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**SEXUAL MISCONDUCT OF EDUCATORS: A COMPARISON OF DECISIONS OF
COURTS AND TRIBUNALS IN BRITISH COLUMBIA, NOVA SCOTIA AND
ONTARIO**

by

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**Submitted in partial fulfillment of the requirements
for the degree of Master of Laws**

at

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ABSTRACT

This thesis examines the genesis of society's awareness of the problem of child sexual abuse as well as changes in the legal system to the prosecution of child sexual offence cases and then situates the problem within the educational system in British Columbia, Nova Scotia and Ontario. Thereafter, there is an examination of the panoply of remedies that the legal system provides to victims of sexual misconduct by educators. Conversely, it also analyses whether it is fair that educators who engage in such conduct should be faced with a multiplicity of proceedings before many different institutions. Further, the efficacy of these institutions in each jurisdiction is analyzed. In evaluating the efficacy of the institutions, one factor examined is the impartiality of the decision-makers and whether they treat same and opposite sex abuse cases alike.

Sexual misconduct by educators in Nova Scotia appears to occur at a similar rate to the rate in British Columbia and Ontario, but there are far fewer reported cases in Nova Scotia by all institutions that deal with such allegations. As a result, the focus of the analysis is on cases from British Columbia and Ontario.

The main perpetrators of sexual misconduct are male educators. When the offence is the most serious type of misconduct committed and the educator is criminally charged, the complainants are both male and female. However, when the misconduct is less serious, such as when it is sexual harassment, it appears that most victims are female.

Accused educators are provided with full due process in criminal cases. Although further research is needed, in British Columbia judges do not appear to treat same sex abuse cases impartially. They seem to treat these cases more seriously than opposite sex abuse cases. Additionally, criminal courts in British Columbia, unlike in Ontario, appear to find female complainants in opposite sex abuse cases generally less credible than male educators. Thus, from the perspective of the accused in same sex abuse cases and of female victims in opposite sex abuse cases, the criminal system in Ontario seems to be more efficacious than the system in British Columbia.

Because limitation legislation in each jurisdiction often restricted a victim's access to obtaining compensation for injuries allegedly suffered, the civil system was unfair to victims of sexual misconduct by educators. However, with amendments to the legislation, British Columbia is the jurisdiction which provides sexual assault victims with the greatest access to bringing a civil action against an educator.

Few complaints of sexual harassment are filed against educators with the Human Rights Commissions, but when they are filed the human rights process may be more efficacious than those used by the professional regulatory bodies and school boards. Human Rights Commissions provide the parties with a full hearing before a legally trained decision-maker with both parties equally participating in the process. While the professional regulatory bodies offer the parties a full hearing, many school boards generally do not. Because the major focus of professional regulatory and school board hearings is not on the harm done to the victim, as it is in hearings of the Human Rights Commission, the victim's participation in these hearings is minimized.

TABLE OF ABBREVIATIONS

In this thesis the following abbreviations have been used:

QUICKLAW DATABASES

ADM	- Administrative Law Reports
ARB	- Arbitration Decisions
BCJ	- British Columbia Judgments, global
BCLA	- British Columbia Decisions, Labour Arbitration
BCLB	- British Columbia Labour Decisions
CJ	- Canadian Judgments, global
CRIM	- Criminal Law, global
OLRB	- Ontario Labour Relations Board Decisions
ORP	- Ontario Reports Plus, global
NSJ	- Nova Scotia Judgments

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1.

INTRODUCTION

For years child sexual abuse had been hidden in the private sphere but over the past few decades it has entered the public discourse in a visible fashion¹ with the result that in the mid 1980s it was recognized as a tragedy of national concern.² The public discourse has resulted in an explosion of public and professional commentary about the vulnerable sexual status of young persons³ and the exploitation and abuse of that vulnerability. Despite the greater understanding by society of the magnitude of the problem of child sexual abuse, there continue to be cases of educators who are disciplined for sexual misconduct with students.

Society now views the problem of child sexual abuse seriously and as a result there are many ways in which a complaint can be made against an educator. This thesis examines to what extent the Canadian legal system in British Columbia, Nova Scotia and Ontario provides a panoply of remedies for victims of sexual misconduct by educators.⁴ Conversely, it also analyzes whether it is fair that educators who allegedly engage in sexual misconduct should be faced with several proceedings before many different institutions. Further, the efficacy of the various institutions in each jurisdiction is examined from the vantagepoint of both the complainant and the accused.⁵ In evaluating

¹ S. B. Boyd, "Can Law Challenge the Public/Private Divide? Women, Work and Family" (1996) 15 Windsor Y.B. Access Just. 161 at 170.

² Canada, *Sexual Offences Against Children*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984) at 3 (Chairperson: Dr. Robin Bagdley).

³ T. Sullivan, *Sexual Abuse and the Rights of Children - Reforming Canadian Law*, (Toronto: University of Toronto Press, 1992) at 4.

⁴ The term educator includes public and private teachers and other non-teaching personnel who have a teaching certificate but are not directly engaged in teaching children. It does not include educators who teach in various residential settings. Generally, college and university educators are also not considered.

⁵ In determining the efficacy of the various institutions from the educator's perspective factors considered include whether the educator is provided with due process, whether the decision-maker is legally trained and whether the decision-maker treats all cases alike. Similar considerations apply when looking at the efficacy of the institutions from the victim's perspective. However, from the victim's perspective there is also an analysis of whether the victim actively participates in the proceedings.

the efficacy of the various institutions, one of the major factors analyzed is the impartiality of the various decision-makers and whether they treat same sex abuse cases⁶ involving educators the same as opposite sex abuse cases.⁷

The problem of educators engaging in sexual misconduct with youth is far greater than suggested in this thesis. The cases discussed in the various chapters touch only the tip of the iceberg. The criminal cases discussed in chapter four include those cases where the educator has not pleaded guilty to a sexual offence involving a youth and has had a trial. There are many other unreported cases of educators who have pleaded guilty to a sexual offence or who have had a trial before a judge and jury. Further, many cases are not reported in the various case law databases and there are no published decisions of school boards that have dealt with sexual misconduct involving their employees. In addition, there are instances of sexual misconduct by educators that are not reported by students.

I. THE NATURE OF THE PROBLEM

In 1986 the British Columbia community was shocked when a thirty-seven-year-old teacher, Robert Noyes⁸ pleaded guilty to indecently and sexually assaulting nineteen children aged six to fifteen over a fifteen-year period in five different school districts. What was extremely disturbing about this case, is that during his dangerous offender hearing, the evidence was that Noyes had been diagnosed as a paedophile in 1972, that he had been treated by ten psychiatrists and that parents in at least two school districts

⁶ This term means that an educator engages in sexual misconduct with a student of the same gender as the educator.

⁷ This terms means that an educator engages in sexual misconduct with a student of the opposite gender as the educator.

⁸ Robert Olav Noyes was declared a dangerous offender and sentenced to an indeterminate sentence. See *R. v. Noyes* (1986), 6 B.C.L.R. (2d) (S.C.) [hereinafter *Noyes*]; appeal dismissed with respect to the finding that Noyes was a dangerous offender, *R. v. Noyes* (1987), 22 B.C.L.R. (2d) 45 (C.A.); appeal dismissed with respect to the indeterminate sentence, *R. v. Noyes* (4 June 1991), Vancouver CA006054 (B.C.C.A.).

complained about him.⁹ Astonishingly, no medical professional treating Noyes would provide an opinion that he was an incurable paedophile who should not be in contact with children.¹⁰ Instead the system allowed Noyes to move from district to district. Even when his former employer had told a district that he had been accused of molesting boys and had undergone treatment, this new district decided to give him a second chance.

In 1988 Gordon Ledinski was convicted of gross indecency of a fifteen-year-old boy.¹¹ After the school district fired him and a board of reference reinstated him, there was a barrage of media coverage concerning this case. There were reports in various newspapers that when a British Columbia school district hired Mr. Ledinski no information was sought about his personnel record while he was teaching in a former school district in Calgary.¹² While Mr. Ledinski was teaching in Calgary he was permitted to resign after a parent complained about his behaviour with a grade five male student. After the school board successfully appealed the board of reference decision, it came to light that Mr. Ledinski was charged and was subsequently convicted of gross indecency of two fourteen-year-old former students while he was teaching in Saskatchewan.¹³ Mr. Ledinski's teaching certificate was finally revoked by the British

⁹ *R. v. Noyes, ibid.* See also E. Carey, "Sex abuse in schools may go unpunished child-care experts say" *Toronto Star* (4 July 1986) A1.

¹⁰ D. Margoshes, "Blatherwick accepts Noyes responsibility" *Vancouver Sun* (14 February 1986) A1- A2 at A1.

¹¹ *R. v. L. (G.E.)*, [1988] B.C.J. No. 860 (Co.Ct.), online: QJ (BCJ).

¹² F. Bula, "Former files not used when Ledinski hired" *Vancouver Sun* (29 November 1989) A 18.

¹³ In *Central Okanagan School District 23 v. Ledinski* (25 April 1990), Kelowna 4891 (B.C.S.C.), it was held that a board of reference exceeded its jurisdiction when it substituted a penalty of suspension without pay for a dismissal of a teacher. A school board had dismissed Mr. Ledinski after he was convicted of gross indecency. The question for consideration by the board of reference was whether there was just and reasonable cause for dismissing the teacher. If not, the only option open to the board of reference was to make an order for reinstatement with or without pay. Under the legislation it had no jurisdiction to substitute a lesser penalty. The matter was remitted back to the board of reference. After it was remitted back to the board of reference, it stated that it would not have dismissed the teacher but the board of reference decided it was bound to confirm the action of the school board in dismissing the teacher for just and reasonable cause. The teacher appealed, (16 October 1990) *School Law Commentary* (Case File Nos.

Columbia College of Teachers in 1993.¹⁴ The system allowed Mr. Ledinski to move from Saskatchewan to Alberta to British Columbia before his teaching certificate was finally revoked.

In 1993, Kenneth De Luca pleaded guilty to a dozen charges of sexual assault of various female students.¹⁵ The Roman Catholic school board in Ontario allowed Mr. De Luca to remain in the system despite repeated complaints over several years from students and parents about his behaviour. Instead of confronting Mr. De Luca with the complaints, he was simply transferred from school to school and no report was ever provided to the police or the children's society.

In 1997, Narcisse Kuneman was convicted of thirty-three counts of sexual assault, indecent assault, gross indecency and possession of child pornography and as a result he was declared a dangerous offender.¹⁶ Over a twenty-year period, he sexually assaulted fifteen boys.

These cases highlight problems that have occurred over the years in the education system, such as failing to recognize the seriousness of sexual misconduct of an educator, allowing an educator who has engaged in sexual misconduct with students to move from province to province, failing to check references, as well as covering up an educator's misconduct and harbouring a child molester in the education system. These cases describe only the

5-4-12 and 5-4-13) (B.C.S.C.). The Court allowed the teacher's application to the extent that it was remitted back to the board of reference for a third hearing to consider it afresh and determine whether there was misconduct on the part of the teacher such as to constitute just and reasonable cause for dismissal from the school board. In *Education Law Reporter*, 7 (1995 December) at 26, it is stated that the school board's appeal was dismissed (1992 May 13), Vancouver CA013195 (B.C.C.A.). It is stated further that Ledinski was charged in Saskatchewan with indecent assault and common assault against two former fourteen-year-old students. He agreed to hold off on the third board of reference hearing until the criminal matters were dealt with. In April, 1991 he was convicted of these charges.

¹⁴ B.C., British Columbia College of Teachers, Winter (Vancouver: British Columbia College of Teachers, 1993/94).

¹⁵ M. Valpy, "21 years of wickedness" *The Globe and Mail* (21 September 1996) D1, D3 at D1.

¹⁶ "Discipline Panels Render First Decisions" *Professionally Speaker* (1998 September) 33 at 34.

serious sexual misconduct of educators. However, there are also cases of less serious sexual misconduct committed by educators, such as cases involving sexual harassment.¹⁷

In 1997 the British Columbia College of Teachers found assistant-superintendent, Dr. Arthur Tindill guilty of professional misconduct as a result of sexually harassing female principals, teachers and staff.¹⁸

II. INSTITUTIONS HANDLING THE ALLEGATIONS

A complaint against an educator can be initiated in diverse forums, including the school board, the regulatory body of teachers, the Human Rights Commission, the civil courts and the police which could culminate in a trial in the criminal courts.¹⁹ The initiation of a complaint may result in the educator being criminally and/or civilly liable. In addition, a school board may be found liable for failing to provide a safe and healthy environment for its students.

At the centre of the disciplinary process is the rule of law which is expressed through governing legislation, collective agreements and grievance arbitration proceedings.²⁰ Each legal process that an educator is subject to as a result of engaging in sexual misconduct has a different purpose. When the criminal process is invoked, its purpose is to punish the educator who has been found guilty of engaging in wrongful conduct and to deter other individuals from engaging in similar behaviour. If a plaintiff is successful in

¹⁷ By this statement it does not mean that the physical and emotional consequences of one type of sexual misconduct are less serious than another. But by referring to cases as being cases "of less serious sexual misconduct" this refers to the legal categorization of different types of sexual misconduct. Some misconduct, such as sexual assault, has criminal consequences while other types, such as sexual harassment, do not.

¹⁸ B.C., British Columbia College of Teachers, 8(4) (Vancouver: British Columbia College of Teachers, 1997).

¹⁹ Complaints can also be made to the provincial Ombudsman and to the provincial Ministry that governs the welfare of children, but complaints to these bodies are beyond the scope of this thesis.

²⁰ E. Grace, "Professional Misconduct or Moral Pronouncement: A Study of "Contentious" Teacher Behaviour in Quebec" (1993) 5 E.L.J. 99 at 103.

proving damages in a civil court, the court is compensating the plaintiff and attempting to put the plaintiff in his or her original position before the sexual misconduct occurred.

The employer/employee relationship is dealt with in school board proceedings. In these proceedings the school board makes a determination as to whether the educator engaged in misconduct and whether a disciplinary sanction should be imposed. Labour grievance procedures may likely be invoked when a school board deals with an educator concerning an allegation of wrongful conduct.

The alleged wrongful conduct may also result in proceedings by the professional regulatory body, the teachers' College or Union. The purpose of these proceedings is to regulate the conduct of a teacher and to determine whether the teacher engaged in conduct unbecoming of a member. Finally, if a complaint is made to the Human Rights Commission, the purpose of these proceedings is to investigate and regulate the behaviour of individuals and to compensate an injured complainant. All of these proceedings are important and in each of them, consideration has to be given to both the rights of the alleged perpetrator and the complainant.

Prior to analyzing and comparing decisions from the various institutions, this thesis begins with a discussion in chapter two of factors that resulted in the federal government being concerned with child sexual abuse. Initially, in the early 1970s individual members of Parliament raised concerns as to whether children were being adequately protected against sexual exploitation. Following these initial concerns, the government in the latter part of the 1970s initiated a study by the Law Reform Commission of Canada of all the sexual offences in the *Criminal Code*,²¹ including those offences against children. Thereafter, the government commenced studies into child abuse as well as child sexual

abuse. These factors culminated in a wholesale concern by all members of Parliament into the national problem of child sexual abuse.

The second part of chapter two focuses on the reasons why it has only been quite recent that child sexual abuse has been recognized as a national tragedy. As a result of the change in the public/private divide, which is an ideological division of life into opposing spheres of private and public or state regulated activities, certain activities such as sexual abuse, rape, and child abuse are no longer hidden in the private sphere out of reach of state regulation.²² Coupled with this change, there has been a major change in the legal arena to evidentiary rules regarding the reception of children's evidence in a courtroom. In addition, over time there has been a change in society's views of teachers. These changes have resulted in a greater number of prosecutions against educators who have engaged in sexual misconduct involving youth.

To situate the problem of child sexual abuse within the educational context, chapter three begins with a discussion of the role of the teacher in society. Thereafter, the framework of analysis to determine the standard of conduct that is expected of educators commences with a discussion of the various types of legislation that impact on educators. Given that the legislation is of little assistance in determining the required standard of conduct of teachers, the discussion then centres on the civil case law.

The focus of the remaining chapters is a comparative analysis of the processes as well as the decisions of the courts, school boards, professional regulatory bodies of teachers and Human Rights Tribunals in the various jurisdictions to determine similarities and differences between them. In addition, the efficacy of the institutions is examined from

²¹ R.S.C. 1970, c. C-34.

²² *Supra* note 1 at at 170.

the perspective of both the accused educator and the complainant. The decisions are analyzed to determine whether decision-makers treat same sex abuse cases involving educators the same as opposite sex abuse cases. Where there is a difference in how decision-makers treat these two groups of cases, the reasons for the differences are discussed.

In discussing the criminal cases in chapter four the analysis focuses on whether there is a difference in conviction rates between the two groups of educators when cases are heard before a judge alone or when they are heard before a judge and a jury. The analysis focuses mainly on cases in British Columbia and Ontario because in Nova Scotia there is a dearth of cases. After examining various factors, it is apparent that in British Columbia there is a much higher conviction rate when judges hear same sex abuse cases in comparison to when they hear opposite sex abuse cases. This pattern is not seen in cases in Ontario. A theory is developed to explain why there is a significant difference in the conviction rate when these two groups of cases are heard before judges in British Columbia.

It is evident from examining the limited number of criminal cases that accused educators in each jurisdiction are provided with the full panoply of natural justice rights. However, in British Columbia because judges appear to treat same sex abuse cases more harshly than opposite sex abuse cases, it seems that they do not treat these cases in an impartial and objective manner. Additionally, the criminal courts in British Columbia, unlike in Ontario, appear to find female complainants in opposite sex abuse cases less credible than male educators. Thus, from the perspective of the accused in same sex abuse cases and female victims in opposite sex abuse cases, the criminal system in Ontario seems to be

fairer than the system in British Columbia. Before any definitive conclusions can be drawn with respect to these issues, more expansive research would have to be done in the area of child sexual assault cases in both British Columbia and Ontario.

The civil system for many years was unresponsive and unfair to victims of sexual misconduct by educators given that limitation legislation in each jurisdiction often restricted a victim's access to obtaining compensation for injuries allegedly suffered. However, now that society has recognized that often victims of sexual abuse do not know they have been abused until many years after the abuse occurred, limitation legislation in both British Columbia and Nova Scotia has been amended making it easier for victims to commence actions against educators. Of the three jurisdictions, British Columbia provides sexual assault victims with the greatest access to bringing a civil action against an educator. With the recent amendments to the British Columbia legislation, in most cases there no longer is a limitation period governing the commencement of most civil sexual assault actions.

As is discussed in chapter five, the formerly restrictive limitation periods governing civil sexual assault actions is one of the reasons why there are far fewer civil proceedings commenced against educators in all jurisdictions in comparison to the number of criminal prosecutions brought by the state against these individuals. Additional reasons that account for this difference are discussed in chapter five. Because of the small number of civil cases, it is impossible to reach any substantive conclusions as to whether civil court judges treat same and opposite sex abuse cases in a similar manner.

Although the relaxed limitation periods will likely result in an increase in the number of civil suits brought against educators, any increase will likely be nominal because to date

no Canadian court has found a school board liable for the sexual abuse committed by its employee. As is discussed in chapter five, despite the Supreme Court of Canada's extension to a non-profit organization of the principle of vicarious liability of an employer for sexual assaults committed by an employee, there likely will only be a limited number of facts situations involving school boards where the principle will be applied. Thus, victims who receive a damage award by the courts may have a hollow victory if only the educator has been held personally liable and there is no judgment against the school board. The victim may never be able to enforce the judgment if the educator is insolvent.

Proceedings before the professional regulatory bodies in British Columbia and Ontario and the union in Nova Scotia are discussed in chapter six. The discussion in chapter six is centred on British Columbia and Ontario because the Nova Scotia Teachers' Union does not publish discipline decisions.

While the processes of dealing with sexual misconduct cases are generally similar in these institutions in the three jurisdictions, they are more formal in British Columbia and Ontario than they are in Nova Scotia. When these matters proceed to a hearing, educators in all jurisdictions are provided with at least the minimum requirements of procedural fairness. Since legislators in each jurisdiction have determined that the accused's peers, rather than legally trained individuals, decide on whether or not an educator has engaged in sexual misconduct, these lay decision-makers may not have an in depth understanding of rules of evidence and the standard of proof necessary to prove that an educator has engaged in professional misconduct. It appears generally that there are inconsistent disciplinary sanctions imposed by lay decision-makers of the colleges

when the cases involve male educators engaging in sexual misconduct with older adolescent students. Because the colleges do not explain in detail the factors they take into consideration when imposing the disciplinary sanction, it is difficult to determine in these types of cases why in some instances an educator is suspended while in other cases the educator is dismissed.

It does appear that lay decision-makers of the British Columbia College of Teachers treat educators the same, regardless of whether they engaged in sexual misconduct with students of the same or opposite gender as the educators. No conclusions can be drawn with respect to the decision-makers of the College of Ontario because they have not yet considered same sex abuse cases.

In difficult cases where an educator has not been charged with a criminal offence, but has allegedly engaged in sexual misconduct with a youth, it may not be fair to an educator that the decision-maker does not have legal training. However, there is a check on the decision-makers, as the decision can be appealed to or judicially reviewed by an individual with legal training. Since there is not enough available data from each jurisdiction, it is impossible to draw any firm conclusions as to which jurisdiction from the viewpoint of the educator is more efficacious.

In professional disciplinary proceedings the alleged victim may be quite removed from the proceedings and may not be a major participant, particularly if the educator has been convicted of a sexual offence. Because the focus of the hearings is not about the harm done to the victim, but rather it is whether the educator engaged in conduct that constitutes professional misconduct, from the victim's perspective the hearing may not appear to be fair.

In all three jurisdictions, school boards generally treat these cases seriously and, as is seen in chapter seven, the educator's employment relationship is generally terminated for engaging in any type of sexual misconduct. Even though the potential consequences of an allegation of sexual misconduct can be devastating to an educator's career, the common law, legislation and collective agreements do not require a school board to provide the educator with a full hearing before a legally trained decision-maker. Ideally, it would be fairer from the educator's perspective if she or he was entitled to a full hearing. However, as is the case with professional regulatory decisions, the decisions of lay school board officials can be appealed to or judicially reviewed by a legally trained decision-maker.

When these matters are appealed to or judicially reviewed by an institution where the decision-makers have legal training, it is apparent that in the three jurisdictions, that the applications brought by educators are successful in over fifty percent of the cases. Upon reviewing cases of courts and boards of reference and arbitration, decisions of school boards are overturned as a result of the disciplinary sanction being too harsh, for failing to treat the educator in accordance with the principles of natural justice or for failing to correctly apply the requisite standard of proof to the evidence.

In order to determine the process school boards apply in handling cases of sexual misconduct involving educators, an empirical study was conducted. Questionnaires were sent to school districts in the three jurisdictions. Given that there were a small number of responses, any conclusions must be interpreted cautiously. The results of the study are discussed in chapter seven and they show that most of the school districts that responded do have written policies regarding the handling of allegations of sexual misconduct by

educators. As is consistent with the common law, many educators are given the right to be heard which does not mean a right to a full oral hearing. Given that the consequences of allegations of sexual misconduct can be very serious to an individual, the process from the educator's perspective may not appear to be fair if a full oral hearing is not granted. Most districts appear to have some understanding of the burden of proof required to prove whether there is just cause to terminate an educator for engaging in sexual misconduct.

The discussion in chapter seven outlines the different approaches lay school trustees and legally trained decision-makers bring to these matters. School trustees focus on the educational context and the protection of students when they are considering these cases. Thus, rather than giving the educator a second chance, school trustees terminate the employment of an educator. Although legal decision-makers consider the educational context, their approach is more of a labour/grievance model. They appear to apply more of a progressive discipline regime, focussing on whether the educator has had a previous discipline record and whether the educator can be rehabilitated and less on whether the educator has breached a trust relationship.

Chapter eight examines the types of behaviour that constitute sexual harassment within an employment setting. Although educators engage in sexual harassment, complainants rarely resort to the various provincial Human Rights Commissions to deal with this type of sexual misconduct. Rather, complainants (including both students and other educators) appear to use internal procedures within the education system to resolve the matters. When complainants do resort to the commissions for a remedy against the sexual harasser, the process appears to be fair to both the alleged harasser and the complainant.

Because the focus is on whether the conduct occurred and whether the complainant sustained harm and a loss of dignity, both are key participants in the proceedings. The alleged harasser is provided with a full complement of the elements of natural justice.

Finally, in chapter nine there is a summary of conclusions as to major trends that are evident from the decisions of each institution dealing with complaints of educators who engage in sexual misconduct with youth. It is apparent that complainants do have an array of mechanisms that they can access to seek a remedy against an educator. The thesis ends with recommendations directed at the various institutions that deal with educators who engage in sexual misconduct.

2. THE GENESIS OF SOCIETY'S RECOGNITION OF CHILD SEXUAL ABUSE

I. INTRODUCTION

The proliferation of commentary about the vulnerable sexual status of young persons¹ and the exploitation and abuse of that vulnerability has been stimulated in part by the various provincial and federal governments' intermittent concern about child sexual abuse. In British Columbia, over a decade ago, the government initiated an enquiry by Barry M. Sullivan, Q.C. (since deceased), into the sexual abuse of children by school board employees in British Columbia.² The Sullivan Enquiry was initiated partially as a result of the tremors that were felt throughout the British Columbia community from the Robert Olav Noyes case.³ The Sullivan Enquiry resulted in a report recommending improvements in legislation and policies dealing with the identification and removal of child abusers from the school environment.⁴

At the federal level, on December 19, 1980 the government appointed the Badgley Committee to determine the adequacy of Canadian laws in protecting children from sexual offences and to recommend improvements in laws for the protection of young

¹ T. Sullivan, *Sexual Abuse and the Rights of Children - Reforming Canadian Law*, (Toronto: University of Toronto Press, 1992) at 4.

² British Columbia, *An Enquiry into the Sexual Abuse of Children by School Board Employees in the Province of British Columbia* (Victoria, Queen's Printer, 1986 (Co-chairs: B.M. Sullivan & G.E.J. Williams)) [hereinafter the *Sullivan Enquiry*].

³ Robert Olav Noyes pleaded guilty to nine counts of indecent assault and ten counts of sexual assault on nineteen different children. Mr. Justice Paris found that he was a dangerous offender and ordered him to serve an indeterminate sentence. See *R v. Noyes* (1986), 6 B.C.L.R. (2d) (S.C.); appeal dismissed with respect to the finding that Noyes was a dangerous offender, *R. v. Noyes* (1987), 22 B.C.L.R. (2d) 45 (C.A.); appeal dismissed with respect to the indeterminate sentence, *R. v. Noyes* (4 June 1991), Vancouver CA006054 (B.C.C.A.) [hereinafter *Noyes*].

⁴ In Nova Scotia, the only report into child sexual abuse is the *Report of an Independent Investigation in Respect of Incidents and Allegations of Sexual and other Physical Abuse at Five Nova Scotia Residential Institutions* (Halifax: 1995). In Ontario it appears there have been no reports written specifically on child sexual abuse.

persons from sexual abuse and exploitation.⁵ In addition, the Badgley Committee was to determine the incidence of child sexual abuse and was to examine charge patterns of sexual offences committed against children.⁶ As a result of the recommendations made by the Badgley Committee, the criminal law was reformed in 1988 by amending various sexual offences involving children and making it easier to prosecute child sexual abusers.⁷

Despite the increased awareness of child sexual abuse, educators⁸ continue to be disciplined for sexual misconduct with students. A complaint against an educator can be initiated in diverse forums, including the school board, the College or Union of Teachers, the Human Rights Commission and the police.⁹ The initiation of a complaint may result in the invocation of several proceedings including a criminal or civil proceeding, a professional regulatory proceeding, an employment and/or labour grievance proceeding. As a result of these proceedings, an educator may be criminally or civilly liable, lose his or her professional certification and/or may lose his or her employment. In addition, a school board may also be found liable for failing to provide a safe and healthy environment for its students.

⁵ Canada, *Sexual Offences Against Children*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984 (Chairperson: Dr. Robin Badgely)) at 3 [hereinafter the *Badgley Committee*].

⁶ *Ibid.* at 3.

⁷ Canada, *Canada's Law on Child Sexual Abuse*, (Ottawa: Minister of Supply and Services Canada, 1990) at 9.

⁸ Educators are defined as teachers, vice-principals, principals or other individuals who hold a teaching certificate and are employed by a publicly funded school board at either the elementary or secondary school level. Educators of residential schools and teachers at colleges and universities are excluded.

⁹ Additional forums include the Ombudsman and the B. C. Ministry of Children and Families, Ontario Children's Aid Society and the N.S. Ministry of Community Services. Because the Ombudsman generally only gets involved in these types of complaints if there is a large number of complainants involving the same institution, consideration of complaints to the Ombudsman will not be discussed. In addition, it is beyond the scope of this thesis to consider complaints made to the B. C. Ministry of Children and Families, the Ontario Children's Aid Society or the N.S. Ministry of Community Services.

This chapter begins with a historical overview of the concerns of Parliament with respect to child sexual abuse in the early 1980s, prior to the amendments to the *Criminal Code*¹⁰ to the various sexual offences against children. Thereafter, the discussion will outline why child sexual abuse has only recently been identified as an immense national problem. In order to contextualize child sexual abuse within the educational setting, the discussion will focus on how education and the educator have historically been viewed by society. Following this, there will be a discussion of factors that have led to an increase in prosecutions against educators for child sexual abuse.

The thesis of this chapter is that the increase in the prosecution of child sexual abuse cases, including those brought against educators, is a result of four factors. First, the division between public or state regulated and private activities has changed. Sexual abuse, rape, and child abuse were previously hidden in the private sphere but have over the past few decades entered public discourse in a visible fashion¹¹ resulting in raising the awareness of the problem of child sexual abuse. Secondly, there was a belief in the tendency of children to fabricate stories of abuse which belief entered into the body of legal theory, causing a reluctance to prosecute these cases.¹² This notion and the requirement that the evidence of a child had to be corroborated made it difficult to prosecute offences committed against children. Thus, the perception was reinforced that child sexual abuse was not widespread.¹³ Thirdly, there has been a change in the view of teachers from being esteemed as public guardians of unquestionable status to that of

¹⁰ R.S.C. 1970, c. C-34.

¹¹ S. B. Boyd, "Can Law Challenge the Public/Private Divide? Women, Work and Family" (1996) 15 Windsor Y.B. Access Just. 161 at 170.

¹² *Supra* note 7 at 6.

¹³ N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990) 15 Queen's L.J. 3 at 3.

being relegated to the position of public servants.¹⁴ Fourthly, as there has been a shift from a rural to an urbanized society, there has been less direct control by community members on the off-duty conduct of educators.¹⁵ This may be a factor in a very small group of educators who have tendencies to abuse children and who might otherwise not have engaged in misconduct if they lived in a small community under the scrutiny of members of the school board.

In order to understand how the increased awareness of child sexual abuse arose, it is necessary to examine historically the concerns members of Parliament had prior to amending the sexual offences in the *Criminal Code*.¹⁶ There were three factors that led to a wholesale concern of members of Parliament regarding sexual abuse of children. The first factor was that in the early 1970s individual members of Parliament began to raise specific concerns regarding the protection afforded to children against sexual predation. The second factor was the government's focus on child abuse, which encompassed child sexual abuse. The third factor was that the government initiated a study of the sexual offences, including those against children, in the *Criminal Code*.¹⁷ These three factors led to members of Parliament being concerned about child sexual abuse. In examining these factors, it is also necessary to contextualize why members of Parliament themselves became concerned with the problem of child sexual abuse.

¹⁴ T. Fleming, "Teacher Dismissal for Cause: Public and Private Morality" (1978) J.L.&E. 423 at 423.

¹⁵ For a discussion on how teachers in the early 1900s lived with families in the community in which they taught and how the community controlled their behaviour see J. Cochrane, *The One-Room School in Canada* (Toronto: Fitzhenry & Whiteside Ltd., 1981) and J. M. Rich, *Professional Ethics in Education* (Springfield: Charles C. Thomas, 1984) at 117.

¹⁶ *Supra* note 10.

¹⁷ *Supra* note 10.

II. HISTORICAL OVERVIEW OF THE CONCERNS OF PARLIAMENT

A. General Concern about the Protection of Children

Throughout the 1970s there were individual concerns raised by a few members of Parliament regarding the protection of children against sexual exploitation. The concerns brought forward included amending the *Criminal Code*¹⁸ to protect youth from invitations to engage in sexual acts. One member, Mr. Kaplan, felt there was a gap in the law created by a decision of the Ontario Court of Appeal.¹⁹ Mr. Kaplan stated that in this decision the Court held that physical touching had to be proven in order for an individual to be convicted of the offence of making an indecent proposition to a child under fifteen years of age. He stated further that the "amendment will restore the former law and give extra protection to children".²⁰

Another member of Parliament was concerned that the definition of "child" in the *Criminal Code*²¹ offered less protection to children than the protection provided by most provincial legislation. This member wanted to "remove this discrepancy and, by raising the age from under 14 to under 16, afford increased protection to juvenile victims of rape".²² There was also a concern that a provision of the *Criminal Code*²³ offered more protection to female children than male children against sexual exploitation and a member of Parliament wanted this unequal treatment addressed.²⁴

In the early 1970s, the concern regarding sexual offences committed against children was largely raised by individual members of Parliament rather than by the government or the

¹⁸ *Supra* note 10.

¹⁹ Unfortunately Mr. Kaplan does not provide the name of this case.

²⁰ *House of Commons Debates* (29 October 1974) at 832 (B. Kaplan).

²¹ *Supra* note 10.

²² *House of Commons Debates* (21 May 1976) at 13762 (U. Appolloni).

²³ *Supra* note 10.

²⁴ *House of Commons Debates* (23 February 1979) at 3526 (J. Epp).

opposition. It was not until the latter part of this decade that there was a wholesale concern regarding child abuse by both the government and the opposition.

B. Child Abuse

In the early 1970s, members of Parliament began to be concerned about child abuse. It is obvious from the speech of the Solicitor General, the Honourable Warren Allmand that the government's knowledge about child abuse was in its infancy:

We might spend some time looking at the definition of child abuse. What exactly is meant by that term? The definitions of child abuse are legion. The problem is not helped by varying degrees of distinction made between physical abuse, sexual abuse and neglect...

What is the extent of the problem? It is impossible to get even a general idea as to the number and distribution of cases of physical abuse, sexual abuse or neglect. Reporting systems, which operate in only five provinces, have so many loopholes and are so inefficiently managed as to preclude obtaining valid statistics...²⁵

In 1974, as a result of the government's continuing concern with child abuse, the Standing Committee on Health, Welfare and Social Affairs of the House of Commons was asked to make recommendations with respect to appropriate measures for the prevention, identification and treatment of child abuse and neglect.²⁶ Although this committee recognized that child sexual abuse was a serious problem, it considered it within the context of the broader problem of child abuse and neglect.²⁷

In December 1975, the government requested that the Standing Committee on Health, Welfare and Science of the Senate consider the feasibility of an investigation on "Early Childhood Experiences as Cause of Criminal Behaviour."²⁸ As a result of a dearth of information, this committee limited its inquiry to a consideration of the experience of

²⁵ *House of Commons Debates* (6 December 1974) at 2037 (W. Allmand).

²⁶ *Supra* note 5 at 117.

²⁷ *Supra* note 5 at 117.

²⁸ *Supra* note 5 at 119.

children during the first years of life. In 1980, this committee tabled its report: *Child at Risk* and one of its recommendations was that there be a review of offences in the *Criminal Code* with respect to those pertaining to all forms of child abuse.²⁹ As a consequence of these investigations, it became apparent that child sexual abuse was a problem of national scope and needed to be investigated separately from the broader problem of child abuse.

One other major action the government took with respect to its concern for children is that in 1978 it established the *Canadian Commission for the International Year of the Child*.³⁰ In its report, the I.Y.C. Commission commended the Advisory Council on the Status of Women on its recommendations with respect to amendments regarding sexual offences pertaining to children in the *Criminal Code* relative to Bill C-53 and Report Number 10 on *Sexual Offences* of the Law Reform Commission of Canada.³¹

C. General Revision of Sexual Offences

Recognizing that societal values had changed over the years and that the criminal law pertaining to sexual offences was disorganized and archaic, resulting in it being inaccessible to the lay person, the government initiated a study of these offences.³² This study, conducted by the Commission, included sexual offences against children. In its report, the Commission recommended a sweeping reform of the section on sexual offences, for three reasons.³³ First, the part dealing with sexual offences was a

²⁹ *Supra* note 5 at 119.

³⁰ *Supra* note 5 at 121 [hereinafter the *I.Y.C. Commission*].

³¹ *Supra* note 5 at 121.

³² Canada, Law Reform Commission of Canada, *Criminal Law - Sexual Offences*, Working Paper 22, (Ottawa: Supply and Services Canada, 1978) at 1 [hereinafter the *Commission*].

³³ Canada, Law Reform Commission of Canada, *Sexual Offences*, No. 10, (Ottawa: Supply and Services Canada, 1978) at 1.

compilation of disparate sections that did not reflect a consistent view of the problem of sexual offences and were not readily understandable by the public.

Secondly, the language used in the *Criminal Code* was outdated and archaic. In some offences, expressions such as "of previously chaste character" and "carnal knowledge" existed. Although the judiciary had clarified these expressions, they clearly reflected ideas of a bygone era, "were out of synch with contemporary thinking in Canada"³⁴ and needed to be modernized.

Thirdly, since the promulgation of the *Criminal Code*, societal attitudes concerning sexual behaviour had drastically changed. Although over the years various major changes had been made to it, further changes were required to make the law more egalitarian. At the time of the Commission's report, the *Criminal Code*³⁵ enshrined a stereotyped image of masculine and feminine roles. During the course of its consultations, the Commission ascertained that the public was ready to put aside these anachronisms to have the offences adapted to modern realities.

In order to develop a cohesive approach to the review of the sexual offences, the Commission set out three underlying organizing principles to this set of offences including:

- protecting the integrity of the person;
- protecting children and special groups and
- safeguarding public decency.³⁶

One of the fundamental principles embodied in the philosophy of our criminal justice

³⁴ *House of Commons Debates* (7 July 1981) at 11306 (Hnatyshyn).

³⁵ *Supra* note 10.

³⁶ *Supra* note 32 at 5. See also *supra* note 33 at 6 -7.

system is the protection of the integrity of the person.³⁷ In the context of sexual offences, this means that no individual, including a young person, should be forced to submit to sexual acts to which he or she has not consented or was procured by force or trickery.

With respect to the principle of protecting children and special groups, the Commission stated:

The development of human sexuality is a gradual process. Its full realization presupposes the achievement of an equilibrium between body and spirit, between physical growth and mental and emotional maturation. Our society believes, and justly so, that the law must protect those who have not attained full sexual autonomy or who have not yet achieved this equilibrium. Children must therefore be protected from sexual exploitation and corruption until they have arrived at a degree of maturity which will enable them to foresee the consequences of their acts and take important personal decisions with full and clear appreciation of the facts, or at least until they come to the age at which that degree of maturity should be presumed.³⁸

At the same time that the Commission recognized that children should be protected, it also recognized that in many cases when two adolescents engage in sexual acts, it is the natural outcome of normal sexual development. The Commission recommended that the consequences of such acts would be far more effectively dealt with by provincial family or child welfare legislation rather than by the criminal law.³⁹ Although the Commission recognized that sexual development may begin in adolescence, it also recognized that there is a minimum age at which the law provides absolute protection to a child from sexual acts. Despite a change in moral standards, the Commission was of the view that the age of fourteen should be retained regardless of the capacity of the child or adolescent

³⁷ *Supra* note 33 at 6.

³⁸ *Supra* note 33 at 7.

³⁹ *Supra* note 33 at 21.

to "consent".⁴⁰ It also recommended that there be qualified protection for youths between fourteen and eighteen years of age. The Commission and the government were also concerned that there be an exemption from liability based on the age of the accused or the age difference between the accused and the other party to the sexual activity.⁴¹

According to the third principle of safeguarding public decency, what society is recognizing is that sexuality is an intimate matter and it is not legitimate to subject others to witness acts that are private in nature. The Commission stated that it is not sexual behaviour itself or any specific type of it, but rather its public exhibition which society is seeking to repress.⁴²

The government considered the report of the Commission and drafted legislation⁴³ to amend the sexual offence provisions. When the legislation was introduced for a second reading, the government recognized a fourth principle underlying the amendments to these offences.⁴⁴ This principle was the elimination of sexual discrimination in criminal law. For example, the *Criminal Code*⁴⁵ reflected "nineteenth century attitudes that young women are passive and must be protected from males and that young boys can or should protect themselves".⁴⁶ The government wanted to bring the law into the twentieth century and put persons of both sexes on equal footing.⁴⁷

In wanting to enhance the protection of children, the government drafted a portion of Bill C-53 to specifically pertain to offences committed against children. As a result, Bill C-53

⁴⁰ *Supra* note 33 at 19.

