cert. denied*, 65 N.J. 292, 321 A.2d 253 (1974).
- ⁵⁷ Jerry v. Bd. of Educ., 35 N.Y.2d 535, 324 N.E.2d 106 (1974). *see also* Sullivan v. Meade Indep. School Dist. No. 101, 530 F.2d 799 (S.D. 1976).
- ⁵⁸ Appeal of Haney, 406 Pa. 515, 178 A.2d 751 (1962)
- ⁵⁹ Logan v. Warren County Bd. of Educ., 549 F. Supp. 145 (S.D. Ga. 1982).
- ⁶⁰ Norton v. Macy, 417 F.2d 1161 (D.C. Cir 1977).
- ⁶¹ Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).
- ⁶² Lindgren v. Bd. of Trustees, 171 Mont. 360, 558 P.2d 468 (1976).
- ⁶³ Overton v. Goldsboro City Bd. of Educ., 304 N.C. 312, 283 S.E.2d 495 (1981).
- ⁶⁴ Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975).
- ⁶⁵ Fisher v. Snyder, 476 F.2d 375 (8th Cir 1973).
- ⁶⁶ Burton v. Cascade School Dist., 353 F. Supp. 254, 255 (D.C. 1973).
- ⁶⁷ authors emphasis.
- ⁶⁸ Id.
- ⁶⁹ Please note from the titles of these journals, the reading audience that they are intended for.
- ⁷⁰ authors emphasis.
- ⁷¹ *see* Fleming, T. (1978) Teacher dismissal for cause: public and private morality, J. of Law and Education. 42; and Delon, Floyd (1984) Dismissal of Public School Teachers for Immoral Conduct. Paper presented at a meeting of the Kentucky Council of School Attorneys. *for United States Cases. See also* Siracusa, Gabriella (1991), John and ILze Shewan Case *for Canadian reference.*
- ⁷² authors emphasis; R.S.N.S. 1967, c. 81, s. 74, as amended
- ⁷³ British Columbia was unique among the provinces in the provision for a second tribunal, the Review Commission, which was established specifically to deal with allegations of teacher incompetence as opposed to dismissals for misconduct. (Jan. 1, 1974-Jan 4, 1988). (Marshall, 1986, p.10; Czuboka, 1986. p.197)

CHAPTER 3**METHOD****Literature Search Process**

Teacher incompetence and dismissal is by its very nature a very broad realm of study covering a large number of social issues. To provide some structure to the literature search and make the sheer volume and variety of documents on the subject a little more comprehensible, a modification of the exploratory case study method for reviews of multivocal literatures (Ogawa and Malen: 1991) was used. A comprehensive search for documentation was conducted using the search terms; teacher dismissal, teacher discipline (of and not by; the teacher), teacher behavior, teacher-administrator relationship, teacher alienation, teacher attitudes, teacher characteristics, teacher evaluation, teacher burnout, and teacher competence.

Articles dealing with teacher competence from the perspective of teacher education, or teacher inservice programs, or teacher internship programs were excluded from this review as they were deemed beyond the topic of this research. Other search terms initially examined and then excluded as not central to the study were; competency - based teacher education programs, performance - based teacher evaluation systems, teacher testing programs, competency indicators for teacher training institutions, and effective vs. ineffective supervision. Lastly the search term; teacher situational incompetence was examined in the context of teachers at risk.

Appendix A contains a chronological listing of the historical changes to the suspension and dismissal provisions of

the B.C. Public Schools Act, while Appendix B contains a detailed account of the literature search process.

Research Method

This study examined British Columbia Board of Reference and Review Commission decisions within the period from 1972 to 1987, in terms of Bridges and Groves Typology of Teacher Failure (1984). It then identified and examined in greater depth selected cases that illustrate distinct facets of this problem, taking examples from the same period.

This study replicated (with some differences to account for differing legislation and differing data sources) an existing study by Bridges & Gumpert (1984) in which national data from United States court report summaries in the period 1939 to 1982 were examined for instances which involved the dismissal of tenured teachers. It similarly involved four main methodological tasks: (A) location of reported instances which involve the dismissal of teachers, (B) determination of which dismissal cases to include in the analysis, (C) description of the features of the cases to be included, and (D) analysis of the data for trends, patterns, or consistencies.

(A) Location of Reported Instances Which Involve the Dismissal of Teachers.

In British Columbia there are 5 locations where information regarding disciplinary actions against teachers by school boards, could (in theory) be obtained, however gaining access to this information was a major stumbling block in the design of this study. The following reasoning was used by the author to choose the College of Teachers as the appropriate data source.

POSSIBLE DATA SOURCE #1

Individual school boards keep standard employment records on the teachers in their district (past and present). This information had two disadvantages for use in this study; one, it was suggested to the author by administrators even in his own district that the files were of too sensitive a nature for him to be allowed access; and two, gathering the information needed for the study in this way would involve obtaining permission for authorized access to restricted files from 80 different British Columbia school districts, and in light of disadvantage #1, this possibility seemed remote.

POSSIBLE DATA SOURCE #2

The Court Registry of the Supreme Court of British Columbia was provided with anonymous copies of Board of Reference decisions for study by lawyers to determine precedent; however, these decisions had every identifying reference as to school district, age, name, school, and community erased so that confidentiality could be maintained. This erasure of information from these decisions made them unusable for this study, as many of the variables that the author wished to code had been erased. More importantly however, was the fact that Review Commission decisions were not provided to the Vancouver Court Registry.

POSSIBLE DATA SOURCE #3

Small Teacher Records, used by the Ministry of Education prior to 1940, had for a number of years been in the process of being converted to microfiche and stored in the public documents section of the provincial archives. The disadvantages to this

source of data were that no one seemed to know what type of information was contained on the Small Teacher Records and that no information could be obtained from them about Review Commission Reports as the commission did not exist at the time that the Small Teacher Records were in use.

POSSIBLE DATA SOURCE #4

Casefiles on teachers dismissed from B. C. school districts located at the legal office of the British Columbia Teacher's Federation would in all likelihood contain sufficient information to be of use to this study, however a discreet inquiry at the B.C.T.F. while the author was there on another errand satisfied him that he would not be allowed access to those files.

POSSIBLE DATA SOURCE #5

The only location that would provide enough detailed information for this study was the Ministry of Education microfiche records kept with the individual teacher's certification files. The aforementioned files had until 1987 been kept at the Professional Relations Branch of the Field Services Division of the Ministry of Education in Victoria. Since December 24, 1987 however, changes in legislation (Bills 19 & 20)¹ had moved responsibility for the discipline and certification/decertification of teachers out of the hands of the Ministry of Education and had placed it into the hands of the newly formed British Columbia College of Teachers. The Professional Relations Branch had been concluded and its files had been broken up. Some of the files had been placed in storage for a waiting period before destruction, some of the very old teachers

records had been stored on microfiche and filed in the public documents section of the Provincial Archives and the bulk of the more recent teachers files (on microfiche) had been sent to the College of Teachers with the removal of some confidential information such as; Crown Council Reports, sworn statements of victims, copies of police investigations and any other information that had been submitted to the Ministry of Education by the Criminal Justice Branch under a special agreement that the Ministry of Education had with the Ministry of the Attorney-General until 1987.

After initial telephone discussions with the registrar of the College of Teachers I began to realize that gaining access to the information required by my study would be difficult. A meeting with Dr. Piddocke of Simon Fraser University affirmed my belief that the information required for the study was available in the microfilmed Board of Reference and Review Commission decisions, as he had performed a previous study of contentious teacher behaviors that result in misconduct charges by studying the Board of Reference decisions while they were under the control of the Ministry of Education (May 1988).

On June 5/91 a request for access to selected teachers files was sent to the Registrar of the College of Teachers (APPENDIX D). This request was politely but firmly turned down with the suggestion that I contact the Ministry of Education again for access to this documentation (APPENDIX E). An initial phone call requesting access to Earl Cherrington's stored files from the former Professional Relations branch was followed by a formal request for access to both Mr. Gib Lind of Field Services

Division and Mr. Dave Williams of Program Support Services Division (APPENDICES F & G). Mr. Lind's response (APPENDIX H) was very encouraging and arrangements were made through the Ministry of the Attorney General to have a non-disclosure agreement made up between the author (researcher) and the Ministry of Education (APPENDIX I).

This portion of the data collection yielded sufficient information (lists of Review Commissions, Boards of Reference, Certificate suspensions and cancellations) for me to then request access to specific teacher casefiles held at the College of Teachers (C.O.T.) through Mr. Lind's office. Mr. Lind then met with Mr. Douglas Smart of the C.O.T. on Wednesday August 21/91 to discuss the project and the possibility of access to specific teacher casefiles and Mr. Smart agreed to present the proposal before the Council of the C.O.T. on Friday August 23/91. Mr. Smart did not know how the council would receive the proposal as it was the first one of this nature that they would have to deal with since the inception of the college. I received word through Mr. Lind's assistant at 10:58 A.M. on August 23/91 that "permission had been granted by the council to work with the registrar at no cost to the college". (Article 8, APPENDIX M)

A meeting with Mr. Smart, Dr. Michael Manley-Casimir (Director of Graduate Studies with the Faculty of Education, Simon Fraser University) and the author (researcher) was set up by phone for Aug. 30/91 to finalize the terms, conditions, and extent of access to a limited set of teacher casefiles (APPENDIX J). The agreed upon casefile list was sent to the College on

October 1/91 (APPENDIX J) and another Non-disclosure agreement (between the College and the author this time) was signed with Mr. Gordon Eddy (Assistant Registrar) on January 3/92 (APPENDIX M) .

Access was for Spring break 1992 and the first three weeks of Summer vacation 1992. Mr. Eddy and Marie Kerchum (Deputy Registrar) also indicated to me at this time that this project might have an effect on their current work as they were setting up a precedent framework for the analysis of previous casefiles and teacher discipline decisions for incoming C.O.T. board members and various lawyers involved with new discipline cases. Detailed notes and encoded data values for the variables listed in **table 3(1)** were taken for 58 selected teacher dismissals. This data was added to the data accumulated the previous summer at the Ministry of Education (19 out of 38 cases had enough data to be useful for this study) from anonymous Certification Advisory Committee files located in the stored fileboxes from the former Professional Relations Division of the Deputy Ministers Office.

(B) Determination of Which Dismissal Cases to Include in the Analysis

Seventy-seven cases² containing data with sufficient detail were selected for the final data set to be analyzed. The cases ultimately chosen for analysis had to meet three criteria: 1) the case had to involve dismissal of a teacher or an administrator; 2) the case had to involve dismissal for either misconduct, a minimum of 3 less than satisfactory reports or for declining enrollment; 3) the case had to have a paper trail

that contained sufficient detail to code at least 6 of the seven classes of variables to be analyzed in this study (**table 3(1)**).

Anonymous Board of Reference decisions filed in the certification advisory committee files stored in temporary storage for a waiting period before destruction frequently had information erasures specifically concerning variables 2b-2e and 5 (**table 3(1)**) that made them unusable for this study. Therefore 12 cases of ethical failure (1989), 1 case of technical failure (1989), 5 cases of ethical failure (1988), and 1 case of ethical failure (1978), were not included in the quantitative sample set.

(C) Description of the Features of the Cases to be Included.

TABLE 3(1)

To characterize the cases selected, seven classes of variables were used:

- (1) Background features of the case;
 - a) the year in which the ruling was made,
 - b) the year that the teachers problem was identified
 - c) the school district involved,
 - d) the type of quasi-judicial forum involved (Board of Reference, Review Commission, Transfer Review Committee, Certification Advisory Committee, or College of Teachers Discipline Committee).
- (2) Characteristics of the teacher;
 - a) gender,
 - b) number of years at the school where the dismissal action was initiated,
 - c) number of years employed in the school district,

- d) number of years of teaching experience,
- e) i) grade level(s) taught,
 - ii) secondary subjects taught.
- (3) Grounds for dismissal;
 - a) technical failure,
 - b) bureaucratic failure,
 - c) ethical failure,
 - d) productive failure,
 - e) personal failure.
- (4) Nature of the evidence;
- (5) Outcome of the tribunal;
 - a) eventual certification status
- (6) Possible grounds for reversal;
- (7) Whether the case proceeded to judicial review.

DISCUSSION OF VARIABLE CLASSIFICATION

1) Four background features of the cases were noted: the year in which the ruling was made; the year that the teachers problem was identified; the school district involved, coded with actual school district number for analysis, but coded with a 2 character alphanumeric code to maintain confidentiality for reporting purposes; and the type of quasi-judicial forum involved (Board of Reference, Review Commission, Transfer Review Committee Certification Advisory Committee, or College of Teachers Discipline Committee), coded consecutively 1-5.

2) Five characteristics of the teachers involved were classified: Gender, coded male =1 and female = 2; years at the school where the dismissal action was initiated, coded with actual number of years; years employed in the school district

before dismissal, again coded as per actual number of years; number of years of teaching experience, coded with actual number of years; grade level or function coded with primary = 01, intermediate = 02, junior high school = 03, senior high school = 04, counselling or guidance = 05, special education = 06, administrative = 07, and missing = 99.

3) Bridges' categories of teacher failure (Bridges and Groves, 1984, pg. 7-8) were coded with (1) for present in teacher casefile when detailed analysis performed, or (2) for not present in teacher casefile when detailed analysis performed. The reliability of the coding for teacher failure type was not checked due to time restraints on data collection while at the College of Teachers.

4) Fourteen categories of nature of evidence against the teacher were coded: 01 = three or greater than three less than satisfactory reports; 02 = declining enrollment in the school where teacher was employed; 03 = sexual misconduct (indecent assault, sexual assault, sexual intercourse with a minor); 04 = physical or psychological abuse of students (manhandling students, intentional corporal punishment, continuous negative or derogatory remarks to students, or continuous screaming at students); 05 = having an affair with former student; 06 = charged with a criminal offence (illegal substance use, sales, or physical assault outside of school); 07 = substance abuse while on the job (use of alcohol or illegal drugs on the job, with students or providing various substances for students to use); 08 = insubordination (loud and abusive language to and about administration, disregarding administration directives,

failure to obey a lawful order of the school board, slanderous letter published about school board activities); 09 = neglect of duty (classroom or supervision duties only); 10 = absent without official leave, with full knowledge of consequences; 11 = forging reports from previous administrators; 12 = private life of teacher brings reputation of employer into disrepute (nude photo published); 13 = inappropriate discussion with a minor (discussion of mutual fears of homosexual orientation); 14 = mental instability (former public schools act Sec. 107(3)).

5) Four categories of tribunal outcome were coded: 01 = appeal allowed (dismissal overturned); 02 = appeal varied (tribunal varies penalty in order to provide substantial due process, only available to boards of reference and review commissions after legislative change of 1979-80); 03 = appeal or suspension upheld; 04 = appeal abandoned (resignation of teacher, school board buyout, judicial appeal upholds dismissal).

5a) Three categories of eventual certification status were coded: 01 = certificate retained; 02 = certificate suspended or cancelled; 03 = final certificate status unknown.

6) The possible grounds for reversal were very case specific and therefore were not coded in a quantitative sense and were not included in the statistical analysis or in the crosstabulations of the variables. This area is very important in the discussion of various cases however and is included in the chapter on illustrative cases.

7) The three categories of this final variable disregarded whether it was the school board or the teachers side of the

dispute which advanced it to a judicial review. It was coded simply as: 01 = case proceeded to judicial review; 02 = case did not proceed to judicial review; or 03 = information in casefile left it ambiguous as to whether the case proceeded to judicial review.

(D) Method by Which the Data was Analyzed for Trends, Patterns, or Consistencies.

The number of cases included in this study was relatively small and were listed for inclusion by a defined set of criteria and a signed legally binding agreement with officials at the College of Teachers. It was therefore the author's opinion that descriptive statistics rather than inferential statistics would be more informative with a sample set such as this. As defined by Glass and Stanley (1970) "the purpose of inferential statistics is to surmise the properties of a population from a knowledge of the properties of only a sample of the population"; therefore the sample of the population should be representative of the entire population. This sample set however represents an entire population as *it has been defined*, rather than a sample of the larger population as represented by the total number of teachers in the province. Inherent in the definition is the author's agreement for restricted access to the closed files with Mr. Smart the registrar of the College of Teachers. In this agreement only files which resulted in the establishment of a Board of Reference or a Review Commission were to be examined. Any cases where the tribunals had been requested, but then later had been abandoned due to private settlement agreements between the school districts involved and the teachers, were still

classified as closed and the author was denied access to these files.³

Four separate analysis runs with the coded data were performed using S.P.S.S. release 4.0 for IRIS on S.F.U.'s Silicon Graphics Computer "Selkirk". The first analysis used all frequency of variables, all descriptive statistics, and produced histograms of frequency distributions. The second analysis was similar except that it selected for only Review Commissions. The third analysis was similar to analysis 1 & 2 except that it selected for only Boards of Reference. The fourth analysis compared all variable lists with all other variable lists and produced Cross-Tabulation tables for every possible combination of variables, a total of 1121 pages of crosstabulation tables. Only a few of the total number of crosstabulation tables and other descriptive statistics tables are shown in the following chapter on Descriptive Statistics. The tables selected were the ones that showed graphically specific issues of interest to the research.

Notes

¹ Bill 20 was called the Teaching Profession Act

² Appendix J.

³ *see* Access/Non-Disclosure Agreement between the author and the Registrar of the British Columbia College of Teachers. Appendix M, Clause #1.

CHAPTER 4**DESCRIPTIVE STATISTICAL PROFILE**

This chapter addresses the answers to the seven research questions stated in chapter one. These research questions are similar to the questions asked by Bridges and Gumport, 1984 in their Project Report No. 84-A1 performed at the Stanford University School of Education, for the Institute for Research on Educational Finance and Governance. This Bridges and Gumport study will hereafter be referred to as the Parent Study and the study being presented in this paper will be referred to as the Present Study. The questions asked by the two studies are almost identical to allow for comparisons and contrasts to be drawn between them. However, the present study had to modify the guiding questions slightly in order to provide for the differences between a national study covering the entire continental United States, and a smaller study covering one Canadian province. There was also some major differences in the information base accessed by the two studies. The authors of the Parent Study drew their cases studied from "digests of teacher employment court cases appearing in state courts of appeal, state supreme courts, federal trial courts, federal appellate courts, and the U.S. Supreme Court.

[specifically these digests were] the *Teachers Day in Court* for the period 1939 to 1972 and the *School Law Reporter* for the period 1972 to 1982. In addition, the investigators [of the parent study] examined articles in annotated case reporters, law reviews, and law journals that focused on teacher incompetence." (Bridges and Gumport, 1984, p.6).

The present study drew the main body of cases to be analyzed from confidential B.C. Board of Reference and B.C. Review Commission reports stored at the B.C. College of Teachers. A few cases were drawn from Certificate Advisory Committee and Transfer Review Committee reports stored with Earl Cherrington's (director) files from the former Professional Relations Branch of the Ministry of Education, which the author examined at the Field Services Division office of the Ministry of Education with the assistance of Mr. Gib Lind. One or two cases were drawn from a study of the Legal Aspects of Teacher Termination for Incompetence in British Columbia by Diane J. Marshall, 1986.

QUESTIONS WHICH GUIDED THE RESEARCH:

Question #1 What is the incidence of dismissal of teachers in British Columbia for a) incompetence (pre-1988 P.S.A. Sec. 123 & pre-1988 P.S.A. Regs. 65), or b) professional misconduct (pre-1988 P.S.A. Sec 122)?¹

a) REVIEW COMMISSIONS

The analysis included only 14 out of the 24 Review Commissions ever requested of the Minister of Education. Of the total of 24; 14, (58%) were convened and 10, (42%) were withdrawn due to: a) resignation of the teacher (3 cases, 13%); or b) a settlement agreement between the school board and the teacher was reached before the hearings could be convened (6 cases, 25%)², or one, (4%) which was denied by the minister as dismissal under s. 153(1) was not subject to ministerial review.

One of the cases actually was heard once and requested twice as the first attempt to terminate the teacher was overturned by the Review Commission on the basis of a technicality³ and the second Review Commission although requested was eventually not required as an agreement was reached between the teacher and the school board before the commission could be convened. Five, (21%) of the Review Commissions convened upheld the teacher's appeal and ordered reinstatement of the teacher, while nine, (38%) of the Commissions supported the action taken by the board and dismissed the appeal. "Three of the cases, (12.5%) were improperly directed to the Review Commission in 1975 as they were not concerned with incompetence, but rather involved the demotion of vice-principals to classroom teachers" (Marshall, 1986). Of the five cases which were decided in favour of the teacher, two ended up with the teacher back in the classroom, one as indicated above ended up with a second Review Commission request and then went to a settlement/resignation agreement, one ended up with a medical leave of absence and the last went to a request for judicial review (B.C.S.C.) of the review commission's decision by the school board, whereupon the teacher suffered a coronary, negotiated a settlement/resignation agreement with the school board that was unconditional and irrevocable, and then promptly died. This actually increases the number of settlement agreements, (although after the Review Commission decisions were reached,) to 33% of the total. A combination of the data gathered by the author at the Ministry of Education and the data gathered by Marshall, 1986 is shown in the table below:

Table 4(1) Descriptive Statistics for Review Commissions

Year	Sex	Years of Exp.	Position	Teaching Level	Case Resolution	Court	
1974	F	18	Teacher	H.Sch	Board	-	
1974	F	14	Teacher	Elem.	Board	-	
1975	M	-	Vice-Pr.	Elem.	Abandoned	-	
1975	M	-	Vice-Pr.	Elem.	Board	BCSC	
1975	M	-	Vice-Pr.	Elem.	Board	BCSC	
1976	M	15	Teacher	H.Sch.	Board	-	
1978	M	7	Teacher	H.Sch.	Board	-	
1978	M	29	Teacher	H.Sch.	Board	BCSC/BCCA	
1979	F	25	Teacher	Elem.	Teacher	-	
1979	F	21	Teacher	Elem.	Teacher	BCSC	
1979	F	-	Teacher	Elem.	Settlement	-	
1979	M	-	Teacher	Elem.	Abandoned	-	
1980	M	-	Teacher	-	Withdrawn	-	*
1980	M	-	Teacher	H.Sch.	Denied	-	*
1980	M	-	Teacher	H.Sch.	Settlement	-	*
1981	M	-	Teacher	H.Sch.	Settlement	-	
1984	M	-	Teacher	Elem.	Settlement	-	
1985	F	9	Teacher	Elem.	Teacher	-	
1985	F	17	Teacher	H.Sch.	Board	-	
1985	M	-	Teacher	Elem.	Settlement	-	
1986	F	13	Teacher	H.Sch.	Teacher	2nd RC	*
1986	M	19	Teacher	H.Sch.	Teacher	BCSC	*
1987	F	-	Teacher	Elem.	Settlement	-	*
1987	F	18	Teacher	Elem.	Board	-	*

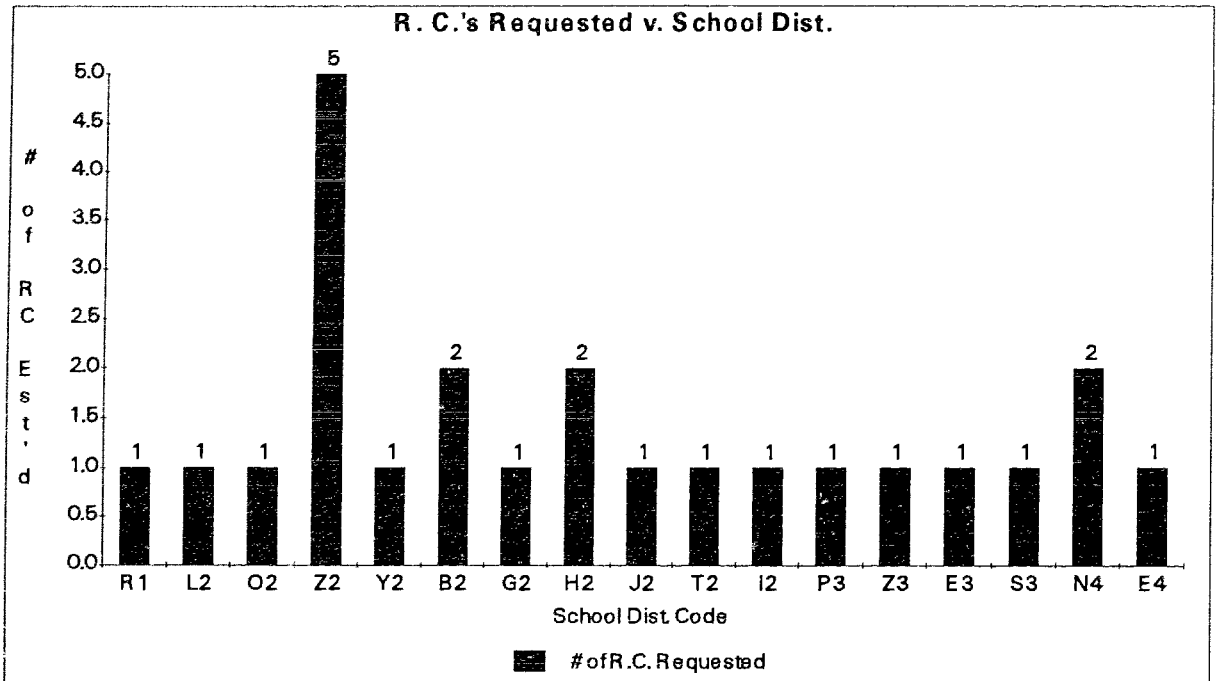
* these cases were not within the set of cases analyzed by Marshall, 1986. This set now represents all of the Review Commission cases that were ever requested of the Minister during the statutory existence of the Review Commission.

BCSC = British Columbia Supreme Court, BCCA = British Columbia Court of Appeals, Years of Exp. = years of teaching experience.

A brief look at the descriptive statistics as shown from this table indicates that 10 out of 24 cases or 42% were requested by females, 14 out of 24 cases or 58% were requested by males, the average teaching experience of the teacher was 17 years, 13 out of 24 cases or 54% involved elementary school educators, 10 out of 24 cases or 42% involved secondary school educators, and 5 out of 24 cases or 21% were appealed to a higher court.

One additional statistic worth noting is the frequency of Review Commissions requested versus the coded identity of school districts.

Figure 4(1)



School districts which were required to defend a dismissal decision on the basis of three less than satisfactory reports during 1974 - 1987 normally only had one or two disputed dismissals to defend. One school district during this time however, had five, four which they reached settlements on and one which they won. This statistic might be classed as an anomaly if it were not for the fact that this same school district was required to defend another disciplinary decision in the B.C. Supreme Court (1979) that involved the suspension of two teachers for insubordination towards their principal and the school board (MacKay, 1984, p. 265).

The two teachers were *summoned* by the school board to a hearing the day before the hearing was to take place. The

teachers did not attend and were suspended without pay. The two teachers were then *summoned* to another hearing 2 weeks later to explain their involvement in the school's problems. They attended this meeting, accompanied by a lawyer, but refused to answer any questions and challenged the authority of the board to *order* their attendance at the meetings. The board further suspended the teachers for a set time period on the grounds of refusal to obey its orders. The case was reviewed in the B.C.S.C. and in his summary Justice Fulton held that the conduct of the board in demanding the attendance of the teachers following insufficient notice and without furnishing any particulars of the complaint against them constituted a total denial of natural justice. Justice Fulton also concluded that the day-to-day discipline of school teachers was within the statutory domain of the district superintendent, and that the school board lacked the powers to interfere. He classified the orders of the board requiring the attendance of the two teachers on the two occasions in question as beyond the board's powers and unlawful, and thus the suspensions imposed for failure to appear or to answer questions as similarly unlawful. He ordered the employment records of the two teachers erased with respect to the incidents and the lost pay to be reimbursed.

The same school district also had three transfer review appeals and three Board of Reference Appeals during the 1974 - 1987 time period.

An agreement between the author and the registrar of the College of Teachers (Appendices J & M) allowed only the cases which resulted in a tribunal being convened to be examined in

detail, as only those cases would include Review Commission decision reports. The following tables include from the total number of Review Commissions requested, only the 14 commissions that were actually convened and the one that was reconvened a second time for the same teacher, (see notes #3).

The table below shows the number of Review Commission decisions handed down in any one year, and the frequency of the variable that was classified as the year of the teacher's problem. This variable indicates the year that the first, less than satisfactory report was received by the teachers in the study.

Table 4(2) Number of Review Commission Decisions per Year, displayed against the number of teachers whose problem was detected in that year.

Year	Review Commission Decisions	Year of teacher's Problem
1974	2	2
1975	2	3
1976	1	0
1977	0	1
1978	2	2
1979	2	1
1980	0	0
1981	0	0
1982	0	0
1983	0	0
1984	0	0
1985	2	2
1986	2	3
1987	2	1

Although there is relatively little difference between the two columns, the table does indicate that the year in which the teacher's problem was assessed was not necessarily the year in which the dismissal occurred or the year in which the appeal was heard.

Table 4(2) also shows that numbers of Review Commissions convened held relatively constant from 1974 to 1987, with an

interesting drop in participation during the period 1981 to 1984. This lack of participation was at first confusing until a certain amount of elucidatory information came to light from the 1979 Review Commission reports and a Teachers Services Branch annual report which offered a satisfactory explanation (see Review Commission discussion in Ch. 6).

b) BOARDS OF REFERENCE

The analysis included data gathered on 49 selected Board of Reference appeal cases which occurred between the years 1962 and 1989. This does not mean that all cases between 1962 and 1989 were analyzed, in fact they were not. These cases were the ones found on a confidential listing composed by Mr. Earl Cherrington, the head of the former Professional Relations Branch of the Ministry of Education. The listing was inclusive of all the Boards of Reference requested by teachers during the years 1974 to 1987, a total of 56 cases. The total number of cases which were analyzed, between the years 1974 to 1987 where a Board of Reference was actually convened was 37, only 66% of the total number which were requested. The remaining 19 cases between 1974 and 1987 were either:

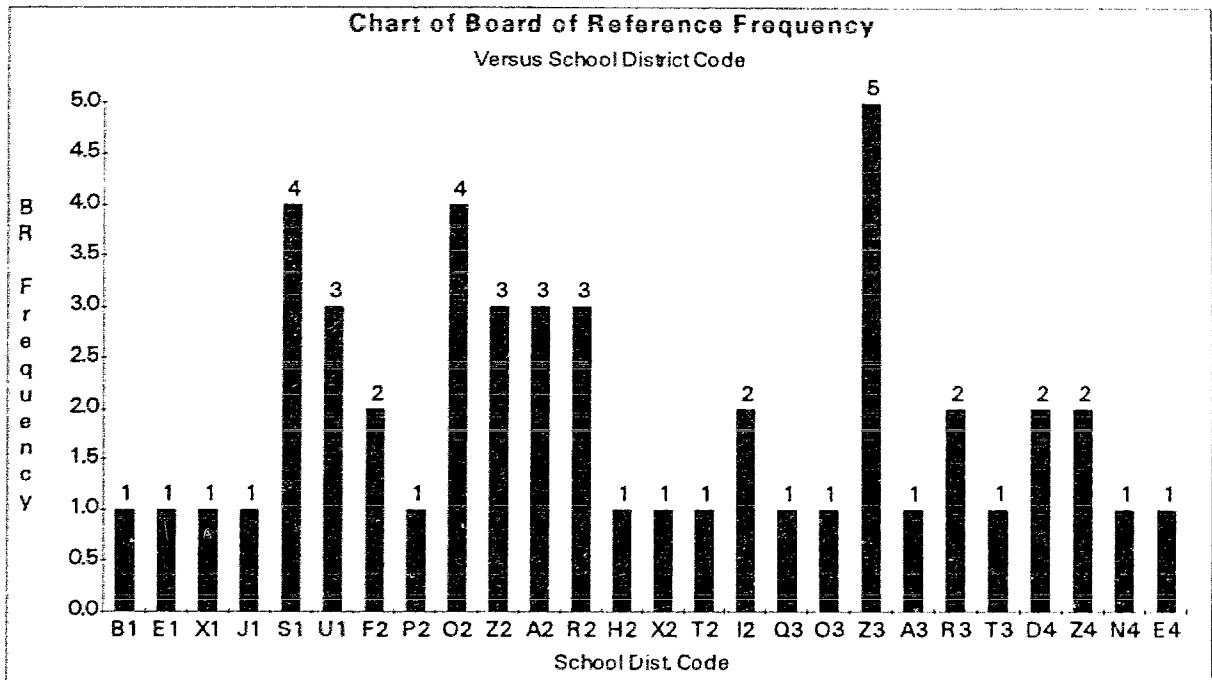
- a) abandoned by the teacher during or before the hearing was convened (7 cases, 13%); or,
- b) voluntarily withdrawn by the teacher before the hearing was convened (6 cases, 11%); or,
- c) resolved by settlement/agreement with the school board before the hearing was convened (2 cases, 4%); or,

- d) adjourned or deferred during the hearing, pending disposition of criminal charges (3 cases, 5%); or,
- e) reassessed by the school district on advice offered by the Ministry of Education -(resulted in the teacher being reinstated, -1 case, 2%).

The following tables and figures include those cases which the author was allowed access to at the College of Teachers plus some cases which were found in the archived files from the former Professional Relations Branch that he was allowed access to at Field Services Division of the Ministry of Education. The number of cases then that was analyzed for these statistics were 49 Board of Reference summaries. Thirty seven from the College of Teachers and twelve from the archived files at the Ministry of Education.

The following chart shows the frequency of Boards of Reference versus School District from the selected sample set. The school districts are coded with a scrambled alphanumeric code to maintain confidentiality.

Figure 4(2)

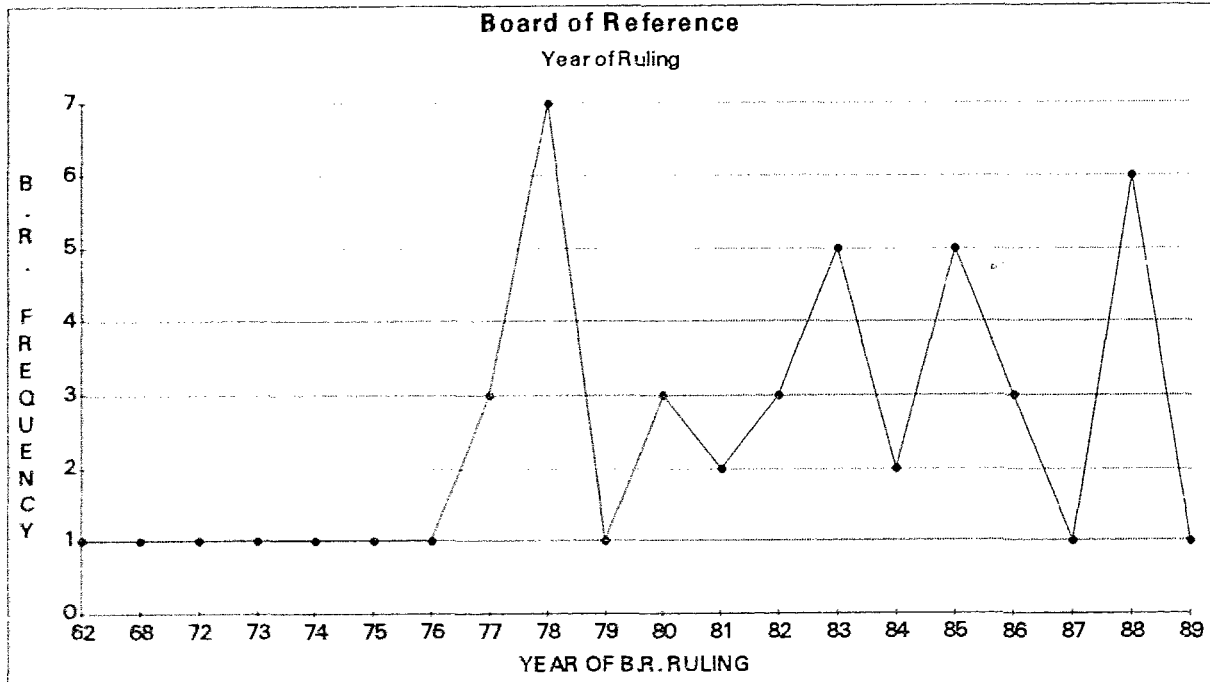


The chart shows similar results to the graph of Review Commission versus school district. Again the Boards of Reference are not distributed evenly among the number of school districts that were required to defend dismissal decisions that were made on the basis of s. 122(1) of the former P.S.A. A number of school districts are well over the average of approximately 2 Boards of Reference per school district in the sample set. If all 75 school districts in the province are considered then the average number of Boards of Reference that each school district had to participate in drops to 0.65 per school district during this 13 year period. The school district that was very high in the Review Commission chart(Z2) and was discussed to some extent above, was also relatively high in the Board of Reference chart as well. This statistic corresponds with the findings in a profile of teacher sex offenders that was done by the Education Ministry's Division of Legislative

Services in Jan. 1986. This study found that nearly 50% of the sex offenders were from only 5 school districts, and that there was a disproportionate number of offenders in relation to population in 3 of the school districts. The meaning of this finding was not discussed in the Ministry's study but it could have something to do with the separate district's screening procedures as was suggested to a superintendent of one of the northern school districts by the former Professional Relations Branch.

The following figure shows the number of Boards of Reference as a function of year. The year does not indicate when the tribunal was convened, but when the tribunal concluded and the decision was filed.

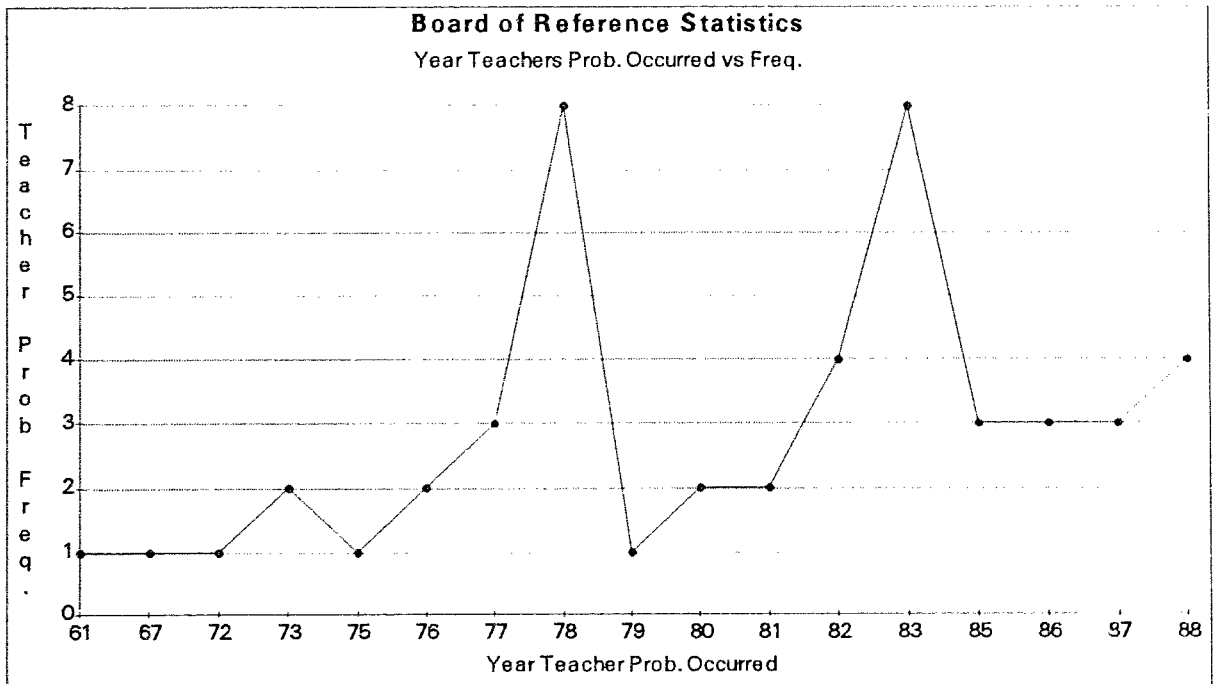
Figure 4(3)



Contrasting this with the next figure which shows the year that the teachers problem (insubordination, misconduct, neglect of duty, etc.) occurred, the slight differences in frequency on

different years shows that some Boards of Reference must not have occurred in the same year as the teachers problem. This was especially true in the cases where the teacher was charged with a criminal offence. The criminal offence sometimes took place a number of years previous to the actual charge being placed. In one particular 1986 dismissal case, the charge dated back to 1978 in a previous district.

Figure 4(4)



One of the most interesting aspects of both of these figures is the fact that the Boards of Reference were continuing after the legislation that enacted them was considerably changed. This was probably due to the fact that teacher's union locals had not yet completed negotiation of collective agreements which fell under part 6 of the Industrial Relations Act, therefore, teachers who were appealing their dismissals in the bridging years (88-89) following the change in legislation

(Bills 19&20, 1987), had to request a Board of Reference under the new P.S.A. s. 122 (4b).

Another interesting peculiarity about both of these figures above is the increasing frequency of Boards of Reference that were being convened towards the middle of the 1970's and continuing into the 1980's. A possible reason that will account for this is the public's increasing awareness during this same time period, of sexual and other forms of abuse in schools. A quote from British Columbia Television on it's 6:00 P.M. broadcast as of January 25, 1986 seems to typify the public "mood" at the time; "a provincial court judge says there's a near epidemic of child molesting cases in B.C. and it needs to be curtailed. This statement was made in the sentencing of a former school teacher to two years for gross indecency involving students."⁴ This mood was to get even worse as 1986 dragged on, with the publication of evidence from the trials of school teacher Robert Noyes (June, 1986), of elementary school teacher William James Cadden (Sept. 1986), of secondary school counsellor Leonard Marchant (Oct. 1986), of elementary school teacher Allan Wesley Britton (Sept. 1986), and of secondary school teacher Robert David Galloway (Sept. 1986). The same article (Western Report, Oct. 6, 1986) that summarized these cases also indicated that 20 B.C. convictions for school sexual abuse had occurred in the three years preceding 1986. The resulting public furor about sexual abuse in B.C. schools would no doubt have caused a number of false accusations as well as legitimate ones to be leveled against teachers at that time. This could account for the dramatic increase in teacher appeals

against dismissal for misconduct that is shown in figures 4(3) and 4(4). The public frenzy at this time is also blamed for the death by suicide of a teacher who had charges of sexual assault leveled against him. In this case the suicide was motivated by the airing of the teacher's name by a Victoria radio station in contravention of a court ban prohibiting publication.⁵

This trend of increasing activity is also reflected in the number of teacher certificate suspensions and cancellations that were being recommended to the Lieutenant-Governor in Council through the Director of Teacher Services from the Certification Advisory Committee of the Ministry of Education.

Figure 4(5a)

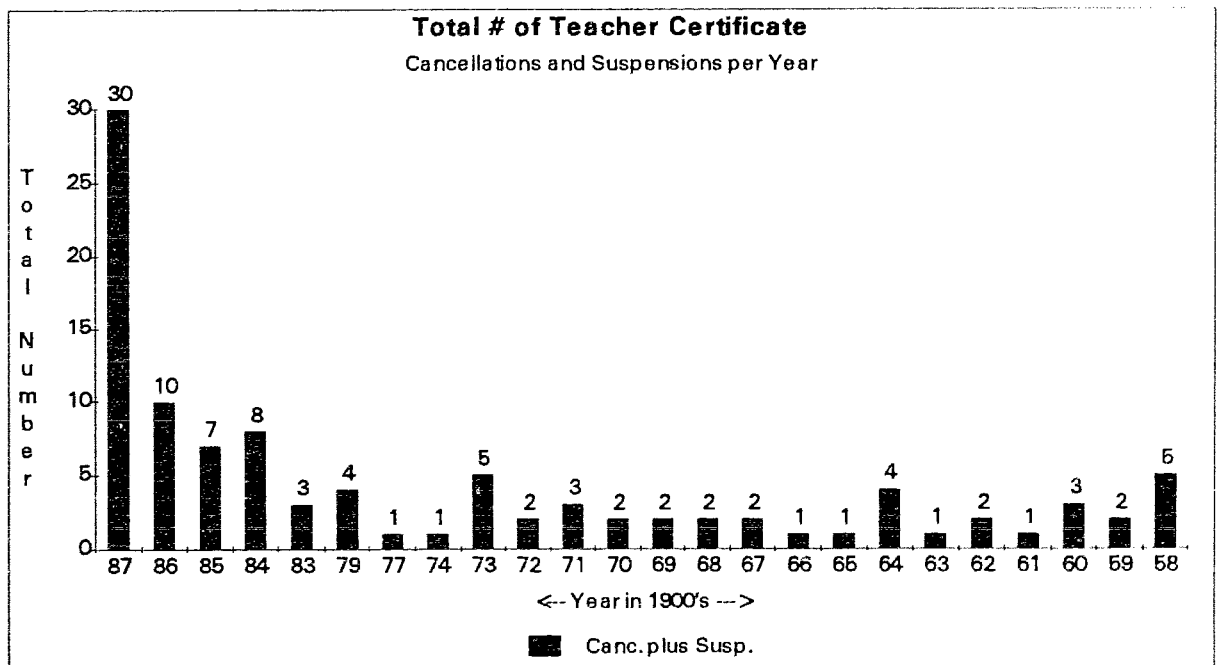
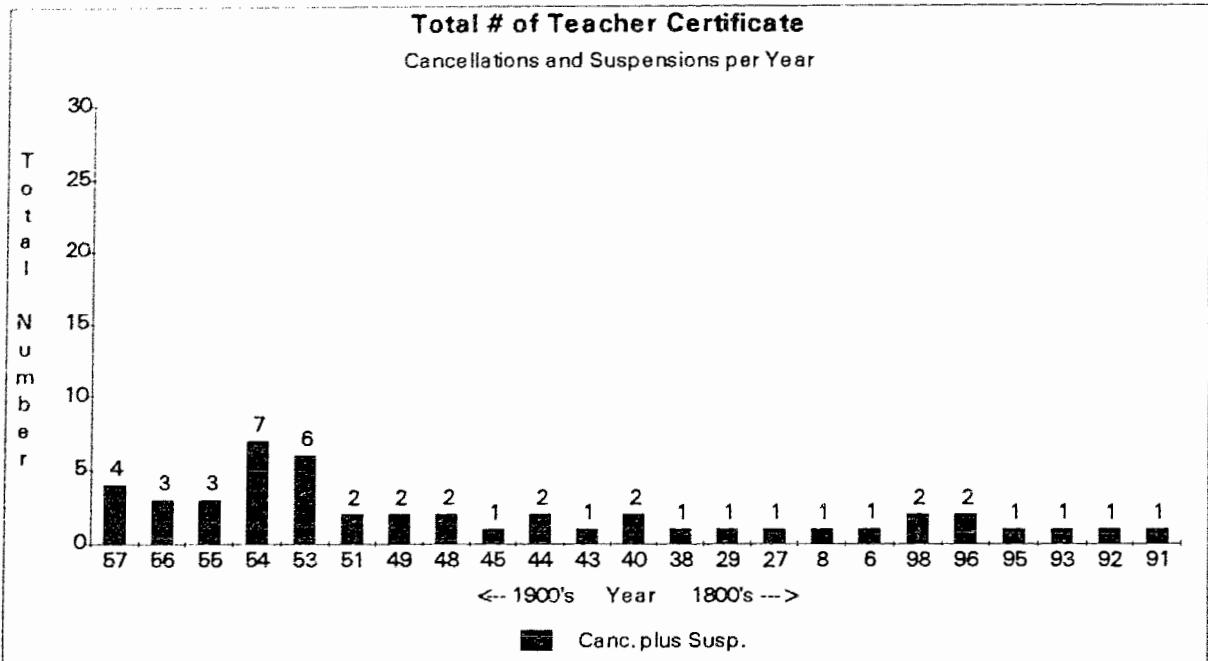


Figure 4(5b)



This figure above (in two parts due to spacing and readability) shows the total number of teacher certificate cancellations plus suspensions in reverse order from 1987 to 1891. The years not shown had zero cancellations or suspensions. While the average⁶ number per year is 1.03 from 1890 to 1979, the figure shows an almost exponential increase from 1883 to 1987. Table 4(3) below shows the same increase but also lists the reasons that the teacher's certificates were cancelled or suspended for.

Table 4(3) Reasons for Teacher certificate Cancellations and suspensions 1891 to 1987.⁷

1891	- (Dec 30) Failure to retract an adverse statement made against the Department of Education (certificate cancelled).
1892	- Gross misconduct (certificate cancelled).
1893	- Suspension - no details given.
1895	- Suspension for six months - no details given.

