J. PAUL R. HOWARD

THE WAY WE WERE — OR ARE

-It used to be so natural.
It used to be ...
But used-to-bes don't count anymore
They just lay on the floor
Till we sweep them away.
— Barbra Streisand & Neil Diamond, "You Don't Bring Me Flowers"

USED TO BE, I'D KEEP A COLLECTION OF CASES HANDY.

When I first started working in the education law field, about 20 years ago now, representing school boards and their officials, I always kept at the ready a half-dozen or so judicial decisions that expressed an attitude of judicial deference that many judges, including some of the Supreme Court of Canada, often displayed toward the decisions of educators. And so if a case turned on, say, whether a particular pedagogical policy was appropriate or whether an educator had exercised her professional judgment properly, I would readily refer the court to one of these pronouncements. These were what I called my "educator deference" cases.

The thread that ran through my educator deference cases was a recognition by the courts that in some instances they lacked the functional expertise required to resolve the question at issue. These judges had stepped back from the merits of the particular case before them and had considered the larger issues of functional competence and relative expertise. These judges had asked themselves: "who should be deciding this question, the educators or the courts?"

One of my favourite passages, which I valued highly because it was so pithy, came from the majority judgment penned by Mr. Justice LaForest in *The Queen v. Jones*, the decision in which Pastor Jones, who home-schooled his own children and some 20 others in the Western Baptist Academy, was charged with truancy under the compulsory school attendance provisions of the Alberta *School Act*. His defence was that "the requirement that his children attend public school, or even the requirement that he apply for exemption from such attendance as provided by the Act, contravenes his religious beliefs and deprives him of his liberty to educate his children as he pleases contrary to the principles of fundamental justice" as allegedly guaranteed by, respectively, sections 2(a) and 7 of the *Canadian Charter of Rights and Freedoms*.

In upholding the convictions, the majority of the Supreme Court dismissed the pastor's challenge to the legislative provisions that exempt a student from compulsory attendance if a government inspector or superintendent of schools certifies that the student is receiving "efficient instruction at home." Mr. Justice LaForest wrote:

> But it seems normal enough to refer a question of efficient instruction within the meaning of the *School Act* to a school inspector or a Superintendent of Schools who is knowledgeable of the requirements and workings of the educational system under the *School Act*.
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> It is true that some provinces have adopted another method of doing this, by having the issue determined by a court. There are, no doubt, some advantages to the latter approach but there are

EN BREF **Historiquement, les tribunaux canadiens ont manifesté un devoir de réserve face aux décisions des éducateurs – en prenant du recul par rapport au fond d'une cause donnée pour tenir compte des questions plus larges de compétence fonctionnelle et relative. Dans ces causes, les juges ont demandé : « Qui devrait décider de cette question, les éducateurs ou les tribunaux ? » Mais les choses ont changé il y a quelques années. Au cours des années 1990, l'argument qu'il y avait lieu de faire preuve de réserve face au jugement professionnel des éducateurs dans les questions d'éducation a commencé à avoir moins d'emprise, alors que la société canadienne se tournait de plus en plus vers les litiges, que les juges et les avocats invoquaient de plus en plus la *Charte des droits* et qu'un virage des conceptions sociétales a changé notre façon de percevoir les éducateurs. On dénote toutefois certaines indications que le balancier revient. Plusieurs jugements récents semblent annoncer une nouvelle volonté des tribunaux d'accorder plus de poids aux décisions des éducateurs.**

AS THE 1990s PROGRESSED…THE ARGUMENT THAT ONE SHOULD GIVE SOME DEFERENCE TO THE PROFESSIONAL JUDGMENT OF EDUCATORS IN EDUCATION MATTERS – BECAUSE, AFTER ALL, THEY ARE THE EDUCATORS – FOUND SUCH DISFAVOUR… THAT ITS PERSISTENT ADVANCEMENT BECAME SADLY QUIXOTIC.