⁴¹ *Supra* note 34 at 11306.

⁴² *Supra* note 33 at 8.

⁴³ Bill C-53, "An Act to amend the Criminal Code in relation to sexual offences and the protection of young persons and to amend certain other Acts in relation thereto or in consequence thereof". [hereinafter *Bill C-53*].

⁴⁴ *Supra* note 34 at 11300 (R. Irwin).

⁴⁵ *Supra* note 10.

⁴⁶ *Supra* note 34 at 11306 (Hnatyshyn).

created new offences against sexual exploitation of young people by adults and against child pornography.⁴⁸

On December 19, 1980, the Ministers of Justice and of National Health and Welfare appointed a Committee under the direction of Dr. Robin Bagdley to investigate child sexual abuse.⁴⁹ This study occurred in tandem with the Commission's study on sexual offences. Some conclusions the Bagdley Committee came to were as follows:

- excluding acts of genital exposure, about one in four of the sexual offences against young persons was committed by persons either prominent in the youth's life or by persons to whom the child was especially vulnerable;⁵⁰
- about one half of the assailants were friends or acquaintances;⁵¹
- about eighteen percent or one in six assailants were strangers to the child;⁵² and
- nearly all assailants were males; one in one hundred was a female.⁵³

A major concern of the Bagdley Committee was with adults in a position of trust who committed sexual offences against children. An Ontario politician, John Charlton, had raised this concern many years earlier in 1882. In attempting to protect vulnerable female students from male teachers, Mr. Charlton introduced a bill known as the "Charlton Seduction Bill" into the all-male House of Commons.⁵⁴ Although it was

⁴⁷ *Supra* note 34 at 11306.

⁴⁸ *Supra* note 34 at 11300.

⁴⁹ *Supra* note 5 at 3.

⁵⁰ *Supra* note 5 at 57.

⁵¹ *Supra* note 5 at 217. This figure is taken from the results of the National Population Survey which was the largest of four surveys conducted by the committee chaired by Dr. Robin Bagdley. In this survey 2008 individuals responded to the questionnaire.

⁵² *Supra* note 5 at 217. This figure is taken from the results of the National Population Survey.

⁵³ Canada, *Sexual Offences Against Children*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1984, Chairperson: Dr. Robin Bagdley) at 854 and 855.

⁵⁴ C. Backhouse, "Sexual harassment in education: the 19th century Canadian perspective" (1990) C.A.U.T. Bulletin 10 at 10.

withdrawn by Mr. Charlton in 1884 it was eventually passed in 1886, after it had been "shorn of much of its substance".⁵⁵

One of the key provisions excised from the bill before enactment dealt with sexual relations between teachers and students. Wanting to criminalize this conduct, Mr. Charlton in speaking in the House about this bill stated:

...teachers having peculiarly intimate relations with their pupils, it was proper to incorporate in the Bill a clause making the seduction of a pupil by a teacher a criminal offence.⁵⁶

The original provision provided:

Any person who is a superintendent, tutor, or teacher in a private or public school, or other public institution of learning attended by females, or who is instructor of any female in music, or any branch of learning of art, who has illicit intercourse at any time or place with any female under his instruction, or attending such school or institution during the term of his engagements as superintendent, tutor, instructor, or teacher, shall be punishable...(by a maximum term of) two years in a penitentiary...⁵⁷

A supporter of the bill, Senator Vidal in defending it, recognized the power differential that may exist in a student/teacher relationship. Thus, it was his view that the teacher should be punished when he takes advantage of the relationship with his student.

In defending the male teachers who had expressed their outrage to many of the politicians, the Minister of Justice was concerned that this bill might cast aspersions upon the moral character of the teaching profession:

One teacher says he has practised his profession for 57 years and never known a case of the kind referred to in this clause. Does any member of this House know a cause for treating teachers in a different manner from other subjects of Her Majesty? Are they more loose in their morals than lawyers, clergymen or other classes of society? I do not think they are. Whoever drew this Bill has possibly pre-supposed that because of the relations existing between pupil and teacher, one

⁵⁵ *Ibid.* at 10.

⁵⁶ *Ibid.* at 10.

⁵⁷ Canada, Hansard Parliamentary Debates v. 1 (1883) 221-2; v. 1 (1884) 142 as cited in C. Backhouse, *ibid.* at 10.

is necessarily of mature age and the other of tender years and therefore advantage may be taken by the teacher to seduce his pupil. So far as we know, that is not the case. The Bill does not limit the offence to occasions where the pupil is under the control and influence of the teacher, but says it may take place at any time and without reference to the ages of the parties.⁵⁸

Similarly, another member, the Honourable Mr. O'Donhue, was of the opinion that this provision of the bill was offensive to male teachers:

I feel that that clause must be extremely offensive to a body of the most cultivated men in the country, and while they are so selected, no reasons and no statistics are given for such a selection... Why then should the body of teachers - that body who from their very youth are trained for the very purpose of educating the youth of our country - why offer them a gratuitous offence such as no body of men could endure?⁵⁹

It took many more years before the issue of child sexual abuse by adults who are in a position of trust was raised again. In 1984, the Badgley Committee was also concerned with sexual offences committed against children by adults who abused a position of trust, such as teachers. After discussing activities that would be considered normal sexual development in adolescents and stating that such behaviour should not be criminalized, the Badgely Committee stated:

The situation is quite different, however, where a 40 year-old teacher induces his 17 year-old pupil to engage in sexual intercourse with him... In circumstances such as these, the Committee considers that the application of criminal sanctions against such adults is fully warranted. The vital policy served by such an offence is deterrence: the deterrence of those who selfishly exploit that position of trust for the purposes of gratifying their own sexual appetites...

The findings presented in this Report reveal that young persons are particularly vulnerable to a wide range of persons in their lives... and that this vulnerability is not explicitly recognized by the criminal law. In place of the under-inclusive and haphazard provisions directed at step-fathers, foster fathers and male guardians... the Committee considers that more comprehensive protection must be provided against such abuses of trust, protection more in keeping with the realities of modern social life. We believe that this protection must apply both to a wider

⁵⁸ Canada, Debates Senate (1883) 259-260 as cited in C. Backhouse, *ibid.* at 10.

⁵⁹ Canada, Debates Senate (1883) 267 as cited in C. Backhouse, *ibid.* at 10.

range of relationships than has traditionally been recognized and to abuses of trust that involve either sexual intercourse or other forms of sexual touching.⁶⁰

After the Badgley Report was published, the government was concerned that children needed additional protection from being exploited by persons in a position of trust towards them. In reporting on the Badgley Report, Mr. Bob Corbett stated:

The Badgley Report provided alarming figures regarding the relationship of children and youth to their offenders. A person prominent in the child's life committed almost one in four of the sexual offences or to whom the child was vulnerable. About three of every five offences were committed by persons the victim either knew well or was acquainted with.

Badgley also reported that young persons were at greater risk from blood relations and persons in positions of trust than from other persons. The greater proportion of sexual offences committed by persons in a position of trust was against a child under the age of 12. A full 86 per cent of offences by a person in a position of trust concerned a child 11 years of age or under.⁶¹

Mr. Bob Corbett was so concerned about the pervasiveness of child sexual abuse by individuals in a position of trust that he introduced in the House of Commons a private member's bill, Bill C-261.⁶² The purpose of the Bill was to draw the attention of the House of Commons to the serious concern that Canadians have about the problem of child sexual abuse.⁶³ One of the items dealt with in the Bill was the "position of authority offence"⁶⁴ which offence is section 153 in the *Criminal Code*.⁶⁵ This offence was

⁶⁰ *Supra* note 5 at 58.

⁶¹ *House of Commons Debates* (13 February 1986) at 10806.

⁶² [hereinafter the *Bill*]. The Bill was withdrawn and the subject matter was referred to the Standing Committee on Justice and Legal Affairs, *House of Commons Debates* at 10811 (13 February 1986). A new bill, Bill C-15 was introduced by the Minister of Justice and Attorney General of Canada on June 10, 1986. The Bill created three new offences relating to the sexual abuse of children including sexual interference, sexual exploitation, (s. 153 of the *Criminal Code*) and invitation to sexual touching. It also changed rules of evidence with respect to sexual offences and testimony of youths under age eighteen. See Canada, *Is Bill C-15 Working?* (Ottawa: Minister of Justice and Attorney General of Canada) at p. 2. *An Act to Amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19 was assented to on 30 June 1987 and in force on 1 January 1988. This Act brought into force section 153 of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁶³ *Ibid.* at 10805.

⁶⁴ *Ibid.* at 10809.

viewed as breaking new ground.⁶⁶ With respect to this offence, Ms. Lynn McDonald, Member of Parliament, stated:

The position of authority offence is an important one because so much of sexual abuse is committed by people in positions of authority, whether it be authority by age, authority because one is a parent or some other adult in the family or because someone is known to a child and is in a position of authority. This makes children particularly vulnerable. The stigma is great, as is the aftermath, because the victim has to continue to interact with the aggressor in the situation.⁶⁷

III. HISTORICAL CONTEXT WITHIN WHICH CONCERNS OF CHILD SEXUAL ABUSE WERE RAISED

One factor leading to greater awareness by society and the government of the pervasiveness of the problem of child sexual abuse was a societal shift in the public/private divide. This divide is the ideological division of life into opposing spheres of public and private activities and public and private responsibilities.⁶⁸ The public activities are those that are state regulated and private activities are those that fall within the realm of family relations which in the past were largely unregulated.

The division of people's lives into public and private spheres occurred as a result of the acceleration of industrialization over the past two decades of western capital societies.⁶⁹ Prior to industrialization men and women worked within the household, but with industrialization came the notion of leaving the home to go to work.⁷⁰ As a result, the spheres of home/family and paid work became "physically and conceptually more

⁶⁵ R.S.C. 1985, c. C-46. This section makes it either an indictable or summary conviction offence for a person who is in a position of trust or authority towards a young person who is fourteen years of age and under eighteen years of age for a sexual purpose to touch directly or indirectly the body of the young person, or for a sexual purpose, invites, counsels or incites a young person to touch directly the body of another person.

⁶⁶ *Supra* note 61 at 10809.

⁶⁷ *Supra* note 61 at 10809.

⁶⁸ *Supra* note 11 at 162.

⁶⁹ *Supra* note 11 at 163.

⁷⁰ *Supra* note 11 at 164.

separate in the 19th and early 20th centuries".⁷¹ Further, with the growth of the welfare state and increased regulation by the state and law of family life, there was a parallel assertion of the need for the privacy of the home.⁷²

The public sphere ideology was reinforced as a result of public authorities failing to intervene to prevent or criminalize violence against women and children in families and also because laws on marriage and family relations accorded husbands significant "privatized power".⁷³ Not only have men exercised considerable power in the private sphere, over both women and children,⁷⁴ they have also controlled issues in the public sphere and were the main group that spoke on these issues until the feminist movement became more powerful.

The divide shifts in response to many factors such as economic and class changes.⁷⁵ Some of the factors that have resulted in changes to the divide are the greater participation of women in the labour force and increased regulation of family relations.⁷⁶ Until very recently, there was a belief that the law or the state should not interfere with the private sphere of family relations. This resulted in sexual abuse, rape, and child abuse being hidden in the private sphere.⁷⁷ As a consequence there was a strong tendency by society to deny the existence of child sexual abuse. However, over the past two decades these topics entered the public discourse resulting in an awareness of the profundity of the problem of child sexual abuse. In 1986 Ms. Sheila Copps recognized the shift in the

⁷¹ *Supra* note 11 at 163.

⁷² *Supra* note 11 at 163.

⁷³ *Supra* note 11 at 168.

⁷⁴ *Supra* note 11 at 165.

⁷⁵ *Supra* note 11 at 164.

⁷⁶ *Supra* note 11 at 169.

⁷⁷ *Supra* note 11 at 170.

public/private divide:

...most of the incidents and cases of abuse occur within the family or among people who know these children and who will never be reported to the authorities.

...[O]ne thing that we should begin doing in our constituencies is to become more open to discuss these problems and be better informed of the fact that these children or families need our support. It is by changing attitudes, not by changing the law, that we can bring about real change. For instance, when I was sitting about two years ago on a provincial committee examining family abuse and violence in Ontario...Mr. Speaker, even two years ago...it is a good thing that the situation has changed, and it did because of our study. However, two years ago, when police officers were sent to school to get acquainted with the problem of family violence, they were told to consider the problem as a private and domestic problem and not as a criminal act.

Conditions are now changing. Heavy pressures are brought to bear not only by legislators but also by people who say: "Abuse or violence in the family is illegal. It is not a matter or a problem that should remain within the family".

...I think that public conscience about child abuse in 1986 has reached the same level as attained by domestic violence five years ago, that is domestic violence is now being discussed more openly by authorities and by people.⁷⁸

Child sexual abuse was no longer hidden away in the private sphere and as a result society recognized it as a tragedy of national concern.

IV. EVIDENTIARY RULES REGARDING THE EVIDENCE OF CHILDREN

For many years there was a reluctance to prosecute cases of sexual abuse because there was a belief in the tendency of women and children to fabricate stories of abuse.⁷⁹ This belief entered into the body of legal theory, which was expressed by John Henry Wigmore, the highly influential American authority on evidence.⁸⁰ In 1940, expressing views that were "typical of those which shaped the law in this area"⁸¹ he cautioned

⁷⁸ *Supra* note 61 at 10808.

⁷⁹ *Supra* note 7 at 6.

⁸⁰ *Supra* note 7 at 6 and note 13 at 6.

⁸¹ *Supra* note 13 at 6.

against prosecuting sexual assault cases because women and children were predisposed to bringing false accusations against men of good character:

Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.⁸²

Further, Wigmore was of the view that if these offences were to be prosecuted, then women and children should be examined by a qualified physician before being allowed to testify:

No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.⁸³

Wigmore's view was supported by the American Bar Association's Committee on the Improvement of the Law of Evidence. In its 1937 - 1938 report, the American Bar Association reported:

Today it is unanimously held...by experienced psychiatrists that the complainant woman in a sex offense should *always* be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases.

The imperative nature of this measure is further emphasized by the legal fact that the penalty for intercourse with a girl under sixteen years (so-called "statutory rape") is extremely heavy - sometimes twenty years; in one State, life imprisonment! Thus the erotic imagination of an abnormal child of attractive appearance may send an innocent man to the penitentiary for life. The warnings of the psychiatric profession, supported as they are by thousands of observed cases, should be heeded by our profession.

⁸² J. Wigmore, *Evidence in Trials at Common Law*, 3d ed., vol. 3A (Boston: Little, Brown, 1940), cited in N. Bala, *supra* note 13 at 6.

⁸³ *Ibid.*, Wigmore at 737.

We recommend that in all charges of sex offenses, the complaining witness be required to be examined before trial by competent psychiatrists for the purpose of ascertaining her probable credibility, the report to be presented in evidence.⁸⁴

These views, shared by many judges and lawyers, who were generally male, were supposedly based on both "modern" psychiatry and the experiences of judges of criminal courts and prosecuting attorneys.⁸⁵ While Wigmore's views about the unreliability of victims of child sexual abuse are wrong, they were nevertheless highly influential⁸⁶ in shaping evidence rules regarding the reception of children's evidence. The evidentiary rules, both common law and statutory, reflected the view that children's testimony in civil and criminal cases is untrustworthy because it was believed that:

- (1) children do not have adequate cognitive skills to either understand or accurately describe what they witnessed;
- (2) children have no ethical sense and are prone to fabricate; and
- (3) children have difficulty differentiating fact from fantasy.⁸⁷

Thus, "[b]efore 1982 sexual offences involving child witnesses were virtually impossible to prosecute to conviction".⁸⁸ Not only was there a belief shared by the judiciary and lawyers that women and young girls often fantasize that they were sexually abused by a man but there was also a belief that children were prone to fabricate events in their lives. The impediments to prosecuting cases of child sexual abuse were recognized and as a result, evidentiary changes were made to the reception of the evidence of children.⁸⁹ In

⁸⁴ *Ibid.* Wigmore at 746 - 747.

⁸⁵ *Supra* note 13 at 6.

⁸⁶ *Supra* note 13 at 7.

⁸⁷ Ontario, Law Reform Commission of Ontario, *Report on Child Witnesses* (Toronto: Law Reform Commission of Ontario, 1991) at 3.

⁸⁸ W. Harvey & P. E. Dauns, *Sexual Offences Against Children and the Criminal Process* (Toronto: Butterworths, 1993) at 145.

⁸⁹ W. Harvey & P. E. Dauns, *ibid.* at 1 explain the various evidentiary changes that resulted in abrogating the requirement of corroboration of a child's evidence in sexual offence cases. To begin with Bill C-127, S.C. 1980-81-82-83, c. 125 in 1983, abrogated the requirement of corroboration in sexual assault

*R. v. W.(R.)*⁹⁰ at page 142, Madam Justice McLachlin summarized the Court's change in approach to the evidence of children:

The law affecting the evidence of children has undergone two major changes in recent years. The first is the removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution. Thus, for example, the requirement that a child's evidence be corroborated has been removed: s. 586 of the Criminal Code, R.S.C. 1970, c. C-34, which prohibited the conviction of a person on the uncorroborated evidence of a child testifying unsworn, was repealed by an Act to amend the Criminal Code and Canada Evidence Act, S.C. 1987, c. 24, s. 15, effective January 1, 1988. Similar provisions of the Canada Evidence Act, R.S.C. 1970, c. E-10 and Young Offenders Act, S.C. 1980-81-82-83, c. 110, have also been eliminated. The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults. So if a court proceeds to discount a child's evidence automatically, without regard to the circumstances of the particular case, it will have fallen into error.

The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection...

As a result of several significant changes both in society's view of sexual abuse and in the law and the legal community's approach to the reception of children's evidence in court, there has generally been an increase in the number of prosecutions of child sexual abuse cases, including those against educators. There are a number of additional factors, which

complaints. As of January 1, 1988, various amendments to the *Criminal Code*, R.S.C. 1985, c. C-46, as am. and to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as am. (Bill C-15), *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.) eliminated the requirement for corroboration of unsworn evidence of children in child sexual assault cases. Finally, on August 1, 1993, Bill C-126, *An Act to amend the Criminal Code and the Young Offenders Act*, S.C. 1993, c. 45 was proclaimed in force and this eliminated the requirement for corroboration of children's evidence in general.

⁹⁰ [1992] 2 S.C.R. 122.

will be discussed below, that has resulted in the increased numbers of prosecutions against educators for sexual offences involving youth.

V. SOCIETY'S SHIFT IN THE VIEW OF EDUCATORS AND THE TREND TOWARDS 'JUSTICE FOR YOUTH'

As society moved from a rural to an industrial and post-industrial society, education has been viewed as perhaps the most important function of provincial governments. Society has recognized the importance of education to our democratic society by enacting compulsory school attendance laws and by expending a large share of the budget on education. It is viewed as a principal instrument in waking the child to cultural values, in preparing the child for later professional training and in helping him/her adjust to his environment. Education is the very foundation of good citizenship.⁹¹

Since the dominant goals of schools have historically been the formation of good character and citizenship, it has been a natural consequence to require moral excellence in the individuals who staff them.⁹² In return for upholding the public trust, teachers historically have been accorded a singular and unquestionable status⁹³ in the community. However, this attribution of status to educators has over the past several years become the subject of controversy and scrutiny for a number of reasons.⁹⁴ Fleming notes that over time teachers' groups' demands for greater financial reward, rather than social recognition, have been "instrumental in precipitating an abrupt revision in the public conception of the teacher's place"⁹⁵ in society. He states further:

The growth of a militant and collective approach by teachers for greater economic benefit and job security has accentuated divisions between instructional

⁹¹ *Brown v. Board of Education*, 347 U.S. 483 at 493.

⁹² *Supra* note 14 at 423.

⁹³ *Supra* note 14 at 423.

⁹⁴ *Supra* note 14 at 423.

⁹⁵ *Supra* note 14 at 423.

personnel, administrators, school board representatives and the public. Consequently, new community attitudes reflect the altered status of the teacher. No longer esteemed as public guardians, teachers have been relegated to the position of public servants. In effect, such stridency has been unpopular.⁹⁶

A change in the status of educators is also a result of the public's willingness over the past couple of decades to challenge the once unquestioned authority of many traditional authority figures, such as educators, priests, police and government officials.

Occurring in tandem with a change in the view of educators has been the movement towards justice for youth. In years past, a parent was more likely to accept as the final authority an educator's version of his/her conduct towards a child. However, with more societal recognition that child sexual abuse occurs and with greater willingness by adults to believe children generally, parents are asserting their children's rights and are challenging an educator's authority by having the courts review the matter.⁹⁷

VI. IMPACT OF THE SHIFT FROM A RURAL TO AN URBANIZED SOCIETY

In the days of the one-room schoolhouse, the country schoolteacher occupied a special place in the community; besides being a teacher, he or she was expected to be a model individual setting an example for all the class and the community.⁹⁸ Teachers boarded in the community where they taught. This was sometimes a condition of employment which was written into the contract.⁹⁹ The teacher did not choose the boarding homes, the community did.¹⁰⁰

⁹⁶ *Supra* note 14 at 423.

⁹⁷ This is particularly so in cases of corporal punishment. See *R. v. Corkum* (1936), 67 C.C.C. 114 (N.S.C.Ct.) and *R. v. Haberstock* (1970), 1 C.C.C. (2d) 433 (Sask.C.A.) It is also true with respect to suspension of students. See *Re Taylor and School District No. 35*, [1985] B.C.J. No. 2000 (C.A.), rev'd in part [1984] B.C.J. No. 165 (S.C.) and *Re Ward and Board of Blaine Lake School* [1971] 4.W.W.R. 161 (Sask.Q.B.). See further J. L. Black-Branch, "Weighing the Balance Between Constitutional Legal Rights and Administrative Duties" (1994) 33(8) *The Can. Adm.* 1 at 3.

⁹⁸ J. Cochrane, *supra* note 15 at 126.

⁹⁹ J. Cochrane, *supra* note 15 at 127.

¹⁰⁰ J. Cochrane, *supra* note 15 at 127.

The community exerted tight control over the teacher's behaviour, both on and off-duty. One American author describes the restrictions placed on an educator's behaviour as follows:

The use of tobacco and liquor was stringently regulated, with the use of the latter always grounds for dismissal from teaching. Gambling and profane language were also taboo; and it was expected, especially in smaller communities, that teachers would attend church regularly and participate in religious activities. Whereas for people in the community, on the other hand, it was a common practice in the mid-nineteenth century for men to chew tobacco and for men and women of higher social classes to drink at social gatherings; gambling, in various forms, was also widespread. The single teacher's dating behaviour was usually carefully observed - and in some communities forbidden; in other cases restrictions were imposed in terms of the time that teachers should be in at night.¹⁰¹

Not only did teachers live and socialize in the communities in which they taught, but school trustees were very much in contact with the school and the teacher:

They were not remote politicians, meeting in some downtown boardroom. They were neighbours and parents, who held their meetings in the school, which many of them attended. In a lot of cases they maintained the school themselves, putting on a roof, painting the windows, mowing the lawn...¹⁰²

...

Teachers were wary of the boards for good reason. Hiring was one of their major responsibilities, and so was firing and their decisions weren't always fair or based on predictable reasons.¹⁰³

Rich notes that one of the most salient changes since the 1930s has been the change in the type of communities in which the majority of American teachers live. It was common in the 1930s for teachers to live in small towns and rural areas but today the majority of teachers live in large urban areas.

¹⁰¹ J. M. Rich, *supra* note 15 at 117.

¹⁰² J. Cochrane, *supra* note 15 at 142.

¹⁰³ J. Cochrane, *supra* note 15 at 143.

With urbanization, not only is it common for teachers not to live in the same community in which they teach, but it has also resulted in school trustees being far removed from the more "hands on" role that trustees had in the nineteenth and early twentieth century. In addition with other changes, such as the establishment of teachers' unions and a variety of sociological and legal changes, the community can no longer impose the extreme restrictions on the conduct of teachers as it did in earlier times. Thus, the off-duty conduct of a teacher is not controlled and scrutinized as it was when the teacher lived in the community in which she or he taught. This decrease in scrutiny of a teacher's off-duty conduct may be a factor in the increase in prosecutions against teachers who have engaged in sexual misconduct involving youth. It may result in a very small number of educators who have predilections towards abusing youth to actually engaging in sexual misconduct with students, when in earlier times the constant scrutiny of a teacher's behaviour may have been a sufficient deterrent.¹⁰⁴

VII. CONCLUSION

The shift in the public/private divide was a major impetus in society recognizing that child sexual abuse is a national tragedy. There have been many factors that have led to the increased number of educators being prosecuted and sued civilly for sexual misconduct involving youth. Some of these factors include the change in society's view of educators, and the fact that corroboration of children's evidence is no longer required which has made sexual offences against youth easier to prosecute. In addition, since the enactment

¹⁰⁴ See also chapter 7 wherein there is a discussion of how school districts realized that by ignoring or covering up the sexual misconduct of an educator, they were part of the problem.

of the *Canadian Charter of Rights and Freedoms*¹⁰⁵ there has been a trend towards recognizing that students have rights.¹⁰⁶ Thus, parents no longer accept an educator's version of events and are willing to have a court hear and decide the matter.

In order to determine the standard of conduct expected of educators, it is necessary to examine the role of the teacher in society which will be discussed in the following chapter.

¹⁰⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰⁶ See W. MacKay, "The Judicial Role in Educational Policy-Making" 1 E.L.J. 127 at 133.L.J. 127 at 133 wherein Professor MacKay notes that "[p]rior to the Charter, there was little protection of student rights".

3. IN SEARCH OF THE STANDARD OF CONDUCT FOR SCHOOL BOARDS AND EDUCATORS

To situate the problem of child sexual abuse within the educational environment, it is necessary to consider the role of the teacher and the standard of conduct expected of the school board as well as educators. The framework for this discussion will focus on legislation and case law.

I. THE ROLE OF THE TEACHER

At core, schools are cultural institutions and teaching is a cultural activity.¹ As such, the education system plays a vital role in the socialization and the transmission of cultural values, beliefs and knowledge to the young. The teacher, as cultural custodian, has the responsibility of creating cultural continuity by passing on to the next generation the valued aspects of the culture.² In addition, a teacher is expected to socialize students into a particular normative order.³ Given that teachers are "inextricably linked to the integrity of the school system",⁴ the effective transmission of values, beliefs and knowledge is a function of the fitness of the "medium" (the teacher).⁵ The values and beliefs, which are taught as part of the official or prescribed curriculum, are coloured by the unofficial curriculum; the tacit values of the teacher.⁶

Since teachers occupy a special position in society, they have a unique opportunity to influence students both within and outside the classroom. Thus, the teacher's role transcends into spheres outside the classroom and, as such, a teacher's influence over his

¹ S. Pidcocke, R. Magsino & M. Manley-Casimir, *Teachers in Trouble: An Exploration of the Normative Character of Teaching*, (Toronto: University of Toronto Press, 1997) at 10.

² M. Manley-Casimir, "Teaching as a Normative Enterprise" (1995) 5 E.L.J. 1 at 20.

³ *Supra* note 1 at 13.

⁴ *Ross v. New Brunswick School District 15* [1996] 1 SCR 825 at 857 [hereinafter *Ross*].

⁵ A. Reyes, "Freedom of Expression and Public School Teachers" (1995) 4 Dal.J.L.St., 35 at 37.

⁶ Mr. Justice La Forest, "Off-Duty Conduct and the Fiduciary Obligations of Teachers" (1997) 8 E.L.J. 119 at 120.

or her students does not stop at the schoolyard gates.⁷ In *Ross* Mr. Justice La Forest commented on the role teachers play in the school system and in the wider community:

Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence and upon the community's confidence in the public school system as a whole...⁸

By virtue of holding a position of trust, the community expects teachers to be role models for their students. This expectation enhances the public position of teachers and intensifies the scrutiny of teachers' behaviour, both inside and outside of the classroom.⁹

II. STANDARD OF CONDUCT

Educators are vested with a broad authority over their students. Parents and the wider community have reposed trust in them and, as a result, the law and society generally hold educators to a higher standard of conduct than members of the general public. Although the law holds school boards and teachers to a certain standard of conduct, this standard is elusive and not easily discernible by educators. In order to determine the expected standard of conduct it is necessary to examine legislation and decisions of the courts.

A. School Board

There are many ways in which a court can hold a school board liable when a student or other individual is injured. A school board might be held vicariously liable for the negligent acts or for acts of sexual harassment committed by its employees in the scope of employment.¹⁰ Thus, a court may determine that an educator has been negligent in performing his or her duties and thus, is personally liable for any resulting injury.

⁷ *Supra* note 5 at 36.

⁸ *Supra* note 4 at 857.

⁹ *Supra* note 1 at 13.

However, the court may also impose vicarious liability on the school board because as the employer it is liable for the acts of its employees. The school board is generally in a better position than the employee to compensate the victim as it generally carries insurance to cover such losses. A school board can also be held directly liable for its negligence in carrying out its duties, including the hiring and supervising of its employees. Further, if a school board is in breach of any of the statutes that regulate its conduct, this may also lead to a finding of liability.

Although the various education acts in British Columbia, Ontario and Nova Scotia set out duties and obligations of a school board, they do not explicitly set out the expected standard of conduct of a school board. There are several provisions in the acts which impose an express duty on a school board to ensure that students are provided with a safe and healthy learning environment. These provisions are sufficient to establish a statutory duty of care.¹¹

In providing a safe and healthy learning environment, a school board has a duty to protect students and to minimize any risk of sexual misconduct its employees may pose.¹² This duty begins with the hiring of employees. Pursuant to various acts, a school board is responsible for hiring, supervising and disciplining employees.

Brown and Zuker¹³ note that even though a school board is not an absolute insurer of the safety of its students, it has a legal obligation to take reasonable steps to ensure their safety from board employees who could pose as a risk of sexual abuse to the students. This requires a school board to carefully screen all potential employees by fully

¹⁰ For a detailed discussion of vicarious liability and other types of liability of a school board, see chapter four.

¹¹ A. F. Brown & M. A. Zuker, *Education Law* (Scarborough: Carswell, 1994) at 54.

interviewing them, diligently checking references, supervising and investigating employees whenever any suspicions are raised, and taking appropriate disciplinary steps when required.

In both British Columbia and Ontario the screening procedures include requiring prospective educators to submit to a criminal records check. There is no requirement in Nova Scotia for teachers to undergo a similar check. In British Columbia, the *Criminal Records Review Act*¹⁴ has been in force since January 1, 1996 while in Ontario a *Criminal Records Screening Bylaw* was just recently added in December 1998 to the bylaws of the Ontario College of Teachers.¹⁵ The *C.R.R.Act* is far more comprehensive than the *C.R.S.Bylaw*. The *C.R.R.Act* applies generally to teachers and non-teaching personnel in all public and independent schools who work with children, including those who are not certified by the British Columbia College of Teachers. However, the *C.R.S.Bylaw* appears to only apply to prospective teachers applying for membership in the Ontario College of Teachers.

Pursuant to the *C.R.R.Act* it is the responsibility of school boards in British Columbia to obtain criminal record checks from non-teaching personnel who work with children and from teachers who are not certified by the college. It is the responsibility of the college to obtain criminal record checks from new teachers and for teachers who are registered members.

If a criminal records check under the *C.R.R.Act* indicates that an employee has a conviction for an offence that results in a determination that the individual poses a risk of

¹² K. Mitchell & S. M. Kennedy, "Sexual Misconduct in Schools - Recent Jurisprudence" (CAPSLE '98 Conference, Banff, Alta. 27 April 1998)[unpublished] 1 at 3.

¹³ *Supra* note 11 at 73.

¹⁴ R.S.B.C. 1996, c. 86 [hereinafter *C.R.R.Act*].

physical or sexual abuse to children, then a board must ensure that the employee is removed or never placed in a position where the individual works with children. Although the *C.R.R.Act* and the *C.R.S.Bylaw* do not apply to volunteers or student teachers, a board has an obligation to take reasonable steps to determine that these individuals, as well as visitors, do not pose a risk to the safety and welfare of its students. As part of its duty to take reasonable steps to ensure the safety and well-being of its students, a school board should ensure that it familiarizes all of its employees with the reporting requirements of the various child protection and welfare statutes.¹⁶ These Reporting Laws impose an obligation on educators who have a reason to believe that a child has been or is likely to be abused by a parent or other person, including an educator, to report the matter to the proper authorities.¹⁷

In taking reasonable steps to ensure the safety and well being of its students, a school board also has a duty to supervise the conduct of teachers and to discipline teachers when appropriate. The various education acts contain provisions for disciplining teachers. Whereas both the British Columbia *School Act*¹⁸ and the Nova Scotia *Education Act*¹⁹ have provisions allowing a school board the right to suspend a teacher for just cause, the Ontario *Education Act*²⁰ has no such provision.²¹

¹⁵ Minutes of Governing Council Meeting, Dec. 10 -1, 1998, Ontario College of Teachers, <http://www.oct.on.ca/english/minutes8.htm>. [hereinafter *C.R.S.Bylaw*].

¹⁶ British Columbia - *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46; Nova Scotia - *Children and Family Services Act*, S.N.S. 1990, c. 5; Ontario - *Child and Family Services Act*, R.S.O. 1990, c. 11 [hereinafter *Reporting Laws*].

¹⁷ In British Columbia an educator would report to the Ministry of Children and Families; in Nova Scotia and Ontario the report is made to a local children's aid society.

¹⁸ R.S.B.C. 1996, c. 412.

¹⁹ S.N.S. 1995-96, c.1.

²⁰ R.S.O. 1990, c. E.2.

²¹ In several collective agreements between various school boards and the Elementary Teachers' Federation of Ontario there are provisions stipulating that a teacher shall not be demoted, suspended or disciplined without just cause. See the collective agreements of the following district school boards: Lakehead, Lambton Kent, Renfrew County, Simcoe and Waterloo Region.

In British Columbia, unlike Nova Scotia, there is an additional specific provision regarding conduct that may result in suspension. This provision provides that an employee who is charged with an offence that renders the person unsuitable from the performance of one's duties may be suspended.²² Further, in British Columbia if the superintendent suspends an employee from the performance of his or her duties because the welfare of the students is threatened by the presence of this employee, the school board must confirm, vary or revoke the suspension.²³ In the Nova Scotia *Education Act* there is a similar provision which states that if a school board authorizes a superintendent to suspend a teacher for just cause for a period not exceeding ten days, the school board shall confirm, vary or revoke the suspension.²⁴

All acts have provisions for dismissing teachers. In British Columbia and Nova Scotia an employee can be dismissed for just cause,²⁵ while in Ontario a teacher can be dismissed if in the opinion of the Minister a matter has arisen that adversely affects the welfare of the school.²⁶ Given that the standard of conduct of a school board is not defined in any of the legislation in British Columbia, Ontario and Nova Scotia, this standard must be gleaned from case law.

1. STANDARD OF CONDUCT REQUIRED BY A SCHOOL BOARD

The general standard of conduct owed by school authorities to its students is that of a reasonably prudent or careful parent. The duty of care is to protect its students from any

²² *Supra* note 18, s. 15(4).

²³ *Supra* note 18, section 15(5) - (7).

²⁴ *Supra* note 19, section 33.

²⁵ *Supra* note 18, section 15(3) and note 12, section 34.

²⁶ *Supra* note 20, section 263.

reasonably foreseeable risks of harm or injury.²⁷ The leading authority on the standard of conduct expected by school authorities is set out in *Myers v. Peel County Board of Education*.²⁸ At page 31, Mr. Justice McIntyre described the expected standard of conduct as follows:

The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful or prudent parent, described in *Williams v. Eady* (1983), 10 T.L.R. 41. It has, no doubt, become somewhat qualified in modern times because of the greater variety of activities conducted in schools, with probably larger groups of students using more complicated and more dangerous equipment than formerly: see *McKay et al. v. Board of Govan School Unit No. 29 of Saskatchewan et al.* (1968), 68 D.L.R. (2d) 519, [1968] S.C.R. 589, 64 W.W.R. 301, but with the qualification expressed in the *McKay* case and noted by Carrothers J.A. in *Thornton, supra*, it remains the appropriate standard for such cases. It is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application will vary from case to case and will depend upon the number of students being supervised at any given time.

The careful, prudent parent standard has been criticized as being an outdated standard that is paternalistic and that offers very little guidance to school board authorities in the assessment of their conduct.²⁹ Further, the physical and human environments of homes and schools cannot necessarily be compared. In addition, the experiences and levels of expertise of parents and teachers are likely different.³⁰ This standard has also been criticized because it allows courts to manipulate the standard in any way they desire.³¹ One author has suggested ... "the myriad of "judicial modifications" to the test in

²⁷ J. Bell, "Liability Issues Affecting Boards of Education, Their Trustees, Servants, Agents and Employees" (Education Law - After the ABC's, Continuing Legal Education, OISE Facilities, 21 April 1988) (1988) CBA Ontario, C.L.E. 5.00.

²⁸ [1981] 2 S.C.R. 21.

²⁹ A. W. MacKay & L. I. Sutherland, *Teachers and the Law: A Practical Guide for Educators* (Toronto: Edmond Montgomery Publications, 1994) at 4.

³⁰ W. F. Foster, "Child Abuse in Schools: The Statutory and Common Law Obligations of Educators", (1993) 4 E.L.J. 1 at 44.

³¹ *Supra* note 29 at 4.

Williams v. Eady, in particular those catalogued in *Myers*, have reduced the prudent parent standard to a sham."³²

Who is the elusive careful, prudent parent that the court uses as its prototype in assessing the conduct of a teacher? William Foster suggests that it is not that of any prudent parent, but rather it is the standard of the "(fictitious) reasonably prudent or careful parent. This is not a standard which makes educators and their employers guarantors or insurers of their pupils' safety".³³ School boards are not guarantors of their students' safety because if they were, this would mean that courts are applying a standard of the perfect parent and not that of a reasonably prudent parent. From a social policy point of view if a school board was an insurer of their students' safety, a multitude of claims would likely be made against a school board by students for injuries suffered. This would greatly increase the insurance premiums for a school board which may be extremely burdensome in the current climate of fiscal conservativeness.

Although the test of the reasonably prudent parent is objective, in the multi-cultural societies of British Columbia and Ontario is the standard of the prudent Asian or Indo-Canadian parent the same as the careful, prudent Caucasian parent? Despite serious doubts as to the relevance of the careful, prudent parent standard, this traditional common law standard by which the propriety of the conduct of teachers and their employers is measured, continues to be the present Canadian standard.³⁴

³² L. C. H. Hoyano, "The 'Prudent Parent': The Elusive Standard of Care" (1984) 18 U.B.C.L.R. 1 at 31.

³³ *Supra* note 30 at 45.

³⁴ *Supra* note 30 at 44.

Keel and Goto³⁵ note that schools boards may have a common law duty to exercise reasonable care in hiring practices. While many jurisdictions in the United States have recognized a tort of negligent hiring³⁶ in the context of a plaintiff suing a teacher for sexual misconduct and the school board that hired the teacher, Canadian courts recognize an allegation that an employer was negligent in hiring a particular employee within the general tort of negligence.³⁷ Plaintiffs in the United States who bring these actions, combine the tort of negligent hiring with the tort of negligent supervision and retention. Generally, Canadian courts consider the same factors as American courts when determining whether an employer was negligent in hiring the employee.³⁸ To date, Canadian courts have not considered the issue of negligent hiring within the context of a student suing a teacher for assault and battery arising from sexual misconduct and the

³⁵ R. G. Keel & E. Goto, "Liability Issues: Striking the Balance: (CAPSLE '94, Saskatoon, Sask., 1 may 1994) (Chateaugay: Imprimerie Lisbro Inc., 1995) at 280.

³⁶ For a list of the jurisdictions in the United States that recognize the tort of negligent hiring see P. S. Swedlund, "Negligent Hiring and Apportionment of Fault between Negligent and Intentional Tortfeasors: A Consideration of two unanswered questions in South Dakota Law" (1996) 41 S.D.L.R. 45 at 59 note 93.