- 1896 -One cancellation - reinstated Nov. 11, 1898 - no details given. One suspension (3 months)- no details given.
- 1898 - Two cancellations - no details given. One reinstated Nov. 28, 1898.
- 1906 -3 year suspension - no details given.
- 1908 -cancellation for cause - no details given.
- 1927 -suspension for criminal assault conviction - reinstated Aug. 4, 1932.
- 1929 -cancellation for robbery conviction.
- 1938 -indefinite suspension - guilty of a criminal offense.
- 1940 -two suspensions - one was conduct unbecoming a teacher & other was public drunkenness.
- 1943 -suspension for gross misconduct - reinstated May 12, 1944.
- 1944 -one indefinite suspension for gross indecency. One cancellation for gross misconduct, reinstated July 10, 1956
- 1945 -suspension for breach of contract - reinstated Apr. 30, 1946
- 1948 -two suspensions for mental health problems.
- 1949 -one suspension for mental health problems - reinstated Apr. 27, 1959. one indefinite suspension for misconduct.
- 1951 -two cancellations for cause and one suspension for "drinking problem" - reinstated Aug. 24, 1951
- 1953 -three suspensions for breach of contract - two reinstated Aug. 28, 1953 & one reinstated Oct. 29, 1954. Two cancellations for contributing to juvenile delinquency - one reinstated May 1976. One cancellation for immoral behavior with school children - proved innocent of charges Jan. 8, 1954
- 1954 -three suspensions for breach of contract - one reinstated Sep. 17, 1954. One suspension for failure to pay fees to BCTF & loss of membership. Three cancellations, 2 for cause and 1 for contributing to juvenile delinquency.
- 1955 -three cancellations, 1 for cause, 1 indecent gesture to superintendent, & 1 buggery.
- 1956 -three cancellations, 1 contributing to juvenile delinquency - reinstated Jan. 30, 1959, 1 mental health problems, & 1 teaching inefficiency - reinstated July 4, 1960
- 1957 -one suspension and one cancellation for breach of contract - the cancelled certificate was reinstated Aug. 25, 1966. Two cancellations for criminal charges - 1 reinstated Aug. 8, 1963

- 1958 -five cancellations, three for contributing to juvenile delinquency - one of which was a breaking and entering charge - reinstated July 14, 1960, 1 for buggery & 1 jail sentence.
- 1959 -one cancellation - misconduct with female students. One suspension, breach of security during examinations - reinstated May 24, 1960
- 1960 -two suspensions, 1 for breach of examination security, 1 for false application information. One cancellation, indecent assault conviction.
- 1961 -one cancellation, indecent assault conviction.
- 1962 -two suspensions, 1 for false supporting documents in job application, 1 for contributing to juvenile delinquency - reinstated Apr., 1968. One cancellation, contributing to juvenile delinquency.
- 1963 -one cancellation, contributing to juvenile delinquency.
- 1964 -two cancellations, previous Manitoba morals charge conviction, contributing to juvenile delinquency. Two suspensions, indecent exposure conviction & theft conviction - reinstated June 17 & Apr. 18, 1968 consecutively.
- 1965 -one cancellation, contributing to juvenile delinquency.
- 1966 -one suspension, criminal conviction - fraudulent cheques.
- 1967 -two cancellations for criminal convictions, 1 for using mail for obscene purposes, 1 for possession of marijuana - reinstated May 28, 1970.
- 1968 -one cancellation, contributing to juvenile delinquency. One suspension, sexual misconduct with students - reinstated June 17, 1968
- 1969 -two cancellations, 1 conviction for indecent assault and indecent exposure, & 1 conviction for indecent assault in Alta. prior to B.C. certification.
- 1970 -two suspensions, 1 breach of contract, 1 gross misconduct - reinstated Oct. 1, 1970.
- 1971 -one suspension, poor teaching performance. Two cancellations, 1 for sexual assault conviction, 1 for indecent exposure - reinstated Nov. 14, 1974.
- 1972 -two breach of contract suspensions, 8 mo. & 10 mo.
- 1973 -three suspensions, 2 breach of contract, 1 forged academic credential. Two cancellations for sexual assault convictions.

- 1974 -one cancellation, contributing to juvenile delinquency.
- 1977 -one suspension, convicted of incest.
- 1979 -three cancellations, 1 sexual assault of students, 1 sexual misconduct with students - reinstated Dec 3, 1987, 1 convicted of indecent assault - reinstated Dec 3,1987.
- 1983 -three cancellations, 1 indecent assault conviction, 1 attempted wife murder conviction, 1 use of drugs and alcohol on field trip.
- 1984 -seven cancellations, 3 gross indecency & sexual assault convictions, 1 indecent assault, 1 improper acts with female students, 1 sexual intercourse with female student, 1 liquor, drugs and inappropriate behavior on field trip. One suspension for submitting changed transcripts for teacher certification.
- 1985 -seven cancellations, 1 child abuse of male students, 1 sexual assault of male student, 1 indecent assault of male student, 1 gross indecency with male student, 2 indecent assault & sexual assault, 1 gross indecency.
- 1986 -nine cancellations, 4 sexual assault or indecent assault or sexual activities with male students, 3 sexual assault or indecent assault or sexual abuse of girls outside of school, 1 sexual relations with female students, 1 assault of wife & children.
- 1987 -24 cancellations, 3 indecent assault of female, 2 sexual relationship with female student 2 inappropriate relationship with male student, 1 sexual activity with 13 yr. old male, 4 gross indecency & sexual assault of boys, 1 sexual assault of very young female students, 1 sexual abuse, 1 sexual assault of female student, 1 sexually inappropriate comments with female students & providing liquor to minors, 1 teaching incompetence & fraud, 1 homosexual voyeuristic activities with stepson and another student, 4 sexual assault charges, 2 inappropriate conduct and neglect of duty, 1 sexual assault involving children. -6 suspensions, 1 indecent assault on female, 1 sexual involvement with 15 year old female student, 2 sexual assault & gross indecency with female elementary students in the class, 1 inappropriate touching of female elementary students, 1 charged with sexual assault - reinstated Sep. 10,87

While the dramatic increase shown in both Figure 4(5) and Table 4(3) above may have been a political response to the increasing public 'mood' at the time, there were also other political factors at work behind the scenes.

A confidential memo from Field Services Division to Teacher Services Branch dated Oct. 6, 1986 indicates that there was a "rather significant political problem brewing" which was "intensified by the tabling of the Sullivan Report and the B.C.S.T.A. Task Force on Child Abuse", which necessitated the "urgency to move on decertifying a large number of individuals (approximately 30)." The political problem I think was being referred to in this Memo was the changes in legislation that were being drawn up for enactment Jan. 1, 1988, which would remove the certification/decertification powers from the Ministry of Education and place them into the hands of the College of Teachers which as yet did not exist.

Two other documents, a decertification discussion paper and a draft policy paper on suspension and cancellation of teacher's certificates for 'cause', also indicated that "the Ministry of Education was handicapped in dealing with [several] cases primarily because there was no statutory authority under the Act for it [the ministry] to initiate an independent investigation," of misconduct cases. The draft policy paper indicated that "the Ministry of Education has no legal authority to initiate decertification proceedings for teacher incompetence." Under regulation 65 at that time only school boards could recommend to the minister the suspension or cancellation of a teacher's certificate and this was rarely done. According to Marshall,

1986 only two teacher certificate suspensions had ever occurred as a result of less than satisfactory teaching. "First, in 1960, a female teacher had her certificate suspended because she falsified information in a teaching application after having received three less than satisfactory reports. Second, in 1971, a male teacher had his certificate suspended for poor teaching performance." Both of the documents above were cautious about the ministry making decisions that were without due consideration of the precepts of natural justice as they both quoted and discussed the Evershed decision made by the Ontario Supreme Court, where a teacher's certificate was cancelled by the Ontario Ministry of Education without a hearing, and the Supreme Court reversed the decision citing it as a classic denial of procedural due process.

Both of the two papers (discussion paper and policy paper) mentioned above were suggesting changes to the Ministry's enabling legislation, policies, and procedures that would allow the Ministry of Education to take immediate action to suspend or cancel the certificate of teachers who:

- "a) had been charged with a criminal offence and were awaiting trial;
- b) had been dismissed or resigned for reasons of unethical/unprofessional behavior and had not yet appealed;
- c) had been dismissed for incompetence;
- d) had been allowed to resign, (at times with pay);
- e) were reinstated by a Board of Reference but whose conduct warranted decertification;
- f) were dismissed or resigned with no criminal proceedings;

- g) had pleaded guilty;
- h) had received conditional or absolute discharges but whose conduct warranted decertification;
- i) were acquitted by the courts but whose conduct warranted certificate cancellation."

With the demonstrated increase in teacher certificate cancellations and suspensions toward 1987 this author poses three questions:

- 1) Were any of these policy and legislative changes implemented, and if so, was the dramatic increase in cancellations and suspensions between 1983 and 1987, the result?
- 2) Do the bylaws of the College of Teachers who are now responsible for the certification/decertification of teachers, take into account the situations described above with respect to their disciplinary function? and;
- 3) How does the College of Teachers deal with the decertification of educators who have resigned their membership in the College?

The answers to these questions although valid will not be addressed in this study as they are beyond the scope of this study; they could however be addressed in further studies in this area of education law at some other time. Situations c,e,f,h,and i mentioned above do bring up the possibility of a denial of natural justice if the immediate action referred to above to cancel or suspend teacher's certificates is applied indiscriminately. In fact for situations h and i above there was a specific statutory clause that required the school board to reinstate the suspended teacher after acquittal, absolute, or

conditional discharge, if the appeal period had expired [pre-1988 P.S.A. s. 122 (2c)]. If reinstated under subsection (2)(c), then the teacher would be paid his entire back salary for the period of his suspension. This entire section was amended by Bill 19 s. 61 in 1987 so that the school board could now *decide* (regardless of the teachers guilt or innocence), whether they are going to reinstate the teacher without loss of salary, or whether they are going to proceed with dismissal of the teacher. This dismissal could then be grieved under the provisions laid out in the collective agreement and Part 6 of the Industrial Relations Act.

OVERALL DESCRIPTIVE STATISTICS

To calculate the proportion of teachers in the province who requested a Review Commission for 3 less than satisfactory reports (incompetence), the number of Review Commissions during the period 1974 - 1987 was divided by the headcount of practicing teachers (not full-time equivalents) in the province during those same years. (The two Review Commissions in 1975 involving administrator dismissals for declining enrollment were not included in this calculation.) These ratios were averaged and the value came to just 0.0057% of the total number of practicing teachers in the province per year. The same calculation was performed for Boards of Reference and came to a value of .0154% of the total number of practicing teachers in the province. On average then out of the total number of practicing teachers in the province each year, one and two thirds teachers requested a Review Commission and 4.5 teachers requested a Board of Reference. The ratio of teachers that

requested Board of Reference appeals for professional misconduct or breach of contract to the number of teachers that requested Review Commission appeals for incompetence was roughly 3:1.

For the set of descriptive statistics called "Overall descriptive statistics", all of the cases selected for this study, including Review Commission reports, Board of Reference reports and Certification Advisory Committee reports were combined together and analyzed for the frequency of all the variables. One of the more interesting patterns discovered in this analysis is discussed below.

In the selected sample set in this study 65 cases were coded with school district, and 12 cases had the references to school district erased, (Certification Advisory Committee reports). However, the cases that were analyzed for school district did not show an even distribution for the 75 school districts in the province. The 65 cases were distributed in only 36 school districts. Several districts accounted for multiple cases; one district had 6 cases, 8.7% of the sample, one district had 5 cases, 7.2% of the sample, three districts had 4 cases each, 5.8% of the sample in each, three districts had 3 cases each, 4.3% of the sample in each, nine districts had 2 cases each, 2.9% of the sample in each, and nineteen districts had 1 case each, 1.4% of the sample in each.

Question #2 What are the characteristics of dismissed teachers?

The characteristics of dismissed teachers are strangely similar with respect to both of the quasi-judicial forums examined in this study.

Review Commissions

Teachers who requested Review Commissions of their dismissal are of two types; those who had been dismissed for 3 less than satisfactory reports (incompetence), constituted 13 out of 15 cases or 87% of the sample set; and those who were dismissed for declining enrollment in the school to which they were assigned (2 out of 15 cases or 13% of the sample set. The gender ratio of the selected sample set was interesting in that 9 out of the 15 cases or 60% were female, and 6 out of the 15 cases or 40% were male.

The next series of statistics proved very revealing. These dealt with the teacher's age at the time the problem occurred, the years teaching in the school where the problem occurred, the years taught in the school district where the problem occurred, and the total number of years teaching experience that the teacher had accumulated at the time of the problem. Notice the following histogram with respect to the teacher's age at the time of the problem.

Figure 4(6) Age of Teacher at Time of Problem
Review Commission Descriptive Statistics

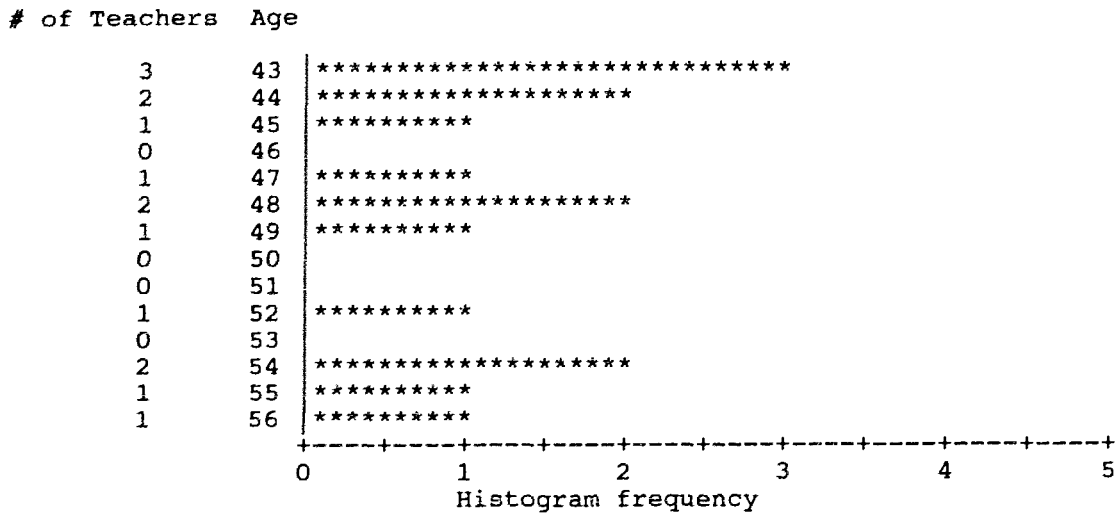
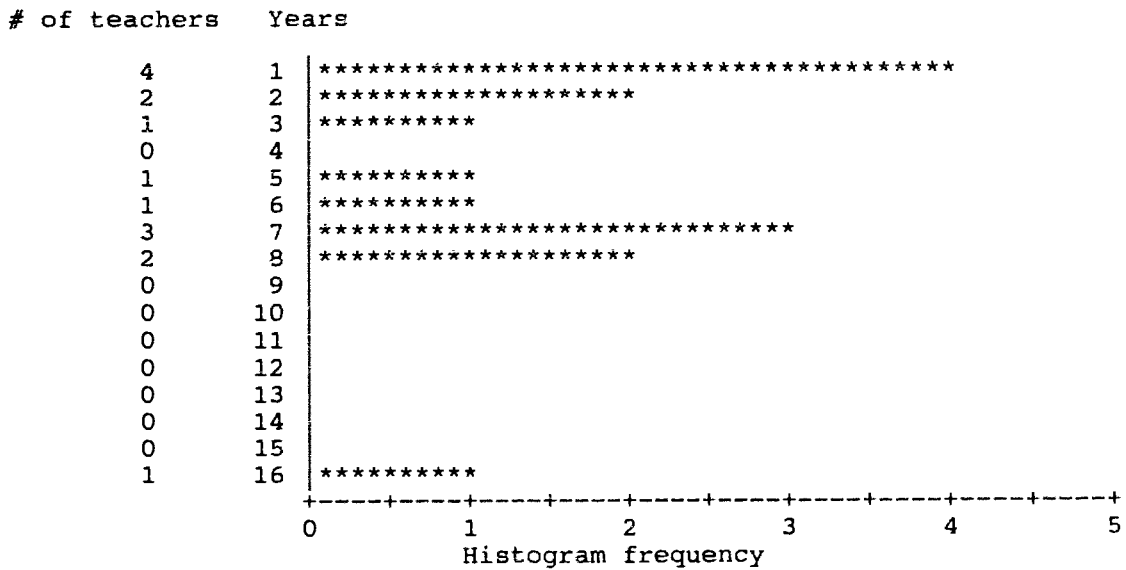


Figure 4(6) shows the age range is from 43 - 56, with an average of 48! This could mean that older teachers with more at stake in their careers, appeal their dismissals on the basis of incompetence more than younger ones do, or it could mean that older teachers have a greater chance of being given a less than satisfactory evaluation rating. Conversely it could also mean that younger teachers are handled with more leniency by administrators after they have achieved tenure in the hope that they will change.

The next figure shows the number of years teaching in the school where the problem occurred for the teachers in the selected sample set.

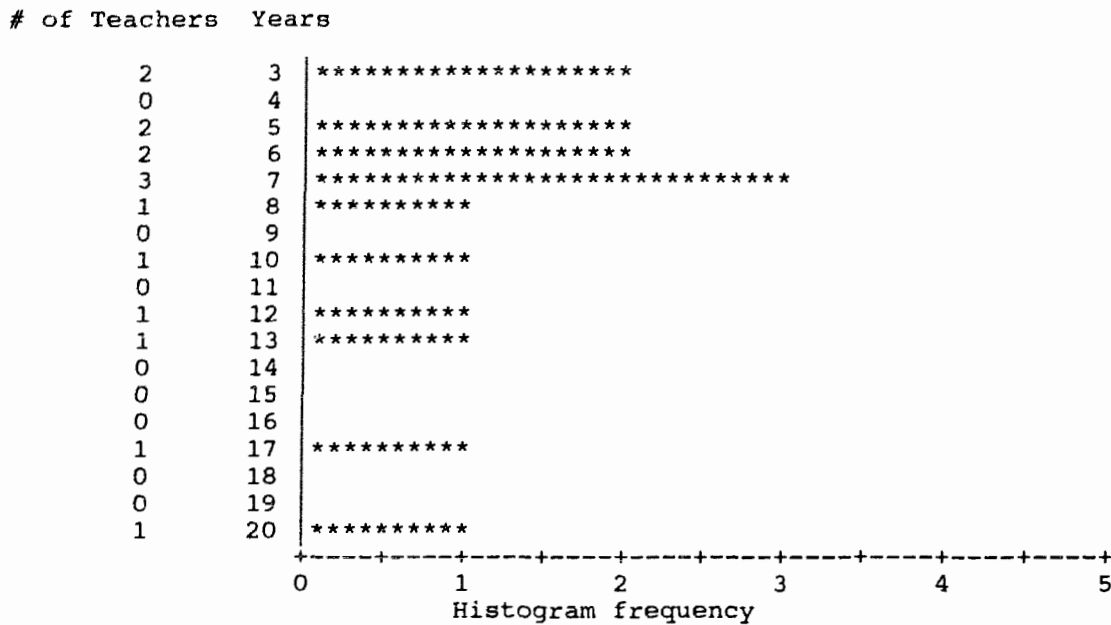
Figure 4(7) Number of Years Teaching in School Where Problem Occurred
Review Commission Descriptive Statistics



When Figure 4(6) is compared to Figure 4(7) there appears to be a discrepancy. Figure 4(7) seems to indicate that although the teachers are older, their years of teaching in the school where their problem occurs is relatively few. The average in Figure 4(7) is only 5 years.

The next figure shows the number of years teaching in the school district where the problem occurred for the teachers in the selected sample set.

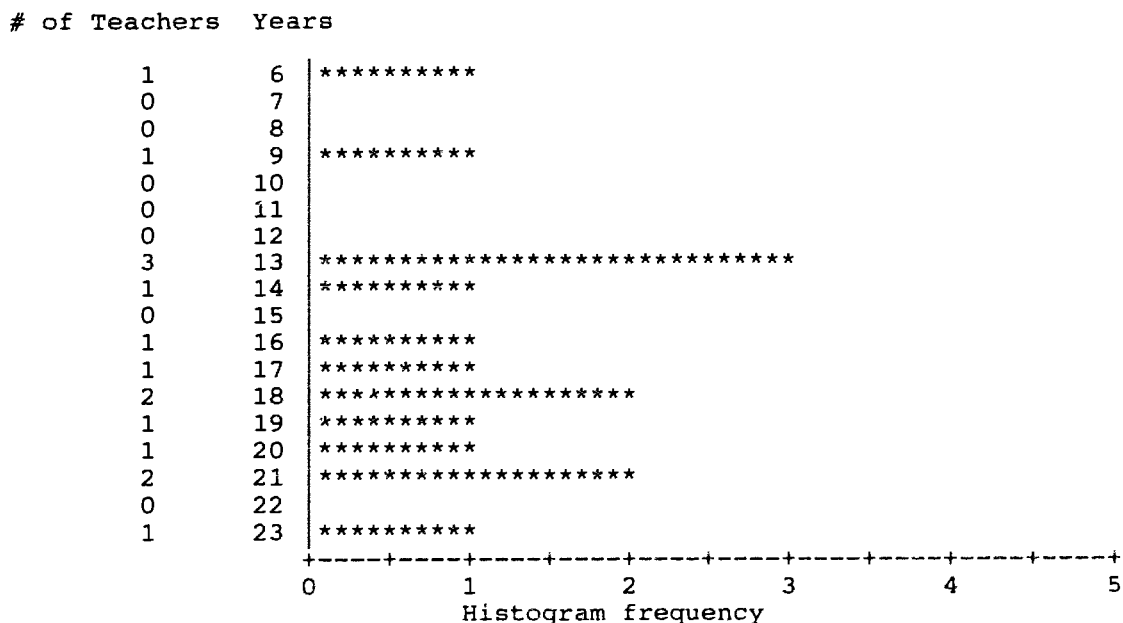
Figure 4(8) Number of Years Taught in School District Where Problem Occurred
Review Commission Descriptive Statistics



Again as in Figure 4(7) the number of years taught in the school district where the three less than satisfactory reports were issued seems to be smaller than expected for teachers in the age range from 43 to 56. The median value in the above histogram is 7 years.

The following figure shows the total number of accumulated years of teaching experience for the each of the teachers in the selected sample set.

Figure 4(9) Number of Years of Teaching Experience Before Problem Occurred
Review Commission Descriptive Statistics



The above Figure shows the expected experience level for teachers within the age range 43 to 56. The average experience of these teachers was 16 years, while the range was from 6 to 23 years experience.

To summarize the above 4 sets of statistics for the teachers that attended Review Commissions. They ranged in age from 43 to 56 years of age with a mean of 48 years of age. Their accumulated teaching experience ranged from 6 years to 23 years with a mean of 16 years. These statistics seem to match. What does not seem to match about these teachers is their years in the school where their problem occurred which ranged from 1 year to 16 years with a mode of 1 year, and their years in the school district where the problem occurred which ranged from 3 years to 20 years with a mode of 7 years. (see Table 4(4) for a comparison of these factors with the same factors for Boards of Reference).

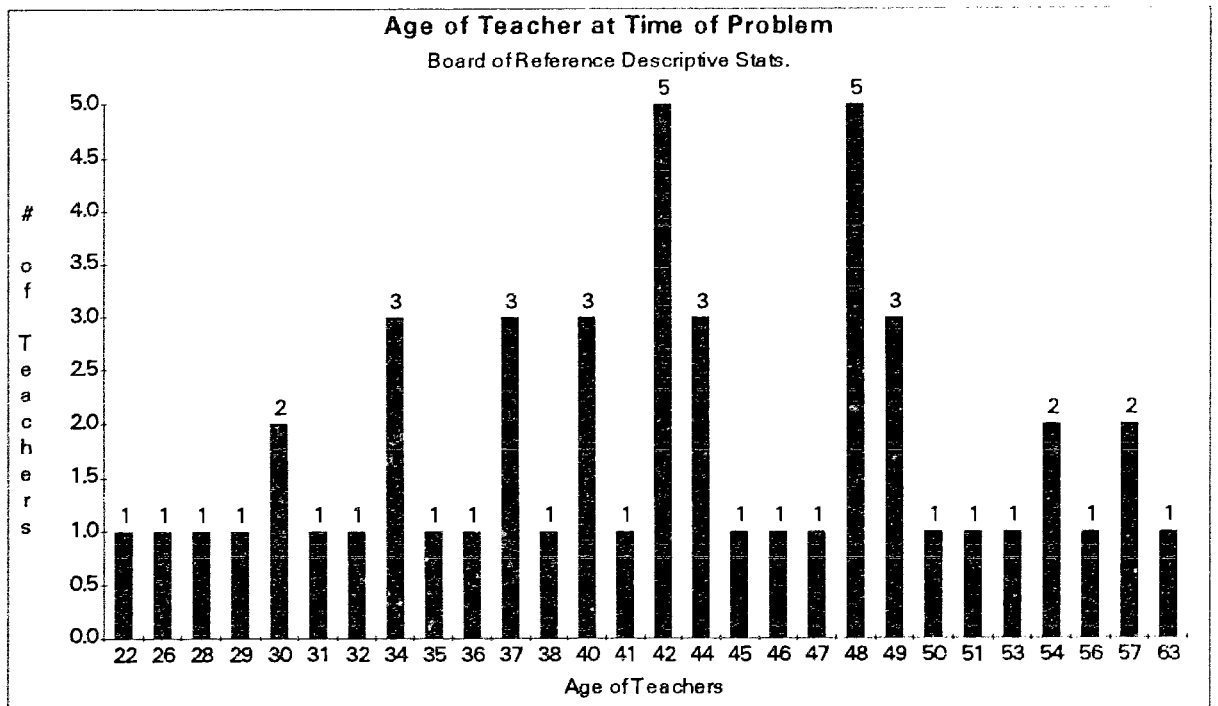
What the above summary seems to suggest is that older teachers should not transfer school districts toward the end of their careers and above all they should not transfer schools, otherwise, they may find themselves in a situation that they can no longer satisfactorily teach in (possibly situational incompetence). The author has examples of this on the staff where he currently works. Excellent older teachers who grow dissatisfied teaching the same senior subjects in smaller rural schools who have transferred to a larger urban school and must now teach a set of junior high courses have found the challenge more than they expected. Urban schools now, are similar to the inner-city schools of 20 years ago. They are difficult to teach in.

The teaching category of the teachers who attended Review Commissions would support this hypothesis as well. Of the 15 teachers in the Review Commission analysis 27% or 4 taught primary, 47% or 7 taught junior high school, with 7%(1), 7%(1), and 13%(2) in senior high school, special education and administration consecutively. The large percentage of teachers dismissed for incompetence who taught junior high school subjects indicates that older teachers who are teaching in the junior high school area are more at risk for charges of incompetence than teachers in other levels of education. If this is so and assuming that teachers with marginal competence do not seek out employment in the junior high school area, then this could be indicative of a systemic failure at the junior high level in the education system.

Boards of Reference

Teachers who requested Boards of Reference within the selected sample were 73.5% male (36 cases), and 26.5% female (13 cases) out of a total of 49 cases analyzed. This was opposite to the trend shown by the Review Commission cases where the majority of the cases involved females. The ages of the teachers involved in Board of Reference cases was also not as narrow in its range as the Review Commission statistics. The graph below shows a range from 22 years of age to 63 years. The mean age is 42 years.

Figure 4(10)



Although the range in ages of the teachers in the Board of Reference cases covers a larger range than the range of ages of the teachers in the Review Commission cases, the average age is still relatively high at 42 years. When this is compared to the number of years that the teachers had been teaching in the

school where the problem took place, a discrepancy again occurs. Again the number of years that teachers spent in the schools where the problem occurs is relatively small and so is the number of years that the teacher has been a part of the district where the problem occurs, when compared to their average age. On average the teachers have only been teaching at the school for 5.3 years and in the district for only 8 years (see Figures 4(11) & 4(12) below). Also notice that in Figure 4(11) the largest category of the teachers that have a problem under former s. 122(1) have only been in the school for 1 year, (mode = 1).

Figure 4(11) Number of Years Teaching in School Where Problem Occurred
Board of Reference Descriptive Statistics

of Teachers Years

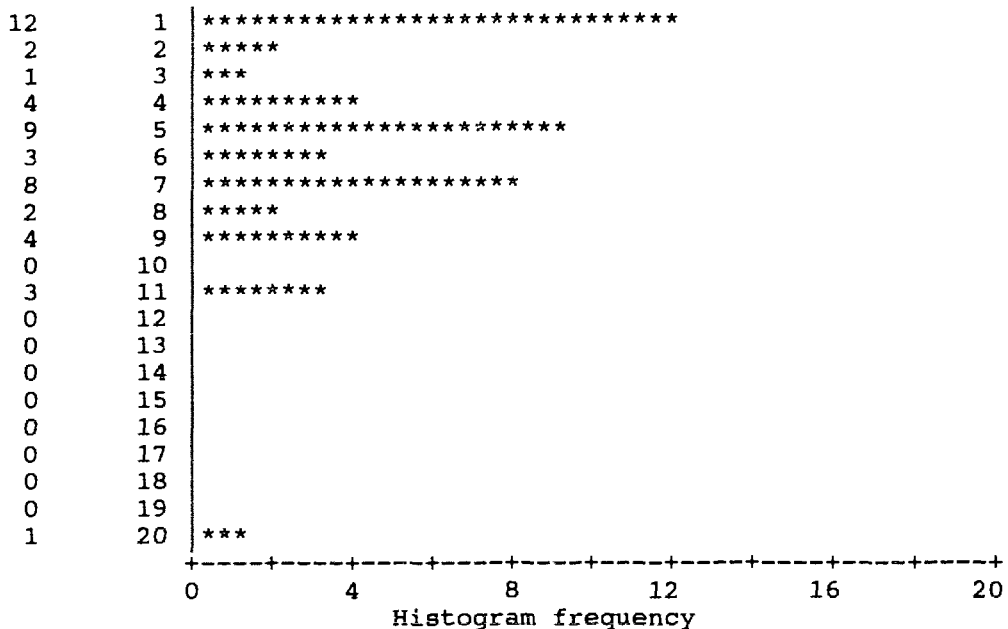
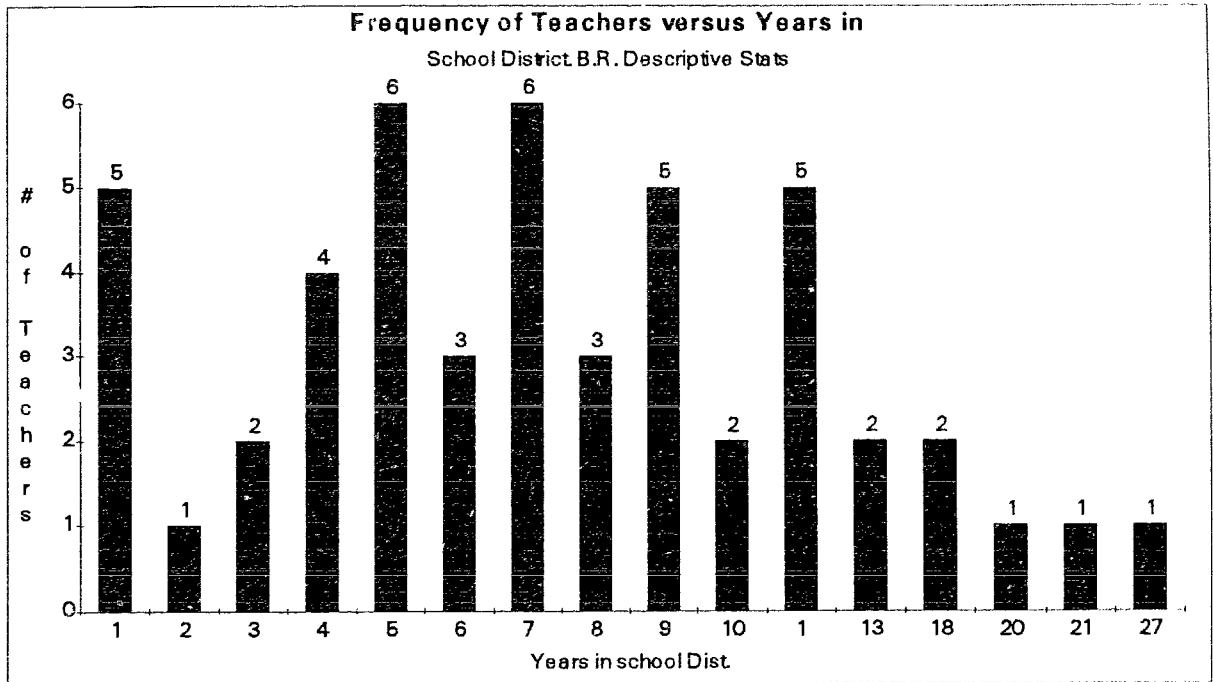
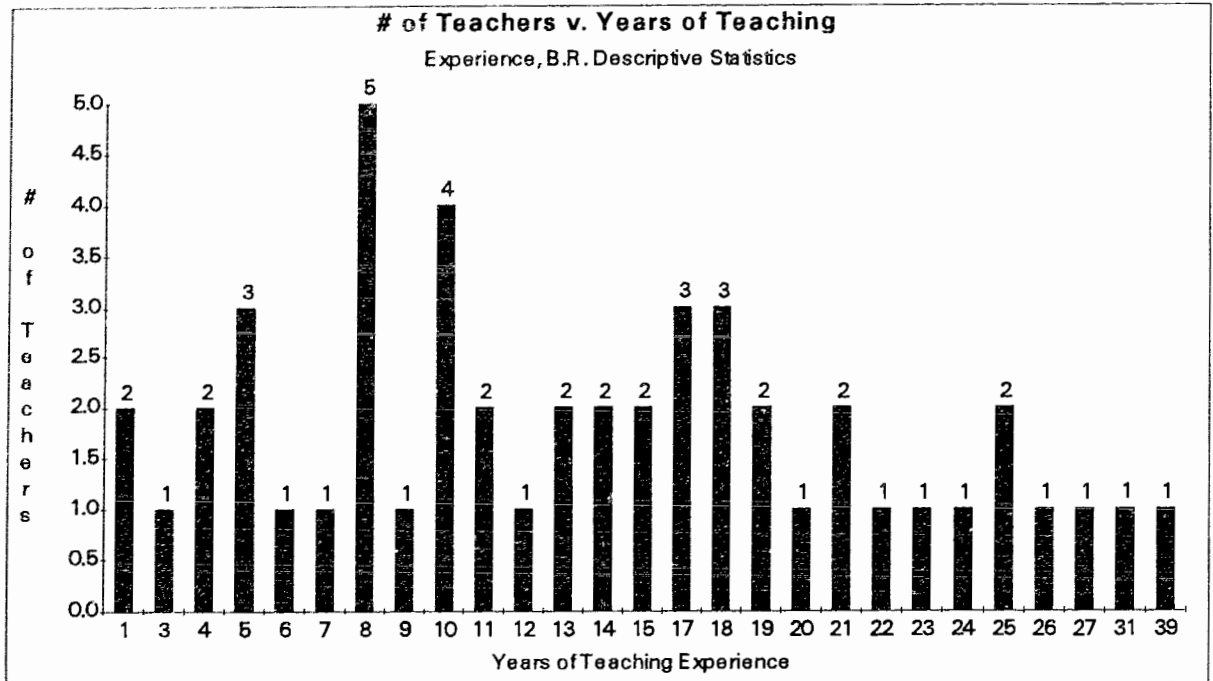


Figure 4(12) Number of Years Teaching in the School District where the Problem Occurred



The total experience of the teachers that requested Boards of Reference ranged from 1 year to 39 years, with an average of 14 years experience. (see Figure 4(13) below).

Figure 4(13) Number of Teachers attending Boards of Reference v. Total Teaching Experience of those Teachers



There appears to be a pattern in the data from both the Review Commission reports and the Board of Reference reports with respect to the teachers age, experience, and years of teaching both in the school where the problem occurred and in the school district where the problem occurred.

Table 4(4) Comparison of age, Years in School, Years in District, and Total Experience in Years.

		Age	Years in School	Years in District	Total Exp.
Review Commission	range	43-56	1-16	1-20	6-23
	Mean	48	5	9	16
Board of Reference	range	22-63	1-20	1-27	1-39
	Mean	42	5	8	14

Whether this pattern would be the same in the entire population of teachers in the province is not a question that can be answered by this study. In both of the quasi-judicial forums studied, the teachers involved seem to be older and have a significant amount of teaching experience. However, the years

taught in the school where the problem occurred and the years taught in the school district where the problem occurred, are relatively few. This result was unexpected by the author who assumed that there would be a large difference between the characteristics of teachers dismissed for incompetence and the characteristics of teachers dismissed for misconduct. What this could mean is pure speculation, however it could mean that teachers who are going to have problems in the teaching profession will usually be found when they transfer schools or school districts. It could also mean they are given the "turkey trot" treatment (to use Bridges vernacular) until their problem becomes too obvious for their direct superiors to ignore.

To complete the analysis of teacher characteristics in Board of Reference cases we lastly will look at the teaching categories of the teachers when the problem occurred. Out of the total of 49 cases analyzed; 27% of these teachers taught intermediate grades (13 cases), 27% taught at the junior high school level (13)cases, 16 % taught at the senior high school level (8 cases), 14% taught primary school (7 cases), 10 % were administrators (5 cases), 4% were in counseling (2 cases), and 2% were in special education (1 case). An interesting aspect of teaching category indicates that although 27% of the Board of Reference cases were teaching in junior high school during the time of their problem, this figure is well below the high of 47% of the Review Commission cases that were teaching in junior high school at the time of their problem.

Question #3 What is the nature of the teacher's incompetence?

Review Commissions

As was indicated in chapter 2 the (pre-1988) Public School Act did not define the term incompetence as the lawful cause for the dismissal of a teacher in s. 126 or in P.S.A. Reg. 65. The definition of what was meant by incompetence was left up to local school district's discretion and the evaluation reports of at least 3 senior supervisors. Three less than satisfactory reports which followed all the statutory requirements of the P.S.A and the P.S.A. Regulations, had to be filed in order to dismiss a teacher for incompetence. Although it was not a statutory requirement, Review Commission decisions and court decisions (which add to the common law) have stated that the three reports had to include suggestions for improvement of sufficient specificity that the teacher was able to understand what changes in behavior were required, and what outward indicators of this behavior change would be evaluated. Sufficient time to internalize the suggestions and thus bring about substantial change in behavior was also required. One Review Commission in its summary of a case where the teacher was reinstated and the dismissal decision reversed stated "as a compassionate employer it [the school board] is obliged to develop and articulate a clear plan for the rehabilitation of all employees who are perceived and judged to be either incompetent or marginally competent."

In an effort to determine how British Columbia school districts have dismissed teachers for incompetence, the author

used the indicators of incompetence as defined by Bridges, 1974. These indicators were classified into one of the following categories: technical failure, bureaucratic failure, ethical failure, productive failure, and personal failure.

With respect to the categories of teacher failure within the group of teachers who requested Review Commissions; 73% had classic technical failure symptoms (11 cases), 33% also had varying indications of bureaucratic failure (5 cases), 53% exhibited some productive failure (8 cases), and 20% were experiencing some form of personal failure (3 cases). Sixty percent exhibited multiple forms of teacher failure. The most common patterns of failure were the combinations of technical-productive (3 cases), technical-bureaucratic-productive (2 cases), and technical-bureaucratic-personal (2 cases).

Board of Reference

Unlike dismissal for incompetence, dismissal under s. 122(1) of the former P.S.A. had more direction for the school boards and administrators in terms of what constituted 'just and reasonable cause'. In s. 122(1) four causes were specifically mentioned; misconduct, neglect of duty, refusal or neglect to obey a lawful order of the board, and s. 122(1b) "where the teacher has been charged with a criminal offence and the board believes the circumstances created by it render it inadvisable for him to continue his duties."

Although less is left to the school board's discretion in this section of the School Act, there is still area left for the interpretation of the terms misconduct (with respect to the local community values), neglect of duty, and the belief that

the circumstances render it inadvisable for the teacher to continue his duties. The interpretations of these terms will be discussed in the next chapter with a series of illustrative cases.

With respect to the categories of teacher failure within the group of teachers who appealed to Boards of Reference; 12% of these teachers had some form of technical failure (6 cases), 31% were experiencing bureaucratic failure (15 cases), 76% had some form of ethical failure (37 cases), only 6% showed indicators of productive failure (3 cases), and 14% were experiencing some form of personal failure (7 cases).

OVERALL DESCRIPTIVE STATISTICS

For the set of descriptive statistics called "Overall descriptive statistics", all of the cases selected for this study, (77 cases in total) including Review Commission reports, Board of Reference reports and Certification Advisory Committee reports were combined together and analyzed for the frequency of all the variables. The last analysis performed on the descriptive statistics was to crosstabulate the frequency of all the variables with each other to determine the ways in which the variables correlated with each other. This analysis resulted in 1121 pages of crosstabulation tables, of which only a very small number are shown in this chapter. The crosstabulation tables were disappointing as they did not reveal much more in terms of further issues concealed in the data, than were revealed by the descriptive statistics. What they did show was that: 9.1% of the selected sample set displayed signs of both technical and bureaucratic failure; 2.6% displayed both technical and ethical

failure; 10.4% displayed both technical and productive failure; 3.9% displayed both technical and personal failure; 7.8% displayed both bureaucratic and ethical failure; 3.9% displayed both bureaucratic and productive failure; 10.4% displayed both bureaucratic and personal failure; 2.6% displayed both ethical and productive failure; 9.1% displayed both ethical and personal failure; and 3.9% displayed both productive and personal failure.

Eight percent of the cases (6 in all) were coded in 3 categories and one case was coded in four categories of teacher failure. The case coded in four categories will be discussed in the next chapter on illustrative cases.

Question #4 What types of evidence are used by school officials as proof of incompetence, professional misconduct, or breach of contract.

The case study mentioned above that was coded in four categories of teacher failure (see C. 5 Illustrative Cases) meets a lot of the criteria for both incompetence (3 less than satisfactory reports) and professional misconduct (abuse complaint by a student or a parent). However that case was very unusual, normally the evidence gathered to substantiate a case against a teachers will only include some of the types of evidence shown in the table below. In the table below, the reader will notice a large difference in the amount of evidence used to substantiate cases before Review Commission hearings versus the amount of evidence needed in Board of Reference

hearings. This is due to the fact that the courts require an incompetence charge to be based on a series of repetitive incidents, "a preponderance of evidence" rather than a single egregious incident as is the case in some misconduct cases that appear before Boards of Reference.

Table 4(5)

The types of evidence gathered in the cases that were selected for this study includes many statements from administrator reports. These comments come from cases that where dismissals were upheld by the quasi-judicial tribunal concerned. These comments were as follows:

a) for incompetence;

- the statutory reason; 3 less than satisfactory reports,
- more specific reasons include;
 - "i) discipline and management problems;
- lack of a set of well organized, consistent, well-established classroom routines; -question and answering technique of raising hands not enforced; -unruly, noisy, disorderly classroom; -sharp exchanges between teacher and students; -students mimic teacher; -tense, strained, defensive environment lacking warmth, friendliness, and good humour; -teacher has dour manner and 'does not appear to enjoy teaching'; -poor student rapport and attitude; - teacher loses student interest during seatwork; -low number of students on task; -inadequate expectations of teacher results in lack of neatness and output of student seatwork; -students careless with materials; -ragged change-over from one lesson to another; -teacher appears frustrated; -

teacher threatens students; -teacher grabs students; -'more time spent on disciplining students and attempting to gain their undivided attention than on the teaching of the lessons'; -student told by teacher to 'read a thick book and don't bother me for thirty minutes'; -inadequate supervision during study period; -students transfer out of class: -teacher accepts no responsibility for discipline and regularly sends students to office for discipline and sometimes sends wrong student; -students sleeping undetected in class; -students arriving late to class and leaving room without permission; -students moving desks, exchanging notes, throwing objects, walking behind teacher as she moves about the room; -hostile parents;

ii) instruction problems;

-teacher reliance on texts and worksheets; -little class participation in lessons; -poor voice control of teacher; -teacher conducts most lessons from sitting position; -lessons lack variety, are shallow, or weakly developed; -failure of teacher to challenge students; -program not meaningful in relation to stated objectives of teacher; -'teaching has lost its spark', lacks enthusiasm; -gym classes without gym strip, warm-ups, demonstrating or formal instruction; -major portion of materials obtained from other teachers; -teacher fails to complete curriculum; -outdated text used by teacher; -overuse and misuse of workbooks by teacher; -teacher frequently interrupts lessons for discipline; -program not meeting individual needs; -teacher gives too few tests;

iii) planning and organization problems;
-inadequate daybook; -inadequate planning for substitute teacher; -disorganized, unattractive environment; -poor desk arrangement; -poor record keeping; -poor time use; -superficial marking and failure to return work to students; -lack of awareness of course of study; -not fulfilling course objectives stated in curriculum guide; -poorly prepared materials; -students inform teacher that they already have done an assignment; -inadequate individualized educational plan; -no unit plans; -displays out-of-date; -report card deadlines not met;" (Marshall, 1986)⁸

b) for professional misconduct;

-sexual misconduct (indecent assault, sexual assault, sexual intercourse with a minor); -physical or psychological abuse of students (manhandling student, corporal punishment, continuous sarcastic disparagements, continuous screaming at students); -general misconduct (having affair with or living with former or current student, use of alcohol or marijuana on the job or with students); - Charged with a criminal offence (marijuana use, sexual or physical assault outside of school, breaking and entering, possession of stolen goods); -substance abuse (outside of school); -insubordination (loud & abusive language to administration, disregarding principals directives, failure to obey a lawful order of the S.B., slanderous letter about S.B. activities.); -neglect of duty; -A.W.O.L. (full knowledge of consequences); -forged reports from previous administrators; -nude photo published

(private life of teacher brings reputation of employer into disrepute); -inappropriate discussion with minor (discussion of fears of homosexual orientation);

c) for breach of contract;

-resigning at incorrect time (Oct1, Aug. 28, June 10, etc.); -accepting an Ontario job after acceptance of B.C. job; -accepting business opportunity and walking away from job without informing school board, and

d) eclectic reasons "cause";

-declining enrollment in the school to which the administrator is assigned; -and mental instability (schizophrenic breakdown).

Question #5 How successful are school districts when their dismissal decisions are contested in forums such as Boards of Reference or Review Commissions?

Using the selected sample set of all Review Commission decisions, and Board of Reference decisions 17% of the cases were overturned, 8% of the cases were varied (penalty changed), 56% were dismissed (school board won), and 20% were abandoned by the requestor during the tribunal, (teacher resigned or confidential settlement/agreement was reached between the parties). Tribunals that were abandoned or withdrawn before they were convened did not result in a tribunal report, therefore could not be subject of this study due to an agreement between the author and the Registrar of the College of Teachers (see Appendices J & M).

Table 4(6) Overall Descriptive Statistics Tribunal Outcome

Decision of Tribunal	Code	Frequency	Percent
Appeal Allowed (teacher won)	1	13	16.9
Appeal Varied (penalty changed)	2	6	7.8
Appeal Dismissed (Board won)	3	43	55.8
Appeal Abandoned	4	15	19.5
		-----	-----
Total		77	100.0

Using only Review Commission selected cases, 27% were overturned, 7% were varied, 60% were dismissed and 7% were abandoned by the requestor during the tribunal, (teacher resigned or confidential settlement/agreement was reached between the parties).

Table 4(7) Review Commission Descriptive Statistics Tribunal Outcome

Value Label	Code	Frequency	Percent
Appeal Allowed (teacher won)	1	4	26.7
Appeal Varied (penalty changed)	2	1	6.7
Appeal Dismissed (Board won)	3	9	60.0
Appeal Abandoned	4	1	6.7
		-----	-----
Total		15	100.0

Using only Board of Reference selected cases 18% were overturned, 10% were varied, 43% were dismissed, and 29% were abandoned by the requestor during the tribunal, (teacher resigned or confidential settlement/agreement was reached between the parties).

Table 4(8) Board of Reference Descriptive Statistics Tribunal Outcome

Value Label	Value	Frequency	Percent
Appeal Allowed (teacher won)	1	9	18.4
Appeal Varied (penalty changed)	2	5	10.2
Appeal Dismissed (Board won)	3	21	42.9
Appeal Abandoned	4	14	28.6
		-----	-----
Total		49	100.0

In the composite table below, statistics for all quasi-judicial tribunals (including Transfer Review Committees) are compiled for the period 1973 to 1987. In this table even the

tribunals which were requested but were withdrawn before they could be convened are depicted statistically. These data show that: 15% of Boards of Reference requested and 21% of Review Commissions requested overturned the dismissal; 49% of Boards of Reference requested and 38% of Review Commissions requested were dismissed, retaining the school boards decision; and, 36% of Boards of Reference requested and 42% of Review Commissions requested were withdrawn before the tribunals could be convened.

The selected data set that the author was allowed access to at the College of Teachers for Boards of Reference and Review Commissions was slightly higher in its percentage overturned in each case as it could not include those tribunals which were never convened. (see Appendices J & M)

Table 4(9) below presents a list of Board of Reference, Review Commission, and Transfer Review statistics between the years 1973 and 1987.

Table 4(9)
Summary of Appeals 1973 - 1987

Year	Board of Reference				Review commissions				Requ- ested	Transfer Review Committee Total				
	Est.	Appeal Upheld	Appeal Dis- missed	w/d	Est.	Appeal Upheld	Appeal Dis- missed	w/d		Est.	Appeal Dis- missed	Appeal Upheld	w/d	
1973	2	0	2	0	0	0	0	0	7	7	5	0	2	9
1974	2	0	2	0	2	0	2	0	4	4	4	0	0	8
1975	1	1	0	0	3	0	2	1	0	0	0	0	0	4
1976	1	1	0	0	1	0	1	0	2	2	1	1	0	4
1977	4	2	2	0	0	0	0	0	10	9	5	4	1	14
1978	6	2	3	1	2	0	2	0	6	6	5	1	0	14
1979	6	1	4	1	4	2	0	2	9	8	8	0	1	19
1980	1	0	1	0	3	0	0	3	8	7	7	0	1	12
1981	4	1	2	1	1	0	0	1	6	6	3	3	1	11
1982	4	0	2	2	0	0	0	0	2	1	0	1	1	6
1983	7	0	5	2	0	0	0	0	13	11	10	1	1	20
1984	0	0	0	0	1	0	0	1	7	7	6	1	0	8
1985	8	1	2	5	3	1	1	1	4	4	3	1	0	15
1986	8	0	6	2	2	2	0	0	4	4	3	1	0	14
1987	13	1	2	10	2	0	1	1	4	4	4	0	0	19
total	67	10	33	24	24	5	9	10	86	80	64	14	8	180

w/d = request for appeal withdrawn

Est. = request for appeal received by Minister and tribunal members established

All of the data presented above deal with the rate of success or failure of dismissal decisions by school boards in quasi-judicial tribunals that follow their own procedure and rules of natural justice. If either of the parties was unsatisfied by a decision at this level of appeal then their next recourse was to seek a judicial decision by way of the courts, who follow even more stringent legal procedure.

