

UNLOCKING THE SCHOOL DOOR: IMMIGRATION STATUS AND THE RIGHT TO LEARN

IT'S A CONCEPT THAT EVEN A CHILD CAN UNDERSTAND. The concept has, however, sometimes proved difficult for adults to fully grasp, especially the adults who administer our education system. What is this concept? It is that every child has a right to go to school.

International law – specifically the United Nations *Convention on the Rights of the Child* – makes it clear that all children have a right to attend school. Ontario's *Education Act*, like that of other provinces, requires children between age six and sixteen to be in school, with penalties for parents who don't play their part. And for the last decade, Ontario's education act has prohibited school boards from denying the right of access to children whose parents have no immigration status.

Despite the law, Ontario has a spotty record when it comes to respecting a child's right to education – a record that is likely shared by other provinces, although information has been difficult to obtain. Fortunately, Ontario has recently taken big steps forward to make sure no child is left standing at the door when the school bell rings. In fact, Ontario has, in many respects, become a positive case

IF PARENTS IN THESE CASES HAVE ANYTHING IN COMMON, IT IS THAT THEIR LACK OF STATUS – AND POOR LANGUAGE SKILLS – MAKES THEM ANYTHING BUT EAGER TO BE IN THE LIMELIGHT, EVEN IF THE LAW IS ON THEIR SIDE IN TERMS OF THEIR CHILDREN'S EDUCATION RIGHTS.

study for advocates in other provinces struggling against obstinate school officials who take it on themselves to decide who gets in, and who does not.

Situations where school or school board officials have denied access largely fall into two categories. First are children whose parents are in Canada without lawful immigration status, or 'illegally'. Second are children whose parents' immigration status is that of visitors – or, more precisely, 'temporary residents' – even when their applications to Canada's immigration department for permanent residence are likely to be accepted.

The clear wording of Ontario's *Education Act* ought to have preempted any question about the eligibility of children in the first category. Section 49.1, which amended the act over a decade ago, says that a person "shall not be refused admission because the person or the person's parent or guardian is unlawfully in Canada." End of story, one might think. In practice some school officials have been surprisingly slow to incorporate this provision into their conduct. Ironically, some of the same officials justify their own disobedience of the law on the basis that they disapprove of the conduct of parents who may be disobeying federal (immigration) laws.

In some cases, education officials have taken the absurd position that parents must actually prove they are in Canada 'unlawfully' with the presentation of documents! In other cases, proof of application to immigration authorities has been demanded. In an Oakville case, a school official told parents that their children would be accepted only after the parents called a specified telephone number. The



EN BREF Le droit international – plus précisément la Convention relative aux droits de l'enfant des Nations Unies – est clair : tous les enfants détiennent le droit de fréquenter l'école. Les lois provinciales du Canada sur l'éducation sont tout aussi claires. Pourtant, les enfants d'immigrants illégaux sont encore confrontés à des obstacles. La plupart des échappatoires susceptibles d'empêcher la fréquentation scolaire de ces enfants ont été éliminées, mais certains autres écueils nuisent à leur inscription scolaire. Le seul fait de se faire poser des questions peut terrifier les parents dont le statut d'immigration est ambigu. Lorsque les documents d'inscription comprennent de telles questions, certains employés trop zélés continuent de croire que l'absence d'un statut d'immigrant annule le droit de fréquenter l'école. Des questions de ce type favorisent l'intrusion et la violation du milieu scolaire en tant que milieu protégé d'apprentissage pour tous les enfants.

the real issue is about the kids and the fact that they should be in school – a notion that is accepted and understood by the public at large.

Education officials sometimes explain their eagerness to enforce federal immigration laws by a fear that they will be prosecuted for 'aiding and abetting' individuals who violate immigration laws. Yet there has never been a case where a school official has been prosecuted for helping an eight-year old, or any other child for that matter, get into school to learn to read and write.

After years of bringing this problem to the attention of Ontario education ministers – and meeting with virtual indifference – the situation changed for the better when a new provincial government came to office in 2003. The following year, Ontario's new education minister, Gerard Kennedy, intervened on behalf of the hundreds, perhaps thousands, of children who were illegally being kept out of school.

In December 2004, Kennedy issued a formal memorandum to school boards reminding them of their obligations under s. 49.1. He also made it clear that officials could not demand documents such as work permits and immigration applications, or health documents that were not required of other children. (Schools are precisely the places where children get the type of preventive health care that protects the community at large.)

In the meantime, a provision in the new federal immigration act removed another obstacle by making it clear that children who fell under s. 49.1 were not required to apply for study permits, documents that education officials previously insisted on even while knowing that federal officials would not issue them to children in this circumstance. Under the newly passed *Immigration and Refugee Protection Act*, only temporary residents, such as foreign visa students or tourists, need to obtain study permits. A previous federal immigration minister, Elinor Caplan, had in any case made it clear that study authorizations were not intended to be a barrier to admission for children at the primary or secondary level, as provincial officials had come to use them.