³⁷ For Canadian cases that have recognized an allegation that an employer was negligent in hiring an employee see *Alberta U Drive Ltd. v. Jack Carter Ltd.* (1972), 28 D.L.R. (3d) 114 (Alta. S.C.T.D.); *Barrett v. The Ship "Arcadia"* (1977), 76 D.L.R. (3d) 535 (B.C.S.C.); *B.C. Ferry Corp. v. Invicta Security Service Corp.* [1988] B.C.J. No. 2671 (C.A.), online: QL (BCJ); *Downey v. 502377 Ontario Ltd.* [1991] O.J. 468 (Gen.Div.), online: QL (ORP); *G.B.R. v. Hollett* (1995), 143 N.S.R. (2d) 38 (S.C.), aff'd (1996), 139 D.L.R. (4th) 260 (N.S.C.A.) [hereinafter *Hollett*]; *Hillcrest General Leasing Ltd. v. Guelph Investments Ltd.* (1970), 13 D.L.R. (3d) (Ont.Co.Ct.); *K.(W.) v. Pornbacher* (1997), 32 B.C.L.R. (3d) 361 (S.C.) [hereinafter *Pornbacher*]; *Levesque v. Kavanaugh* (1980), 30 N.B.R. (2d) 76 (N.B.Q.B.T.D.); *Lyth v. Dagg* (1988), 46 C.C.L.T. 25 (B.C.S.C.) which is a negligent/supervision claim; *McDonald v. Mombourquette* (1995), 145 N.S.R. (2d) 360 (S.C.), rev'd (1996), 152 N.S.R. (2d) 109 (C.A.); *Q. v. Minto Management Ltd.* (1985), 49 O.R. (2d) (H.C.), aff'd (1986) 57 O.R. (2d) 781 (C.A.).

³⁸ In particular see *Pornbacher*, *supra* note 37 and *Hollett*, *supra* note 37.

school board for hiring the teacher.³⁹

In *Peck v. Siau*, the Washington Court of Appeal described the tort of negligent hiring as follows:

[A]n employer may be liable to a third person for the employer's negligence in hiring or retaining the employee with knowledge of his unfitness, or of failing to use reasonable care to discover it before hiring or retaining him. The theory of these decisions is that such negligence on the part of the employer is a wrong to such third person, entirely independent of the liability of the employer under the doctrine of respondeat superior. It is, of course necessary to establish such negligence as the proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired.⁴⁰

In the United States, the tort of negligent hiring is composed of the traditional elements of negligence. In order for a plaintiff to be successful in proving this tort, the following six elements must be proven:

1. the employer owed a duty of care to the plaintiff and breached this duty;
2. an employment relationship existed between the employer and the tortfeasor;
3. the employee was unfit for the particular position;
4. the employer knew or should have know through reasonable investigation that the employee was unfit;
5. the employee's tortious act caused the plaintiff's injury and actual damage or harm occurred to the plaintiff;
6. the negligent hiring was the proximate cause of the plaintiff's injury.⁴¹

³⁹ In *Lyth v. Dagg*, *ibid*, the plaintiff alleged that the school district was negligent because it should have known that the teacher who engaged in sexual misconduct with the plaintiff, had engaged in similar conduct with other students. This case is a negligent supervision/retention case.

⁴⁰ 827 P.2d 1108 at 1110; review denied 925 S.W.2d 534 (Wash.App. 1992).

⁴¹ C. M. Haerle, "Employer Liability for the Criminal Acts of Employees under the Negligent Hiring Theory: *Ponticas v. K.M.S. Investments* (1984) 68 Minn.L.R. 1303 at 1304.

A leading American case⁴² has recognized that there is a sliding scale with respect to the standard of care required by an employer in investigating the background of a prospective employee. In *Ponticas* the Court stated:

...if the employer "knew or should have known" of the incompetence, and notwithstanding hired the employee, there would exist a breach of duty. Although an employer will not be held liable for failure to discover information about the employee's incompetence that could not have been discovered by reasonable investigation, the issue is whether the employer did make a reasonable investigation. The scope of the investigation is directly related to the severity of risk third parties are subjected to by an incompetent employee. Although only slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment would not constitute a high risk of injury to third persons, "a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant..."...Likewise, when the prospective employee is to be furnished a passkey permitting admittance to living quarters of tenants, the employer has the duty to use reasonable care to investigate his competency and reliability to employment...⁴³

Given that an educator with paedophilic tendencies is a severe risk to students in the district, courts would likely hold a school district to a higher standard of investigation than other employers.

Negligent hiring claims involving allegations against a school district in the United States have a low success rate.⁴⁴ This is particularly true if it is a historical sexual assault

⁴² *Ponticas v. K.M.S. Investments* 331 N.W.2d 907 (Minn. 1983) [hereinafter *Ponticas*].

⁴³ *Ibid.* 912.

⁴⁴ Nineteen cases were reviewed. Plaintiffs won only seven of nineteen or thirty-seven percent of their claims of negligent hiring against the employers of teachers who engaged in sexual misconduct. The seven cases the plaintiffs won on the negligent hiring issue are: *Doe v. Edwards* [1996] WL 92228 (Super.Ct.Conn.), online: WL (AL-CS); *Doe v. Town of Blandford*, 525 N.E.2d 402 (Mass. 1988); *John R. v. Oakland Unified School District*, 240 Cal.Rptr. 319 (C.A. 1987), *aff'd in part and rev'd in part*, 769 P.2d 948 (Cal. 1989); *Koran v. New York City Board of Education*, [1998] WL 925211 (N.Y.A.D. 1 Dept.), online: WL (AL-CS); *Mueller v. Community Consolidated School district*, 678 N.E.2d 660 (Ill.App. 1 Dist. 1997); *Ortega v. Pajaro valley Unified School District*, 64 Cal.App. 4th 1023, 75 Cal.Rptr. 2d 777 (C.A. 1998); *Virginia G. v. Unified School District*, 15 Cal.App. 4th 1848, 19 Cal.rptr.2d 671 (C.A. 1993). The plaintiffs lost on the issue of negligent hiring in twelve of nineteen cases. These cases are as follows: *Doe v. Clyde-Green Springs Exempted Village Schools* [1997] WL 586748 (Ohio App. 6 Dist.), online: WL (AL-CS) [hereinafter *Doe v. Clyde-Green*]; *Doe v. Coffee County Board of Education*, 852 S.W.2d 899 (Tenn.App. 1992); *Doe v. Coffee County Board of Education*, 925 S.W.2d 534 (Tenn.App. 1996); *Doe v. Jefferson Area Local School District*, 646 N.E.2d 187 (Ohio App. 11 Dist. 1994); *Godar v. Edwards*,

case.⁴⁵ Often in these cases memories of witnesses have faded and documentary proof of hiring practices may not be available. In addition, the standard upon which the school district will be judged by the court to determine if its hiring practices were reasonable, will be the standard required of school districts at the time the assault occurred. This will be a lower standard than the standard required of school districts today given that the idea that a teacher would sexually abuse a student has only been acknowledged since the early 1980s.⁴⁶ Thus, prior to the 1980s school districts may not have developed hiring policies as stringently as they have since recognizing that some educators do abuse students.

The courts in the United States and Canada are generally reluctant to impose vicarious liability against school districts for the acts of sexual misconduct of its employees against students.⁴⁷ According to Fossey and DeMitchell one of the reasons courts are reluctant to find school districts vicariously liable for the sexual misconduct of its employees is because the damages awarded could financially cripple a school district, making it impossible to deliver educational services to the children within its jurisdiction.⁴⁸ If courts did impose vicarious liability on a school district for the sexual misconduct of its employees, this could result in a district being liable for the sexual misconduct of several

[1999] WL 22759 (Iowa), online: WL (AL-CS) [hereinafter *Godar*]; *L.R.M. v. Engstrom*, 397 N.W. 2d 317 (Mich.App. 1986); *Medlin v. Bass*, 398 S.E.2d 460 (N.C. 1990); *P.L. v. Aubert*, 527 N.W. 2d 142 (Minn.App. 1995); *Peck v. Siau*, 827 P.2d 1108; review denied 925 S.W.2d 534 (Wash.App. 1992); *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582 (Cal. 1997); *Rosacrans v. Kingon*, 397 N.W.2d 317 (Mich.App. 1986) and *Walters v. Hawken School*, [1999] WL 43326 (Ohio App. 8 Dist.), online: WL (AL-CS).

⁴⁵ see *Doe v. Clyde-Green*, *ibid.* and *Godar*, *ibid.*

⁴⁶ For many years child sexual abuse had been hidden in the private sphere of the family and has only entered public discourse over the past few decades. See S.B. Boyd, "Can Law Challenge the Public/Private Divide? Women, Work and Family" (1996) 15 Windsor Y.B. Access Just. 161 at 170. Further the Federal Government only recognized child sexual abuse as a national concern in the early 1980s. See *Sexual Offences Against Children*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984) at 3.

⁴⁷ For a discussion on the reluctance of American courts of imposing vicarious liability against school boards, see R. Fossey & T.A. Demitchell, "'Let the Master Answer': Holding Schools Vicariously Liable When Employees Sexually Abuse Children" (1996) 25 J of L&Educ. 575 at 576. Also for a case in Canada

employees and damages assessed in several cases could be quite high. Although damages are awarded in successful negligent hiring claims, very few of these claims succeed. Thus, it would be unlikely that a school board would be financially crippled as a result of being sued for the tort of negligent hiring. This tort is an important cause of action for a plaintiff. It provides the plaintiff with an alternative cause of action against an employer who often has the ability to pay a judgment ordered by the court.

If the problem of sexual predation is to be eliminated or at least controlled, the employer must be powerfully motivated⁴⁹ to develop appropriate hiring and supervision procedures to ensure employees with tendencies to abuse children are not working in the education system. Although the tort of negligent hiring is an important cause of action for a plaintiff, it likely will not be a powerful motivator for employers because of the limited success of these actions. Requiring teachers to undergo a criminal records check may eliminate some individuals from the teaching profession who have criminal records for convictions for offences that are marginally related to the education of children. However, it will not eliminate teachers who have paedophilic tendencies who do not have a criminal record for sexual offences.

To control sexual predation in schools, the solution may not be with hiring practices of a school district but with educators being more closely supervised by administrators in their interactions with students. Supervision of staff is more than directly monitoring the interactions of educators with staff. It also includes alerting staff members in staff

where a school district was sued unsuccessfully for vicarious liability see *E.D.G. v. Hammer* (20 April 1998), Vancouver C954374 (B.C.S.C.). See chapter five for a discussion of vicarious liability of schools.

⁴⁸ *Ibid.* at 596.

⁴⁹ *P.A.B. v. Curry* [1999] S.C.J. No. 35 at para. 32 citing Wilkinson J. of the British Columbia Supreme Court.

meetings to types of behaviours and styles of interacting with students that should be avoided by educators. Further, it involves being aware of characteristics of abusers and following up on any interactions between educators and students that appear to be inappropriate. While duties of administrators have increased over the past decade, closer supervision of staff should be a priority of principals. In addition, the solution may also include ongoing education of both students and teachers with respect to appropriate interactions between these two groups.

These issues may be before the British Columbia Supreme Court in 1999 involving actions brought by former students of Robert Noyes.⁵⁰ According to Soltan and Kennedy⁵¹ these students have commenced actions against four school boards for damages as a result of sexual abuse committed by Noyes. The former students are alleging that the school boards are liable in negligence for failing to take reasonable care in their hiring and supervision practices.⁵²

The careful, prudent parent standard would not be appropriate to determine if a school board met the required standard of care in its hiring practices. A higher standard, such as the standard of a reasonable employer similarly situated to that of a school board,⁵³ would

⁵⁰ See note 3 of Chapter 2 [hereinafter *Noyes*].

⁵¹ "Sexual Abuse and Sexual Harassment in Schools: Recent Cases and Trends" (School Law 1997, Vancouver, February 1997) (1997) (Vancouver: CLE) 1.2 at 1.2.19.

⁵² Only one set of pleadings has been able to be obtained in *K.J. v. Noyes*, Vancouver C973615 which was to proceed to trial on November 30, 1998 but did not. No new trial date has been set. In this action the plaintiff has pleaded that the school district was negligent in failing to supervise Noyes. There is no allegation that the school board was negligent in its hiring practices.

⁵³ In *Toronto (Board of Education) v. Higgs* (1960), 22 D.L.R. (2d) (S.C.C.) [hereinafter *Higgs*] the Supreme Court of Canada was considering whether the school board was negligent as a result of the system of supervision used by the principal. In discussing this case, Brown and Zuker, *supra* note 11 at 66 note that Ritchie J. raised the question that a different standard of care may apply to the board as a corporate entity in contrast to the standard which applies to employees. In *Higgs*, Ritchie J. states: "...[I]t seems to me that the analogy between the duty of a school master to his pupils and that of a parent to his children, while it applies with some force to the duty which the individual master owes to children under his care, cannot be related with the same validity to the responsibilities of organization and administration which rested on Mr. Macpherson as principal of a school with an enrolment of 750 pupils".

be a more appropriate standard to determine whether the school board met the required standard of care. The standard of a reasonable employer would require a school board to undertake a comprehensive examination into the background of a potential employee, including a criminal records check.

B. TEACHERS

*Like Caesar's wife, the teacher must be above reproach.*⁵⁴

As the quote suggests, the law holds teachers to a high standard of conduct both within and outside the classroom. This standard of conduct is not easily discernible from any of the many sources of law that govern teachers; including case law, legislation, board policy or the professional code of conduct. Each of these sources that govern teachers, will be discussed below.

1. Legislation Governing Teachers

Although the various education acts and regulations⁵⁵ define the duties of a teacher, they do not explicitly state the standard of conduct expected of teachers. The education acts and regulations do not in any way require teachers to adhere to proper conduct either during or outside of their teaching responsibilities.⁵⁶ There are no statutory provisions in any legislation in British Columbia or Nova Scotia imposing a higher standard of moral conduct on teachers than on the rest of the community. However, in the *Education Act* in Ontario there is a provision that uses phrases that allude to some notion of societal expectations of teachers. The duties of a teacher are stated in section 264 of the Ontario

⁵⁴ *Supra* note 2 at 6.

⁵⁵ *School Regulation*, B.C. Reg. 265/89; *Regulations under the Education Act*, N.S.Reg./97.

⁵⁶ A. Black & A. M. Lopez, "Teacher Discipline for Off-Duty Conduct: Is the Standard too High?" (Chateaugay: Imprimerie Lisbro Inc., 1997) 104 at 110.

Education Act as follows:

...to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues...

This provision is extremely broad and open to interpretation and fails to recognize the multi-cultural and religious diversity of society and, increasingly, of the teaching profession. In commenting on this section, Mr. Justice Cory stated:

The language is that of another era. The requirements it sets for teachers reflect the ideal and not the minimal standard. They are so idealistically high that even the most conscientious, earnest and diligent teacher could not meet all of them at all times. Angels might comply but not mere mortals...⁵⁷

Despite the fact that child sexual abuse is no longer hidden in the private sphere and has been recognized as a serious problem in our society, existing criteria in these education acts for determining what constitutes unacceptable conduct by teachers is written in legal jargon and requires an understanding of jurisprudence that governs employer/employee relations. The acts in Nova Scotia and British Columbia state that an employee can be disciplined or dismissed for "just cause"⁵⁸ while the Ontario legislation stipulates that an employee can be terminated for a "matter which adversely affects the welfare of the school".⁵⁹ These terms are subject to a great deal of interpretation.

The acts which establish the teachers' professional regulatory bodies, the Colleges of Teachers in British Columbia and Ontario and the Nova Scotia Teachers' Union, also do not overtly deal with the standard of conduct expected of teachers.⁶⁰ Further, in British

⁵⁷ *Toronto Board of Education v. O.S.S.T.F.* (1997), 144 D.L.R. (4th) 385 (S.C.C.) at 401 as noted by Mr. Justice La Forest, *supra* note 6 at 134.

⁵⁸ *School Act*, *supra* note 18, s. 15(3); *The Education Act*, *supra* note 19, ss. 33 and 34.

⁵⁹ *Education Act*, *supra* note 20, s. 263.

⁶⁰ See s. 4 of the *Teaching Profession Act*, R.S.B.C. 1996, c. 449; s. 7 of the *Teaching Profession Act*, R.S.N.S. 1989, c. 462 and s. 3 of *An Act to establish the Ontario College of Teachers and to make related amendments to certain statutes*, R.S.O. 1996, c. 12 [hereinafter the *Ontario College of Teachers Act*].

Columbia and Nova Scotia there are no provisions in the regulations to the provincial *Teaching Profession Acts* that allude to the requisite standard of conduct. However, Ontario provides in a regulation to the *Ontario College of Teachers Act* that "abusing a student physically, sexually, verbally, psychologically or emotionally" is professional misconduct.⁶¹ Although this regulation does not define the term "abusing a student sexually", Ontario is the only jurisdiction that clearly sets out that sexual abuse by an educator is professional misconduct.

There is no clear statement defining the required standard of conduct in the bylaws of the Colleges and the Nova Scotia Teachers' Union. However, in the introduction to the bylaws of the British Columbia College of Teachers it stipulates that teachers must be individuals who understand that there is a significant trust relationship between themselves, students and parents, and teachers must be individuals who can be given that trust.⁶² It also indicates that teachers must be fit and proper persons to be teaching.⁶³ There are no similar provisions in the bylaws of the Ontario College of Teachers or the Nova Scotia Teachers' Union.

2. Professional Code of Ethics

Each of the teachers' unions in the three jurisdictions has a professional code of ethics. However, none of the codes stipulate the required standard of conduct expected of teachers. The Code of Ethics of the British Columbia Teachers' Federation is the only code of the three jurisdictions that does state that teachers are in a special relationship with students and that this relationship should not be exploited:

⁶¹ O. Reg. 437/97 s. 1(1)(7).

⁶² B. C., the B.C.C.T., "Bylaws and Policies" at iii.

⁶³ *Ibid.* at iii.

The teacher recognizes that a privileged relationship with students exists and refrains from exploiting that relationship for material, ideological or other advantage.⁶⁴

Further, the B.C.T.F. expects teachers to treat all students with respect and dignity and to deal with them judiciously, being mindful of their individual rights and responsibilities.⁶⁵

In both the Code of Ethics of the Nova Scotia Teachers' Union and the Ontario Teachers' Federation there is no recognition that teachers are in a trust relationship with students. However, the Nova Scotia Teachers' Union recognizes that a teacher is to be just and impartial in all relationships with pupils.⁶⁶ Similarly, the Ontario Teachers' Federation recognizes that a member shall show justice and consideration in all his relations with students and shall concern himself with the welfare of his students while they are in his care.⁶⁷

Ontario is the only jurisdiction that provides a clear statement in the legislation that an educator who sexually abuses a student is clearly engaging in professional misconduct. In British Columbia and Nova Scotia there is not a clear statement in the legislation, the codes of ethics or the bylaws of the College or the Union regarding the expected standard of conduct of an educator. Although vague and open to a great deal of interpretation, the statements that are closest to articulating a standard of conduct expected of teachers in British Columbia and Nova Scotia are those expressed in the bylaws of the B.C. College of Teachers and the B.C.T.F. Code of Ethics. Both of these organizations state that a teacher is in a trust relationship with students, which is a privileged relationship.

⁶⁴ B. C., the B.C.T.F., "Members' Guide to the B.C.T.F. (1998-1999)" (Vancouver: The B.C.T.F.) at 103.

⁶⁵ *Ibid.* at 103 [hereinafter the *B.C.T.F.*].

⁶⁶ Nova Scotia Teachers Union, *Member Diary 1998 - 99*, (Halifax: Nova Scotia Teachers' Union, 1998) [hereinafter the *N.S.T.U.*].

3. Civil Case Law

The leading case that deals with the expected standard of conduct of a teacher is *Abbotsford School District 34 v. Shewan*.⁶⁸ In this case a teacher took a semi-nude photograph of his wife, who was also a teacher, and sent it to an American magazine. With the Shewans' permission, the photograph was published in a magazine. When the School Board learned of its publication, both teachers were suspended for six weeks. The teachers appealed to a Board of Reference, which held that there was no misconduct by the teachers.

The School Board appealed to the Supreme Court of British Columbia wherein Mr. Justice Bouck reduced the suspension of the teachers to a period of one month. On further appeal by the teachers, the Court of Appeal had to determine the meaning of "misconduct" as used in s. 122(1) of the *School Act*,⁶⁹ and the standard to be applied in determining whether particular conduct constitutes misconduct within the meaning of the statute.

The Court held that "misconduct" means wrong, bad or improper conduct. It further held that because a teacher holds a position of trust, confidence and responsibility, the term "misconduct" can apply to activities that occur both within and outside of the classroom. The Court stated further that if the teacher acts improperly either on or off the job, the public could lose confidence in the teacher and in the public school system. Students could also lose respect for the teacher and other teachers generally, and there might be a

⁶⁷ Ontario Teachers' Federation, *We the Teachers of Ontario - 1996 Handbook, Regulation Made under the Teaching Profession Act*, s. 14 at 8 (Toronto: Ontario Teachers' Federation, 1996).

⁶⁸ 21 B.C.L.R. (2d) 93 (C.A.) [hereinafter *Shewan*].

⁶⁹ R.S.B.C. 1979, c. 375.

controversy within the school and the community, which would disrupt the educational system.

The Court articulated the expected conduct of teachers as follows:

The minimum standard of morality, which will be tolerated in a specific area, is not necessarily the same standard of behaviour that a schoolteacher must meet. The behaviour of the teacher must satisfy the expectations, which the British Columbia community holds for the educational system. Teachers must maintain the confidence and respect of their superiors, their peers and, in particular, the students, and those who send their children to our public schools. Teachers must not only be competent, but they are expected to lead by example. Any loss of confidence or respect will impair the system and have an adverse effect upon those who participate in or rely upon it. That is why a teacher must maintain a standard of behaviour which most other citizens need not observe because they do not have such public responsibilities to fulfil.⁷⁰

The Court stated that to determine whether the actions of the teachers amounted to misconduct the test is an objective one, taking into consideration the reaction of administrators, other teachers, students and members of the community.

Although this case sheds some light on what standard of conduct is expected of teachers, the Court of Appeal does not state which community standards the teacher is to uphold. It states that the teacher must satisfy the standards the British Columbia community holds for the educational system. Is the British Columbia community the entire provincial community or is it the lower mainland or the Abbotsford community standard?

The Court also fails to discuss what factors it took into consideration when it determined that the conduct of the teachers failed to meet the standard expected by the community. What exactly was the evidence of the administrators, students and members of the community that led the Court to conclude that the actions of the teachers amounted to misconduct? Although the Court articulates that it is applying an objective test, without a

⁷⁰ *Supra* note 68 at 97-98.

more thorough discussion of just how the Court came to determine what the community standard was in this case, it appears that it is really an exercise in judicial discretion and subjectivity. Moreover, it seems that it is a matter of common sense for a judge who will simply recognize the community standard when he or she sees it.⁷¹

Although *Shewan* has been considered in subsequent cases,⁷² no civil court has provided further illumination on the elusive "community standards" test.⁷³ The Supreme Court of Canada in *Ross* quoted from *Shewan* to explain that off duty conduct of a teacher could amount to misconduct because a teacher holds a position of trust, confidence and responsibility in the community. The Court then stated:

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system.⁷⁴

In *Ross* Mr. Justice La Forest did not discuss the community standards test in determining the high standards to which the courts hold teachers.

In summary, the Supreme Court of Canada has stated that educators are held to high standards of conduct both on and off duty. Teachers have been specifically recognized by the judicial system to have some type of higher responsibility to the public, their

⁷¹ For a discussion on *Shewan* and a similar case in Quebec with different results to *Shewan*, see L. M. Bezeau, "Female Protestant Teachers should not Pose in the Nude" (1990) *The Canadian School Executive* 10 and E. Grace, "Professional Misconduct or Moral Pronouncement: A Study of "Contentious" Teacher Behaviour in Quebec" (1993) 5 *E.L.J.* 99.

⁷² *Ross*, *supra* note 4; *Hanson v. College of Teachers (British Columbia)* (1993), 110 D.L.R. 4th 567 (B.C.C.A.).

⁷³ In a criminal context Mr. Justice MacDonald in *R. v. L. (G.E.)* (2 March 1988), Vernon 17275 (B.C.Co.Ct.) in considering an act of gross indecency allegedly committed by a teacher, stated at page 6, "The law is clear that the courts must look at this issue, as I have stated, in an objective sense. To do this, I have to ask myself, what the ordinary Canadian citizen from all walks of life think of this? To begin with, who are these people these ordinary citizens? They are, among other things, mothers and fathers, family members. There are people, generally, with an understanding of an experience in life, and I would add the basic sense of decency..."

⁷⁴ *Supra* note 4 at 858.

employer and their students.⁷⁵ Teachers have a duty to maintain an upstanding profile not only while on the job but in their private lives as well.⁷⁶ The case law establishes that the on and off duty conduct of a teacher must satisfy the expectations that the community holds for the education system. The expectations of the community will be determined on a case by case basis using an objective standard taking into consideration the views of administrators, other teachers, students and members of the community. In cases concerning moral behaviour or sexual misconduct of an educator, the reasonably prudent standard is not used by the courts, but is applied to teachers in cases concerning supervision of students.

It is clear that the law "sets the behavioural bar for teachers almost "unrealistically high" and expects teachers to strive to clear the hurdle of "ideal" conduct, both in their conduct on the job, and when "off duty".⁷⁷ As Mr. Justice La Forest notes,⁷⁸ McLachlin J.A., as she then was, in her dissenting reasons in *Cowichan School District 65 v. Peterson*,⁷⁹ identified the harms that can result from the retention of a teacher who has engaged in off-duty misconduct, including the risk that the misconduct may recur resulting in injury to students, the danger that students may be influenced by inappropriate role models, the diminution of teaching effectiveness caused by loss of respect from students and the community, and the public's loss of confidence in the educational system. Mr. Justice La

⁷⁵ *Supra* note 56 at 107.

⁷⁶ *Supra* note 56 at 107.

⁷⁷ J. May and R. Evenson, "Teacher Misconduct - "Medium" as Message" (CAPSLE 1999, Royal York Hotel, Toronto, 25 April 1999) [unpublished] [footnotes omitted].

⁷⁸ *Supra* note 6 at 136 - 137.

⁷⁹ (1988), 22 B.C.L.R. (2d) 98 (C.A.), leave to appeal to S.C.C. ref'd (1988), 27 B.C.L.R. (2d) xxxv (note) S.C.C.

Forest states that it is these harms, rather than the violation of a state imposed moral code, that the prohibition of off-duty misconduct seeks to redress.⁸⁰

4. The Criminal Code

There are several sections of the *Criminal Code*,⁸¹ that directly impact on educators. In enacting these sections, Parliament has made it clear that there is zero tolerance for persons in positions of trust or authority in relation to young persons, engaging in any form of indirect or direct sexual touching or other types of sexual activities with children. Educators obviously fall into the category of a person of trust or authority towards young persons.⁸² The case law interpreting these sections will be discussed in chapter four.

III. DISCUSSION

The education acts in all three jurisdictions do not explicitly state the standard of conduct expected of school districts. Ontario is the only jurisdiction that sets out in regulation what behaviour of educators constitutes professional misconduct. Personnel in school districts in British Columbia and Nova Scotia and to some extent in Ontario would have to resort to legal counsel to obtain the judicial interpretations of the legislation in order to understand the expected conduct of the school district as well as its educators. Given that

⁸⁰ *Supra* note 6 at 137.

⁸¹ R.S.C. 1985, c. C-46; s. 151 makes it an indictable offence for every person who for a sexual purpose touches directly or indirectly any part of the body of a person under the age of fourteen; section 152 makes it an indictable offence for every person who for a sexual purpose invites, counsels or incites a person under the age of fourteen to touch the body of another person; section 153 makes it either an indictable or summary conviction offence for a person who is in a position of trust or authority towards a young person who is fourteen years of age and under eighteen years of age for a sexual purpose to touch directly or indirectly the body of the young person, or for a sexual purpose, invites, counsels or incites a young person to touch directly or indirectly the body of another person, section 159 makes it an indictable or summary conviction offence to engage in anal intercourse with an individual under eighteen years of age unless it is a husband and wife engaging in the act; section 163.1 makes it an indictable or summary conviction offence to produce, import, distribute or possess child pornography and section 173(2) makes it a summary conviction offence if a person for a sexual purpose exposes his or her genitals to a child under the age of fourteen; sections 271-273 makes sexual assault in section 271 an indictable or summary conviction offence and an indictable offence in section 272 and 273; consent is not a defence all of the sections if the accused is an adult and the complainant is under fourteen years of age.

the standards have not changed over several decades, senior administrators of school districts would likely know that the standard of conduct expected of school districts is that of a reasonably prudent parent. But it may be difficult in some situations to know exactly what constitutes that standard.

The statements regarding conduct expected of educators as expressed in legislation, codes of ethics and bylaws of the colleges and the N.S.T.U. are vague. These vague standards are compounded by a subjective relative standard in the case law whereby the appropriateness of a teacher's conduct depends on how the community perceives the conduct.⁸³ The use of vague and "subjective relative" standards may have unjust consequences.⁸⁴

The judiciary has failed to articulate how the community standard is determined. In most cases expert evidence does not appear to be required in order for a judge to somehow determine what the community standard is for the educational system. A judge's personal views and perceptions of the community cannot be appropriate guidelines for determining the proper behaviour of a teacher. The use of personal views and the perceptions of others as "standards" is unfair because it denies a teacher any useful guide to acceptable conduct before acting. The judiciary should articulate clearly how it determined the standard.

The community standard expected of educators may be fairly obvious in certain situations. However, it is less clear in other situations such as where an educator engages in sexual conduct with a sixteen or seventeen-year-old student in the district but not in the

⁸² *Supra* note 29 at 26.

⁸³ J. A. Gross, *Teachers on Trial - Values, Standards, & Equity in Judging Conduct & Competence* (Ithaca: ILR Press, 1988) at 14.

⁸⁴ *Ibid.* at 17.

educator's school and the age difference between the educator and student is not that great. Under the *Criminal Code* a seventeen-year-old is considered able to consent to a sexual relationship with strangers and a whole host of other persons, but with respect to adults such as teachers the contrary is presumptively and almost absolutely presumed.⁸⁵ A teacher who has engaged in a sexual relationship with this student will be left guessing as to whether he or she is in a trust relationship to this student.

IV. CONCLUSION

Given that the standard of conduct required by school boards and educators is not explicitly stated in the legislation in the various provinces, educators must determine the standards from case law. Although the duties of a teacher are defined in the legislation in each province, there is no requirement in the legislation that teachers must adhere to proper conduct both during and outside of their teaching responsibilities. While there are no statutory provisions in any legislation in British Columbia or Nova Scotia imposing a higher standard of moral conduct on teachers than on the rest of the community, there is a provision in the Ontario legislation that uses language from another era to allude to some notion of societal expectations of teachers. This provision is extremely broad, open to interpretation and is not responsive to the realities of the multi-cultural society of Ontario. As a yardstick for measuring the standard of an educator's behaviour it is not very meaningful.

Although the Ontario regulation sets out that sexual abuse of a student by an educator constitutes professional misconduct, there is no definition in the regulation as to what constitutes sexual abuse of a student. However, it is a starting point in defining the

⁸⁵ A. Gold, *R. v. Auder: Sex Offences - Sexual exploitation - "Power imbalance"* Case Comment (1996) Crim.L.Q. 145.

standard of conduct expected of teachers. While it certainly is not possible to list in a regulation the many examples of behaviour that constitute sexual abuse of a student, it may be useful to define the parameters of the term. This might include milder forms of sexual harassment such as inappropriate comments to more serious forms of sexual abuse involving a sexual relationship with a student.

Although it may be obvious to the majority of educators that sexual abuse of a student constitutes professional misconduct, it may not be obvious to some who engage in milder forms of sexual misconduct that the conduct constitutes sexual abuse. Further, for some young teachers who are not much older than some of the high school students, they may not be aware of the professional boundaries between them and the students.

In drafting the sections in the education acts and regulations that deal with the disciplining of teachers, the legislatures in the various provinces have chosen language from an employment/labour model and, as a result, there is no express statement in the legislation of the requisite standard of conduct of educators. Educators are disciplined and dismissed for "just cause". To understand what behaviour constitutes "just cause" an educator is required to resort to case law.

While it is laudable that the B.C.T.F. Code of Ethics and the bylaws of the British Columbia College of Teachers stipulate that teachers are in a trust relationship with students, these organizations do not go far enough in explicitly setting out the standard of conduct expected of teachers in their interactions with students. If child sexual abuse by educators is going to be eliminated or at least decreased, all institutions involved with educators must take a role in attempting to alleviate the problem. This process begins by

explicitly setting out clear standards of behaviour for educators in their interactions with students.

I. SEXUAL MISCONDUCT DEFINED

The courts, both criminal and civil, and other tribunals have considered a wide range of sexual misconduct of educators. Sexual misconduct can include both sexual abuse and sexual harassment.¹ Child sexual abuse occurs when a child is used for the sexual gratification of an older youth or adult and involves exposing a child to sexual contact, activity or behaviour. This may include invitation to sexual touching, intercourse or other forms of sexual exploitation such as prostitution or pornography.²

In this chapter, cases of sexual misconduct of educators that have been heard by criminal courts in British Columbia, Ontario and Nova Scotia will be discussed and compared. Although criminal courts consider a wide range of charges against accused educators, the majority of cases deal with charges of sexual assault and sexual exploitation. When an educator is charged with a sexual offence, the criminal court is just one of many courts and tribunals that the educator will have to confront to deal with the allegations. In criminal proceedings the Crown must prove beyond a reasonable doubt the *actus reus* or the physical act and the *mens rea* or the mental element of the offence. If the educator is convicted of the offence, the goals of the criminal law are to punish the educator and to act as a deterrent to other individuals. These goals are different from those of proceedings in civil court and other tribunals.

In British Columbia, Ontario and Nova Scotia the criminal courts have considered historical and recent sexual misconduct cases involving educators. Although there are a few cases that were heard in the late 1960s and 1970s, these cases generally started to be

¹ Sexual harassment will be discussed in chapter 8.

² A.F. Brown & M.A. Zuker, *Education Law* (Scarborough: Carswell, 1994) at 119-120.

brought against educators in the mid 1980s. One of the very first cases in British Columbia that alerted the public to the problem of sexual misconduct of educators was the case against Robert Noyes.³ This case was one of the impetuses for the British Columbia government to establish an enquiry into the sexual abuse of children by school board employees.⁴

There were a number of factors that led to an increase in the number of criminal cases being brought against educators for sexual misconduct. By the early 1980s child sexual abuse was no longer hidden in the private sphere but had entered public discourse.⁵ This increased public awareness of the problem of sexual misconduct by educators. In addition the federal government focussed on the problem⁶ and made legislative changes to both the *Criminal Code*⁷ and the *Canada Evidence Act*.⁸ These changes allowed for the reception of children's evidence without the necessity of it being corroborated. Another factor is that the Supreme Court of Canada changed its approach to the evidence of children. To test the credibility of a child's evidence, the Supreme Court of Canada held in *R. v. W.(R.)*⁹ that it no longer was appropriate to apply adult tests for credibility to their evidence. The court recognized a new sensitivity to the different perspectives of children.

As of January 1, 1988 the legislation no longer required corroboration of a child's evidence in child sexual assault cases. One of the possible outcomes that could have

³ For details regarding Robert Olav Noyes see chapter 2, note 3 [hereinafter *Noyes*].

⁴ For further information regarding the enquiry see chapter 2, note 2.

⁵ S. B. Boyd, "Can Law Challenge the Public/Private Divide? Women, Work and Family" (1996) 15 *Windsor Y.B. Access Just.* 161 at 170. For a detailed discussion on the facts that led to an increase in the number of prosecutions being brought against educators, see chapter 2.

⁶ See chapter 2, note 5.

⁷ R.S.C. 1970, c. C-34.

⁸ S.C. 1987, c. 24, s. 15.

⁹ [1992] 2 S.C.R. 122.

been predicted is that with this change a higher number of educators who were charged with various types of sexual misconduct, would be convicted of the charges. In British Columbia this certainly appears to be the situation in cases involving educators who were charged with sexual offences involving students of the same gender as the educator. However, this is not the case in Ontario.

In British Columbia the conviction rate is much higher for educators involved in same sexual abuse cases in comparison with the conviction rate for educators involved in opposite sex abuse cases. However, in Ontario the opposite is true. In Ontario, the rate of conviction for educators involved in sexual misconduct with students of the opposite gender is higher than it is for educators involved in sexual misconduct with students of the same gender as the educators. In Nova Scotia the sample of cases is far too small to draw any conclusions.

II. ANALYSIS OF CRIMINAL CASE LAW

A. Methodology

Criminal case law involving educators in British Columbia, Nova Scotia and Ontario accused of engaging in sexual misconduct with youths was examined. Unfortunately all cases are not reported in either the computer databases or in paper sources, such as the Canadian Abridgement. The search for case law in all three jurisdictions included the Canadian Abridgement and the Quicklaw databases, CJ and CRIM. In addition, regional Quicklaw databases were searched including BCJ, ORP and NSJ. Other searches were made of the Canadian Criminal Cases and Criminal Reports. Newspaper searches were conducted of the Globe and Mail, the Toronto Star and the Vancouver Sun. Some information regarding cases that are not reported in any databases in British Columbia

and Ontario was obtained from discipline decisions from the Colleges of Teachers in these jurisdictions. Additionally, information was obtained regarding Ontario cases from a lawyer who acts on behalf of the Ontario College of Teachers.

The following specific factors in each case were isolated for review:

1. the gender of the educator;
2. the ages and gender of the complainants;
3. whether the case was heard by a judge alone or before a judge and jury;
4. whether the accused gave evidence;
5. the description of the offences;
6. whether there was corroboration of the allegations and
7. the result.

These factors were isolated to determine whether there was an explanation from the evidence in the cases as to why the patterns of conviction are so different in British Columbia and Ontario. The age of the educator was not considered because the publishers often did not report it. Without having access to each and every file, it was impossible to obtain information on all of these factors for every case because publishers do not always provide it. Thus, the results from the analysis must be interpreted somewhat cautiously.

B. BRITISH COLUMBIA CASE LAW

1. Cases of Educators Engaging in Sexual Misconduct with Youths of the Same Gender as the Educator

Name of Case	Gender of Educator	Ages and Gender of Complainants	Judge or Judge and Jury	Accused Gave Evidence	Offences	Corroboration of Allegations	Result
1. <i>R. v. Szymiest</i> ¹⁰	Male	Grade 6 male student	Judge and jury	No	Gross indecency (s. 157 of the <i>Criminal Code</i> ¹¹); historical sexual assault.	No	Convicted; conviction affirmed on appeal
2. <i>R. v. Robertson</i> ¹²	Female	14 year old female	Judge	Yes	Gross indecency; (s. 157 of the <i>Criminal Code</i> ¹³)	Yes	Convicted
3. <i>R. v. Smart</i> ¹⁴	Female	15 and 16 year old female students	Judge and jury	Yes	Sexual exploitation; (s. 153 of the <i>Criminal Code</i> ¹⁵)	One kissing incident involving "B"	Convicted; affirmed on appeal
4. <i>R. v. Short</i> ¹⁶	Male	14 year old male student	Judge	Yes	Gross indecency	No	Convicted; affirmed on appeal
5. <i>R. v. Stark</i> ¹⁷	Male	Two 9 year old males	Judge	Unknown	Indecent assault	Unknown	Convicted
6. <i>R. v. Bristow</i> ¹⁸	64 year old male former high school music teacher	Male; age not stated	Judge and jury	Unknown	Indecent assault and gross indecency; historical sexual assault	Unknown	Convicted

¹⁰ [1993] B.C.J. No. 181 (C.A.), online: QL (BCJ); see also [1993] B.C.J. No. 245 (C.A.), online: QL (BCJ), rev'd, [1991] B.C.J. No. 2052 (S.C.), online: QL (BCJ).

¹¹ *Supra* note 7.

¹² (6 March 1993), New Westminster 32825 (B.C. Prov. Ct.) and (31 March 1993), New Westminster 32825 (B.C. Prov. Ct.).

¹³ *Supra* note 7.

¹⁴ [1992] B.C.J. No. 2917 (C.A.), online: QL (BCJ).

¹⁵ R.S.C. 1985, c. C-46.

¹⁶ [1991] B.C.J. No. 3515 (C.A.), online: QL (BCJ).

¹⁷ (1991), 64 C.C.C.(2d) 231 (B.C.C.A.).

¹⁸ K. White, "Ex-teacher gets 3 years for sex acts with boys" *The Vancouver Sun* (1989 March 9) A15.

7. <i>R. v. Cadden</i> ¹⁹	Male	5 male grade 4 students	Judge	Unknown	Gross indecency; (s. 157 of the <i>Criminal Code</i>) sexual assault; (s. 246.1 of the <i>Criminal Code</i>) ²⁰	Unable to determine but several students gave similar evidence	Convicted; conviction affirmed on appeal
8. <i>R. v. Homma</i> ²¹	Male	2 male students; one 9 and the other 10 years of age	Judge	Unknown	Sexual assault	Unknown	Convicted
9. <i>R. v. L.(G.E.)</i> ²²	Male	15 year old male	Judge	Yes	Gross indecency; (s. 157 of the <i>Criminal Code</i>)	No	Convicted
10. <i>R. v. Bates</i> ²³	Male music teacher	24 year old male	Unknown	Unknown	Sexual assault	Unknown	Convicted
11. <i>R. v. Le Gallant</i> ²⁴	Male teacher	Male 13 year old student	Judge and Jury	Yes	Sexual assault	Unknown	Acquitted
12. <i>R. v. Minor</i> ²⁵	45 year old male	4 male foster sons; age not stated	Judge	Unknown	Indecent assault	Unknown	Convicted
TOTALS	10 Males, 2 Females /12		7 Judge, 4 judge and jury, 1 unknown /12	1- No 5- Yes 6- Unknown /12		3-No 2-Yes 1-Similar Fact Evid. 6- Unknown /12	11- Convicted 1-acquittal /12

¹⁹ (1989), 48 C.C.C. (3d) 122 (B.C.C.A.).