Question #6 What are the grounds for reversal when school districts or teachers are unsuccessful in a Quasi-judicial tribunal?

This section will also be broken up into the two sections as were the answers to the questions above; 1) grounds for reversal of school board dismissal decisions in Review Commissions and 2) grounds for reversal of school board dismissal decisions in Boards of Reference.

1) In cases that were appealed to Review Commissions, the teachers appointments were terminated after three less than satisfactory reports. Most often control or discipline problems were cited as the teachers incompetence. Commissions have upheld teacher's appeals due to:

- a) School Board refusal of a teachers request for leave or transfer (situational incompetence),
- b) serious errors of fact or other inconsistencies in the reports causing one or more to be rejected,

- c) using the words "teaching-learning situation" rather than "learning situation" as is specified in former P.S.A. Regulations 94 & 65,
- d) no adequate evidence of assistance or follow-up on suggestions to improve teaching (regulation 65 (e)(1) ignored),
- e) lack of support (equipment and resources) in school or district for E.M.H. class,
- f) request by teacher to visit other E.M.H. classes denied,
- g) insufficient evidence that no learning was taking place in classroom,
- h) School Board decision taking place in inimical climate,
- i) teachers unsatisfactory behavior not proven to be irremediable,
- j) time for remediation not provided,
- k) technicalities, no dates on reports, and less than 30 days between notice of intent and dismissal notice,
- l) visitation notes not filed or inconsistent with unsatisfactory report,
- m) lack of notice of or import assigned to teachers deteriorating emotional condition.

The reasons listed above were not sufficient evidence to overturn a dismissal when taken in isolation. Often combinations of the above reasons were manifest in the same case.

2) In cases that were appealed to Boards of Reference, the teachers appointments were terminated for professional misconduct or breach of contract. Most often physical, sexual

or psychological abuse or criminal charges were cited as the teachers failure. Boards of Reference have upheld teacher's appeals due to:

- a) school boards own policy not followed w.r.t employee assistance plan;
- b) no progressive discipline used;
- c) dismissal for non-culpable cause (alcoholism);
- d) contemporary Canadian standards not violated by teachers behavior therefore lack of judgment does not add up to misconduct;⁹
- e) dismissal too harsh a penalty for extra - marital affair, even with former student;
- f) dismissal too harsh a penalty for having wine and beer served at restaurant with senior students;
- g) decision to suspend made by "special Board committee" not full board;
- h) denial of natural justice, full statement of reasons for dismissal not provided to teacher;
- i) female witness shown to have exaggerated facts in sexual assault case;
- j) school board considers transfer of principal and misconduct of principal at same meeting and does not separate the two discussions;
- k) teacher and his counsel not provided with specifics of allegations before hearing with School Board and was denied postponement to study them;
- l) physical contact causing pain was performed with no intent to cause bodily harm or inflict pain as a penalty for an

offence, then action did not constitute corporal punishment;

- m) teacher receiving conditional or absolute discharge for a minor criminal offence;
- n) teacher being dismissed for failure to obey an order of the Board, However order was received after incident occurred.

The reasons listed above were often not sufficient evidence to overturn a dismissal when taken in isolation. Usually combinations of the above reasons were manifest in the same case.

Question #7 What proportion of cases proceed from quasi-judicial tribunal to judicial review? (under what circumstances)?

From the casefiles analyzed it appears that judicial reviews tended to limit the scope of enquiry to: a) - the adequacy of documented evidence, b) - whether or not the action was taken in accordance with the School Act and its regulations, and Board policies, and c) - whether the action taken by the Board was a result of reasoned analysis and not of arbitrariness or abuse of discretionary power. A good list although not necessarily complete of grounds for which the Judicial Review Act was applicable can be found in chapter 9 of appendix U (Guidelines for Boards of Reference) where it states "grounds for appeal include:

- 1 Lack of jurisdiction, eg. the appeal was not properly filed.

- 2) Excess of jurisdiction, eg. deciding issues not properly before the Board of Reference.
- 3) Procedural error, eg. compelling the teacher to proceed first.
- 4) Denial of natural justice, including:
 - a) bias;
 - b) denial of fair hearing by refusing to hear admissible evidence;
 - c) denial of fair hearing by hearing and being influenced by inadmissible evidence;
 - d) denial of fair hearing by receiving additional material the parties do not have the opportunity to address in the presence of each other.
- 5) Error of law, eg. interpreting a statute wrongly on a point of substance to the decision.

This list, although it admits to being incomplete nevertheless seems to cover most of the cases that were analyzed in this study.

Overall Descriptive Statistics

The crosstabulation table of Tribunal Outcome for all cases examined vs Judicial Review displays an interesting issue;

Table 4(10) Judicial Review by Tribunal Outcome (77 cases in total)

		TRIBUNAL OUTCOME				Row Total
		AppAllow	AppVar	AppDis	AppAbn	
JUDICIAL REVIEW	Percent	1	2	3	4	
	Yes	7.8	0	9.1	2.6	19.5
	No	9.1	7.8	46.8	16.9	80.5
	Column Total	16.9	7.8	55.8	19.5	100.0

AppAllow = Appeal allowed, teacher won; AppVar = Appeal Varied, school board won the point but penalty was reduced; AppDis = Appeal Dismissed, school board won; and AppAbn = Appeal abandoned by teacher, school board decision uncontested.

The number of tribunal decisions taken to judicial review by school boards (column AppAllow, 6 cases) is almost the same as the number of tribunal decisions that were taken to judicial review by teachers (column AppDis, 7 cases). Another interesting issue is the number of appeals that were abandoned, but were then appealed to the courts (column AppAbn, 2 cases).

Board of Reference

The proportion of Boards of Reference that proceeded to judicial review from the selected data set of B.R. reports was 13 out of 49 cases or 27%.

Review Commission

The relative proportion of Review Commissions that proceeded to judicial review from the selected data set that the author was allowed access to, was only 2 out of 15 cases or 13%. However, in Table 4(1) which includes all of the Review Commissions that were ever requested of the Minister, the proportion of cases that proceeded to judicial review was 5 out of 24 cases or 21%, a significantly higher proportion. This discrepancy is due to the number of cases that withdrew their request for Review Commission appeal before the commission was

convened. The author was not allowed access to these cases as they did not generate a tribunal report (Appendices J & M). Some of these cases however would probably have generated important issues; such as the case reported by Proudfoot, 1988, p. 205. In this case the Review Commission was bypassed because the teacher had not been dismissed yet and the teacher appealed the content of the less than satisfactory reports directly to the courts. The case is reported by Proudfoot in the following manner;

"A jury in Haight v. Robb, another unreported B.C. case from 1975, awarded a teacher substantial damages against four principals for defamatory statements made in reports. The jury found the statements to be false and motivated by malice, thereby negating any defence of privilege. In commenting on this decision, the provincial Department of Education, the B.C. School Trustees Association, and the B.C. Teacher's Federation issued the following joint¹⁰ statement: 'The prescriptions of the Public Schools Act must be followed, and the authors of reports must be scrupulously introspective to ensure that their comments are valid and fair and free from any taint of animus toward the recipient of the report. The efficient and effective operation of the public school system demands some sort of reporting system. This isolated and unusual decision of a court of law should be viewed for its positive contribution in stressing the obligation for fairness in the system.'"

Another case that bypassed a Board of Reference this time and proceeded directly to court was a case of refusal to obey a lawful order of the school board. This case was discussed in detail on page 115, however, it bears mentioning here again as it is another example of a case that would not appear in the set of cases that the author was allowed access to. These cases often illustrate important issues but would have been missed by this study if they were not reported in other texts.¹¹ A concern that was constantly nagging at the back of this authors mind was the possibility of important issues in the Review

Commission and Board of Reference cases that were requested and then subsequently withdrawn before a tribunal could be convened, did not generate a report and thus were by agreement, excluded from this analysis.

Certification Status Following Quasi-Judicial Tribunal Review

An related issue to the above seems to surface when analyzing the data from Review Commission reports and Board of Reference reports. All cases of incompetence studied that were appealed to Review Commissions retained their certification although under Reg. 65 the Ministry of Education had the power to terminate a teacher's certificate for incompetence, if the school board involved recommended that the action be taken. This is in contrast to the Board of Reference cases where at least 20% of them had their certificates cancelled or suspended a short time after the conclusion of Board of Reference or after the last judicial review following the Board of Reference. (see also Table 4(3) and figure 4(5))

Table 4(11) Board of Reference Final Certification Status

Value Label	Value	Frequency	Percent
Certificate Retained	1	37	75.5
Certificate Canc. or Susp.	2	10	20.4
Certification Status Unknown	3	2	4.1
		-----	-----
	Total	49	100.0

The answer to this question came in a policy proposal report from Teacher Services, 1986. "School Boards, under the provisions of Regulation 65, may terminate a continuing contract of a teacher for incompetence and may recommend to the Minister the suspension or cancellation of that teacher. Boards have

been reluctant to exercise this option (the last instance in 1960)¹² and the Ministry of Education has no legal authority to initiate decertification proceedings for teaching incompetence" without said recommendation from the dismissing School Board.

SUMMARY

In this chapter, 7 questions which guided the research were addressed. In the first question the number of each type of tribunal that was convened, the number of appeals that were withdrawn, the number of appeals per year, and the number of appeals per school district, were examined. It was found that there were trends in the Board of Reference data which showed an increase in tribunals toward the late 1970's and into the 1980's. This trend was backed up by an equivalent trend in teacher certificate suspensions and cancellations. The characteristics of dismissed teachers examined were gender ratios, age distributions, the number of years in the school district where the problem occurred, the number of years in the school where the problem occurred, and the teachers experience in years. A hypothesis that explained the age distributions was discussed, and the correlation between teaching level (primary, junior high, etc.) and dismissal rate was examined.

The nature of the teacher's problem was classified into the various categories of Bridges' typology of teacher failure, and the rates of failure in the categories were crosstabulated with each other. The types of evidence used in teacher dismissals was gathered from all of the dismissal cases and summarized. The large amount of evidence required for less than satisfactory

performance was compared with the smaller amount of evidence required for misconduct cases. The success of school districts in tribunals was described in terms of overall statistics, review commission only statistics and board of reference only statistics. Overall 17% were won by the teacher and 56% were won by the school board. In Review Commissions 27% were won by the teacher, 7% were varied, and 60% were won by the school board. In Boards of Reference 18% were won by the teacher, 10% were varied, and 43% were won by the school board. A much larger percentage of Board of Reference cases (29%) were abandoned than Review Commission Cases (7%). To answer question number six, 13 reasons for reversal of dismissals were drawn from Review Commission cases and 14 reasons for reversal were drawn from Board of Reference cases. In question number seven, 27% of Board of Reference decisions were appealed to the courts whereas 21% of Review Commission decisions were appealed to the courts. Lastly in this chapter a question not posed in the parent study was examined. The eventual certification status of the teachers who appealed to the different types of appeal tribunal showed that 100% of the Review Commission cases retained their certificates whether they won or lost the appeal. However in Board of Reference cases 20% of the cases would end up with the loss of their certificate, either suspended for some period of time or permanently cancelled.

Notes

¹ see appendices O, P, T, and U for copies of pre-1988 Public School Act and Public School Act Regulations.

² this usually involved a negotiated monetary settlement of some kind. In one case the teacher signed an agreement not to seek teaching employment in B.C. In another case the teacher was terminated due to closure of the music department in his school, which was the only secondary music department in the district. The Minister in this case decided that dismissal in this case under s. 153(1) was not subject to ministerial review. Three other cases involved termination of Vice-principals; two due to declining enrolment, and one due to unsuitability as a vice-principal.

³ two statutory steps were not followed by the school board, thus the first Review Commission overturned the dismissal on the basis of a denial of natural justice. 1) the dates of the reports filed with the school board were not recorded, and 2) only 22 days had elapsed between the issuance of the letter of intent to terminate and the actual termination notice, whereas the legislation makes 30 days mandatory. (1986 case)

⁴ Jan 27 1986 press clippings compiled by Support Services Dept. for the Information Services Dept., Ministry of Education.

⁵ Canadian Broadcasting Corporation 6:00 P.M. Newscast, Wednesday, June 18, 1986. - press clippings compiled by Support Services Dept. for the Information Services Dept., Ministry of Education.

⁶ 93 cases divided by 90 years.

⁷ This list of reasons was taken from a list of Teacher Certificate Cancellations and Suspensions that had been compiled by Earl Cherrington's office, the Professional Relations Branch of the Ministry of Education. This office was concluded in 1987 when its duties were assumed by the newly formed College of Teachers. (Bills 19 & 20, 1987). The original list will not be included in the appendices as the teachers in it are identified by both name and certificate number. This is to comply with the restrictions placed on the author by the nondisclosure agreements that he signed with both the Ministry of Education and the College of Teachers. Appendices I & M.

⁸ The cases that were studied by Marshall were exactly the same cases that were studied by the author with a few minor exceptions in 1980 and 1987. Marshall's list serves to indicate the types of evidence gathered by administrators in incompetence cases.

⁹ The John and Ilze Shewan Case, analyzed by G. Siracusa, 1991. This opinion of the Board of Reference was not upheld by the S.C.B.C. The Supreme Court overturned the decision and found that there was 'misconduct' within the meaning of s. 122(1)(a) of the P.S.A. but suspension period of teachers was reduced. The B.C.C.A. later upheld the S.C.B.C. decision and dismissed the teacher's appeal.

¹⁰ author's emphasis.

¹¹ reported in Education Law in Canada by A. Wayne MacKay, 1984.

¹² this statement from the report was wrong as Marshall, 1986 indicated that the last instance of suspension or cancellation of a teacher's certificate for incompetence was in 1971.

CHAPTER 5
ILLUSTRATIVE CASES

The following cases illustrate various issues and important concepts examined in this study. Further discussion of these issues, along with more detailed analysis of some Review Commission and Board of Reference cases are presented in chapter six. The author has chosen some of the more salient issues, but these are not the only issues in the cases studied. There seemed to be almost as many issues available as there were cases to study, however I have tried to bring out and examine the more salient ones.

Case #1 Situational Incompetence causing Rapid Burnout

This particular case is interesting as it supports the theory of situational incompetence and emotional deterioration (burnout) that can occur when a teacher is placed in a situation for which he is not suited. This was the only case coded by the author in four categories of teacher failure: technical failure, ethical failure, productive failure, and personal failure. In this case the teacher had a M.Sc. in zoology from an Indiana State university and had excellent reports from both 5 years of teaching in Singapore and 7 years of teaching chemistry 11 & 12 and biology 12 in the United States. In 1970 he applied to B.C. and secured a position teaching science and general science at the grade 8 & 9 level. By 1978 the superintendent's reports indicated a dramatic change had occurred:

in most classes the pupils pay no attention to the teacher, they are throwing paper airplanes, hitting each other, clapping, whistling, talking, playing cards, wandering around the class playing with equipment or walking in and out of class without being challenged. The teacher does not use a daybook, leaves equipment out and does not clean up after labs are over. The teacher often has verbal confrontations with pupils, even in classes with only 7 or 8 pupils. Other teachers in the school request that he teach in someone else's room, due to destruction and theft of materials. Maintenance complains of gas valves being left open, rooms filled with explosive mixtures of gas, plugged sewer lines, water leaking through floor into typing room below destroying equipment, and large piles of materials, texts, apparatus etc. on grass outside his room. The teacher often plays a Karate game with students at beginning of class and then abruptly changes and begins sending students to office when things get out of hand. In one class 2 misbehaving students successfully refused to go to the office, in my presence!! - there is no work being done by students in the class

In May/78 the principal wrote to the superintendent:

relations with pupils in Mr. H.'s classes are very poor. There have been many requests for transfers to other classes. Twice now from two separate classes delegations of students have stormed out of his classes to the office with complaints. Substitute teachers refuse to come back and do his classes. Mr H. has not implemented any of my class management suggestions. The present educational situation is hopeless. Should I need to give Mr. H. a teaching assignment for Sept. 1979 the situation would be indefensible. When (not if) parents and students protest, I will be without a reasonable explanation!!

The situation finally comes to an end with the School Board dismissing him for misconduct when he had 2 boys pile desks in front of the doors to prevent a girl from leaving her detention and the teacher chased her around the classroom to catch her, she escaped through a window. This particular case seemed to fit all of the teacher failure categories except Bureaucratic failure. Most of the other cases did not have all of the indicators of teacher failure that this one did but some of the others managed to come quite a close second. The school board dismissed Mr. H. for misconduct June 6, 1978 and a Board of

Reference appeal was requested June 8, 1978. The B.R. was convened August 24, 1978 and was subsequently abandoned by the teacher August 29, 1978.

Case #2 Bringing the Reputation of Your Employer into Disrepute, as Seen by the Standards of the Local Community could be "Cause" for Discipline

This case has been reported in the media, has been the subject of appeals in the B.C. Supreme court and the B.C. Court of Appeals, and is even the subject of a fellow Masters student's project, (Siracusa, 1991). Since the case is in the public domain, the author feels free to use the names of the parties in this case as it is not covered by the author's signed non-disclosure agreements with the Ministry of Education and the College of Teachers. (Appendices I & M).

John and Ilze Shewan are husband and wife, and are both employed by Abbotsford School District (#34). They started a controversy by winning a subsidiary prize in an amateur photo contest in Gallery magazine. The magazine canvassed their readership for models for a "Girl Next Door" amateur erotica photo contest. Mr. Shewan submitted 3 semi-nude photographs of his wife (from the waist up, in a reclining position), along with an entry form and a short essay. The winning photograph would receive a large monetary prize, while the runner-ups would receive smaller subsidiary prizes. The magazine informed the Shewans in December 1984 that one of their photos had been chosen for publication and that it would be in the Feb. 1985

edition. Of the five photos appearing on p. 48 of the magazine showing the results of the contest, Mrs. Shewan's photo was the least revealing. The caption below her picture identified her, the photographer (her husband) and their location.

A local radio station reporter inadvertently informed the superintendent about the photograph and after confirming the information the superintendent held a meeting with the Shewans. In the meeting and all subsequent hearings the Shewans always stated that the photograph was to improve Mrs. Shewan's self-image and that they felt the submission of the photograph met community standards. The School Board did not agree and suspended Mrs. Shewan immediately upon being informed by the Superintendent. The Superintendent stated in a television interview before the statutory hearing with the school board that he was shocked and sickened by the whole episode. Mr. Shewan was suspended following Mrs. Shewan's hearing with the Board and both suspensions were for six weeks without pay.

On appeal to a Board of Reference, the appeal was allowed by the majority and both teachers were ordered reinstated with full back pay. The members of the majority Mr. Phillip Rankin (BCSTA) and Mr. Gordon Eddy (BCTF) felt that "Mr. and Mrs. Shewan showed an 'appalling lack of judgement', but that such an imprudent act does *not amount to misconduct* within the meaning of s. 122 of the P.S.A." (Siracusa, 1991)

On appeal to the B.C.S.C by the school board the Board of Reference decision was overturned. Justice Bouck found that *there was misconduct* within the meaning of s. 122 (1)(a) of the P.S.A. as the case involved the 'moral standards of the

community' where the Shewans taught and lived, and not the contemporary Canadian standards adopted by the Board of Reference. He reduced the penalty however, from six weeks to four weeks suspension. He concluded that the majority of the Board of Reference erred in law when they adopted the standards of tolerance test in Towne Cinema Theatres Ltd.¹ as a basis for allowing the appeal.

On December 21, 1987 an appeal by the Shewans was dismissed by the B.C. Court of Appeal and the decision by Justice Bouck was upheld.

Case #3 Telling Your Superiors What You Think of Their Ideas
Could be Classed as Insubordination

This case involves a man selected by the Colombo Plan Teacher Exchange to organize an underprivileged school in the colony of Sarawak Borneo from 1957 to 1960. His first year as a principal was in 1956. The Superintendent's reports on him in 1962 to 1967 are glowing with statements such as: "--strong teacher, able organizer, man of action, his loyalty and cooperation have made it a pleasure to work with him, supervision is good, his work with the Parent teachers association and basketball and hockey teams is excellent, details of administration are looked after in full detail, and strong principal who works with vigor."

In August 1, 1972 the school board, in response to the loss of accreditation from this principal's school, ordered a set of rules which were written from the suggestions of a Provincial

Accreditation Committee, to be obeyed by the principal "for the improvement of the operation of the school." The school board further stated that these rules could only be modified by the recommendation of any 2 of the Principal, the Director of Instruction, or the Superintendent. The principal then wrote a 17 page memorandum of rebuttal to the school board which states in part:

"I must point out [that] most of the rules are; completely unworkable amongst students intolerable to thinking parents insulting to the integrity, competence, and sophistication of the teaching staff. For the Board to assume that the senior secondary can be improved by this set of rules is to make an error of unbelievable proportions. I am led to the inescapable conclusion that this repressive and unjustified set of Rules has been inspired by reasons other than the desire to improve the educational program of the school. after reading this comprehensive set of absurd Rules, [anyone could see] that they were drawn up by someone who had deliberately set out to discredit the Board and thus place it in an untenable and ridiculous situation. I would implore the Board to rescind this inept and unworkable set of Rules if it wishes to avoid the loss of all respect amongst students, parents, [etc.] Please, Trustees, withdraw all these rules and avoid becoming the laughing stock of this community...."

Needless to say this memorandum becomes the basis of a dismissal for insubordination. The school board found the memorandum to be "divisive, inflammatory, and grossly insubordinate." At one hearing with the Board the principal was asked to sign a retraction, which he refused to do. At a second hearing the principal's lawyer requested an adjournment to study the charges, which was denied; he asked for a court reporter to take down proceedings as the charges were being read off at high speed, this was also denied; he asked for a list in writing of the complaints against his client, and this again was denied. He was told by the solicitors acting on behalf of the Board that no list of reasons for the alleged misconduct would be supplied.

The battle between the board and the former principal heated up with a demonstration at the secondary school by parents in support of the principal. Two of these parents ended up getting arrested. The principal went on television in an interview with the host of the C.B.C. television program "Hourglass", and the B.C.T.F. blacklisted the former principal's position. In a public statement the School Board chairman stated that the former Principal had run a "continuing challenge over a long period of time to the *supremacy* of the School Board". The Minister granted a Board of Reference for Jan. 10, 1973 and in a majority decision, Mr. B.J.B. Morahan (Chair), Mr. R. Wilson (BCTF), and Mr. F. Gingell (BCSTA) disallowed the appeal and upheld the School Board's dismissal. An judicial appeal was launched by the principal in B.C. Supreme Court but the dispute was settled out of court by the School Board.

An epilogue to this case came with a request from Ontario to the College of Teachers on December 1,87. The former principal requested a statement of professional standing from the former Teachers Qualification Service for teaching category purposes back in B.C.

Case #4 Being Too Understanding and Caring for Students who are Crying can Lead to Charges of Misconduct

This case illustrates the need for cross-examination and to be able to be confronted by your accusers. The teacher in this case was alleged to have kissed a female student who he was consoling on the mouth and to have placed his hands down her

pants in a school library. Upon being informed of the allegations by the District Superintendent, the school board held a hearing and promptly dismissed the teacher on June 24, 1983. A Board of Reference was requested on June 27, 1983 and was convened on October 3-5, 1983. The B.R. consisted of Mr. Anthony Peyton (BCTF), Mr. Phil Rankin (BCSTA), and Mr. George Cumming (Chair). During cross-examination it was revealed that although Mr. Q. was overly demonstrative in his style of teaching and that placing his arm around a crying girl in the library was unwise, there were significant contradictions in the evidence. The girl admitted to exaggerating a kiss on the cheek to a kiss on the mouth, and it was demonstrated that in order to have placed his hand down the girl's pants the angle of Mr. Q.'s arm would have been physically impossible. The girl also never reported the alleged incident to her parents or to the school authorities until mid-June. The principal's report about Mr. Q.'s level of care and understanding of students was used as a defence factor. The B.R. decision overturned the teachers dismissal and substituted a period of suspension with pay from June 3, 1983 until the end of 1983. The teacher was subsequently cleared of criminal charges in a court appearance due to the unreliability of the witnesses.

Case #5 Too Many Lates and Absences Can Lead to Neglect of Duty Charges

This case concerns a teacher who started teaching in Alberta in 1966 and applied for B.C. Certification in September

1973. A principal's report in 1974 and a superintendent's report in 1977 indicated that her classroom performance was satisfactory, and that her classes were not out-of-control nor off task. Both reports indicated a good relationship with pupils, but also indicated a concern about a large number of absences and lates. She was warned several times orally about lates to school and on November 17, 1978 she was given a written warning by principal about continuous lates to school (P.S.A. Reg. 87). On December 4, 1978 she was suspended by the school board on the basis of s. 130 (1)(a) neglect of duty. The School Board hearing was held December 6, 1978 and she was dismissed December 7, 1978. A request for a Board of Reference was received by the Minister on December 13, 1978. Evidence presented at the Board of Reference in May 1979 indicated that she was often late 4 times per week which caused a disruption in her classes and the adjoining classes, and she displayed an obvious antagonism to her superiors. She appeared to be beset with health problems and family problems, and placed her personal affairs above her consideration and recognition of her obligations as a teacher. Considerable personal antagonism had developed between herself and her principal as a result of his Nov. 17 letter of warning. She did not enjoy her current teaching assignment and described the town of F___ L___ as a "God forsaken hole".

The Board of Reference consisting of Mr. George S. Cumming (Chair), Mr. M.A. Paterson (BCTF), and Mr. Don Patten (BCSTA) unanimously upheld the school boards dismissal as much on her

"expressed attitude of truculent defiance" as on her record of absences and lates.

Case #6 Failure to Disclose Information about Prior Employment may be "Cause" for Dismissal

This case involves a male teacher whose first year of teaching was the 73/74 school year. A superintendent's report from School Dist. # H2 indicated that his split class of 17 gr. 6 students and 14 gr. 7 students was a ways a:

hive of on task activity, with various learning centers. sound planning and evaluation procedures are used chalkboard work is good individual needs of students are being met considerable freedom is allowed for the students, but control is satisfactory, and participation and rapport with students is good. In extra-curricular areas Mr. F. coaches various sports and runs the Canada Fitness Test in the school.

On Feb. 7, 1979 the School Board of Dist. # H2 suspended Mr. F. without pay for misconduct on the basis of a criminal offence charge of sexually oriented behavior with a Gr. 7 male student that dated back to Feb. 1976, the date of his criminal charge. Mr. F. requested and was granted on Mar. 6, 1979 release from contract with S.D. # H2 effective Feb. 6, 1979. Mr. F. pled guilty to the charge of indecent assault of a young boy in May 1979, and was given a conditional discharge which involved probation and psychiatric treatment, after which Mr. F. would then be available for gainful employment.

In July 1979 Mr. F. was interviewed and secured a position in S.D. # B1. At no time during the interview did he indicate that he had been previously employed with S.D. # H2 in 1978 or

1979. After a standard investigation of the facts included in the resume, S.D. # B1 on Sept. 4, 1979 suspended Mr. F. without pay for misconduct relating to his "willful failure to disclose facts that would work against his acceptance as an employee." Mr. F. appealed this dismissal on Oct. 4, 1979, and a Board of Reference was convened on Feb. 6, 19, & 20 1980. The B.R. was composed of Mr. Walby Lightbody (Chair), Ms. Rendina Hamilton (BCSTA), and Mr. Roland Cacchioni (BCTF). The teachers Lawyer was Mr. A. Black of MacTaggart-Ellis & Co. and he submitted that "misconduct" as referred to in s. 130 (1)(a) must be limited to misconduct that occurred while there was in effect a subsisting contractual relationship, and not misconduct that occurred between the time that the interview took place and the formal hiring.

The B.R. did not agree with the Appellant's argument, stating: "we are not merely dealing with a failure to disclose, [we are dealing with] a deliberate intention to mislead the interviewer, which in itself constitutes misconduct." In a unanimous decision the B.R. dismissed the appeal, Feb. 1980.

Case #7 School Boards' Powers to Dismiss Teachers Under Pre-1988 s. 122 (1)(b) were Narrower than Under s. 122 (1)(a)

This case requires a bit of preamble with respect to the pre-1988 School Act. Under s. 122 which dealt with Suspensions or Dismissals of teachers, subsection (2)(c) stated:

c) where the teacher is suspended under subsection (1)(b) and is acquitted of the charge or given an absolute or

conditional discharge, [the School Board shall] reinstate him forthwith after the later of

- (i) the expiry of the appeal period, or
- (ii) the expiry of the period for appealing from the last court to which an appeal from the decision is taken and in which he is acquitted or given an absolute or conditional discharge.

Keeping the previous statement in mind, the situation in this next case was applicable. (Section 122 was formerly numbered section 130 in 1977).

This case involved a man employed by S.D # A2 as a counsellor and guidance teacher at a junior secondary school. On Nov. 24, 1976 he was charged with possession of marihuana contrary to the provisions of the *Narcotic Control Act*. After a hearing with the School Board, on Dec. 9, 1976, he was suspended with pay pending outcome of the charges. On Mar. 29, 1977 he pleaded guilty to the charge and was given a conditional discharge by Judge W.G. Craig. On June 10, 1977 the probation order was varied, deleting the condition. Following the period for appealing the court's order the School Board proceeded to terminate Mr. B.'s employment based on his guilty plea, on May 2, 1977.

Mr. B. appealed to the Minister on June 3, 1977 and the Board of Reference convened on July 20, 1977. The Board of Reference consisted of Mr. G.S. Cumming (Chair), Mr. P.D. Walsh (BCSTA), and Mr. M.A. Paterson (BCTF). The conclusion of the B.R. was that according to s. 662.1 (3) of the Criminal Code of Canada and s. 130 of the B.C. Public Schools Act, the School Board was without jurisdiction to order the dismissal of Mr. B. when he had received a conditional discharge. Section 662.1 (3) of the Criminal code states:

"(3) Where a court directs under subsection (1) that an accused be discharged [absolutely or conditionally], the accused shall be deemed not to have been convicted of the offence to which he pleaded guilty...."

In their decision the Board of Reference stated:

"We are, therefore of the opinion that although the Appellant's case is, somewhat legalistic, it is a proper one, well-founded in law and must be acceded to.

The appeal is, accordingly, allowed. The dismissal is set aside and the Appellant is reinstated.

We can only observe as a final and somewhat gratuitous comment that the authorities responsible for the formulation of the legislative provisions in the Public Schools Act should review and revise them to bring them into conformity both legally and philosophically with the provisions of the Criminal Code."

Not to be counted out yet, the School Board appealed this decision to the S.C.B.C. on Nov. 30, 1977. In the Supreme Court decision filed Dec. 22, 1977 Justice MacDonald essentially reiterated the arguments of the teacher's council (Mr. McDonald) from the original Board of Reference decision and dismissed the School Board's appeal.

Following this decision, various school boards facing similar situations asked the Ministry of Education for guidance. The advice given by the Ministry² was:

".... had the allegation [by the school district] respecting Mr. B. not been as specific as it was -that is, a charge and conviction under the Criminal Code -then it might have been possible to ease him out under section 130 (1)(a) of the Public Schools Act. Section 130 (1)(a) seems to confer a much broader power on the Board to suspend a teacher under clause (b). So far as new cases are concerned, it seems to me that if it is undesirable to have such teachers as Mr. B. in the employ of the School District in the Province of British Columbia, then an amendment should be made to the Public Schools Act which reflects the present state of the law.

The reader will note that both the Board of Reference and this legal opinion from the Attorney-General's office mentioned

revisions to the School Act which would bring it more in line with the Criminal Code amendments that were introduced in 1972 by the Federal Liberal Government under Mr. Trudeau. These amendments took place nearly 10 years later, in 1987.

Case #8 Sometimes Placing the Teacher Back in the Classroom is not the Best Course of Action for The Teacher or the Students, or the System

This case involved a business education teacher with a lot of business experience who became trained as a teacher when she was 35 years old. A Principal's report on Apr. 30, 1975 stated that she was teaching Shorthand 11, Business and Marketing 12, Bookkeeping 11, and Typing 9/10. She had 2 years experience elsewhere and she was in her first year teaching in school district #J1. Her day book was classed as good, her planning for individual needs was good, the room was neat and tidy, and repair and maintenance of the equipment was up to date. The principal indicated that her register and markbook were good, her discipline was good, she was careful about inattention of students, she used a variety of teaching methods, and her closure was good. One slightly negative comment was in the report however, "It is recommended that Miss J. keep a more formal distance from her students in her interpersonal relationships with them."

The next items in the report are a series of complaints from parents and students all spaced closely together which culminate in a suspension for misconduct.

May 3, 1978 a female student complained that Miss J. was staring at her body.

May 5, 1978 several female students complained about Miss J.'s preoccupation with breasts and with having students wear brassiers.

May 23, 1978 a parent complained that Miss J. fondled the girls hair and they did not like it.

May 25, 1978 a female student stated that Miss J. had said that "your clothing has gone from the sublime to the ridiculous".

Oct. 13, 1978 a female student did not report to detention because she thought that Miss J. was "gay" and was "coming on to her".

Apr. 9, 1979 Miss J. placed her arms around a girl to check typing distance, and student complained that her breasts were touched.

Apr. 11, 1979 Miss J. asked a student to take the paper out of her desk, and the student refused to comply, at which point Miss J. bearhugged the student and held her down to get the paper out of the desk.

The School Board suspended Miss J. without pay on Apr. 12, 1979 for misconduct on the basis that she had been previously warned by the principal about unnecessary handling or touching of students. The period of suspension was from Apr. 17 to June 30, 1979 inclusive.

The compulsory School Board hearing was held Apr. 18, 1979, and Miss J. then appealed to the Minister for a Board of Reference. The B.R. was convened on May 10, 1979. The members were Mr. George Cumming (Chair), Mr. M.A. Paterson (BCTF), and

Mr. D.N. Patten (BCSTA), with Mr. J.S. Clyne as the School Board's solicitor, and Mr. A.E. Black as the appellant's solicitor. In a unanimous decision the B.R. upheld the suspension for misconduct and stated further that by not contacting the student's parents after the Apr. 11 incident and not heeding the principal's 1978 instructions, the teacher had committed a basic breach of teaching ethics as well as having committed misconduct.

Normally a case would end with the decision of the Board of Reference, however this case continued. In August 1980 Miss J. was placed on Long Term Disability Leave for chronic back problems and *mental instability*. On Nov. 13, 1984 the School Board suspended her again subject to s. 107 (3) of the P.S.A. This suspension was now on medical grounds due to an advisement from the School Districts Medical Officer on Nov. 1, 1984, where he stated:

"a return to the classroom might pose a risk to her mental health, given her brittle makeup and maladaptive coping techniques -she denies data that she finds uncomfortable. Miss J. may have trouble with difficult students will have a negative impact on students due to enigmatic personality makeup and distorting coping mechanisms -has a tendency to project blame away from herself. In May and June of 1984 the psychiatric and psychological reports that were ordered by the superintendent showed that she suffered from anxiety and depression brought on by the stress of the job situation and an underlying mental disorder -there is a family history that suggests the possibility of a major mental illness, -suggestive of paranoia and rigidity of personality defenses. In the classroom the symptomatology would show up in soft and subtle ways such as inappropriate social behavior, interpersonal eccentricities, rigidity, over-reaction to stimulus situations, and problems with empathy. In 1982 Crown Life began using a rehabilitation specialist to look into different vocational alternatives for Miss J."

On Aug. 15, 1985 a Physician from South X_____ Health Services misinterpreted the Act and sent a Medical analysis on Miss. J. to the Superintendent rather than to the teacher, in contravention of the Act (s. 107 (3)) and the School Board was obliged to reinstate her. The superintendent was very careful to make every effort to help her back into the profession such as giving her 6 classes with no homeroom with all classes on the first floor, but by Oct. 1, 1985 she was again encountering significant difficulties meeting her professional responsibilities. On Oct. 11, 1985 the teacher asked for a medical leave of absence, which was granted by the School Board without pay. She also asked the School Board to recommend a program of professional upgrading. The case's paper trail ended with a letter from the superintendent to Miss J. where he described her desire to return to teaching as a "self-destructive dream" and he continued to suggest career alternatives.

Case #9 Not all Misconduct Cases End in Despair, Although Sometimes it May Seem like they Do.

This next case involved the private life of an admittedly "gay" man who taught French in the languages department of the local high school. Mr. Q. was charged under s. 246.2(2) of the Criminal code of Canada after he came in to the local police station of his own accord and made a written admission that: "he had invited 3 boys from the same family, who were in the same church as he over to his house, after they had previously showed

him and discussed with him written examples of gay behavior, oral sex, etc. The boys had also kissed him in a romantic way at the church. He invited them over on 3 separate occasions. On the second occasion he shared a bed with the 13 year old boy (eldest of the brothers) and allowed him to masturbate him. On the third occasion more in depth sexual contact occurred."

The teacher remarkably had a great deal of community support on his side, as the eldest boy of the three was blackmailing the teacher which eventually led him to file the above statement with the police. At some point after this time the older boy left home, moved in with another man and bragged publicly about bringing down a teacher.

The School Board suspended Mr. Q. without pay after a hearing on Nov. 4, 1984 pending disposition of the criminal charges. The first of a set of criminal trials occurred on June 14, 1985 in the B.C. Supreme Court. It resulted in an acquittal when Justice McLachlin ruled that s. 246.2(2) of the Criminal Code contravened s. 15 of The Canadian Charter of Rights and Freedoms. The Crown appealed the acquittal to the B.C. Court of Appeals and in the Vancouver Sun Newspaper on Sept. 5, 1986 it was recorded that the first acquittal was overturned by the B.C.C.O.A. and the decision was remanded back to the Supreme Court for a *trial de novo*. The second trial was by jury in the B.C.S.C. and was presided over by Justice Paris. The trial began on Feb. 21, 1987 and eventually this trial *also*, resulted in an acquittal.

Meanwhile back at the ranch, the School Board dismissed Mr. Q. on Mar. 4, 1987 and authorized the payment of \$78,000.00 in

back wages for the period of time that Mr. Q. was on suspension pursuant to s. 122(4) of the P.S.A. On Mar. 11, 1987 he appealed the dismissal to the Minister. A Board of Reference was convened but was delayed by the parties until a decision was reached in another B.C.S.C. action on the authority of the School Board to dismiss Mr. Q. On July 28, 1987 Justice Legg upheld the authority of the School Board to dismiss Mr. Q. and Mr. Q's lawyer promptly threatened suit in the B.C.S.C. again. The B.R. was abandoned after the teacher and the School Board reached a settlement/agreement.

Normally this is where the author ends his summary of cases, however the conclusion to this one is interesting. The former teacher now went on to graduate school at the University of New Brunswick in Moncton and graduated L.L.B. on May 19, 1990. The title of his graduate thesis was Hypercriminalization versus the Sexual Consent of the Adolescent. Mr. Q. was then selected to attend the prestigious European Institute of Advanced International Studies at Sophia, Antipolis, and became their representative to the European Parliament.

Case #10 The Practice of Confidential Settlement/Agreements Makes Careful Screening of Applicants Essential: Especially if the Teacher has Resigned Under Unusual Circumstances. (Fossey, 1990)

This case involved more the actions of a superintendent than a teacher. Mr. L. a great basketball coach and super teacher of physical education voluntarily surrendered himself to

police on Dec. 18, 1986, to answer charges of 2 counts of indecent assault, and 1 count of sexual intercourse with a 13 year old. These charges dated back to between June 1978 and Sept. 1978. The teacher was trusted as a great coach in School Dist. # U1. He taught grade 3 and coached girls basketball from grade 6 to grade 12. In 2 cases he decided to have sexual intercourse with the teenagers involved to "bring up their maturity level". He would follow the girls' careers from early on to grade 12 but tended to lose interest in them around grade 9. It was alleged that during a 1 week long summer basketball camp he insisted on himself and the girls "camping out" and the girls switched turns sleeping in his van with him each night. Other allegations include that; he propositioned 3 different girls at a Florida Basketball camp, he regularly touched girls on the breasts and buttocks, he used abusive and vulgar language with the girls, he never coached boys teams, and that some girls did not want to go to school if he was going to be there because he regularly picked up the girls by the waist and crotch.

Complaints of this nature led to his resignation under unusual circumstances from School Dist. # U1 and following that, from the coaching position at a local junior college for the same reasons. According to trial testimony he even continued to have secretive basketball practices around the city as he had retained the keys to the athletic club after his dismissal.

On May 31, 1986 Mr. L. was interviewed for a secondary teaching position in another school district (S.D. # Z4), and was offered the position on June 11, 1986. This is where the case takes an interesting turn. The superintendent of the new

district began investigating the reasons for Mr. L's dismissal from the previous district. At the Ministry he was told that the teacher resigned rather than go through an investigation for sexual improprieties. At the junior college he was told that there was no problems. A mother who lived in the previous school district had even contacted Mr. L. to see if her daughter (who had been abused by her father) could go to school in Mr. L.'s new school district and live with him. The superintendent in a meeting with Mr. L. informed him that if any concerns came up that are similar in nature to the ones that he resigned for in his previous district that he would be dismissed immediately.

It did not take long: On Nov. 19, 1986 a fellow girls' basketball coach and teacher warned Mr. L. about touching the girls' breasts and pulling shorts. On Nov. 22, 1986 two police officers at the towns recreation center noticed Mr. L. run his hands over the breast of a female student and they concluded privately that the contact was not accidental. On Nov. 24, 1986 in a School Board hearing the inappropriate comments and the breast touching were confirmed and the teacher was offered a leave of absence with pay until the next Board meeting.

The superintendent had meanwhile contacted a former principal of Mr. L. and was led to Miss B., one of the teacher's former basketball students. *It is this phone call that initiated criminal charges to be laid against the teacher in his previous district.*

Mr. L. was dismissed from School Dist. # 24 on Nov. 27, 1986, and he appealed to the Minister Dec. 12, 1986. Mr. L. was subsequently charged with one count of sexual intercourse with a

minor and 3 counts of indecent assault in his former town. By Mar 2, 1987 both parties agreed to adjourn the Board of Reference until disposition of the criminal charges. On July 14, 1987 Mr. L. pled guilty to the charges and was given an 8 month jail sentence, 3 years probation and ordered to attend psychiatric counselling, by Judge Gordon. The Board of Reference was cancelled on Aug. 14, 1987, and Mr. L.'s teaching certificate was cancelled on Dec. 9, 1987 just before s. 15g of the previous School Act was repealed (Jan. 1, 1988). Psychiatric reports stated that Mr. L.'s problem was treatable and controllable, he had arrested social development leading to developmental problems in dealing with the opposite sex.

In a political epilogue to this case, in 1987 the superintendent of S.D. # 24 objected strongly to the Minister about the leniency of Mr. L.'s sentence; 4 teachers in S.D. # U1 were charged with sexual offences involving students; the Ministry of Education had to transfer approximately 12 pending decertification cases over to the newly formed College of Teachers; and the Government established a special Inquiry into Sexual Abuse of students by teachers headed up by Barry Sullivan and Georgina Williams. All in all it was an interesting year.

SUMMARY

In the titles to each of the cases presented in this chapter the author has tried to describe, inasmuch as the specific situations in the cases would allow, the major issue exemplified by each case.

The number of issues available in a comprehensive study such as this seem to be almost as high as the number of cases themselves. There are some common threads, however, such as the inadvisability of teachers having any contact of a sexual nature with any minor student or non-student, male or female, past or present. This theme is present in cases 9 and 10. Sexual contact of any nature with minors is prohibited by the Criminal Code of Canada.

Tactile contact of a disciplinary nature (case #8) has been prohibited by the Public School Act in B.C. since 1972, and could lead to the double jeopardy of assault charges being laid under the Criminal Code as well as a misconduct charge under the School Act. Tactile contact of a consoling nature such as in case #4 is inadvised as it could be misconstrued as sexual advances. There is a suggestion of this type of contact in case #8 as well. Tactile contact in the British Columbia school system must be limited to accidental or innocuous contacts, or directionary contact used to prevent a child from harm. This is especially so in junior high school grades. (see chapter 4).

For teachers charged with an offence such as in cases 6,7,9, & 10, the language in the pre-1988 School Act and in the current School Act is virtually the same. "If the Board believes that the circumstances created by the charge render it inadvisable for the teacher to continue his duties, the Board may suspend the teacher...." (s. 122.2(1)). In the current school act however appeal is subject to the provisions of the local collective agreement and Part 6 of the *Industrial*

Relations Act. The double jeopardy factor mentioned above is inherent in this section of the post-1988 P.S.A. as well.

For those teachers who are susceptible to physical, emotional or mental breakdown, such as in cases 1, 5, and 8, teaching in a public school today will accelerate this better and faster than most other occupations. The occupation today requires the patience of a saint, the reserve of a Supreme Court magistrate, and the caring of Mother Teresa. If you react to a situation in most of the ways that a real human being, not a robot would react you *could* end up being charged with misconduct. If you overreact to a situation you **will** be charged with misconduct. Some teachers respond to this expectation today by exhibiting the perfect example of passive-aggressive behavior, in which anger, which is repressed due to the current fashion in teaching and the expectations of many 'modern' parents, is redirected into forgetfulness, backhanded compliments, sarcasm, or any other type of covert expression of hostility. The author believes that this is due to the legislated and fashionably expected subjugation of more direct expressions of disapproval or hostility. (Chatelaine, Jan. 1993, p. 59)

In case #3 the operative phrase is "keep your comments to yourself". Gone are the days when criticism of your superiors was an admirable quality called "spunk" that helped you distinguish yourself in the system. This has been replaced by the word 'insubordination'. If you feel that it is necessary and in the best interests of your superiors to criticize their policies, do it with tact and discretion. Euphemisms that you

use on your student's report cards (because you can't criticize them without damaging their precious self-image) are best used in this context. Subtle insubordination as in the background case #2 in chapter 1 is difficult to deal with or even expose. Even the Canadian military, where the entire command structure is designed to express conformity and the ability to see that a command is carried out, precisely and correctly, down to the lowest levels of the service, is having troubles with insubordination and discipline within its ranks.³

As for case #2, this is a perfect example of behavior that brings the image and reputation of the employer into disrepute, according to the local community values. In most labour law this is a classic definition of misconduct. For a teacher inappropriate or controversial behavior is prohibited both on-the-job and off-the-job. **Remember your history**, as Dan Lortie would put it, often teachers in the early days of America (and Canada) were apprentice clergymen who "had to accept stern inspection of their moral behavior the status of teachers in colonial America reflected the connection between their activities and the core values of that society." (Lortie, 1975, p. 11).

For case # 10 the behavior of the teacher is not in question; it was patently illegal! The behavior I would like to point out is the behavior of the first school district and the junior college. Without resorting to the "old boys network" the superintendent of the second district would never have been able to discover the "cause" behind the coerced resignation of the teacher from the first district and from the junior college.

Without his investigation the teacher would simply have been dismissed from another school district to start all over again somewhere else. A phrase that I would like to borrow from Fossey, 1990 describes what I think happened in the first district. "A covenant of non-disclosure is often included in the settlement/agreement between a school district and a teacher accused of sexual molestation or other child abuse." To the author, Fossey's use of the term covenant is a misnomer. A settlement/agreement such as this is a far cry from the traditional use of the word covenant. This type of agreement is a misuse of the powers of the school board and does not take into account any consideration of future ramifications of the agreement to other victims.

I will end this summary with a discussion that I actually started at the end of Case #7. The pre-1988 school act included within it a number of reasons for suspension or dismissal. These reasons included criminal offence charges, neglect of duty, misconduct, refusal or neglect to obey a lawful order of the board, and three less than satisfactory reports filed with respect to the P.S.A. and the P.S.A. regulations. The current legislation which attempted to respond to the criticisms outlined in Case #7 as well as other factors, now only states that a teacher may be dismissed, suspended, or disciplined for criminal offence charges, or for "just and reasonable cause". The current legislation rather than trying to define a number of "causes", now allows School Boards to define for themselves what types of "cause" are just and reasonable and the burden of proof then lies with the union local to demonstrate that the specific

type of "cause" as it is defined is not just and reasonable, in front of an arbitration hearing.

Notes

- ¹ *Towne Cinema Theatres Ltd. v. The Queen*, S.C.C., unreported, May 9, 1985. Case arose out of a charge of presenting obscene motion pictures contrary to s. 163 of the Criminal Code.
- ² Memorandum from the Department of the Attorney-General by P.A. Insley, Legal Officer, Criminal Law Division.
- ³ CBC and CTV Newscasts 8:00 A.M. broadcasts on September 1, 1993. Topic was the release of the findings of a military inquiry into the deaths of Somali villagers at the hands of some very prejudiced Canadian military personnel.