> disadvantages too. It creates a more cumbersome administrative structure. If the decision maker is more detached, he is also less knowledgeable and sensitive to the needs of the educational system. I do not think such a system can be imposed on the province in the present context. …
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> The province cannot, in my view, be faulted for adopting the philosophy frequently applied in the courts of the United States, namely, that "The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality"; see *State v. Shaver*, 294 N.W. 2d 883 (N.D. S.C. 1980) at p. 900.[1]

Similar sentiments were subsequently expressed by the Saskatchewan Court of Appeal in *Trofimenkoff v. Saskatchewan (Minister of Education)*, where a group of parents challenged the decision of the Minister of Education to close a special school for the deaf on the grounds that the decision to integrate the students into the regular public school system violated their rights to freedom from discrimination on the basis of disability. In dismissing the parents' challenge, the Court of Appeal prefaced its decision with the following remarks:

> We begin by reminding the parties that our function is a narrow legal one. Much has been said both below and here about the varying merits of educational systems and the political process that was involved in making decisions with respect to segregated or integrated education for the deaf. Our function is a narrow legal function, that is to consider the legality, or lack thereof, of the minister's actions. The wisdom of the policy and the substance of it are matters for the minister, who is responsible to the legislature, members of whom are of course ultimately responsible to the electorate.[2]

But that was a number of years ago.

And then things changed.

And as the 1990s progressed I found that I no longer had much need to refer to my educator deference cases – because no one was listening to them anymore. The argument that one should give some deference to the professional judgment of educators in education matters – because, after all, they are the educators – found such disfavour, or just disinterest, with courts and tribunals that its persistent advancement became sadly quixotic. Pretty soon, I just stopped trying.

I don't think one can point to a singular cause for those cases' desuetude. I have no doubt that part of it was a function of the increasing resort by lawyers and litigants to *Charter of Rights* claims, in keeping with what I came to refer to as the "constitutionalization" of Canadian classrooms. Part of it was simply Canadian society's increasingly fervent embrace of litigation, a trend that was often, and somewhat unfairly, blamed on our American neighbours. But I also think a distinct part of the explanation can be attributed to the same fundamental shift in societal thinking that, within one generation, changed the way in which we had come to regard educators. It now seems commonplace to observe that a generation ago, if Johnny got into trouble at school, the principal's call to the parents was almost inevitably followed by an equally stern reaction at home; whereas, today the principal's call home often seems to precipitate the principal being confronted the next morning by the parent advocating on behalf of the now aggrieved Johnny.

To be clear, I certainly do not claim that the decisions of educators should never be challenged or should always be determinative of any given question. Far from it. As a

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lawyer and a citizen, I am deeply committed to the rule of law, and firmly believe that the actions of no public official should be beyond the law's scrutiny.

But at the same time, we have now come to the point where (to borrow just a few real-life examples from my practice) an Asian principal who places a recently-immigrated South Asian kindergarten student in his age-appropriate grade rather than advance him to Grade 1 is reported to the Human Rights Commission for racial discrimination, and the Commission purports to review the appropriateness of the grade placement; where the decisions of special education administrators to deploy educational assistants on the basis of whether a student poses any safety or high-risk medical concerns are routinely challenged by the parents of children who were not assigned an assistant as being contrary to the students' equality rights; where, when an educational assistant assigned to a student is replaced in a job competition by one who is deemed more qualified for the position, the parent runs off to the courts and seeks an injunction stopping the school board from making the replacement. In all of this, one is left to wonder whether the professional judgment of the educator is given any consideration at all.

Recently, however, we have seen a handful of decisions that follow a path of judicial restraint, which was marked by the Supreme Court of Canada in recent cases such as *Auton v. British Columbia (Attorney General)*.[3] In the same vein, we have also recently seen some decisions in the education context that would seem to herald the court's renewed willingness to give appropriate weight to decisions of educators.

One such case, which is worthy of closer examination, is the Ontario Divisional Court's decision last summer in *Stephanie Jackson v. Toronto Catholic District School Board*.[4] At issue was the decision of a school principal, and subsequently the school board, to impose a limited expulsion on a Grade 6 student under the controversial safe schools provisions of the Ontario *Education Act*.

In April 2002, the student, then aged eleven, brought a knife (consisting of a double-edged blade inside a silver pen) to school. At recess, he took the knife into the schoolyard where it was alleged that he threatened one or more fellow students with it. A student-witness reported that the student threatened a girl with the knife, saying he was going to "cut her."