²⁰ *Supra* note 7.

²¹ [1989] B.C.J. No. 793 (C.A.), online: QL (BCJ).

²² [1988] B.C.J. No. 860 (Co.Ct.), online: QL (BCJ).

²³ [1988] 6 W.C.B. (2d) 55 (B.C.C.A.), online: QL (CRIM) [hereinafter *Bates*].

²⁴ Criminal case is discussed in *Le Gallant v. Board of School Trustees of School District 61* (1987) 16 B.C.L.R. 155 (S.C.). For a decision on a ruling during the trial see [1985] B.C.J. No. 2700; see also Crown's appeal of the accused's acquittal (1986) 54 C.R. (3d) 46.

²⁵ G. Bellett, "Teacher guilty of sex charges" *The Vancouver Sun* (1 February 1986) A3.

Eleven of twelve or ninety-two percent of educators who engaged in sexual misconduct involving youths of the same gender as the educators were convicted. Four cases were heard before a judge and jury. In three of the four or seventy-five percent of the cases, a judge and jury found the educators guilty of the offences. Of the remaining eight cases, seven were heard before a judge alone and there was a one hundred percent conviction rate for these seven educators. In the one other case, the educator was convicted but it is not clear from the case report whether the matter was heard before a judge alone or a judge and jury.

2. Cases of Educators Engaging in Sexual Misconduct with Children of the Opposite Gender as the Educator

Case Name	Gender of Educator	Ages and Gender of Students	Judge or Judge and Jury	Accused Gave Evidence	Offences	Corroboration of Allegations	Result
1. Unknown ²⁶	Female	14 year old male student	Judge and jury	Yes	Sexual assault	Unknown	Acquitted
2. <i>R. v. Cocker</i> ²⁷	52 year old male teacher	Female students; age not stated	Judge - application for stay	Not applicable	Sexual assault	Not applicable	Conviction overturned on appeal; BCCA held that a 17 month trial delay had infringed Crocker's right to a speedy trial.
3. <i>R. v. Douglas (aka Jeffries)</i> ²⁸	Male	Four 12 year old female students	Judge	Yes	Sexual touching (s. 151 of the <i>Criminal Code</i> ²⁹); sexual assault (s.	No	Acquitted

²⁶ N. Hall, "Woman acquitted on two charges of sexual assault" *The Vancouver Sun* (25 November 1998) A1.

²⁷ [1997] B.C.J. No. 992 (C.A.) [hereinafter *Cocker*]; see also N. Hall, "Reporter can attend disciplinary hearing, teachers college rule" *The Vancouver Sun* (4 March 1998) B8.

					271 of the <i>Criminal Code</i>)		
4. <i>R. v. Brydon</i> ³⁰	Male	Five Grade 3 female students	Judge	Yes	Sexual assault (s. 271 of the <i>Criminal Code</i> ³¹)	No	Acquitted
5. <i>R. v. Kliman</i> ³²	Male	2 female students, one 11 and the other 12 years of age	Judge	Yes	Indecent assault; gross indecency; (s. 157 of the <i>Criminal Code</i> ³³); historical sexual assault	No	Acquitted
6. <i>R. v. C.R.F.</i> ³⁴	Male teacher	3 female complaints who ranged in age from 5 - 8 when the offences occurred.	Judge	Yes	Sexual assault; historical sexual assault; offences occurred in 1984 and 1987.	No	Acquitted
7. <i>R. v. Samson</i> ³⁵	Male	17 year old female	Judge	Unknown	Sexual assault (s. 271 of the <i>Criminal Code</i> ³⁶)	No	Convicted

²⁸ (12 March 1998), Surrey 87150-01DC (B.C. Prov. Ct.).

²⁹ *Supra* note 15.

³⁰ (8 September 1997), Nelson 987Z (B.C.S.C.).

³¹ *Supra* note 15.

³² (23 December 1997), Vancouver CC930630 (B.C.S.C.).

³³ *Supra* note 7.

³⁴ [1996] B.C.J. No. 1439 (S.C.), online: QL (BCJ).

³⁵ [1995] B.C.J. 2071 (Prov. Ct.), online: QL (BCJ).

³⁶ *Supra* note 15.

8. <i>R. v. Armstrong</i> ³⁷	Male	3 female students; age not stated	Judge application for stay	Not applicable	Motion to stay proceedings due to delay; indecent assault (s. 149 of the <i>Criminal Code</i>) and sexual assault (s. 246 of the <i>Criminal Code</i>)	Not applicable	Granting of motion to stay proceedings affirmed by B.C.C.A.
9. <i>R. v. Schofield</i> ³⁸	Male	15 year old female	Judge	Yes	Sexual assault (s. 246.1 of the <i>Criminal Code</i> ³⁹)	No	Acquitted
10. <i>R. v. Marchant</i> ⁴⁰	Male	Seven different female students, one of whom was 16 years of age.	Judge and jury	Yes	Indecent assault and rape	Unknown	Convicted ⁴¹

³⁷ [1993] B.C.J. No. 1412 (C.A.), online: QL (BCJ) [hereinafter *Armstrong*].

³⁸ [1987] B.C.J. No. 121 (Co. Ct.), online: QL (BCJ) [hereinafter *Schofield*].

³⁹ *Supra* note 15.

⁴⁰ [1988] B.C.J. No. 1608 (C.A.), online: QL (BCJ).

⁴¹ There are other cases of sexual misconduct by an educator, but these cases cannot be found in a database. In the Discipline Decisions in the *Report to Members* published by the British Columbia College of Teachers there are several reported decisions of educators who have been involved in the criminal process. To preserve the confidentiality of the educators, no reference has been made to their names. Each educator is identified by a letter of the alphabet. From the report in the Discipline Decisions it is difficult to determine if the educator had a trial or pleaded guilty. These are as follows: Ms. PP (reported in Vol. 8 No. 3 Spring 1997). From the decision, it appears she was charged with an act of gross indecency of a female student contrary to s. 157 of the *Criminal Code*, *supra* note 7. It appears she had a trial and was convicted of the offence. Mr. NN (reported in vol. 8 No. 2 Winter 1996/97)- it appears that he was charged with sexual exploitation of a female student, contrary to s. 153 of the *Criminal Code*, *supra* note 15, had a trial and was convicted of the offence. Mr. II (reported in Vol. 7 No. 5 Summer 1996) appears to have been convicted after a trial of indecently assaulting a male person. Mr. SS (reported in Vol. 9 No. 1 Fall 1997) appears to have been convicted following a trial of sexual assault of female persons. In addition, in *Peace River North School District 60 v. Peace River North Teachers' Association* (30 September 1995), (Orr) it is reported that the teacher in the grievance proceedings had been acquitted of the criminal charges of indecent assault and gross indecency involving a female student. In *R. v. R.B.T.* (12 January 1990), *School Law Commentary*, Case File No. 5-9-6 (B.C.Co.Crt.) a male teacher was convicted of sexual exploitation under s. 153 of the *Criminal Code* for allowing sexual advances by a fifteen year old student that developed into sexual intercourse over a period of time. An assumption is being made that the student was female. In *R. v. Stanford* (30 June 1994), *School Law Commentary*, Case File No. 9-9-9 (B.C.S.C.) the court acquitted a male principal charged with three counts of indecent assault of a female student. If these cases are taken into account, then thirteen of fourteen or ninety-three percent were convicted of sexual offences involving

TOTALS	9-Males 1-Female /10		6-Judge,2 judge and jury, 2 applica- tions re: stays/10	7-Yes 1- Unknown 2-Not applicable /10		6-No 2- Unknown 2-Not applicable /10	2- Convicted 6- acquitted 2-stays /10
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In two cases educators had charges dismissed as a result of a delay in bringing the cases to trial. The conviction rate for educators who were charged with engaging in sexual misconduct with youths of the opposite gender as the educators is two of eight or twenty-five percent.⁴² Further, two of the eight educators were tried before a judge and jury. Of these, one educator was acquitted and the other educator was convicted. Of the remaining six cases that were heard before a judge alone, one educator or seventeen percent of the educators were convicted of the charges.

The combined conviction rate for both groups of educators is thirteen of twenty cases or sixty-five percent.⁴³ The combined conviction for both groups of educators when a judge alone hears the cases is eight of thirteen or sixty-two percent. When juries hear these cases, the total conviction rate is four of six or sixty-seven percent.

C. ONTARIO CASE LAW

1. Cases of Educators engaging in Sexual Misconduct with Children of the Same Gender as the Educators

Case Name	Gender of Educator	Ages and Gender of Students	Judge or Judge and Jury	Accused Gave Evidence	Offences	Corroboration of Allegations	Result
1. <i>R. v. Cohen</i> ⁴⁴	47 year married male	10 year old male special	Judge	Yes	Sexual interference - s.	No	Acquitted

students of the same gender as the educators. In contrast, five of thirteen or thirty-eight percent of the educators were convicted of sexual offences involving students of the opposite gender to themselves.

⁴² A total of eight cases were considered for the analysis. *Cocker* and *Armstrong* were excluded from the analysis because the charges were stayed as a result of delays.

⁴³ *Bates* is included in this calculation but it is not included in either of the following calculations because it is not known whether *Bates* was heard before a judge alone or a judge and jury. See Appendix A for calculations.

⁴⁴ [1997] O.J. No. 4696 (Gen.Div.), online: QL (ORP).

		education student			152 of C.C.; sexual assault - s. 271 of <i>Criminal Code</i> ; Historical sexual assault; incident alleged to have occurred in 1987 - 1988.		
2. <i>R. v. Wilson</i> ⁴⁵	53 year old male high school teacher	Male complainants referred to as male prostitutes	Judge and jury	Unknown	Gross indecency and paying a minor for sexual services, s. 212(4) of <i>Criminal Code</i> ; historical sexual assault, gross indecency occurred between 1980 - 1982 and "pay for sex" occurred in the early 1990s.	Unknown	Convicted
3. <i>R. v. Kuneman</i> ⁴⁶	55 year old male teacher	15 young boys	Unknown	Unknown	Sexual assault, indecent assault, gross indecency and possession of child pornography	Unknown	Convicted; declared a dangerous offender
4. <i>R. v. Cummins</i> ⁴⁷	Male principal;	Male grade 6	Judge	Yes	Indecent assault	Unknown	Acquitted

⁴⁵ [1997] O.J. No. 1471 (G.D.), online: QL (ORP).

⁴⁶ (9 January 1997), Blind River 96-651 [hereinafter *Kuneman*].

	52 years of age at time of trial	student					
5. <i>R. v. McKay</i> ⁴⁸	Grade 3 male teacher	Grade 3 male student	Judge	Unknown	Indecent assault, s. 156 of <i>Criminal Code</i> ; gross indecency, s. 157 of <i>Criminal Code</i> ; historical sexual assault	Unknown	Acquitted on charge of indecent assault; convicted of gross indecency. On appeal, new trial was ordered.
6. <i>R. v. Seymour</i> ⁴⁹	Married male music teacher	15 year old male student	Judge	Yes	Sexual exploitation	No	Acquitted
7. <i>R. v. Stevenson</i> ⁵⁰	Male	Two male and one female complainants in grade 3 or 5.	Judge	Yes	Sexual assault; historical sexual assault, offences occurred between 1982 - 1984.	No	Acquitted
8. <i>R. v. Bullock</i> ⁵¹	Male teacher; 51 years old at time of trial	Male grade 4 student	Judge	Yes	Sexual assault; historical sexual assault	Unknown	Acquitted
9. <i>R. v. Profit</i> ⁵²	57 year old male principal	Male student 14 or 15 years of age and other students (gender not specified)	Judge	Unknown	Indecent assault, s. 156 of <i>Criminal Code</i> ; ⁵³ Historical sexual assault	No	Convictions restored

⁴⁷ S. Josey, "Metro principal acquitted of indecent assault" *The Toronto Star* (11 October 1997) A9.

⁴⁸ [1995] O.J. No. 3306 (Gen.Div.), online: QL (ORP) [hereinafter *Mckay*]. The accused had two trials involving different complainants. In this decision, the results of the previous trial are reported. In the case report, the judge was dealing with a motion regarding similar fact evidence in the second trial. Reported in the table above are details regarding the first trial. There does not appear to be any reported or unreported decision of the first trial.

⁴⁹ [1995] O.J. No. 2700 (Prov.Div.), online: QL (ORP).

⁵⁰ [1994] O.J. No. 2317 (Gen.Div.), online: QL (ORP).

⁵¹ F. Crook, "Court acquits Peel teacher of sexual assault on student" *The Toronto Star* (25 March 1993) A7.

⁵² (1993), 15 O.R. (3d) 803 (S.C.C.).

10. <i>R. v. Kennedy</i> ⁵⁴	Male teacher, 47 years of age at time of trial	10 year old male	Judge	Yes	Sexual assault, s. 271 of <i>Criminal Code</i> .	Unknown	Convicted
11. <i>R. v. Gagne</i> ⁵⁵	43 year old female teacher	Male and female elementary students	Judge	No; teacher acquitted after two days of crown testimony.	Sexual exploitation	Unknown	Acquitted
12. <i>R. v. Jamieson</i> ⁵⁶	Male teacher	Male student	Judge	Yes	Sexual touching; s. 153(a); sexual assault, 2. 271 of <i>Criminal Code</i> . ⁵⁷	Similar fact evidence	Convicted of sexual assault; no verdict on sexual touching
13. <i>R. v. Stour</i> ⁵⁸	56 year old male teacher	Male students, under the age of 14	Judge	Yes	Sexual assault, s. 151 and indecent assault, s. 156 of <i>Criminal Code</i> .	No, but the evidence of 11 male complainants was similar fact evidence	Acquitted
14. <i>R. v. Marmo</i> ⁵⁹	45 year old male teacher	Male 14 year old student	Judge	Yes	Sexual assault	Unknown	Convicted
15. <i>R. c. Pion</i> ⁶⁰	Male teacher	3 male special education students (behaviour disturbed)	Judge	Unknown	Sexual assault, s. 246.1 of <i>Criminal Code</i> .	No	Acquitted
16. <i>R. v. Mick</i> ⁶¹	Male principal	11 year old male student	Judge	Yes	Sexual assault, s. 246.1 of <i>Criminal Code</i> .	No	Acquitted

⁵³ *Supra* note 15.

⁵⁴ [1993] O.J. No. 1434 (G.D.), online: QL (ORP).

⁵⁵ "Teacher cleared of sex charges" *The Toronto Star* (17 December 1992) A2. This case is also included in the next section because the educator was alleged to have sexually abused youths of both genders. See note 100.

⁵⁶ [1992] O.J. No. 3026 (Prov.Div.), online: QL (ORP).

⁵⁷ *Supra* note 15.

⁵⁸ [1990] O.J. No. 2498 (Gen.Div.), online: QL (ORP).

⁵⁹ "Etobicoke teacher found guilty of sexually assaulting boy, 14" *The Toronto Star* (13 January 1988).

⁶⁰ [1987] A.O. No. 1702 (Cour du district de l'Ontario), online: QL (ORP).

⁶¹ [1987] O.J. No. 1840 (Prov.Crt.Crim.Div.), online: QL (ORP).

17. <i>R. v. Owens</i> ⁶²	Male teacher	3 Grade 2 Male students	Judge	Yes	Sexual assault, s. 246.1 of <i>Criminal Code</i> .	Unknown	Conviction affirmed on appeal
18. <i>R. v. Campbell</i> ⁶³	31 year old male teacher	Grade 2 male students	Judge	Yes	Indecent assault	Unknown	Convicted
19. <i>R. v. F.</i> ⁶⁴	37 year old male teacher	14 year old male student	Judge	Yes	Sexual assault	Similar fact evidence	Conviction overturned on appeal
TOTALS	18-Males 1-Female /19		17-Judge 1-judge and jury 1-unknown /19	13-Yes 1-No 5-Unknown /19		6-No 3-Similar Fact Evid. 10-Unknown /19	8-Convictions 10-Acquittals 1-Unknown /19

The conviction rate for educators in Ontario who engaged in sexual misconduct with youths of the same gender as the educator is eight of eighteen or forty-four percent.⁶⁵ Of the cases discussed above, one case was heard before a judge and jury and the jury convicted the educator of the offences. Of the remaining sixteen cases, six or thirty-eight percent of the educators were found guilty of the offences by a judge.

⁶² (1986), 33 C.C.C.(3d) 275 (Ont.C.A.).

⁶³ "Sex attacks could cost teacher job" *Toronto Star* (10 June 1981) A24.

⁶⁴ [1968] 1 O.R. 658 (H.C.).

⁶⁵ *McKay* was excluded from the analysis because on appeal the educator was granted a new trial and the outcome of the trial is not known. The analysis for this group included a total of eighteen cases. *Kuneman* was included in the analysis of the number of cases of total convictions but was not counted in cases heard

2. Cases of Educators Engaging in Sexual Misconduct with Children of the Opposite Gender as the Educators

Case Name	Gender of Educator	Ages and Gender of Complainants	Judge or Judge and Jury	Accused Gave Evidence	Offences	Corroboration of Evidence	Result
1. <i>R. v. Westcott</i> ⁶⁶	Male computer teacher and librarian	11 young female students	Judge	Yes	Sexual assault, (s. 271 of the <i>Criminal Code</i>) touching for a sexual purpose (s. 151) and invitation to touching (s. 152).	Unknown	Acquitted
2. <i>R. v. Morgan</i> ⁶⁷	56-year-old male teacher	Female students; age not stated	Unknown	Unknown	Sexual Assault	Unknown	Convicted
3. <i>R. v. Tyrell</i> ⁶⁸	Male principal	Female student; age not stated	Judge	Unknown	Sexual assault, gross indecency, sexual intercourse with a female under 14 and over 14 but less than 16 years of age; historical sexual assault	Unknown	Convicted
4. <i>R. v. D.O.</i> ⁶⁹	Male	6 female students	Judge - motion by accused to quash a committal	Not applicable	Sexual touching and sexual assault	Not applicable	Motion allowed

before a judge alone or judge and jury given that this information is unknown. Thus, the total of cases heard before a judge alone was sixteen.

⁶⁶ [1999] O.J. NO. 916 (Gen.Div.), online: QL (CRIM).

⁶⁷ (23 June 1997), Walkerton (Ont.Prov.Crt.) [hereinafter *Morgan*]. Also see "Discipline Panels Render First Decisions" *Professionally Speaking* (1998 September) 33 at 34.

⁶⁸ "Principal sentenced to jail" *The Globe and Mail* (19 January 1999) A6. Also see "Principal faces sex charges" *The Globe and Mail* (14 May 1997) A4.

			order of 12 counts of sexual interference				
5. <i>R. v. Rossi</i> ⁷⁰	47 year old male high school teacher	Female student	Judge and Jury	Yes	Sexual assault	Unknown	Acquitted
6. <i>R. v. Gostick</i> ⁷¹	Male; 50 years of age	3 female complainants; grade 7.	Judge	Yes	Sexual assault	No	Convicted
7. <i>R. v. Mennie</i> ⁷²	Male	Female student; age not stated	Judge	Unknown	Sexual assault, s. 149 of <i>Criminal Code</i> ; ⁷³ Historical sexual assault	Unknown	Conviction on count 1 re: sexual intercourse overturned and new trial ordered; conviction on count 2 affirmed.
8. <i>R. v. B.(L.)</i> ⁷⁴	Male	7 different female complainants who were students or babysitters	Judge	Yes	Indecent assault, sexual assault and sexual touching	No, but similar fact evidence	Convicted of 3/9 charges
9. <i>R. v. Bergin</i> ⁷⁵	Male	16 year old female	Judge and jury	Yes	Sexual assault	Unknown	Conviction affirmed on appeal
10. <i>R. v. Guirand</i> ⁷⁶	Male teacher	Female student; age not stated	Judge	Unknown	Sexual Assault	Unknown	Convicted
11. <i>R. v. Scidmore</i> ⁷⁷	Male teacher	11 year old female student	Judge	Unknown	Indecent assault	Unknown	Conviction affirmed on appeal
12. <i>R. v. Carosella</i>	Male	2 Grade 7 or 8	Judge - Motion to	Not applicable	Gross indecency,	Not applicable	Charges stayed as a

⁶⁹ [1998] O.J. No. 3981 (Gen.Div.), online: QL (ORP) [hereinafter *D.O.*].

⁷⁰ "Teacher acquitted of assault", *The Globe and Mail* (1998 September 18) A10.

⁷¹ [1997] O.J. No. 4084 (Gen.Div.), online: QL (ORP).

⁷² [1998] O.J. No. 2333 (C.A.), online: QL (ORP).

⁷³ *Supra* note 7.

⁷⁴ (1997), 35 O.R.(3d) 35 (C.A.).

⁷⁵ [1997] O.J. No. 2697 (C.A.), online: QL (ORP).

⁷⁶ (17 December 1996) Cornwall (Ont.Prov.Crt.). Also see "Discipline Panels Render First Decisions" *Professionally Speaking* (1998 September) 33 at 33.

⁷⁷ (1996), 112 C.C.C.(3d) 28 (Ont.C.A.).

		female complainants	stay		s. 149 of <i>Criminal Code</i> . ⁷⁹ Historical sexual assault; alleged acts occurred 30 years ago.		result of unavailability of therapist's records due to sexual assault crisis centre shredding records.
13. <i>R. v. J.B.</i> ⁸⁰	Male	Adolescent female student; age not stated	Judge and Jury	Unknown	Sexual exploitation, s. 153 (1) (a) and sexual assault, s. 271 of <i>Criminal Code</i> .	Unknown	Convicted of sexual exploitation; charge of sexual assault stayed
14. <i>R. v. Seeney</i> ⁸¹	Male teacher	Female; age not stated	Judge	Unknown	Sexual assault; historical sexual assault; offences occurred 11 years prior to trial	Unknown	Convicted
15. <i>R. v. Wark</i> ⁸²	Male	4 female former students	Judge	Unknown	Sexual assault and indecent assault; historical and recent sexual assaults.	Unknown	Convicted
16. <i>R. v. Gauthier</i> ⁸³	Male teacher	13 year old female student	Judge	Yes at first trial, but not known whether educator gave evidence at new trial.	3 charges of sexual touching	Yes - Corroboration of 1 incident of sexual touching	Convicted at trial; appeal allowed; result unknown; Crown did not prove touching was for a

⁷⁸ (1997), 112 C.C.C.(3d) 289 (S.C.C.) [hereinafter *Carosella*].

⁷⁹ S.C. 1953-54, c. 51.

⁸⁰ [1996] O.J. No. 4011 (Gen.Div.), online: QL (ORP).

⁸¹ [1996] O.J. No. 366 (Gen.Div.), online: QL (ORP).

⁸² V. Galt, "Teacher 'always blatant' about assaults: victim" *The Globe and Mail* (1998 May 7) A10.

⁸³ [1995] O.J. No. 4239 (Gen.Div.), online: QL (ORP) [hereinafter *Gauthier*].

							sexual purpose. On appeal, it was held that the accused was not guilty on two counts and a new trial was ordered on the third count.
17. <i>R. v. Johnston</i> ⁸⁴	Male teacher	4 female students; age not stated	Judge	Yes	Sexual assault and touching for a sexual purpose	Unknown	Convictions of included offence of Sexual assault set aside; verdicts of acquittal entered ⁸⁵
18. <i>R. v. Dussiaume</i> ⁸⁶	Male high school teacher	17 year old female student	Judge	Yes	Sexual exploitation, s. 153 of <i>Criminal Code</i> . ⁸⁷	No	Conviction affirmed on appeal
19. <i>R. v. Grainger</i> ⁸⁸	Male elementary school teacher	Female students of elementary age	Judge	Unknown	Sexual assault and touching for a sexual purpose	No	Acquitted; judge found that most witnesses had discussed their evidence with other witnesses.
20. <i>R. v. Gosselin-Taylor</i> ⁸⁹	40 year old married female teacher	Grade 8 male student	Judge	Unknown	Gross indecency	Unknown	Acquitted

⁸⁴ (1995), 81 O.A.C. 54 (C.A.).

⁸⁵ The Ontario Court of Appeal held that once the trial judge determined that there was a doubt as to the nature of the physical contact between the accused and the complainants, she was obliged to acquit the accused. The accused admitted touching the complainants but denied it was for a sexual purpose.

⁸⁶ (1995), 98 C.C.C. (3d) 217 (Ont.C.A.).

⁸⁷ R.S.C. 1985, c. 19 (3rd Supp.), s. 1.

⁸⁸ [1995] O.J. No. 200 (Gen.Div.), online: QL (ORP).

⁸⁹ S. Thede, "Judge rejects claim teacher seduced boy" *The Vancouver Sun* (2 June 1995) A10.

21. <i>R. v. Stevenson</i> ⁹⁰	Male teacher	Two male complainants in grade 3; one female complainants in grade 5.	Judge	Yes	Sexual assault; historical sexual assault, offences alleged to have occurred in 1982 - 1984.	No	Acquitted
22. <i>R. v. Sanderson</i> ⁹¹	31 year old male married grade 8 teacher	Female complainant; 13 & 14 years old when offence occurred	Judge	Yes	Touching for a sexual purpose, s. 151(1); touching complainant when in a position of trust, s. 153(1)(a); inciting the complainant to touch him for a sexual purpose, s. 153(1)(b) of <i>Criminal Code</i> .	No	Convicted
23. <i>R. v. J.C.G.</i> ⁹²	Male	2 female complainants; one of whom was his adopted daughter	Judge - application for a stay	Not applicable	Gross indecency; indecent assault and sexual intercourse with a female under 14; historical sexual assault.	Not applicable	Application granted for a stay of proceedings as a result of delay; reversed on appeal matter was remitted to trial; result unknown.
24. <i>R. v. Forde</i> ⁹³	Male high school supply	2 female students; one 16 and	Judge	Unknown	Sexual touching, s.	Unknown	Convicted

⁹⁰ [1994] O.J. No. 2317 (Gen.Div.), online: QL (ORP).

⁹¹ [1994] O.J. No. 1484 (Gen.Div.), online: QL (ORP).

⁹² [1992] O.J. No. 2037 (C.A.), online: QL (ORP) [hereinafter *J.C.G.*].

	teacher	one 14 years of age.			153(1)(a) of the <i>Criminal Code</i> . ⁹⁴		
25. <i>R. v. Platt</i> ⁹⁵	Male teacher	Three 13 year old female students	Judge	Yes	Sexual touching	Unknown	Acquitted
26. <i>R. v. Piccinato</i> ⁹⁶	42 year old male teacher	12 year old female	Judge	Yes	Sexual assault, s. 246.1 of <i>Criminal Code</i> .	No	Convicted
27. <i>R. v. Macaskill</i> ⁹⁷	Male	Young female students	Judge	Unknown	Sexual assault; sexual interference	Unknown	Acquitted
28. <i>R. v. M.D.H.</i> ⁹⁸	Male	2 Grade 3/4 female students	Judge	Yes	Indecent assault; historical sexual assault, offences alleged to have occurred between 1988 and 1980.	No	Acquitted
29. <i>R. v. R.H.</i> ⁹⁹	Male	11 and 12 year old female students	Judge	Yes	Physical and sexual assault	Unknown	Convicted of common assault; acquitted of sexual assault
30. <i>R. v. Gagne</i> ¹⁰⁰	43 year old female teacher	Male and female elementary students	Judge	No; teacher acquitted after two days of crown testimony.	Sexual exploitation	Unknown	Acquitted
31. <i>R. v. Henke-</i>	Male teacher	Female student;	Judge	Unknown	Sexual assault (s.	Unknown	Conviction affirmed

⁹³ [1992] O.J. No. 1698 (Gen.Div.), online: QL (ORP).

⁹⁴ *Supra* note 15.

⁹⁵ "Teacher's life ruined by false charges of sexual assault" *The [Montreal] Gazette* (17 February 1992) A7.

⁹⁶ [1992] O.J. No. 2060 (Gen.Div.), online: QL (ORP).

⁹⁷ Discussion of this case in *R. v. Rapai* (1992), 11 O.R. (3d) 47 (Prov.Div.).

⁹⁸ [1992] O.J. No. 102 (Gen.Div.), online: QL (ORP).

⁹⁹ [1991] O.J. No. 2496 (Gen.Div.), online: QL (ORP).

¹⁰⁰ "Teacher cleared of sex charges" *The Toronto Star* (17 December 1992) A2. See note 55.

<i>mans</i> ¹⁰¹		age not stated			246.1 of Criminal Code)		on appeal.
32. <i>R. v. Lysack</i> ¹⁰²	63 year old male teacher	8 or 9 year old female children	Judge	Unknown	Sexual assault	Unknown	Conviction affirmed on appeal.
33. <i>R. v. Field</i> ¹⁰³	33 year old male grade 1 teacher	Grade 1 female students	Judge	Unknown	Sexual assault	Unknown	Convicted
34. <i>R. v. Hindley-Smith</i> ¹⁰⁴	47 year old male principal	2 female students	Judge and jury	Yes	Sexual intercourse with a female less than 14, s. 146 of Criminal Code.	Unknown	Conviction affirmed on appeal
35. <i>R. v. Brackenbury</i> ¹⁰⁵	42 year old married male teacher	Six female elementary school students	Judge	Unknown	Sexual assault	Unknown	Acquitted
TOTALS	33-Males 2-Females /35		27-Judge 4-Judge and Jury 1-Unknown 3-Motions /35	14-Yes 1-No 16-Unknown 3-Not applicable 1-Appeal - not known if educator gave evidence at 2 nd trial /35		1-Yes 7-No 23-Unknown 3-Not applicable 1-Similar fact evidence /35	19-Convicted 12-Acquittal 2-Motions to stay and quash 2-Unknown /35

In the above cases, one educator was successful in having the charges against him quashed¹⁰⁶ and one educator had charges stayed as a result of a delay in the court process.¹⁰⁷ In addition, one educator who was successful in having charges stayed had

¹⁰¹ [1990] W.C.B. (2d) 430 (Ont. Dist. Ct.), online: QL (WCB).

¹⁰² (1988), 26 O.A.C. 338 (C.A.).

¹⁰³ P. Marcell, "Teacher's sentence suspended for molesting Grade 1 pupils" *The Toronto Star* (3 April 1989) A18. See also "Teacher guilty of assault on 3 pupils, court rules" *The Globe and Mail* (14 February 1989) A14.

¹⁰⁴ [1988] O.J. No. 956 (C.A.), online: QL (ORP).

¹⁰⁵ "Cleared in sex case, teacher may quit job" *The Globe and Mail* (28 December 1987) A16.

¹⁰⁶ *D.O.*, supra note 69.

¹⁰⁷ *Carosella*, supra note 78.

the order reversed on appeal with the matter being remitted to trial.¹⁰⁸ One educator was convicted at trial and on appeal the Ontario Court of Appeal ordered a new trial, the results of which are unknown.¹⁰⁹ In one other case, it is not known whether it was heard before a judge alone or a judge and jury.¹¹⁰

The conviction rate for educators in Ontario who were charged with engaging in sexual misconduct with youths of the opposite gender as the educators is nineteen of thirty-one cases or sixty-one percent.¹¹¹ Four educators had their cases heard before a judge and jury. Three of four or seventy-five percent of the educators were convicted of the offences. Of the remaining twenty-six cases,¹¹² fifteen or fifty-eight percent of the educators were convicted of the offences by a judge.

The global conviction rate for both groups of educators is twenty-seven of forty-eight cases¹¹³ or fifty-six percent.¹¹⁴ The total conviction rate of judges for both groups is

¹⁰⁸ *J.C.G.*, *supra* note 92.

¹⁰⁹ *Gauthier*, *supra* note 83.

¹¹⁰ *Morgan*, *supra* note 67.

¹¹¹ Of the thirty-five cases listed for this group of educators, thirty-one were included in the analysis regarding total convictions. Four cases were excluded. They are *D.O.*, *Carosella*, *Gauthier* and *J.C.G.* In *D.O.* the charges were quashed and in *Carosella* and *J.C.G.* the charges were stayed. In *Gauthier* the appeal was allowed but the result of it is unknown.

¹¹² The total remaining cases is twenty-six because in the case of *Morgan* it is not known whether it was heard before judge alone or judge and jury.

¹¹³ Total of forty-eight cases is derived from eighteen cases of educators engaging in sexual misconduct with youths of the same gender as themselves, plus thirty cases involving educators engaging in sexual misconduct with youth of the opposite gender as the educators. *Gagne*, notes 55 and 100 was only counted once. See Appendix A for calculations.

¹¹⁴ There are twelve other cases that have not been included in the analysis to this point because from the case report it is impossible in some of the cases to determine the gender of the children that the educator was alleged to have assaulted. In other cases it cannot be determined whether or not the educator pleaded guilty or was found guilty of the charges. In addition one of the matters was stayed. These are Mr. F as reported in *Professionally Speaking*, Sept. 1998 at 35, a male educator was found guilty of sexual touching of two students. The gender of the students was not stated. In Mr. K as reported in *Professionally Speaking*, March 1999 at 30, a male teacher was found guilty of sexual assault involving a seventeen-year-old student. The gender of the student was not reported. In Mr. L as reported in *Professionally Speaking*, March 1999 at 30, a male teacher was found guilty of touching a young person for a sexual purpose. The gender of the young person is not reported. In Mr. I as reported in *Professionally Speaking*, March 1999, at 29, a male teacher was convicted of indecent assault and sexual assault involving his former grades five and six students. The gender of the students is not stated. In Mr. H a teacher was convicted of sexual intercourse with a previously chaste female under sixteen years old and over fourteen years old, indecent

twenty-one of forty-one cases or fifty-one percent. The total conviction rate for both groups of educators when these cases are heard before a judge and jury is four of five or eighty percent of cases.

D. NOVA SCOTIA CASE LAW

Case Name	Gender of Educator	Ages and Gender of Complainants	Judge or Judge and Jury	Accused Gave Evidence	Offences	Corroboration of Evidence	Result
1. <i>R. v. Hache</i> ¹¹⁵	Male teacher	6 male Grade 5 & 6 students	Judge	Unknown	Sexual assault	Unknown	Convicted of 4/6 offences; new trial ordered on appeal
2. <i>R. v. M.H.</i> ¹¹⁶	Male teacher	14 or 15 year old female neighbour	Not certain	Yes	Sexual assault; (s. 271 of the <i>Criminal Code</i> ¹¹⁷)	No	Convicted
3. <i>R. v. Whitehouse</i> ¹¹⁸	At time of trial, male teacher	Grade 7 female student	Judge and Jury	No	Sexual assault, gross	No	Convicted of 3 of the 5 charges

assault and one count of gross indecency. It does not state whether or not he pleaded guilty or was found guilty of the charges. In *R. v. Bisoon* [1995] O.J. No. 57 (Gen.Div.), online: QL (ORP) [hereinafter *Bisoon*]. In *Bisoon* a male high school teacher was charged with sexual assault and sexual exploitation of two students whose gender was not stated. His application for a stay of proceedings was granted due to a delay in the court process. In *R. v. Headrick* (1995 March 29), Ottawa 94-15396 (Ont.Prov.Div.) the thirty-three year old male teacher was convicted of sexual exploitation of a sixteen year old emotionally disturbed student. In *R. v. Laroche* [1989] O.J. No. 1432 (C.A.), online: QL (ORP), varying (1988 April 27) Ottawa-Carleton 2511 (Ont.Dist.Ct.) the fifty-six year old male teacher was convicted of sexual assault of students in his class but the report does not indicate the gender of the student. In *R. v. Hutter* (1993), 16 O.R. (3d) 145 (C.A.); leave to appeal to SCC refused April 28, 1994 (1994), 87 C.C.C. (3d) vi note a male teacher's convictions by a judge for sexual and indecent assault of five young children between the ages of seven and eleven were affirmed by the Court of Appeal. In *R. v. R.H.* [1992] O.J. No. 542 (Gen.Div.) a male teacher was convicted by a judge of sexual assault of children ages eleven and twelve. In *R. v. L.L.*, June 13, 1986 (Ont.Dis.Crt.) a male principal was acquitted by a judge of sexual assault of ten children between the ages of ten and twelve. The appeal of the Crown was allowed and a new trial was ordered. In *R. v. R.G.T.* [1984] O.J. No. 413 (S.C.), online QL (ORP) a male teacher was convicted of indecent and sexual assault charges and his appeal of his sentence was dismissed. The gender of the students was not stated. If these cases are taken into account, excluding *Bisoon* which was an application for a stay of proceedings and *R. v. L.L.* which involved a new trial and the result being unknown, ten additional convictions are added to the global conviction numbers above. Thus, taking these cases into account, the total conviction rate is thirty-seven of fifty-eight or sixty-four percent.

¹¹⁵ [1999] N.S.J. No. 158 (C.A.), online: QL (CJ).

¹¹⁶ [1998] N.S.J. No. 413 (S.C.), online: QL (NSJ).

¹¹⁷ *Supra* note 15.

¹¹⁸ On April 21, 1999 I spoke with an individual at the Nova Scotia's Teacher Union and was provided with the information regarding the outcome of the trial of Mr. Whitehouse. Prior to the trial, Mr. Whitehouse filed an application to stay which was dismissed, [1998] N.S.J. No. 82 (S.C.), online: QL (NSJ).

	was 46 years of age.				indecent and intercourse with a female less than 16 years of age.		
4. R. v. <i>Drolet</i> ¹¹⁹	Male	Grade 1 male student	Unknown	Yes	Sexual assault; (s. 246.1 of the <i>Criminal Code</i>)	Unknown	Conviction set aside; no new trial was directed because there was no corroborative evidence
TOTALS	4 Males 0 Females /4		1-judge 1-judge and jury 2- unknown /4	2-Yes 1-No 1- Unknown /4		2-No 2- Unknown /4	2-Convictions 1- Acquittal 1- Unknown /4

In Nova Scotia the sample of cases is extremely small, making any conclusions impossible. One male teacher who engaged in sexual misconduct with a female neighbour was convicted of the offence and the case report does not state whether a judge alone or a judge and jury heard the matter. Another male teacher who engaged in sexual misconduct with a female grade seven student was found guilty by a jury of three of the five offences with which he was charged. Two male teachers who convicted at trial by a judge alone of sexual assaults committed against male students were successful on their appeals. In one of the appeals a new trial was directed and in the other no new trial was ordered due to the lack of corroborative evidence.

E. ANALYSIS

One striking observation is that sexual misconduct of youths is committed overwhelmingly by male educators. In British Columbia male educators committed sexual misconduct with youths in nineteen of twenty-two or eighty-six percent of cases. In Ontario fifty-one of fifty-three¹²⁰ or ninety-six percent of cases involved male educators and in Nova Scotia all cases involved male educators.¹²¹

Below is an analysis of the British Columbia and Ontario cases. Several factors in the cases are analyzed to determine whether one or more factors could possibly account for the difference in conviction rates between the two groups of educators in both British Columbia and Ontario.

1. Age of Complainants

In British Columbia if the one case of the educator who sexually assaulted a twenty-four year-old is excluded from the analysis, there is no significant difference in the ages of the youth involved in cases in British Columbia and Ontario of educators accused of sexual misconduct with youths of the same or opposite gender to the educator. In cases of same sexual misconduct cases, the ages of the students in British Columbia ranged from nine to sixteen, while in Ontario the age range of students in this group is seven (Grade two) to fifteen-years-of age. In cases of opposite sexual misconduct, the ages of the students in British Columbia ranged from five to seventeen, while in Ontario the range of students in

¹¹⁹ [1986] N.S.J. No. 201 (C.A.).

¹²⁰ *Gagne, supra* 55 and 100 was only counted once.

¹²¹ This is consistent with other studies. See C. Shakeshaft & A. Cohan, "Sexual Abuse of Students by School Personnel" *Phi Delta Kappan* (1995 March) 513 at 516, Canada, *Changing the Landscape: Ending Violence - Achieving Equality* (Ottawa: Minister of Supply and Services Canada, 1993) at 9, Canada, *Sexual Offences Against Children*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984) (Chairperson: Dr. Robin Badgley) at 215. Also see chapter 8 with respect to males committing sexual harassment.

this group is from six (grade one) to seventeen years of age. Thus, this is not a factor that accounts for the difference in conviction rates in British Columbia and Ontario.

2. Corroboration of Evidence

Without having the benefit of reading the transcripts of the evidence of the trials, it is difficult to determine from the case reports whether the evidence of the sexual misconduct was corroborated. In British Columbia there were two cases in which there was corroborative evidence of some of the physical acts that occurred between the accused and the complainants. In *Robertson* an independent witness, who was a former student at the school the complainant attended at the relevant time, gave evidence that on one occasion she saw the accused and the complainant holding hands and on another occasion she saw them engage in a long, passionate kiss. In *Smart* there appeared to be evidence that the mother of the complainant "B" observed Ms. Smart and her daughter kiss. In both cases the educators were convicted of the offences.