CHAPTER 6**CONCLUSIONS, IMPLICATIONS, and RECOMMENDATIONS FOR NEW RESEARCH**

As can be observed from the descriptions of the casefiles labelled Case A and Case B in the background section of Chapter 1 this study was initiated as a result of examples of bureaucratic failure in the teaching profession (insubordination, neglect of duty, failure or neglect to follow the directions of superordinates). The study's purpose in 1988 when it began was that I would discover some administrative panacea, an infallible way to root out insubordinate saboteurs and end their teaching career forever. It became apparent, however, on examination of the qualitative data available from a number of the teacher casefiles who eventually ended up in a Board of Reference or a Review Commission appeal, that this study would have to be expanded to include all types of teacher failure. In a significant number of the cases, (37.7% of all cases studied) where bureaucratic teacher failure was a factor, much of the recorded observations, notes from administrators, and other pertinent paperwork indicated that the bureaucratic failure **followed** initial criticisms by superiors of the teacher's behavior in another failure area such as technical, ethical, productive, or personal. It appears from the data that in most cases teachers do not come into the profession "ripe" with bureaucratic failure, it is created through the interaction of the often mutually contradictory objectives of the teacher, the community, the parents, **the student**, and the administration. The defensive positions that teachers and administrators find

themselves being forced into become steadily harder and more immutable as the situation continues to build.

A case in point involved a male teacher 55 yrs. old with 19 years of teaching experience, 8 years in the school where the problem occurred, with many good evaluations to his credit under a number of different supervisors. Between 1984-86 however Q___ F___ received 3 less than satisfactory reports which in general indicated that although "classes are extremely well behaved and listen attentively when the teacher speaks and do not call out or disrupt", the students "show low levels of industry,..... they stop and chat when finished work,..... they do not show good capacity to make inferences or solve problems,..... due to lack of teacher expressing these skills in questioning or assigned work". The reports also stated that the "daybook is not always filled out,..... the lessons consist mainly of worksheets,..... lesson pace is slow,..... standards for student performance is low,..... ample individual assistance is given, but little whole group instruction is used." (Business and Commerce courses 11/12). The reports indicated a pleasant personality to his students, good class control, *no extra-curricular involvement*, and although 2 reports did not include any specific suggestions for improvement, they both stated "he did not appear willing to modify either his planning techniques or his classroom methodology in accord with suggestions".

The teacher was given an intent to terminate letter April 30 subject to Sec. 123(1) & (2) of the pre-1988 P.S.A. and requested a review commission of the Minister May 20/86, (pre-

1988 P.S.A. s. 130). The Review Commission took 12 weeks to hear all witnesses with many extensions and even the Ministers office got involved by initially denying the second extension (Aug. 20), however the Attorney-General's office informed the Education Minister's office that this could result in a possible charter of rights challenge alleging lack of procedural fairness in limiting time for teacher's counsel and the review commission to make a decision. With this in mind the Ministry of Education agreed not to call for a decision until the review was concluded (Sept. 26).

After \$70,000.00 in costs to adjudicate this appeal the review commission rendered its decision:

"the termination of Q___ F___ is to be reversed and he is to be immediately reinstated..... the school board must work with the teacher to develop a trustful new working relationship..... the school board must pay for the training of Q___ F___ to raise his level of effectiveness up to a satisfactory level of professional competence before he is assigned to a classroom..... a formative evaluation cycle is to be developed before any summative evaluation is reinstated..... the board and the local association will jointly establish a district-wide evaluation process with uniform criteria of evaluation and performance indicators.....".

In the review commission summary both the *teacher's* bureaucratic failure (1) and the *school district's* systemic bureaucratic failure (2) were referred to:

- 1) Q___ F___'s behavior during this 2 year period of time is described as "intransigent" in that "he adopted an overly-formal legalistic and defensive approach to his superiors..... which led to a deterioration of professional relations".
- 2) "the report writing practices of the school district resulted in an injustice to the teacher natural justice requires

that a comprehensive program of rehabilitation should be followed **before** steps are taken which lead to the dismissal of a staff member. The board's decision to terminate took place in a climate which was antagonistic to the practice of rational processes and the maintenance of professional courtesies" (*teacher was past president and head of negotiations in a very bitter dispute in 1984 when his "teaching incompetence" started*) - "the school board's evaluation processes had: no common criteria, no assigned responsibility, no defined follow-up procedures, no definite timeliness, no public, legal, or professional options for the 'less than satisfactory' teacher..... - there was more than one administrator evaluating at one time..... - the reports are filled with spelling, typographic, and comprehension errors..... - the reports did not follow requirements for statutory terminology..... - the second principals report had no specific recommendations as to what must be done to satisfy undetermined expectations, and the final evaluation of the learning situation was not supported in the body of the report..... - the teachers daybook was not a legitimate document of accountability".

The review commission report judged at least one of the evaluation reports written by the principal as "judgmentally weak and stylistically flawed". It went on to conclude that "no common school board policy resulted in the evaluation of a teacher by three report writers whose criteria and processes for evaluation differed each from the others". In it's summary recommendations the review commission stated that "when a school board initiates a dismissal action, the reports upon which the

decision is made must lead the board to the firm conclusion that the teacher is irremediable".

The intractability of this by now adversarial process and the positions taken can be seen in the aftermath of this review commission decision. A vast plethora of memos between the school district involved, various departments of the education ministry, and the attorney-general's office were generated during the term of this review commission and afterwards as well. The contents of some of these interdepartmental memos indicated that the Ministry of Education and the Attorney-General's office were very alarmed at the apparent direction that was taken by this review commission. Some of the comments are listed below. The memos a) suggest that this particular review commission has set a precedent which invalidates the P.S.A. legislation dealing with incompetent teachers, b) suggest that a judicial review of the decision is warranted even though the chances of winning are less than 50%, c) attack the legal ability of the review commission to sit as a quasi-judicial tribunal, d) attack the composition and the integrity of the review commission members, e) attack the BCTF lawyer for pursuing a money grab by prolonging the hearing, and f) object to the costs involved in fulfilling the recommendations of the review commission.

This case seemed to become more bizarre at every turn as each side concerned itself solely with winning its point. On Dec 6/86 the teacher had a coronary and was placed on medical leave. Dec 30/86 the school board which had earlier refused to back a judicial review, now filed a writ in the B.C.S.C. with

the Attorney-General's office as Intervenor and Co-petitioner to overturn the Review Commission decision. Feb. 2/87 the R.C.M.P. informed the Ministry of Education of a perjury investigation against the school district superintendent during the review commission hearings. Feb. 11/87 answer and counter-petition filed against perjury charge by the school board. May 7/87 The school board lawyer outlined the estimated costs of a B.C.S.C. appeal, a B.C. Appeals court action, an S.C.C. action, the civil actions against the board and its officers versus a net payout of the teacher in a memo to the school board. The lawyer also stated that "...the attorney-general's insistence on a judicial review is now academic as Bill 20 is passed and the P.S.A. legislation has changed." July 17/87 the school board found that Q___ F___ was ineligible for long term disability and in this case the teacher expressed an interest in returning to work. Sept. 11/87, 4 years after this adversarial process had begun, the teacher and the school board came to an agreement on a payout sum, a resignation, an early retirement pension and the dropping of all pending charges in civil courts and the B.C.S.C. An ironic epilogue to this case is included in the last piece of microfiche out of 15 pages of microfiche representing 100 pages of typewritten material each. An unsigned, undated page simply stated "Teacher died, End of File".

After reading just one of the casefiles like this and there are many of equal complexity (even a recent one, 1989 that does go to a request for Supreme Court of Canada appeal by the School Board and is turned down), I am convinced more and more of the appropriateness of outplacement counselling (Abrell, 1985),

institutional-level accountability and evaluation programs (McLaughlin & Pfeifer, 1988) and career transition incentive programs which do not level blame for inabilities in the classroom at the teacher, administrators, or other front line employees but look at factors like situational incompetence for these inabilities or at the organizational factors in the school district as a whole.

Venturing a purely speculative theory at this point, I would state that some humans tend to develop a sense of ownership towards their jobs, not only toward the place of work (building, etc. as evidenced by the number of people that will make statements like "that's *my* school" rather than "that's the school where I work"), but also toward how they actually perform their job. This sense of ownership is not easily challenged by those in authority whose job it is to see that subordinates do their job correctly and as expected.

A change therefore in how a subordinate in a profession is expected or required to do his job will almost always be viewed by the subordinate as interference in something that is uniquely owned by that subordinate. Additionally if a superordinate is evaluating a teacher with the expectation that he could be gathering evidence to take away that teacher's job (and this expectation is known by both parties), then it is likely that the subordinate is going to develop some form of bureaucratic failure. He/she is not likely to give up something that they consider theirs to own, something that gives them security, pays the bills, supplies food, etc. with very much ease. *The security issue here is a crucial point.* The security of a

person's job is equivalent to a personal level of safety. If a person's safety is threatened then they will fight back with any and all weapons that they have at their disposal. This feeling is likely to create the "intransigent" type of behavior as exhibited in the previous casefile.

This sense of ownership is likely to increase with experience, age, duration of stay in a single teaching assignment/location, and as the teacher invests more in the job both economically and characterologically. This is evidenced by this study's interpretation of the age and experience level found in the Review Commission data. The median age of teachers who fought their dismissal for incompetence (doing their job incorrectly) was 48 years, while the range varied from 43 years to 56 years. Their experience level in the teaching profession varies between 6 years and 23 years with a mean of 16 years and a median of 17 years. These data indicate that these people are likely to have developed a strong sense of ownership toward their job and their career. This idea of ownership is also born out by discussions that I have had with various administrators and by my experience as an administrator. Douglas Smart the registrar of the College of Teachers once told me in a discussion that the greatest proportion of the people that can be gently counselled out of the profession by a friend, colleague, or administrator they trust, have between 1 to 6 years experience in the profession (lower sense of belonging or of ownership of the job), and that this study missed these people. This was precisely correct. This study design would miss those people as they would not have developed enough of a

sense of possession over the job to stand up and say; "I'm not going to take this lying down!! I'm going to fight for what I have come to consider is mine!! " People who have not developed such a great sense of ownership over the job would likely be more amenable to being counselled out of the profession, or to just throwing up their hands and choosing another line of work.

This concept could even be tested in future studies by evaluating the sense of ownership of the job that teachers of various ages, experience levels, and durations of stay in their positions, had developed. This sense of ownership might even be inversely related to the tenure of the current principal in the school, a concept that should also be tested and evaluated.

IF I CAN'T WIN, THEN I'M NOT GOING TO PARTICIPATE

An interesting unanticipated result to emerge from this study's analysis was the relative absence of Review Commissions from 1980 to 1982. The reason for this became apparent upon closer examination of the casefiles and the Teacher Services Branch 1982 annual report.

In 1979 a dismissal action following 3 less than satisfactory reports on a 57 year old female teacher with 21 years teaching experience, resulted in a Review Commission precedent setting decision and a subsequent Supreme Court of B.C. action that confirmed the broadened jurisdiction for Review Commissions. In this case evaluations of the teacher from 1949 to 1978 indicate that although there was conscientious preparation in the daybook, long range objectives, evidence of short range planning for meeting the needs of students, adequate

housekeeping & classroom maintenance, regular marking of student work, and good record of student marks; her pupil-teacher rapport was poor. She was often described as sarcastic, cold, and methodical, with very little enthusiasm or humor. Her 1978 evaluations indicated continuous interruptions for discipline purposes, weak class control, and class routines and procedures that were not well established nor functioning effectively. The R.C. began Mar 3/79 and required a ministerial extension to complete the review. In a majority decision the commission reversed the termination effective Dec 31/78. The commissions summary included the following reasons for reversal; a) Sec. 96(d) of the P.S.A. regulations was not followed in the assessments of the learning situation and recommendations for improvement were lacking or vague, b) no follow-up on any recommendations was performed, c) poor pupil control was in many of the documented cases caused by one pupil over a period of 2 years, Why did the principal not transfer the student? d) there was no documentary evidence to support the unsatisfactory learning situation stated in the reports, e) there was no assessment by testing of pupil performance, especially in light of the fact that no teacher receiving a class of her pupils in a year following her instruction complained of unsatisfactory pupil progress, f) there was no evidence of unsatisfactory work being done by the pupils, g) the notes made by the principal during his visitations were mainly commendable, but his remarks on the reports had changed to indicate an unsatisfactory learning situation, h) transfer requests made by the teacher which would have been beneficial by changing the environment

were denied by the superintendent, i) requests for medical leave for her by her doctor which stated "emotionally she can no longer handle the discipline of students" were denied by the school board.

The School Board appealed the R.C. decision to the S.C.B.C. as in their opinion the R.C. had exceeded its jurisdiction and misconstrued the meaning of the P.S.A. regulations. Their reasons were; a) the R.C. should only state whether the principals and the superintendents opinions were justified by law or not, b) the R.C. had no legislative right to take into account; the absence of documentary evidence concerning pupil achievement, the absence of complaints by other teachers receiving this teachers students, and the denied transfer and leave requests, c) the R.C. refused to take the director of instructions testimony which was a denial of natural justice, d) the R.C. erred in law when it interpreted Sec. 96(d) as requiring recommendations for improvement in all reports, e) the R.C. erred in law when it took testimony as evidence that problems were caused by one pupil over 2 years.

In a land mark decision Justice Verchere stated; a) pg.8 - "accordingly, I think that the commission here was free to consider all the evidence before it, and having done so, to reach the several conclusions..... and I am also of the view that it was within its jurisdiction, for a majority of its members to form the opinion that 'the case against Mrs. F____ Q____ has not been proven by the testimony and evidence presented to it'..... ", b) pg.9 -"the question of the existence of that less than satisfactory situation is as much

one for the commission as it was for the school board
.....neither the act nor the regulations circumscribe the
conduct of the commission in any way in the performance of its
function", c) pg.11 -"they (board side) could have recalled the
superintendent and had him give the director of instructions
suggestions", d) pg.17 -"this appeal is accordingly
dismissed."

A second 1979 Review Commission decision had similar
circumstances. The case file describes a 49 year old teacher
with 23 years teaching experience. Evaluations from 1958 to
1972 show either no control problems (intermediate students) or
some situational control problems (primary students tend to take
advantage of her quiet, kind and pleasant manner), and excellent
performance as the schools librarian. As teaching changed
(corporal punishment no longer in school act) and her home-life
changed (parents die and she was left to take care of a
chronically schizophrenic brother who could not be left alone)
however, her class management and control deteriorated markedly.
The notes from a 1979 classroom observation by the
superintendent read like a teacher's nightmare:

constant disobedience, direct insubordination, authority of
teacher challenged constantly, students entering and
leaving room at will, students going up to the front and
imitating the teacher, names for detention on board are
erased by a student, noise is constant and uncontrolled,
students who are told to go with another teacher
'refuse'!!, threats of being sent out of the room to stand
at the office are met with laughter, students imitate
teachers SH...SH when she attempts to get quiet, students
argue with teacher, there are fights in the classroom, and
there is only 22 primary students in this class.

The teacher requested a 1 year medical leave of absence
through her doctor in 1979 and her request went unanswered by

the school board (even though Sec 132 of P.S.A. stated a timeline of days off for requested medical leave). The school board missed the 30 day deadline for notice of intent to terminate on June 30/79 and therefore decided to terminate Dec 31/79. The Review Commission was held in late Nov. and early Dec. 1979. It found astounding the fact that all 3 reports had serious errors in fact in them which went uncorrected until presentation at the hearing. The commission in its summary referred to the previous S.C.B.C. decision by Justice Verchere and again went further afield considering not only the 3 reports but the teachers request for a 1 year leave which was found to be reasonable under the circumstances due to her 23 years of satisfactory service and her doctors suggestion that she be granted a leave of absence to try to cope with the care needed by her brother. The commission found it odd that, although aware of her deteriorating emotional condition, none of the administrative staff mentioned this in their reports nor brought it to the school boards attention. The commission also found it strange that the school board chose not to grant leave under P.S.A. Reg. Sec. 65 (e)(i) which stated that after receiving a less than satisfactory report and having it accepted by the teacher, the teacher shall undertake the program of professional or academic instruction necessary and then be evaluated when she returns.

In a unanimous decision the commission reversed the termination order and recommended:

- a) -a leave of absence that is of sufficient duration
..... to put her personal affairs in order, b) -that the
widest possible application of Secs. 132, 129 (A) (b) and/or

129 (A)(c) be used to assist the teacher, c) -that the program of professional studies be cooperatively determined pursuant to Sec. 65 (e)(i) of the P.S.A. regulations, d) that the school board give careful consideration to her reassignment when she returns and that she should be involved in the decision-making of this assignment to ensure that the situation is one in which she can best utilize her skills.

This commission, which I shall name after one of its members (Dr. N. Robinson) to maintain confidentiality of the teacher, also sent a series of recommendations to the Minister of Education on the subject of instructions to report writers:

- "1. That in reporting on teachers the report writers follow both the 'letter and intent' of the P.S.A. and the P.S.A. regulations.
2. That the supervisory practices employed by school board personnel should be the most current and knowledgeable in terms of their appropriateness and acceptability as sound educational practice. eg. there should be pre-conferences with the teacher, appropriate data collection, post-conferences, *et al.*
3. That on finding a less than satisfactory learning situation care must be exercised to ensure that; A) every avenue of help for the teacher is investigated, and B) the board has complete and accurate information upon which to consider its action under Sec. 130 (A) of the P.S.A.
ie. a) the report writers should ensure that the teacher understands the implication of the 3 statutory reports and that they should take the action required to assure that appropriate advice and guidance is available to the teacher.

- b) the report writers should ensure that every avenue of help for the teacher has been investigated before filing the 3rd statutory report eg. selection of alternative teaching assignment.
- c) the report writers should seek an explanation for any change in teaching performance.
- d) the school board may expect;
 - i) that all reports presented to it are factually correct;
 - ii) that the support data from which the 3 statutory reports have been developed has been retained on file,
 - iii) that the board has been provided with all of the information required as a basis for its decision."

An excerpt from the Teacher Services Branch Annual Report June 30/82 discussed the absence of participation in Review Commissions (Sec. IV (C) 1.):

During the period 1980-82, very few Review Commissions have been established. The activity during the 1980-82 period is in marked contrast to that of earlier periods. It is probable, however, that 3 events have contributed to a growing reluctance on the part of school boards to become involved in protracted tests of teacher competency. The Justice Verchere decision in 1979 enabled Review Commissions to consider evidence outside the three adverse reports required by legislation. This decision has had the effect of introducing factors into the Commission's deliberations hitherto *having no bearing on the case before it.* (emphasis added). It has thus considerably broadened the basis upon which a teacher may launch an appeal, and the considerations that must be taken by a Board of School Trustees in initiating a dismissal for incompetence. More recently, the results of two Review Commissions have alerted school administrators to the potential for misrepresentation, and subsequent legal action emanating from poorly-written and/or prepared evaluation reports.¹

Although the topic of situational incompetence has been discussed previously in this study it bears mentioning again here. The above two cases are quite good examples of the first instances of Review Commissions that took into account circumstances surrounding the central issue of the teacher's three less than satisfactory reports. Their consideration of the teacher's situation, and deteriorating emotional condition, respectively, in the two above cases indicated a need for school boards and administrators to consider the possibility of situational incompetence in dismissal cases. As stated by Beebe, 1985, p.19; "the role of administration is not to punish these teachers for deficiencies, but rather to try to solve the professional problems the teachers are experiencing as effectively and as efficiently as possible. Few persons begrudge students with special problems the special help they need to overcome their difficulties. [therefore] Only callous administrators would begrudge a teacher needing professional help what they are able to offer."

LEGISLATIVE LIMITS TOO NARROW FOR ADMINISTRATIVE FAIRNESS

It is clear from the statements in these two cases, the Verchere Decision, and the Robinson Commission Report that the jurisdiction of the Review Commission was originally designed within legislative limits that were too narrow in some cases to withstand judicial tests of administrative fairness. The Boards of Reference as well, before they were allowed to vary school board decisions and penalties imposed (1980), had very narrow limits imposed upon them. In a 1976 example a teacher R_____

M____ had booked a return flight for himself and his family to Hawaii 1 year in advance to take advantage of lower rates. This return was booked for Jan. 8/77 with the expectation that school would start Jan. 9/77. In April 1976 however the school term calendar indicated a start date of Jan. 3/77. Instead of cancelling his families trip, (all reasonable flights within his budget booked by this time) R____ M____ decided to go on the trip and attempt to get an earlier flight for himself on standby. This did not work out either as on Jan. 2/77 he required a root canal in Honolulu for a serious dental infection. The root canal was postponed to Jan. 4/77 and he had a friend phone the school board's electronic secretary and indicate transportation delay as the reason for his continued absence. Upon his return Jan. 10/77 he did not try to hide any of the facts from the district superintendent. He was dismissed for neglect of duty (P.S.A. Sec. 130) on Jan. 26/77 and appealed to the Minister for a Board of Reference on Feb. 2/77. The Board of Reference in a majority decision stated "we are compelled to the conclusion that his conduct was such that the school board could not properly overlook it, that it constituted neglect of duty and that accordingly the board was justified in taking a disciplinary action. In these circumstances and *in view of the limitations imposed on our jurisdiction*² we have no alternative but to dismiss this appeal. In doing so we reach this conclusion with a very considerable degree of regret."

In this particular case even the school board wanted to have another alternative, however they were limited by existing

legislation to issuing a reprimand and suspending with pay or dismissal. The school board later sent a letter to the Minister urging him to amend the P.S.A. to enable Boards of Trustees to impose a period of suspension w/o pay.

Another example of narrow legislative limits, this time on admissibility of evidence is demonstrated by a June 1978 case where a teacher was dismissed for neglect of duty due to 3 particular instances of inadequate supervision of his physical education classes. It was generally known by the staff, students, and parents of the school that this particular teacher had taken on more jobs within the school both curricularly and extra-curricularly, than one person could handle (all physical education classes in the school, organization of sports day, community recreation classes, etc.). One of the instances of neglect of duty was even admitted to being partially caused by the intervention of another staff member who required his assistance. The Board of Reference in its summary stated "Mr. (council for teacher) on behalf of the Appellant, tendered in evidence a series of letters from Mr. Q____'s professional colleagues and from certain students and parents of students, the general burden of which we were advised, not having read them, was to protest his dismissal and to express support for him as a teacher. *Although such evidence might be admissible in a labor arbitration case, where an arbitration board may have a discretion, notwithstanding the existence of a just cause for dismissal, to substitute a less severe penalty, we do not consider it admissible in proceedings before a Board of Reference under the Public Schools Act which has only the*

*alternatives of allowing or dismissing the appeal. Accordingly, we refused to admit this evidence In the result the appeal is dismissed."*³

LEGISLATIVE LIMITS EXPANDED AS A RESULT OF JUDICIAL REVIEW

In 1980 an amendment to the P.S.A. allowed school boards the leeway of imposing a suspension without pay rather than the suspension with pay or dismissal choices that they had had previously, and it also allowed Boards of Reference to substitute or vary the punishment decision of a school board if they found the teacher guilty of an offense in the eyes of the Public Schools Act, but found that the penalty imposed by the school board was not in keeping with standard arbitration law penalties imposed in similar situations. In a 1981 case after the change in legislation a Languages Dept. Head with a Ph. D. in Linguistics who taught French, Spanish, Portuguese and English to senior high school students, attended a Spanish restaurant with her students, on a *school authorized* field trip, paid for by the students as a term end thank-you to a great teacher. At this luncheon she made no attempt to stop the students from ordering wine, beer, or sangria with their meals. Compounding this error in judgment she denied that alcohol consumption had taken place in both an oral and a written statement to her principal. She was dismissed by the S.B. Feb. 2/81 and asked for an appeal on Feb. 13/81. In making their decision the Board of Reference "adopted the approach taken by the Labour Relations Board in the case of B.C. Central Credit Union vs. O.T.E.U. local #15 in their decision entitled #7/80,

which stated at pages 16 and 17 ' - obviously, an arbitration board is not only permitted to hear evidence which reaches beyond the particular conduct for which the grievor was discharged, the arbitration board is obliged by its mandate under Part VI of the Labour Code and the "just cause" concept to take into account the particulars of the grievor's overall employment relationship in arriving at its conclusion about whether the discharge was excessive...'. The Board of Reference further applied a modified Scott test (W. M. Scott & Co., 1976) to determine whether the penalty of dismissal imposed by the School Board was appropriate in the circumstances. After applying these tests the Board of Reference stated "This Board sympathizes with the concerns of the School Board with regard to the misconduct committed by F____ G____ but finds that dismissal in the circumstances of this case is not warranted.

The Board unanimously finds that the decision of the School Board under Sec. 22 should be varied and orders that F____ G____ be suspended without pay from and including Feb. 9/81, to and including June 30/81."

Q? WHEN IS A PRECEDENT, NOT A PRECEDENT?

A! WHEN IT IS RARELY, IF EVER, USED!

After establishing this precedent where a School Board decision was varied to bring the imposed penalty more in accordance with established arbitration and Labour Code Law, the author then found that succeeding Boards of Reference only referred to this decision once in all the cases studied after 1981 even though in the author's opinion the results of this

"precedent" could have been considered in a number of the succeeding cases. This dilemma was eventually solved to the author's satisfaction by examining the legislative mandate of Boards of Reference. Apparent justice discrepancies were due to the unspecified power assigned to these quasi-judicial tribunals; to decide what materials they would take as evidence and to decide what, (if any) cases they were going to decide to use as precedent. Since these tribunals were not bound by *stare decisis* as is the case in judicial hearings, then "precedents" which expanded or changed their jurisdiction would be used, only if the lawyers on a particular case had worked on the previous "precedent" setting one, or if the members of the boards had served on previous boards, or if the anonymous summary report had been filed with the Supreme Court Registry (after 1979). Board of Reference members or Review Commission members did not have access to previous decisions due to the fact that the decisions were considered to be arbitration reports, which the school boards or the teachers or (with permission) their lawyers might make public or not as they choose. Another consideration with respect to precedent was that no school board would want to publicize adverse decisions unless they were appealing to the courts. Some Ministry of Education documents, as well, indicated that they did not want a number of previous decisions to be regarded as "precedent". As is noted in the M. E. Saunders Report (1987) "The decisions are not public because the hearings are not public. The Board of Reference must therefore rely on the parties or their counsels to provide the authorities for them for consideration." (Pidcocke, 1989) The legislated

constitution of each Board of Reference was; a chair taken from a list of candidates made up by the Chief Justice of the Supreme Court of B.C. (usually a practicing lawyer), a member taken from a list of candidates supplied by the B.C.S.T.A., and a third member taken from a list of candidates supplied by the B.C.T.F. The legislated makeup of the Review Commissions was almost identical to that of the Boards of Reference except that the Chairman was appointed by the Minister from persons who had been actively engaged in education within the previous 5 years, within the province, and who were not members of the staff of either the B.C.T.F. or the B.C.S.T.A. (usually a former superintendent). With the constitutions thus described and with the knowledge that either party could appeal the decision to a higher court, the decisions of the tribunals were usually presented in legal terms "as proper judicial decisions carefully grounded in law and evidence. Boards of Reference (and presumably Review Commissions) have regarded their hearings as equivalent to trials *de novo*, and higher courts have behaved as if these hearings are thus." (Pidcocke, 1989).

Despite the fact that these tribunals made every attempt *within their jurisdiction* to carefully base their decisions in law and evidence, and were given specific instructions as to procedures to be used and were given guidance on admissibility of evidence (pgs. 6,18,25, & 26 of Guidelines for Boards of Reference, Mar/87, Appendix U), there are a number of cases where tribunal decisions are overturned by higher courts for errors "in law", procedural errors, and jurisdictional errors where the paper trail seems to indicate a lack of natural

justice on one side or the other. These concerns are addressed in *A Critique of the Legal Authorities* by M. P. Heron. Where he states

"Sub-section 6 of Section 122.2 indicates that a Board of Reference may vary the decision by a School Board under Section 122 and make any order it considers appropriate in the circumstances. This appears to cause considerable confusion with Boards of Reference and therefore the only recourse of a School Board in which a decision is varied, would be to the Supreme Court.

Sub-Section 8 of Section 129 also leads to confusion as this is the only reference to how a Board of Reference shall be conducted. Part 15 and 16 of the Enquiry Act simply specify the powers of the Commissioner in being able to subpoena witnesses and require appropriate documentation. What is totally unclear is the rules of evidence, admissibility of hearsay evidence, whether cross-examination is allowed by members of the Board, and considerable differences in the conduction of the Boards, depending upon the chairman. The lack of clarity leads to frustration for not only the other members of the Board of Reference, but also for the teacher and the representatives for the School Board. As this frustration increases, and as the length of the hearing increases natural justice appears to decrease. I believe it is absolutely essential that the procedures under which Boards operate must be clarified."

Another apparent concern with respect to these quasi-judicial tribunals that I would like to mention at this point was the increasing difficulty in obtaining lawyers to sit as Chairmen on Boards of Reference and in some cases Review Commissions due to the length of some of the hearings, and the low amount of the stipend paid to the Board members. As stated by M. P. Heron "Sub-Section 9 of Section 129 also leads to major frustrations on the part of Board members if the allowances established are far less than, as in the case of lawyers, the monies normally earned by the course of their employment. This civic duty soon pales as a Board hearing becomes longer and longer and individuals suffer considerable loss of salary. Once

again this leads to a real lack of natural justice especially for the teacher." Given this assessment of the difficulties involved in a long hearing the author is given to wonder about; a) examples of hearings that are cut short by the Board where in their opinion character witnesses and other information being presented by either the teacher's side or the School Board side is ruled irrelevant to the proceedings, and b) examples of hearings that require many extensions by the Minister such as in the case of two Boards of Reference in the 83/84 school year which both required five extensions of the 30 day limit, and lasted for five and six months respectively. One of the cases cost the Ministry over \$ 35,000.00 to administer, and this sum does not include the funds that were spent by either of the parties.

With respect to Review Commissions, M. H. Heron goes on to state "Section 130 decrees the terms under which a Review Commission may be established. Although Review Commissions normally consist of educators, many of the same comments and criticism with respect to Boards of Reference apply. The procedures followed by a Review Commission, in particular, are even less clear"

COMPARISON TO BRIDGES AND GUMPORT STUDY

When this British Columbia study is compared to the parent study of United States Court Report Summaries by Bridges and Gumpert several differences in the results are apparent.

INCIDENCE OF DISMISSAL

With respect to the rapid increase in frequency that the Bridges and Gumpert report found in cases of dismissal for incompetence, especially from 1978 to 1984, this study found a fluctuating pattern with an interesting increase toward 1987. Their finding that seventy seven percent of the tenure dismissal cases proceeded through the state court system was significantly higher than this study's finding of 21% possibly indicating differences in enabling legislation.

CHARACTERISTICS OF DISMISSED TEACHERS

In terms of gender representation this study's finding was similar to Bridges and Gumpert in that males were overrepresented in Board of Reference appeal cases. This study concurs with their finding that males "are more 'vulnerable' to termination for misconduct than their female counterparts". However, this was not the case in Review Commission appeals, where females outnumbered males in a 3:2 ratio. In terms of dismissal for incompetence the present study found that females were more 'vulnerable' than males. With respect to the number of years employed in the school where the problem occurs and the number of years employed in the district where the problem occurs, this studies findings and their findings are also quite similar. There is some indication that the probability of dismissal declines as the years of service in one location or district increases, however, there is also an indication in this studies findings that there is a local maximum of dismissal probability at 14 years experience, for all failure types and a mean of 16 years experience for teachers suffering dismissal for

incompetence. With respect to grade level Bridges and Gumport found that 43% of teachers dismissed taught at the elementary school level whereas this study found 38% taught at the elementary school level, again a similar result. A significant difference was in the percentage of teachers dismissed at the junior high school level, Bridges and Gumport found only 17% junior high teachers and this study encountered 34% junior high teachers, a 100% difference in results.

GROUNDS FOR DISMISSAL

Figure 6(1)

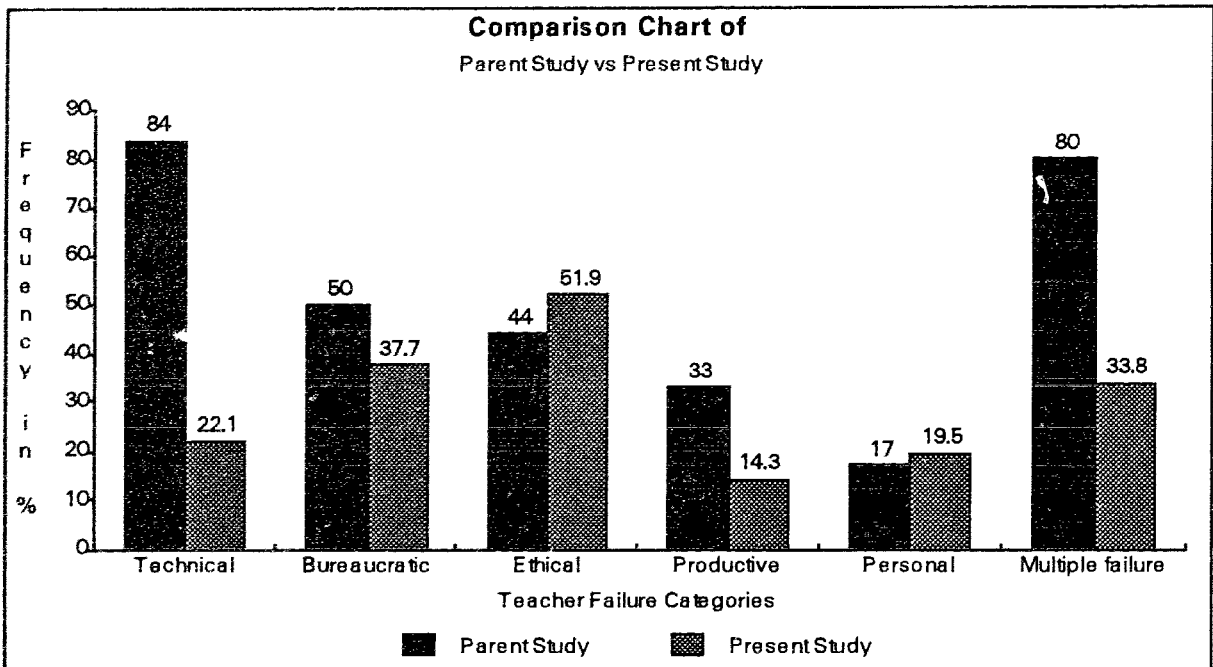


Table 6(1) Comparison of Parent Study vs. Present Study

Technical	Bureaucratic	Ethical	Productive	Personal	Multiple failures	
84	50	44	33	17	80	Parent Study %
22.1	37.7	51.9	14.3	19.5	33.8	Present Study %

In the above comparison charts, the grounds for dismissal categorized under the Bridges and Gumport typology is compared between both studies. The comparison shows a radical difference in the relative amounts of technical, bureaucratic, and

productive failure types with a greater than 100% difference in teachers displaying multiple failure types.

NATURE OF THE EVIDENCE

By statutory definition in British Columbia a teacher's lack of satisfactory work, (pre-1988 P.S.A. Regs. 9, 93, & 94), must be defined by a teachers supervisors in at least 3 less than satisfactory reports, therefore many of the evidence types as described by Bridges and Gumpert eg. peer or collegial evaluations, student ratings or surveys, exit interviews, student test performance scores, etc. are not applicable to the B. C. scene. The Bridges and Gumpert report does, however, state that 90% of the cases they studied use supervisory evaluations and 66% "depend on the evaluations of multiple raters". Additionally their report states that court proceedings accord great deference to these supervisory ratings. In cases of professional misconduct however, evidence such as parental or student complaints figure most prominently and this the Bridges and Gumpert report found to be their second most frequently used type of evidence. In British Columbia the statutory requirements were quite explicit even though they did not state a precise definition for misconduct. Sec. 122 (1), (a&b) of the pre-1988 P.S.A. stated that a teacher may be suspended or dismissed from his duties: "a) for misconduct, neglect of duty or refusal or neglect to obey a lawful order of the board; or b) where the teacher has been charged with a criminal offence and the board believes the circumstances

created by it render it inadvisable for him to continue his duties."

QUASI-JUDICIAL OUTCOMES VS. COURT OUTCOMES

In the Bridges and Gumpert report nearly 71% of the cases were decided in favor of the school district, and in the present study a similar amount of 75% were decided in favor of the school district. In the parent study reversal of the school board decision occurred in 27% of the cases and in this study reversal occurred in 17% of the cases. However, due to B.C. legislation since 1980, a Board of Reference was able to vary the decision of a School Board in cases where the teacher was guilty as charged but the penalty levied by the School Board was found to be too harsh. This variance occurred in 8% of the cases studied.

GROUND FOR REVERSAL

In the British Columbia cases as well as in the parent study cases the grounds for reversal seem to centre around procedural due process errors and substantive due process errors. This particular topic has been discussed extensively in Chapters 3&4 where the author indicated that procedural errors usually involve the failure of the School Board to follow natural justice procedures, the procedures as laid out in the P.S.A. and its regulations, or the procedures in district policy, or in local contract. Substantive errors can otherwise be described as insufficient evidence or incorrect use of

evidence to justify the dismissal decision, or inability to recognize mitigating factors in the teacher's situation.

COMPARISON OF MAJOR CONCLUSIONS

The Bridges and Gumport report ended with two major conclusions:

- "1) that the dismissal of tenured teachers for incompetence in the classroom appeared to be a relatively rare occurrence; and,
- 2) that this rarity was due to the forced resignation which in their informal discussions with school administrators was a far more common occurrence than the more formal adjudicated route."

On page 113 of Ch. 4 the author indicated that there was a major difference in the information bases accessed by the parent study versus the present study. The parent study which drew it's cases from court challenges to teacher dismissals in state courts of appeal, federal trial courts, federal appellate courts, and the U.S. Supreme Court, covered the entire United States; whereas the present study which drew it's cases from quasi-judicial (arbitration level) tribunals covered only one Canadian province. This difference in information base makes specific comparisons with respect to the conclusions drawn by the two studies somewhat less meaningful, therefore the following calculated results are presented not as a comparison between the United States and British Columbia, but merely as a derived statistic that indicates general agreement between the two studies with respect to the parent study's first major

conclusion. In the present study the data compiled in 1991 and 1992 showed that on average British Columbia had 1.67 Review Commission (competency based) cases per year between 1973 and 1987, whereas the parent study on average had 1.95 cases (that went to judicial review on the basis of teacher competence), per year, between 1939 to 1982 over the entire United States. In general, therefore, the present study concurs with the parent study in the statement that "the dismissal of tenured teachers for incompetence in the classroom appears to be a relatively rare occurrence"

With respect to the parent study's second major conclusion the present study has come to similar conclusions after talking informally to various educators, administrators, and Ministry of Education representatives and by examining the conclusions reached by Marshall, 1986. Forced resignation may be a less prevalent form of removing incompetent teachers in B.C. than in the U.S., but it does exist and is a factor to consider in any study of teacher dismissal. However, it would be a difficult parameter to quantify as few districts keep statistics on the number of teachers that have been quietly convinced (one way or another) to leave the school system.

Recommendations for Action

After studying the Heron report, the Marshall thesis, and a number of Ministry of Education studies published over the years previous to 1988 as well as all of the teacher casefiles that were reviewed for this study, the author would like to state that some of the most important "action" in terms of

legislative changes has already taken place; specifically the introduction of Bills 19 & 20 in 1987 and the creation of the College of Teachers, a self-policing body for the teaching profession.

Whether the new legislation is more fair and just than the pre-1988 legislation is a matter of the interpretation that it is given in a plethora of arbitration hearings each year and in the court cases that are based on it. Only in-depth longitudinal studies of these changing decisions will tell us how its effect is being felt in the field. The current study at least will give future researchers a basis for comparison.

Summary and Suggestions for Future Research

Suggestion for Future Research with respect to Legislative Basis of Disciplinary Processes Both Before and After Bills 19 and 20

The author has included flowcharts in Appendices P & Q, of the Ministry of Education Teacher disciplinary processes involved before Bills 19 and 20 created the British Columbia College of Teachers (1988) and a flowchart which depicts the disciplinary process for teachers now that the College is in place. A suggestion for future research would be two parallel studies which examine the enacting legislation from a natural justice perspective of both the teacher disciplinary process before 1988 and the teacher disciplinary process after 1988. Another suggestion would be a set of parallel studies which examine the actual practices and implementation of the

disciplinary processes before 1988 and after 1988, again from natural justice and administrative fairness perspectives.

CONCLUSIONS

A standard of "competence" has been determined for teachers in British Columbia through Review Commission decisions, and a standard of "behavior" for teachers both on and off the job has been determined through Board of Reference decisions, guided by the controlling legislation. While these standards were being defined, through tribunal decisions that upheld dismissal decisions by school boards, another 'standard' was being defined through tribunal decisions that overturned dismissal decisions by school boards. This is a standard of organizational or administrative competence and fairness, and it applies to the entire administrative structure.

As a final recommendation and conclusion to this study I would like to state my reasoning for a proposal to increase Education Law classes at both the graduate and the undergraduate levels in teacher and administrator training institutions. These classes would familiarize would-be administrators and would-be teachers with: the rights of students or subordinates under them; the rights and responsibilities of themselves and their colleagues; and, the rights and responsibilities of their superordinates.

At a graduate level Education Law classes could examine the moral dimensions of administrative practice and examine how the recent judicial interpretations of various issues are changing the common law and thus are affecting the rights, freedoms, and responsibilities that they currently understand. The Canadian

Charter of Rights and Freedoms would figure prominently in the latter discussions. Hopefully these courses would arouse a latent interest in education law that appears to be present in most of the educators that this author has talked to. Also these courses would perpetuate a more increased awareness in reports of court decisions that educators are normally not aware of, and would allow educators to become more aware of how these decisions will affect their current practices and procedures in the field of education.

Notes

- ¹ author's emphasis.
- ² author's emphasis.
- ³ author's emphasis.

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APPENDIX A

"Since 1872, there have been eight new School Acts passed in the following years: 1872, 1876, 1879, 1885, 1891, 1905, 1922, and 1958. Six of these Acts, were legislated near the turn of the century over a span of 33 years. In the past 81 years, only two acts have been passed, the last of which was written almost 30 years ago." (Marshall, 1986, p.85). Numerous amendments have added to this legislation during this time and meaning has been added to much of the legislation through subordinate legislation called the British Columbia Public School Act Regulations. The following table briefly outlines some of the more important changes that have occurred in the area of teacher dismissal and discipline from 1872 to the present. This table is a compilation of information from Vey (1979), MacLaurin (1936), and Marshall (1986).

- 1872 -original Public School Act, S.B.C. [35 Vict.] No. 16. -Board of Education appointed all teachers & fixed their salaries, -if good cause could be shown then Bd. of Educ. could dismiss the teacher or teachers in any district. eg. if 3/4 of the school age children in a district did not attend school then this would provide sufficient cause fo. dismissal of the teacher unless satisfactory reasons could be shown to the contrary. The Board of Education consisted of 6 people and a Superintendent of the Province. All teachers required a Certificate of Qualification issued by the Board of Education.
- 1873 -an amendment to the act of 1872 was passed that transferred the power to appoint and dismiss teachers to the trustees of each school district subject to Board of Education approval.
Dismissal, except for gross misconduct, not effective until end of school term.
- 1876 -second Public Schools Act, S.B.C. [39 Vict.] No. 2.

- 1879 -third Public Schools Act, S.B.C. [42 Vict.] Chap. 30. -Public School Act abolished the Board of Education and made provision that Boards of School Trustees should give teachers 30 days notice of dismissal. -Trustees now permitted to select and appoint teachers, provided they hold certificate of qualification.
- 1885 -fourth Public Schools Act, S.B.C. [48 Vict.] Chap. 25. Board of Examiners was established to administer examinations to teacher candidates, whose success in those examinations determined the class and grade of certificate issued. Teacher being dismissed was now entitled to be advised of the reasons therefor.
- 1888 -provision was made that any teacher might be summarily dismissed for gross misconduct without further payment of salary, but such teacher might appeal to the county court judge of the district, however even if court appeal was sustained the teacher might not be reinstated to the same school without the consent of the trustees.
- 1889 -an amendment to the act provided that any teacher could be suspended for cause with the sanction of the Lieutenant Governor-in-Council and if reasons for the dismissal were confirmed then the teachers certificate should be cancelled.
- 1891 -fifth Public Schools Act, S.B.C. [54 Vict.] Chap. 40. Basis for teacher dismissal expanded to include inefficiency and misconduct. Formal right of appeal to the Council of Public Instruction now available for gross misconduct only.
- 1905 -sixth Public Schools Act, S.B.C. Chap. 44. -Board of School Trustees now required to give at least 30 days notice of dismissal before the close of the term. In the case of dismissal for gross misconduct the teacher could now appeal to the Council of Public Instruction.
- 1922 -seventh Public Schools Act, S.B.C. Chap. 64. -allowed dismissals to take place on the 31st day of July or December following the giving of at least 30 days notice. Upon notification of the Council of Public Instruction, however of inefficiency or misconduct, a Board of Trustees were now required to dismiss a teacher at any time during the school year by giving him/her 30 days notice of dismissal.

- 1925 -Public Schools (Amendment) Act, R.S.B.C. Chap. 46. -tenure of teachers was made more secure by provision that if a teacher appealed the dismissal within 5 days of notice to the Council of Public Instruction then no vacancy appointments would be valid or binding unless the dismissal was confirmed by the C.P.I. The right of appeal was extended to include every teacher dismissed by a Board for any reason. Council was authorized to appoint some responsible person to take evidence on appeals and to report to the Council.
- 1933 -Public Schools (Amendment) Act, R.S.B.C. Chap. 57. -creation of Boards of Reference composed of 1 member of Bar, 1 member of BCSTA & 1 member of BCTF, to which all appeals against dismissal were referred. BR's reported findings to Council of Public Instruction which could or could not accept recommendations. Deposit for teacher was \$15.00 & time for appeal was 15 days. Termination on notification by the S.B. provision of the Act was amended to require that such a dismissal be for "cause". This amendment explicitly prevented School Boards from exercising their power capriciously.
- 1934 -Public Schools (Amendment) Act, R.S.B.C. Chap. 58.
- 1936 -Public Schools (Amendment) Act, R.S.B.C. Chap. 55.
- 1937 -Public Schools (Amendment) Act, R.S.B.C. Chap. 68. -tenure of teachers was increased by provision that every appointment made by Boards of School Trustees except probationary or temporary, would be deemed to be 'continuing' engagements unless terminated pursuant to provisions of P.S.A.
- 1940 -Public Schools (Amendment) Act, R.S.B.C. Chap. 45. -Boards of School Trustees given power to transfer teachers within district and adjust their salaries, if transfer affected status, provided reason for transfer was stated and transfer was made in consultation with superintendent of Education, or District Inspector of Schools.
- 1943 -Public Schools (Amendment) Act, R.S.B.C. Chap. 57.
- 1944 -Public Schools (Amendment) Act, R.S.B.C. Chap. 45. -Amendment provided that no reason for transfer need be given if transfer made at beginning of school term, & no reduction in salary was entailed.
- 1946 -Public Schools (Amendment) Act, R.S.B.C. Chap. 64. -amendment requiring Boards of School Trustees to consider the recommendation of the Inspector of Schools before appointing any teacher.

- 1947 -Public Schools (Amendment) Act, R.S.B.C. Chap. 79. s. 101 included membership in the B.C.T.F. as a requirement for employment as a teacher.
- 1948 -Public Schools Act, R.S.B.C. Chap. 297.
- 1954 -Public Schools (Amendment) Act, R.S.B.C. Chap. 36. Age (prior to 65 years old) becomes a formal requirement for employment.
- 1954 -Public Schools (Amendment) Act, R.S.B.C. Chap. 37.
- 1958 -eighth Public Schools Act, S.B.C. Chap. 42. -new step provided in the process governing appeals. Appeals initiated by a teacher were first investigated by an Investigation Committee consisting of 3 nominees; one from the Board of School Trustees, one from the local association of the BCTF, and one from the superintendent. Investigation Committee findings and recommendations were passed on to the Council of Public Instruction or referred to a Board of Reference if the teacher wished to continue his appeal.
- 1958 -Public Schools Act Regulation, S.B.C. Reg. 122/58, August 21.
- 1960 -Public Schools Act, R.S.B.C. Chap. 319.
- 1961 -Public Schools Act Regulation, S.B.C. Reg. 53/61, April 20. Brief appearance of the word 'incompetence' made with respect to the termination of administrative appointments.
- 1961 -Public Schools (Amendment) Act, R.S.B.C. Chap. 53. School Board could now authorize the termination of the appointment of a teacher to any position such as; principal, head teacher, vice principal, or district supervisor. Such a termination could be reviewed only by the Superintendent of Education.
- 1965 -Public Schools (Amendment) Act, R.S.B.C. Chap. 41.
- 1967 -Public Schools (Amendment) Act, R.S.B.C. Chap. 42.
- 1968 -Public Schools (Amendment) Act, R.S.B.C. Chap. 45.
- 1971 -Statute Law Amendment Act, Public Schools Act, R.S.B.C. Chap. 58. -the terms 'lieutenant Governor in Council' and 'Minister' substituted for the terms 'Council of Public Instruction' and 'Superintendent of Education', respectively.
- 1972 -Public Schools (Amendment) Act, R.S.B.C. Chap. 52. Pre-1988 system of dismissal or suspension set up under s. 122

- 1972 -Public Schools Act Regulation, S.B.C. B.C. Reg. 82/72, April 6.
- 1973 -Public Schools (Amendment) Act, R.S.B.C. Chap. 142.
- 1974 -Public Schools (Amendment) Act, R.S.B.C. Chap. 74.
- 1974 -Public Schools Act Regulation, S.B.C. B.C. Reg. 376/74, June 13. -creation of Review Commissions arising from 3 less than satisfactory reports. Was designed to eliminate cumbersome procedures for dismissing inefficient or incompetent teachers. Ad-hoc transfer appeal review committees appointed rarely P.S.A. Sec. 120(6).
- 1975 -Public Schools (Amendment) Act, R.S.B.C. Chap. 58.
- 1976 -Public Schools (Amendment) Act, R.S.B.C. Chap. 44. -provincial principals association assured by then Minister P. McGeer that Transfer Appeal Review Committees would be appointed when transfer resulted in significant loss of income, status or from punitive intent.
- 1977 -Public Schools (Amendment) Act, R.S.B.C. Chap. 79.
- 1977 -Public Schools Act Regulations, S.B.C. B.C. Reg. 118/77; 119/77; 120/77; Mar. 31.
- 1977 -Public Schools Act Regulation, S.B.C. B.C. Reg. 264/77, July 4.
- 1979 -Public Schools Act, R.S.B.C. Chap. 375.
- 1980 -amendment which granted power to boards of reference to vary the decision of school boards in discipline cases. Powers were now similar to courts or labour relations boards, in effect BR. could now confirm S.B. decision, reject it, or substitute its own decision.
- 1981 -Public Schools Act Regulation, S.B.C. B.C. Reg. 436/81, Oct. 26, requirement for deposit of \$150.00 for board of reference or review commission appeal was repealed.
- 1985 -Public Schools (Amendment) Act, R.S.B.C. Chap. 35, July 15.
- 1988 -Public Schools (Amendment) Act, Teaching Profession Act, R.S.B.C. Chap. 20, Jan. 1. -called bills 19 & 20 these amendments made sweeping changes to the School Act and the Industrial Relations Act. These bills created the College of Teachers, allowed the unionization of teachers in B.C., removed the principals and vice-principals from the bargaining units, removed the responsibility for the certification/decertification and discipline of teachers from the Ministry of Education and placed it into the hands of the newly created College of Teachers, and ended the usefulness of the Boards of Reference and Review Commissions.