The second group of children being denied access includes 'temporary residents' (a.k.a. visitors) who intend to stay in Canada. In many cases such visitors have already applied for permanent resident status but are awaiting the immigration department's determination. Often, these delays were keeping children out of school for many months even though the applications were certain to be granted. The end result was that a child would ultimately need expensive remedial programs to catch up to his or her classmates.



number was that of the federal immigration agency. (The children remained out of school for over two years.)

In other cases, officials have insisted on documents that parents are not likely to have, such as social insurance numbers, work permits, and proof of taxpayer status. Such prerequisites subvert the clear wording of the *Education Act*. If parents in these cases have anything in common, it is that their lack of status – and poor language skills – makes them anything but eager to be in the limelight, even if the law is on their side in terms of their children's education rights. Advocates at legal clinics, community centres, and churches can help those who come to them – and advocacy usually succeeds – but there is no help for those who don't know their rights or that advocates are available to help.

The thinking behind s. 49.1 is that no child should be punished for the immigration faults of his or her parents and that no one benefits from keeping children out of school. Our advocacy group (The Education Rights Task Force) has scrupulously avoided getting into public debates about the fairness of Canada's immigration system. We do not avoid this debate because of the lack of good arguments.

For instance, it is argued that people should not jump the immigration queue (although for many people without wealth or specific skills there is no queue) and people who don't pay taxes should not benefit from our education system. (Yet we allow them to do jobs that other Canadians shun; their low wages make items like new houses more affordable; and they do pay sales taxes without benefiting from expensive services like health care.) The reason this debate is not worthwhile in the education context is that

IN FACT IT REMAINS A CHRONIC PREOCCUPATION OF SCHOOL BOARDS THAT THE FAILURE TO ASK IMMIGRATION QUESTIONS WILL LEAD TO ABUSE, DESPITE THE ABUNDANT EVIDENCE THAT THE ASKING OF QUESTIONS HAS INFRINGED THE FUNDAMENTAL RIGHT TO EDUCATION OF MANY CHILDREN.

Under the Ontario *Education Act*, visitors to Canada who are admitted to school must pay fees prescribed by school boards. These fees can be \$10,000 or more per year and effectively bar access to most children.

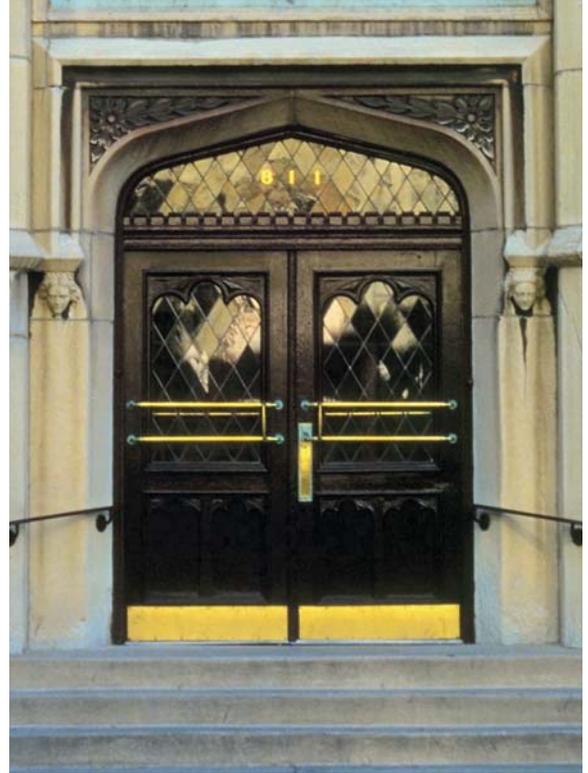
A typical example of such a case might be a parent and child coming to Canada to be united with a spouse who is a Canadian citizen. For example, a Canadian citizen of Ukrainian descent may return to his native country and marry a woman who has a child from a previous marriage. The woman and her child then come to Canada as visitors and apply for permanent resident status. The application will almost certainly be granted, but with delays that may result in the child losing an entire school year.

The first answer of school officials in these cases has been that the children, as visitors, must pay the required fees. School board officials worry that if a Ministry of Education audit will discover that the board has not charged the prescribed fee and withdraw the provincial grant (amounting to about \$7,500 per student) for that child. In practice, with some prodding from advocates, such children were often allowed in through the 'back door' by sympathetic administrators, usually with the admonition to keep quiet about it.

Ontario's education minister again intervened. In this case he proposed an amendment to the *Education Act* so that any child whose parents had *applied* for immigration status or for a work permit would be admitted without being required to pay fees. In May 2005, the amendment passed unanimously in the Legislature.