In Ontario, the only case where there appeared to be corroboration of one incident of sexual touching was in *Gauthier*.¹²² At trial Mr. Gauthier was convicted, but on appeal he was found not guilty on two counts and a new trial was ordered on the third count.

It is doubtful that this is a factor that accounts for the difference in the conviction rates in either British Columbia or Ontario. It is highly unlikely that many of the cases actually had corroborative evidence given that sexual assaults are often committed in private with only the two parties present.

3. Whether the Accused Gave Evidence

It cannot be determined from all of the case reports whether or not all educators gave evidence during their trials. In British Columbia in same sex abuse cases, it can only be determined in six of twelve cases whether or not the educator gave evidence. In one of the six cases the educator did not give evidence and was convicted by the jury. In the remaining five cases, two were heard before a judge and jury and three were heard by a judge alone. In the three cases heard before a judge alone, the educators were convicted of the offences. In the two cases heard before a judge and jury, one educator was convicted and the other was acquitted of the offences. The sample of cases is too small to make any conclusions, but it is noted that there was a hundred percent conviction rate for this group when the educators gave evidence and the matters were heard before a judge alone. In only one of the cases, *Robertson*, was there corroboration of some of the complainant's evidence.

It appears that in same sex abuse cases where the educator gives evidence before a judge alone, the complainant's evidence is preferred over that of the teacher. This is similar to an observation made by American authors studying complaints of sexual misconduct by educators in New York. They noted that when a superintendent investigated complaints of sexual misconduct:

Homosexual acts were seen as more serious than heterosexual acts. Thus students who reported same-sex abuse were more likely to be believed and to be judged as harmed more severely than students who reported opposite-sex abuse. This clearly related to the way female accusers were treated, because the large majority of abusers of students of either sex were male.¹²³

¹²² *Supra* note 83.

¹²³ C. Shakefshaft and A. Cohan, *supra* note 121.

In British Columbia, in opposite sex abuse cases, it can be determined in seven of eight cases for analysis¹²⁴ that the educators gave evidence. Only one of seven educators or fourteen percent were convicted. This male educator was tried before a judge and jury. Five of seven educators were tried before a judge alone and all were acquitted. In the one other case, the female educator gave evidence before a judge and jury and was acquitted. In opposite sex abuse cases if an educator gives evidence either before a judge alone or before a jury, there is a good chance the educator will be acquitted of the charges. In these cases the victims are usually female. It appears that female victims in these cases are found to be less credible than the male perpetrators. Shakefshaft and Cohan made similar observations in their study:

Although the majority of the victims of abuse are females, superintendents seemed to consider abuse of males a more serious offense...A male who reported being sexually abused by a teacher was seldom suspected of lying or of complicity - something that was not true of female accusers...¹²⁵

In Ontario, in cases of educators accused of sexual misconduct with youths of the same gender as themselves, it is possible to determine in fourteen of eighteen cases whether or not the educator gave evidence at trial. In one of the fourteen cases, the educator did not give evidence and she was acquitted. In the remaining thirteen cases in which the educators gave evidence, five or thirty-eight percent of educators were convicted of the offences by judges and eight or sixty-two percent were acquitted. In Ontario, unlike in British Columbia, it appears in same sex abuse cases, judges prefer the evidence of the educator to that of the complainants.

¹²⁴ See note 42 for cases excluded from analysis.

¹²⁵ *Supra* note 121 at 517. See also M. D. Everson, B. B. Boat, S. Bourg & K. R. Robertson, "Beliefs Among Professionals About Rates of False Allegations of Child Sexual Abuse" (1996) 11(4) *J. of Interpersonal Violence* 541 at 549 wherein the researchers found that professionals, including district court judges, viewed allegations made by adolescent females to be least credible of all child allegations.

In cases of educators in Ontario who allegedly engaged in sexual misconduct with youths of the opposite gender as themselves, it is possible to determine that one educator did not give evidence and fourteen did.¹²⁶ The one educator who did not give evidence was acquitted by the trial judge. Of the fourteen educators who did give evidence at trial, two of three educators were convicted by juries and five of eleven or forty-five percent of educators who gave evidence before a judge alone were convicted. Six of eleven or fifty-five percent of educators who gave evidence before a judge alone were acquitted. It appears when an educator gives evidence in Ontario before a judge alone, she or he has an almost equal chance of being acquitted or convicted. Thus, in Ontario, unlike in British Columbia, it appears that female complainants in opposite sex abuse cases have almost an equal chance to that of the educators of being believed by judges. The sample of cases heard before juries is too small to make any conclusions.

4. Trials by Judge and Jury

In British Columbia six of twenty cases were heard before a judge and jury. In four of six or sixty-seven percent of the cases, juries convicted the educators. Three of four or seventy-five percent of cases involved educators who were convicted by juries of charges of sexual offences involving youths of the same gender as the educators. Two cases involved educators charged with sexual offences involving youths of the opposite gender to the educator. Of these two cases, juries convicted one male educator and acquitted one female educator. Thus, the conviction rate by juries is fifty percent for educators charged with sexual offences involving youths of the opposite gender.

¹²⁶ Although the educator in *Gauthier* gave evidence in the first trial, this case has not been included in the fourteen cases because an appeal was granted and the result of it is unknown.

In Ontario five of forty-eight cases¹²⁷ were heard before a judge and jury. The conviction rate for all educators when juries hear the cases is four of five or eighty percent. Four cases involved educators charged with sexual offences involving youths of the opposite gender to themselves. The juries convicted three of four or seventy-five percent of these educators. The one educator who was charged with sexual offences involving a youth of the same gender as the educator was convicted of the offences by the jury.

The sample of cases is too small to make any conclusions, but it is noted that in Ontario when juries hear these cases the conviction rate is higher than it is for juries in British Columbia. In Ontario the conviction rate for all educators is eighty percent compared with sixty-seven percent in British Columbia.

5. Trials by Judge Alone

In British Columbia and Ontario there is a significant difference in the conviction rates of educators charged with committing sexual offences against youths when these cases are heard before judges. The total conviction rate for both groups is higher in British Columbia than it is in Ontario. Of the total of thirteen cases for both groups of educators in British Columbia heard before judges, educators were convicted in eight of thirteen or sixty-two percent of cases. In contrast, in Ontario the total number of convictions by judges for both groups is twenty-one of forty-one cases or fifty-one percent.

The conviction rate by judges in cases in British Columbia involving educators who engaged in sexual misconduct with youths of the same gender as themselves is one hundred percent which is much higher than the conviction rate by judges in British

¹²⁷ The total cases of forty-eight is derived from eighteen cases involving educators who engaged in sexual misconduct with youth of the same gender as the educators. *McKay* is excluded because a new trial was ordered and the result is unknown. There were a total of thirty cases of educators who engaged in sexual

Columbia for both groups. In contrast, in Ontario the conviction rate for this group of educators when cases are heard by judges is considerably lower, being six of sixteen or thirty-eight percent.

The conviction rate in British Columbia by judges for cases involving educators who engaged in sexual misconduct with youths of the opposite gender to themselves is one of six or seventeen percent, which is far lower than the total conviction rate by judges of sixty-two percent for both groups of educators. However, in Ontario the conviction rate by judges for this group is fifteen of twenty-six or fifty-eight percent which is much closer to the total conviction rate by judges of fifty-one percent for both groups.

One wonders why in British Columbia the conviction rate of educators involved in same sexual misconduct cases is so much higher than the conviction rate for the group of educators involved in opposite sexual misconduct cases. Moreover, one wonders why the conviction rate in British Columbia for educators involved in sexual misconduct with youths of the same gender is approximately three times higher than it is for this group in Ontario.

Although the sample of cases in British Columbia is small, there are only one third more cases in Ontario of educators involved in sexual misconduct of youths of the same gender as the educators. In British Columbia there are twelve cases of educators in this group, while in Ontario there are nineteen cases.

This leads one to the question of whether society's bias against homosexuals and lesbians is reflected by judges in British Columbia hearing cases of educators who have been accused of sexual misconduct of youths who are the same gender as the educators. The

misconduct with students of the opposite gender as the educators. *Carosella, D.H. J.C.G. and Gauthier* were excluded. *Gagne, supra* note 55 and 100 was only counted once.

discourse used by some judges in British Columbia hearing cases of educators who have been accused of sexual misconduct of youths who are the same gender as the educators, reflects a "fear of conversion/infection of children by homosexuals and homosexuality".¹²⁸ Paris, J. when considering an application by the Crown to have Noyes declared a dangerous offender was concerned whether as a result of the assault, the male child would become a homosexual:

I raised with the witness the question whether such activities with a male child, particularly if repeated over a period of time, might lead to future paedophilia or homosexuality in the victim himself. However, although there are indications in that direction, the concrete information in that regard is scanty. It does not seem unreasonable to me, however, that a process of patterning of the child's sexual personality may take place, just as such patterning takes place in other areas of a child's personality, attitudes and beliefs during the crucially formative years of pre-pubescence and early adolescence...

Because, as I have said, the empirical data on these matters is not yet firm or comprehensive, it is not possible to say whether all, or what percentage of, these victims are affected in the ways I have set out above. It is abundantly clear, however, that these things do occur and that there is, at least, a very great risk of their occurrence.¹²⁹

As MacDougall notes, there was no awareness by the judge of any double standard. He states further that there was no thought that the logical consequence of such an opinion is that "boys become heterosexual by patterning - perhaps at the hands of a rapacious female".¹³⁰ Although recognizing the absurdity of such a position, MacDougall notes that its analogy was acceptable in a homosexual situation.

Toy, J.A. of the British Columbia Court of Appeal expressed a similar concern of the

¹²⁸ B. MacDougall, "Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology" (1998) 61 Sask. L. Rev. 41 at 60. For a similar view see also D. G. Casswell, *Lesbians, Gay Men and Canadian Law* (Toronto: Emond Montgomery Publications Ltd.) at 624 - 626. For a discussion on discourse and how it is not mere thought, but is a reflection on how we think about something, see J. M. Conley & W. M. O'Barr, *Just Words: Law, Language, and Power* (Chicago: The U. of Chicago Press, 1998) at 18.

¹²⁹ [1986] B.C.J. No. 3127 (S.C.), online: QL (BCJ) at 6.

¹³⁰ *Supra* 128 at 60.

conversion of female students a lesbian teacher assaulted wherein he stated:

...The gravamen of this particular crime is that adults in positions of trust or authority must not touch young people for sexual purposes. Had there been evidence of coercion, manipulation of the *causing of either of these two young persons to make a choice between a female and male sexual orientation*, such would have been appropriately considered as an aggravating circumstance leading to higher sentences than those that were imposed in this case.¹³¹

In another case involving a man who is not a teacher and had sexually assaulted a youth of the same gender, the "individuality of the accused and the victim was lost as the whole concept of homosexuality and the whole class of homosexuals are brought into the picture".¹³² In *Regina v. Paquette*¹³³ "the class of homosexuals was brought into the judicial imagination and the idea of conversion was central".¹³⁴ Mr. Justice Selbie stated:

This fatherless boy was vulnerable and you took full advantage of that. You deliberately and carefully gained the trust of the boy and his mother with the intention of abusing it and if you believe that leading a youth into homosexuality is not an abuse, the this Court disagrees with you.

We have here then the sordid scenario of an aging homosexual on the hunt for a young vulnerable youth with little or no concern for the long-term effect on the youth himself...

In none of the judgments in cases concerning an educator in an opposite sex abuse case, does a judge refer to whether the assault will result in the youth being sexually patterned in a normal manner. Further, most judges treat these cases as simply a sexual assault. In *Schofield*,¹³⁵ a male teacher was charged with sexually assaulting two female members of the basketball team he coached. There was no painting by the judge that this was an "aging heterosexual male on the hunt for young nubile females". Rather the judge characterized the situation as a basketball coach not being careful professionally in an

¹³¹ *Supra* note 14 at 5 [emphasis added].

¹³² *Supra* note 128 at 60 - 61.

¹³³ [1988] B.C.J. No. 1624 (Co.Ct.), online: QL (BCJ).

¹³⁴ *Supra* note 128 at 61.

atmosphere of open playfulness where the team members were "full of the buzz and stirring of adolescence".¹³⁶

It is interesting to note that in reviewing the discourse in judgments written by judges in Ontario hearing cases of educators accused of engaging in sexual misconduct with a student of the same gender as the educators, there does not appear to be any discussion by the judges of whether the assault will cause the student to become homosexual. The judges in Ontario simply deal with the cases as a sexual assault.

In examining the issue further regarding society's bias against homosexuals and lesbians, Cossman and Bell¹³⁷ provide various examples of how these groups are often the targets of Canada Customs and the police. These authors argue that after the 1992 decision of *R. v. Butler*¹³⁸ which involved a challenge to the obscenity law, straight mainstream pornography appears to be flourishing. On the other hand, gay and lesbian materials en route to Canada are a frequent target of Canada Customs.

Further, these authors also state that the new child pornography law has resulted in a "police witchhunt for gay men who have sex - often paid with teenage males".¹³⁹ In London, Ontario and in Vancouver local police in each of these jurisdictions claim they have discovered local "kiddie porn rings". At page 5 Cossman and Bell state:

In London, Ontario where local police have discovered a local "kiddie porn ring", in a sixteen month period, from August 1993 to June 1995, the London police have laid more than four hundred criminal charges against fifty-two men. Only forty are for "sexual interference" (s. 151 C.C.C.), which involves sexual actions with boys under fourteen. (Couture 1995, 16-17). There was only one charge of making "child" pornography (s. 163.1 C.C.C.). Almost half of the criminal arrests have been brought against gay men paying for sex with males under eighteen (s.

¹³⁵ *Supra* note 38.

¹³⁶ *Supra* note 38 at 2.

¹³⁷ *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 4.

¹³⁸ [1992] 1 S.C.R. 452.

¹³⁹ *Supra* note 137 at 5.

212(4) C.C.C.). Similar arrests have been made in Vancouver, where once again the police claimed to have uncovered the largest child pornography ring in Canada. And once again, the target has been gay men who have sex for money with teenage male prostitutes. Virtually no charges have been brought against men who have sex with underage girls.

By examining the discourse in some of the cases, it appears that the fear of conversion of a youth into homosexuality and revulsion of homosexuality is central to some of the judgments in British Columbia.¹⁴⁰ According to Cossman and Bell, a sexual panic, brought on by the AIDS crisis, is prevalent in our political and cultural life, which has produced a "logic of contagion". The further one is away from the law's construct of "good sex" (heterosexual sex), the lower one is located on the downward spiral of contagion. These authors state that an associational link has historically been made and remains between various types of sex, including lesbian and gay sex and disease.

Lise Gotell argues that sexual panics have tended to occur during times of social upheaval. To understand the contemporary sexual panic, it is important to examine the context in which it has occurred. According to Gotell, the contemporary panic follows the sexual revolution which began in the 1960s. This was a time of sexual exploration and politicization. At the same time the sexual revolution was occurring, there was a liberalization of laws regulating "such previously defined 'moral' issues as homosexuality, divorce, contraception and abortion".¹⁴¹ Gotell states that in the present atmosphere of social anxiety, the optimism of the sexual revolution and its liberalized impetus has been identified by many actors as a cause of social decline. Further, Gotell argues that the construct of "epidemic" which was generated initially as a discursive

¹⁴⁰ See B. MacDougall, *supra* note 128 at 61 wherein he states that custody cases provide the most fertile ground for determining judicial attitudes about homosexuality and youth. In custody cases, MacDougall states that courts often construct extremely high standards for homosexual parents which standards cannot

response to AIDS provides the occasion for increased surveillance and repression of marginalized sexual communities.

After discussing previous sexual panics, Gotell states at page 59:

Ours is a time when the 'excesses' of the past have been highlighted as the cause of social decline and the solutions posed take the form not of expansion or discovery, but instead of restraint, constraint and caution. In economics, discourses of neoconservatism urge political restraint as the answer to economic crisis and locate the cause of economic decline in 'excessive' and interventionist state policy. Contemporary discourses of sexual danger echo and parallel the cries of neoconservative voices. The 'excesses' of the sexual revolution are decried and sexual prudence, control, and constraint are recommended as responses...

The construct of "sexual panic" might provide an explanation as to why judges in British Columbia appear to respond differently to those educators charged with sexual offences in same sex abuse cases compared with those educators charged with sexual offences in opposite sex abuse cases. In Ontario the judgments do not appear to reflect a "fear of conversion/infection of children by homosexuals and homosexuality".¹⁴² One wonders if the greater panic in British Columbia is indicative of a more conservative judiciary in British Columbia than in Ontario. Another possible explanation is that perhaps since the Noyes case, the judiciary in British Columbia has overreacted in same sexual abuse cases. No conclusions can be drawn regarding the cases in Nova Scotia given the small sample.

III. EFFICACY OF THE CRIMINAL COURTS

Upon examination of the limited number of criminal cases, it is evident that accused educators in each jurisdiction are provided with the panoply of due process. In

be met. In his paper MacDougall examines the role courts have played in perpetuating the inferiorization and marginalization of homosexuality.

¹⁴¹ *Supra* note 137 at 58.

¹⁴² *Supra* 128 at 60.

evaluating the efficacy of the criminal system, one aspect of fairness is whether the judiciary treats same and opposite sex abuse cases alike. Although the judiciary in Ontario appears to treat both groups of cases in a similar fashion, judges in British Columbia appear to approach same sex abuse cases with a fear of conversion/infection of children by the perpetrator. Thus, while it appears that judges in British Columbia do not treat same sex abuse cases in an impartial and objective manner, further research in this area is required before a definitive conclusion can be drawn in this regard.

From a victim's perspective, criminal courts in British Columbia, unlike in Ontario, appear to find adolescent female complainants in opposite sex abuse cases less credible than the male educators. In Ontario, an alleged female victim has an equal chance to that of an accused educator of being believed by the judiciary. Thus, from the perspective of the accused in same sex abuse cases and of female victims in opposite sex abuse cases, the criminal system in Ontario seems to be fairer than the system in British Columbia. However, before any conclusions can be drawn with regard to these issues, more research is required in the area of child sexual assault cases in both British Columbia and Ontario.

IV. CONCLUSION

Although there are a small number of female educators who engaged in sexual misconduct with students, in all jurisdictions male educators are generally the perpetrators of sexual abuse involving youths. This finding is consistent with several other studies.

In British Columbia there is a significantly higher rate of conviction by judges in same sex abuse cases in comparison with opposite sex abuse cases. This pattern of conviction

is not seen in cases in Ontario. Unfortunately, no conclusions can be drawn with respect to cases in Nova Scotia because the sample is too small.

Several factors were isolated and examined in the cases to determine if there was an explanation as to why there is a hundred percent conviction rate by judges in British Columbia in same sex abuse cases in comparison to a seventeen percent conviction rate in opposite sex abuse cases. Certainly both groups of educators should be treated the same during the criminal investigation and the court process. The educator who has been charged with sexual offences involving youths of the same gender as himself or herself should not be subject to greater public scrutiny or to a higher standard of conduct than an educator involved in an opposite sex abuse case, or conversely, an educator who is involved in an opposite sex abuse case should not be subject to a lessor standard. It does not seem to be that judges are applying a standard that is too high in same sex abuse cases, but perhaps they are applying a standard that is too lenient in opposite sex abuse cases. To determine whether judges in British Columbia approach both groups of sex abuse cases objectively and impartially further research is required.

5. CIVIL ACTIONS AGAINST EDUCATORS AND SCHOOL BOARDS

With child sexual abuse being hidden in the private sphere until the mid to late 1970s, there was a strong tendency by society to deny the existence of this problem.¹ After the Bagdley Report² was published in 1984, child sexual abuse was recognized as a national tragedy. Over the past decade there has been a dramatic change in attitude and awareness of child sexual abuse.³ Adult survivors of childhood sexual abuse have been encouraged by the growing professional sensitivity and the feminist movement, to tell their stories and to document "the social patterns of denial".⁴ As a result of changes in the law concerning the reception of children's evidence by the courts,⁵ there have been successful criminal prosecutions,⁶ which has had the effect of "weaken[ing] the social attitudes of denial of the existence of the problem".

The legislative, judicial and attitudinal changes have taken time to change. Thus, it is not surprising that it was not until 1988 in British Columbia that the first civil action against an educator for damages for sexual abuse was heard by a court.⁷ There appear to be a few cases in Ontario initiated by students against educators for damages for sexual abuse but to date there are no civil cases in Nova Scotia brought against educators.⁸

¹ N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990) 15 Q.L.J. 3 at 3.

² Canada, *Sexual Offences Against Children*, vol. 1 & 2 (Ottawa: Minister of Supply and Services Canada, 1984) (Chairperson: Dr. Robin Bagdley).

³ *Supra* note 1 at 3.

⁴ *Supra* note 1 at 3.

⁵ See the discussion in chapters two and four regarding evidentiary changes in the law regarding the reception of children's evidence.

⁶ For a discussion of all the criminal cases in British Columbia, Nova Scotia and Ontario see chapter 4.

⁷ *Lyth v. Dagg* (1988), 46 C.C.L.T. 25 (B.C.S.C.) [hereinafter *Lyth*].

⁸ In Nova Scotia there are civil cases that have been brought against a priest and a child care counsellor for damages for sexual assault of a student. In *M. (F.W.) v. Mombourquette* (1996), 152 N.S.R. (2d) 109 (C.A.) [hereinafter *Mombourquette*] a student brought an action against a priest and in *R. (G.B.) v. Hollett* (1996) 139 D.L.R. (4th) 260 (N.S.C.A.) an action was brought against a childcare counsellor. Also see the compensation scheme for victims who were sexually abused in three provincially operated institutions,

Unlike criminal proceedings where the goal is to punish the offender and to deter others, in civil proceedings the goal is to compensate the victim and to restore the person through monetary damages to the position she or he would have been in had the assault not occurred. If the victim meets the burden of proof, the civil court will award damages for which the educator will be personally liable. Although there have been some cases brought in negligence and vicarious liability against the school board, these actions have not been successful.

Once an allegation is made against an educator, the school board will generally suspend the educator while the matter is investigated. Depending on the outcome of the investigation, the school board may have the educator return to his or her position or may dismiss the employee. As a result of a school board's actions, an educator may bring an action in civil court against his or her current or former employer. If the action taken by the board against the educator results in one of the parties taking the matter to an arbitration hearing and if either party disagrees with the decision of the arbitrator, the educator or the school board may appeal the decision to the civil court. Thus, civil courts consider not only personal injury cases arising from sexual misconduct of educators but also consider employment issues arising from the alleged misconduct.⁹

In all three jurisdictions there are far fewer civil cases brought against educators who have allegedly engaged in sexual misconduct than there are criminal cases. However,

Dept. of Justice news release, May 3, 1996, <http://www.gov.ns.ca/cmns/msrv/nr-1996/nr96-05/96050301-htm>.

⁹ For a discussion of employment related cases civil courts consider, see chapter 7. There is another type of case that civil courts in Ontario have considered which is whether or not the Minister of Education acted fairly in refusing to grant a teacher a hearing before a board of reference. See *Campbell and Stephenson* (1984), 5 D.L.R. (4th) 676 (Ont. H.C.). In British Columbia boards of references no longer exist. In Nova Scotia there never were boards of reference and in Ontario boards of reference only apply with respect to applications for a Board of Reference that were made before September 1, 1998 and have not been finally

with the Supreme Court of Canada's reasoning in *P.A.B. v. Curry*,¹⁰ there soon may be somewhat of an increase in the number of civil actions brought against educators. In this chapter the discussion will begin with reasons as to why the number of civil actions is so much lower than the number of criminal prosecutions brought against educators. Thereafter, civil cases brought against educators and school boards will be discussed. The thesis of this chapter is that although there may be an increase in the number of civil actions brought against educators as a result of the reasoning in *Curry*, the increase will not be all that significant.

I. REASONS WHY THERE ARE FEWER CIVIL CASES

One reason for fewer civil cases is the fact that the costs of pursuing a civil action against an educator likely act as a deterrent since they are borne by the plaintiff; while in criminal cases the state absorbs the costs of prosecuting the matter. Another reason for the smaller number of civil actions brought against educators is that while there is no limitation period governing the prosecution of criminal sexual assaults against children,¹¹ each jurisdiction has limitation periods governing civil cases of assault and battery, depending on how the action is framed. There has been a dramatic increase in the number of civil cases in British Columbia brought for damages for sexual assault as a result of the elimination of the limitation periods governing most of these actions.

A plaintiff can frame an action in several different ways, including suing the educator directly for assault and battery, breach of fiduciary duty and negligence. In addition, the plaintiff may allege that the school district is liable in negligence for improper hiring and

determined, see the *Education Quality Improvement Act*, S.O. 1997, c. 31, s. 121. Thus, *Re Campbell and Stephenson* will be discussed in chapter 7 which deals with school boards and boards of reference.

¹⁰ [1999] S.C.J. No. 35, online: QL (S.C.J.) [hereinafter *Curry*].

supervision practices or for breach of policies and/or statutes. Further, the plaintiff may sue the school board for breach of fiduciary duty and may also allege that the school board as employer of the plaintiff is vicariously liable for the acts of sexual misconduct committed by the employee.

Given that far more is understood about child sexual abuse, including the fact that a victim may not realize that he or she has been abused for several years after the incidents occurred, the legislatures in British Columbia and Nova Scotia amended acts dealing with limitation periods for actions brought for damages arising from sexual abuse.¹² In British Columbia a person may at any time bring an action in tort where the action is based on sexual misconduct; whether or not the misconduct occurred when the person was a minor and whether or not the person's right to bring the action was at any time governed by a limitation period.¹³ Thus, where the plaintiff's action is brought in tort for a claim for damages for assault, battery, trespass to the person, intentional affliction of mental suffering or negligence, no limitation period applies. As a result, the court does not have to consider the provision in the legislation dealing with statutory postponement of actions.¹⁴ With the elimination of the limitation period, there has been a dramatic

¹¹ J. W. W. Neeb & S. J. Harper, *Civil Action for Childhood Sexual Abuse* (Toronto: Butterworths, 1994) at 59.

¹² *Limitations Act*, R.S.B.C. 1979, c. 236 and *Limitation of Actions Act*, R.S.N.S. 1989, c. 258.

¹³ *Limitation Act*, R.S.B.C. 1996, c. 266, see s. 4 - "The following actions are not governed by a limitation period and may be brought at any time:...(k) for a cause of action based on misconduct of a sexual nature, including, without limitation, sexual assault (i) where the misconduct occurred while the person was a minor and (ii) whether or not the person's right to bring the action was at any time governed by a limitation period; (l) for a cause of action based on sexual assault, whether or not the person's right to bring the action was at any time governed by a limitation period...See also J. W.W. Neeb & S.J. Harper, *supra* note 11 at 76.

¹⁴ J. W.W. Neeb & S. J. Harper, *supra* note 11 at 76.

increase in the number of civil cases in British Columbia brought for damages for sexual assault.¹⁵

If the plaintiff in British Columbia frames part of the action as a breach of fiduciary duty, this equitable action is likely caught by the broad definition of "action" and by the catchall provision for any other action not specified in the *Limitation Act*.¹⁶ This means that unless the plaintiff relies on the postponement provision in section 6 of the legislation, the plaintiff would have to bring this action within six years from the date the cause of action arose. Subsection 6(3) provides that the running of time concerning fixed periods of limitation under the legislation for an action *inter alia* for personal injury and/or in which material facts relating to the cause of action have been wilfully concealed is postponed and time does not begin to run against the plaintiff until:¹⁷

- 6(4)...the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question, ought in the person's own interests and taking the person's circumstances into account, to be able to bring an action.¹⁸

In Nova Scotia¹⁹ there is a one-year limitation period governing actions brought in assault and battery which is based on the common law rule of discoverability. In Ontario²⁰ there

¹⁵ See P. Willcocks, "Child Sex Victims Sue their Abusers in Civil Court" *The Globe and Mail* (23 November 1998) A3. In this article Willcocks states that the rise in civil-abuse cases in British Columbia has been so rapid that the law has not been able to keep up. As a result, the B.C. Law Institute has set up a special committee to study sexual-assault damages.

¹⁶ J. W.W. Neeb & S. J. Harper, *supra* note 11 at 76.

¹⁷ J. W. W. Neeb & S. J. Harper, *supra* note 11 at 76.

¹⁸ *Limitation Act*, *supra* note 13.

is a four-year limitation period for bringing actions in assault and battery and the discoverability rule applies to the interpretation of this section. "Actions upon the case" or in negligence in Ontario and Nova Scotia must be commenced within six years after the cause of action arose.²¹ If the action or a part of the action for damages for childhood sexual abuse is brought in equity as a breach of a fiduciary duty, there is no statutory period of limitation in Ontario or Nova Scotia governing this type of action.²²

In Ontario, the legislation does not contain any statutory extension of the prescription periods.²³ In Nova Scotia, upon application the court may "disallow a defence based on the time limitation" and allow the action to proceed if it appears equitable to do so considering the degree to which,²⁴

3(2)(a) the time limitation prejudices the plaintiff or any person whom he represents; and

¹⁹ *Limitations of Actions Act*, R.S.N.S. 1989, c. 258, s.2; as am. S.N.S. 1993, c. 27, s. 1; 1995-96, c. 13, s. 82 - see s. 2(1) "The actions mentioned in this Section shall be commenced within and not after the time respectively mentioned in such Section, that is to say (a) actions for assault, menace, battery, wounding, imprisonment or slander, within one year after the cause of any such action arose...2(5) Sexual Abuse (5) In any action for assault, menace, battery or wounding based on sexual abuse of a person, (a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and (b) notwithstanding subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse".

²⁰ *Limitations Act*, R.S.O. 1990, c. L.15 - see s. 45(1) "The following actions shall be commenced within and not after the times respectively hereinafter mentioned, ... (j) an action for assault, battery, wounding or imprisonment, within four years after the cause of action arose..." This provision has been interpreted by the Supreme Court of Canada in *K.M. v. H.M.*, [1992] 3 S.C.R. 6 [hereinafter *K.M.*]. *K.M.* was an incest case. La Forest J. stated at 24 "...Incest is both a tortious assault and a breach of fiduciary duty. The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries. In this case, that discovery took place only when the appellant entered therapy and the lawsuit was commenced promptly thereafter. The time for bringing a claim for breach of fiduciary duty is not limited by statute in Ontario, and therefore stands along with the tort claim as a basis of recovery by the appellant..."

²¹ J. W.W. Neeb & S. J. Harper, *supra* note 11 at 72. Also see *Limitations Act*, *supra* note 20, s. 45(1)(g) and *Limitations of Actions Act*, *supra* note 19, s. 2(1)(e).

²² J. W.W. Neeb & S. J. Harper, *supra* note 11 at 75. Also *K.M. supra* note 20 confirmed that the time for bringing a claim for breach of fiduciary duty is not limited by statute in Ontario.

²³ J. W.W. Neeb & S. J. Harper, *supra* note 11 at 76.

²⁴ J. W. W. Neeb & S. J. Harper, *supra* note 11 at 79.

(b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.²⁵

The legislation in Nova Scotia sets out in subsection 3(4) the factors it must consider in determining whether or not the limitation defence should be disallowed. The court's jurisdiction to disallow a limitation defence is restricted by subsections 3(6) and 3(7). Pursuant to subsection 3(6) a court shall not exercise the jurisdiction conferred by section 3 if the action is commenced or notice is given more than four years after the prescribed limitation period has expired. Subsection 3(7) provides that the section does not apply to an action where *inter alia* the limitation period is ten years or more.²⁶

In *P.(J.) v. Sinclair*²⁷ the British Columbia Court of Appeal held that in cases where the *Limitation Act*²⁸ extinguished a plaintiff's cause of action for damages based on misconduct of a sexual nature that occurred when the plaintiff was a minor and the plaintiff's right to bring the action was at any time governed by a limitation, the amendments to the *Limitation Act*²⁹ made in 1992, 1992 and 1994 are to be applied retrospectively. This results in reviving previously extinguished causes of actions.

The Court of Appeal held further that where wrongful acts of the tortfeasor teacher and the school board result in the same damage and one of the wrongs is sexual misconduct, then the plaintiff may seek compensation from all persons whose act or omissions contributed directly or indirectly to the damage suffered. On the issue of vicarious liability, the Court held that since the principle of vicarious liability does not depend on

²⁵ *Limitations of Actions Act*, *supra* note 19, s. 3(2).

²⁶ J. W. W. Neeb & S. J. Harper, *supra* note 11 at 80.

²⁷ (1997), 37 B.C.L.R. (3d) 366 (C.A.) [hereinafter *Sinclair*].

²⁸ *Supra* note 13.

²⁹ *Supra* note 13.

any blameworthy conduct on the part of the employer, it also is liability "based on" an act of sexual misconduct and is therefore covered by the statute.

As a result of *Sinclair* there is no longer a limitation defence available to school boards and educators in British Columbia when the plaintiff brings his or her cause of action in tort for damages for sexual misconduct. It is possible that in British Columbia and Nova Scotia a greater number of these cases may be commenced by students against educators given the amendments in each jurisdiction to the acts governing limitations periods for sexual assault actions. However, even though it is easier for a plaintiff to bring a civil action against an educator now that the limitation periods have been relaxed, a plaintiff still may not be motivated to bring an action unless the school board will be held vicariously liable for the educator's misconduct.

II. ACTIONS FOR DAMAGES

A. Claims of Vicarious Liability of Employer

In Canada the application of the principle of vicarious liability to hold employers responsible for the criminal and wrongful acts of their employees has undergone a considerable metamorphosis over the past few years.³⁰ Devine Harris states that only a few years ago there was no precedent for holding employers liable for acts of sexual misconduct committed by their employees. Today, however, the legal position of employers has changed dramatically.³¹ Recently, courts have held employers, but not school districts, vicariously liable for sexual misconduct of employees.³²

³⁰ W. Devine Harris, "School Board Liability for Sexual Misconduct: Recent Developments" (CAPSLE '97, Victoria, British Columbia, 5 May 1997) (Chateauguay: Imprimerie Lisbro Inc.) 220 at 233.

³¹ *Ibid.* at 220.

³² *Curry, supra* note 10. The trial judge in *T.(G.) v. Griffiths* (25 October 1995), Doc. Vernon 24139 [hereinafter *Griffiths*] found the employer vicariously liable but this finding was overturned on appeal, (1997), 31 B.C.L.R. (3d) 1 (C.A.) and the decision of the Court of Appeal was affirmed by the Supreme Court of Canada, [1999] S.C.J. No. 36. In *K.(W.) v. Pornbacher* (1997), 32 B.C.L.R. (3d) 360 (S.C.) the

In this section, the principles of vicarious liability will be discussed, as well as two recent Supreme Court of Canada cases, *Curry* and *Griffiths*. Neither of these cases deals with vicarious liability of a school board. However, the principles enunciated by the Supreme Court of Canada are directly applicable to school boards to determine whether they could be held vicariously liable.

1. Principles of Vicarious Liability

When an employer is held vicariously liable for the act or omission of his or her employee, it does not involve the commission of any tort by the employer. Under the doctrine of vicarious liability, the employer is held liable when an employee has committed the particular tort because the employer and employee are connected by a relevant juridical relationship, the employment relationship.³³ With vicarious liability, the employer who is held responsible is "innocent" in a personal sense of any wrongdoing.³⁴ Thus, "it is also known as "strict" or "no-fault" liability, because it is imposed in the absence of fault on the employer."³⁵ In order for vicarious liability to be imposed on the employer, there must be some "fault", in the sense of a legal wrong, on the part of the employee.³⁶

According to Fridman, there are two competing maxims used by judges to provide a juridical basis for such liability. The one maxim holds an employer vicariously liable because the acts of the employee are regarded as having been authorized by the

Catholic Church was found vicariously liable for the sexual assaults of the priest. In *Mombourquette*, *supra* note 8 the Nova Scotia Court of Appeal overturned a finding at trial of vicarious liability of the Catholic Church for the sexual assault of a young boy by a priest.

³³ G.H.L. Fridman, *The Law of Torts in Canada*, Vol. 2 (Toronto: Carswell, 1990) at 314.

³⁴ *Ibid.* at 314.

³⁵ *Curry*, *supra* note 10 at 4.

³⁶ *Supra* note 33 at 314.

employer. Thus, the acts of the employee are the acts of the employer. The other maxim is *respondeat superior*. Fridman explains that:

[T]he person who is the master or controller of the one who has acted tortiously is answerable for what was done simply because that person was the other's superior and, in consequence, in charge or command of the other, the perpetrator of the harm. This will only be so, however, if what was done was done in the course of the duties entrusted to the inferior. But liability will ensue even if the act was not for the benefit of the superior but for the benefit of the one subject to control and command. The superior is liable because he is the superior. He is answerable because, ultimately, he was the one who ought to have controlled the behaviour of the inferior...³⁷

An employer can often escape liability for the tortious acts of his employee on the basis that the employer did not authorize the act or the act was committed outside the scope of the employee's employment.

a. The Decisions

One of the consequences of child sexual abuse entering public discourse after being hidden in the private sphere until the mid to late 1970s, is that courts are dealing with an increasing number of cases of plaintiffs alleging they have been abused by individuals in positions of trust in society such as counsellors, teachers, parents and priests. Thus, courts are having to re-examine the application of the principles of vicarious liability to enterprises, such as non-profit organizations providing social services to children that likely were never contemplated when the principles first evolved.

In *Curry* the Children's Foundation was found vicariously liable for acts of sexual abuse committed by one of its employees. The Children's Foundation is a non-profit organization that provides residential care and treatment for children with behaviour and emotional problems who are in the care of the Superintendent of Child Welfare. As

³⁷ *Supra* note 33 at 315.

stated by McLachlin J. the Children's Foundation, as substitute parent, practised total intervention in the lives of the children in its care.

In finding the Children's Foundation vicariously liable, McLachlin J. held that it is the second part of the "course of employment" or Salmond Test³⁸ that is applicable when the responsibility of an employer for the intentional tort of sexual assault by an employee placed in a position of control over the victim is being considered. It was held that the second branch of the Salmond test may be approached in two steps. First, a court should determine whether there are precedents that determine on which side of the line between vicarious liability and no liability the case falls. Secondly, where precedent is inconclusive, courts should consider policy rationales behind strict liability.

The policy considerations that favour imposing strict liability on employers is fair allocation of loss to risk-creating enterprises and the deterrence of harm. In cases where precedent is inconclusive, to determine whether an employer is vicariously liable for an employer's unauthorized, intentional wrong Madame Justice McLachlin set out the following principles:

- (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
- (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of

³⁸ The Salmond test provides that: "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. Although there are few decisions on the point, it is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. In other, a master is responsible not merely for what he authorises her servant to do, but also for the way in which he does it". R.F.V. Houston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 20th ed. (London: Sweet & Maxwell, 1992) at 456 - 57 as cited in *Curry*, (1997) 30 B.C.L.R. (3d) at 11-12.

vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

- (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
- (a) the opportunity that the enterprise afforded the employee to abuse his or her power; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (d) the extent of power conferred on the employee in relation to the victim; (e) the vulnerability of potential victims to wrongful exercise of the employee's power.³⁹

The centrepiece of the Court's decision rests on whether the employer's enterprise and empowerment of the employee materially increases the risk of the sexual assault and the harm. Factors to consider in determining this are as follows:

1. whether the employer gave the employee an opportunity to commit the abuse. This involves examining the length of time an employee is required or permitted to be with children and the type of activities that the employee is expected to supervise. If the employee is involved with the child for extended periods of time and is required to supervise intimate activities such as bathing and toileting, the opportunity for abuse increases.
2. the nature of the employment relationship between the employee and the child. McLachlin J. stated that the more an enterprise requires the exercise

³⁹ *Curry, supra* note 10 at 13.

of power or authority for its successful operation, the more likely it is that an abuse of that power relationship will be attributed to the employer.

3. whether the employee is required to or permitted to touch a child in intimate body zones and
4. spatial and temporal factors such as time and place. It may be that spatial and temporal factors may negate any idea of materially enhanced risk of harm if they suggest that the conduct was unrelated to the employment and any enhanced risk it may have created.

In applying this test for vicarious liability for an employee's sexual abuse of a client,

McLachlin J. stated:

The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability -- fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.⁴⁰

In holding that there should not be an exemption for non-profit organizations, McLachlin J. reasoned that however meritorious the work is of this non-profit organization, it put the respondent in the intimate care of Curry and enhanced the risk of abuse occurring. As such, by imposing vicarious liability on the Children's Foundation, the principles of fair compensation and deterrence apply in these circumstances. The Court stated that this may motivate charitable organizations entrusted with the care of children to take not only the precautions that the law of negligence requires, but all possible precautions to ensure that their children are not sexually abused.