APPENDIX B**LITERATURE SEARCH PROCESS**

- 1) Education Research Information Clearinghouse (ERIC) Search #1 (C.I.J.E. only) performed with the assistance of an S.F.U. librarian, Thurs. Nov. 10 /88, used the descriptors "teacher/incompetent(s)", produced 3 references.
- 2) ERIC Search #2 (C.I.J.E. only) performed with the assistance of an S.F.U. librarian, Thurs. Nov. 10/88, used the descriptors "teacher dismissal (of, not by, the teacher) and Canada", produced 8 references.
- 3) ERIC Search #3 (C.I.J.E. only) performed with the assistance of an S.F.U. librarian, Thurs. Nov. 10/88, used the descriptors "competence and (teacher dismissal or teacher evaluation)", produced 335 references.
- 4) ERIC Search #4 (C.I.J.E. only) performed on S.F.U. Michigan Terminal System by author, Thurs. May 11/89, used the descriptor "teacher dismissal", produced 78 references.
- 5) ERIC Search #5 (C.I.J.E. previous year to last 4 years) performed on S.F.U. M.T.S. by author, Tue. May 30/89, used the descriptor "teacher dismissal", produced 29 references.
- 6) ERIC Search #6 (R.I.E. last 4 years and previous year to last 4 years) performed on S.F.U. M.T.S. by author, Tue. May 30/89, used the descriptor "teacher dismissal", produced 89 references.
- 7) ERIC Search #7 (R.I.E. last 4 years and previous year to last 4 years) performed on S.F.U. M.T.S. by author, Thurs. Jul. 19/90, used the descriptor "competency based education", produced 18 references.

- 8) ERIC Search #8 (C.I.J.E. last 5 years and previous year to last 5 years) performed on S.F.U. M.T.S. by author, Fri. Dec. 27/91, used the descriptor "competency based education", produced 20 references.
- 9) ERIC Search #9 {C.I.J.E. (1969 - 1992), R.I.E.1 (1980 - 1992), R.I.E.2 (1966 - 1979), C.E.I. (1985 - 1992) } performed on S.F.U. UNIX system through the University of British Columbia curriculum library by author, Mon. Aug. 10/92, used the descriptors "competence and (teacher dismissal or teacher evaluation)".
- 10) ERIC Search #10 {C.I.J.E. (1969 - 1992), RIE1 (1980 - 1992), RIE2 (1966 -1979), C.E.I. (1985 - 1992) } performed on S.F.U. UNIX system through U.B.C. curriculum library by author, Tue. Aug. 11/92, used the descriptor "teacher dismissal".
- 11) Various references were found from reference sections of Bridges texts and from references included in other major articles. References such as; Education Law in Canada by A. Wayne MacKay; Don't Teach That by Eisenberg and MacQueen; Rights, Freedoms, and the Education System in Canada by Dickinson and MacKay; Teacher Beware by Proudfoot and Hutchings; The John and Ilze Shewan Case: Unconventional Teacher Behavior: Private Life in Public Conflict by Siracusa; The Incompetent Teacher by Edwin M. Bridges; Managing the Incompetent Teacher by Bridges and Groves; Courts in the Classroom by Manley-Casimir and Sussel and a host of other pertinent articles were referred to in various courses at Simon Fraser University offered by the faculty of the Educational Administration Department.

SIMON FRASER UNIVERSITY

VICE-PRESIDENT, RESEARCH



BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6
Telephone: (604) 291-4152
FAX: (604) 291-4860

April 23, 1991

Mr. Edward R. Spetch
9265 - 212A Street
Langley, B.C.
V1M 1K3

Dear Mr. Spetch:

**Re: A Study Of Incompetence And Teacher
Failure In British Columbia**

This is to advise that the above referenced application has been granted approval on behalf of the University Ethics Review Committee. However, for our records, we require written approval from the College of Teachers. Once this information is received in the Grants Office, you may proceed with your research.

Sincerely,

William Leiss, Chair
University Ethics Review
Committee

cc: P. Winne
M. Manley-Casimir

FACULTY OF EDUCATION

BURNABY, BRITISH COLUMBIA V5A 1S6
Telephone: (604) 291-3395

June 5, 1991

W. Douglas Smart, Registrar
B.C. College of Teachers
#405 - 1385 West 8th Avenue
Vancouver, B.C. V6H 3V9

Dear Mr. Smart:

I am a graduate student in educational administration at Simon Fraser University, working under the direction of Dr. Michael Manley-Casimir (senior supervisor). The Simon Fraser University Ethics Committee has approved the proposed study (see attached), which involves an examination of British Columbia Board of Reference and Review Commission data for the period 1900-1990. Any data collected in the study will be treated completely confidentially and no individuals will be identified in any way at all. I realize that the data is extremely sensitive and therefore the following precautions will be taken to ensure its confidentiality:

- (1) I am willing to work directly at the College of Teachers under the direction and supervision of College of Teachers personnel.
- (2) I am willing to provide the College with photocopies of any notes taken from the casefiles and I am willing to delete any references deemed necessary to protect confidential and private information.

Please consider this letter as a formal request for supervised access to the College of Teachers files for the purposes of examining British Columbia Board of Reference and Review Commission data for the period 1900-1990.

Sincerely,

Edward Spetch
Graduate Student

Abstract of Proposed Study

This study will closely resemble an existing study by Bridges & Gumport (1984) in which national data from U.S. court report summaries in the period 1939 to 1982 were examined for instances involving the dismissal of tenured teachers for incompetence. It will similarly use four main methods: (1) location of reported instances involving the dismissal of tenured teachers for incompetence; (2) determination of the dismissal of cases to be included in the analysis; (3) description of the features of the cases to be included; and (4) analysis of the data for trends, patterns, or consistencies.

The selected cases will be classified in terms of the following typology:

1. Background features of the case:
 - a) the year in which the ruling was made
 - b) the school district involved
 - c) the type of quasi-judicial forum involved (Board of Reference or Review Commission)
2. Characteristics of the teacher:
 - a) gender
 - b) number of years at the school where the dismissal action is initiated
 - c) number of years employed in the school district
 - d) number of years of teaching experience
 - e) - grade level(s) taught
- secondary subjects taught
3. Grounds for dismissal:
 - a) technical failure
 - b) bureaucratic failure
 - c) ethical failure
 - d) productive failure
 - e) personal failure
4. Nature of evidence
5. Outcome of tribunal

July 8, 1991

Mr. Edward Spetch
9265 212 A Street
Langley, B.C.
V1M 1K3

Dear Mr. Spetch:

I have received a facsimile transmission of a copy of your letter to me of June 5, 1991. We have not been able to locate any earlier copy of your letter received in our office.

With regard to the decisions of the British Columbia Boards of Reference and Review Commissions I am not sure that the College of Teachers is in a position to assist you with obtaining access to these documents. As I indicated to you on the telephone I believe you should contact the Field Services Division of the Ministry of Education in Victoria, B.C. They may have a complete set of decisions of Boards of Reference and Review Commissions to which they are in a position to give you access. I also indicated to you that it is my understanding that the Board of Reference decisions were filed with the Court Registry of the Supreme Court of British Columbia. It may be possible for you to obtain access to the documentation through that route.

The only Board of Reference decisions which the College would have custody of would be in the individual certification files of individuals who hold British Columbia Teaching Certificates. There may be a number of difficulties providing you with access to these documents. The problems that I foresee include that these reports are in the individual confidential files of individuals holding British Columbia teaching certificates, that we do not have a list of the names of individuals for whom there may be Board of Reference decisions, that while the British Columbia College of Teachers has custody of the certification files and is responsible for any current documentation in the file, the decisions of the Board of Reference relate to work of the Ministry of Education.

.../2

- 2 -

You indicated that you had been referred to the College of Teachers for access to these documents by the Ministry of Education. I suggest that you contact the Ministry of Education again regarding access to this documentation.

I am sorry I am not able to be of any further assistance to you at this time.

Yours sincerely,

W. Douglas Smart
Registrar

c.c. Dr. Michael Manley-Casimir
Faculty of Education
Simon Fraser University

WDS/jr

Mr. Edward R. Spetch
9265 212A Street
Langley B. C.
V1M 1K3

July 9, 1991

Mr. G. Lind
Field Services Division
620 Superior Street
5th Floor
Parliament Buildings
Victoria, B. C.
V8V 2M4

Dear Mr. Lind:

RE: Our telephone conversation of July 8, 1991.

I am a graduate student in educational administration at Simon Fraser University under the direction of Dr. Michael Manley-Casimir (senior supervisor). The Simon Fraser University Ethics Committee has approved the proposed study (see attached), which involves an examination of British Columbia Board of Reference and Review Commission data for the period 1900-1987.

Please consider this letter as a formal request for supervised access to the files compiled by Mr. Earl Cherrington, head of the former Professional Relations Division of the Ministry of Education. Any data collected in the study will be treated with the utmost discretion and no individuals will be identified in any way at all.

I realize that the data is extremely sensitive and therefore the following precautions will be taken to ensure its confidentiality:

- (1) I am willing to work directly at your office under the direction and supervision of Support Services personnel.
- (2) I am willing to provide your office with photocopies of any notes taken from the files
- (3) I am willing to delete any references deemed necessary to protect confidential and private information.

Sincerely,

Edward R. Spetch
Graduate Student

Mr. Edward R. Spetch
9265-212A St.
Langley B.C.
V1M 1K3

July 9, 1991

Mr. Dave Williams
Program Support Services Division
620 Superior Street
5th Floor
Parliament Buildings
Victoria, B.C.
V8V 2M4

Dear Mr. Williams:

This is the followup information that you requested in our telephone conversation of July 5, 1991.

I am a graduate student in educational administration at Simon Fraser University under the direction of Dr. Michael Manley-Casimir (senior supervisor). The Simon Fraser University Ethics Committee has approved the proposed study (see attached), which involves an examination of British Columbia Board of Reference and Review Commission data for the period 1900-1987.

Please consider this letter as a formal request for supervised access to the files compiled by Mr. Earl Cherrington, head of the former Professional Relations Division of the Ministry of Education. Any data collected in the study will be treated with the utmost discretion and no individuals will be identified in any way at all.

I realize that the data is extremely sensitive and therefore the following precautions will be taken to ensure its confidentiality:

- (1) I am willing to work directly at your office under the direction and supervision of Support Services personnel.
- (2) I am willing to provide your office with photocopies of any notes taken from the files, and
- (3) I am willing to delete any references deemed necessary to protect confidential and private information.

Sincerely,

Edward R. Spetch
Graduate Student



July 31, 1991

Mr. E.R. Spetch
9265 212A Street
Langley, B.C.
V1M 1K3

Dear Mr. Spetch:

I am writing in response to your request to access information pertaining to British Columbia Board of Reference data. If the study were to go forward there could be nothing recorded which would lead to an identification of the individual concerned. This would include not only the individual's name but also the location, school district and school, would be confidential. Therefore section 1b of your outline would have to be omitted.

It would be necessary for you to sign a non-disclosure agreement outlining the expected level of confidentiality.

I see the first step in the process being your perusal of the summary document in which you indicate the specific cases you wish to examine. At that point possible retrieval of the files would be coordinated from my office.

If you are prepared to proceed under these conditions please contact myself at 365-2575. Arrangements will be made for signing the agreement mentioned above. It should be noted that this must be done in person at the Ministry of Education. We expect the agreement for non-disclosure to be ready for signing shortly, it is now being reviewed by the Ministry of the Attorney General.

Sincerely

Gib Lind
Executive Director
Field Services Division

GL:eb

NON DISCLOSURE AGREEMENT

THIS AGREEMENT BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
BRITISH COLUMBIA represented by the Minister of Education
(herein called the "Province")

OF THE FIRST PART

AND:

EDWARD R. SPETCH of 9265 - 212A Street, Langley, British
Columbia, V1M 1K3 (herein called the "Researcher")

OF THE SECOND PART

In consideration of the Ministry of Education permitting me to examine certain Ministry of Education records pertaining to boards of reference and teacher disciplinary actions (the "Records"), I, Edward R. Spetch hereby agree to the following conditions with respect to my research and examination of the Records:

1. I will not disclose to any person the name or names of any individual(s) contained in any of the Records examined in the course of my research.
2. I will not publish or otherwise disclose, by whatever means, the names, schools, districts or location of any individual contained in the Records examined in the course of my research and subsequent writings.
3. My research and subsequent writings will be limited to those matters outlined in my letter of July 9, 1991 to Mr. Gib Lind, Executive Director, Field Services Division, Ministry of Education.
4. I will indemnify the Province from and against any and all losses, claims, damages, costs and expenses that the Province may sustain and incur at any time by reason of any disclosure or publication by me or my agents of any of the information set out in paragraphs 1 and 2 of this Agreement.

Signed this second day of August, 1991.

Witnessed:

(Name)

(Researcher)

Executive Director (Field Services)
(Title)

Edward R. Spetch
9265 212A Street
Langley, B.C.
V1M 1K3

October 1, 1991

Mr. W. Douglas Smart, Registrar
British Columbia College of Teachers
#405-1385 West 8th Avenue
Vancouver, B.C.
V6H 3V9

Dear Mr. Smart:

Please accept my apologies for not communicating with you earlier, however, the numerous difficulties of setting up a science department in a partially completed school have occupied all of my spare time.

Pursuant to our meeting of Friday August 30, 1991, 10:00 a.m. at your office with Dr. Manley-Casimir; I have enclosed the requested list of those individuals whose Review Commission or Board of Reference summary reports are needed for my study of Teacher Incompetence and Dismissal in British Columbia.

In our meeting we identified 14 Review Commission summary reports and approximately 25-30 Board of Reference summary reports from preliminary lists that were recovered from the former Professional Relations Branch files archived at the Ministry of Education. The enclosed list includes those Board of Reference summaries that are listed as "appeal dismissed" and "appeal denied". I hope there are summaries for these files, however, there may not be.

I have adjusted some of the wording of the draft "Access/Non-Disclosure Agreement" to reflect the intent and content of our meeting. I hope that these changes meet with your approval.

Therefore, I would like you to consider this letter as a formal request for supervised access to selected Board of Reference and Review Commission summary reports.

Sincerely,

Edward R. Spetch
Graduate Studies
Faculty of Education
Simon Fraser University

ERS

Enc.

SIMON FRASER UNIVERSITY**M E M O****VICE-PRESIDENT, RESEARCH**

To: M. Manley-Casimir
Education

From: Ellen Loosley
Grants Officer

Subject: Non-Disclosure Agreement
E. Spetch

Date: October 8, 1991

I am responding to your October 3rd memorandum to Dr. Leiss regarding liability of a graduate student undertaking a research project involving access to confidential records. As a graduate student whose project was approved by the Ethics Review Committee, Mr. Spetch's research, where it involves human subjects, is covered by the University's liability insurance. Nevertheless, should any legal action against the University result from a disclosure of sensitive matters by Mr. Spetch contrary to the terms of the non-disclosure agreement which he has signed, the University or its insurer could in turn seek compensation from him.

We ask you as Mr. Spetch's supervisor to:

- 1) caution him to carefully adhere to the terms of the non-disclosure agreement
- 2) ensure that the thesis adheres to those terms and to the matters raised by Mr. Gib Lind in his letter of July 31, 1991.

Further, we ask Mr. Spetch to acknowledge below the points raised in this memorandum and return a copy to me.

Edward Spetch

Ellen Loosley



British Columbia
College of Teachers

405 - 1385 West Eighth Avenue,
Vancouver, B.C. V6H 3V9
Telephone (604) 731-8170

December 6, 1991

Mr. Edward R. Spetch
9265-212A Street
Langley, B.C.
V1M 1K3

Dear Mr. Spetch:

**RE: ACCESS/NON-DISCLOSURE AGREEMENT WITH
B.C. COLLEGE OF TEACHERS**

Enclosed are two copies of an Access/Non-disclosure Agreement to cover the use by you, of Board of Reference decisions and Review Commission reports for your study of Teacher Incompetence and Dismissal in British Columbia.

If you are in agreement with the articles of this document, please sign and have witnessed two copies and return one signed copy to the College.

As to our meeting, I understand that we have a tentative date for Friday, December 27, 1991, at 10:00 a.m. and a definite date for Friday, January 3, 1992, at 10:00 a.m. I will call you if it is possible for me to meet you on the twenty-seventh.

Yours truly,

Gordon Eddy
Assistant Registrar

Enclosures:

GE/gs

ACCESS/NON-DISCLOSURE AGREEMENT

Between: British Columbia College of Teachers,
Represented by the Registrar
(herein called "the College")

And: Edward R. Spetch, of
9265-212A Street
Langley, B.C. V1M 1K3
(herein called "researcher")

In consideration of the British Columbia College of Teachers permitting me to examine certain records in the custody of the College of Teachers pertaining to Boards of Reference and Review Commissions, conducted under the School Act in the period from 1973 to 1987, I, Edward R. Spetch, hereby agree to the following conditions with respect to my research and examination of the records:

1. I will examine only those records that are Board of Reference decisions or Review Commission reports relating to individuals whose names have been provided to the Registrar of the College of Teachers.
2. I will not disclose to any person the name or names of any of the individual(s) contained in any of the records examined in the course of my research.
3. I will not publish or otherwise disclose by whatever means the names, schools, districts or location of any individual(s) contained in the records examined in the course of my research and subsequent writings.
4. My research and subsequent writings will be limited to those matters outlined in my letter of October 1, 1991, to Mr. W. Douglas Smart, Registrar, British Columbia College of Teachers.
5. I will indemnify the British Columbia College of Teachers from and against any and all losses, claims, damages, costs and

expenses that the College may sustain and incur at any time by reason of any disclosure or publication by me or my agents of any of the information set out in paragraphs 1, 2 and 3 of this agreement.

- 6. Recognizing the sensitive nature of these files, I will work directly at the offices of the British Columbia College of Teachers and under the supervision of the Registrar or his designate.
- 7. I will provide the British Columbia College of Teachers with photocopies of any notes made from the files.
- 8. I will reimburse the British Columbia College of Teachers for any costs incurred in providing me access to the records in the custody of the College of Teachers. This reimbursement will include any staff time required for the screening of records or the creation of any hard copies from microfiche records so as to limit my access to Board of Reference decisions and Board of Review reports only.

Signed this 3rd day of January 1992 ^{ERS/AH.} ~~September, 1991~~

Witness:

J
Name
Accounting clerk.
Title

Researcher:

[Signature]

The following is a typewritten copy of a handwritten progress report by the author to his senior supervisor.

Mike:

1:00 P.M.
Jan. 3/92

This is an update on progress to date w.r.t. gaining access to Bd. of Ref. & Review Commission summaries at C. of T.

Have just finished a Mtg. with Gordon Eddy, Asst. Registrar of the C. of T. I will be allowed access to the files at any time convenient to myself and the C. of T. (Have selected Spring Break 92 and the first couple of weeks in Summer 92) When finished the project, Mr. Eddy would be delighted to serve as the external reader. Mr. Eddy and Marie Kerchum (deputy registrar) have come to the conclusion that this study may assist them in their current work. They are setting up a **precedent** framework for the analysis of previous casefiles and decisions made so that new C. of T. councilmembers and various lawyers involved can become familiar with the precedent setting cases that exist in the casefiles. They will allow me to take notes and photocopies, provided that they get copies of my notes and that I don't make photocopies of restricted material. They are very interested in getting notes and my analysis on "nature of the evidence" vs "tribunal outcome" for previous cases. They are also interested in getting a copy of the 1984 Bridges and Gumpert report with it's teacher failure and case analysi classifications. They expressed interest in Edwin Bridges text "The Incompetent Teacher". I will be sending them some of this information shortly and I intend to take some of the data needed for my project during spring break.

P.S.

Mr. Eddy has sat on some of the Board of Reference cases that I was interested in and is willing to discuss aspects of the cases that may be missing in the report summaries.

RS CHAP. 375

SCHOOL

28 ELIZ. 2

Physical exercises

103. The school medical officer shall have supervision over all physical exercises of pupils attending school, and in special cases may modify or prohibit them.

RS1960-319-111.

Examination and treatment of teeth

104. (1) A board may

- (a) provide for the examination of the teeth of all pupils attending public school in the district, and, subject in each individual case to the consent of the parents or guardians of the pupil, for surgical treatment of the teeth of the pupils;
- (b) for purposes of examination and treatment, appoint and pay the registered dental surgeons and nurses and provide the buildings, furniture, equipment, fittings, instruments, machinery and materials that are necessary; and
- (c) for the same purposes, make all necessary rules, including rules for the fixing and collection of fees from parents and guardians for surgical treatment provided in cases where collection of fees is deemed advisable.

(2) All expenses necessarily incurred by the board of school trustees under this section for the purposes of examination and surgical treatment of the teeth of pupils attending school shall be an expense of the board for the current year, and all fees collected for surgical treatment provided shall be paid to the secretary treasurer of the board, who shall receive and account for them as part of the board's account.

RS1960-319-112.

Eye-glasses

105. Pupils whose sight is so defective as to handicap them in their studies, and who, through lack of means, are unable to avail themselves of remedial measures, may, at the discretion of the board and at its expense, be provided with eye-glasses prescribed by a physician or optometrist.

RS1960-319-113.

Teachers' health

106. Each school medical officer shall, as required by the Ministry of Health, make or cause to be made an examination of the general health of the teachers and other employees of the board of school trustees. If he finds that the health condition of a teacher or other employee is such as to endanger the health of the pupils attending the school, he shall so report to the board, giving the name of the teacher or other employee concerned.

RS1960-319-114, 1974-106-Sch., 1977-75-1.

Board may require teacher to undergo examination

107. (1) On the advice of the school medical officer, a board of school trustees may require a teacher or other employee to undergo an examination

- (a) by a medical practitioner, and to submit to the school medical officer a certificate signed by the medical practitioner setting out his conclusions regarding the physical, mental and emotional health of the teacher or

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employee, and, in that case, the board shall report the circumstances and conclusions to the ministry; or

- (b) by a qualified person designated by the Minister of Health, and to submit to the school medical officer a certificate signed by the person conducting the examination setting out his conclusions regarding the mental and emotional health of the teacher or employee.

(2) If a teacher or other employee, within 14 days from the date of receiving notice from the board requiring that an examination be taken, fails to take the examination, a board may summarily dismiss him.

(3) If the certificate submitted to the school medical officer shows that the physical, mental or emotional health of the person examined is such as to be injurious to the pupils of the school, the board shall suspend the person from his duties and not permit him to return to his duties until he delivers to the board a certificate signed by the school medical officer permitting his return, and shall report the circumstances to the ministry.

(4) A teacher or other employee who has failed to take an examination required under subsection (1) or who has been suspended from duties under subsection (3) shall not be offered or accept a position with a board until he submits a satisfactory medical clearance certificate to the ministry.

(5) A teacher or other employee who is granted a superannuation allowance on medical evidence of total and permanent disability shall not be offered or accept a position with a board until he submits a satisfactory medical certificate to the ministry that the disability no longer exists.

(6) Expenses necessarily incurred by a board under this section shall form part of the expenses of the board.

RS1960-319-115; 1965-41-5; 1967-42-16; 1970-41-12; 1971-47-39; 1972-52-4A; 1973-142-18; 1974-106-Sch.; 1977-75-1.

First aid equipment

108. Each board of school trustees shall provide each school in the school district with suitable first aid equipment, and shall also, so far as practicable, provide that on each school staff there shall be at least one teacher or other person qualified to administer first aid.

RS1960-319-116; 1972-52-5.

Health Act to be adhered to

109. Each board of school trustees shall ensure that the *Health Act* and regulations are carried out in regard to the pupils attending public school in the school district.

RS1960-319-117.

Health policy

110. The Minister of Health shall outline policies and procedures for the operation of school health services, and shall provide all necessary forms, record keeping material and useful appliances for operating the school health service.

RS1960-319-118; 1974-106-Sch.

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of the board, of which notice of time and place has been served on the parent or guardian and pupil, to provide the parent or guardian and pupil with an opportunity to discuss with the board the suspension or expulsion, as the case may be.

(6) A board may readmit a student expelled under subsection (2).

(7) A board may order that any reference to a suspension or expulsion be expunged from the records of a pupil.

RS1960-319-126; 1973-142-20; 1976-44-5.

DIVISION (2)

Protection of pupils and maintenance of order

118. (1) A person who disturbs, interrupts or disquiets the proceedings of an official school function, or disturbs, interrupts or disquiets a school established and conducted under authority of this Act, or by rude or indecent behaviour or by making a noise, either within the place where a school is kept or held or so near to it as to disturb its order or exercises, commits an offence.

(2) A person who does not immediately leave the land and premises occupied by a public school when directed by anyone authorized to make that direction by the minister or the school board commits an offence.

(3) The principal of a school may, in order to restore order on school premises, require adequate assistance from a constable or peace officer.

RS1960-319-127; 1976-44-6.

PART 7

DIVISION (1)

Appointment and assignment of teachers

119. (1) The board of each school district shall, as required, after considering the recommendation of the district superintendent of schools, appoint or authorize the appointment of properly qualified persons as part time or full time teachers in the school district, assign or authorize the assignment of those teachers under section 6 (1) (e), and enter contracts with them, as provided in this Act.

(2) Every appointment made by a board, except a probationary or temporary appointment made under the regulations, and every contract relating to it, shall be deemed to be a continuing contract until terminated as provided in this Act; but no appointment made to fill a vacancy caused by the dismissal or termination of the contract of a teacher who, within 10 days from receiving the written notice of dismissal or termination, sends by registered mail to, or serves on, the board a copy of an appeal or request for review sent by him to the minister shall be deemed to be a continuing contract, unless the action of the board in dismissing that teacher or terminating his appointment is confirmed by a board of reference or review commission.

(3) A board may authorize the assignment of teachers under section 6 (1) (e) as

(a) principals, head teachers and vice principals; or

(b) school district supervisory personnel in the numbers and with the powers and duties prescribed by the regulations,

and may, under section 120, transfer a teacher so assigned.

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(4) A person who was appointed to a position referred to in subsection (3) as enacted by the *Public Schools Amendment Act, 1976*, under a provision respecting the appointment that was in force at any time prior to the coming into force of that subsection, shall be considered to have been assigned to the position under that subsection.

(5) Notwithstanding subsections (3) and (4), a board may, after considering the recommendation of the district superintendent of schools, authorize the assignment of a teacher to a position referred to in subsection (3) by a term assignment.

(6) Subject to the regulations of the Lieutenant Governor in Council, the board may authorize the assignment of a teacher to a position referred to in subsection (3) by a temporary assignment only where the position is temporarily vacant.

1972-52-7, 1976-44-7, 1978-28-17, 1979-8-17, 1980-51-4, proclaimed effective October 16, 1980.

Transfer of teachers

120. (1) Subject to section 121, a board may transfer a teacher from one assignment under section 6 (1) (e) to another at any time by giving at least 7 days' notice in writing to the teacher of the transfer.

(2) Within 7 days after receiving notice of the transfer, the teacher may request, in writing, a meeting with the board.

(3) The board shall, within 7 days after receipt of a request under subsection (2), grant the teacher a meeting with the district superintendent of schools and the board, or the district superintendent of schools and a committee of the board, and shall not proceed with the transfer until after the meeting.

(4) If the board directs that the meeting shall be with a committee, it shall consider the committee report before proceeding with the transfer.

(5) If the salary of the teacher is to be decreased by the transfer, then the board may adjust the salary only at the beginning of the next school year.

(6) Transfers made under this section are not subject to the appeal or review provisions of this Act, but if the transfer is from an assignment referred to in section 119 (3), or to an assignment in a school other than the one to which the teacher is presently assigned, it may be reviewed by the minister, whose decision shall then be final and binding on the board and on the teacher, except as provided in subsection (9).

(7) A teacher who wishes the minister to review his transfer shall so request within 7 days of the day the teacher is advised by the board that it is proceeding with the transfer.

(8) The teacher may be accompanied by another teacher or by a member of the staff of the British Columbia Teachers' Federation, who may represent him or advise him during the meeting referred to in subsection (3).

(9) Notwithstanding this Act or the regulations, a teacher transferred by a board may, if he does not wish to comply with the transfer order, resign immediately by notice in writing to the board.

1972-52-8, 1974-74-9, 1976-44-8, 1980-51-5, proclaimed effective October 16, 1980

Term assignment

121. (1) Subject to subsections (2) to (4), where the board authorizes the assignment of a teacher as a vice principal, principal, head teacher or a member of the school district supervisory personnel under a term assignment, the board may transfer the teacher only at the end of the term assignment.

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(2) Where the board authorizes the assignment of a teacher as a principal, vice principal, head teacher or a member of the school district supervisory personnel, the board may transfer the teacher if, owing to a decrease in the enrolment of pupils, the number of principals, vice principals, head teachers or persons who are supervisory personnel, as the case may be, is found to be greater than the number that is required in the school district for next term.

(3) Where a board transfers a teacher under subsection (2), section 153 (2) applies as if the transfer were a termination.

(4) Subsection (1) does not apply to the transfer of a vice principal, principal, head teacher or a member of the school district supervisory personnel to the same position in a different school in the school district.

1979-8-18.

Suspensions or dismissals

122. (1) A board may at any time suspend a teacher with or without pay from the performance of his duties

- (a) for misconduct, neglect of duty or refusal or neglect to obey a lawful order of the board; or
- (b) where the teacher has been charged with a criminal offence and the board believes the circumstances created by it render it inadvisable for him to continue his duties.

(2) A board that has suspended a teacher shall

- (a) appoint a date within 7 days of the suspension when the teacher shall have the opportunity of meeting with the district superintendent of schools and the board, or the district superintendent of schools and a committee of the board; and
- (b) where the teacher is suspended under subsection (1) (a), within 7 days of the meeting, reinstate the teacher without loss of salary, or, after the notice required by the regulations, dismiss him on the same grounds on which he is suspended or take other action permitted by the regulations; or
- (c) where the teacher is suspended under subsection (1) (b) and is acquitted of the charge or given an absolute or conditional discharge, reinstate him forthwith after the later of
 - (i) the expiry of the appeal period, or
 - (ii) the expiry of the period for appealing from the last court to which an appeal from the decision is taken and in which he is acquitted or given an absolute or conditional discharge.

(3) Where a teacher is suspended under subsection (1) (b) and the teacher is convicted of the charge the board may, after the notice required by the regulations, dismiss him or take any other action that is permitted by the regulations after the later of

- (a) the expiry of the appeal period, or
- (b) the expiry of the period for appealing from the last court to which an appeal from the conviction is taken.

(4) Where a teacher is suspended without pay and is reinstated under subsection (2) (c), the board shall pay the teacher his salary for the period that he was suspended.

(5) Where a teacher is suspended without pay and is reinstated after being convicted, the board may pay a teacher his salary for part or all of the period that he was suspended.

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(6) Where a teacher is suspended without pay under subsection (1) (a) and reinstated, the board

- (a) shall pay the teacher his salary from the date specified by
 - (i) the board of reference, where no appeal is taken, or
 - (ii) the last court to which an appeal from the board of reference is taken, and
- (b) shall pay the teacher his salary from the date of reinstatement where no order or decision is made respecting salary by
 - (i) the board of reference where no appeal is taken, or
 - (ii) the last court to which an appeal from the board of reference is taken.

(7) Where the board of reference orders that a teacher be reinstated, the board shall reinstate the teacher

- (a) in the case where no appeal is taken
 - (i) forthwith if the board does not specify any time, or
 - (ii) within the period of time that the board specifies, or
- (b) where an appeal is taken, at the time specified by the last court to which an appeal from the board of reference is taken.

1972-52-10; 1975-58-7; 1976-44-9; 1980-51-6, proclaimed effective October 16, 1980.

Termination of contracts

123. (1) Subject to section 120 (9), and the regulations, either party to a continuing contract under section 119 (2) may terminate the contract by giving in writing at least 30 days' notice to the other party, and the termination shall take effect at the end of a school term, or, by agreement, at an earlier date.

(2) Except as otherwise provided in this Act, a board shall, at least 30 days prior to the issue of a notice of termination of a contract, give the teacher a written notice of its intention to give a notice of termination and shall set a time for a hearing within 20 days of the issue of the notice of intention, at which the teacher shall have the opportunity to meet with the district superintendent of schools and the board, or with the district superintendent of schools and a committee of the board.

(3) The teacher may be accompanied by another teacher or by a member of the staff of the British Columbia Teachers' Federation, who may represent him or advise him during the interview referred to in subsection (2).

1972-52-11; 1973-142-21; 1976-44-10; 1980-51-7, proclaimed effective October 16, 1980.

Training of student teachers

124. A board shall, where a request for permission for student teachers to practise teaching and observe tuition has been received from a university established under the *University Act* or an institution for the training of teachers established under any Act, permit students enrolled at the university or institution free access to all classrooms and other school accommodation in accordance with arrangements made by the district superintendent of schools for the purposes of practising teaching, supervising, observing tuition and any related duties, and a student teacher engaged in any of these duties

- (a) has the same disciplinary authority as a teacher in the school, and
- (b) is not entitled to remuneration for the period of practice teaching.

RS1960-319-131; 1961-53-17; 1970-41-13; 1980-51-8, proclaimed effective October 16, 1980.

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Leave of absence

125. (1) For the purpose of professional improvement, for maternity or for any purpose acceptable to the board, a board shall, in accordance with the regulations, and may, in its discretion, grant leave of absence to a teacher

- (a) without pay for a stated period of time;
- (b) with pay for a stated period not exceeding 6 months; or
- (c) with the prior approval of the Lieutenant Governor in Council, with pay for a stated period in excess of 6 months.

(2) If a teacher is absent from his duties for reason of illness or unavoidable quarantine and has, if the board so required, presented a certificate signed by a medical practitioner to that effect, the board shall allow him full pay for the number of days of the absence that is equivalent to 1 1/2 times the number of months taught by him in the service of the board after April 1, 1968, plus full pay for the number of days of the absence equivalent to the number of months taught by him in the service of the board prior to April 1, 1968, less the number of days during which he has been absent for either or both of those reasons and for which the board has previously allowed and paid full pay.

(3) The number of days for which a teacher may be allowed full pay under subsection (2) in any one school year shall not exceed 120.

RS1960-319-132, 1961-53-18; 1965-41-7; 1968-45-15; 1970-41-14; 1972-52-9; 1975-58-6.

Report of dismissal

126. The board shall without delay report to the ministry a termination, dismissal or suspension of a teacher in the school district, with the reasons for it.

1971-47-41; 1973-142-22; 1977-75-1.

127 and 128. [Repealed 1980-51-9, proclaimed effective October 16, 1980.]

Appeals

129. (1) Within 10 days after receipt of a notice under section 122 (2), a teacher may appeal under the regulations to the minister against a suspension for a period exceeding 10 days or a dismissal.

(2) The minister shall refer an appeal under subsection (1) to a board of reference consisting of 3 members appointed by the minister. The chairman shall be appointed from among members of the Law Society of British Columbia nominated by the Chief Justice of British Columbia; one member shall be appointed from among persons nominated by the executive of the British Columbia Teachers' Federation, and one member shall be appointed from among persons nominated by the executive of the British Columbia School Trustees Association.

(3) On the request of the minister, the Chief Justice of British Columbia and each executive shall, within 14 days, notify the minister of the names of at least 2 persons nominated by him or by it for the purposes of this section.

(4) If the Chief Justice of British Columbia fails to notify the minister of his nominees, within the time limit in subsection (3), the minister shall appoint a suitable person as chairman.

(5) If either or both executives fail to notify the minister of their nominees within the time limit in subsection (3), the minister shall appoint suitable persons as members of the board of reference.

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(6) A board of reference shall in accordance with the regulations consider an appeal referred to it and may allow or disallow the appeal or vary the decision made by the board under section 122 and make any order it considers appropriate in the circumstances.

(7) Either party to an appeal to a board of reference may, within 30 days of the decision of the board of reference, appeal the decision to the County Court or Supreme Court in accordance with their respective Rules; but no reinstatement under subsection (6) shall take place during the course of the appeal or a subsequent appeal from it.

(8) For the purposes of an appeal referred to it, a board of reference constituted under this section shall have the powers and privileges of a commissioner appointed under Part 2 of the *Inquiry Act*, and sections 12, 15, and 16 of that Act apply to an appeal under this section.

(9) The expenses necessarily incurred by a board of reference under this section, and the allowances to and expenses of its members as the Lieutenant Governor in Council determines, shall be paid from money appropriated by the Legislature for that purpose.

(10) The expenses referred to in subsection (9) do not include the fees or expenses of the parties to the matter in dispute, or their counsel, agents or witnesses.

1972-52-12; 1973-142-23; 1977-79-8; 1980-51-10, proclaimed effective October 16, 1980.

Review of termination

130. (1) Except in the case of a teacher on a probationary appointment, a teacher whose appointment or contract has been terminated by a board under section 123 of this Act may, within 10 days of receipt of notice of termination, and in accordance with the regulations, request the minister to direct that a review commission review the termination.

(2) On receipt of a request under subsection (1), the minister shall direct the chairman of one of the review commissions established under this Act to proceed without delay with a review of the termination.

(3) The review commission designated under subsection (2) shall, in accordance with the regulations, investigate and review the matters referred to it, and confirm or reverse the action of the board; and the decision of the review commission is final and binding on the teacher and the board.

(4) Where a review commission directs that the action of the board be reversed, the board shall promptly reinstate the teacher.

(5) The minister shall appoint, when required, the number of review commissions he considers necessary.

(6) Each review commission shall consist of

(a) a chairman appointed by the minister, from among persons qualified under paragraph (b) within the 5 years immediately preceding the date of his appointment;

(b) 2 members appointed by the minister, one of whom shall be from among persons nominated by the executive of the British Columbia Teachers' Federation and one of whom shall be from among persons nominated by the executive of the British Columbia School Trustees' Association, and each of whom shall be

(i) actively engaged in education in the Province, as evidenced by appointment to the staff of a board, college, provincial institute, university or some other educational institution or organization

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established under this Act, the *College and Institute Act* or the *University Act*; and

- (ii) not a member of the staff of either the British Columbia Teachers' Federation or the British Columbia School Trustees' Association.

(7) Members, including the chairman, shall hold office at the pleasure of the minister.

(8) If either party fails to notify the minister of its nominees within 14 days of receipt of his request for the names of nominees, or if both parties fail to notify the minister, the minister may appoint a suitable person as a member of the review commission on behalf of the party that failed to nominate a member.

(9) A person employed by a board, a college council or a university who is appointed under this section shall be granted leave of absence with full salary to permit him to carry out his duties on the review commission, but the board, college council or university shall be reimbursed as provided in subsection (14).

(10) To investigate the matters which it has under review, a review commission constituted under this section shall have the powers and privileges of a commissioner appointed under Part 2 of the *Inquiry Act*, and sections 12, 15, and 16 of that Act apply to a matter under review under this section.

(11) The expenses necessarily incurred by a review commission under this section and the allowances to and other expenses of its members that the Lieutenant Governor in Council determines, shall be paid from money appropriated by the Legislature for that purpose.

(12) The expenses referred to in subsection (11) do not include the fees or expenses of the parties to the matter under review, or their counsel, agents or witnesses.

(13) The minister may authorize payment to a member of a commission or review commission of an allowance in an amount and under the conditions prescribed by the minister.

(13.1) A regulation made by the minister under subsection (13) is not a regulation within the meaning of the *Regulation Act*.

(14) The Lieutenant Governor in Council shall reimburse a board, college council, university or other educational institution or organization from funds voted by the Legislature for the purpose, for the salary of a person appointed under subsection (6), for the period of leave of absence granted under subsection (9).

1972-52-13, 1977-67-82, 1980-51-11, proclaimed effective October 16, 1980. RS1979-375-274, proclaimed effective October 16, 1980

DIVISION (2)

Interpretation

131. For the purposes of this Division

"association" means an incorporated or unincorporated association of teachers in a school district,

"bonus" means money paid or a financial benefit or benefits provided in lieu of money;

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

1965-41-8, 1975-58-8.

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Retirement gratuity

139. (1) A board may, with the prior approval of the minister, make a retirement gratuity to a teacher who retires from its service for reasons of ill health or age, but the expenses of the gratuity shall be borne by the board.

(2) Provision for a retirement gratuity shall not be included in an agreement between a board and an association or in an arbitration award.

(3) In this section "retirement gratuity" includes "retirement bonus".

1971-47-45, 1977-79-9.

DIVISION (3)**Federation membership required**

140. Subject to section 141, every person who

(a) is a teacher on November 29, 1973; or

(b) after November 29, 1973, becomes a teacher

shall be, or immediately become, a member of the British Columbia Teachers' Federation, and it shall be a condition of his employment that he be and continue to be a member.

1973-142-25.

Exemption

141. Section 140 does not apply to a person who

(a) teaches only in a night school;

(b) holds a valid letter of permission or a temporary certificate of qualification for teaching and who has been declared ineligible by the British Columbia Teachers' Federation for a category of membership;

(c) is engaged only as a substitute teacher;

(d) is in the employ of a board and who is, by order of the Lieutenant Governor in Council, classified as a major supervisory officer, or

(e) holds a certificate of qualification for vocational instruction only and who by virtue of that certificate is engaged in giving instruction in a trade or occupation.

(f) [Repealed RS1979-375-274, proclaimed effective October 16, 1980.]

1973-142-25, 1977-67-82, RS1979-375-274, proclaimed effective October 16, 1980

Suspension from membership

142. (1) In accordance with its bylaws, the British Columbia Teachers' Federation may suspend or expel a teacher from membership in the Federation, and a person so suspended or expelled shall not be employed as a teacher in a public school until reinstated as a member.

(2) A teacher so suspended or expelled may, not later than 10 days after receiving notice of suspension or expulsion, appeal the decision to the Lieutenant Governor in Council by sending

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- (a) a written statement by registered mail addressed to, or serving it on, the Provincial Secretary, setting out in detail the grounds of appeal and facts in support, together with \$15 as security for costs; and
 - (b) a notice of appeal by registered mail addressed to, or serving it on, the general secretary of the British Columbia Teachers' Federation, accompanied by a copy of the written statement.
- (3) If a notice of appeal is sent or served under subsection (2), the suspension or expulsion shall not take effect unless or until
- (a) the appeal has been decided and the suspension or expulsion confirmed; or
 - (b) the notice of appeal has been sent or served under subsection (2) after the time limited for an appeal.
- (4) Notwithstanding subsection (3), where a teacher has sent notice of appeal under this section, a board may require him to take leave of absence with full salary and other employment benefits until the Lieutenant Governor in Council has confirmed or reversed the suspension or expulsion.
- (5) Where the board so determines, a suspension or expulsion shall not have the effect of terminating employment in a school before a date to be fixed by the board; but the date shall not be later than the end of the current school year.
- (6) The British Columbia Teachers' Federation shall, not later than 5 days after receipt of the notice of appeal from the teacher, send by registered mail to the Provincial Secretary for consideration by the Lieutenant Governor in Council a statement by way of reply to the statement of grounds of appeal sent by the teacher, and shall at the same time send a copy by registered mail to the teacher.
- (7) On consideration of the statements and the other evidence he considers necessary for a proper determination of the matter, the Lieutenant Governor in Council may confirm or reverse the decision, and, if the Lieutenant Governor in Council reverses the decision, the suspension or expulsion, as the case may be, shall be rescinded without delay.
- (8) Where the decision is reversed, the \$15 so deposited by the teacher shall be returned to him, and the Lieutenant Governor in Council may order the British Columbia Teachers' Federation to pay the costs of the appeal.
- (9) The British Columbia Teachers' Federation may, with the approval of the Lieutenant Governor in Council, make bylaws governing the suspension and expulsion of members and providing for a hearing authority to exercise the power of suspension and expulsion on its behalf.

1973-142-25; 1975-58-10; 1976-44-12.

143 and 144. [Repealed 1980-51-12, proclaimed effective October 16, 1980.]

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DIVISION (4)

Certificate or letter of permission required

145. A person shall not be employed as a teacher in a public school unless he holds a teacher's certificate of qualification issued to him by the ministry, or a letter of permission issued to him under section 5 (b), except that a person

- (a) employed for 20 consecutive teaching days or fewer in teaching a particular class or classes where no teacher holding a certificate of qualification is available;
- (b) teaching in a night school; or
- (c) engaged as a short term instructor in a vocational school,
- (d) [Repealed RS1979-375-274, proclaimed effective October 16, 1980.]

and who possesses the appropriate qualifications prescribed by the Lieutenant Governor in Council, may be employed without a teacher's certificate of qualification or letter of permission.

RS1960-319-149; 1968-45-20; 1970-41-15; 1971-47-49; 1977-75-1; 1977-67-82; RS1979-375-274, proclaimed effective October 16, 1980.

Qualifications for teaching certificate

146. A certificate of qualification for teaching shall not be issued to a person who does not furnish the minister or his authorized representative satisfactory proof that he is of good moral character and a fit and proper person to be granted a certificate.

RS1960-319-150.

DIVISION (5)

Retirement age and exceptions

147. A teacher shall not be engaged or regularly employed as a teacher in a public school in the Province beyond the end of the school year during which he attains the age of 65 years, save that, where by reason of experience and need for his services the minister decides it is in the interest of education to re-engage after retirement or to defer the retirement of a person as a teacher,

- (a) the minister may, on the request of a board, authorize the re-engagement after retirement or the deferment of retirement of a person as a teacher for a period not exceeding one year, and successive re-engagements or deferments, each of one year, may be authorized by the minister, but no re-engagement or deferment may extend beyond the school year in which the person attains the age of 70 years; or
- (b) a request by a board for the re-engagement of a person who has been retired as a teacher may be considered after May 31 in the year in which the person concerned attains the age of 65 years. Requests for successive re-engagements or deferments may be considered by the minister after May 31 in any succeeding year.

RS1960-319-151, 1971-47-50

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DIVISION (6)

Duties of teacher

148. Every teacher employed in a public school shall, subject to this Act and the regulations,

- (a) perform the teaching and other educational services required or assigned by a board or the ministry;
- (b) provide the information in respect to pupils in his charge as required by the ministry, board, or, subject to the approval of the board, by a parent, and, when required to do so by the ministry, verify the accuracy of the information;
- (c) send to the parent or guardian of each pupil taught by him reports of the progress and attendance of the pupil, at the times, on the form and in the manner prescribed by the board; and
- (d) admit to his classroom, to observe tuition and practise teaching, student teachers enrolled in a university established under the *University Act* or in an institution for training teachers established under any Act, and render, without additional remuneration or salary, the assistance to the student teachers, and submit the reports on their teaching ability or on other matters relating to them or to their work considered necessary for the training of teachers by the university or institution.

1974-74-10; 1977-75-1; [amended 1981-21-102, to be proclaimed, amendment not included].

DIVISION (7)

False reports

149. Where a teacher sends the minister a return which is misleading or false in whole or in part, the minister may report the facts to the Lieutenant Governor in Council, who may suspend the certificate of that teacher for any period.

RS1960-319-153; 1971-47-52.

Employment with ministry

150. Where a teacher has been employed by a board for any period and receives, during the period of his engagement with the board, an appointment as an officer in the ministry, then, on his delivering or mailing by registered mail to the board, within 24 hours of the time of his acceptance of the appointment, notice of the acceptance, he shall be released from his engagement with the board.

RS1960-319-154; 1961-53-19; 1970-41-17; 1971-47-53; 1977-75-1; 1977-67-82; RS1979-375-274, proclaimed effective October 16, 1980.

Release by consent

151. Except as specifically provided in this Act, a person engaged as a teacher by a board may obtain a release from his engagement only by the consent in writing of the board.

RS1960-319-155(1).

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Suspending certificate

152. Where a teacher fails to fulfil his engagement with a board, the board shall report the facts to the minister; and, if on investigation the minister believes his failure was in violation of this Act or the regulations, the minister may recommend the suspension or cancellation of the certificate of that teacher to the Lieutenant Governor in Council.

1971-47-54.

Closing classes or schools

153. (1) Where a board summarily closes a department of a school district, or a public school or a classroom or department of a public school, it may terminate the appointment of each teacher employed in that department, public school or classroom on 30 days' written notice.