The principal conducted an inquiry of the matter as required by the *Education Act*. Indeed, he conducted a thorough investigation of the incident, which included talking to all the students involved (including those subsequently proposed by the parent), and putting the allegations to the students in order to obtain a response. In addition, the principal spoke with the parent several times and kept her informed of the progress of his inquiry. He reviewed the student's documented history of behavioural problems. He canvassed the mitigating factors set out in the regulations under the *Act* and determined there were no mitigating factors in this case. He took into account the fact that it was common knowledge that the student had brought a knife to school.

Following his inquiry, the school principal imposed a limited expulsion on the student of one year. The student's mother appealed the principal's decision to the Toronto Catholic District School Board pursuant to the *Education Act*. The appeal was heard by a committee of school board trustees, who denied the appeal and upheld the limited expulsion.

The parent then applied to the Ontario Divisional Court for judicial review of the principal's decision to impose a limited expulsion and the school board's decision to dismiss the parent's expulsion appeal. The parent's court application entailed sweeping challenges to seemingly every aspect of the process followed by the principal and school board.

On July 17, 2006, the Divisional Court unanimously dismissed the parent's application for judicial review and upheld the decision of the school board. The Divisional Court began its analysis by determining what "standard of review" should be applied to judicial review of the educators' decision to impose discipline on students under the safe schools provisions of the *Education Act*. The Divisional Court ruled that in reviewing discipline provisions under the *Education Act*, the "patently unreasonable" test should be applied, which is the most stringent standard of review, requiring the most deference to the decisions of educators. The Court held that :

> ...in making its decision, we find the Board to have functioned in an area where its expertise was engaged. ... we find the Board to possess certain specialized knowledge in the area of education which requires a degree of deference. That knowledge persuades us that the Board's expertise in this area is greater than that of the court. The specific issues were the appropriateness of [the school principal's] inquiry and of the suspension [sic] imposed. These are matters that directly relate to the Board's expertise, particularly the matter of penalty.[5]

The Court found that the principal's inquiry was "scrupulously fair, reasoned and appropriate." Accordingly, the Court held that it was appropriate to defer to the decision made by the educators, and the application for judicial review was therefore dismissed.

However, the educators did not escape criticism from the Court. The Divisional Court also dealt with the parent's challenge to the sufficiency of the reasons given by the school board in dismissing the appeal. The board's decision stated little more than that the board was "satisfied that the principal ... considered all relevant factors in arriving at his decision." Although the Court found that the reasons were sufficient in this particular case, the Court commented that "[t]hese reasons fall dangerously close to being inadequate." The Court held that school boards should be made aware of the importance of giving adequate reasons in any of their decisions, and indicated that administrative decision-makers must give reasons that set out their findings of fact and the principal evidence upon which those findings are based. The reasons must address the major

points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

One of the lessons to be learned from the *Jackson* case is that, as long as administrative decision-makers in school boards continue to follow proper procedures and make well informed decisions supported by adequate reasons, the courts will be willing to recognize that significant deference should be paid to such decisions of school boards, as they have both the authority and the expertise to make decisions concerning the rights of students under the *Education Act*.

Clearly, we have not returned to the way we were: educators today cannot, and should not, assume that the courts and administrative agencies will automatically defer to their decisions. However, it is fair to say that the pendulum has begun to swing back, and that the courts are again prepared to acknowledge the relative expertise of educators and to defer to their professional judgment where their decisions follow due process and are based on sound educational principles.

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Notes

1 *The Queen v. Jones*, [1986] 2 S.C.R. 284 at paras. 40-42.
2 *Trofimenkoff v. Saskatchewan (Minister of Education)*, [1991] 6 W.W.R. 97 at para. 4 (Sask. C.A.).
3 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, where the Court found that the province's refusal to fund controversial intensive behavioural therapy for preschool-aged autistic children did not violate the children's rights under ss. 15 (equality) or 7 (right to liberty) of the *Charter of Rights*.
4 *Stephanie Jackson v. Toronto Catholic District School Board*, [2006] O.J. No. 2878, 216 O.A.C. 204 (Div. Ct.), leave to appeal refused (12 February 2007), file no. M34082 (Ont. C.A.). My law firm, Shibley Righton LLP, represented the school principal on the expulsion appeal before the board trustees, and my partner Thomas McRae appeared before the Divisional Court to make oral argument on behalf of the school principal.
5 *Ibid.*, at paras. 29-34.