In the companion case, *Griffiths*, the Supreme Court of Canada, applied the same reasoning as it did in *Curry* but in *Griffiths*, the employer, the Vernon Boys' and Girls' Club [hereinafter the *Club*] was not vicariously liable for acts of sexual assault committed

by one of its employees on two children who attended the Club. Mr. Justice Binnie writing for the majority, held that under the first phase of the analysis in *Curry*, the case law reflecting policy judgments by various courts over the years, suggests that by imposing no-fault liability in this case would extend too far the existing judicial consensus about appropriate limits of an employer's no-fault liability. Vicarious liability is imposed where there is a strong connection between the job-created power and job-created intimacy, neither of which is present in this case to the necessary degree.

In considering policy considerations which is the second phase of the analysis in *Curry*, Binnie J. noted that the theory is that an employer who employs individuals to advance his own economic interests should bear the responsibility for incurring losses sustained in the course of the enterprise. The majority was of the opinion that non-profit enterprises lack an efficient mechanism to internalize such costs. The Court held that because of the weakness of the policy justification for the expansion of vicarious liability to non-profit organizations, the respondent is entitled to rely on the "strong connection" requirement between the enterprise risk and the sexual assault and that it be applied rigorously.

In applying the principles to the facts in *Griffiths* the Court noted that the Club's "enterprise" was to offer group recreational activities for children to be enjoyed in the presence of volunteers and other members. The opportunity that the Club provided to Mr. Griffiths to abuse whatever power he may have had was minimal. It was held that Mr. Griffiths, in pursuing his agenda of personal gratification, depended on his success in isolating the victims from the group. The Court held that the chain of events constitutes independent initiatives on the part of Mr. Griffiths for his personal gratification and the

⁴⁰ *Supra* note 10 at 14.

ultimate misconduct is too remote from the employer's enterprise to justify the imposition of vicarious liability.

Curry and *Griffiths* are at the opposite ends of a continuum of the conferral of authority by an employer to an employee. At the one end is *Curry* with the employer granting to the employee full authority over the lives of children and at the other end of the continuum is *Griffiths* with no delegation by the employer to the employee of any kind of authority over children. It still leaves open the question of employer liability in the middle of the continuum where educators would be positioned, which is somewhere between enjoying full in *loco parentis* status as in *Curry* and no authority whatsoever, as in *Griffiths*.⁴¹ Based on the Supreme Court of Canada's reasoning in *Curry* there likely will be very limited factual situations wherein a school board will be found vicariously liable for acts of sexual misconduct of its employee. In most circumstances there will not be a strong enough of a connection between the school board's enterprise and the extent of the power conferred on the educator. Most educators are only with students for approximately five to six hours per day and generally do not have to supervise intimate activities such as bathing and toileting. However, there are some factual situations that could result in a court imposing vicarious liability on a school board. For example, a school board could be held vicariously liable for any acts of sexual abuse by a teacher who had responsibility for special education students on an extended trip which required the teacher to be involved in self-care activities of the students.

Despite more relaxed limitation periods in British Columbia and Nova Scotia, plaintiffs may not be encouraged to bring actions against educators and school boards for sexual

⁴¹ G.M. Dickinson, "Fault, No-Fault and Fiduciary Duty: School Boards' Liability for Employee Torts" (CAPSLE '99, Royal York Hotel, Toronto, Ontario, 26 April 1999) [unpublished] at 22.

misconduct if boards will not be found vicariously liable. If a plaintiff did obtain a judgment against the educator, she or he still may be empty handed because the educator may not have the ability to pay the judgment or may not have sufficient assets to satisfy it.

B. Action in Battery against the Educator and Action in Negligence against the School Board

In these actions the plaintiffs' claims are based on fault and the personal wrongdoing of both the employee and employer. The plaintiff alleges that the employee committed an assault and that the employer was negligent in hiring and supervising the educator. As discussed in the previous section, in attempting to have a court impose vicarious liability on a school board, there are difficult policy questions and "nuances of job-based authority"⁴² for the plaintiff to overcome. However, there are also difficult hurdles for the plaintiff to overcome in trying to lead sufficient evidence to demonstrate negligence and personal liability on the part of a school board.⁴³

In British Columbia there are only two cases of former students suing educators for damages for assault and battery. One of the cases, *C.M.K. v. Young*⁴⁴ is an opposite sex abuse case and involves a female plaintiff suing her former male principal. The other case, *Lyth*, is a same sex abuse case of a male student suing his former male drama teacher. Both cases resulted in damages being awarded against the educator. In Ontario there appears to be only one case that was initiated by a student against her former teacher,⁴⁵ but the reported decision deals with an interlocutory motion. The case may have settled because there is no report of a trial decision. These cases portray the

⁴² *Ibid.* at 22.

⁴³ *Ibid.* at 23.

⁴⁴ [1994] B.C.J. No. 2729 (S.C.), online: QL (BCJ) [hereinafter *Young*].

difficulties for a plaintiff who is claiming personal liability on the part of a school board employing an educator who engaged in sexual misconduct with a student.⁴⁶

1. The Decisions

In *Young* the female plaintiff brought an action for damages for personal injuries suffered as a result of acts of sexual assault committed in 1964 to 1965 by the male defendant, her former teacher and principal. These assaults occurred in the school over a fifteen-month period, two or three times a week when the plaintiff was nine years old. Prior to the action being commenced, the defendant pleaded guilty in the criminal proceedings and left the country before being sentenced.

The action against the school board was dismissed by consent of the parties. Presumably, the plaintiff did not have sufficient evidence to demonstrate that the school board was negligent in hiring or supervising the teacher.

The Court held that the defendant's assaults upon the plaintiff were a breach of trust and that he used his power to take advantage of this vulnerable student who was in the custody of her father while her schizophrenic mother was in the hospital. In assessing general damages of \$60,000, past loss of income of \$10,000 and punitive damages of \$20,000, the Court considered the fact that part of the plaintiff's emotional injuries were caused by abuse she suffered by both her brother and father. With respect to the awarding of punitive damages, the Court held that because the tortfeasor had left the jurisdiction before being punished in the criminal proceedings, it was in the interests of society that these damages be awarded.

⁴⁵ *M.(S.) v. C. (J.R.)* (1993), 13 O.R. (3d) 148 (Gen.Div.).

⁴⁶ *Ibid.* at 23.

If this case was decided today, it is unlikely, based on *Curry*, that the court would impose vicarious liability on the school board. Although the plaintiff in *Young* was extremely vulnerable and the school board had conferred authority on the educator both as a teacher and as a principal, there still likely is not enough of a strong connection between the risk created by the power and authority granted by the school board and the sexual misconduct of the educator.

In *Lyth*, a decision six years earlier, a male student brought an action in battery against a former male teacher claiming damages for psychological trauma as a result of sexual abuse by the defendant. The plaintiff also brought an action in negligence against the school board alleging that it was or should have been aware of the propensity of its employee to engage in homosexual activities with his students and should have protected its male students from exposure to his attentions.⁴⁷ It does not appear that there was a claim of vicarious liability against the school board.

The plaintiff claimed damages for sexual assaults by his teacher from August 1981 when he was fifteen years of age to the fall of 1982. The sexual assaults occurred off the school premises. The action in battery succeeded but only insofar as it related to the initial sexual assault because during this period of time the Court found that the defendant dominated and influenced the plaintiff, such that the plaintiff did not genuinely consent to the sexual activities. As a result, the defendant was liable for damages arising from the August 1981 sexual assault and general damages were assessed at \$5000. After the initial sexual assault, the Court held that the plaintiff consented to participate in a sexual relationship with the defendant. Thus, no damages were payable to the plaintiff for that

⁴⁷ For a discussion on negligent hiring and retention claims against a school board see chapter 2.

relationship given that the student had ample opportunity to break off the relationship and did not.

In dismissing the plaintiff's claim for punitive damages, the Court noted that the defendant had already been punished for his conduct in criminal proceedings. The Court also dismissed the plaintiff's claim in negligence against the school board because the plaintiff did not prove on a balance of probabilities that the school board ought to have known of the defendant's propensity to abuse male students. In trying to discharge the burden of proof, the plaintiff presented evidence of two former students who had complained to a vice-principal that Mr. Dagg has also made sexual advances to them during a visit to the teacher's cabin. Although the judge characterized these witnesses as impressive, the judge preferred the evidence of the vice-principal who recalled that these students characterized the incident as roughness and tickling and there was no report of any sexual touching. The vice-principal also gave evidence that if she thought that sexual misconduct occurred, she would have advised her superiors.

Given the state of the law in 1988 when this case was heard, it would have been difficult to advance a claim for vicarious liability against the school board. It would have been difficult to bring "the facts of the case - off site and out-of school sexual relations within the strictures of the Salmond test".⁴⁸

In *Lyth* the Court determined that although a fifteen-year-old could not consent to a sexual relationship with a forty-four year old teacher who had a dominating influence, a sixteen-year-old could. Unlike in *Young*, in *Lyth* there was no discussion by the judge about Mr. Dagg breaching a trust relationship with his student by engaging in sexual acts with him. Further, unlike in the criminal cases, the judge in *Lyth* did not discuss whether

a student who engaged in a sexual relationship with a person in a position of trust or authority, could actually consent to sexual acts.

Given the Supreme Court of Canada's view that a teacher is presumptively in a trust relationship with a student,⁴⁹ it is likely that today the court would view differently the ongoing sexual relationship between Mr. Dagg and his sixteen-year-old student. Today with similar facts the general damage award could likely be higher.

The difference in the general damage awards in *Young* and *Lyth* is not a result of judges treating these cases differently because one was an opposite sex abuse case and the other was a same sex abuse case. But rather, the disparity in the awards is a result of the factual differences in the two cases. In *Young*, unlike in *Lyth*, the student was extremely vulnerable, coming from a difficult family background and the teacher/principal took advantage of her vulnerability. In these cases there was a difference in the ages of the students when the sexual assaults first started. In *Young* the sexual assaults began when the female student was nine years old; well below the age of consent in a criminal sense, while in *Lyth* the student was fifteen years of age when they began. The sexual assaults were also far more frequent in *Young* than they were in *Lyth*.

C. BREACH OF FIDUCIARY DUTY

An educator and school board can also be faced with an equitable claim brought by a plaintiff that the educator and school board breached the fiduciary duty owed to a student. Although the law governing fiduciary relationships originally developed to govern trusts,⁵⁰ over the years the fiduciary principle that was developed to "protect vulnerable

⁴⁸ *Supra* note 41 at 26.

⁴⁹ See *R. v. Audet*, [1996] 2 S.C.R. 171 [hereinafter *Audet*].

⁵⁰ *Supra* note 23 at 27.

individuals from abuse by those with discretionary power to affect their interests" has been extended to include relationships unrelated to a trust.⁵¹ The categories of fiduciary relationships are never closed because it is the nature of the relationship, not the specific category that determines whether it is fiduciary.⁵² The Supreme Court of Canada has stated the categories are subject to expansion whenever the fiduciary has the latitude to exercise power or discretion unilaterally, so as to affect the legal or practical interests of a beneficiary who is especially vulnerable to the fiduciary.⁵³

Although the Supreme Court of Canada has not had to consider a claim based on the fiduciary obligations of educators towards their students, the Court has relied on the fiduciary concept in defining the legal obligation of teachers for off-duty conduct in a number of non-fiduciary contexts.⁵⁴ The Supreme Court of Canada has found that because a teacher holds a fiduciary-like position of trust and confidence, this status does not necessarily terminate when the teacher leaves the school.⁵⁵ Thus, even when a teacher is off-duty in a non-fiduciary context he or she may be perceived by the community to be wearing his or her teaching hat.⁵⁶ As such, when a teacher is off-duty he or she may not be able to freely express public opinions that denigrate a group of persons, such as women, if it has the effect of poisoning the school environment.

⁵¹ Mr. Justice La Forest, "Off-Duty Conduct and the Fiduciary Obligations of Teachers" (1997) 8 E.L.J. 119 at 122 and 137.

⁵² *E.D.G. v. Hammer* [1998] B.C.J. No. 992 at 6 (S.C.), online: QL (B.C.J.) [hereinafter *Hammer*]. For this proposition, Mr. Justice Vickers cites *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384.

⁵³ G.M. Dickinson & N. Tymochenko, "Board Liability for Sexual Assault: A New Standard?" (1998) 5(1) *Educ.Law* 3 at 3.

⁵⁴ *Supra* note 51 at 128. The cases the Supreme Court of Canada has considered that deal with the fiduciary concept in defining the legal obligations of teachers for off-duty conduct in a number of non-fiduciary contexts are *Ross v. New Brunswick School District 15*, [1996] 1 S.C.R. 825 [hereinafter *Ross*] and *Audet*, *supra* note 49.

⁵⁵ See *Ross*, *supra* note 54.

⁵⁶ *Supra* note 51 at 129.

While it is clear that teachers are in a fiduciary relationship with their students, it seems more questionable whether school boards are in a fiduciary relationship with students.⁵⁷ The courts in both British Columbia and Ontario have had to deal with this issue in cases of janitors sexually assaulting students.

1. The Decisions

In *K.M.K. v. Ackerman*,⁵⁸ the Ontario Court of Justice refused to strike the Statement of Claim wherein the plaintiff alleged that the school board breached its fiduciary duty to her as a result of a janitor sexually assaulting her. The janitor was convicted in 1994 of several sexual assaults against the plaintiff. In her action, the plaintiff also alleged that the school board was negligent in hiring and supervising the janitor. In disagreeing with the school board that the Statement of Claim failed to disclose a reasonable cause of action, the Court held that although pleading breach of a fiduciary duty was novel in a school context, the plaintiff was not barred from proceeding to trial because the categories of relationships giving rise to fiduciary duties are not closed.⁵⁹

In *Hammer*, another case involving a janitor sexually assaulting a student, the British Columbia Supreme Court considered whether the school board owed a fiduciary duty to the plaintiff who brought an action for damages for personal injuries arising from these assaults. The assaults took place from 1978 to 1980 in her elementary school when the plaintiff was eight to ten years of age. The plaintiff pleaded that the school board was negligent, breached its fiduciary duty, and was vicariously liable. At trial the plaintiff did not pursue the negligence claim.

⁵⁷ *Supra* note 41 at 27.

⁵⁸ [1996] O.J. No. 3546 (Gen.Div.), online: QL (ORP).

⁵⁹ This case may have settled because there is no decision of the trial.

In considering the claim for a breach of fiduciary duty, the Court recognized that the categories of fiduciary relationships are not closed since it is the nature of the relationship which is characterized by discretion, inherent vulnerability and influence over the interests of another that gives rise to the relationship, rather than the specific categories. In finding that the relationship between the school board and the plaintiff was a fiduciary one, similar to the fiduciary relationship between a parent and child, Vickers J. stated at page 6:

Perhaps it goes without saying that the Board, by virtue of its statutory position, enjoys a position of overriding power and influence over its students. It is a power dependent relationship, one characterized by unilateral discretion. See *Hodgkinson v Simms*, [1994] 2 S.C.R. 377; and *Norberg v. Wynrib*, [1992] 2 S.C.R. 226. While in its care, the Board has a duty to nurture, care for and protect the lives and the best interests of students. It has a duty to provide a safe, non-threatening environment. In my view, the duty remains similar to the duty of a parent. Based on trust and dependency, with inherent vulnerability of the student and an undisputed power imbalance, the relationship is fiduciary in its nature.

The Court stated that the difficulty in this case was that the school board did not commit the assaults on the plaintiff but rather they were committed by an employee who had no direct duties relating to students. The Court held that in this case there was no evidence that the school board's fiduciary duty was breached.

In rejecting the submission of plaintiff's counsel that a claim for a breach of fiduciary duty was intended to impose a no-fault obligation, the Court stated:

In my view, a claim for breach of fiduciary duty was never intended to impose a no-fault obligation. No fault obligations are imposed in the context of a claim for vicarious liability. Breach of fiduciary duty is not a no fault claim.⁶⁰

With respect to the issue of foreseeability of the damages sustained, the Court stated that although the loss must flow from the breach of fiduciary duty, it need not be reasonably foreseeable at the time of the breach. Vickers J. held that although the damage to the

plaintiff was not foreseeable, the claim must fail, not for that reason but because there is no proof that there was a breach of a fiduciary duty.

According to the reasoning of Vickers J. it appears that in these circumstances an action for breach of fiduciary duty, is not much different than an action based on negligence. In both, a fiduciary duty or duty of care must be proven, as well as a breach of that duty. There is the difference, however, that in a negligence action the loss must be reasonably foreseeable, while in a breach of fiduciary action, Vickers J. held that it is not necessary that the loss be foreseeable. According to Greg Dickinson it is

hard to see how a cause of action against a school board based on its breach of fiduciary duty adds anything of practical importance to an ordinary negligence claim beyond, perhaps, the imprimatur that breach of fiduciary trust carries.⁶¹

The vicarious liability claim against the school board in *Hammer* failed because although the janitor's duties provided him with the opportunity to commit the sexual assaults, he had no direct duties involving students.

III. EFFICACY OF THE CIVIL SYSTEM

It is impossible to evaluate the efficacy of the civil system because of the dearth of cases brought by alleged victims of sexual misconduct by an educator. However, over the past few years in British Columbia and Nova Scotia there has been an important change to legislation governing limitation periods with respect to civil sexual assault actions. With the amendments made to the legislation in these jurisdictions, it is easier for victims to commence actions against educators who have allegedly engaged in sexual misconduct. Of the three jurisdictions, British Columbia provides sexual assault victims with the

⁶⁰ *Supra* note 52 at 7.

⁶¹ *Supra* note 41 at 30.

greatest access to the civil system given than in most cases there is no longer a limitation period governing the commencement of a civil sexual assault action.

IV. CONCLUSION

While it appears that it is easier for a plaintiff to sue an educator and school board for sexual misconduct, a personal judgment or one based on vicarious liability against a school board is fairly elusive for the plaintiff. Actions against school boards based on breach of fiduciary duty or negligent hiring or supervision of an educator often fail because it is difficult for the plaintiff to prove actual fault of the school board.⁶² Many years have often passed from the time the sexual misconduct occurred and it may be difficult to locate the evidence or it may have disappeared. Further, when there is conflicting evidence given by an administrator and former students who were young children at the time the abuse occurred, judges may prefer the evidence of the adult who was in a position of authority at the time the incident occurred.⁶³

Despite these difficulties, British Columbia is the most likely jurisdiction to experience an increase in the number of civil cases brought against educators for sexual misconduct. As a result of the elimination in British Columbia of the limitation period with respect to bringing civil actions in tort, including negligence, for damages for sexual assault, as well as the number of criminal prosecutions for sexual offences brought against educators in this province, it is possible that there will be an increase in civil actions against educators for sexual misconduct.⁶⁴ However, the increase in civil cases may not be significant

⁶² *Supra* note 41 at 31.

⁶³ *Supra* note 41 at 31.

⁶⁴ It is noted that a civil action has been commenced by a former student of Alistair Ian Cameron, a counsellor in the British Columbia school district of Williams Lake. See M. Hume, "Teen Sues School District for Damages of Sex Assault" *National Post* (15 June 1999) A8. In this article it states that the plaintiff is suing the school district, a teacher, vice-principal and Cameron for damages arising from sexual assaults that took place in 1993-94. In her Statement of Claim she is suing the teacher and vice-principal in

because of the Supreme Court of Canada's reasoning in *Curry*. While the Court has left the door open for the imposition of vicarious liability on a school board, there will only be a limited number of cases that meet the strong connection required between the risk created by the conferral of power or authority on the educator and harm created by the sexual misconduct. Based on the reasoning in *Curry*, in order for vicarious liability to be imposed on a school board, it will be necessary for there to be evidence of a school board giving an educator the authority to be with students for an extended period of time in a position of intimacy and power over them.

The Supreme Court of Canada stated that in determining whether vicarious liability should be imposed in new situations, the policy goals to be considered are fair compensation and deterrence. When courts are considering the policy question of who should bear the loss in a sexual misconduct case involving an educator, it seems that the obvious answer is the wrongdoer. However, given that an educator likely will not be able to satisfy the judgment, at first blush it seems fair that a school board should bear the loss given the compulsory nature of education "along with the profound sense of trust required to carry it out".⁶⁵ However, where there merely is an opportunity provided by the employer for the educator to commit the tort, and there is nothing more done by the school board to increase the risk of sexual misconduct, it does not seem fair that a school board would be held vicariously liable for the wrongful conduct. If the school board was held vicariously liable for every act of sexual misconduct of its employees, including those committed off school premises with no connection to school activities, there will be

negligence for failing to investigate why *Cameron* was removing her from class and for failing to investigate evidence that she was the victim of sexual assault and battery. The allegations against the school district are for negligently hiring and supervising *Cameron*. See Chapter 2 for discussion on negligent hiring and supervision.

no deterrent purpose served and the school board would become an involuntary insurer.⁶⁵ Thus, the more the school board requires an educator to exercise power and authority over children for the successful operation of a school programme, the more likely an abuse of that relationship, will result in the imposition of vicarious liability against the school board.

If the particular fact situation does not come within the scope of the principles enunciated in *Curry*, plaintiffs may not be motivated to bring civil suits against educators for sexual misconduct because they will have one less weapon to try to obtain a judgment against a school district. Although in *Young* and *Lyth* both plaintiffs were successful in obtaining a judgment against the educator, they did not have the evidence to advance negligence claims against the school board. Further, in *Young* the plaintiff was unsuccessful in her action for breach of fiduciary duty the school board. Unless plaintiffs can succeed in obtaining a judgment against the school district, they may end up empty handed despite winning their cases against educators, as they may never be able to enforce the judgments if the educators have no assets.

⁶⁵ *Supra* note 41 at 32.

⁶⁶ *Supra* note 10 at para. 36.

When an allegation of sexual misconduct is made against an educator, the educator will likely face disciplinary proceedings through the teachers' professional regulatory body or union. In British Columbia and Ontario this body is the College of Teachers¹ and in Nova Scotia it is the Teachers' Union. The mandates and structures of these two institutions are very different. The Colleges, being professional self-regulatory bodies, are charged with establishing, having regard to the public interest, standards for the education, professional responsibility and competence of its members and prospective members.²

The primary purpose of a self-governing profession is the protection of the public.³ There are two methods by which professional regulators protect the public interest. First, they restrict admission to the profession to those who meet educational, practical and others standards. Second, they review the conduct of people admitted to practice for the purpose of maintaining minimum standards of practice and conduct.⁴ Recognizing the importance of a self-governing profession protecting the public, one author has described regulatory disciplinary proceedings as "... a catharsis for the profession and a prophylactic for the public..."⁵

In protecting the public interest, the Colleges are responsible for certification and discipline of its members. Some members of the councils of the Colleges are members of

¹ [hereinafter the *College(s)*].

² *Teaching Profession Act*, R.S.B.C. 1996, c. 449.

³ J. T. Casey, *The Regulation of Professions in Canada* (Scarborough: Carswell, 1994) at 1-3 as cited by M. Baird, "Regulating the Conduct of Educational Professionals - The Disciplinary Process" (CAPSLE '97, May 1997) 1 at 2.

⁴ M. Baird, *supra* note 3 at 2.

⁵ J. Gray & M. I. Harrison, "Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems (1994), 11 *Capital U.L.R.* 529 at 537 as cited by M. Baird, *ibid.* at 2.

the public appointed by the governments in British Columbia and Ontario. Thus, this enables these institutions to be somewhat responsive to the public interest.⁶

However, the Nova Scotia Teachers' Union⁷ has as its object the advancement and promotion of the teaching profession and the cause of education, but does not have as its object the advancement of the public interest.⁸ While the N.S.T.U. does discipline its members, it is the Ministry of Education and Culture and not the N.S.T.U. that is responsible for the determination of the fitness of a prospective teacher when entering the profession and for the certification of teachers. The structure of the N.S.T.U. is like any other union and only its members, and not members of the public appointed by the government, sit on committees that discipline its members. The union model is not as conducive to responding to the public interest as is the model of the College.

Being self-regulatory bodies, the mandate of the disciplinary jurisdiction of the Colleges is to determine, in the public interest, whether the alleged conduct renders the teacher unfit to continue in the teaching profession or reveals a character trait incompatible with the high standards of conduct expected of teachers both on and off the job.⁹ If the Colleges determine that a teacher is unfit to continue in the teaching profession, they can suspend or cancel the teacher's certificate.

The mandate of the disciplinary jurisdiction of the N.S.T.U. is similar to that of the Colleges. However, while the N.S.T.U. makes a determination as to whether the alleged conduct of a teacher is unbecoming of a member of the teaching profession, it can only

⁶ In British Columbia fifteen members of the council are elected and the government appoints five. See s. 5 of the *Teaching Profession Act*. In Ontario seventeen members are elected and the government appoints fourteen. See s. 4 of the *Ontario College of Teachers, S.O. 1996, c. 12*.

⁷ [hereinafter the *N.S.T.U.*].

⁸ *Teaching Profession Act*, R.S.N.S. 1989, c. 462.

⁹ M. Baird, *supra* note 3 at 3.

make recommendations to the Minister of Education and Culture concerning the certification of the member.¹⁰ On the other hand, the Colleges can directly revoke the certification of a teacher. Thus, under the college model, the majority of members who determine whether an individual is fit to continue in the profession are the peers of the educator;¹¹ whereas under the union model in Nova Scotia it is the Minister, who may or may not be an educator, who makes this determination.

In this chapter the discussion will first focus on the groups of teachers that are regulated by the Colleges and the union. Thereafter, the disciplinary processes of the two Colleges and the N.S.T.U. will be discussed and compared. The thesis of this chapter is that the college model is more responsive to the public interest than the union model. Following a discussion of the standard of proof required in a professional disciplinary matter, the discipline decisions of both Colleges will then be analyzed to determine whether the Colleges treat all cases in a similar fashion. Unfortunately, there are no published discipline decisions of the N.S.T.U.

I. WHO IS REGULATED BY THE COLLEGES AND THE UNION

Educators in British Columbia and Ontario who are regulated are members of the Colleges. Members are defined as individuals holding certificates of qualifications.¹²

¹⁰ *Supra* note 8.

¹¹ See s. 27 of the *Ontario College of Teachers Act* wherein it provides that at least four of the eleven members of the Discipline Committee are persons appointed to the Council by the Lieutenant Governor in Council. Also see Bylaw 6 of "Bylaws and Policies of the British Columbia College of Teachers" (Vancouver: British Columbia College of Teachers, 1998) which provides that all members of the Council shall be members of the Discipline Committee. Three elected Council members, all of whom are educators, are appointed by Council to the Preliminary Investigation Subcommittee. Two of three Council members who sit on the Hearing Sub-Committee are educators who have been elected.

¹² *Supra* note 2, s. 3 provides that membership of the college consists of all persons who on December 22, 1987 held valid certificates of qualification issued under the *School Act*, all superintendents or assistant superintendents of schools on December 22, 1987 and all persons admitted to membership by the council. In the *School Act*, R.S.B.C. 1979, c. 375 s. 145 provides, inter alia that the minister issues certificates of qualification and the definition of teacher is s. 1 is a person holding a valid certificate of qualification issued by the ministry who is appointed or employed by a board, but does not include a person appointed

The majority of members are public school teachers. However, in both jurisdictions there are some educators in private or independent schools who are regulated if they hold certificates of qualification. In Nova Scotia members of the N.S.T.U. are solely those teachers who teach in the public school system.¹³ In all three jurisdictions there are private school teachers who are not subject to the standards of the Colleges or the requirements of the N.S.T.U.

II. THE DISCIPLINARY PROCESS OF THE COLLEGES AND THE UNION

Disciplinary tribunals wield tremendous power and may ultimately cancel the educator's certificate of qualification which removes the individual's ability to practice his or her profession. In the context of lawyer discipline, the British Columbia Court of Appeal has

by a board as superintendent or assistant superintendent of schools. Bylaw 2 of the British Columbia College of Teachers governs membership and certification. To be eligible for membership and certification, a person must be of good moral character and a fit and proper person to practise the profession of teaching; must have completed a program of professional and academic or specialist preparation and must be in compliance with *Criminal Records Review Act*. In section 1 of the *Independent School Act*, R.S.B.C. 1996, c. 216 [hereinafter *I.S.A.*] "certified teacher" is defined inter alia as a teacher who holds a certificate of qualification under the *Teaching Profession Act* or who holds a certificate of qualification issued by the inspector under the *I.S.A* and "teacher" is defined as a person employed by an authority to provide an educational program to students or to administer or to supervise the provision of an educational program to student. Section 7 provides that if an authority dismisses, suspends or in any other way disciplines a member of the College of Teachers a person holding a certificate of qualification it must report the dismissal, suspension or disciplinary action to the council of the College of Teachers. Thus, in the independent or private school system in British Columbia there are some teachers who hold certificates of qualification issued by the College of Teachers and may be registered as members.

The *Ontario College of Teachers Act*, supra note 6, s. 14 provides that every person who holds a certificate of qualification and registration is a member of the College. Section 2 and 3 of O.Reg. 184/97 provides that where a dean of a college or faculty of education or the director of a school of education reports to the Registrar that a candidate has submitted satisfactory documentation regarding date and place of birth, marriage certificate and/or change or name documentation if applicable, holds an acceptable university degree and has successfully completed a program of professional education the Registrar may grant to the candidate a certificate of qualification. Section 6 provides for limited certificates of qualification being granted to individuals teaching in the primary and junior division to an individual who is of native ancestry, holds the requirements for a Secondary School Graduation Diploma or standing that is equivalent, has successfully completed a program of professional education with concentration in the primary and junior division, has an offer of a teaching position in the primary or junior division from a board, a private school, the Provincial Schools Authority established under the *Provincial Schools Negotiations Act*, the Department of Indian Affairs and Northern Development of the Government of Canada or a council of a

recognized the impact of the disciplinary proceedings:

..."[I]rrespective of their outcome, the very nature of the proceedings can have a devastating effect on a member's reputation, the single most valuable asset which any professional can possess".¹⁴

Thus, it is incumbent upon those who regulate the conduct of its members to recognize the powers they wield.¹⁵ As such, it is imperative that fair processes that encompass the full panoply of natural justice be developed, given the seriousness of the decisions being made.

A. The Origin of the Complaint Against a Member

There is a difference in all three institutions as to the origin of complaints against members. Ontario's process is far more open to the public and thus responsive to the public interest than the processes in both British Columbia and Nova Scotia. In Ontario, the College accepts complaints from a member of the public or the profession, the Registrar or the Minister of Education and Training.¹⁶ The legislation has excluded school boards from making a complaint to the College. However, a school board is obliged to notify the College in writing when it becomes aware that a member who is or has been employed by a board has been convicted of a sexual offence involving minors or of an offence that in the opinion of the board indicates that students may be at risk of harm or injury.¹⁷ The legislation also requires a school board to notify the College in writing where the board is of the opinion that the conduct of a member who is or has been

band or an education authority. See ss. 8 - 27 for other individuals who may be granted limited and/or restricted certificates of qualification.

¹³ See *Teaching Profession Act*, *supra* note 8, s. 12 and *Education Act*, S.N.S. 1995-1996, c. 1, s. 1(aj).

¹⁴ *Cameron v. Law Society (British Columbia)* (1991), 81 D.L.R. (4th) (B.C.C.A.) 484 at 492 as cited by M. Baird, *supra* note 3 at 13.

¹⁵ M. Baird, *supra* note 3 at 13.

¹⁶ *Ontario College of Teachers Act*, *supra* note 6, s. 26(1).

¹⁷ *Ontario College of Teachers Act*, *supra* note 6, s. 47(2).

employed by the board should be reviewed by a committee of the College.¹⁸ Upon receiving the information, the matter may be brought forward as a complaint of the Registrar.

In British Columbia, a complaint to the College can be made by a school board under the *School Act* or an authority under the *Independent School Act*, the office of the Attorney General, five members or the Registrar.¹⁹ Any complaint from the public is discretionary, unless it is information regarding a criminal charge against a member. The Registrar's complaint can originate from information received from the Ministries of Education, Social Services, the Attorney General or an equivalent body in another jurisdiction.²⁰ Although the Registrar has discretion to accept complaints from other sources, these are usually referred to school districts and if appropriate, to the police, for resolution of the complaints.²¹ While the College in Ontario does take complaints from a single member, the College in British Columbia discourages collegial disputes and refers the member to the British Columbia Teachers' Federation.

The process of the N.S.T.U. is the most insular of all three jurisdictions. A complaint to the Professional Committee can be made by a local, the executive of the local or the Executive of the N.S.T.U.²² There is no process whereby the public can make a request to the Professional Committee that it inquire into the conduct of a member. Although the process of the N.S.T.U. has not been studied in depth, it appears that the union model services only its members and is not concerned with the public's interest.

¹⁸ *Ontario College of Teachers Act*, *supra* note 6, s. 47(3).

¹⁹ *Teaching Profession Act*, *supra* note 2, s. 26.

²⁰ *Supra* note 11 at bylaw 6.B.05.

²¹ B.C., *British Columbia College of Teachers: Report to Members*, 9(4), (Vancouver: The British Columbia College of Teachers, 1998) at 6.

²² *Teaching Profession Act*, *supra* note 8, s. 11(2).

As a result of the sources from which the College in British Columbia can receive complaints, one may be skeptical as to whether it truly acts in the public interest or whether it is a self-serving regulatory body "tainted by motives of self-preservation and protection".²³ Certainly, the College in Ontario appears to be structured in a manner that does respond to the public interest given that it actually takes complaints about its members directly from the public. In order that the Colleges be viewed by society as acting in the public interest, they must be seen as being capable of fairly and objectively disciplining one of their own. This perception is enhanced by the fact that the Colleges publish the outcomes of discipline decisions and that in Ontario, unlike in British Columbia, the proceedings are generally open to the public.²⁴ This is in stark contrast to the N.S.T.U. which does not publish its discipline decisions.

1. Process once Complaint is Received

The structures created by the legislation to deal with complaints made against members are similar in British Columbia and Ontario, with a less elaborate structure in Nova Scotia. Pursuant to the British Columbia legislation, the College is required to have a Discipline Committee,²⁵ which according to the bylaws has a Preliminary Investigation Sub-Committee²⁶ and a Hearing Sub-Committee. In Ontario the College is required to have both an Investigation and a Discipline committee.²⁷ In Nova Scotia, the *Teaching Profession Act*²⁸ requires that the N.S.T.U. establish a Professional Committee to inquire into conduct of its members.

²³ M. Kerchum, "Policy Development in the Discipline Process of the B. C. College of Teachers" (CAPSLE '99, Royal York Hotel, Toronto, 26 April 1999) [unpublished] 1 at 1.

²⁴ *Supra* note 11, bylaw 6.J.02; *Ontario College of Teachers Act*, *supra* note 6, s.s. 32(6) and (7).

²⁵ *Teaching Profession Act*, *supra* note 2, s. 28.

²⁶ [hereinafter the P.I.S.C.].

²⁷ *Ontario College of Teachers Act*, *supra* note 6, s. 15.

²⁸ *Supra* note 8, s. 11(1).

The legislation in both British Columbia and Ontario requires that complaints must be submitted to the Colleges in writing. Although the legislation in Nova Scotia does not specifically stipulate this, by inference it can be concluded that the request must be in writing as a copy of it must be forwarded to the executive.²⁹ In British Columbia, once a complaint or a report regarding a member is received and the Registrar determines that the report or complaint meets the requirements specified in the *Teaching Profession Act*, the Registrar refers the matter to the P.I.S.C. and informs the member that a report has been received by the College.

The Investigations and Hearings Department of the Ontario College has three units; an intake, investigations and hearing unit. If the staff of the intake unit do not resolve the complaint, the matter is forwarded to the investigations unit. In order for the complaint to be considered, it must set out the names of the member against whom the complaint is made, and the person making the complaint, as well as a description of the conduct of the member.³⁰

In Ontario there are two different types of investigators. There are investigators that are part of the investigations unit who assist an individual in preparing a complaint in the proper form and then who also investigate complaints. Another type of investigator can be appointed pursuant to section 36 of the *Ontario College of Teachers Act*, where the Registrar believes on reasonable and probable grounds that a member has committed an act of professional misconduct, there is cause to refuse to issue a certificate, there is cause to suspend or revoke a certificate, or there is cause to impose terms, conditions or limitations on a certificate. The appointment of this type of investigator must be

²⁹ *Teaching Profession Act*, *supra* note 8, s. 11(3).

approved by the Executive Council of the College. This investigator has powers of a commission under Part II of the *Public Inquiries Act*,³¹ allowing the investigator to issue a summons to an individual requiring him or her to attend a hearing and to produce documents. This legislation also allows the investigator to state a case to the court for contempt of an individual who fails to attend a hearing or fails to produce documents as set out in the summons. Further, the investigator has the power to administer oaths as well as accept copies of documents into evidence.

The bylaws of the British Columbia College do not require the P.I.S.C. to believe on reasonable and probable grounds that a member has engaged in professional misconduct before it appoints an investigator. There is no provision in the British Columbia legislation similar to the provision in the Ontario legislation allowing for the appointment of a different type of investigator. However, the legislation in British Columbia does stipulate that for the purposes of conducting an inquiry into the conduct of a member arising from a complaint, the council or Discipline Committee has the powers of a commissioner under certain sections of the *Inquiry Act*.³² These sections are similar to Part II of the *Public Inquiries Act* but the powers under the *Inquiry Act* are not as wide as under the *Public Inquiries Act*. These provisions allow the council or Discipline Committee to issue a summons requiring an individual to attend a hearing and to produce documents. There is no such provision in the *Teaching Profession Act* in Nova Scotia.

At the investigation stage, both British Columbia and Ontario notify the member of the complaint and advise that the matter is being investigated. The legislation in Nova Scotia

³⁰ Ontario, Ontario College of Teachers, "The Bylaws of the Ontario College of Teachers" (Toronto: The Ontario College of Teachers, 1998) at s. 28.

³¹ R.S.O. 1990, c. P.41.

³² R.S.B.C. 1996, c. 224.

does not provide for immediate notification to the member of the complaint but states that the member shall be given at least thirty days written notice of the charge and shall be given full opportunity to be heard by the Professional Committee.³³

In the legislation in Ontario and in the College bylaws in British Columbia the member is entitled to make written submissions at some stage of the investigation. However, the legislation in Nova Scotia provides the member with one opportunity of responding to the allegations, which is an opportunity to be heard by the Professional Committee. It appears that the College in Ontario provides the member with an opportunity to make a written response to the complaint upon notification of it. In British Columbia the member is provided with an opportunity to respond in writing upon completion of the investigation,³⁴ but there is no opportunity at this stage of the proceedings for the member to make oral submissions. However, in Ontario the Investigations Committee is not required to hold a hearing and does not have to provide an opportunity for any person to make oral or written submissions.³⁵

Investigators in both Ontario and British Columbia provide a written report to their committees.³⁶ Prior to the matter being presented to the P.I.S.C. and the Discipline Committee there is full disclosure of the report and relevant documentation to the

³³ *Teaching Profession Act*, *supra* note 8, s. 11(4).

³⁴ *Supra* note 11 at Bylaw 6.C.03.

³⁵ *Ontario College of Teachers Act*, *supra* note 6, s. 26(8).

³⁶ In Ontario there is no specific provision in the legislation, bylaws or Rules of Procedure of the Discipline Committee of the Ontario College of Teachers stating that an investigator provides a written report at the completion of its investigation. However Patrick O'Neill, Co-ordinator of Investigations and Hearings Department of the Ontario College of Teachers at the CAPSLE Conference at the Royal York Hotel on April 26, 1999 stated that at the conclusion of the investigation, a written report is prepared. M. Kerchum states in "Policy Development in the Discipline Process of the B.C. College of Teachers" *supra* note 23 at 5 that there is full disclosure of the investigator's report and relevant documentation to the member once the investigation is completed.

member upon completion of the investigation.³⁷ In Ontario a copy of the investigator's report is not given to the member.

Although the *Ontario Teaching Profession Act* directs that the Investigation Committee shall refuse to consider and investigate a complaint if it does not relate to professional misconduct, incompetency or incapacity or it is frivolous, vexatious or an abuse of process, the legislation in British Columbia and Nova Scotia does not have such a provision. However, once the P.I.S.C. considers the matter it can determine that the matter is not a discipline case, that the matter should be dismissed, that no further action needs to be taken, that the matter should be disposed of informally, that a preliminary investigation should be made or that it will appoint an investigator. When the Investigation Committee in Ontario considers a matter, it has similar options open to it as the P.I.S.C. The Investigation Committee can either direct that the matter, in whole or in part, be or not be referred to the Discipline Committee, require that the member complained against appear before the committee to be admonished or cautioned, or take such action as it considers appropriate.