(2) If in a school district, owing to a decrease in the enrolment of pupils, the number of teachers is found to be greater than the number of teachers required for the next school term, the board may terminate the engagement of so many teachers as shall be in excess of its requirements for the next school term, by giving to each teacher whose engagement is to be terminated at least 30 days' notice of the termination and the reasons for it, which period of notice shall expire on July 31 or December 31 next following the giving of the notice. In that case, the teachers to be retained on the staff shall be those who have the greatest seniority with the school district, provided that they possess the qualifications necessary for the positions available and if it is found, during the period of 5 months following the termination of engagements, that the number of teachers remaining in the employ of the board is less than the number required, the board shall offer re-engagement to the teachers whose engagements were terminated and as are required and qualified to fill the existing vacancies.

RS1960-319-156; 1965-41-16; 1971-47-55; 1973-142-26

PART 8**DIVISION (1)****Interpretation and application**

154. (1) In this section "boarding house" includes a private dwelling or apartment, a lodging house, hotel or school dormitory, and an institution in which children may board, other than a charitable institution approved for the purposes of this section by the Lieutenant Governor in Council; and "boards" includes lives, abides, dwells and lodges.

(2) For the purposes of this Act, a pupil whose parent or guardian resides elsewhere shall not be deemed resident in a school district by reason only that he boards at a boarding house in the school district or municipality, unless he is a pupil whose parent or guardian resides in a part of the Province not in a school district.

(3) Subsection (2) applies where the board and lodging of the pupil are supplied free, and also where they are paid for in money or by work or services, and the residence of a pupil shall be determined without regard to any guardianship constituted by indenture or agreement.

(4) For the purposes of this Act, a child placed in a home in a school district with the approval of the Minister of Human Resources shall be regarded as a resident of that district.

RS1960-319-157; 1972-52-17; 1977-79-10

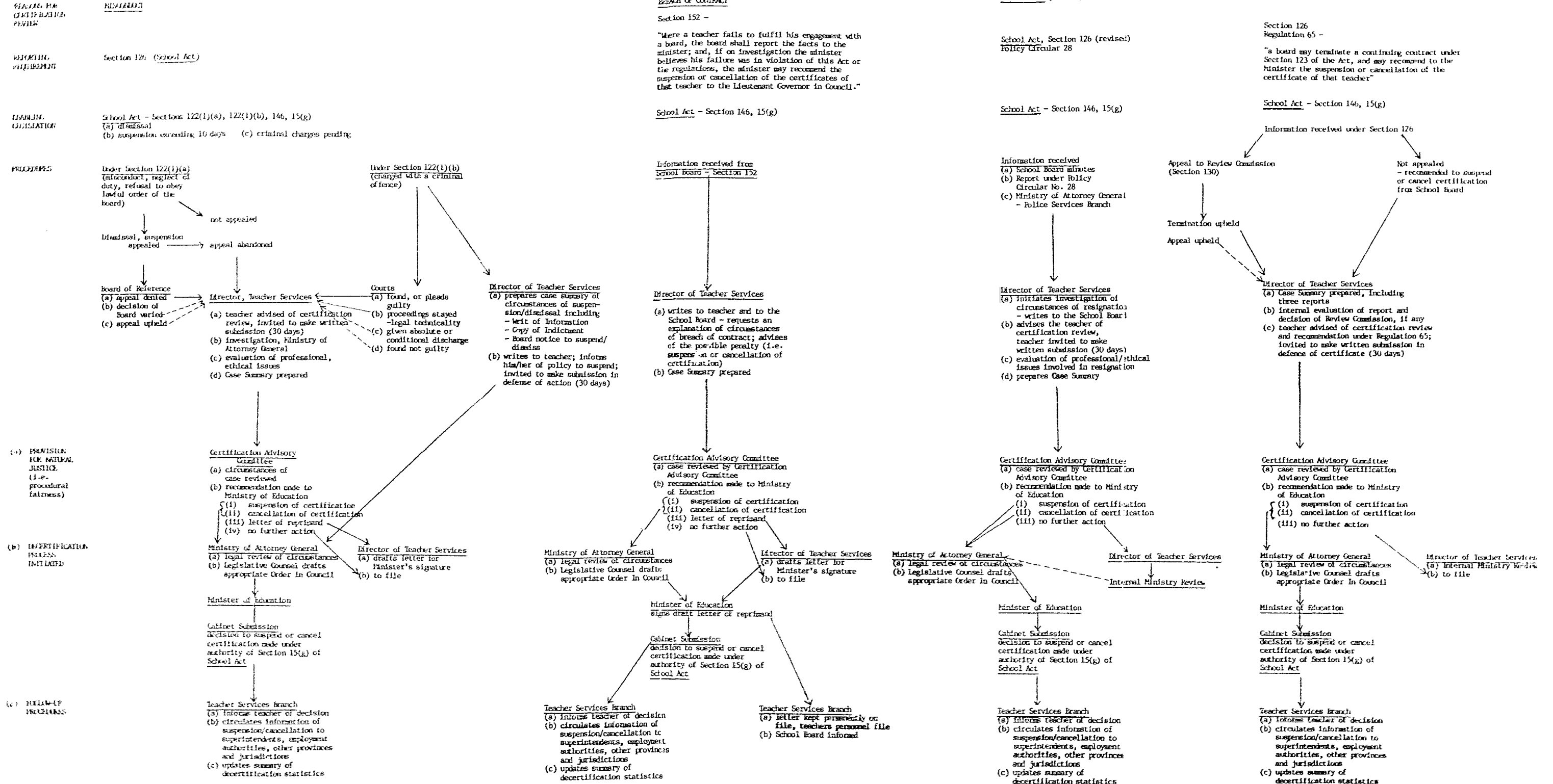
1979

SCHOOL

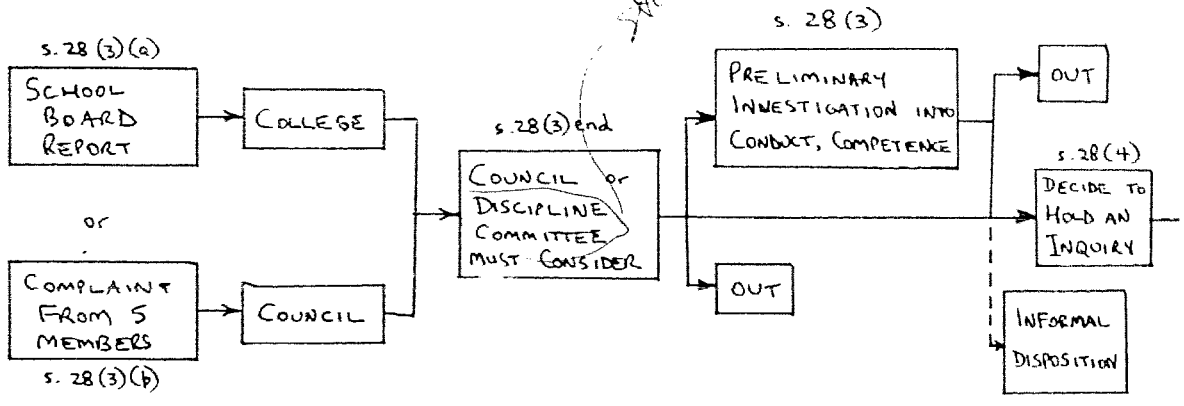
RS CHAP. 375

Duties of board

- 155.** (1) The board of each school district shall,
- (a) except as otherwise provided in this Act, provide sufficient school accommodation and tuition, free of charge, to
 - (i) all children of school age resident in that school district; and
 - (ii) children not more than one year younger than school age, in accordance with the regulations;
 - (b) after considering the recommendation of the district superintendent assign pupils to various schools in the school district, and may authorize the division of the district into areas for the purpose of assigning pupils to various schools;
 - (c) provide during any school year, free of charge, sufficient school accommodation and tuition for every child of school age not resident in the school district and whose parents are the registered owners of real property in the school district in respect of which real property taxes during the preceding calendar year amounted to at least \$75;
 - (d) pay tuition fees on behalf of any pupil of school age normally resident in the school district, and who is necessarily confined, as certified by a medical practitioner, for a period of one month or longer to a hospital or other medical rehabilitation centre in another school district, and who is receiving, in the hospital or centre, regular instruction in classes provided by the board of the district in which the hospital or centre is located;
 - (e) when so ordered by the medical health officer appointed under this Act, or when inclemency of weather might endanger the health of the pupils, close a school temporarily without permission of the ministry;
 - (f) where dormitory accommodation for pupils is provided, make and cause to be enforced rules for the management of dormitories and the supervision of pupils accommodated in them; and
 - (g) pay tuition fees charged to the board under regulations made under section 16 (e).
- (2) The board of a school district need not provide school accommodation for a child to attend Grade 1 unless he
- (a) presents himself or is presented for admission to a school within 2 weeks of the day on which the school opens in September; or
 - (b) has attained a standard of education equivalent to that of the pupils attending Grade 1 in the school to which he seeks admission at the time he presents himself or is presented for admission.
- (3) The board of a school district need not provide school accommodation for a child after he has attained the age of 15 years unless he
- (a) presents himself for admission to school within 2 weeks of the day on which the school opens in September and remains in regular attendance after that;
 - (b) presents a certificate signed by a medical practitioner that he was unable to so present himself or to remain in regular attendance because of illness or unavoidable quarantine; or



*Protect to
Public Interest
Admin. Inst*



NOTE:

Limited authority
to receive complaints

POLICY

1. Should the
Council or
Disc. Cmte
consider
complaints at
this stage?

2. Composition
of Disc. Cmte:
NB. s. 29(1),
and s. 30(1).

POLICY

1. Criteria for "OUT":

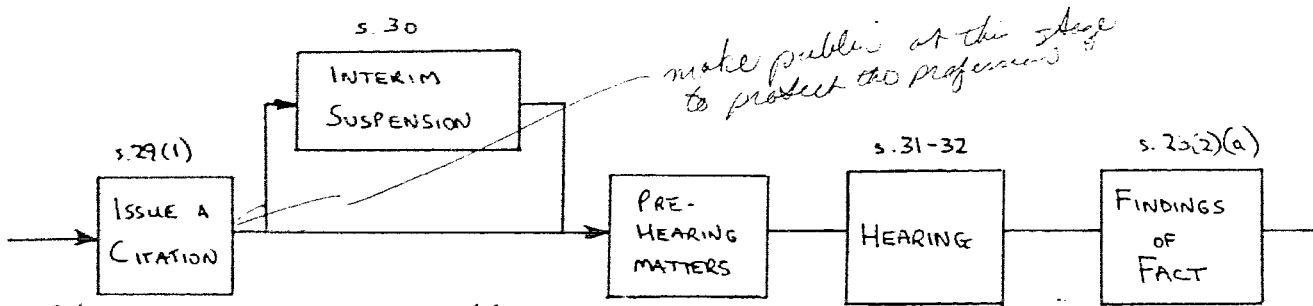
- no merit
- outside jurisdiction
- matter has been resolved
- etc.

2. Admin. machinery
for investigating
complaints:

- complaint in writing
- gather all information
- ask member for a response

TEACHING PROFESSION ACT

Disciplinary Proceedings Flow Chart



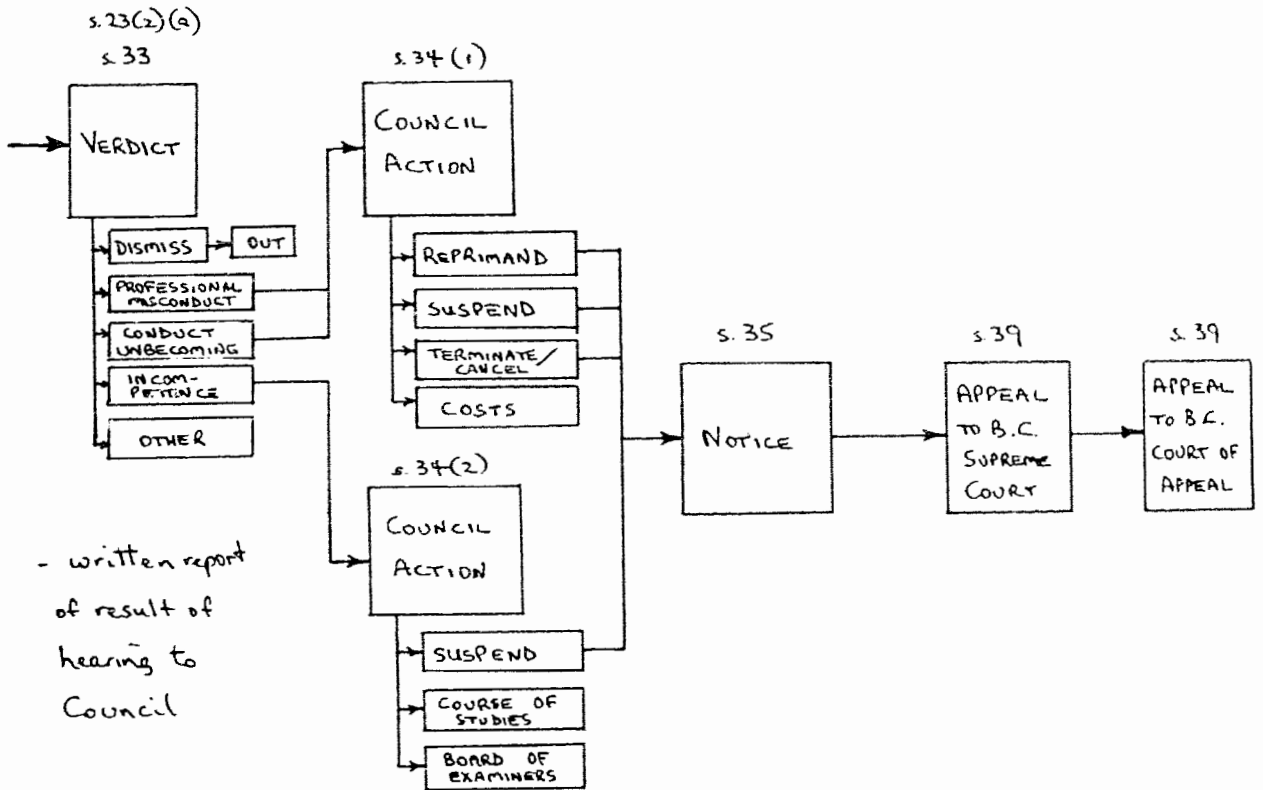
make public at this stage to protect the profession

If admits guilt by Pass Citation

publish in Discipline Digest

open hearings enhance the status of the profession

- | | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><u>POLICY:</u></p> <p>1. <u>Directed by:</u></p> <p>a) 3 <u>elected</u> Councillors, or</p> <p>b) <u>Chair of Disc. Cmte.</u></p> <p>2. <u>For specific behaviour:</u></p> <ul style="list-style-type: none"> • professional misconduct • conduct unbecoming • incompetence <p>3. <u>Must give member details</u></p> <p>4. <u>Disclosure of citation to public</u></p> | <p><u>POLICY:</u></p> <p>1. <u>Ex parte</u> or hearing?</p> <p>2. <u>Criteria</u> - eg. School Act, s.122.3</p> <p>3. <u>Panel must be 3 elected Councillors</u></p> <ul style="list-style-type: none"> • may be different from Disc. Cmte • may be disqualified from sitting on hearing <p>4. <u>Variation Hearing</u></p> <ul style="list-style-type: none"> • by "council" • quorum = 11? | <p><u>POLICY</u></p> <p>1. <u>Appoint panel to sit on hearing</u></p> <ul style="list-style-type: none"> - Council or Disc. Cmte? <p>2. <u>Appoint counsel to represent College.</u></p> <p>3. <u>Deliver "particulars" to member</u></p> <p>4. <u>Set hearing date</u></p> <p>5. <u>Allow for "guilty" plea</u></p> | <p><u>POLICY</u></p> <p>1. <u>Public or private?</u></p> <p>2. <u>Disqualification of Council members to sit</u></p> <p>3. <u>Transcript of hearing</u></p> <p><i>Court recorder?</i></p> <p>4. <u>Procedure:</u></p> <ul style="list-style-type: none"> • College goes first • testify under oath <p>written report to Council</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|



POLICY

- meaning of:
 - "professional misconduct";
 - "conduct unbecoming"
 - "incompetence"

POLICY

1. further hearing before Council re penalty?
2. By-laws under s. 23(2)(b), so that Disc. Cmte may impose penalty?

POLICY

- summarize all cases, and circulate to all members.

The **Discipline Committee** is one of the statutory committees of the College, and is established under Section 28 of the **Teaching Profession Act**. In general terms, the mandate of the Committee is to exercise the decertification function of the College, a task which used to be performed by the Ministry of Education. The difference is that now a member facing loss of a certificate is entitled by statute and the bylaws of the College to a measure of due process which never previously existed.

The College may take action in cases of professional misconduct, conduct unbecoming a member, or incompetence. These are general terms however, and the College does not enforce a list of specific offences.

The College felt that specifying the misdeeds which would mandate disciplinary action would unnecessarily, and possibly illegally, restrict its ability to deal with misconduct.

In drafting its disciplinary bylaws, the College was guided by the five basic rights of teachers established by UNESCO.

The College was also guided in drafting the specific provisions of the discipline bylaws by the discipline procedures of the BCTF, the Law Society, and the Registered Nurses' Association of B.C. Legal counsel also provided considerable advice, as, indeed, they continue to do.

More recently, court decisions have had some impact on their vision of the discipline bylaws. If anything is clear, it is that the development of discipline bylaws and procedures is not a one-time activity, but an ongoing one of reconsideration, review and revision in the light of experience.

Discipline Procedures

Bylaw 6 outlines the discipline process, and is written pursuant to various sections of the **Teaching Profession Act**, primarily Sections 28 to 39.

The Discipline Committee itself is the primary body that makes recommendations to Council for bylaws or policies, and is concerned with the administration of the process generally. Disciplinary actions are dealt with by two sub-committees: the preliminary investigation sub-committee (PISC) and the hearing sub-committee (panel). Members of these two sub-committees are not necessarily members of the standing Discipline Committee, although either the chairperson or vice-chairperson sits on the PISC. In fact, it has become practice for the vice-chairperson to sit on PISC for a variety of technical reasons. All members of a panel must be elected councillors. The Act does not provide for anybody other than a councillor or, in some circumstances, former councillor, to deal with disci-

plinary matters.

The College comes into possession of a disciplinary matter in one of three ways, and sometimes by a combination of these ways. Five members may complain about the conduct of a member. A school board shall report to the College when it has disciplined a member for reasons of either conduct or competence. (In the latter case, the College may not act until all grievance procedures or other appeals have been completed.) The Ministry of Education, Ministry of Social Services and Housing, or Ministry of the Attorney General may inform the College about the conduct of a member. The College does not take complaints from parents or members of the public, as they have other avenues of redress, such as to a school board or the police.

Preliminary Investigation

Investigation of a complaint is carried out by the PISC who may hire somebody to gather information about the case, although information gathering is usually done by the Registrar. Investigation may take some time before the PISC has enough information on which to base a decision. When it decides that the investigation is complete, the PISC has a choice of several courses of action.

Course of Action

The matter may be dismissed. This is done if there is insufficient evidence to support a complaint.

If the matter is a minor one, or it is otherwise in the interest of the public or the profession, the PISC may decide to take no further action. Such a case may be one in which the PISC decides that disciplinary action taken by the member's school board or union has dealt with the matter sufficiently. However, a decision to take no further action may be reconsidered if new information comes forward within a year.

The PISC may decide that the matter is no longer a discipline case. This may result from the member resigning from membership in the College or from a school board withdrawing previously submitted evidence.

In some cases, the PISC may decide that some action is necessary, but something short of a full hearing is appropriate. The bylaws provide for informal action, in which the member meets with two councillors to discuss his/her conduct and, if appropriate, to make commitments with respect

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Discipline Procedures and Hearings

to future conduct. An unsatisfactory result may lead to the issue of a citation.

When the PISC decides to issue a citation, legal counsel is retained and takes over the preparation of the case on behalf of the College. If it is necessary for the protection of children, the PISC

may suspend the member's certificate at this time, an action which may be appealed to the whole Council. The citation states what allegations are being made against the member (the respondent) and is served on her/him, although this is sometimes difficult because people disappear. A bylaw allowing for substitute service is now in place.

Hearing Procedures

The hearing is a quasi-judicial proceeding at which the College is represented by counsel. The respondent may be represented by counsel, by a friend, by her/himself, or not at all. The hearing may proceed in the absence of the respondent, and they frequently do, especially when the respondent is currently incarcerated. Proceedings are recorded by a court reporter and evidence is taken under oath from witnesses, who may be cross-examined. In practice, in many cases, a good deal of the evidence has been agreed to in advance by counsel for both sides, and it is not necessary to hear witnesses. The panel may also hear submissions with respect to penalty.

The panel has the absolute jurisdiction to decide whether or not the respondent is guilty or not guilty. In the matter of penalty, the procedure is more complex. If the panel is unanimous in its decision as to penalty it may impose a reprimand. However, more severe penalties require the consent of the respondent, and if that is given the penalty is binding insofar as termination or suspension of certificate and membership are concerned. If the respondent does not consent to suspension or termination then the penalty is determined by the College Council. There are always several other recommendations attached to the report of a hearing panel which are not, strictly speaking, penalties. These have to be approved by Council, and may include such things as publicity of the decision, assessment of costs, and anything else the panel sees fit to recommend. As those who have sat on hearing panels will readily attest, approval of their recommendations by Council is by no means easy or automatic. The College notifies School Boards and other education authorities regarding suspension or termination of a certificate for cause.

If a member is found to have been incompetent, the hearing panel must report to Council whether or not a recognized program of remediation was available. In some cases, the hearing panel report must also be referred to the Professional Development Committee for consideration and, if necessary, additional recommendations to Council. When incompetence relates to physical or mental disability or addiction to alcohol or drugs, the hearing panel must receive evidence from at least one medical practitioner. These provisions in the bylaws have not yet been used.

Action by Council

Following a hearing, the hearing panel makes a written report to Council. A copy of the report will have been provided to the respondent, who may make a written submission to Council. Council does not have to accept the recommendations of the hearing panel and may, for instance, increase or decrease penalties, amend the list of people to whom information about the case is to be provided, or make changes in the summary that is to be released to members.

Right of Appeal

A member who has been disciplined has the right to appeal to the Supreme Court of British Columbia, and further, if leave is granted, to the Court of Appeal. At the time of writing, one case is awaiting hearing in the Supreme Court and the College has sought an expedited appeal of another case in the Court of Appeal.

Members are cautioned that the foregoing is not a complete or definitive description of the discipline procedures of the College. It is intended to be a useful outline only, and those who want more information should refer to the College bylaws and the appropriate sections of the **Teaching Profession Act**, the **School Act**, the **Inquiry Act**, and other statutes.

Discipline Committee

Robert Jackson, Chairperson
Wes Nickel, Vice-chairperson

All members of the Council technically serve on the Discipline Committee. The following members of Council serve on the Discipline Committee when it is considering policy issues:

Peter Ellis	Gib Lind
Rod Sherrell	Margaret Dixon
Joyce McLeod	

TERMS OF REFERENCETRANSFER REVIEW COMMITTEESIntroduction

Transfer Review Committees are established under the implied power of the Minister to seek advice on matters that can be brought before him and pursuant to the provisions of Section 120 of the School Act. The Transfer Committees are established to:

- a) enquire into the circumstances surrounding the reassignment of a teacher (where these have been determined by the Minister to fall within the criteria for such reviews);
- b) make recommendations to the Minister regarding the status of the transfer subsequent to the enquiry.

Under the provisions of Section 120 of the School Act, the Minister alone is empowered to decide upon the final status of a transfer review. Since the legislation does not permit delegation of this power, transfer review committees are in fact advisory to the Minister. Thus, the conduct of a review of a transfer is considered to be a less formal process than that attached to other appeal processes.

In order to assist committee members in the conduct of the enquiry and the development of recommendations, the following guidelines are suggested:

1. It is expected that appellants shall have received in writing and prior to the conduct of the hearings the reasons for their transfer.
2. No documentation shall be provided to members of the transfer review committee in advance; however, committee members will know the names and positions of the persons being transferred and the school district, and be provided with the appropriate addresses and phone numbers of the parties. Information on the reasons for transfer and for the appeal will be presented at the hearings with both parties and their counsel present (where applicable). In addition to the material presented by both parties during the hearings, the committee may request additional information where this is deemed pertinent to their deliberations.
3. Both parties have the right to representation by legal counsel should they choose.
4. Procedures to be used during each hearing should be reviewed with both parties at the beginning of the hearing before these are finalized. Certain procedures basic to any fair hearing are given below:

4.
 - a) The Chairman in this instance, with the consent of the majority of the members, is solely empowered with the responsibility for the direction and conduct of the hearings.
 - b) Both parties have the right to call a reasonable number of witnesses who may be cross-examined.
 - c) The hearing shall be in camera. The appellant and a representative of the school board and counsel for both parties have the right to be present throughout the hearing. All other witnesses shall be excluded until their testimony is to be given, and shall leave when it is completed.
 - d) The school board will begin the presentation with evidence supporting the transfer. The appellant shall have the right to cross-examine witnesses. Members of the review committee may ask further questions of witnesses after the two parties have completed their questioning.
 - e) The appellant shall next present evidence opposed to the transfer. The school board shall have the right to cross-examine witnesses, and members of the review committee may ask questions of these witnesses.
 - f) The school board shall present arguments for the transfer.
 - g) The appellant shall present arguments against the transfer.
 - h) The school board shall have the right of rebuttal of any new material presented by the appellant.
 - i) The merit of the case presented by the two parties may include the processes followed in the transfer, the legal authority, the educational impact, and the reasonableness of the transfer.
 - j) Evidence presented during the hearing shall be supported by appropriate documents, witnesses, or other means. Unsupported evidence shall not be considered in the committee's final deliberations.
5. A written report shall be prepared by the review committee and sent confidentially to the Minister of Education. Should one of the committee members not agree with the others, there may be a majority report and a minority report.
6. The committee may, in making its recommendations to the Minister, suggest upholding the transfer, sustaining the appeal, or modifying the terms and conditions of the transfer as deemed appropriate through evidence presented during the hearings.
7. Suggested procedures for notification of parties of final decision:

7. (continued)

- a) Upon completion of the hearing, the Chairman and members of the transfer review committee should convene to weigh the evidence and reach a decision on the status of the appeal.
- b) Upon reaching a final decision, the Chairman of the Committee shall submit to the Minister a report of the findings which shall include a written statement of the recommendation of the committee and a written explanation/justification for the recommendations.
- c) The Minister upon receiving the findings of the Committee and in accordance with the provisions of the School Act shall report in writing and by registered mail to the parties involved regarding the status of the appeal. In addition, the Minister or his delegated representative shall inform the members of the review committee of the decision made subsequent to their recommendation.
- d) It is strongly recommended that Chairmen and members of the review committee do not discuss the appeal or their recommendations beyond the confines of the committee.

The above suggestions are not meant to preclude the committee reaching its own conclusion on matters related to procedure, taking into account the local circumstances. In addition, committee members are reminded that transfer reviews are not formal courts of enquiry (or law), and proceedings should be kept as informal as possible.

PROCEDURAL HANDBOOK FOR REVIEW COMMISSION CHAIRMEN

The purpose of this handbook is to assist Chairmen of Review Commissions in adopting appropriate procedures during Review Commission Hearings and to clarify the responsibilities and authority of the Commission. The Chairman should look upon this document as a set of guidelines, not as a prescriptive directive.

A. THE AUTHORITY OF A REVIEW COMMISSION

Unlike Boards of Reference which are quasi-judicial in nature and function, Review Commissions involve reviews of professional judgement, as it applies to the termination of teaching contracts for less than satisfactory teaching performance.

Under the Inquiry Act of the province a minister is empowered to ... "appoint commissioners or a sole commissioner to inquire into and to report on the state and management of the business, or any part of the business, of that ministry, ...".

Specifically, a Review Commission is authorized to inquire into the "administration of justice" and the application of the provisions of the School Act and Regulations in a school board's decision to terminate a teacher's appointment or contract under Section 123 of the School Act. The powers and privileges of the Commission are described in Sections 5, 12, 15, and 16 of the Inquiry Act (Appendix A) in carrying out this inquiry.

B. LEGAL AUTHORITY, PROCEDURES, AND TERMS OF REFERENCE OF A REVIEW COMMISSION

Legal Authority

Section 130 (1) Except in the case of a teacher on a probationary appointment, a teacher whose appointment or contract has been terminated by a board under Section 123 of the Act may, within 10 days of receipt of notice of termination, and in accordance with the regulations, request the Minister to direct that a Review Commission review the termination.

Procedures

See Flow Chart (Appendix "B")

- 2 -

- (A) Notice of termination received from the School Board.

Section 126 The board shall without delay report to the ministry a termination, dismissal or suspension of a teacher in the school district, with the reasons for it.

- (B) To qualify for a review, a teacher must apply in writing by registered mail to the Minister within 10 days of receipt of notice of termination.

Regulation 68 (129, 130)

All requests for appeal or review shall be made in writing, with copies to the board concerned.

Regulation 69 (129, 130)

All requests for appeal or review and any other correspondence connected with such action shall be transmitted by registered mail.

- (C) The Director of Teacher Services, on behalf of the Minister, notifies the School Board that the teacher has requested a review of his/her termination and that the Board provide reasons for the termination.

Regulation 70 (129, 130)

Upon receipt of a request for an appeal or review, the Minister shall notify the board concerned, and the board shall, within 5 days of the receipt of the notice, deliver to the Minister a full statement of the reasons for the notice of dismissal or termination of contract, and shall at the same time provide the teacher with a copy.

- (D) After receipt of the school board's reply, the Director of Teacher Services, on behalf of the Minister, establishes a Review Commission.

Section 120 (2) On receipt of a request under subsection (1), the Minister shall direct the chairman of one of the Review Commissions established under this Act to proceed without delay with a review of the termination.

- 3 -

(E) Membership of the Committee

Section 130 (6) Each Review Commission shall consist of

- (a) a chairman appointed by the Minister, from among persons qualified under paragraph (b) within the 5 years immediately preceding the date of his appointment;
- (b) 2 members appointed by the Minister, one of whom shall be from among persons nominated by the executive of the British Columbia Teachers' Federation and one of whom shall be from among persons nominated by the executive of the British Columbia School Trustees Association, and each of whom, shall be
 - (i) actively engaged in education in the Province, as evidenced by appointment to the staff of a board, college, provincial institute, university or some other educational institution or organization established under this Act, the College and Institute Act or the University Act; and
 - (ii) not a member of the staff of either the British Columbia Teachers' Federation or the British Columbia School Trustees Association.

Administrative

Each year, the executive of the B.C.T.F. and the B.C.S.T.A. provides nominees to serve on Review Commissions. In the past, chairmen have been selected from among the ranks of recently retired School Superintendents (normally retired within the last 5 years).

The number of Review Commissions is determined by the number of appeals. The Minister is responsible (Section 130 (5)) for the appointment of Review Commissions. Letters of appointment are drafted by the Director of Teacher Services, over the Minister's signature.

Section 130 (5) The Minister shall appoint, when required, the number of Review Commissions he considers necessary.

- 4 -

The term of Review Commission members is normally one year, but by Section 130 (7), "Members, including the chairman, shall hold at the pleasure of the Minister."

- (F) Potential Review Commission members are recruited by telephone; verbal acceptance is followed by formal letters of appointment from the Minister. (Appendix 1)
- (G) Once the members have formally accepted their appointments in writing, the Director of Teacher Services mails, by registered post, all pertinent material and information, including the three (3) less than satisfactory reports to the chairman. (Regulation 71)

Regulation 71 (130)

Where a board submits reports under Section 65 to a Review Commission, the commission shall require that the board also file any other such reports issued between the date of the first and the last such report.

- (H) The chairman is responsible for making all necessary arrangements as to time and place the review hearing will be held.

The terms of Reference of the Review Commission are defined in Section 130 (3) and (4) of the School Act.

Section 130 (3) The Review Commission designated under subsection (2) shall, in accordance with the regulations, investigate and review the matters referred to it, and confirm or reverse the action of the board; and the decision of the Review Commission is final and binding on the teacher and the board.

Section 130 (4) Where a Review Commission directs that the action of the board be reversed, the board shall promptly reinstate the teacher.

- (I) The time-limit on decisions by Review Commissions is set by Regulation 73.

Regulation 73 (1)

A board of reference or a review commission shall, subject to subsection (2), make its decision within 30 days after the minister refers an appeal or directs a review, as the case may be.

- 5 -

Regulation 73 (2)

Where a board or commission does not make a decision within the time set out in subsection (1), the chairman of the board or commission shall notify the minister of the reason for the delay and the minister may extend the period for making the decision or order that the decision be made immediately.

- (J) At the conclusion of the hearing, the chairman of the Review Commission advises the Minister and all concerned parties of the Commissions' decision. (Regulation 74)

Regulation 74 (129, 130)

The chairman of a Board of Reference or Review Commission shall, within 3 days of reaching a decision, notify the teacher, the board, and the ministry of the decision of the Board of Reference or Review Commission, and shall forward to the ministry the documents or certified copies thereof examined by the Board of Reference or Review Commission.

- (K) The Director of Teacher Services keeps all documents permanently, and confidentially on file. After one year, all documentation is microfilmed. (Regulation 75)

Regulation 75 (129, 130)

The Minister shall retain for not less than 60 days all documents or certified copies thereof forwarded to him by the chairman of a Board of Reference or Review Commission.

(L) Honoraria

The chairman of a Review Commission is entitled to an honorarium of \$200.00 and a member \$100.00 plus expenses for each day that the Review Commission meets unless the chairman is:

- (a) employed by a public agency (college or school board);
- (b) salaried and paid while absent.

In the case of (a) or (b) above, employing authorities may bill the Ministry of Education for salary compensation for loss of services at a rate not to exceed \$200.00 a day for the chairman and \$100.00 a day for each member.

- 6 -

The flow chart in Appendix "B" sets out sequentially the sections of the Act and Regulations as they relate to the report writers, the Board, the teacher, and the Review Commission.

C. THE NATURE AND CONTEXT OF THE HEARING

A Review Commission may be described as a structured inquiry into, and evaluation of, a decision made by school district administrators to terminate a teacher for unsatisfactory performance. In design, the Review Commission is similar to commissions or boards of inquiry appointed by the legal or the medical profession.

The principal role of the Chairman of the Review Commission is to ensure that the hearing is conducted expeditiously and efficiently with equal consideration for procedural fairness and timeliness in adjudicating the appeal. The Chairman has the responsibility of applying the collective professional judgement of the Commission to the appeal and has the responsibility of overseeing the judicial proceedings.

In virtually all cases both the board and the teacher will be represented by counsel, which in some ways, assists the Chairman in assuring that the proceedings follow the protocol of a fair hearing. However, the Chairman must not lose sight of the professional aspects of the review, that he is in charge of the hearing, and the hearing is not a courtroom. Occasions will arise in which there will be a dispute between counsels regarding procedures, admissibility of evidence, and so forth, leaving you, the Chairman, to rule on the dispute.

The following guidelines may assist you in resolving these disputes:

1. Ask counsel to clarify to the Commission how their positions will assist the Commission in reaching a decision in the case. Call a recess to consider the position of your two other members. Don't debate among the Commission before counsel.
2. If the dispute is fundamental to the case and you are not satisfied that you can give appropriate direction to counsel, seek advice from the Attorney-General's office. The Director of Teacher Services will assist you in this regard.
3. Remember, there is a professional encumbrance upon counsel of both parties to assist the Commission in its duties, especially a commission composed of professional educators rather than lawyers. Take counsel aside and remind them of such an obligation, if necessary.

- 7 -

4. Press counsel to be specific and efficient in their presentations, in their examination and cross-examination of witnesses. If the Commission believes that a point has been made to its satisfaction, direct counsel to press on to the next point in evidence. Meandering and vagueness during the hearing leads to a dissipation of purpose and an unnecessary increase in frustration and costs.

D. PRE HEARING DUTIES AND CHECKLIST

CHECKED

1. Upon the members of the Review Commission being named by the Ministry, confirm with the Ministry and the members named that they currently are eligible to sit as described in Section 130 of the School Act. _____
2. Clarify with the Minister how costs shall be covered and reimburse for:
 - the Commission members _____
 - the meeting room _____
 - clerical services _____
 - coffee/refreshments _____

(The Ministry guidelines for claiming fees and expenses may clarify these procedures.)

3. Arrange for a suitable location for the hearing. Confirm with counsel that the location is suitable. A "neutral" location may be necessary if the case is contentious or has already received local publicity. _____
4. Block a number of days with both counsels for the hearing. Press counsel, if necessary, to set aside an uninterrupted number of days for the hearing rather than a series of days over an extended period of time. _____
5. Ask each counsel to identify the number of witnesses they will be calling and to estimate the number of days necessary to complete the hearing. You can request that this estimate be expressed in writing if you wish. If not, at least record the estimates and remind both counsels if it appears that they will overrun the estimated time. Such is expected of them in a regular court setting and judges show little tolerance for poor estimates. _____

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6. Assure through counsel that their witnesses are available for the hearing. Advise legal counsel that you may ask them to justify the relevance of the testimony of each witness. Character witnesses are not acceptable. _____

7. Select a consistent start and finish time for the daily sitting. Typically the hearing is 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 4:00 p.m. or 1:30 p.m. to 4:30 p.m. Evening sessions may be scheduled to complete review within estimated timelines. _____

8. Arrange for the following:
 - (a) a bible for swearing in witnesses _____
 - (b) a good tape recorder with sequentially numbered tapes _____
 - (c) materials to record evidence _____
 - (d) water for counsel and witnesses _____
 - (e) duplicating services close at hand, if possible _____
 - (f) a highliner felt pen (wide tip) _____
 - (g) security for evidence _____
 - (h) a process for identifying exhibits e.g. B1, B2, B3, etc. for Boards exhibits; T1, T2, T3, etc. for Teacher exhibits _____

9. Meet with your commission members prior to the hearing to establish protocol, such as:
 - (a) the procedure by which the members can ask questions of witnesses and counsel _____
 - (b) the procedure for reviewing evidence and writing decisions _____
 - (c) the necessity for confidentiality _____

10. Clarify with the Ministry its role during the hearing. (Contact person - Director of Teacher Services, 356-2451) _____

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11. Identify a contact person in the Attorney-General's office and the telephone number of the contact person. (Derek Finall, Senior Solicitor, Legal Services Branch, Ministry of the Attorney General, 384-4434) _____

E. STATUS REQUIREMENTS OF THE HEARING

At the outset of the hearing there will be at least seven people in the room (eight people if either counsel has arranged for a court reporter) - the three members of the Review Commission, the two counsels, the teacher in question and probably the Superintendent of Schools, representing the Board. On occasion, Board members may attend as observers.

Introduce the Review Commission and ask counsel to introduce themselves and their clients. _____

Following introductions it is important to ratify, for the record, the agreement from both counsels that the following requirements have been met:

1. that the Review Commission has been properly constituted in compliance with the Inquiry Act and the School Act (Section 130). _____
2. that the hearing has been duly and properly called. _____

Note: If there is disagreement from either or both counsels on the status of the Review Commission, make note and ask for clarification. If there has been an error in constituting or establishing the Review Commission, contact the Ministry immediately.

F. PROCEDURAL REQUIREMENTS OF THE HEARING

Seek agreement from both counsels on the following:

1. who shall be authorized to attend the hearing. Typically the hearing is closed to the press and public. _____
2. that witnesses will be sworn in. _____

- 3. that witnesses shall be excluded until they are called upon to give evidence. (There may be some debate about when the superintendent is to give evidence if he is the Board's representative at the hearing and he has written the second or third report. The problem is do you receive the reports in sequence or do you break sequence and have the superintendent go first? There is precedents for both ways.) _____
- 4. that exhibits and evidence be placed before the Review Commission in sequence. _____
- 5. that no new or additional evidence will be introduced during the summation by counsel. _____
- 6. that exhibits shall be identified and numbered. _____
- 7. that the Board's evidence will be first. _____
- 8. that counsel will be prepared and be as concise as possible in their presentations before the commission. _____
- 9. have counsel identify and agree to exchange documents which they will rely on during the case. _____

G. TECHNICAL REQUIREMENTS OF THE SCHOOL ACT AND REGULATIONS

Prior to hearing evidence, assure that the technical aspects of the School Act and Regulations have been followed by all parties and that such is acknowledged by the counsels. If there are any major discrepancies the Review Commission should weigh their effects upon the case prior to hearing evidence. You may wish to contact the Attorney General's office for advice prior to making a decision if the Review Commission believes a major discrepancy has jeopardized the case.

- 1. Were the three reports written in accordance with Regulation 65? _____
- 2. If there is one or more reports by a principal was the report or reports written in accordance with Regulations 93 and 94? _____
- 3. Was the request for review in accordance with Regulations 68, 69 and Section 130(1) of the School Act? _____

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4. Did the Board adhere to the time constraints of Section 123 of the School Act? _____
5. Was Regulation 9 followed? _____
6. Was Regulation 65 (e)(i) enacted, and, if so, were the time constraints followed? _____

H. THE EVIDENCE

Typically, the structure of the hearing during the giving of evidence follows this pattern:

1. Counsel for the Board will put before the Review Commission the three reports and supporting documents. This will be done through the report writers as evidence-in-chief.
2. After each witness gives evidence-in-chief the counsel for the teacher has the opportunity to cross-examine the witness.
3. The counsel for the Board has the right to put questions to the witness after cross-examination if new information has been raised during the cross-examination.
4. Counsel for the teacher, in most cases, will have the teacher give evidence-in-chief. The same pattern as in 2 and 3 follows.
5. A request by either counsel may be made to examine witnesses other than the report writers and the teacher. If such a request is made the Review Commission must establish the following:
 - (a) that witnesses other than the report writers and the teacher are necessary in order for the Review Commission to make an informed decision in the case. It is the obligation of the counsel making a request for further witnesses to show the relevancy of his request.
 - (b) that not accepting more witnesses has not precluded either side from the right of natural justice. This is especially true in dealing with a request from the teacher's counsel who should have a full opportunity to meet the case against his client.

Note: It is important to establish with each counsel the number of days required to hear the evidence. Do this prior to the hearing. If either counsel thereafter requires more time than estimated, it is the responsibility of the counsel to justify the extended time requested.

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I. THE SUMMARY

The case will be summarized in argument by both counsels. This is a most important time for the Commission to clarify the essence of the argument on both sides. Although the Chairman can request written argument it is not often done because it tends to prolong the case and is seldom used unless the subtlety of the case demands the accuracy of a written statement.

The order of presentation of the argument is the same as the order for the evidence: the Board's counsel will give argument; the teacher's counsel will follow with his argument and the Board's counsel has the opportunity for a short rebuttal. Remind both counsels that there should be no new evidence introduced during the argument. At any rate, each counsel will quickly respond if the other tries to introduce new evidence.

J. WEIGHING THE EVIDENCE

Appendix "C" has been attached to assist the members of the Review Commission in weighing the evidence put before them. The "indicators of competency" cited in Appendix "C" are a compilation of teacher behaviors referred to by former Review Commissions in their decisions, and the skills assessed by training institutions prior to recommending a candidate for a teacher's certificate.

Note that the teacher skills and behaviors in Appendix "C" have not been "weighted", nor is there significance in the category titles other than for reasons of organization.

THE REPORT OR DECISION

Note that Regulation 73 limits the time from the beginning of the hearing to the decision to thirty (30) days. If you expect to run over this time limit, ask the Ministry for an extension of time. Also note Regulation 74 and 75 which have to do with notification of the parties and retention of documents.

A suggested outline for the written decision follows as a guideline, not as a prescriptive approach to the report.

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1. Introduction

A review of the procedures followed and confirmation of agreement on technical matters:

- list of Review Commission members
- names of counsels, teacher, superintendent
- outline of statutory authority of Review Commission
- terms of reference of Review Commission
- list of procedural questions put to counsel
- list of those authorized to attend the hearing
- list of witnesses and titles called by Board's counsel
- list of witnesses and titles called by teacher's counsel
- description of hearing procedures, including dates and length of time seated, number of witnesses examined, description of evidence put before the Commission (in general terms), and rulings made by the Chairman over the course of the hearing.

2. The Evidence

- (a) A description, in sequence, of the weaknesses cited by the report writers regarding the teacher's competence highlighting the critical and thematic weaknesses, and actions for correction that the district officials and principal(s) used.
- (b) A description, in sequence, of the teacher's responses in light of the report and counsel for the teacher's analysis of the situation.

Note: The argument should include all of these critical issues.

3. The Review Commission's Analysis (Summary)

This section should include the Review Commission's weighing of the evidence and evaluation of the significance of the important items to the over-all case.

4. Conclusion

This section deals with the Review Commission's decision whether to uphold the Board's decision to terminate or to reinstate the teacher.

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5. Appendices

This section includes an annotated list of the exhibits put before the Review Commission. The annotation should be brief. If the Review Commission has any recommendations for either the Board or the teacher, or both, such recommendations should be included in this section.

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INQUIRY

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[Consolidated January 20, 1984.]

INQUIRY ACT**CHAPTER 198***[Act administered by the Ministry of Provincial Secretary and Government Services]*

Part	Section
1.	1 - 6
2.	7 - 18

PART 1**Interpretation**

1. The minister presiding over any ministry of the public service of British Columbia may at any time, under authority of an order of the Lieutenant Governor in Council, appoint commissioners or a sole commissioner to inquire into and to report on the state and management of the business, or any part of the business, of that ministry, or of any branch or institution of the executive government of the province named in the order, whether within or without that ministry, and the conduct of any person in the service of that ministry or of the branch or institution named, so far as it relates to his official duties.

RS1960-112-2; 1977-75-1.

Commissioner's oath of office

2. Every commissioner appointed under this Part shall, before entering on the duties of his office, take the following oath before a justice or commissioner for taking affidavits within British Columbia, namely:

I, A.B., swear [or affirm, as the case may be] that I will truly and faithfully execute the powers and duties entrusted to me by appointment as commissioner under the *Inquiry Act*, according to the best of my knowledge and judgment. [So help me God.]

RS1960-112-3; 1977-75-37.

Powers of commissioners

3. Every commissioner appointed under this Part may, for the inquiry, enter into and remain in any Provincial public office or institution, and shall have access to every part of it, and may examine all papers, documents, vouchers, records and books of every kind belonging to it.

RS1960-112-4.

Power to allow counsel

4. (1) The commissioners or commissioner may allow a person whose conduct is being investigated under this Part, and shall allow a person against whom any charge is made in the course of an inquiry, to be represented by counsel.

(2) No report shall be made under this Part against a person until reasonable notice has been given to him of the charge of misconduct alleged against him, nor until he has been allowed full opportunity to be heard in person or by counsel.

RS1960-112-5

Power to summon witnesses

5. (1) The commissioners or commissioner appointed to conduct an inquiry under this Part may, by summons, require the attendance as a witness before them, at a place and time mentioned in the summons, of any person, and may in a similar manner

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by summons require any person to bring and produce before them all documents, writings, books, deeds and papers in his possession, custody or power touching or in any way relating to or concerning the subject matter of the inquiry.

(2) The person named in and served with the summons shall attend before the commissioners or commissioner and answer on oath all questions touching the subject matter of the inquiry, and shall produce all documents, writings, books, deeds and papers according to the tenor of the summons.

(3) For this section and the inquiry, the commissioners or commissioner have or has the powers of a judge of the Supreme Court for compelling the attendance of witnesses and of examining them under oath, and compelling the production and inspection of documents, writings, books, deeds and papers.

RS1960-112-6.

Regulations

6. The Lieutenant Governor in Council may make regulations respecting all inquiries under this Part, or may make an order respecting a specific inquiry, providing for

- (a) remuneration of commissioners;
- (b) remuneration of witnesses;
- (c) allowance to witnesses for vehicle use and maintenance;
- (d) incidental and necessary expenses; and
- (e) generally, for all acts, matters and things necessary to enable complete effect to be given to this Part.

RS1960-112-7; 1977-53-1; 1983-10-21, effective October 26, 1983 (B.C. Reg. 393/83).

PART 2**Interpretation**

7. In this Part "commissioners" includes a sole or surviving commissioner.

RS1960-315-2.

Appointment of commissioners

8. Whenever the Lieutenant Governor in Council thinks it expedient to inquire into any matter relating to the election of any member of the Legislative Assembly, past or present, or into and concerning any matter connected with the good government of the Province, or the conduct of any part of the public business of it, including all matters municipal, or the administration of justice in it, or into payments or contributions for campaign or other political purposes, or for the purpose of obtaining legislation, or obtaining influence and support for franchises, charters, or any other rights or privileges, from the Legislature or government of the Province by any person or corporation or by any of the promoters, directors or contractors of that corporation, or by any other person in any way connected with, representing or acting for or on behalf of that corporation or any of the promoters, directors or contractors, the Lieutenant Governor in Council may by commission titled in the matter of this Act, and issued under the Great Seal, appoint commissioners to inquire into the matter.

RS1960-315-3.

Death or retirement of commissioner

9. (1) In case any of the commissioners appointed, if there is more than one, die, resign or become incapable to act, the surviving or continuing commissioners may act in the inquiry as if he or they had been appointed to be sole commissioner.

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(2) In case of the death, resignation or incapacity of a sole commissioner, a commission under this Part may be issued to a new commissioner or commissioners, according to the will of the Lieutenant Governor in Council, and all the provisions of this Part concerning commissioners appointed to make an inquiry apply to the surviving or continuing or new commissioners.

RS1960-315-4.