The only irony of this amendment was that the girl whose case inspired the government action – a nine-year old in Hamilton who had been out of school for two years – did not benefit because her parents could not afford the immigration application fee. (An application for permanent resident status costs \$550 per adult and \$150 per child.) Our recommendation to the government that additional exceptions should be made for cases where economic hardship could be proven as the reason preventing an application was not included in the amendment.

Certain other problems leading to the denial of admission remain – and will likely remain as long as education officials are allowed to ask immigration questions in the admission process. Why? First, because the mere asking of questions can have a chilling effect on parents whose immigration status is ambiguous. Second, because when admission documents include such questions, some overzealous officials will continue to believe that a lack of immigration status can trump the right to attend. And third, as we learned this spring when federal agents entered two Toronto schools in search of children whose parents were in Canada unlawfully, these types of questions simply invite intrusions and the violation of the school



environment as a safe haven for learning for all children.

In one of the recent Toronto cases – which smacked of extortion – Canadian border service agents entered a school and demanded that two children be brought to the principal's office. Their parents were then telephoned and told that the children would be taken into custody if they did not turn themselves in. When the mother arrived she was taken to a detention centre.

This case, however, attracted so much negative public attention that the federal department quickly apologized and claimed that the agents' conduct was not standard practice. Officials at the Toronto District School Board took a rather meek position in the aftermath of the case, advising school principals that they should cooperate with federal agents since those agents are legally entitled to enter schools. Our group acknowledged that federal officials cannot be denied access to schools – an interesting irony – but there is no obligation to cooperate with such officials.

Various community groups seized the moment by demanding the Toronto Board adopt a Don't Ask, Don't Tell policy about immigration status, a limited variation of which had already been passed by the Toronto police. In May 2007, Board trustees unanimously passed such a policy which, although still allowing questions on visitor status, nonetheless constituted a big step forward. The Board would now regularly train school staff about a child's right to attend even when parents lack lawful immigration status, remove status questions from registration documents, and require staff to forward any questions by immigration agents to the Director (who would advise agents that the Board opposes disclosure).

Another odd gap in the right of a child to attend school was revealed by a recent Newmarket case in which a Canadian citizen was denied access to school because her parents were not resident in the jurisdiction of the school board. In fact, her parents lived in Hong Kong but the girl, who was born in Canada, had now returned to Canada to live with her aunt. The Board took the view that the child could only be admitted under the *Education Act* if she paid the requisite school fees because her parent or 'person with lawful custody' did not live in the school jurisdiction – even though the child was a Canadian citizen. The Board argued



that the child's aunt did not have 'lawful custody', meaning, in the Board's view, 'court-ordered' custody. In May, 2005, the court, in *Chou v. Chou*, found that the aunt did indeed have 'lawful custody' by virtue of an agreement between her and the parents. The child therefore had to be admitted.

The relevant wording of the *Education Act* considered in *Chou* does not distinguish between parents who live elsewhere in Ontario or elsewhere in the world. However, in practice boards no longer, for funding purposes, have to worry if the child's parents are outside of their jurisdiction, as long as they are in Ontario. The same exception was not yet being made if the parents lived outside of Ontario or outside of Canada. The original motive for requiring the payment of fees for children from outside a board's area is in fact no longer relevant. In the days when school boards were funded from local property taxes, the rule about fees was intended to compensate local boards (and taxpayers) for educating a child from outside the jurisdiction. Under the last provincial government, however, education funding became a provincial responsibility.

The case of *Chou* has potentially broader implications if it opens the door to exploitation by entrepreneurs looking for ways to bring children to Ontario solely for the purpose of studying for free. A legal agreement between the parents and an Ontario resident with permanent status might be enough to achieve admission. The Ontario government could have preempted the court's decision and the problem simply by directing schools to accept all Canadian citizens. To address this potential abuse, the act could be amended to deal harshly with the entrepreneurs.

In fact it remains a chronic preoccupation of school boards that the failure to ask immigration questions will lead to abuse, despite the abundant evidence that the asking of questions has infringed the fundamental right to education of many children. For example, Toronto area boards maintain that they must ask immigration questions in order to identify students who come to Canada as visa fee-paying students. Certain boards advertise in Asian countries for such students, who collectively pay millions into Board coffers. A sophisticated system ought, however, to be able to identify such students without depriving other children of their right to go to school.

Ontario is moving towards a system where there is a presumption of admission – a development that coincides with a growing respect for the right to go to school. The right to attend has now become far more real than theoretical in Ontario, in part because of the recognition that children ought not to be used as pawns for the enforcement of the federal immigration laws. The biggest gap that remains is to educate education administrators about the law. Fortunately, a better education for such administrators is a task that one might expect our education system to be capable of handling quite well.

ALBERT KOEHL is a founding member, lawyer, and volunteer chair of The Education Rights Task Force (www.educationismyright.ca). The group was established in 1999 to advocate for children being denied their right to go to school. Comments are invited at ertf@sympatico.ca

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