In Nova Scotia the legislation simply requires the Professional Committee to inquire into the conduct of a member upon the request by any of the various bodies listed in the legislation. There is not a lot of detail in the legislation as to how the Professional Committee is to make the inquiry. However, when an inquiry is made it appears that a hearing is held to provide the member with an opportunity of responding to the allegations. Once the Professional Committee considers the matter it can dismiss the

³⁷ M. Kerchum, *supra* note 23 at 5. Patrick O'Neill at the CAPSLE Conference also stated this at the Royal York Hotel on April 26, 1999, *ibid*.

charge, or reprimand, suspend or expel the member. There is no provision in the Nova Scotia legislation for the appointment of an investigator.

Once the Investigation Committee receives all the material, the legislation in Ontario directs that it is to make all reasonable efforts to examine all the information. Similarly, the bylaws of the British Columbia College direct that the P.I.S.C. will consider the investigator's report, the results of the investigation and any written response from the member. In Ontario, unlike in British Columbia, the Investigation Committee must provide a written decision and reasons, except if the matter is being referred to the Discipline Committee, then no reasons have to be provided. The Registrar in Ontario provides the complainant and the member with a copy of the written decision and reasons when applicable.

In British Columbia once the preliminary investigation is completed, the P.I.S.C. may refer the matter for further investigation, determine the matter is not a discipline case, dismiss the matter, determine to take no further action, dispose of the matter informally or issue a citation. Although the member is notified of the decision made by the P.I.S.C., in British Columbia there is no requirement in the legislation or the bylaws that the P.I.S.C. provide written reasons for its decision. Similarly in Nova Scotia, the legislation requires that the Professional Committee provide the member with its decision, but there is no requirement that the committee provide reasons for its decision.

In British Columbia disciplinary issues do not come before the College until the discipline process between the teacher and his/her employer have been completed so that the school board is in a position to make a report to the college.³⁸ In those circumstances

³⁸ M. Baird, *supra* note 3 at 6.

where the teacher initiates a grievance and/or arbitration of the disciplinary action taken by the school board, the legislation provides that the College's disciplinary proceedings are stayed until those matters are concluded.³⁹ Thus, there can be a time delay between the impugned conduct and any professional disciplinary consideration of the member's conduct by the College.⁴⁰ There is no such provision in the legislation in Ontario or Nova Scotia.

As a result of lengthy delays in the criminal justice system, College proceedings in British Columbia⁴¹ and Ontario are conducted parallel to any ongoing criminal proceedings. The N.S.T.U. does not get involved in investigating the matter in a criminal proceeding, other than ensuring that due process is followed and that the member is provided with a lawyer.⁴² The N.S.T.U. will only get involved if the employer has disciplined the member and the member grieves the discipline imposed by the employer.

a. Procedures if Matter Proceeds to a Hearing

If the P.I.S.C. determines that a hearing into the conduct of a member should be held, its legal counsel will draft a citation setting out the allegations. Citations are not used in Ontario and Nova Scotia.

There is provision in the bylaws of the British Columbia College⁴³ and the Rules of Procedure of the Discipline Committee of the Ontario College of Teachers⁴⁴ for a pre-hearing conference. There is no such provision in the Nova Scotia legislation. In British Columbia and Ontario the purpose of this conference is for the simplification of issues,

³⁹ M. Baird, *supra* note 3 at 6. See also s. 28 of the *Teaching Profession Act*, *supra* note 2.

⁴⁰ M. Baird, *supra* note 3 at 6.

⁴¹ M. Kerchum, *supra* note 23 at 5.

⁴² J. Huntley, "What every teacher should know: Criminal allegations" *The Teacher* 37(6) (1999 February).

⁴³ *Supra* note 11, Bylaw 6.I.01.

⁴⁴ (Toronto: Ontario College of Teachers, March 6, 1998) [hereinafter the *Rules of Procedure*].

obtaining admissions, the discovery and production of documents and in British Columbia it is for fixing the date of the hearing.

Given that the Colleges and the N.S.T.U. have the burden of proving that the educator engaged in misconduct, these institutions present their cases first. In British Columbia hearings are generally conducted by *viva voce* evidence but the hearing sub-committee may admit evidence in any other manner it considers appropriate.⁴⁵ In Ontario the *Rules of Procedure* provide for oral, written or electronic hearings.⁴⁶ In Nova Scotia the legislation does not stipulate whether the hearing is oral or by way of written submissions. Thus, given that the Professional Committee can determine its own procedure, it would be up to the committee to determine the type of hearing that would be held, which would have to conform to the principles of fairness articulated by the courts.

i. Standard of Proof

If a matter proceeds to a hearing before the Colleges or the N.S.T.U., the committees hearing the matters must apply the appropriate standard of proof to the allegations. In *Hanson v. College of Teachers (Disciplinary Hearing Sub-committee)*⁴⁷ a thirty-four year old male substitute teacher was found guilty of professional misconduct by the British Columbia College for improperly touching seven female fifteen to sixteen year old students. The finding of professional misconduct was upheld by the Supreme Court of British Columbia but the Court allowed the teacher's appeal against the penalty, substituting a suspension for a fixed period of eighteen months for the indefinite period of suspension.

⁴⁵ *Supra* note 11, Bylaw 6.K.05.

⁴⁶ *Supra* note 44, see Rules 8 and 9.

⁴⁷ (1993), 110 D.L.R. (4th) 567 (B.C.C.A.) [hereinafter *Hanson*].

The teacher appealed the finding of misconduct further to the Court of Appeal. In overturning the finding of professional misconduct, the Court held that the discipline committee of the College did not give the teacher's evidence the weight it should have and if it had, the result might have been a finding that the College had not been proven the case against him. In referring to *Hirt v. College of Physicians and Surgeons*⁴⁸ and *Joy v. College of Physicians and Surgeons*,⁴⁹ the Court held that the standard of proof required in a disciplinary hearing involving a professional person is a standard less than the reasonable doubt test of criminal law but higher than the balance of probabilities in civil cases.⁵⁰

On the facts of the case, Gibbs J.A. found that the requisite standard of proof with respect to the teacher's state of mind had not been met. The Court noted that the touching in each case was of a fleeting and minor nature. According to Gibbs J.A. the facts could sustain an equally valid inference of innocence and he also found that there was no evidence of a guilty mind. Recognizing that no useful purpose would be served by ordering a rehearing given that the record would be the same as was put forward at the original hearing and that the case had been ongoing for five years, it was ordered that the notice of conviction that was entered upon the teacher's record be expunged.⁵¹

In considering a school board's dismissal of a teacher, Arbitrator Hope, Q.C. in *Re Chilliwack School District 33 and Chilliwack Teachers' Association*⁵² states that there are only two standards of proof, being proof on a balance of probabilities and proof beyond a

⁴⁸ (1985), 63 B.C.L.R. 185 (S.C.).

⁴⁹ (unreported) December 13, 1985, Vancouver No. A850601 (S.C.).

⁵⁰ *Supra* note 47 at 576.

⁵¹ *Supra* note 47 at 577.

⁵² (1991), 16 L.A.C. 94 (4th) (Hope) [hereinafter *Chilliwack*]. For the facts of *Chilliwack* see chapter 7.

reasonable doubt.⁵³ He did not recognize a third standard falling between the balance of probabilities and reasonable doubt tests. At page 119, Arbitrator Hope states:

Allegations amounting to criminal or sexual misconduct which impact upon the issue of employability generally and allegations made against a person's professional reputation which may affect that person's career have been viewed by arbitrator's as constituting consequences that require proof of disputed facts to a high degree of probability...

Allegations of impropriety made against teachers by their students are not uncommon and their vulnerability to such allegations requires that care be taken in any adjudicative process to ensure that the rights of the teacher are preserved with the same scrupulous care that the rights of students, parent and society are preserved. In that context, it is appropriate to require proof to a high degree of probability of any allegations made against the professional reputation of a teacher, bearing in mind not only the disciplinary consequences of finding such allegations to be true, but the implications in terms of professional reputation.

Bell⁵⁴ is of the view, as is the writer, that *Hanson* has been misinterpreted by some who suggest that there is a second standard of proof that differs from the balance of probabilities. His interpretation of *Hanson* is that the judge was acknowledging that the civil standard of proof is flexible:

Applying the rule of flexibility in the civil standard of proof, it is possible that, depending on the facts alleged, a case may be established on a mere balance of probabilities, or on a degree of certainty lower than that required to establish an allegation involving deceit or moral turpitude, as long as it is "commensurate with the occasion".⁵⁵

Although there are no cases in Ontario and Nova Scotia involving disciplinary hearings of educators by the College or the N.S.T.U., the same standard that was applied in *Hanson* and *Chilliwack* has been applied by the courts in both Ontario and Nova Scotia in cases involving other types of professional disciplinary hearings.⁵⁶

⁵³ *Ibid.* at 117.

⁵⁴ Glen W. Bell, "The Standard of Proof in Professional Disciplinary Matters" (March 1995) 53 *The Advocate* 255.

⁵⁵ *Ibid.* at 257.

⁵⁶ See *Bernstein v. College of Physicians of Surgeons of Ontario* (1977), 76 D.L.R. (3d) 38 (Div. Ct.) and *Dhawan v. College of Physicians and Surgeons of Nova Scotia*, [1998] N.S.J. No. 170 (T.Div.).

b. Summary

Although the processes of dealing with sexual misconduct cases are quite similar in the colleges and the N.S.T.U., they are more formalized in the colleges. Because the procedures to be followed are quite detailed in the bylaws of the British Columbia College of Teachers and in legislation in Ontario, but are not specified in Nova Scotia, an educator in British Columbia and Ontario would have a much better understanding of the process than someone would in Nova Scotia.

When a case proceeds to a hearing, educators in all jurisdictions are provided with at least the minimum requirements of procedural fairness. It appears that in British Columbia, because the hearings are generally oral, the college provides educators with much more than the minimum requirements of procedural fairness. Educators in British Columbia, and to some extent in Ontario when hearings are not electronic, have the right to give oral evidence, to cross-examine witnesses and also to appear before the ultimate decision-maker. It is not known whether hearings in Nova Scotia are oral or written or whether the educator actually has the opportunity of calling witnesses.

III. Decisions of the Colleges

While the British Columbia College has conducted disciplinary hearings since the fall of 1988,⁵⁷ the Ontario College rendered its first decisions in September 1998.⁵⁸ The composition of the hearing panels is the same in both British Columbia and Ontario. Each panel in both jurisdictions is composed of three members of the College council, two of whom are elected members.

⁵⁷ B.C., *British Columbia College of Teachers: Report to Members* 8(1) Fall 1996 (Vancouver: The British Columbia College of Teachers) at 4.

A. Decisions of the British Columbia College of Teachers

The discipline decisions from the winter of 1990 to the spring of 1999 have been reviewed.⁵⁹ During this period of time, there were sixty-three cases involving educators who allegedly engaged in sexual misconduct. Educators who engaged in sexual misconduct included teachers, vice-principals, principals and an assistant superintendent. Criminal charges were laid against the educators in thirty-six or fifty-seven percent of cases and in all but two of these cases, the educators either pleaded guilty or were found guilty of the charges after a trial. In two cases the criminal charges were dismissed against the educator.⁶⁰

In fifty-five or eighty-seven percent of cases, the allegations of sexual misconduct were made against male educators.⁶¹ In forty or sixty-three percent of cases,⁶² male educators were alleged to have engaged in sexual misconduct with female young persons and in ten cases or sixteen percent male educators were alleged to have engaged in sexual

⁵⁸ "Discipline Panels Render First Decisions" *Professionally Speaking* (September 1998) 33.

⁵⁹ For a complete summary of the cases see Appendix "B".

⁶⁰ B.C., *Report to Members - Discipline Decision*, Fall (Vancouver: The British Columbia College of Teachers, 1992) re: Mr. K. In this case a male teacher was found guilty of professional misconduct by the college as a result of engaging in a sexual relationship with a fifteen-year-old female student. Charges were laid against the educator but were later dismissed. In B.C., *Report to Members* 10(2) Winter 1998/99 (Vancouver: British Columbia College of Teachers, 1999) re: Mr. BBB after a second trial, was acquitted of several sexual assault charges involving his students. The college dismissed the citation against him. In referring to educators who had hearings before the College, each educator is identified by a letter of the alphabet. This is to preserve the confidentiality of each educator.

⁶¹ This figure is consistent with other studies identifying men as the main perpetrators of child sexual abuse. See Canada, *Sexual Offences Against Children* vol. 1 (Ottawa: Ministry of Supply and Services, Canada, 1984) (Chairperson: Dr. Robin Badgley) at 215; F. Marshall & M.A. Vaillancourt, *Changing the Landscape: Ending Violence - Achieving Equality- Final Report: The Canadian Panel on Violence Against Women* (Ottawa: Minister of Supply and Services Canada, 1993) at 9 wherein it was stated that in sexual abuse of girls (age 16 and under) 96 percent of perpetrators of child sexual abuse were men. See also V. Schmolka, *Is Bill C-15 Working? An Overview of the Research of the Effects of the 1988 Child Sexual Abuse Amendments* (Ottawa: Department of Justice, 1992) at 23 wherein it was stated that the accused was male in over 94 percent of cases in a child sexual abuse cases.

⁶² In nine of sixty-three cases the gender of students was not reported. In three of these nine cases the gender of the educators was also not reported. In two of sixty-three cases students were not involved.

misconduct with male young persons. Female educators were alleged to have engaged in sexual misconduct with female students in four or six percent of cases.⁶³

There was one case of a male educator engaging in sexual misconduct with five males and one female young person.⁶⁴ In nine cases, the gender of the youth was not reported. In all but two cases, the College found that the educators had engaged in the sexual misconduct as alleged.⁶⁵ In two cases it was not clear from the case summaries whether the allegations of touching by a male educator were sexual in nature.⁶⁶

In fifty of sixty-three cases, educators' certificates of qualification were cancelled and their membership in the College was terminated. In one case, the citation against the educator was dismissed. Two educators were reprimanded, one was barred from reapplying to the College for a period of two years and nine educators had their certificates of qualification and membership suspended for various periods of time.

⁶³ There were five female educators who were involved in some form of sexual misconduct. Only four of them engaged in sexual misconduct with students. One female teacher alleged that she was sexually assaulted by or under the direction of staff members, but this was unfounded. See B.C., *Report to Members* 10(4) Summer 1999 (Vancouver: The British Columbia College of Teachers, 1999) re: Ms. JJJ.

⁶⁴ B.C., *Report to Members - Discipline Decisions*, Spring, (Vancouver: The British Columbia College of Teachers, 1992) re: Mr. H. This case has been counted in the forty cases of male educators who were alleged to have engaged in sexual misconduct with female youths and also in the ten cases of male educators who were alleged to have engaged in sexual misconduct with male youths.

⁶⁵ B.C. *Report to Members - Discipline Decisions*, Fall, (Vancouver: The British Columbia College of Teachers, 1992) re: Mr. L. In this case there were two citations issued against the member. In the first citation allegations were that the teacher had invited a recent graduate to his home, served her alcohol and made sexual advances to her. In the second citation, the allegations were that he had invited a second graduate to his home, served her alcohol and engaged in sexual activity with her. The hearing committee held that the member was only guilty of serving alcohol to the first student and none of the sexual misconduct allegations were proven. The teacher was reprimanded for serving alcohol to a minor. Also see the case of Mr. BBB wherein after criminal charges were dismissed after a second trial, the college dismissed the citation against him, *supra* note 60.

⁶⁶ B.C., *Report to Members: Discipline Decisions*, Spring, (Vancouver: British Columbia College of Teachers, 1993) re: Mr. P. In this case the male teacher was found to have engaged in professional misconduct when he invaded the space of his female students by standing too close to them and by touching their hair and shoulders of the students who were the complainants. It does not state whether his behaviour was sexual in nature. Also, see *Report to Members - Discipline Decisions*, Fall (Vancouver: British Columbia College of Teachers, 1993) re: Mr. V. The male teacher was found to have engaged in inappropriate touching of three female students, aged eleven and twelve. It is not reported whether the allegations were that the touching was of a sexual nature, but the college found that it was not.

Of the eleven cases that involved educators either being suspended from the College or being reprimanded, nine of eleven cases involved conduct that was less serious than the educator engaging in a sexual relationship, including sexual intercourse with a student. The sexual misconduct in these nine cases included using female students as models for inappropriate photographs,⁶⁷ invading female students space by standing too close to them and touching their hair and shoulders,⁶⁸ touching female students' backs and shoulders and standing too close to them,⁶⁹ making comments of a sexually demeaning and offensive nature,⁷⁰ engaging in inappropriate conversation and inviting a female student out for dinner while touching her on the waist,⁷¹ sexually harassing two female teachers, school secretaries and two swimming coaches,⁷² making unfounded allegations that the educator had been a victim of threats and sexual assault by or under the direction of fellow staff members⁷³ and engaging in inappropriate conduct toward female students by violating the boundaries of the student teacher relationship.⁷⁴ In one case the College

⁶⁷ B.C., British Columbia College of Teachers, *Report to Members: Discipline Decisions*, Winter 92/93 (Vancouver: British Columbia College of Teachers, 1993) re: Mr. O. The College suspended the teacher's membership and certificate of qualification until he had provided a psychiatric report that he is not a risk to students. The suspension would not be lifted before May 31, 1993.

⁶⁸ See *Report to Members: Discipline Decisions*, Spring 1993, *supra* note 66.

⁶⁹ See *Report to Members: Discipline Decisions*, Fall 1993, *supra* note 66.

⁷⁰ B.C., *Report to Members: Discipline Decisions*, 10(3), (Vancouver: British Columbia College of Teachers, 1998) re: Mr. FFF. In this case the hearing panel found that the teacher had made remarks to his students that were deemed to be sexual, demeaning and offensive. It was recommended, and the teacher consented, to a three-month suspension of his certificate of qualification and membership.

⁷¹ *Ibid.* re: Mr. HHH. In this case the teacher acknowledge that the allegations were true. This was the only time in the teacher's career that he had engaged in such conduct. The hearing panel recommended and the teacher consented to a five-month suspension of his certificate of qualification and his membership.

⁷² B.C., *Report to Members: Discipline Decisions*, Summer, (Vancouver: British Columbia College of Teachers, 1993) re: Mr. T. In this case the teacher admitted professional misconduct by making inappropriate comments to students in his Grade 3 class, and by sexually harassing female adults, including two teachers, a school secretary and two swimming instructors. The sexual harassment included inappropriate comments and touching. The hearing panel reprimanded the teacher for his conduct and ordered that a summary of the case be published to members.

⁷³ B.C., *Report to Members*, *supra* note 63 re: Ms. JJJ.

⁷⁴ B.C., *Report to Members: Discipline Decisions* 10(4) Summer, (Vancouver: The British Columbia College of Teachers, 1999) re: Mr. KKK. In this case the teacher's inappropriate actions included giving flowers, gifts and a note with inappropriate sentiments to female students, taking a student to dinner, visiting students' workplaces in order to give gifts, intervening in an inappropriate manner in a relationship

held that allegations of sexual misconduct made against a male teacher were not proven but the allegation of serving alcohol to a minor was proven which resulted in the teacher being reprimanded.⁷⁵

The British Columbia College appears to treat all cases of sexual misconduct by educators the same, regardless of whether they are same or opposite sex abuse cases. In all of the same sex abuse cases, the educators were criminally charged with committing a sexual offence or with the possession of child pornography. The educators either pleaded guilty to the charges or were found guilty after a trial.

Two decisions of the British Columbia College have similar facts but the results are different. In one case, the College held that the teacher's conduct of engaging in a one-month sexual relationship with a nineteen-year-old female student at his school constituted professional misconduct but it warranted a one-year suspension rather than termination. The student was not in any classes taught by the teacher.

In the Discipline Decisions⁷⁶ it is reported that the College relied on the report of the arbitrator in determining the facts. The College determined that the teacher had engaged in a relationship with the student that was sexual but the evidence was conflicting as to its nature. It is reported further that the student had no interest in the teacher after the relationship ended and the teacher made no attempt to contact her. There were no allegations of sexual harassment or abuse. It is stated that the teacher was contrite about his actions and has established new and appropriate procedures to avoid any repetition of

between students and checking into grades and attendance in a course for which he was not the teacher and subsequently reporting the marks to the student.

⁷⁵ B.C., *Report to Members: Discipline Decisions*, Fall 1992, *supra* note 65 see re: Mr. L.

⁷⁶ B.C., *Report to Members: Discipline Decisions*, 8(1), (Vancouver: British Columbia College of Teachers, 1996) re: Mr. KK.

this behaviour. In concluding the teacher had committed a serious breach of trust by engaging in this relationship, the disciplinary panel suspended the teacher's certificate of qualification and membership for one year.

This decision must be contrasted with the decision concerning Mr. AAA⁷⁷ who had his certificate of qualification and membership terminated as a result of engaging in a sexual relationship with an eighteen-year-old female student who attended his school but was not in his class. The Hearing Sub-Committee was of the view that this penalty was deemed appropriate given the need for members to recognize the inability of a student to give informed consent to sexual activity with a teacher.

Without having the written record of the proceedings before the College of these two hearings, it appears that the difference in these two cases is the ages of the students. However, in the reasons of the arbitrator in the first case there is much more information provided.⁷⁸ It appears that the nineteen-year-old female student was experienced sexually and actively set out to seduce the teacher. She gave evidence that she enjoyed their sexual relationship and once she had seduced the teacher, she no longer was interested in him.

In the Mr. AAA, case there are no details as to who initiated the relationship. Although in Mr. AAA, the Hearing Sub-Committee applied the principle that a student was incapable of truly consenting to a relationship with a teacher, it appears that this principle was not followed in the case involving the nineteen-year-old student. The Hearing Sub-Committee considering the case involving the nineteen-year-old student was likely

⁷⁷ B.C. *Report to Members: Discipline Decisions*, 10(1), Fall 1998 (Vancouver: British Columbia College of Teachers, 1998) re: Mr. AAA.

⁷⁸ For a full discussion of the arbitration hearing, see chapter 7.

influenced by the fact that the board of arbitration overturned the school district's decision to terminate the teacher and substituted a penalty of a one-year suspension.

In another case where the College suspended the teacher rather than terminating his membership and cancelling his certificate of qualification, the male teacher had engaged in a sexual relationship with a female student that commenced when she was fifteen years of age.⁷⁹ After the student graduated, the teacher lived with her in a common-law relationship for approximately eighteen months. The relationship continued from 1984 until approximately 1994.

It cannot be determined from the case summary why the College only suspended the teacher and did not terminate his membership and cancel his certificate of qualification, as it did in Mr. AAA. The student in this case was younger than the student in Mr. AAA. The College did not appear to apply the principle that a fifteen-year-old student is incapable of truly consenting to a relationship with a teacher. Perhaps, the College felt that when the female student had reached the age of majority she was capable of consenting to the relationship and she continued to remain in it.

Although none of the teachers who were involved in same sex abuse cases were given a suspension, the facts in those cases are distinguishable from the case involving the nineteen-year-old female student. In cases of educators engaging in sexual misconduct with young persons of the same gender as themselves, all the educators were criminally charged for their behaviour. All of them pleaded guilty or were found guilty after a trial. All of the young persons were younger than nineteen years of age.

B. Discipline Decisions of the Ontario College of Teachers

In the reports of the discipline cases of the Ontario College, fifteen⁸⁰ of sixteen cases coming before the hearing panels dealt with educators who had been alleged to have been involved in sexual misconduct. Fourteen or ninety-three percent of educators were charged criminally with sexual offences. All the educators either pleaded guilty to the charges or were convicted of the offences after a trial. One educator who was found guilty of thirty-three of forty-two charges was declared a dangerous offender.

All educators in the discipline cases were males. Six of fifteen or forty percent of educators engaged in sexual misconduct with female students,⁸¹ four or twenty-seven percent engaged in sexual misconduct with male youth⁸² and in one case the educator was found guilty of possession of child pornography.⁸³ In four cases the gender of the

⁷⁹ B.C., *Report to Members - Discipline Decisions, Fall 1992*, supra note 60 re: Mr. K.

⁸⁰ For a complete summary of the cases see Appendix "C".

⁸¹ *Supra* note 58 at 33 - 35. Mr. A - The educator was guilty of professional misconduct as a result of being convicted in 1997 of sexual assault of a female under his care. Mr. D - Mr. D was guilty of professional misconduct as a result of being convicted in 1997 of sexual assault and assault of young females. Mr. E - The educator was found to have engaged in professional misconduct as a result of sexual abuse of a ten year-old female student which began in 1977. In 1996, Mr. E pleaded guilty to a charge of indecent assault. Mr. G - Mr. G was found guilty of professional misconduct as a result of engaging in sexual misconduct of young female students. In 1996, he was found guilty of two counts of sexual assault and two counts of indecent assault. "Discipline Panel Decisions" *Professionally Speaking* (March 1999) at 29 - Mr. H - The educator was found to have engaged in professional misconduct by sexually abusing two female students between 1971 and 1978. He was convicted in December 1996 of two counts of sexual intercourse with a female under sixteen years of age and over fourteen years of age, two counts of indecent assault and one count of gross indecency. "Discipline Decisions" *Professionally Speaking* (June 1999) at 35 - Mr. N - Mr. N was found guilty of professional misconduct for engaging in an inappropriate sexual relationship with a seventeen-year-old female student. He pleaded guilty of sexual exploitation of the student.

⁸² *Supra* note 58 at 33 - 35. Mr. B - Mr. B was found guilty of professional misconduct as a result of touching a fourteen year-old male student. In September, 1996 he was convicted of sexual exploitation. Mr. C - Mr. C was found guilty of professional misconduct as a result of being convicted of thirty-three of forty-two sexual offences against young boys. He was declared a dangerous offender. "Discipline Decisions" *Professionally Speaking* (March 1999) at 35 - Mr. J - Mr. J was found to have engaged in professional misconduct as a result of convictions of communicating with a male over eighteen years of age for the purposes of prostitution, gross indecency and procuring or attempting to procure sexual services of persons under the age of eighteen. "Discipline Decisions" *Professionally Speaking* (June 1999) - Mr. O - The educator was found to have engaged in professional misconduct as a result of engaging in sex acts with male special education students.

⁸³ "Discipline Decisions" *Professionally Speaking* (June 1999) at 35 - Mr. M.

students was not stated.⁸⁴ In all cases the College found the educators guilty of professional misconduct. All the educators' certificates of registration and qualification were revoked with the exception of one which was suspended for a period of eighteen months.⁸⁵

From the reported decisions it appears that two penalties imposed by the College on the educators are inconsistent. In one case a thirty-year veteran male educator⁸⁶ had engaged in a sexual relationship with a seventeen-year old former student. The gender of the student is not reported. The teacher was convicted of sexual assault of the student. The teacher's resignation from the College was accepted on the condition that the teacher never apply for reinstatement.

In a similar case, David MacDonald Peckham's⁸⁷ membership and certificates of registration and qualification were merely suspended for eighteen months as a result of engaging in a sexual relationship with a seventeen-year-old female student. Mr. Peckham pleaded guilty to a charge of sexual exploitation involving the student.

There may be some very real factual differences between these two cases but as they are reported, the penalties imposed by the College appear to be inconsistent. It is difficult to know what factors the College took into account to merely suspend Mr. Peckham but in

⁸⁴ *Supra* note 58 at 35. Mr. F - The educator was found guilty of professional misconduct as a result of his conviction in 1997 of six counts of sexually touching two students under his care. "Discipline Decisions" *Professionally Speaking* (March 1999) - Mr. I - Mr. I was found guilty of professional misconduct for sexually abusing his students and former students in his Grade 5 and 6 class. He was convicted in March 1995 of two counts of indecent assault and two counts of sexual assault. Also Mr. K, "Discipline Decisions" *Professionally Speaking* (March 1999) at 30 - This male educator was found guilty of professional misconduct as a result of engaging in an inappropriate relationship with a seventeen-year-old student. He was convicted of sexual assault. Mr. L, "Discipline Decisions" *Professionally Speaking* (March 1999) at 30 - In this case a male educator was found guilty of professional misconduct as a result of being convicted of sexual touching for a sexual purpose of a young person over whom he was in a position of trust or authority.

⁸⁵ "Discipline Decisions" re: Mr. N, *supra* note 81.

⁸⁶ *Professionally Speaking* (March 1999), *supra* note 84 re: Mr. K.

⁸⁷ *Supra* note 81.

the previously discussed case, order the teacher never to apply for reinstatement to the College.

IV. Cases of the College Considered by Courts

A. Cases concerning Procedural Fairness

In cases that did not involve a member engaging in sexual misconduct, in British Columbia the court has held⁸⁸ that the College owes the member a duty to act fairly in the conduct of a preliminary investigation pursuant to s. 28 of the *Teaching Profession Act*. Further, it has been held that procedural fairness cannot be generalized and must be viewed in the factual context of a specific matter.

In conducting an investigation under s. 28(3) of the *Teaching Profession Act*, the College is not restricted only to investigating the instances of the alleged conduct referred to in the report or complaint but may also consider conduct of a similar nature.⁸⁹ Thus, if a report is received from a school district with respect to one incident of sexual misconduct concerning an educator, and during the investigation other instances of similar misconduct come to light, the college is able to consider this other misconduct.

In *Samborski v. The College of Teachers*⁹⁰ the Court held that pursuant to bylaws of the College, P.I.S.C. and not the Registrar, must determine the timeliness of a complaint. The timeliness of a complaint must be determined on a case by case basis because the purpose of requiring a complaint to be filed in a timely manner is:

...to ensure that a person is able to meet his accusers while evidence and recollection are still available to him and to permit people to continue with their lives without concern that old matters from the past still hang over them.⁹¹

⁸⁸ *Hammond v. Association of British Columbia Professional Foresters* (1991), 47 Admin. L.R. 20 (B.C.S.C.) and ref'd to in *Stolen v. College of Teachers (British Columbia)* (1996), 12 B.C.L.R. (3d) 325 (C.A.) [hereinafter *Stolen*].

⁸⁹ *Stolen, ibid.* at 341.

⁹⁰ [1997] B.C.J. No. 2753 (S.C.), online: QL (B.C.J.) [hereinafter *Samborski*].

⁹¹ *Ibid.* at 6.

On the facts of the case, a five-member complaint was submitted concerning the unprofessional conduct of a superintendent, some twenty-two months after the alleged conduct occurred. The Court stated:

In this case it is my opinion that the delay of 22 months after the conduct complained of was unreasonable and that the decision to the contrary on the facts of this case was not only made by a person who had no power to make it but was patently wrong.⁹²

In *Samborski* the Court went on to consider whether the report of the investigator was biased. There were several factors that led the Court to conclude that the investigator's report was biased, including the fact that the investigator was not a neutral fact finder when interviewing various witnesses. Given that the investigator was untrained and he was not involved in the adjudicative process of determining whether the petitioner did engage in unprofessional conduct, the Court held that the investigation and report should only be quashed if it demonstrated an actual operative bias.

In finding that the investigation and report did constitute operative bias, the Court went on to consider the steps taken by the College to cure the objectionable parts of the report and the defects that occurred in the process of the compilation of the report. Relying on *Chandler v. Alberta Association of Architects*⁹³ for the proposition "that an administrative body is able to cure defects in its procedure without losing its jurisdiction"⁹⁴ the Court held that the initial steps taken by the College, including the appointment of a new P.I.S.C., the offer of an interview to the petitioner and the offer to confer with his counsel with a view to excising the objectionable portions of the investigator's report were reasonable in order to cure the defects in its procedure. However, the Court found that

⁹² *Ibid.* at 7.

⁹³ [1989] 6 W.W.R. 521 (S.C.C.).

there were further flaws in the process of the College when the Acting Registrar, without any authority for doing so, took over the investigation. In reviewing the actions of the Acting Registrar the Court stated:

Where a disciplinary or investigatory power is given by the Act or by-laws to a particular body, or where a particular form of process is specified in the Act or by-laws, the terms of the Act or the by-laws must be complied with strictly.

...

In my judgement therefor there never was authority given to the Acting Registrar to take over the investigation on behalf of either the first or second PISC nor for her to revise the report of investigation...In my judgement it was open to either the first or the second PISC to direct those things to be done under by-law 6.C.05. There is no persuasive evidence that either has done so.

The by-laws contain no direct authority for PISC to endorse something which has already been done. However, it is my opinion that although a disciplinary body is limited to the powers expressly granted to it, it should be given a reasonable degree of latitude in the way in which it carries out those powers. That is especially true where, as here, the body is not trained in the legal niceties. The governing principle must be that whatever it does be grounded in the powers specifically given to it and must conform with the requirements of natural justice. In my opinion it would not be offensive for PISC to authorize retroactively the steps already taken by the Acting Registrar where, as here, nothing has been done which can prejudice the petitioner prior to the authorization...⁹⁵

The principles in *Samborski* are applicable to cases of sexual misconduct that come before the Colleges. Given that many investigators who are appointed are educators, often without special training in conducting investigations, it is imperative that they understand that their role is that of a neutral fact-finder, rather than of a judge determining the guilt or innocence of the educator.

⁹⁴ *Supra* note 90 at 10.

B. A Case concerning Discipline imposed by the College of Teachers

In *Stafford v. British Columbia College of Teachers*⁹⁶ the Court held that the cancellation by the College of the teacher's certificate and the termination of his membership was too severe of a penalty for the teacher's sexual misconduct. The teacher had been introduced to a fourteen-year-old girl who was not a student of the teacher. A relationship between the two of them developed. When the girl was fifteen-years-old they had consensual sexual intercourse. The sexual relationship continued for a couple of months. An investigation was conducted by the R.C.M.P. but no charges were laid. When confronted by the school district about the incident, the teacher admitted he had engaged in sexual intercourse with the girl and that he regretted his actions. The teacher resigned from the school district. The Court held that the appropriate penalty would have been a one year termination of his membership in the college and a cancellation of his certificate to practice teaching in B.C. for a period of one year.

V. CONCLUSION

In sexual misconduct cases that come before the Colleges, while there are a few female educators accused of sexual misconduct, the abusers are predominantly male. In Ontario all educators and in British Columbia eighty-seven percent of educators who engaged in sexual misconduct were males. There were five of sixty-three or six percent of educators who were female who came before the Hearing Sub-Committee in British Columbia who engaged in sexual misconduct. In the cases considered by the Colleges the majority of young persons sexually abused by educators in both Ontario and British Columbia were females.

⁹⁵ *Supra* note 90 at 12.

⁹⁶ [1991] B.C.J. No. 217 (S.C.), online: QL (BCJ), *aff'd* [1991] BCJ No. 3412 (C.A.).

Given that the College in Ontario takes complaints directly from the public, it is more responsive than the College in British Columbia and the N.S.T.U. to concerns the public may have about an educator. Because the N.S.T.U. takes complaints only from its members, it is the least responsive to concerns the public may have regarding an educator.

Since legislators in the three jurisdictions have determined that the accused educator's peers and other lay individuals, rather than legally trained persons, shall decide whether or not an educator has engaged in sexual misconduct, these lay decision-makers may not have an in depth understanding of rules of evidence and the standard of proof required to prove that an educator has engaged in professional misconduct. It appears that there are inconsistent disciplinary sanctions imposed by the College decision-makers when the cases involve male educators engaging in sexual misconduct with youths who are fifteen to nineteen years of age. Given that the Colleges do not articulate in detail the factors taken into account when imposing the disciplinary sanction, it is hard to determine in these types of cases why in some instances an educator is suspended while in other cases the educator is dismissed.

The Colleges should more clearly articulate in the discipline case summaries the factors taken into consideration when imposing disciplinary sanctions so that educators will know what particular behaviour and what factors will give rise to a termination or a suspension of his or her certificate of qualification. If those factors are not clearly articulated, it begins to appear that the Colleges are not applying similar principles in each case.

The British Columbia College, unlike the College in Ontario, has decided cases of educators engaging in same and opposite sex abuse. In British Columbia, the decision-makers without legal training treat cases of all educators alike, regardless of whether they were considering same or opposite sex abuse cases. In all cases where the educators who engaged in sexual misconduct were criminally charged and either pleaded guilty or were found guilty of the offences after a trial, the College cancelled the educators' certificates of qualification and terminated their membership. Educators who engaged in sexual misconduct with young persons of the same gender as themselves, were all criminally charged with a sexual offence and either pleaded guilty or were found guilty after a trial. In the more difficult cases where an educator has not been charged with a sexual offence but has allegedly engaged in misconduct with a youth, it may not be fair to an educator that the case is being decided by an individual without legal training. However, there is a check on the decision-maker since the decision can be appealed to or judicially reviewed by an individual with legal training. Without additional data from each jurisdiction, it is impossible to draw any conclusions as to which jurisdiction from the perspective of the educator is more efficacious.

In professional disciplinary hearings the alleged victim may be quite removed from the proceedings and may not be a major participant. Given that the focus of the hearings is not about the harm done to the alleged victim, but rather it is whether the educator engaged in conduct that constitutes professional misconduct, the hearing from the victim's perspective may not be fair.

Although the topic of child sexual abuse entered public discourse in the late 1970s or early 1980s and was recognized in 1984 as a "largely hidden yet pervasive tragedy",¹ it was not until the mid 1980s that some school boards recognized that they were part of the problem. School boards were not effectively screening out potential abusers prior to hiring the educators, either as a result of failing to check references or in some cases, by hiring educators who were known to have been accused of sexual misconduct with students.² In the case of Noyes, it is astounding that in 1978 the Vanderhoof school district hired him after being told by his previous district that Noyes had been accused of molesting boys and had undergone treatment and that if he was given a second chance he should be confined to the high school.³

School districts also came to recognize that the practise of allowing an educator to quietly resign when suspected of engaging in sexual misconduct with a student allowed an abuser to remain in the system drifting from one district to another or from one jurisdiction to another. One author has referred to this practice as "passing the trash".⁴

Notwithstanding the recognition by school boards of their responsibility towards eliminating sexual predation, sexual abuse of students continues to be a problem in schools, evidenced by the number of criminal prosecutions against educators. Although there do not appear to be any Canadian statistics available as to the number of educators

¹ Canada, *Sexual Offences Against Children*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984) (Dr. Robin Bagdley) at 29.

² D. Margoshes, "Sex Abuse hits Schools" *Vancouver Sun* (6 January 1986) A9. See also F. Bula "Former files not used when Ledinski hired" *Vancouver Sun* (29 November 1989) A18 and J. Steed, "Sexually Abused Student Rattles School System" *The Toronto Star* (7 May 1995) F1.

³ D. Margoshes, "Blatherwick accepts Noyes responsibility" *Vancouver Sun* (14 February 1986) A1 - A2 at A2.

⁴ C. Shakeshaft & A. Cohan, "Sexual Abuse of Students by School Personnel" *Phi Delta Kappan* (March 1995) 513 at 518.

who sexually abuse children, one American author estimates that .04% to 5% of teachers sexually abuse children.⁵

Despite the fact that school districts have had over a decade to confront the issue of child sexual abuse and to ensure that they have developed appropriate hiring and supervision practices, as recently as 1993 the Sault Ste. Marie Roman Catholic Board, in Ontario allowed an educator to remain in the school system despite repeated complaints over several years from students and parents.⁶ The educator, Kenneth DeLuca⁷ eventually pleaded guilty to a dozen charges of sexual assault. It appears that when confronted with complaints of sexual misconduct by De Luca, the board had adopted some of the practices that other boards had used in the 1970s and early 1980s. Instead of confronting De Luca with the complaints, he was simply transferred from school to school and no report was ever provided to the police or children's society. In attempting to determine how this educator could have continued in the system despite the many complaints about him, one explanation is:

...that an authoritarian, hierarchical, religious school board considered itself too morally superior to be harbouring someone like Kenneth DeLuca. Therefore, it had to be the troublemaking little girls who were lying. Once that excuse no longer washed, the good name of the board had to be protected at all costs.

There also was a men's club. The fathers, the policemen, the priest, most of the teachers and all of the senior board officials - all were male. Many had known each other since childhood...⁸

While the problem in the Sault Ste. Marie Roman Catholic Board appears now to be more the exception than the practice in school districts when dealing with allegations against

⁵ *Ibid.* at 514.

⁶ M. Valpy, "21 years of Wickedness" *The Globe and Mail* (1996 September 21) D1 and D3.

⁷ [hereinafter *De Luca*].

⁸ *Supra* note 6 at D3.

an educator,⁹ school districts must be ever vigilant in supervising and monitoring educators in their interactions with students. Moreover, when an allegation of sexual misconduct is made against an educator, the school district must ensure that it protects students from any potential risk of harm, while at the same time it affords the educator due process.

The manner in which board administrators conduct the investigation of an allegation of sexual misconduct is governed by legislation, principles of natural justice, collective agreements and, in some cases, the provisions of a contract. In this chapter the legislative framework will form a backdrop to the discussion and analysis of how school boards deal with allegations of sexual misconduct against educators. Decisions will be analyzed to determine if school boards deal with all cases of sexual misconduct in a similar fashion, regardless of whether they are same or opposite sex abuse cases.