Commissioners' oath of office

10. Every commissioner appointed under this Part shall, before entering on the duties of his office, take the following oath before one of the judges of the Supreme Court, or the judge of any County Court:

I, A.B., swear [or affirm, as the case may be] that I will truly and faithfully execute the powers and trusts vested in me by His Honour the Lieutenant Governor in Council, under the *Inquiry Act*, according to the best of my knowledge and judgment. [So help me God.]

RS1960-315-5.

Notice of appointment of commission

11. Notice of the appointment of commissioners appointed under this Part, of the purpose and scope of the inquiry which they are appointed to make, and of the time and place of holding their first meeting, shall be published in the Gazette and in a newspaper published or circulating in the county in which the inquiry is to be held.

RS1960-315-6.

Protection of commissioners

12. A commissioner appointed under this Part has the same protection and privileges, in case of an action brought against him for an act done or omitted to be done in the execution of his duty, as are by law given to the judges of the Supreme Court.

RS1960-315-7; 1975-37-16.

Appointment of staff

13. Commissioners appointed under this Part may appoint, and at their pleasure dismiss, a secretary, and also, with the consent of the Lieutenant Governor in Council, appoint as many clerks and stenographers as necessary for conducting the inquiry, and pay to the secretary, clerks and stenographers salaries and allowances fixed and provided by the Lieutenant Governor in Council.

RS1960-315-8.

Duty of commissioners to conduct inquiry, and to report

14. (1) The commissioners appointed to conduct an inquiry under this Part shall, as soon as convenient, carry out and complete the inquiry entrusted to them, and may hold meetings they think necessary, and shall report to the Lieutenant Governor in Council their findings with reference to the matters comprised within the inquiry.

(2) Every report the commissioners make to the Lieutenant Governor in Council under this Part shall be laid before the Legislative Assembly within 15 days after the report is made, if the Legislative Assembly is then sitting, or if not, then within 15 days after the opening of the next session of the Legislative Assembly.

RS1960-315-9.

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Power of commissioners

15. (1) The commissioners acting under a commission issued under this Part, by summons, may require the attendance as a witness, at a place and time mentioned in the summons, which time shall be a reasonable time from the date of the summons, of any person, and by summons require any person to bring and produce before them all documents, writings, books, deeds and papers in his possession, custody or power touching or in any way relating to or concerning the subject matter of the inquiry.

(2) Every person named in and served with a summons shall attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers according to the tenor of the summons.

RS1960-315-10.

Power to compel attendance of witnesses

16. (1) If any person on whom a summons has been served by the delivery of it to him, or by leaving it at his usual place of abode, fails to appear before the commissioners at the time and place specified in the summons, or having appeared before the commissioners refuses to be sworn, or answer questions put to him by the commissioners, or to produce and show to the commissioners any documents, writings, books, deeds and papers in his possession, custody or power touching or in any way relating to or concerning the subject matter of the inquiry, or if a person is guilty of contempt of the commissioners or their office, the commissioners have the same powers, to be exercised in the same way, as judges of the Supreme Court in the like behalf.

(2) All jailers, sheriffs, constables, bailiffs and all other police officers shall aid and assist the commissioners in the execution of their office.

RS1960-315-11.

Power to make rules

17. The Lieutenant Governor in Council may, by order, make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any commission and inquiry, for

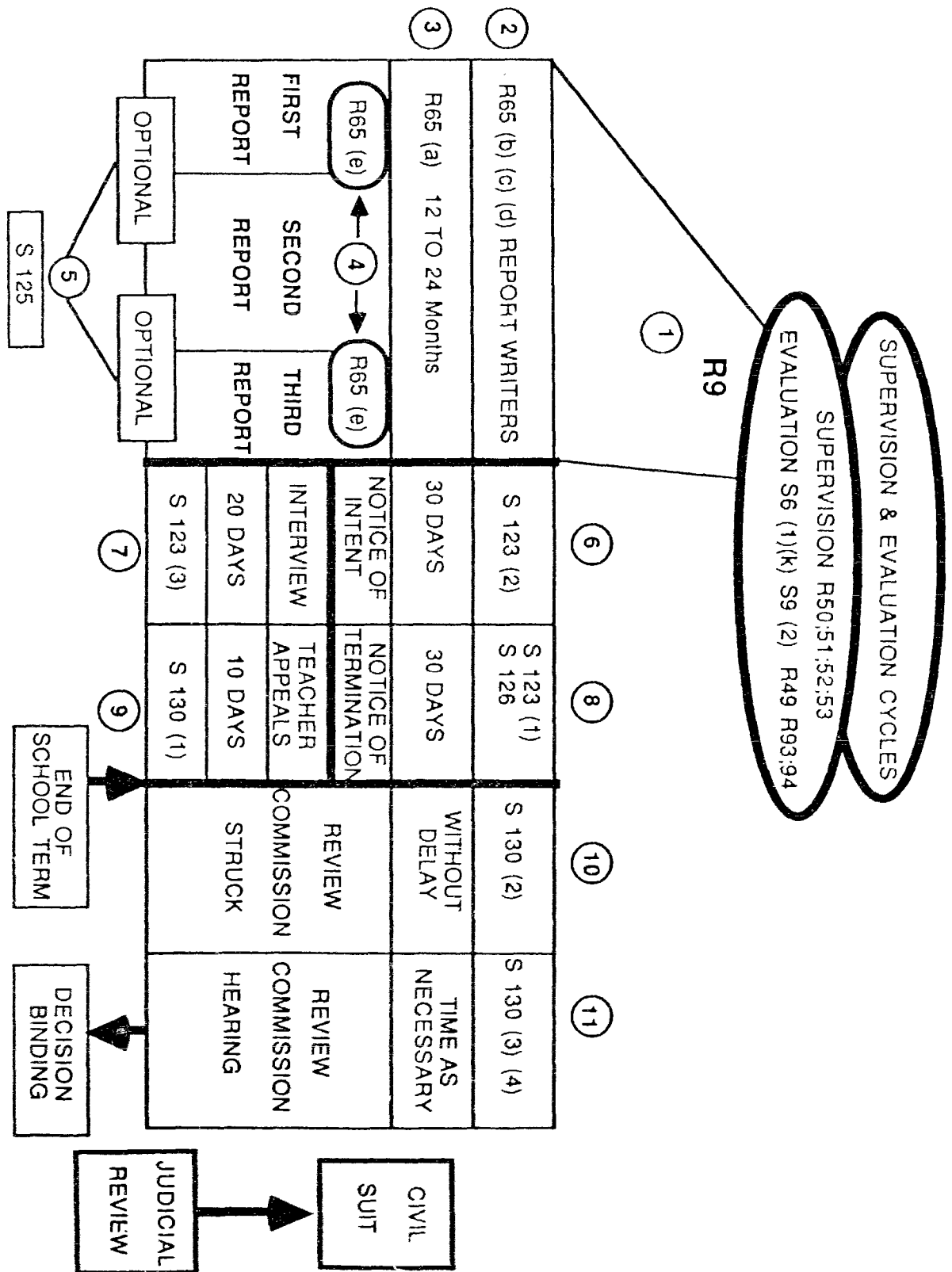
- (a) remuneration of commissioners;
- (b) remuneration of witnesses;
- (c) allowances to witnesses for travel and maintenance;
- (d) incidental and necessary expenses; and
- (e) generally, for all things necessary to give complete effect to this Part.

RS1960-315-12; 1977-53-1.

Appropriation

18. The costs and expenses incurred in connection with a commission issued and inquiry held under this Part shall, in the absence of a special appropriation of the Legislature available for that purpose, be paid out of the consolidated revenue fund.

RS1960-315-13.



Section 6 (1) (K)

Each district superintendent of schools, in respect of his superintendency, shall at some time in the school year, formally inspect or cause to be inspected by a person authorized in that behalf by regulation, the work of

- (i) each teacher on probationary appointment in the school district;
- (ii) any teacher in the school district about whom the board or the minister requests a report; and
- (iii) any teacher in the school district who, on or before March 31 in that school year, requests that a report be made about himself;

and may, at any time during the school year, formally inspect the work of any other teacher in the school district.

Section 9 (2)

The board of a school district that has appointed a superintendent of schools under subsection (1) may, with the approval of the ministry, appoint officers to be known as assistant superintendents of schools, who have and may be assigned or delegated the same powers and duties assigned or delegated to, or conferred or incumbent on, a district superintendent of schools.

Regulation 49

Where a director of instruction is empowered to do so by order of the minister, he may inspect learning situations in classrooms: and may inspect the work of a principal, head teacher, vice principal or school district supervisory personnel: and may inspect the work of school district personnel appointed under section 55, and issue reports.

[6] (2) The reports shall be countersigned by the district superintendent and shall thereupon have the full force of reports issued by the district superintendent.

Regulation 9

Joint notification regarding unsatisfactory work of teacher

9. [6(1)] (1) Where either a principal required to make a report under section 93, or a district superintendent, considers that the work of a teacher is less than satisfactory, he shall notify the other and each shall furnish a written report on the work of that teacher.

(2) The report of the principal shall be deemed to be a report under section 93.

Regulation 65 (a)

(a) the 3 reports shall have been issued in a period of not less than 12 or more than 24 months, except as provided in paragraph (c);

Regulation 65
(b) (c) (d)*Board may terminate continuing contract*

65. [119, 123] Except as provided in section 59, a board may terminate a continuing contract under section 123 of the Act, and may recommend to the minister the suspension or cancellation of the certificate of that teacher, only after receipt by the board of at least 3 reports indicating that the learning situation in the class or classes of the teacher is less than satisfactory, or, where a teacher is assigned pursuant to section 119(3) of the Act, indicating that the performance of the teacher in carrying out his administrative or supervisory duties is less than satisfactory, issued in accordance with the following:

- (b) at least one of the reports shall be a report of a district superintendent of schools, a superintendent of schools, or an assistant superintendent of schools;
- (c) the other 2 reports shall include only reports of
 - (i) a district superintendent of schools, a superintendent of schools, or an assistant superintendent of schools;
 - (ii) a director of instruction, the reports to be issued in accordance with this regulation;
 - (iii) the principal of a school to which the teacher is assigned, provided that section 93 is applicable to that school and that the reports were issued in accordance with this regulation;
- (d) where more than one of the 3 reports is written by the same person, at least 6 months shall have elapsed between writing of the first and the final report by that person;

Regulation 65 (e)

- (c)
 - (i) where the board has, after the receipt of one or more such reports, recommended to the teacher, and the teacher has accepted the recommendation, that the teacher undertake an agreed program of professional or academic instruction, or both, the remaining report or reports shall be based on inspection of the learning situation or other duties of the teacher not less than 3, or more than 6, months after the teacher has returned to his duties and each report shall be issued within 2 weeks of the inspection;
 - (ii) section 125 (1) of the Act applies to an agreement under this section.

Regulation 50

A supervisor shall, under the direction of the district superintendent, carry out duties designed to help teachers improve classroom instruction, and in the performance of his duties shall have access to any classroom.

Regulation 51

A supervisor shall not evaluate the work of any teacher in a written report.

Regulation 52

A teacher consultant, under the direction of the district superintendent, shall, by observation, demonstration, consultation, and visitation, upon the request of the teacher, the principal, or the district superintendent, assist teachers in improving classroom instruction.

Regulation 53

A teacher consultant, in his discussions with the principal or with the district superintendent, shall not make any evaluation of individual teachers.

Regulation 93

93. [148] A principal of a school or schools who is provided with time for the supervision of instruction during which he is not instructing pupils
- (a) may make a written report on the work of any teacher.
 - (b) shall make a written report, if so directed by the district superintendent of schools, on the work of
 - (i) every teacher appointed to that school in that school year; and
 - (ii) every other teacher not less than once in every 3 years;
 - (iii) any teacher upon whom he is directed to write a report by the board or the district superintendent of schools:
 - (c) shall make a written report on the work of any teacher who requests, in writing, before January 31 of the school year, that such a report be made.

Regulation 94

94. [148] Reports made under section 93 shall
- (a) be based on a number of supervisory visits to the classroom of the teacher as well as on the general work of the teacher in that school;
 - (b) be completed and filed on or before the last school day in April;
 - (c) be made in quadruplicate;
 - (d) contain an assessment of the learning situation in the teacher's classes and such recommendations for improvement therein as he may consider necessary;
 - (e) contain a statement that, in the opinion of the principal, the learning situation is satisfactory or less than satisfactory.

Section 123 (1)

123. (1) Subject to section 120 (9), and the regulations, either party to a continuing contract under section 119 (2) may terminate the contract by giving in writing at least 30 days' notice to the other party, and termination shall take effect at the end of a school term, or, by agreement, at an earlier date.

Section 123 (2)

(2) Except as otherwise provided in this Act, a board shall, at least 30 days prior to the issue of a notice of termination of a contract, give the teacher a written notice of its intention to give a notice of termination and shall set a time for a hearing within 20 days of the issue of the notice of intention, at which the teacher shall have the opportunity to meet with the district superintendent of schools and the board, or with the district superintendent of schools and a committee of the board.

Section 123 (3)

(3) The teacher may be accompanied by another teacher or by a member of the staff of the British Columbia Teachers' Federation, who may represent him or advise him during the interview referred to in subsection (2).

Section 125

125. (1) For the purpose of professional improvement, for maternity or for any purpose acceptable to the board, a board shall, in accordance with the regulations, and may, in its discretion, grant leave of absence to a teacher

- (a) without pay for a stated period of time;
- (b) with pay for a stated period not exceeding 6 months; or
- (c) with the prior approval of the Lieutenant Governor in Council, with pay for a stated period in excess of 6 months.

Section 126

126. The board shall without delay report to the ministry a termination, dismissal or suspension of a teacher in the school district, with the reasons for it.

Section 130 (1)

130. (1) Except in the case of a teacher on a probationary appointment, a teacher whose appointment or contract has been terminated by a board under section 123 of this Act may, within 10 days of receipt of notice of termination, and in accordance with the regulations, request the minister to direct that a review commission review the termination.

Section 130 (2)

(2) On receipt of a request under subsection (1), the minister shall direct the chairman of one of the review commissions established under this Act to proceed without delay with a review of the termination.

Section 130
(3) (4)

(3) The review commission designated under subsection (2) shall, in accordance with the regulations, investigate and review the matters referred to it, and confirm or reverse the action of the board; and the decision of the review commission is final and binding on the teacher and board.

(4) Where a review commission directs that the action of the board be reversed, the board shall promptly reinstate the teacher.

Section 130 (5)

(5) The minister shall appoint, when required, the number of review commissions he considers necessary.

(6) Each review commission shall consist of

(a) a chairman appointed by the minister, from among persons qualified under paragraph (b) within the 5 years immediately preceding the date of his appointment;

(b) 2 members appointed by the minister, one of whom shall be from among persons nominated by the executive of the British Columbia Teachers' Federation and one of whom shall be from among persons nominated by the executive of the British Columbia School Trustees' Association, and each of whom shall be

(i) actively engaged in education in the Province, as evidenced by appointment to the staff of a board, college, provincial institute, university or some other educational institution or organization established under this Act, the College and Institute Act or the University Act; and

(ii) not a member of the staff of either the British Columbia Teachers' Federation or the British Columbia School Trustees' Association.

INDICATORS OF TEACHER COMPETENCY AS CITED BY REVIEW COMMISSIONS
AND TEACHER TRAINING INSTITUTIONS IN BRITISH COLUMBIA

OPERATIONAL KNOWLEDGE, SKILLS AND STANDARDS	PERSONAL QUALITIES	INTERPERSONAL SKILLS	
<ul style="list-style-type: none"> -sets a realistic but high standard for student work -thorough marking of student work -accurate record-keeping -fair marking standards -return and commentary on marked assignments -meets school and student report deadlines 	<ul style="list-style-type: none"> -a willingness to improve skills through in-service -enthusiasm on the job 	<ul style="list-style-type: none"> -student-teacher rapport that indicates mutual respect -awareness of and adjustment to students' learning styles -sensitive to different students' abilities -parental acceptance 	<p style="text-align: center;">REVIEW COMMISSIONS</p>
<ul style="list-style-type: none"> -stimulates pupil achievement -ability to diagnose and evaluate -appropriate oral and written language -quality of voice -fluency and ability to project -contributions outside classroom including extracurricular activities 	<ul style="list-style-type: none"> -appearance -responsibility -personality -ability to lead -ability to implement suggestions for improvement -enthusiasm 	<ul style="list-style-type: none"> -rapport with pupils -ability to stimulate and maintain student interest and participation -sensitivity to class and individuals -willingness to receive constructive criticism -relations with staff and peers 	<p style="text-align: center;">UNIVERSITY OF BRITISH COLUMBIA</p>
<ul style="list-style-type: none"> -can select the appropriate type of student assessment; can plan and implement appropriate instruments and procedures to evaluate student learning -can relate public education to its socio-political content; can describe legal responsibilities of public school and teachers -aware of his/her professional responsibilities -can demonstrate knowledge of foundational issues in education 	<ul style="list-style-type: none"> -accept, understand and act upon feedback on one's teaching -demonstrate self-evaluation skills, including reflection, critical analysis, and ability to modify performance 	<ul style="list-style-type: none"> -establish and maintain effective, respectful and ethical working relationships with pupils and others in the educational community -can relate appropriate instructional strategies and/or models of teaching to individual student characteristics, objectives sought, and personal competencies of the teacher 	<p style="text-align: center;">SIMON FRASER UNIVERSITY</p>
<ul style="list-style-type: none"> -Evaluation of pupil progress- variety, marking, records -Speech-voice quality enunciation, pronunciation, expressiveness, pace -Language- correctness, effectiveness, appropriate level -Ethical conduct- staff relations 	<ul style="list-style-type: none"> -Assignment- quantity, clarity of instruction, supervision, checking, relevance to objectives -self-evaluation, enthusiasm, sincerity, calmness, warmth, tactfulness, sense of humour, emotional control, appearance, appropriateness, organization, attitude, reliability, resourcefulness response to criticism 	<ul style="list-style-type: none"> -Teacher/Pupil- rapport, warmth, courtesy, pupil response, respect 	<p style="text-align: center;">UNIVERSITY OF VICTORIA</p>

REVIEW COMMISSIONS	UNIVERSITY OF BRITISH COLUMBIA	SIMON FRASER UNIVERSITY	UNIVERSITY OF VICTORIA
<p>INSTRUCTIONAL SKILLS</p> <ul style="list-style-type: none"> -carefully prepared daybook -adequate planning for substitute teachers -effective use of current course of study -materials related to expected learning outcomes 	<p>PLANNING SKILLS</p> <ul style="list-style-type: none"> -planning -knowledge of subject-matter -selection of teaching aids, materials and resources -ability to organize for learning 	<p>CLASSROOM MANAGEMENT SKILLS</p> <ul style="list-style-type: none"> -can define instructional objectives and select appropriate instructional strategies, learning experiences, and instructional resources -can plan and implement appropriate instruments and procedures to evaluate instructional programs, his/her own performance as an instructor, and instructional materials/ resources 	<p>PLANNING SKILLS</p> <ul style="list-style-type: none"> -Long term-unit plans, learner objectives, resources -Short term- learning activities, materials, appropriateness, organization
<p>CLASSROOM MANAGEMENT SKILLS</p> <ul style="list-style-type: none"> -an orderly, business-like environment -great majority of students on task -teacher dominated tone and agenda -ongoing close supervision by teacher -uncluttered, attractive environment -up-to-date displays -orderly seating arrangements 	<p>CLASSROOM MANAGEMENT SKILLS</p> <ul style="list-style-type: none"> -growth in organization skills -growth in managing student discipline -growth in student control -growth in supervision 	<p>CLASSROOM MANAGEMENT SKILLS</p> <ul style="list-style-type: none"> -can engage pupils in active, experiential learning -can deal with the individual differences of students 	<p>CLASSROOM MANAGEMENT SKILLS</p> <ul style="list-style-type: none"> -Methods- whole class, groups, individuals, appropriateness, effectiveness, timing, reinforcement -Routine- movement, distribution of materials, care of equipment -Physical setting- awareness, pupil safety
<p>INSTRUCTIONAL SKILLS</p> <ul style="list-style-type: none"> -good questioning/discussion techniques -effective use of varied materials -varied instructional methods -smooth pace and transition -a clear separator of instruction and seatwork -appropriate review and testing -completion and enrichment of curriculum 	<p>INSTRUCTIONAL SKILLS</p> <ul style="list-style-type: none"> -handling of questioning discussion -use of blackboard, materials, aids and equipment -pacing of lesson -clarity of objectives 	<p>INSTRUCTIONAL SKILLS</p> <ul style="list-style-type: none"> -can group appropriately -can describe and perform a basic set of teaching skills or approaches; current in his/her age/grade level or subject specialization -can select, develop and use a variety of resources -can employ a number of different instructional strategies and/or models of teaching -can use varied pacing and levels of instruction -can evaluate and encourage individual pupil growth by using a variety of pupil assessment techniques 	<p>INSTRUCTIONAL SKILLS</p> <ul style="list-style-type: none"> -Introduction- review, motivation, appropriateness -Development- pacing/clarity, creativity, organization -Conclusion- summary, recapitulation -Questioning- effectiveness, form, variety of levels, distribution, use of pupil answers -Individual differences- identification, method of handling -Pupil centered activity- organization, supervision -Educational media- chalkboard, skill in handling, appropriateness, effectiveness, charts, displays, centres

GUIDELINES FOR
BOARDS OF REFERENCE
ESTABLISHED UNDER SECTION 129
OF THE SCHOOL ACT

MARCH, 1987

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I

GENERAL DESCRIPTION OF THE SCHOOL ACT

The School Act is divided into 10 parts.

Part 1 deals with interpretation. It defines the players in a Board of Reference hearing:

s.1

'board' or 'board of school trustees' means a Board of School Trustees constituted under this Act;

'minister' means Minister of Education, and includes a member of the public service designated by the minister to act on his behalf;

'ministry' means the Ministry of Education;

'pupil' means a person enrolled in an elementary school, a secondary school or in a Provincial school;

'teacher' means a person holding a valid and subsisting certificate of qualification issued by the ministry who is appointed or employed by a board to give tuition or instruction or to administer or supervise instructional service

in a public school, and includes a person to whom is issued, under this Act, a letter of permission for teaching, but does not include a person appointed by a board as superintendent of schools or assistant superintendent of schools;

Part 2 deals with general administration. This includes the responsibilities and duties of the Ministry and of superintendents of schools. A superintendent of schools appointed by a school board is appointed under section 9 to perform duties set out in section 8. A superintendent is the senior administrative person responsible for maintenance and furtherance of the standards of education in the school district, including responsibility for inspection of teachers.

Parts 3 and 4 of the School Act deal with election of and duties and powers of boards of school trustees.

Part 5 deals with school health. Part 6 deals with pupils, including pupil attendance and deportment.

Part 7 is the part which gives authority to a Board of Reference. It deals with the appointment and dismissal of teachers, the certification of teachers and cancellation of certificates, and salary negotiations.

Part 8 deals with provision of tuition and accommodation by the school board. Part 9 deals with school property and Part 10 deals with finance.

II

PART 7 AND BOARDS OF REFERENCE

A Board of Reference is appointed under section 129 of Part 7 to hear a teacher's appeal from a suspension for a period exceeding 10 days or from a dismissal. The appeal is filed by the teacher after receipt of a notice under section 122(2).

Section 122 provides the statutory procedure for suspension or dismissal for misconduct, neglect of duty, refusal or neglect to obey a lawful order of the board or a charge of a criminal offence which the board believes renders it inadvisable for the teacher to continue to teach. MATTERS OF COMPETENCE OF A TEACHER ARE HANDLED UNDER SECTIONS 123 AND 130 OF THE ACT. After the initial suspension by the board under Section 122(1), the board must provide a meeting within 7 days of the suspension at which time the teacher has the opportunity to meet with the superintendent of schools and the board or its committee. The board must then decide to confirm,

rescind or vary the suspension. It is from this decision that the teacher may appeal to a Board of Reference under Section 129 of the Act.

A Board of Reference is appointed by the Minister. The chairman is from a list of members of the Law Society nominated by the Chief Justice of British Columbia, one member is appointed from a list supplied by the British Columbia Teachers' Federation and one member is appointed from a list provided by the British Columbia School Trustees Association.

The authority of a Board of Reference is to meet and hear the case "de novo". The hearing before a Board of Reference is an evidentiary hearing; see In The Petition of John Shewan, S.C.B.C. unreported No. A850472, MacDonald J., March 5, 1985; In the Matter of the Dismissal of John Valois Coyle by the Board of School Trustees, School District No. 41, (Burnaby), B.C.S.C., unreported, New Westminster Registry No. 526/75, Mackoff J., January 21, 1975.

The Board of Reference may confirm, rescind or vary the suspension or dismissal. This latter power to vary the suspension or dismissal was enacted in 1980. Prior to that, Boards of Reference had no authority to vary the penalty assessed against the teacher. This former limitation on the power is reflected in decisions prior to 1980 concerning the amount of discipline which was appropriate.

The scope to vary the discipline is set out in Section 129(6).

s.129(6) A board of reference shall in accordance with the regulations consider an appeal referred to it and may allow or disallow the appeal or vary the decision made by the board under section 122 and make any order it considers appropriate in the circumstances.

Section 129 of the Act provides for appeal from a decision of a Board of Reference to County Court or Supreme Court.

Section 129(8) of the Act gives a Board of Reference the powers and privileges of a commissioner appointed under Part 2 of the Inquiry Act.

III

THE REGULATION AND BOARDS OF REFERENCE

Sections 72, 73 and 74 of the Regulation to the School Act apply to Boards of Reference. Section 73 requires a Board of Reference to make its decision within 30 days from the referral by the Minister to the Board of Reference. Section 73(2) permits the chairman of the Board of Reference to notify the Minister of a delay. The Minister may extend the period for making the decision. In practice it is often difficult to convene the case within 30 days from the referral, let alone hear and decide the issue. It is therefore appropriate to advise the Ministry of the need for any necessary delay and to seek in writing extensions of the time for rendering a decision, bearing in mind the overall objective of expediting the process to provide where possible and reasonable prompt resolution of the issues.

Section 72 permits the teacher to be accompanied by a representative or counsel. It also entitles the teacher and board to be present

throughout all presentations to the Board of Reference.

Section 74 regulates the release of the decision and requires copies of materials to be forwarded to the Ministry.

IV

PRE-HEARING MATTERSMaterial From the Ministry

The Ministry provides the members of the Board of Reference with material about the case sent by the school board to the Ministry under the legislation. That information normally includes copies of the correspondence from the school board to the teacher advising of the suspension or dismissal as well as written material setting out the reasons for the disciplinary action. This material will give the grounds for the disciplinary action and does not contain any reply of the teacher.

It is recommended that if the material is read, the parties to the hearing be advised of the material which has been provided to the Board of Reference by the Ministry. Both parties generally will have copies of all the material before the hearing. If they do not have this material, they should be provided with copies of it by the Board

of Reference. Alternatively the Board of Reference may elect to decline to read it and rely instead on the material provided by the parties to the Board of Reference. In this case we recommend the parties be advised that the Board has not and will not read the package.

Pre-Hearing Meeting or Call

We recommend the chairman of the Board of Reference hold either a pre-hearing meeting of counsel for the parties and the Board of Reference or a conference call to:

- (1) estimate the number of witnesses to be called. The number of witnesses may suggest that more hearing dates than had previously been estimated may be required;
- (2) determine if child witnesses are anticipated. This will make a difference to the Board's preparation for the hearing, for example, the administration of oaths to child witnesses differs from

administration of oaths to adults.
Further their presence may affect the anticipated time and location of the hearing;

- (3) determine whether anticipated witnesses have any special needs, for example, interpreters or special physical facilities;
- (4) encourage agreements of facts, exchange of documentation and exchange of authorities. While it is not clear whether a Board of Reference has the authority to provide discovery of documents to the parties before the hearing, exchange and agreement before the hearing commences saves hearing time;
- (5) determine if there are any preliminary issues of jurisdiction of the Board of Reference. These preliminary issues may be able to be disposed of prior to the commencement of the hearing in which evidence is intended to be called;

- (6) determine if there are any issues of admissibility of evidence which are expected to arise of which counsel is able to give advance notice. This may lead to further agreement between counsel or at least more concise argument being made to the Board;
- (7) deal with the issue of court reporters. Court reporters are not provided for in the budget of a Board of Reference and accordingly, a chairman may not bill the Minister for a court reporter. However parties to the proceedings may wish to have a court reporter present, or to bring tape recorders into the room to provide a record of the proceedings. These are procedural matters for each Board of Reference to determine, but it has been common for tape recorders to be present in the room provided they are unobtrusive, both to the flow of the evidence and to any witnesses, especially child witnesses who may be easily intimidated.

Written notice of the time, date and location of hearing should be sent to both parties or their counsel, the Board of Reference and the Ministry.

Hearings are normally held Monday to Friday, although Saturday sittings have occurred where the Board of Reference was in agreement to do so.

V

THE HEARING

At the hearing the Board of Reference should confirm with the parties that they agree that the Board of Reference has been properly constituted and has jurisdiction to consider the suspension or dismissal appeal of the teacher. It is normal practice for a Board of Reference to ask the parties to agree that the procedural requirements of the School Act to bring the matter to the Board of Reference have been complied with.

Hearings of Boards of Reference are not public and accordingly members of the public or the press are not entitled to be present. It is expected that the teacher, the teacher's counsel and a representative from the British Columbia Teachers' Federation at the request of the teacher, along with the superintendent of schools, the school board's counsel and all or some members of the school board will be in attendance throughout the hearing. Otherwise one would expect witnesses not to attend the proceedings except for the

purposes of giving evidence. It is sometimes asked that a child's parent be allowed to be present while the child testifies. Should there be objection to that presence by one party, the Board will need to assess the impact of the parent's presence and the needs of the child in making its decision.

Hearings held in meeting rooms normally have the tables set up in a U-shape, with a witness table facing the Board of Reference. Hearings in court rooms use the bench for the Board and counsel tables for the parties.

As a Board of Reference is given the powers and privileges of a commissioner appointed under Part 2 of the Inquiry Act, the chairman of a Board of Reference may issue summonses to attend and to bring documents.

The School Board must present its case first; see In the Matter of the Dismissal of John Valois Coyle by the Board of School Trustees, School District No. 41 (Burnaby) (supra). Evidence is presented before a Board of Reference in the same manner as in court, that is,

examination-in-chief, cross-examination and re-examination if necessary.

A Board of Reference shall take sworn testimony. The chairman of the Board of Reference should come equipped with a Bible and any other tools for administering oaths that may be known to be needed for the case. School Act cases often involve child witnesses. Therefore, the chairman and members of the Board of Reference should be prepared to satisfy themselves that the child witnesses can take an oath. For those under the age of 14 years, the Board must satisfy itself that the child understands the nature of the oath and the moral obligation of telling the truth, independent of any challenge by counsel; see R. v. Bannerman (1966) 55 W.W.R. 257 aff'd [1966] S.C.R. v. and Horsburgh v. The Queen [1967] S.C.R. 746.

A Board of Reference is a quasi-judicial body bound by the rules of natural justice. It has a duty to be fair in its procedure. Although the rules of evidence are not strictly binding upon a Board of Reference, they generally form the framework for the presentation of evidence to a

Board of Reference and reliance by a Board of Reference upon improperly admitted evidence may be grounds for overturning the decision on application to court; see Board of School Trustees of School District No. 34 (Abbotsford) and John Shewan and Ilze Shewan, unreported, B.C.S.C. No. A851691, Bouck, J., December 19, 1985. Expert opinions would normally be required to comply with the provisions of the Evidence Act. Expert evidence as to whether activity is misconduct should not be heard as the proper way to test for misconduct is to hear objective evidence about the activities of the teacher in the community and compare that to similar situations where teachers were disciplined for wrongful behaviour, per Bouck, J. in Shewan, supra.

It is useful for the chairman of the Board of Reference to travel with a good textbook on evidence and a copy of the B.C. Evidence Act, Canada Evidence Act and the Public Inquiry Act as well as the School Act, School Act Regulation and Bible.

We ask that the hearing days be as full as possible to compress the number of days required to be set aside by the participants to the proceedings.

VI

ROLE OF BOARD MEMBERS

The Board members are integral to a Board of Reference. Their role is to be impartial and independent in their assessment of the case. They bring to the Board of Reference educational expertise. It is not expected that they would be partisan although it is expected that they will highlight for the chairman those concerns of the constituency from whose list they were drawn. It has been common in the past for Boards of Reference to reach unanimous decisions, showing the strong tradition under the School Act of impartial and independent decision making by the members on the Board of Reference.

We suggest to the chairman of the Board of Reference that there be a discussion amongst the Board of Reference prior to the commencement of the hearing as to the manner in which arguments on questions of evidence will be made, the extent of consultation the members expect, and the role the members expect to play in questioning the parties.

VII

THE DECISION

Regulation 74 requires the chairman of the Board of Reference to notify the teacher, the board and the ministry within 3 days of reaching a decision and to forward to the ministry the documents or certified copies of the documents examined by the Board of Reference. The sessions of the Board of Reference after the hearing has been completed should occur in the presence of the entire Board of Reference. Meetings of only two of the three persons on the Board of Reference, even with the consent of the absent member, risks an appeal of the decision of the Board of Reference to the courts.

Decisions of Boards of Reference commonly follow this pattern:

- (1) recitations of the agreements of jurisdiction of the Board of Reference;
- (2) recitation of the facts;

- (3) recitation of the substantive agreements of the parties on the two issues, whether there was misconduct or other fault fitting into section 122(1), and if so the appropriate discipline;
- (4) recitation of the principles the Board of Reference considers applicable;
- (5) application of the principles and the decisions to the case.
- (6) conclusion.

VIII

ISSUES THAT MAY ARISEUnsatisfactory Reports

From time to time, a Board of Reference may discover that the issues between the teacher and the school board are questions of competence that should have been handled under Section 123 of the School Act with appeal to a review commission. A Board of Reference is not constituted to hear an appeal from a dismissal for incompetence. However, evidence of competence often may be admissible on the issue of the appropriateness of the penalty assessed by the school board against the teacher. See for example Board of School Trustees of School District 63 (Saanich) and Robert A. Abbott, Board of Reference December 19, 1983 (Cumming, Chairman).

Settlement

The parties may settle a case in the middle of a Board of Reference. It is expected

that in most cases a Board of Reference will thereupon adjourn the proceedings pending receipt of the written withdrawal of the appeal which negates the jurisdiction of the Board of Reference. It may be possible in rare circumstances for a Board of Reference to facilitate a settlement by having the two members to the Board of Reference together speak to the parties, with their consent, to encourage a resolution.

Access to Decisions

The decisions are not public because the hearings are not public. The Board of Reference must therefore rely upon the parties to provide the authorities to them for consideration. The decision issued by the Board of Reference will not be made available to the public.

IX

GROUND FOR APPEAL

The decision of a Board of Reference may be appealed to County Court or to the Supreme Court of British Columbia (section 129).

The grounds for appeal are those grounds for judicial review of the decision of a quasi-judicial body. The Judicial Review Procedure Act is applicable.

A list, not necessarily comprehensive, of grounds for appeal include:

1. Lack of jurisdiction, e.g. the appeal was not properly filed. This may be flushed out by asking the parties about jurisdiction.
2. Excess of jurisdiction, e.g. deciding issues not properly before the Board of Reference, answering the wrong question such as on a misconduct case whether there was breach of the Criminal Code

rather than whether there was misconduct.

3. Procedural error, e.g. compelling the teacher to proceed first (see John Valois Coyle case).
4. Denial of natural justice, including
 - a) bias;
 - b) denial of fair hearing by refusing to hear admissible evidence;
 - c) denial of fair hearing by hearing and being influenced by inadmissible evidence;
 - d) denial of fair hearing by receiving additional material the parties do not have the opportunity to address in the presence of each other.
5. Error of law, e.g. interpreting a statute wrongly on a point of substance to the decision.

IN THE MATTER OF THE SCHOOL ACT,
R.S.B.C. 1979 Ch. 375 AS AMENDED

- and -

IN THE MATTER OF THE BOARD OF REFERENCE

- and -

IN THE MATTER OF

BETWEEN:

THE SCHOOL BOARD

AND:

THE TEACHER

S U M M O N S

TO:

WHEREAS it has been made to appear that you are likely to give material evidence respecting the above cited matter, you are hereby summoned to appear before the Board of Reference at a Hearing to be held at situate in , British Columbia, on , the th day of 198 at the hour of o'clock in the noon and

so from day to day until the matter is heard and to give evidence touching the matter in question and also to bring with you and produce at the time and place all documents and other information which is relevant to this Hearing and which you have or which you are able to obtain.

GIVEN UNDER MY HAND this day of 198

Chairman

Vancouver Registry
No. A850472

IN THE SUPREME COURT OF BRITISH COLUMBIA

Vancouver, B.C.

March 5, 1985

THE PETITION OF)	ORAL REASONS FOR
JOHN SHEWAN)	JUDGMENT OF MACDONALD, J.

D.C. TARNOW, ESQ.	appearing for the Petitioner
J.S. CLINE, ESQ., Q.C. and P.H. OWEN, ESQ.	appearing for the Abbotsford School Board

THE COURT: (Oral) The petitioner applies under the Judicial Review Procedure Act for a declaration that he is entitled to be reinstated to his teaching position with the Abbotsford School Board (the Board) pending the outcome of his appeal from the Board's decision to suspend him without pay for a period of six weeks for misconduct.

His alleged misconduct consisted of causing the publication of a picture of his wife, who was also suspended by the Board, in a magazine which features photographic studies of scantily clad females. The question of whether such behavior on the part of these two teachers is misconduct under Section 122(1)(a) of the School Act (the Act) is not before me, nor is the appropriateness of the penalty which the Board imposed.

The sole issue on this hearing is whether the petitioner, having elected to appeal the decision of the Board to suspend him, is entitled to be reinstated to his teaching position pending the outcome of his appeal. While that appeal will not be heard until mid-April, the six weeks' suspension imposed by the Board expires on March 13, 1985. The fact that only a further seven teaching days are involved has no bearing on the issue before me.

Once a Board has suspended a teacher and afforded him the statutory hearing required by Section 122(2)(a) of the Act, a right of appeal to a Board of Reference arises in a case such as this. The petitioner has availed himself of that right. Further appeals from the decision of the Board of Reference, which hears the whole matter de novo, are available to both parties, first to the County or Supreme Court and then to the Court of Appeal. Section 127(7) of the Act deals expressly with the question of reinstatement pending those further appeals:

"Either party to an appeal to a Board of Reference may appeal the decision to the County Court or Supreme Court, but no reinstatement under subsection (6) shall take place during the course of the appeal or a subsequent appeal from it."

Subsection (6) gives the Board of Reference the power to reinstate. Thus any such order is automatically stayed until the appeal process is exhausted.

There is no such express provision applicable to the period between a school board's decision to suspend or

1 dismiss and the outcome of an appeal from that decision
2 to a Board of Reference. The petitioner submits that such
3 a void must not be filled by extending the statutory
4 prohibition in Section 127(7), which only applies after
5 the Board of Reference has reached its decision. He
6 relies on Attorney General Canada v. Hallett & Carey,
7 [1952] A.C. 427 (P.C.) for the proposition that statutes
8 which encroach upon the rights of the individual are
9 subject to a strict construction. Where such an enact-
10 ment is inconclusive, the court may properly lean in
11 favour of an interpretation that leaves private rights
12 undisturbed. There is a legislative gap here, the
13 petitioner argues, which cannot be filled by an extension
14 of Section 127(7); the remedy lies with the Legislature.
15 See Re Navy League of Canada, [1927] 2 D.L.R. 184 (N.S.S.C.)
16 and Magor et al v. Newport Corporation, [1952] A.C. 189
17 (H. of L.).

8 In response, the Board stresses that it is a creature
9 of statute. Its duties, powers and obligations are found
0 in the Act and defined by the regulations thereunder, as
1 are the rights and obligations of teachers such as the
2 petitioner. The Board argues that it is given no
3 authority under the Act to reinstate pending the hearing
4 of an appeal before the Board of Reference and thus no
5 right of the petitioner has been infringed. It points to
6 the provisions in Subsections 122(4) and (6) of the Act,
7 which require the Board to pay the teacher's salary during

1 the period of a suspension without pay, if the Board's
2 decision is reversed or varied on appeal.

3 I have concluded that in the absence of a statutory
4 right to reinstatement pending the outcome of an appeal
5 to a Board of Reference under Section 129 of the Act, this
6 court has no power to order the Board to do so. The
7 petitioner's qualifications as a teacher are exemplary.
8 No danger or hardship would be imposed upon his students
9 if he were reinstated. His principal will be delighted
10 to have him return on March 13th and has sworn an affidavit
11 in support of this petition in the hope that he will
12 return even sooner. I must disappoint them both.

13 An absolute right to reinstatement pending appeal
14 is unthinkable. One can easily speculate about situations
15 where it would be improper or at least inappropriate for
16 a teacher to be returned to the classroom just because he
17 or she had elected to appeal a suspension or termination
18 to a Board of Reference. To suggest that some, but not
19 all cases are appropriate for reinstatement pending the
20 decision of a Board of Reference is to require the court
21 to decide in each case on which side of the line it falls.

22 To require the Board itself to consider such a
23 question would be impractical. It has made the decision
24 to suspend or terminate in the first place. If it was
25 wrong there will be no loss of salary. A Board of
26 Reference will often not be constituted and able to meet
27 in time to be of practical assistance and such a decision

1 on its part, in advance of it considering the merits of
2 the appeal, might compromise the hearing before it. The
3 obligation to pay the salary of a teacher improperly sus-
4 pended or terminated is the only "right" set out in the Act.

5 To hold otherwise would impair the effective
6 administration of its school district by the Board.
7 There is no suggestion here of any lack of procedural
8 fairness on the part of the Board. My view of whether
9 the petitioner's actions constitute misconduct by a
10 teacher, and if so, whether the penalty imposed upon him
11 was fair, is immaterial. I am simply unable to find in
12 the statutory scheme any fundamental right to reinstatement
13 pending an appeal to a Board of Reference. In the absence
14 of such a right, this eption must be dismissed.

15 Where a full appeal from the Board's decision to
16 suspend is available to an independent Board of Reference,
17 with further appeals available to the courts, and where
18 the Board will be obliged to make up any lost salary if
19 its decision is found to be in error or the penalty too
20 severe, the court must be reluctant to interfere. When
21 legislation seeks to bar an appeal on the merits or the
22 actions complained of cannot be supported by the
23 legislation or the result is patently unjust, we are
24 much less hesitant.

25 No right to reinstatement is granted by the Act. To
26 impose such a right would be unworkable. The right to be
27 compensated if the Board's decision is held to be in error

1 is the teacher's protection. The absence of a right to
2 reinstatement in these circumstances is not a breach of
3 the Charter of Rights.

4 The petition is dismissed with costs to the Board.

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6 (CONCLUDED)
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IN THE SUPREME COURT OF BRITISH COLUMBIA

VANCOUVER
JAN 21 1975
REGISTRY

IN THE MATTER OF THE PUBLIC)
SCHOOLS ACT R.S.B.C. 1960)
CHAPTER 319)

AND:)

IN THE MATTER OF A WRIT OF)
CERTIORARI)

AND:)

IN THE MATTER OF THE DIS-)
MISSAL OF JOHN VALOIS COYLE)
BY THE BOARD OF SCHOOL)
TRUSTEES, SCHOOL DISTRICT)
NO. 41 (BURNABY))

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE MACKOFF

IN CHAMBERS

A. Gordon MacKinnon, Esq. Q.C. Counsel for the Applicant

M.I. Catliff, Esq. Counsel for the Board of Refere
and Attorney General of British
Columbia

B.E. Emerson, Esq. Counsel for the Burnaby School
Trustees

Date and place of hearing: January 13, 1975
Vancouver, B.C.

This is a motion for an Order to show cause why a Writ of Certiorari should not issue to remove into this Court a certain record of determination by a Board of Reference made pursuant to the Public Schools Act, R.S.B.C. 1960, Chapter 319, made on the 15th day of August, 1966 recommending the dismissal of John Valois Coyle by the Burnaby Board of School Trustees, School District No. 41 be upheld and for an Order that the recommendation by the Board of Reference be declared a nullity.

The relevant facts are as follows. John Valois Coyle, hereinafter called "the Teacher", who is now 62 years of age, was employed by the Burnaby Board of School Trustees, School District No. 41 (Burnaby) as a counsellor and teacher in the Burnaby secondary schools in the period from 1955 to 1966, excepting one year 1963-64 when he was on leave of absence. He was dismissed by the Board on the 30th day of June, 1966 on the grounds of incompetence.

Upon receiving notice of dismissal, the Teacher pursuant to the provisions of the Public Schools Act, R.S.B.C. 1960, Chapter 319, and amendments thereto, appealed the dismissal and under the provisions of the Public Schools Act an Investigation Committee held hearings in order to investigate the reasons for the dismissal. The Investigation Committee made certain findings and observations.

The Teacher appealed to a Board of Reference under the provisions of the Public Schools Act. The Board of Reference held hearings from August 1st to August 4th, 1966, and on the 15th day of August, 1966, recommended that the dismissal be upheld.

The Board of Reference in its reasons supporting its decision wrote:

"In appealing his dismissal, Mr. Coyle is in the role of Appellant under the relevant provisions of the 'Public Schools Act', and the onus is on him to show that the School Trustees erred in dismissing him for cause - incompetence, and that the Investigation Committee erred in upholding the dismissal." (my underlining)

Counsel for the Teacher contends that there was error in law on the face of the record in that the Board of Reference was in error in law in directing itself as to the onus upon the Applicant in the proceedings before the Board.

Counsel for the Board of Reference conceded that putting the onus on the Teacher was an error in law on the face of the record but he argued that notwithstanding this error, I should exercise my discretion and not grant the relief asked. He argued that the reasons for decision clearly show that the Board of

Reference reached its decision not because the Teacher failed to satisfy his onus but rather because the evidence clearly showed that the Teacher was incompetent. In essence his submission was that even though the Board of Reference had made an error in law there had been "no substantial miscarriage of justice".

Neither the School Trustees nor the Investigation Committee are quasi-judicial bodies which hold hearings. The former is an employer who is empowered by the Act to dismiss for cause while the latter merely investigates and reports. See the unreported decision of Gould, J., Supreme Court of British Columbia, Vancouver Registry No. X178/68, In The Matter of The Public Schools Act and In the Matter of a Writ of Certiorari and In the Matter of an Investigation of the Transfer of Gordon Hutton from Delta Secondary School.

Therefore, when the Act speaks of an "appeal" to the Investigating Committee and an "appeal" to a Board of Reference the word "appeal" is not used in the judicial sense at all. The Public Schools Act gives the Board of Reference jurisdiction which for purposes of illustration may be compared to that of a trial Judge but the Act does not give the Board of Reference jurisdiction which may be compared to that of the Court of Appeal.

The Board of Reference erroneously thought that they were sitting as an appellate body hearing an appeal from an adjudication made by inferior quasi-judicial bodies and accordingly wrongly placed the onus on the Teacher to show that the School Trustees and the Investigating Committee were in error. They not only stated that the onus was on the Teacher but the record shows that the procedure which was followed by the Board

of Reference at the hearings was that the Teacher called his witnesses first and then the witnesses for the School Trustee were called. Consequently no hearing such as contemplated by and provided for in the School Board Act was ever held and the decision of the Board of Reference was made without jurisdiction.

In Smith v. The Queen, ex. rel. Chmielewski (1959) S.C.R. 638, 22 D.L.R. (2d) 129, Cartwright, J. considered the application of judicial discretion with respect to a Writ of Certiorari. In that case a juvenile was convicted under the Juvenile Delinquents Act R.S.C. 1952, Chapter 160, without the notice provided for in Section 10 of the Juvenile Delinquents Act having been served on the parents of the child. The Court held that compliance with the notice section was a condition precedent to the Juvenile Court Judge acquiring jurisdiction. The Court was asked to refuse the granting of the Writ of Certiorari as a matter of discretion. On this point Cartwright, J. says at pp. 139-140:

"...In my opinion the rule by which the Court should be guided is accurately stated in the following passage in Halsbury's Laws of England 3rd ed. vol. 11, pages 140-1:

'Although the order is not of course it will though discretionary nevertheless be granted ex debito justitiae, to quash proceedings which the court has power to quash, where it is shown that the court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely one of the public and if the conduct of the party applying has not been such as to disentitle him to relief.'

In the same case Kerwin, C.J.C., at page 134 stated:

"Nor is it any answer to say that the granting of a writ of certiorari is a matter of discretion. No such question can arise where the terms of a statute have not been complied with."

Whether on the view as expressed by Kerwin, C.J.C., or

on the view as expressed by Cartwright, J. the recommendation of the Board of Reference cannot stand.

Counsel for the Board of Reference urges that the applications should be refused because of the Applicant's delay in bringing on the applications.

The chronology of events is as follows: On August 15, 1966 the Board of Reference handed down its decision. The Teacher ordered a transcript of the proceedings of the Board of Reference and in April, 1967 he received volumes 1, 3 and 4 of the transcripts. Volume 2 of the transcripts, containing all the evidence heard on August 2nd has never been delivered to him because the reporter left Canada shortly after the hearing and the Official Reporters' Office is unable to ascertain his whereabouts.

On March 3, 1967 he instructed his then solicitor to issue a Writ of Summons out of the Supreme Court. On March 18th, 1968 the Writ of Summons was set aside because his then solicitor had not served it in time. Certiorari proceedings were commenced by the solicitor and withdrawn on March 4th, 1969 by consent and without prejudice to further application. From Easter, 1969 to June, 1971, the Teacher resided outside the province and during that time attempted to obtain the aid of the B.C. Teachers' Federation. In late 1972 he obtained counsel through Legal Aid and Mr. McKinnon brought this application in 1974.

While there has been a long delay, I am satisfied that the Teacher earnestly tried to bring the matter to Court but

has encountered a series of unfortunate occurrences which delayed the matter. Although he must shoulder some responsibility for the delay, in the circumstances herein, I am not prepared to deny him the relief he seeks because of it. The Orders sought will go but there will be no costs.

Vancouver, B.C.
January 21st, 1975.



No. A851691
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BOARD OF SCHOOL TRUSTEES
OF SCHOOL DISTRICT NO. 34
(ABBOTSFORD)

APPELLANT

AND:

JOHN SHEWAN
ILZE SHEWAN

RESPONDENTS

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE BOUCK

Counsel for the Appellant:

J. Stuart Clyne, Q.C.

Counsel for the Respondents:

David C. Tarnow

Place and Date of Hearing:

Vancouver, B. C.
19 December, 1985

DESCRIPTION OF PROCEEDINGS

John Shewan and Ilze Shewan are husband and wife. In the fall of 1983 they were employed by the appellant as school teachers. Controversy developed when Mr. Shewan took a picture of his wife in the nude. With their permission the photograph was subsequently published in the February 1985 edition of Gallery magazine. When the matter came to the attention of the School Board they were suspended from their positions as teachers for a period of six weeks.

An appeal was then taken by the respondents from these suspensions to a three person Board of Reference pursuant to s. 129 of the School Act, R.S.B.C. 1979, c. 375. Evidence and argument were heard by the Board of Reference over a period of 6-1/2 days between 9 April and 18 June, 1985. On 28 June, 1985 the majority delivered their written opinion allowing the appeal and ordering the respondents be reinstated together with compensation for all wages and benefits lost as a result of their suspension.

From that decision the School Board appeals to this court.

FACTS

Mr. and Mrs. Shewan have two children, ages 8 months and 3 years. They are both employed as teachers by the Appellant School District. Mrs. Shewan has been with the Appellant since 1976 as a junior high school teacher. She has taught Drama, English, French, German, with English as a second language.

Mr. Shewan has been employed by the Appellant as a junior and senior high school teacher since 1973. He has taught English 8, French 8, 9 and 10, Social Studies 8, 9, 10 and 11, History 12, Law 11, General Business 12 and Foods Cafeteria 10, 11 and 12. He was also extensively involved in many extra-curricular and community activities.

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4 In 1982 or 1983, Mr. Shewan obtained an entry blank for an amateur
5 photo competition in Gallery Magazine. The Respondents filled in the entry
6 form together and mailed it with a 100 word descriptive statement and 3
7 photographs.

8
9 Each month several amateur photographs are published in Gallery
10 Magazine. There is a monthly winner and a monthly runner-up. At the end of
11 the year an over-all winner is chosen. The over-all winner gets a substantial
12 prize. Anyone whose photograph is published receives \$50.00.

13
14 On the entry form no last names are requested. Mr. and Mrs. Shewan
15 therefore expected anonymity.

16
17 On 27 December, 1984 Mrs. Shewan received notification by letter
18 from Gallery Magazine that one of her photographs would be published in the
19 February 1985 edition. With the letter she received a \$50.00 cheque and the
20 remaining two photographs.

21
22 The motives of the Respondents for sending the photographs to
23 Gallery Magazine were personal. Mr. Shewan wanted to tell his wife he loved
24 her and that she was a beautiful woman. Mrs. Shewan was motivated by an
25 attempt to improve her self-esteem and a wish to please her husband.

26
27 As advised the photograph was in fact published in Gallery Magazine
28 and appeared with the following caption at page 48:
29
30

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5 "Ilze S. 34, teacher
6 Clearbook, B.C.
7 Canada
8 Photography by her husband, John

9 Ilze is a high school teacher who can speak,
10 read and write in seven languages. The proud
11 mother of a 15 month old baby boy she also
12 finds time for cooking and photography."

13 It is worth noting the setting and nature of the particular colour
14 photograph which is the subject matter of these proceedings. The picture
15 appears on the bottom left hand side of a page of photographs under the title
16 "The Girl Next Door, February 1985". There are 5 other photographs on the left
17 and right side of ladies who are either totally or partially nude. One page before
18 and about 13 thereafter contain pictures of a similar nature. Mrs. Shewan is
19 seen lying on her back on a bed with the top of her body uncovered. She has on
20 stockings, high heels and a garter belt.

21 Sometime around 23 January, 1985 the Superintendent of Schools for
22 the Appellant received a telephone call from a radio station reporter enquiring
23 about the photograph. He then went and bought a copy of Gallery Magazine and
24 confirmed the identity. After that he called the Respondents to meet in his
25 office on 24 January, 1985. During the meeting the Superintendent asked
26 questions and Mr. Shewan responded for he and his wife.

27 When asked about the appropriateness of submitting the photograph
28 to the magazine, Mr. Shewan said he felt it met community standards. The
29 Superintendent said it wasn't appropriate and he wouldn't be surprised if the
30 School Board felt the same way. Mr. Shewan replied that in his view those
opinions did not reflect the community.

After the meeting on 24 January, 1985 the Superintendent reported the matter to the School Board. The Board then resolved to suspend Mrs. Shewan immediately. It then set 30 January, 1985 as the date for the statutory hearing pursuant to s. 122 of the School Act.

Prior to the statutory meeting on 30 January, 1985 the Superintendent gave an interview on television indicating he was shocked and sickened by the episode.

At the statutory meeting, Mrs. Shewan indicated through her counsel that the picture in the magazine was indeed a photograph of herself. She also said that she had not seen the magazine at the time she sent the photographs. She indicated there was some indiscretion but that she felt it did not go against community standards. Following the meeting the Board decided to also suspend Mr. Shewan. A statutory meeting for this purpose was set for Saturday, 2 February, 1985.

At the 2 February, 1985 meeting Mr. and Mrs. Shewan again appeared with counsel. Counsel for Mr. Shewan requested further time to prepare for the hearing. At that time a joint public statement was put forward by the Respondents but was not accepted by the School Board. On 4 February, 1985 Mrs. Shewan was suspended for six weeks without pay.

Mr. Shewan's statutory hearing took place on 4 February, 1985. Through his counsel Mr. Shewan felt there had been an indiscretion but he further indicated that in his opinion the magazine met community standards.

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4 On 5 February, 1985 Mr. Shewan was notified that he was also
5 suspended without pay for six weeks.
6

7 An appeal was then taken by the Respondents pursuant to s. 129 of
8 the School Act to a Board of Reference. That Board was appointed by the
9 Minister. It consisted of Mr. Marvin R. V. Storrow, Q.C. (Chairman), Mr. Philip
10 Rankin and Mr. Gordon Eddy.
11

12 The Board of Reference heard evidence and argument over a 6 and
13 1/2 day period. At the hearing evidence on behalf of the School Board was given
14 by the Superintendent of Schools for the Appellants, the Superintendents for the
15 School Districts of Vancouver, Burnaby and West Vancouver and two parents of
16 school children were also called.
17

18 The Respondent for the Appellant School District testified he
19 received some 50 phone calls on the subject and the Board also received some
20 letters, both for and against the Respondents. The Superintendent said some 8
21 parents requested their children not be assigned to the classes conducted by the
22 Respondents but he did not know if any of those students were in the classrooms
23 of Mr. and Mrs. Shewan.
24

25 During the course of the hearing the Superintendent described the
26 Respondents as exemplary teachers both in their teaching ability and in their
27 extra-curricular activities.
28
29
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Two parents were called by the Appellant. Mrs. Webb testified she had not seen the magazine or the picture, however she felt it was disgusting. She further stated she would not want her 14 year old son taught in the next term by Mrs. Shewan. Her children had never had Mr. or Mrs. Shewan as a teacher. She had no other knowledge of their capabilities as teachers.

Mr. Maxwell was the second parent called by the Appellant. He also had not seen the magazine or the picture. He did not have any children in Mr. or Mrs. Shewan's classes. Mr. Maxwell was considering placing his children in a new Catholic private school. At that school the prime requirement for teachers was to be their moral and religious views rather than their technical qualifications.

The three experts called by the Appellant all indicated that the teachers conduct amounted to misconduct.

On behalf of the Respondents, Mr. and Mrs. Shewan gave evidence at the hearing. They each admitted an indiscretion but denied any misconduct on their part.

Two parents of students taught by the Respondents were called as witnesses on their behalf. One testified that her daughter had Mrs. Shewan as her English 9 teacher. She saw the photograph in question in the magazine but she was not concerned by the incident.

Another witness had her daughter enrolled in a History course taught by Mr. Shewan. She also saw the magazine and photograph but was not

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4 concerned. However, she was bothered by the actions of the School Board in its
5 suspension ruling.
6

7 The Chairperson of the Periodical Review Board was called by the
8 Respondents. She indicated she examined the February 1985 edition of Gallery
9 Magazine but found nothing obscene in it. She described Gallery Magazine as
10 one of the better magazines which she reviews.
11

12 The Vice-President of Marketing for Mainland Magazine which
13 distributes Gallery Magazine indicated the sale of the magazine was not really
14 increased because of the incident.
15

16 In addition, three expert witnesses were called by the Respondents.
17 A Dr. Robert Walker of Simon Fraser University indicated that since the
18 photograph did not interfere with their professional duties, the incident did not
19 amount to misconduct. Dr. William Bruneau of the University of British
20 Columbia stated that since the three aims of public education were not breached
21 by the Respondents, there was no misconduct. Finally, Dr. Michael
22 Manley-Casimir of Simon Fraser University testified that as there was
23 insufficient evidence of any effect on their teacher performance arising out of
24 the incident, there could not be misconduct.
25

26 A former student of the Respondents also gave evidence. He said
27 that Mr. Shewan had been a very positive influence on him in school and
28 persuaded him to pursue a university education. He felt the incident would have
29 no effect on Mr. Shewan as a teacher or a person.
30

Principals and colleagues of both Respondents were called on their behalf to indicate they were superior teachers and members of the community. It was the opinion of these witnesses that the incident would have no effect on the competence of the Respondents as teachers.

The majority of the Board of Reference held the Respondents' actions fell within accepted standards of tolerance in contemporary Canadian society and therefore did not amount to misconduct. The majority ordered the decision of the School Board set aside with full back pay to Mr. and Mrs. Shewan.

On the other hand, the minority decision of the Board as rendered by Mr. Storrow held the actions of the Respondents constituted misconduct. However, he decided the penalty was unfair and reduced their term of suspension from 6 weeks to 10 days.

ISSUES

Three issues arise from these facts:

1. What is the nature of the appeal jurisdiction granted to this court by s. 129 of the School Act?
2. Assuming this court has the jurisdiction of the Court of Appeal, did the Board of Reference err in law or fact when the majority found there was no misconduct?

3. If there was misconduct what is the appropriate penalty?

LAW

1. Jurisdiction of the Supreme Court of British Columbia on the Appeal from the Board of Reference.

Section 129 of the School Act is the relevant section that grants a right of appeal from the Board of Reference to the Supreme Court of British Columbia. It reads in part:

"(6) A board of reference shall in accordance with the regulations consider an appeal referred to it and may allow or disallow the appeal or vary the decision made by the board under section 122 and make any order it considers appropriate in the circumstances.

(7) Either party to an appeal to a board of reference may, within 30 days of the decision of the board of reference, appeal the decision to the County Court or Supreme Court in accordance with their respective Rules; but no reinstatement under subsection (6) shall take place during the course of the appeal or a subsequent appeal from it."

The Act then provides for an appeal from a decision of this court to the Court of Appeal with leave of a single judge of that court.

Rule 49 of the Supreme Court Rules contains a code of procedure where a statute such as the School Act allows for an appeal to the Supreme Court from some other tribunal. In essence, the rule details the means of

getting before the court but it does not say what guidelines a court should follow on hearing the appeal or what remedies it can impose. Therefore, it is necessary to inquire into the exact limits of the appeal jurisdiction granted to this court on such a hearing.

At common law there was no right of appeal from a decision of a single trial judge as we now know it. "The king's court cannot be charged with a false judgment"; The History of English Law, Pollock and Maitland, Vol. 2, p. 668. And at p. 664; "Nothing that was, or could properly be, called an appeal from court to court was known to our common law. This was so until the 'fusion' of common law with equity in the year 1875."

Generally speaking, there were two ways a mistake could be corrected prior to 1875. One was through the ancient remedy of applying for a Writ of Error. The other was by launching a motion for a new trial. Holdsworth, A History of English Law, Vol. 1 at page 643:

"We have seen that under the old practice at common law a suitor, if dissatisfied, might either (1) proceed by way of writ of error for errors on the record, or by writ of error on a bill of exceptions. If the court of error thought that there had been any misdirection, however trifling, it was bound to order a new trial. Or (2) he might move the court in banc for a new trial. From a refusal to grant a new trial there was no appeal."

I don't believe much will be gained by exploring the exact nature of a Writ of Error or a motion for a new trial to see whether that kind of appeal process could be adopted in these proceedings. In my view, it was not the intention of the legislature to resurrect these forgotten methods of review when it gave appellate jurisdiction to this court in s. 129 of the School Act.

What was more likely the intention of the Legislature was to grant the same powers to a single judge of this Court or the County Court as are possessed by a quorum of the Court of Appeal of British Columbia under the provisions of the Court of Appeal Act, R.S.B.C. 1979, c. 7. There are two reasons for reaching this decision.

The word "appeal" as it appears in the statute is not a word that was ever known to the common law of procedure. Correcting errors made during the course of a trial was done by means of a Writ of Error or a motion for a new trial and not by means of an "appeal". Hence, the reference to the word "appeal" in the School Act must mean a reference to an appeal as defined by a statute relating to appeals. That statute is the Court of Appeal Act.

The second reason for arriving at this conclusion comes from the words of our Court of Appeal in the Board of School Trustees of District No. 61 (Greater Victoria) and Bona C. MacMurchie and Evelyn M. Ball (unreported), 5 June, 1973, Vancouver Registry No. 450/73. That case involved an appeal under an earlier but similar provision of the School Act. The question arose as to whether the procedure before the Supreme Court and the County Court was in the nature of an appeal or a hearing de novo. At page 2, Branca J.A. said this:

"Counsel for the appellant has argued strenuously that the appeal envisioned in subsection 7 is an appeal de novo. We disagree with that entirely. The Appeal that is mentioned, in my judgment is an appeal in the usual sense of the word. . ."

And at page 3, Taggart J. A. also said:

"I agree with my brother that the process below is appellate in the sense in which that word is ordinarily used."

An appeal "in the usual sense" of that word means a procedure whereby this court reviews the conduct of the hearing held before the Board of Reference as opposed to hearing the same evidence all over again. But what are the limits of that review? Since an appeal is a creature of statute the only guidelines are statutory. In British Columbia they are contained in the Court of Appeal Act. Thus, it seems to me the provisions of the Court of Appeal Act are the ones to follow, subject of course to any necessary modifications. A sample of the powers which are mentioned in that statute and which I may exercise include:

1. Making or giving any order that could have been given by the Board of Reference: s. 9 (1) (a).
2. Drawing inferences of fact: s. 9 (3).
3. Setting aside the order of the Board of Reference and directing a new hearing: s. 27(1).

Certain rules interpreting the powers and duties of an appeal court must also be kept in mind. Some examples are:

1. Questions of fact decided by the Board of Reference should be given great weight. But where no question arises as to truthfulness and where the question is as to the proper inferences to be drawn from truthful evidence, then the Board of Reference is in no better position to decide than me: Dominion Trust Co. v. New York Life Ins. Co. [1918] 3 W.W.R. 850 at 853 (P.C.).

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4 2. I should not overrule a finding of fact made by the Board of
5 Reference unless satisfied the finding was clearly wrong but if the
6 issue of fact is not one which depends in any way on the Board's
7 assessment of the witnesses or of the evidence they gave, then it
8 does not have any special advantage denied to me, and if I think the
9 finding clearly wrong I may substitute my finding for that of the
10 Board: Vander Zalm v. Times Publishers et al (1980) 109 D.L.R. (3d)
11 531 at 558-559 (B.C.C.A.).
12

13 Without such a framework it is difficult to know how I might go about
14 exercising any appeal jurisdiction given to me by the School Act. Therefore, I
15 will look at the record coming from the Board of Reference as if I represented a
16 quorum of appellate judges in the British Columbia Court of Appeal hearing an
17 appeal from the decision of a single judge of the Supreme Court of British
18 Columbia.
19

20 2. Inquiry as to any error by the Board of Reference

21
22 (a) Analysis of the Ruling of the Majority

23 Under s. 122 of the School Act a teacher may be suspended by a
24 school board:

25 "(a) for misconduct, neglect of duty or refusal or neglect
26 to obey a lawful order of the board. . ."

27 It is common ground that the appellant made the suspension orders in
28 February, 1985 because of alleged acts of misconduct. In the majority report the
29 members said this:

"This case turns on what is meant by the word 'misconduct'".

Because the incident arose outside the course of their normal duties as school teachers, the majority commented upon the obligations of the Respondents when they are not teaching:

"We are not convinced that an employer can demand more of a teacher than they exhibit enough decorum and formality to do their job. Teachers are not on duty 24 hours a day. Surely their main function is to teach, not to be emulated. When teachers are off the job, they ought to be allowed far greater latitude in their lifestyle."

"We do not expect that teachers should be invisible in their community, nor do we expect a British Columbia teacher must conform to the strictest behaviour in a community, especially while off the job."

Evidence was lead before the Board of Reference as to the "community standards" in Abbotsford. The argument was then made that the conduct of the Respondents did not meet these standards and so there was misconduct. The majority held that proof of community standards was not established to their satisfaction:

"Furthermore, Counsel for the Board argued that there were clearly people in the district who were offended. Since the Shewans had failed to conform with at least some of the community's standards of conduct, he said that failure amounted to misconduct.

Although evidence was lead on the community standards in Abbotsford, neither party established to our satisfaction what those community standards were."

As a consequence, the majority then concluded the real test was whether the Respondents conduct "was within the accepted standards of tolerance in contemporary Canadian society?" In their opinion it was.

"The question we believe that should be asked is not whether the Shewans conduct fell below some of the community's standards but whether it was within the accepted standards of tolerance in contemporary Canadian society. We must formulate an opinion of what the contemporary Canadian community will tolerate. We have heard evidence of the community standards and we have heard expert evidence. In our opinion, the Shewans' conduct would be tolerated by contemporary Canadian standards and the evidence on balance indicates this. British Columbian teachers do not have to have different standards of behaviour depending on what community they teach in.

The actions of Mr. and Mrs. Shewan showed an appalling lack of judgment. Can that lack of judgment or imprudent act on these facts amount to misconduct within the meaning of Section 122 of the School Act? In our opinion it does not."

A fair summary of the majority award is as follows:

- (i) The standard of conduct of a teacher off the job should not be set at as high a level as when the teacher is performing his or her professional duties.
- (ii) When not working a teacher's conduct does not have to compare with that of the strictest behaviour in the community.
- (iii) When assessing what is or is not misconduct, the test should be what is the accepted standard of tolerance in contemporary Canadian society and not what is within the community standards of the area where the teacher is employed.

(b) **Definition of the Word "Misconduct"**

The word misconduct is not defined in the School Act. The Canadian Law Dictionary gives it this meaning:

"Any transgression of some established and definite rule of action, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour."

In the law of master and servant there is no fixed rule of law defining the degree of misconduct which will justify dismissal. The particular act justifying dismissal must depend upon the character of the act itself, upon the duties of the workmen and upon the nature of the possible consequences of the act. The conduct complained of must be inconsistent with the fulfillment of the express or implied conditions of service."

According to the Shorter Oxford English Dictionary it means:

"1. Bad management; mismanagement. Often quasi malfeasance. 2. Improper conduct often in the sense of adultery."

Finally, Black's Law Dictionary, 5th Edition defines misconduct as:

"A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness."

(c) **Analysis of the Evidence**

In proving its case before the Board of Reference, the School Board called a number of witnesses to testify. The first was the Superintendent of Schools of the appellant District, the second the Superintendent of Schools for

School District #45, West Vancouver, the third the Superintendent of Schools for School District #41, Burnaby, the fourth the Superintendent of Schools for Vancouver, the fifth a parent of a child who attended school at the same school where Mrs. Shewan taught and last, another parent whose five children attend or will be attending school in School District #34.

All four School Superintendents gave evidence about the duties and responsibilities of a teacher and the fact the teacher sets an example for the students in their classroom and how they should behave outside of school. They also expressed an opinion that the photography incident amounted to misconduct on the part of the Respondents. One parent had not seen the picture in question but she stated it was disgusting and discipline should have followed. The other parent described Gallery magazine as a kind of cheap "skin" magazine.

Approximately eight witnesses testified on behalf of the Respondents. A parent of a child in a class taught by Mr. Shewan said she had a high opinion of Mr. and Mrs. Shewan and their private life was their own. Another parent was not offended by the picture. An officer representing the distributor of the magazine said the February 1985 edition was approved by a non-statutory Advisory Board that was set up to monitor these kinds of publications. A witness who described herself as a sociologist and who does research in the field of pornography said the particular edition was not objectionable. Mr. Shewan was described by a former student as very helpful to students outside the normal school hours. He stated the picture did not offend him.

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4 One gentleman testifying for the Respondents said he was an expert
5 in the professional conduct of teachers. He is a professor at Simon Fraser
6 University. In his opinion, the incident did not involve any bad behaviour nor was
7 there anything bad about sending a nude photograph of one's wife to a magazine.
8 The principal of a local junior secondary school spoke favourably about the
9 competence of Mrs. Shewan as a teacher but in his opinion it was not wise for
10 her to put her picture in the magazine. Finally, an expert in the theory and
11 development of public education and moral theory described the event as a
12 foolish indiscretion and not misconduct.

13
14 Besides this oral testimony, a number of documents were filed as
15 exhibits at the hearing before the Board of Reference. They included
16 testimonials to the character of the Respondents and written reports of experts
17 who were later called to give evidence.

18
19 In summarizing this evidence I am not intending to describe verbatim
20 what was said by these witnesses over the 6 and 1/2 days of the hearing. Nor do
21 I know what testimony the majority of the Board of Reference accepted and
22 what exactly it rejected. The purpose of the exercise is to give some general
23 idea of what the majority heard so as to put their decision in context.

24
25 **(d) Error in the Majority Award**

26
27 Previously I mentioned the majority held that the real test in this
28 instance was to determine whether or not the conduct of the Respondents was
29 within the standards of what contemporary Canadian society would tolerate. To
30

assist them in reaching their decision they relied upon the judgment of the Supreme Court of Canada in R. v. Towne Cinema Theatres Ltd. [1985] 1 S.C.R. 494. That was a case involving an alleged obscene motion picture. It arose out of a charge under s. 159 of the Criminal Code which defines obscenity in part as follows:

"(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."

The Supreme Court of Canada held at p. 507 that a "breach of community standards" is simply one measure of undueness under s. 159(8).

It then went on to accept the proposition that "standards of tolerance" is not synonymous with "moral standards of the community" because the moral standards of the community involve no more than a consensus of what is right and what is wrong. At page 507:

"A similar point was made by Weatherston J.A., delivering the judgment of the Ontario Court of Appeal in R. v. Penthouse International Ltd. (1979), 46 C.C.C. (2d) 111 (leave to appeal refused, [1979] 1 S.C.R. xi) at pp. 114-15:

'It is neither helpful nor accurate to say that the standard of tolerance is synonymous with the moral standards of the community . . .the words 'moral standards of the community' means no more than a consensus of what is right and what is wrong. . .The question, in any event, is not whether the content of the publication goes beyond what the contemporary Canadian community thinks is right, but rather whether it goes beyond what the contemporary Canadian community is prepared to tolerate.' "

2
3
4 In my view, the issue in the case before me involves the "moral
5 standards of the community" where the respondents taught and lived and not the
6 Canadian standards of tolerance test applied to obscenity cases. I say this partly
7 because the moral conduct of a teacher amounting to misconduct may have
8 nothing to do with obscenity as defined under the Criminal Code. Lying by a
9 teacher is an example. A lie amounts to a breach of morality and may be
10 misconduct, but it is not obscene. Hence, using the "tolerance" test which was
11 designed for obscenity cases is a poor way of testing "moral conduct".
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13
14 It is coincidental in these proceedings that the nude picture may be
15 considered obscene by some. But that does not mean the Board of Reference
16 should apply the test of determining what is or is not obscene to the real issue as
17 to whether or not there was misconduct.
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19 From this discussion it follows that the majority of the Board of
20 Reference erred in law when they adopted the standards of tolerance test in
21 Towne Cinema Centres Ltd. as a basis for allowing the appeal. They also gave
22 undue weight to the expert evidence when they had before them the material
23 itself to look at and rule upon.
24

25 Nonetheless, I do not believe the ruling should be upset for that
26 reason alone. The decision may still be the right one if there was evidence they
27 heard to support the conclusion that the behaviour of the Respondents was not
28 misconduct because it did not offend "the moral standards of the community".
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(e) **Admissibility of Lay Opinion**

A great deal of opinion evidence was heard called from lay witnesses and experts as to whether or not the incident amounted to misconduct on the part of the Respondents. It seems reasonably clear that opinion evidence by a lay witness as to what is misconduct would not be admissible in a court of law if that issue were under investigation: Sherrard v. Jacob [1965] N. I. 151 at 156:

"A witness, for example, cannot be allowed to say that a defendant was negligent or that the respondent in a divorce suit was guilty of the matrimonial offence of cruelty, for while these are issues of fact, they necessitate the application of standards determined by law."

It was put another way by Goddard L.J. in Hollington v. F. Hewthorn & Co. Ltd. et al [1943] 1 K.B. 587 at 595 (C.A.):

"It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express an opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but in truth, it is because his opinion is not relevant."

Although evidence of this nature must be excluded by a court of law, it does not always follow that it cannot be admitted by an administrative tribunal such as the Board of Reference: Reid and David, Administrative Law and Practice, 2nd Edition at page 74:

"There is no single code which, apart from statute, governs the question whether the court rules (of evidence) do or do not apply."

And at page 75:

"The mere violation of an evidential rule may be nothing as such. It is not the error of form but the error of substance that counts."

It is not necessarily an actionable error in law to admit irrelevant evidence at a hearing before administrative tribunal which is exercising judicial or quasi-judicial functions unless a statute says otherwise. The touchstone is whether the majority of the Board of Reference allowed themselves to be influenced in some measure by improperly admitted evidence: Dallinga v. Council of City of Calgary [1976] 1 W.W.R. 319 at 320 (Alta. C.A.).

Even if the lay opinions were improperly admitted, there does not appear to be any indication in the majority decision to show they were wrongly influenced by this testimony.

(f) **Admissibility and Weight of Expert Evidence**

Expert evidence on misconduct also creates a vexing question just as it does in cases involving obscenity: Towne Cinema Theatres Ltd. at page 512:

"The issue of who must place evidence of what before the trier of fact in obscenity cases is a vexing and recurring problem. Under the Hicklin rule expert evidence was in general held to be irrelevant."

And at page 514:

"Expert evidence is always expensive, sometimes simply not available and frequently unreliable. The American experience - based, to be sure on a somewhat different

test for obscenity - has been summarized in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) at p. 56, Note 6. Obscenity, it is said, 'is not a subject that lends itself to the traditional use of expert testimony . . . indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony'. United States v. Various Articles of Obscene Merchandise, 709 F. 2d 132 (2d Cir. 1983) at p. 135, a recently reported American obscenity decision, confirms that although the government bears the burden of providing each element of obscenity (including a breach of community standards) to the satisfaction of the trier of fact, expert evidence of community standards is not constitutionally required, and that absent (or even in the face of) such evidence, the impugned materials may 'speak for themselves' so as to ground a conviction for obscenity.

This is essentially the situation that obtains in Canada..."

(underlining mine)

Consequently, expert evidence in obscenity cases is admissible on the issue of undueness but must be weighed by the court even when it is all one way and stands uncontradicted: Towne Cinema Theatres Ltd. at p. 515. If the obscene material itself is introduced into evidence, then expert evidence is not required: Towne Cinema Theatres Ltd. at page 515:

"I consider as accurate the following statement of evidentiary requirements enunciated in the recent decision of Borins J. in R. v. Doug Rankine Co. (supra), at pp. 171-72:

"It is well established that if the material itself is introduced into evidence, expert evidence as to obscenity or community standards is not required. Indeed, even if it is presented, the trier of fact is not bound to accept it. There is no necessity for the judge or jury to rely on evidence introduced in court as the basis for identifying community standards. Therefore, the trier of fact may determine for himself or herself (or themselves, in cases tried by a jury) the content of the community standard which is to be applied in determining whether the material in issue exceeds that standard. It is an objective

test which applies. The test is not based on the level of tolerance of the judge or the jury. It is what the judge or jury believe the national level of tolerance to be."

(underlining mine)

While the test for obscenity is different from the test for misconduct, nonetheless it seems to me the rules as to the admissibility and weight given to expert evidence in obscenity cases is helpful in examining the weight and admissibility of expert evidence when determining the misconduct of a teacher. In effect, the cases indicate opinions of experts on the issue of misconduct of a teacher have little probative value and are more or less irrelevant when the facts themselves are before the tribunal. Besides, hearing expert evidence on what amounts to misconduct is much like hearing expert evidence on whether a person is honest or not. Misconduct like honesty is tested mostly by other objective testimony which uses fact and not opinion evidence to arrive at the ultimate answer.

There is no factual issue between the parties as to whose picture it was or whether it was published in Gallery Magazine. That is admitted. The real issue is whether the conduct of the respondents offends the moral standards of the community and amounts to misconduct. Since the photograph and magazine were before the Board of Reference, I do not think there was any need to hear expert evidence as to whether the incident amounted to misconduct. To determine the answer the Board was required to hear objective evidence as opposed to opinions.

3. Determining the Moral Standards of the Community By Objective Testimony

Case law seems to indicate a judge or tribunal should not decide the moral propriety of a particular act by using his own personal scale of values. Instead, he should try and seek out other kinds of evidence which leads him to the correct answer. Towne Centre Cinema Theatres Ltd. v. The Queen (1985) 18 C.C.C. (3d) 193 at p. 207:

"The appellant argues, as I have indicated, that the trial judge applied a subjective and local standard rather than a national objective test. In R. v. Brodie (1962), 132 C.C.C. 161, 32 D.L.R. (2d) 507, [1962] S.C.R. 681, Judson J. makes it clear that the trier of fact is not supposed simply to apply his own subjective standard but rather to assess the community standard."

Breaches of the Criminal Code or School regulations by a teacher are examples of objective facts indicating improper behaviour. By themselves, they may be sufficient to reach a finding of misconduct. But other types of abnormal behaviour are not so easy to assess. In certain situations, they may appear to be misconduct to the presiding tribunal whereas to the outside world they may not. The opposite may also be true.

In this instance, the the Board of Reference had the right to hear evidence about what a teacher does from day to day and his or her position in the community at large. In this way it could assess the conduct of the average teacher. Then it could examine the alleged act of misconduct. From this evidence it was in a position to decide if there was misconduct because it could compare the conduct of the average teacher as shown by the evidence with the evidence presented to show an act of misconduct on the part of the teacher who

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5 was charged. It might not be misconduct for a person in some other trade or
6 calling but the same act committed by a teacher might indeed amount to
7 misconduct. All of that was for the Board of Reference to decide and not for a
8 witness. While it was an issue of fact as to whether there was misconduct, the
9 question the Board had to answer in the end was whether those facts amounted
10 to misconduct in law.

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13 Did the respondents meet the moral standard of the community by
14 the publication of the nude picture in Gallery Magazine and if not, did that have
15 any effect on their ability to teach. One way of determining the point is to
16 look at the conduct of other teachers. If a good number of teachers in or about
17 Abbotsford are publishing their nude photographs in a magazine such as the one
18 in question, then the conduct of the respondents may be within community
19 standards. If no other teachers are doing this, then it may be misconduct.
20 Evidence of this nature was not heard by the Board of Reference but I believe I
21 am entitled to draw an inference from the proven facts as to whether a
22 substantial number of teachers in the Abbotsford area do indeed publish their
23 nude pictures in men's magazines. It seems clear they do not.

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26 This is not a conclusive test because the key ingredient is whether
27 the act of misconduct affects the teacher in his or her educational capacity. If
28 it does not, then it is not an offence under the School Act.

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4. Determining Community Standards by Examining Similar Instances Where a Teacher was Found Guilty of Misconduct

In the opinion of the Board of Reference the conduct of a teacher outside of work does not have to comply with "strictest behaviour in the community". That opinion seems correct but in passing I should say that neither is the conduct necessarily proper if it satisfies the lowest standard of behaviour in the community. To objectively determine what is the community standard is difficult. I think some help can come from other cases where tribunals have adjudicated upon the conduct of public sector officials including teachers. Here are a few examples:

1. Fireman: The City of Kamloops v. Arthur Newman, 25 October, 1977. Arbitration Award.

This was a grievance arbitration resulting from the motion of the Grievor from the rank of Assistant Chief to that of Captain in the Kamloops Fire Department. It rose out of his unsatisfactory conduct in fighting a fire which occurred on the Trans Canada Highway and involved a multi vehicle collision. At page 22 of the award, the majority said this about the position of fireman in the community:

"We are mindful that the Fire Department of a Municipality such as Kamloops has a high public profile. It performs many of its duties under the scrutiny of public observation and relies on public support for many of its programs. As one example, in a fire prevention program public acceptance and support is essential to its success. Hence, in evaluating the suitability of the discipline we are concerned not only with the Grievor's ability and conduct as demonstrated in the performance of his duties but also with the effect that level of performance might be expected to have on the trust and confidence of the public in the Fire Department. (Air Canada & I.A.M. (1974) 5 L.A.C.). In the present instance the events of May 8, 1977 were the subject of adverse public comment when the handling of the situation was described over the radio in Kamloops as 'a comedy of errors'."

(underlining mine)

2. Nurse: Re Oshawa General Hospital v. Ontario Nurses' Association

(1981) 30 L.A.C. (2d) 5.

A nurse was arrested when police found marijuana in her residence which was reported to have a street value of \$15,000.00. She also had some marijuana plants which were 8 to 10 feet tall. She was suspended by the hospital pending her trial. Her grievance against the suspension was dismissed. In the course of the decision, the Board said this about the position in society of a nurse at page 9:

"This board is satisfied that if a registered nurse is convicted of active illegal marketing of a narcotic such as marijuana this could present a public hospital employing that nurse with both a work place and community problem sufficient to support the termination of the nurse's employment. Nurses are highly trained professionals. Because of this training they assume an important and strategic role in a hospital. They, in effect, represent such institutions to the community and constitute the interface between physicians and patients. Patients must have confidence in the judgments made by the nursing profession and can often become quite dependent on individual nurses during their stay in the hospital. The trust and confidence reposed in the nursing profession is reflected in its code of ethics and the fact that the profession is regulated to some degree by statute. Indeed, these characteristics are hallmarks of a profession."

(underlining mine)

3. Bus Driver: Re Corporation of the City of Calgary and Amalgamated Transit Union, Local 583 (1981) 4 L.A.C. (3d) 50.

A bus driver plead guilty to the offence of common assault. He assaulted a baby sitter at his home. As a result of the conviction he was discharged. In allowing the grievance and imposing a period of suspension in lieu of discharge, the Board commented upon the position of a bus driver in the community at page 60:

"We are of the opinion that the nature of the grievor's offence and his conviction for common assault are to be considered work-related in the present case. The city transit service is a highly visible public service which carries many female passengers both adult and juvenile. Although there was no evidence of publicity surrounding the incident that circumstance of chance should surely not be the determining factor. The test in our opinion should be whether the employee's conduct, judged by reasonable standards, would be considered by the public who use the Transit System as adversely affecting the reputation of the system. In other words, 'Did the employee do anything likely to be prejudicial to the reputation of the employer?': Re Huron Steel Products Co. case, supra. It is our opinion that the answer to that question must be in the affirmative and that, given the nature of this offence, the city would be open to censure from the public if it stood by and took no disciplinary action against its employee."

(underlining mine)

4. Air Canada Employee: Re Air Canada and International Association of Machinists, Lodge 148, (1973) 5 L.A.C. (2d) 7.

Air Canada dismissed one of its employees when he was found guilty of possession of marijuana. He grieved the firing but it was upheld. At page 9 a single arbitrator commented upon this off-job misconduct in the following words:

"Air Canada, to the contrary, is in a highly, publicly visible industry. It is in the business of serving the air transport needs of the public. Its employees for a substantial part, including the grievor, are directly responsible for the safety of the air travelling public and for the security of their personal valuables. The employees must have the trust and confidence not only of the company but of the travelling public, its customers.

The 'off-job' misconduct of an employee in one industry may not occasion harm to his employer's reputation, while the same misconduct in another industry may be or be likely to be prejudicial to the employer."

(underlining mine)

5. Teacher: Re Etobicoke Board of Education v. Ontario Secondary School Teachers' Federation, District 12, (1982) 2 L.A.C. (3d) 265.

An Ontario teacher was convicted of conspiracy to possess stolen goods. He was discharged and grieved the firing. It was upheld. The three member Board discussed the responsibilities of teachers in these words at page 271:

"The education of children to respect the law and the listed virtues, however they may be overstated, is central to what school boards do and hire teachers to do. It is fundamental to the educational process, as we see it, that teachers are seen not only to teach students, but to practise, within reasonable limits, that which they teach. The grievor has been described as someone who exercises, by force of his personality, considerable influence over his students. That influence flows at least partly from the special relationship created by his employment. It is vitally important that the result of that relationship and influence not be to suggest to students that a respected and influential teacher thinks participation in crime is excusable."

(underlining mine)

6. Teacher: The Board of School Trustees of School District No. 60, Peace River North and William R. Stockman, 25 January, 1974.

A teacher continued his association with a girl contrary to the wishes of the School Board. The details of the association are not set out in the ruling. As a result of his actions, he was suspended. He grieved the suspension which was upheld by the majority. In its award the majority commented upon what is or is not misconduct at page 2:

"Counsel for the School Board also submitted that it is misconduct if a teacher's conduct was likely to bring his employer into disrepute or if he does anything incompatible with the due or faithful discharge of his duty or if he refuses to obey a lawful direction of his employer.

In the opinion of the majority of the Board of Reference, Mr. Stockman's continuing association with the girl justified the School Board in concluding that it would not be fulfilling its responsibilities to the community and particularly to parents of the School District's school children, if it did not take steps to terminate the association. However, the evidence is clear that although Mr. Stockman was prepared to make certain concessions with regard to his relationship with the girl, such as limiting public appearances, he was not prepared to terminate the relationship.

In the opinion of the majority of the Board of Reference, Mr. Stockman's decision to continue the association with the girl was misconduct within the meaning of the Public Schools Act in that the continued association would likely bring the School Board into disrepute in the community and amounted to a refusal to obey a lawful direction by the School Board."

(underlining mine)

7. Teacher: Trustee School District No. 60 (Peace River North) v. Amy Olson, 13 June, 1983.

Mrs. Olson was suspended from her position as teacher and then later dismissed. She grieved the discharge. Evidence led before the Board of Reference indicated she knew stolen property was being kept in her house but turned a blind eye to its existence. She also condoned the use of hash and marijuana by others while they were guests in her house. The grievance was dismissed. At page 14 of the award, the Board of Reference commented upon the position of a school teacher in these words:

"Taylor is a small community. Mrs. Olson agreed that word of improprieties travels quickly. The sort of conduct which Mrs. Olson has engaged in or condoned in her home is a failure of her duty to her employer, to her broader constituency, the community and to her profession. It is likely to detract from the esteem for education in the community. It is abusive of the trust that reposed in her which Mrs. Olson acknowledged in her evidence. As such this conduct not only undermines her ability to do her job in this community, it also erodes the ability of the schools to deliver the standard of education that the community is entitled to expect. Not the least of this was her failure to meet the professional standards of her own Federation as set out in its Member's Guide. We have no hesitation in concluding that this conduct is misconduct deserving of discipline."

(underlining mine)

8. Teacher: The Board of School Trustees of School District No. 39 (Vancouver) v. Van Bryce, 18 August, 1979.

A teacher was suspended from misconduct and subsequently dismissed. He plead guilty to a charge of gross indecency with a 17 year old boy. The dismissal was upheld. At page 5 of the ruling the Board said the following with respect to the position of a teacher in the community:

". . .the role of the teacher is something more than that of a skilled technician in the classroom - that it requires, as an essential part of the learning process, that the teacher be a leader and a model earning the respect and inspiring emulation on the part of those in his charge and with whom he must deal. Mr. Lafavor testified that the necessary element of trust and confidence which the administration must have in the teaching staff has, in the case of the Appellant, been impaired by reason of his involvement in this offence. In Dr. Lupini's view, the Appellant's involvement in such an incident could weaken public confidence in the school system generally and has impaired his usefulness to the school and to his employer. With these views, this Board of Reference is in complete accord."

(underlining mine)

What do these decisions tell us? They say a teacher is an important member of the community who leads by example. He or she not only owe a duty of good behaviour to the School Board as the employer but also to the local community at large and to the teaching profession. An appropriate standard of moral conduct or behaviour must be maintained both inside and outside the classroom. The nature of that standard will of course vary from case to case. Moral standards are those of the community where the teacher is employed and lives not those of some other city or municipality. In most instances there will be little difference, but what may be acceptable in an urban setting may occasionally be misconduct in a rural community and visa versa. For example, a small religious community might find it unacceptable for a female teacher to live with a man out of wedlock or a male teacher to live with a woman who is not his wife. On the other hand, these kinds of relationships may be tolerated in a urban setting where the two people are lost in the anonymity of the crowd because they live far away from the school or because the values of the city are different from the values of the country.

Initially, I should not find whether there is misconduct in these kinds of situations simply by looking at the act complained of and then expressing my personal opinion whether it offends the School Act. Instead, I must see what other objective non-opinion evidence exists to help categorize the nature of the conduct. But at the end of the day, I am required to state my opinion. The difference is that my opinion is based upon outside evidence and not just a personal reaction to the allegations of misconduct.

There was an act of misconduct in this case since the incident amounts to abnormal behaviour which reflects unfavourably on the respondents. They are supposed to be examples to the students. Their actions lower the esteem in which they were held by the community including the students, because they set a standard that the community found unsuitable. All of this amounts to misconduct. The appeal is therefore allowed and I now turn to the issue of penalty.

PENALTY

Was the penalty of 6 weeks suspension as determined by the School Board appropriate in the circumstances?

When the matter first came before the School Board, it set a penalty of 6 weeks suspension without pay for each of the respondents. At the hearing before the Board of Reference the minority report of Mr. Marvin V. Storrow, Q.C. described the financial result of this penalty as an after tax salary loss of \$7,000.00 divided between the two respondents. In the circumstances he reduced the suspension period from 6 weeks to 10 days. The question which now must be answered is what is the appropriate period of suspension given the facts set out above?

One way of deciding the fairness of the suspension period is to examine awards where a teacher has been penalized for misconduct and compare the facts of those instances with what the respondents did here. In that way the final answer should tend to be more consistent. Following are decisions which

were cited to me in this area of the law. The names in brackets after the name of case are those of the Chairman of the particular Board of Reference.

1. The Board of School Trustees of School District No. 33 (Chilliwack) v. Hall, September 16, 1981 (Saunders) - A female teacher who had 20 years experience was absent from her duties as an Elementary School teacher when she went on a holiday for 7 days. Penalty - 2 months suspension by the School Board. Upheld by the Board of Reference.

2. The Board of School Trustees of School District No. 44 (North Vancouver) v. Machado-Holsti, August 20, 1981 (Gifford) - A female teacher with approximately 12 years experience at a Senior Secondary School was found responsible for condoning and participating in a breach of school regulations regarding the use of alcohol at a school-supervised function; misleading the School Principal with respect to the circumstances which took place; and encouraging and setting an example for students of unsatisfactory qualities of personal behaviour. Penalty - dismissal by the School Board. Reduced to a suspension of 4 months and 19 days by the Board of Reference.

3. The Board of School Trustees of School District No. 61 (Greater Victoria) v. Smith, October 6, 1983 (Lightbody) - A male teacher at a Senior Secondary School with 10 years experience admitted to a sexual relationship with a 17 year old female student. She was not a student in any of his classes. Penalty - dismissal by the School Board. Reduced to 6 months suspension by the Board of Reference.

4. The Board of School Trustees of School District No. 19 (Revelstoke) v. Malpass, August 28, 1979 (Cumming) - A female teacher with an unknown number of years of experience who was teaching at a Secondary School was involved in a scuffle of a sexual nature with a female student. Penalty - 1 month plus 13 days suspension by the School Board. Upheld by the Board of Reference.

5. The Board of School Trustess of School District No. 37 (Delta) v. Hutton, July 11, 1978 (Cumming) - A male teacher with an unknown number of years of experience struck a male pupil on the right cheek while he was teaching in a Junior Secondary School. Penalty - dismissal by the School Board. Upheld by the Board of Reference.

6. The Board of School Trustees of School Distict No. 47 (Powell River) v. Basi, March 19, 1980 (Gifford) - A male teacher with an unknown number of years of experience slapped a student while teaching at a Junior Secondary School. He was previously found guilty of a similar offence involving a female student on 7 May, 1979. Penalty - dismissal by the School Board. Upheld by the Board of Reference.

7. The Board of School Trustees of School District No. 47 (Powell River) v. Rouane, May 7, 1979 (Cumming) - A female teacher at a Junior Secondary School with about two years experience in the local School District was consistently late in arriving at school in the morning and afternoon. Penalty - dismissal by the School Board. Upheld by the Board of Reference.

How does the 6 weeks suspension set by the School Board and the alternative 10 day suspension recommended by the Chairman of the Board of Reference fit into this scheme? That is not a easy question to answer. Drawing a precise comparison between this act of misconduct and those other cases is impossible. As a trial judge, I am well aware of the difficult position of the School Board when it is the first one who must select the appropriate penalty. It is often easy to criticize that decision and tempting to make a change.

Occasionally, there is a tendency to think that because of the effluxion of time a more rational and dispassionate assessment can be made as to the correct penalty. It is then perceived to be free of any taint of the public clamor that may have influenced the original judgment. But justice is an intangible substance in many instances. Most of the time no one can really tell whether the penalty fixed by the first tribunal is less correct than the one which reduces it. Will the reduction deter the parties or others who might be inclined to attempt the same thing or will it simply encourage some to commit the same act because the penalty is looked upon as being insignificant?

There is a general rule that I should not "tinker" with the 6 weeks suspension by reducing it by a few days, but if it is excessive in the normal run of things, then I should not hesitate to set a penalty that is more reflective of the incident and of the parties involved. I do not know what kinds of similar cases were referred to the School Board when it was called upon to fix the penalty. Although it is important to stand behind any reasonable imposition of a penalty as determined by a School Board, it is equally important that the offence or misconduct reflect a penalty consistent with other cases, so far as that is possible.

At the same time I must look at the past good conduct of the respondents. They were highly regarded by their peers, their supervisors and their students. No doubt this was an abnormal incident. It came about because of some marital and emotional difficulties the respondents were experiencing at that particular time. Mr. Shewan looked upon the publication as a way of restoring some lost confidence that was affecting his wife. Mrs. Shewan said she did it to please her husband. Neither of them considered it a clever or sly thing to do or a good way to make money.

In these circumstances, I think the appropriate penalty is a one month suspension. This will mean a total past loss of income after taxes between both of them, of about \$4,600.00.

SUMMARY

- (1) The Board of Reference fell into error when
 - (a) It applied the obscenity test of the standard of tolerance of contemporary Canadian society when it should have applied the test of the moral standard of the community, namely the community in the Abbotsford area.
 - (b) It admitted expert opinion on misconduct and allowed itself to be improperly influenced by the experts called on behalf of the respondents. The proper way to test whether the conduct complained of amounted to misconduct was to hear objective

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4 evidence about the activities of other teachers in the
5 community and to compare similar situations where teachers or
6 other public sector employees were disciplined for wrongful
7 behaviour.

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9 (c) It decided the word "misconduct" as set out in section 29 of the
10 School Act has little application to behaviour of teachers
11 outside of their normal school duties.

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13 (2) Teachers are amongst the leaders in the community. They are
14 supposed to set an example for their students to follow. This includes their
15 behaviour both on and off the job.

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17 (3) A fair inference to be drawn from the testimony heard by the Board
18 of Reference is to the effect that other teachers in the Abbotsford area do not
19 send their nude or semi-nude pictures to men's magazines for publication.
20 Consequently, the conduct of the respondents was abnormal.

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22 (4) A teacher owes a duty of good behaviour to the School Board as his or
23 her employer, to the local community and to the teaching profession. Looking at
24 the facts of these cases and the abnormal behaviour of the respondents as
25 described by the evidence, one can only conclude that in this instance their
26 behaviour amounted to misconduct.

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28 (5) The penalty of 6 weeks suspension was excessive given the past
29 favourable history of the respondents and looking at cases where penalties have
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4 been imposed upon teachers for improper conduct. A more reasonable penalty in
5 keeping with these awards is 1 month's suspension.

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8 **JUDGMENT**

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10 The appeal is allowed and a penalty of 1 month's suspension is
1 imposed in place of the 6 weeks' suspension set by the School Board.

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4 Although the Appellant did not succeed in restoring the penalty of 6
5 weeks' suspension, it won on the major issue of misconduct and obtained a higher
6 penalty than the one suggested by the minority ruling. Therefore, it is entitled
7 to its costs.
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6 Vancouver, British Columbia
7 30 January, 1986
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THE END