Given that there are no published decisions of school boards, in order to determine what type of discipline school boards impose when they conclude that an allegation of sexual misconduct against an educator has been proven, reference must be made to decisions that come to the court by way of judicial review or that come before a board of arbitration by way of a grievance. School boards take allegations of sexual misconduct between educators and youth very seriously and react strongly to these allegations.¹⁰ School

⁹ But see R. Fossey & T.A. Demitchell "Let the Master Answer": Holding Schools Vicariously Liable When Employees Sexually Abuse Children" (1996) 25 J. of Law & Educ. 575 wherein these American authors state at 575 that "...there is mounting evidence that schools are not committed to stopping sexual abuse in the school".

¹⁰ See M. & S. Marmo, "Behind School Doors: The Arbitration of Sexual Misconduct Cases involving School Employees and Students"(1995) 24(4) J. Collec. Negotiations 301. At 311 these authors made similar observations when analyzing labour arbitration cases of school board employees in the United States. They note that in order to protect the welfare of students, the school board does not give the employee a second chance.

boards often impose a more severe penalty than what courts and arbitrators impose.¹¹ In some cases school boards have not applied the standard of proof correctly.

I. PROCEDURAL FAIRNESS AND NATURAL JUSTICE¹²

A. The Common Law

The statutory power invested in boards to make decisions that affect the rights of educators carries with it a responsibility of ensuring that the decisions cannot be successfully challenged in court as a result of lack of procedural fairness, or due to "bias", a lack of jurisdiction or an error of law.¹³ Given that the employment relationship in British Columbia, Ontario and Nova Scotia between school boards and teachers, supervisory officers, and officers of the board is governed in various degrees by statute and regulation, the common law relationship of employer and employee between a school board and educator has been substantially modified by the statutory scheme.¹⁴ The employment relationship is not merely one of "master and servant"¹⁵ but rather the result is a hybrid relationship.¹⁶ When a board is considering taking disciplinary action, such as suspension or termination, against an educator, it owes a duty of procedural fairness to the individual.¹⁷

¹¹ See M. & S. Marmo, *ibid.* at 321 wherein these authors conclude that "Arbitrators, however, often reduce the penalty imposed for a variety of reasons".

¹² Given that it is no longer necessary to distinguish between functions that are judicial, quasi-judicial or administrative, courts are generally treating procedural fairness and natural justice as synonymous concepts. In this chapter, these phrases are used interchangeably.

¹³ A. F. Brown & M. A. Zuker, *Education Law* (Scarborough: Carswell, 1994) at 15-16.

¹⁴ *Ibid.* at 16 and *School District No. 65 (Cowichan) v. Peterson* 22 B.C.L.R. (2d) 98 (C.A.) at 100, leave to appeal to S.C.C. *ref'd* (1988), 27 B.C.L.R. (2d) xxxv (note) (S.C.C) [hereinafter *Peterson*].

¹⁵ A. F. Brown & M. A. Zuker, *supra* note 13. at 16.

¹⁶ *Peterson*, *supra* note 14 at 100.

¹⁷ A. F. Brown & M. A. Zuker, *supra* note 13 at 16.

The Supreme Court of Canada when considering the dismissal of a director in *Indian Head School Division No. 19 v. Knight*¹⁸ discussed the circumstances giving rise to procedural fairness:

...There may be a general right to procedural fairness, autonomous of the operation of any statute, depending on consideration of three factors which have been held by this Court to be determinative of the existence of such a right...It should be noted ...that the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body, whose powers are derived from statute, powers that must be exercised according to the rule of administrative law...¹⁹

With respect to the duty of fairness the Court stated:

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in *Cardinal v. Kent Institution, supra* that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body...²⁰

In discussing the nature of the decision, the Court noted that there is no longer a need, except where a statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions. In determining whether an administrative tribunal is under a duty to act fairly, the Court stated another factor that must be considered is whether the decision is of a final nature. While a decision of a preliminary nature will not generally trigger the duty to act fairly, a decision of a more final nature, such as terminating an educator, may have such an effect. Thus, if a school board has decided to terminate an educator after an investigation into an allegation of sexual misconduct has been made, the decision is of a final nature and the duty to act fairly will be triggered.

¹⁸ [1990] 1 S.C.R. 653 [hereinafter *Knight*].

¹⁹ *Ibid.* at 668.

²⁰ *Ibid.* at 669.

The second element that is considered is the relationship between the employer and the employee. In citing *Ridge v. Baldwin*, [1964] A.C. 40, [1963] 2 All E.R. 66, the Court stated that the possible classifications in the employment relationship between an employer and employee are:

(i) the master and servant relationship, where there is no duty to act fairly when deciding to terminate the employment; (ii) the office held at pleasure, where no duty to act fairly exists, since the employer can decide to terminate the employment for no other reason than his displeasure; and (iii) the office from which one cannot be removed except for cause, where there exists a duty to act fairly on the part of the employer. These categories are creations of the common law. They can of course be altered by the terms of an employment contract or the governing legislation, with the result that the employment relationship may fall within more than one category...²¹

With respect to the third element, which is the impact of the decision on the employee, the Court stated that there is a right to procedural fairness if the decision is significant and has an important impact on the individual. Various courts have recognized that the loss of employment against an office-holder's wishes is a significant one that could justify imposing a duty to act fairly on the administrative decision-making body. The Court noted in *Kane v. University of British Columbia Board of Governors*, [1980] 1 S.C.R. 1105 that "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake".²²

The common law does not specify the content of procedural fairness for an administrative tribunal, such as a school board. But rather as L'Heureux-Dube J. stated in *Knight*:

Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case...

²¹ *Ibid.* at 670.

²² *Kane v. University of British Columbia Board of Governors*, [1980] 1 S.C.R. 1105 at 1113 as cited in *Knight*, *ibid.* at 677.

This was underlined again very recently by the Court in *Syndicat des employes de production du Quebec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, supra, where Sopinka J. was writing for the majority at [S.C.R.] pp. 895-896:

"Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provision and the nature of the matter to be decided...[T]he court decides the content of these rules by reference to all the circumstances under which the tribunal operates."²³

Thus, both teachers and administrative officers are entitled to procedural fairness when the school board is dealing with an allegation of sexual misconduct. In British Columbia it has been held in *Hammond v. Assn. of British Columbia Professional Foresters*²⁴ that during an investigation a tribunal has a duty to carry it out with procedural fairness. However, the content of procedural fairness may be different for each group of educators depending on whether the duty of fairness has been modified or increased by legislation, a collective agreement or a contract.²⁵

Brown and Zuker note that at a minimum, the common law duty requires that a person must be advised in advance that the board will be considering a matter that may affect his or her rights. The educator must be given a reasonable opportunity to make oral or written submissions to the board on the matter being considered. In addition, the educator is entitled to be informed of and to respond to all information before the board which may affect its decision. The educator must also be told the reasons for the decision of the board.²⁶ Mullan states the minimum content of procedural fairness as:

Converting this to more precise terminology, there is said to be a duty on all decision-makers obliged to comply with the natural justice rules to give sufficient notice of the hearing and the scope of that hearing as will allow persons entitled to

²³ *Ibid.* at 682.

²⁴ (1991), 47 Admin. L.R. 20 (B.C.S.C.) and referred to in *Stolen v. College of Teachers (British Columbia)* (1995), 12 B.C.L.R. 325 (C.A.) at 331.

²⁵ A. F. Brown and M. A. Zuker, supra note 13 at 17.

²⁶ A. F. Brown and M. A. Zuker, supra note 13 at 18.

the benefit of the rule to take full advantage of their right to be heard. This is also said to involve a duty to give persons affected such knowledge of the arguments and evidence presented against their participation in the decision-making process meaningful. Beyond these basic considerations of minimum adequate participation in the decision-making process, such claims as the right to give evidence orally, the right to cross-examine, the right to representation by counsel, the right to appear before the ultimate decision-maker and adherence to the strict legal rules of evidence are claims that may or may not be recognized depending on the court's perception of the nature of the decision-making power in issue.²⁷

A useful summary of principles of natural justice that a tribunal should follow is set out by Addy J. in *Blanchard v. Millhaven Institution Disciplinary Board* [1983] 1 F.C. 309 (T.D.) and summarized by Jones & de Villars:

- (a) the tribunal is not required to conform to any particular procedure, nor to abide by rules of evidence generally applicable to judicial proceedings, except where the empowering statute requires otherwise;
- (b) there is an overall duty to act fairly in administrative matters, that is, the inquiry must be carried out in a fair manner and with due regard for natural justice;
- (c) the duty to act fairly requires that the person who is being examined and who may be subject to some penalty:
 - (i) be aware of what the allegations are;
 - (ii) be aware of the evidence and the nature of the evidence against him;
 - (iii) be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter;
 - (iv) be afforded the opportunity of cross-examining witnesses or questioning any witnesses where evidence is being given orally in order to achieve points (i), (ii) and (iii). However, there may be exceptional circumstances which would render such a hearing practically impossible or very difficult to conduct, such as deliberately obstructive conduct on the part of the party concerned;
- (d) the hearing is to be conducted in an inquisitorial, not adversarial, fashion but there is no duty on the tribunal to explore every conceivable defence or to suggest possible defences;

²⁷ D. J. Mullan, *Administrative Law*, 2nd ed. (Toronto: Carswell, 1979) at para. 30.

- (e) nevertheless, the tribunal must conduct a full and fair inquiry which may oblige it to ask questions of the person concerned or of the witnesses, the answers to which may prove exculpatory insofar as the person is concerned. This is the way in which the tribunal examines both sides of the question;
- (f) there is no general right to counsel. Whether counsel may represent the person is in the discretion of the tribunal, although matters may be so complicated legally that to act fairly may require the presence of counsel;
- (g) the person must be mentally and physically capable of understanding the proceedings and the nature of the accusations and generally of presenting his case and replying to the evidence against him. The tribunal must satisfy itself on this point before embarking on the hearing.²⁸

1. OBLIGATION TO HOLD A HEARING

When an allegation of sexual misconduct is made against an educator, the educator may have a "right to be heard" which does not necessarily mean a right to a hearing.²⁹ The Supreme Court of Canada stated in *Knight*:

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs, and fair. As pointed out by de Smith (de Smith's *Judicial Review of Administrative Action*, (4th ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the Board, the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word. I would agree with Wade when he writes (*Administrative Law, supra*, at pp. 482-483):

A 'hearing' will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself

²⁸ D.P. Jones & A.S. de Villars, *Principles of Administrative Law* (2nd ed.) (Toronto: Carswell, 1994) at 313-314 as cited in J. Anderson, "School Board Hearings - Political Fairness" in W. F. Foster & W. J. Smith, eds., *Reaching for Reasonableness: The Educator as Lawful Decision-Maker* (Chateauguay: Imprimerie Lisbro, 1999) 61 at 66-67.

²⁹ A. F. Brown and M. A. Zuker, *supra* note 13 at 18.

whether to deal with applications by oral hearing or merely on written evidence and arguments, provided that it does in substance 'hear' them; [Emphasis added; footnotes omitted.]³⁰

A board may offer the educator the opportunity of having a hearing if it is of the view that this is the best method of ensuring that the person is fairly treated.³¹ However, an obligation on the school board to hold a hearing may arise from legislation,³² the common law, a provision in a collective agreement or in a contract.

While a "hearing" includes the right to appear personally before the tribunal, to be represented by counsel, to introduce evidence and to call witnesses as well as to cross-examine witnesses under oath,³³ procedural fairness does not require a school board to provide an educator with all these protections. Since the allegation of sexual misconduct is of a serious nature, a school board may provide the educator with the right to counsel to ensure the individual is treated fairly.³⁴

When school trustees decide to hold a hearing, it must be conducted fairly and they must observe at least the minimum requirement of providing an opportunity to be heard prior to a decision by an unbiased neutral board.³⁵ Where a school board acts in a manner

³⁰ *Supra* note 18 at 685.

³¹ A. F. Brown and M. A. Zuker, *supra* note 13 at 18.

³² In British Columbia the *School Act*, R.S.B.C. 1996, c. 412 does not require that the educator be given a hearing prior to a school board suspending or dismissing the individual. In Nova Scotia ss. 33 and 34 of the *Education Act*, S.N.S. 1995-96, c. 1 stipulate that the educator is entitled to appear before the school board in person when the school board is suspending or dismissing the individual. In Ontario neither the *Education Act*, R.S.O. 1990, c. E.2 nor the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 require that the school board provide the teacher with a hearing prior to suspending or dismissing the individual. See A. F. Brown and M. A. Zuker, *supra* note 13 at 19.

³³ A. F. Brown and M. A. Zuker, *supra* note 13 at 18.

³⁴ See *Re: Canada (Canadian Transportation Accident Investigation and Safety Board)* (1993), 16 Admin. L.R. (2d) 15 (F.C.T.D.) wherein Rouleau J. states at 36 "My review of the jurisprudence reveals that the duty to act fairly implies the presence of counsel when a combination of some or all of the following elements are either found within the enabling legislation or implied from the practical application of the statute governing the tribunal: where an individual or a witness is subpoenaed, required to attend and testify under oath with a threat of penalty; where absolute privacy is not assured and the attendance of others is not prohibited; where reports are made public; where an individual can be deprived of his rights or his livelihood..."

³⁵ J. Anderson, *supra* note 28 at 68.

perceived by the courts to be merely "going through the motions" of procedural fairness, the courts will intervene.³⁶ It is not enough to simply provide a hearing, but rather the hearing must be conducted fairly, openly and free from any political motivation.³⁷

It appears that courts are applying the normal rules of natural justice to administrative proceedings of school boards.³⁸ Courts allow administrative tribunals, such as school boards, a great deal of latitude in determining their own procedures. Procedural fairness requires that the educator be told what the case is against him or her and be given an opportunity to meet it. Thus, when an educator is faced with an allegation of sexual misconduct, school boards will provide the educator with a 'right to be heard' which may not include a formal, structured oral hearing with the right to call witnesses. The school board must allow the educator to provide all of his or her evidence, including that of witnesses. However, the school board has the right to determine whether the evidence of witnesses will be heard orally or in writing.

The common law does not specifically provide that an educator has the right to appear with counsel at a school board hearing. However, given that an educator who has been accused of sexual misconduct might lose his livelihood, it is likely that courts would require, as part of procedural fairness, that a school board allow an educator to appear before it with counsel.

³⁶ J. Anderson, *supra* note 28 at 68.

³⁷ J. Anderson, *supra* note 28 at 68.

³⁸ See *Erickson v. Richmond School District No. 38* (1988), 30 B.C.L.R. (2d) 216 (S.C.), *infra* note 88 [hereinafter *Erickson*], *Haight-Smith v. Kamloops School District No. 34* (1988), 28 B.C.L.R. (2d) 391

2. Bias

a. INDIVIDUAL TRUSTEES

Separate and apart from the conflict of interest provisions contained in the applicable education legislation in each jurisdiction, trustees have a legal obligation to conduct the affairs of the board fairly, impartially and without bias.³⁹ If there exists a reasonable apprehension of bias on the part of the trustee, the trustee may be precluded from participating in a board hearing. There are two possible grounds for a claim of bias: real or actual bias; or (b) situations giving rise to "a reasonable apprehension of bias".⁴⁰

The test for determining whether this is a reasonable apprehension of bias was described in the case of *Committee for Justice and Liberty v. National Energy Board*⁴¹ as:

...the probability or reasoned suspicion of biased appraisal and judgment, unintended though it be...⁴²

The standard that is invoked is outlined by de Grandpre J. (dissenting):

the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."⁴³

Judith Anderson notes that although there is no exhaustive list of what constitutes a reasonable apprehension of bias, the courts have found the following to constitute bias:

- (i) where the decision maker is now or previously has been the solicitor or client of one of the parties in the proceedings;

(C.A.) [hereinafter *Haight-Smith*] and see discussion following on page 176 and *Young v. Powell River School District 47* (1982) 38 B.C.L.R. 267 (C.A.).

³⁹ J. Anderson, *supra* note 28 at 68.

⁴⁰ J. Anderson, *supra* note 28 at 69. See also R. Devlin, "We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995) 18 Dal.L.J. 408 at 416.

⁴¹ [1978] 1 S.C.R. 369.

⁴² *Ibid.* at 391 as cited by the Supreme Court of Canada from *Szilard v. Szasz* [1955], S.C.R. 3 at 6-7.

⁴³ *Ibid.* at 394 as cited by R. Devlin, *supra* note 40 at 418.

- (ii) where one party's solicitor or office has participated in the delegate's deliberations after the hearing;
- (iii) where a person acts as both prosecutor and judge in disciplinary proceedings;
- (iv) where a decision maker receives undisclosed advice from persons who have acted in a prosecutorial role in relation to the proceedings;
- (v) where a decision maker sits on an appeal from his own decision;
- (vi) where there is some dealing between the decision-maker and one of the parties to the proceeding.⁴⁴

It must be determined prior to any hearing of the board into the alleged sexual misconduct of the educator, whether any trustee is perceived as having a bias that may render the hearing unfair. If the teacher accused of sexual misconduct is known to be a homosexual and if a trustee is perceived to have a bias against homosexuals, the trustee should decline to be part of the hearing. The test of a reasonable apprehension of bias is whether the trustee has an open mind to the matter before the board.⁴⁵ Thus, in a case of a homosexual teacher, if a trustee cannot approach the matter with an open mind, she or he should be precluded from taking part in the hearing.

b. SENIOR MANAGEMENT

Often senior management of a school board plays a role in investigating an allegation of sexual misconduct against an educator. When this occurs, management must conduct the investigation fairly and in accordance with the duty of fairness. This duty requires that school board personnel who attend school board deliberations be free from both bias and

⁴⁴ J. Anderson, *supra* note 28 at 69-70.

⁴⁵ J. Anderson, *supra* note 28 at 70.

the appearance of bias when the school board is exercising a statutory power of decision.⁴⁶

If a school board does not exercise its discretionary decision making power in accordance with the duty of fairness, then the court may set aside its decision.⁴⁷ In a disciplinary decision that involved a non-sexual assault of a student, Judith Anderson notes that in *Haight-Smith* the British Columbia Court of Appeal set aside the school board's decision to suspend a teacher on the basis that a reasonable apprehension of bias was created by the presence of the superintendent during its deliberations.

In *Haight-Smith* the superintendent had investigated allegations of corporal punishment against the teacher and then submitted a written report to the board with his opinion that the incidents as described by the students did occur. He then attended a board meeting with the teacher and her counsel. Thereafter, he retired with the board during its deliberations and his role was limited to keeping the board "on track" and to ensuring that trustees deliberated only on the relevant material before them. During the deliberations the superintendent did not present any new information and he took no part in the decision to discipline the member.

The Court reasoned that given that the superintendent had previously assumed the role of an accuser by expressing his opinion in a written report to the board that the teacher had misconducted herself, it was reasonable to conclude that his presence would adversely affect the board's ability to impartially consider the matter. Thus, as a result of the

⁴⁶ J. Anderson, *supra* note 28 at 72.

⁴⁷ J. Anderson, *supra* note 28 at 72.

superintendent's presence during the board's deliberations, this created a reasonable apprehension of bias and was sufficient for the court to quash the board's decision to suspend the teacher. The Court stated:

...if a person who is disqualified by bias is present at a hearing and sits or retires with its tribunal, the decision may be set aside notwithstanding that the person took no part in the decision and did not actually influence it.⁴⁸

The Court noted that the above principle would not apply if the superintendent was not involved at an earlier stage as an investigator or if the legislation specifically authorized the presence of the superintendent at a board meeting even though he was involved in an earlier investigative proceeding. Thus, if a superintendent investigated allegations of sexual misconduct against an educator and reported to the board that in his or her opinion the educator had misconducted himself or herself, then in order to avoid the apprehension of bias, the superintendent should not be present during the deliberations of the board.

B. LEGISLATION

Depending on the conclusions made by the administrators investigating the allegations of sexual misconduct, a school board in British Columbia and in Nova Scotia must not suspend, dismiss or otherwise discipline a teacher except for just and reasonable cause. Although there is no such provision in the Ontario legislation, this stipulation is included in many of the various collective agreements in Ontario.

While the legislation in British Columbia and Ontario specifies that action may be taken if the welfare of the students is threatened by the presence of an employee, the disciplinary action is different in each jurisdiction. In British Columbia the legislation stipulates that the superintendent can suspend the teacher with pay if the welfare of

⁴⁸ *Supra* note 38 at 397.

students is threatened by the presence of an employee.⁴⁹ The board must as soon as practicable vary, revoke or confirm the suspension and if the board confirms the suspension, it can be with or without pay.⁵⁰ In addition, the board can suspend an employee who has been charged with an offence that renders the employee unsuitable to perform his or her duties.⁵¹

However, the legislation in Ontario allows a board, with the consent of the Minister, to terminate the employment of a teacher if a matter has arisen that in the opinion of the Minister adversely affects the welfare of the school.⁵² While there are no similar provisions in the legislation in Nova Scotia, it does stipulate that a board may suspend or terminate a teacher with just cause.⁵³

Many collective agreements, like the legislation in British Columbia and Nova Scotia, generally grant the school board the right to discipline for "just cause". Collective agreements generally do not mention anything specific with respect to employee discipline for sexual misconduct as the parties have not worked out what acceptable behaviour is in such circumstances.⁵⁴ As a result, under the British Columbia and Nova Scotia legislation and most collective agreements, school boards, arbitrators and courts must determine what constitutes "just cause".

In determining whether a board has just cause to suspend or dismiss an educator, a school board may hold a hearing. Neither the *School Act* in British Columbia nor the *Education*

⁴⁹ British Columbia *School Act*, *supra* note 32.

⁵⁰ British Columbia *School Act*, *supra* note 32, s. 15(7).

⁵¹ British Columbia *School Act*, *supra* note 32, s. 15(4).

⁵² Ontario *Education Act*, *supra* note 32, s. 263.

⁵³ Nova Scotia *The Education Act*, *supra* note 32, ss. 33 and 34.

⁵⁴ *Supra* note 10 at 304 - 305.

Act nor the *Statutory Powers Procedure Act*⁵⁵ in Ontario specifies that a hearing must be held if a teacher is being suspended or dismissed. Although the legislation does not require boards in Ontario to hold a hearing in order to terminate a teacher, supervisory officer, or officer of the board, hearings are often held to ensure that the employee has every reasonable opportunity to make submissions, and to hear and reply to the submissions of management.⁵⁶

The *Education Act* in Nova Scotia specifically provides that a teacher who has been suspended or discharged shall be given an opportunity to appear before the school board in person, to make answer to the matters in the complaint within fourteen days of delivery of the notice of the complaint.⁵⁷ Even though the legislation in Nova Scotia provides for a hearing in situations where a board is considering suspending or dismissing an educator, the content of procedural fairness is not specified so that procedural rules will be determined by the context.

While the legislation in Nova Scotia stipulates that an educator may appear with counsel at the hearing before the school board, the legislation in British Columbia and Ontario does not provide this right to the educator. However, some collective agreements in British Columbia⁵⁸ and Ontario⁵⁹ provide educators with the right to have an advocate or representative at the hearing.

⁵⁵ *Supra* note 32, s. 22.

⁵⁶ A. F. Brown and M. A. Zuker, *supra* note 13 at 18.

⁵⁷ *Supra* note 32 ss. 33 and 34.

⁵⁸ This right is provided in collective agreements of the following districts that responded to the empirical research conducted referred to in C 1: B.C.D.3, B.C.D.4, B.C.D.5, B.C.D.8, B.C.D.9 and B.C.D.13.

⁵⁹ This right is provided in collective agreements of the following districts: Collective Agreement between Lakehead District School Board and The Lakehead Elementary Teachers' Federation of Ontario, effective September 1, 1998 to August 31, 2000 [hereinafter *Lakehead Collective Agreement*], Collective Agreement between Lambton Kent District School Board and The Elementary Teachers' Federation of Ontario, effective September 1, 1998 to August 31, 2000 [hereinafter *Lambton Kent District School Board*], Collective Agreement Between The Renfrew County District School Board and The Elementary Teachers' Federation of Ontario, effective 1998 to 2000 [hereinafter *The Renfrew County District School Board*]

C. POLICIES OF SCHOOL BOARDS WHEN DEALING WITH ALLEGATIONS OF SEXUAL MISCONDUCT

Empirical research was conducted in order to determine how school boards handle allegations of sexual misconduct against an educator.

1. Methodology

Questionnaires, tailored specifically to each jurisdiction to reflect the differences in legislation, were mailed to sixty superintendents in British Columbia, six superintendents in Nova Scotia, and fifty-one directors in Ontario.⁶⁰ In Ontario directors of both English-language public and separate district school boards received the questionnaires. In British Columbia fifty-nine were mailed to English-language boards and one was sent to the only francophone board. In Nova Scotia, the questionnaires were sent to English-language boards.

There was great variance in the number of completed questionnaires received. In British Columbia fourteen or twenty-three percent of superintendents returned them, while in Nova Scotia four or sixty-seven percent of superintendents answered them, and in Ontario three or six percent of directors returned completed questionnaires. Perhaps the fairly positive response from the school districts in British Columbia can be explained by the fact that given the Noyes case and the public enquiries that were subsequently held, the school districts have had over a decade to develop policies for the investigation of allegations of sexual misconduct and they wanted to share the policies they had developed. In addition, perhaps school districts in British Columbia view the

Collective Agreement], Collective Agreement between the Simcoe District School Board and The Elementary Teachers' Federation of Ontario, effective 98/00 [hereinafter *Simcoe District School Board Collective Agreement*] and also a collective agreement from a district that participated in the empirical research study referred to in C 1: OD 1.

⁶⁰ See appendix "D" for a copy of the questionnaire sent to Ontario. The other questionnaires were slightly modified to reflect the variation in the provincial education acts.

participation in research projects as being important despite having reduced staffing levels as a result of financial cutbacks that have continued since the early 1980s.

In Nova Scotia districts may have responded to completing the questionnaire largely because this thesis is connected with Dalhousie Law School and Professor MacKay who is well known in the education circles in Nova Scotia. The poor response from Ontario could be reflective of the fact that Ontario has recently been experiencing major changes and financial cutbacks in education and districts may have been preoccupied with the provincial election that took place in 1999.

Obviously the responses are far too few to make any conclusions. However, these questionnaires do provide some insight into school boards' procedures for dealing with allegations of sexual misconduct by an educator.

Below is a discussion of the results of the responses of the various school districts in the three jurisdictions. School districts have not been identified by name and are referred to by an abbreviation for the jurisdiction, the letter "D" which signifies "district" and a number. Thus, school districts in British Columbia are referred to as BCD, in Nova Scotia they are referenced as NSD and in Ontario they are referred to as OD.

2. Results of Research

Ten of fourteen districts in British Columbia, two of four in Nova Scotia and all three districts in Ontario have written policies governing the procedures to be followed when an educator has been alleged to have engaged in sexual misconduct. One British Columbia district stated that it had a policy, but when the policy was reviewed, it was apparent it was a general policy for dealing with allegations of child abuse and it was not specific to allegations of sexual misconduct involving an educator.

a. Policies and Procedures

i. Reporting Requirements under Child Protection Legislation and Contacting Police

All districts in British Columbia, Nova Scotia and Ontario appear to have a good understanding of reporting requirements under the child protection legislation in each jurisdiction. Most districts stipulated that they contact the required body upon receipt of a complaint. One district in Ontario stated that whether or not it contacts a Children's Aid Society varies, but when it does, it is upon receipt of the complaint.

In British Columbia eleven of thirteen districts inform the police immediately upon the allegation being made. One district stated that it informed the police once criminal activity is discovered and another stated that it initially contacts the police if it appears a criminal offence has been committed. One other district relies on the Ministry of Children and Families to make the report to the police.

One district in Nova Scotia contacts the police upon the complaint being made. Another district contacts the police if sufficient grounds are found and the other district makes contact if it is determined there are legal implications. It was not stated what exactly this means; whether the district makes a determination whether a crime has been committed or makes a determination that it may be civilly liable for injuries resulting from the sexual misconduct. Presumably, it refers to whether or not it appears that a crime has been committed.

One school district in Ontario stated that whether or not it contacts the police varies with the situation, and when it does, it is upon receipt of an allegation. Another Ontario district stated that the police are contacted if the allegations are or could be criminal in nature. The one other district stated it contacts the police upon receipt of the allegations.

ii. Conduct of Investigation

Below are tables summarizing who in the districts in the various jurisdictions is responsible for conducting the investigation into the allegations:

INDIVIDUAL RESPONSIBLE	NUMBER OF B.C. DISTRICTS	NUMBER OF N.S. DISTRICTS	NUMBER OF ONTARIO DISTRICTS
Superintendent	5	0	0
Assistant Superintendent	1	0	0
Superintendent or Assistant Superintendent	1	0	0
Employee Relations Supervisor/ Superintendent	1	2	2
Trained Consultant	1	0	0
Director of Human Resources/Human Resources Department	1	1	0
Superintendent/ Assistant Superintendent or Employee Relations Supervisor	2	0	0
A team of individuals	1 ⁶¹	1 ⁶²	1 ⁶³
Police	1	0	0

It appears that the majority of school districts engage a very senior administrator, either the superintendent or an employee relations supervisor, to deal with the allegations.

⁶¹ This team includes the principal, employee relations supervisor and the Assistant Superintendent.

⁶² The investigation begins initially with the principal, then is conducted by the Superintendent who may refer it to the Director of Human Resources.

iii. **Interviewing of Witnesses**

Twelve of fourteen districts in British Columbia stated that they do interview witnesses. One district qualified its answer and stated that it does if it conducts the investigation; however, if the police conduct the investigation then the police do the interviewing. There was only one district in British Columbia that does not interview witnesses. All districts in Nova Scotia and Ontario interview witnesses.

iv. **Signed Written Witness Statements**

Seven districts in British Columbia obtain signed witness statements. One district stated that it most likely does, another stated that it most often does and another stated that it sometimes does. One district does not take signed witness statements but takes notes of the interviews of witnesses. Three districts in British Columbia do not take signed written statements.

Two districts in Nova Scotia take signed written witness statements. However, one of these districts stated it does not take them if the children are very young. Two districts in Nova Scotia do not take written statements.

In Ontario two of three districts take signed written statements. The other district stated that statements are not always taken.

v. **Informing Educator of Allegations**

Although none of the legislation in the various jurisdictions sets out details regarding notifying the educator of the allegations, some of the collective agreements may set this out. One British Columbia collective agreement states:

- a) **Where a teacher is under investigation by the Board for any cause, the teacher and the Association shall be advised in writing of that fact and the**

⁶³ This team includes the principal, social worker, staff review panel, Superintendent of Human Resources and School Services and the Chief of Social Services.

particulars of any allegations immediately unless substantial grounds exist for concluding that such notification would prejudice the investigation. In any event, the teacher and the Association shall be notified of those matters at the earliest reasonable time and before any disciplinary act is taken by the Board. The teacher shall be accompanied by a representative of the Association at any meeting in connection with such an investigation.⁶⁴

Although it appears that all districts, with the exception of one British Columbia district, disclose the allegations to the educator, there is variation in the timing of the disclosure. The police disclose the allegation to the educator in the British Columbia district that does not inform the educator of the complaint. As to the timing of the disclosure, the responses are as follows:

- At outset (B.C.D.2), (B.C.D.9), (B.C.D.10) (N.S.D.4) (O.D.1);
- At initial meeting (B.C.D.1);
- May be informed but it depends if it will prejudice the case (B.C.D.4), (B.C.D.11), (B.C.D.12);
- May be informed but it depends if it will prejudice the case, but in any event shall be notified at the reasonable earliest time and before any action is taken by the board (B.C.D.5);
- Educator is informed but timing depends on legal opinion and police investigation (B.C.D.6);

⁶⁴ Collective Agreement provided by B.C.D.3. There is no such provision in the collective agreement made between The Minister of Education and Culture of the Province of Nova Scotia and The *N.S.T.U.* made on the 3rd day of February, 1998 [hereinafter the *N.S. Collective Agreement*]. There is also no such provision stated in the nine collective agreements of various Ontario school districts that were reviewed; Collective Agreements between The Elementary Teachers' Federation of Ontario Bluewater Local and Bluewater District School Board, effective September 1, 1998 to August 31, 2000; Collective Agreement between The Durham District School Board and The Elementary Teachers' Federation of Ontario, effective September 1, 1998 to August 31, 2000; Lakehead District School Board Collective Agreement, *supra* note 59; Lambton Kent District School Board Collective Agreement, *supra* note 59; Collective Agreement between The Limestone District School Board and The Elementary Teachers' Federation of Ontario, Limestone District, effective September 1, 1998 to August 31, 2000; Collective Agreement between Rainbow District School Board and the Elementary Teachers' Federation of Ontario, effective September 1, 1998 to December 31, 2000; The Renfrew County District School Board Collective Agreement, *supra* note 59; Simcoe District School Board Collective Agreement, *supra* note 59; Collective Agreement between The Waterloo Region District School Board and The Elementary Teachers' Federation of Ontario - Waterloo Region Teachers' Local, effective September 1, 1998 to August 31, 2000.

- Prior to investigation (B.C.D.13);
- After police investigation (B.C.D.14);
- After investigation is completed by Family and Children's Services (N.S.D.1);
- May be immediately if it is recommended that teacher be suspended (N.S.D.1);
- If police are involved they decide when to advise educator of allegations (O.D.2), (O.D.3) and
- Educator is advised of allegations but districts did not stipulate when this occurs (B.C.D.7) (B.C.D.8) (N.S.D.2) (N.S.D.3).

vi. Interviewing Educator

Thirteen of fourteen British Columbia districts stated they do interview the educator accused of the allegations. One of these thirteen districts stated that with the agreement of other agencies, such as the police and the Ministry of Children and Families it does interview the educator. The fourteenth district did not indicate whether or not it does interview the educator. All districts in Nova Scotia and Ontario interview the educator.

vii. Hearing⁶⁵

The legislation in the various jurisdictions and collective agreements or contracts between the educator and the school district will to a large extent determine the type of hearing to which the educator is entitled. In the collective agreement in one British Columbia school district the type of hearing is stipulated as follows:

- b) Unless the Association waives the right to such a meeting, [in connection with an investigation into misconduct by the educator] the Board shall not suspend (other than a suspension to which Section 15(5) of the School Act reasonably applies) or dismiss a teacher unless it has, prior to considering

⁶⁵ By using the word "hearing" it is not meant to indicate that it is a formal hearing wherein the educator is entitled to all of the principles of natural justice. As discussed earlier in this chapter, a "hearing" may merely mean that the educator has the right to be heard in some manner. Also reference should be made to the section on legislation to determine the educator's rights to a hearing as set out in the statutes in each jurisdiction.

such action, held a meeting of the Board with the employee entitled to be present. With respect to this meeting:

...

- iv) the teacher shall be accompanied by a representative and/or advocate appointed by the Association and they shall be entitled to hear all the evidence presented to the Board, to receive copies of all documents placed before the Board, and to present witnesses on behalf of the teacher and to ask questions of clarification regarding the procedure and information...⁶⁶

The meeting with the school board to which the educator is entitled is not an arbitral hearing but is an opportunity for the individual to provide information and make representations as to why the discipline ought not to be imposed.⁶⁷ The board must consider the information and responses of the educator before finally deciding on the disciplinary sanction.⁶⁸

Although a collective agreement may specify that a teacher is entitled to a meeting with the school board, it likely will not stipulate all the details regarding the type of meeting to which the educator is entitled. In British Columbia, ten of fourteen districts stated that the teacher is entitled to both an oral and written hearing, while two districts stated that the hearing is oral. Another district stated that a teacher is given both an oral and written hearing upon request. There is one district that only provides the teacher with a hearing if the teacher is suspended without pay.

⁶⁶ Collective agreement provided by B.C.D.3, *supra* note 64. There is no such provision in the *N.S. Collective Agreement*. However, the *Nova Scotia Education Act*, *supra* note 32 does set out in s. 34(5) that before a school board can terminate a teacher for just cause it must allow the teacher to appear before the school board to make answer to the complaints. In three collective agreements from Ontario school districts it is set out that prior to a school board disciplining a teacher a meeting is held between the teacher and a board representative to discuss the matter. See the *Lambton Kent District School Board Collective Agreement*, *Renfrew County District School Board Collective Agreement* and the *Simcoe District School Board Collective Agreement*, *supra* note 59.

⁶⁷ J. P. Sanderson, Q.C., *Langley School Board Inquiry - Complaints of Abuse: A Report on Process and Procedure* (23 June 1998) [unpublished] at 11.

⁶⁸ *Ibid.* at 11.

In ten of fourteen districts in British Columbia a teacher is entitled to call witnesses at the hearing and in one district the teacher can introduce in evidence written witness statements. There were two districts in British Columbia that stated that the teacher is not entitled to call witnesses. One district did not answer the question and stated that to date, no teacher had called witnesses at a hearing. This district also stated that usually the Teachers' Association spoke on behalf of the educator at the hearing.

In Nova Scotia two districts stated that a teacher is entitled to an oral hearing but is not entitled to call witnesses and two districts stated that a teacher is entitled to both an oral and written hearing with witnesses. Two districts in Ontario stated that a teacher is only given an oral and written hearing if the disciplinary recommendation is dismissal. The other district stated that the teacher is entitled to an oral hearing. Only one of the three districts allows the teacher to call witnesses at the hearing.

In all districts in all jurisdictions the teacher is entitled to have legal counsel at the hearing. With respect to the recording of minutes as to the content of the hearing, eleven of fourteen districts in British Columbia and all districts in Nova Scotia and Ontario do record minutes. One district in British Columbia does not record minutes and two districts record only the decision reached by the board.

viii. Burden of Proof

The majority of districts appear to understand that the burden of proof in proving allegations of misconduct is a balance of probabilities with clear, cogent and convincing evidence. Ten of fourteen districts in British Columbia, three of four in Nova Scotia and two of three in Ontario appear to have some understanding of the standard of proof. There are three districts in British Columbia, one in Nova Scotia and one in Ontario that

do not appear to understand the required burden of proof. One district in British Columbia did not answer the question regarding the burden of proof.

ix. Reliance on Legal Advice

Thirteen districts in British Columbia and all the districts in Nova Scotia and Ontario rely on legal advice to some extent. Some districts stated that they rely on legal advice extensively, while others stated that they do only in unfamiliar or new circumstances. One district in British Columbia indicated it did not rely on legal advice unless needed.

x. Number of Allegations of Sexual Misconduct by Educators over the Past Ten Years

The school districts in the various jurisdictions responded as follows:

DISTRICT	NUMBER OF ALLEGATIONS
B.C.D.1	More than 10
B.C.D.2	Approximately 10
B.C.D.3	8
B.C.D.4	6
B.C.D.5	9
B.C.D.6 - 8, B.C.D.11	No answer
B.C.D.8	100
B.C.D.9	5
B.C.D.11	4
B.C.D.12	5
B.C.D.13	5
N.S.D.1.	At least 10

N.S.D.2	Confidential
N.S.D.3	Approximately 20
N.S.D.4	Since 1996 – 3
O.D.1	10 - 20 (one or two a year)
O.D.2	6
O.D.3	6

Although there are very few criminal cases in Nova Scotia of sexual offences committed by educators, it does appear that the frequency of allegations of sexual misconduct by educators in Nova Scotia is similar to that in British Columbia and Ontario.

xi. Discussion

It appears that most districts that participated in this research study do provide the accused educator with procedural fairness when dealing with an allegation of sexual misconduct. However, it is not clear with those districts that do not allow the educator to call witnesses at the hearing, whether they consider written evidence from witnesses. Presumably, they would consider this type of evidence, otherwise they would be making a decision without all available evidence, which would be unfair to the educator.

School districts that do not have policies certainly should develop them so that when allegations do arise procedural roles and responsibilities of school board officials are clearly understood so that an efficient investigation will occur. This will more likely result in students being protected and will also ensure that the educator is provided with procedural fairness.

In critically examining the process a school district employed when investigating complaints of sexual misconduct by an educator, John Sanderson, Q. C. noted that there should be a distinction between verification or confirmation of the initial complaint and the investigation of it.⁶⁹ This distinction is important because it has implications under some collective agreements as to when the educator is to be notified about the allegations. Usually the educator is to be notified upon the commencement of the investigation but not before the complaint is first verified.

The individual who is responsible for confirming the details of the complaint is usually the principal or the vice-principal. The person who is responsible for verifying the allegation must have a clear idea of what she or he is doing.⁷⁰ Judgments about guilt and innocence are not to be made at this time and the person must be objective about what must be done.⁷¹ At this stage, the principal or vice-principal would have to speak to students and parents about the nature and substance of the complaint. In addition, the administrator would have to decide whether an investigation should take place, whether reports should be made to the child protection Ministry and the police.⁷² John Sanderson suggests that the fact of the verification should be promptly reported in writing to an assigned management person.⁷³

School districts must draft careful policies to reflect the fact that the purpose of investigating the allegation is to conduct a thorough fact finding exercise to determine what happened and to define the dimensions of the allegations.⁷⁴ It is important that the

⁶⁹ *Ibid.* at 5.

⁷⁰ *Ibid.* at 6.

⁷¹ *Ibid.* at 6.

⁷² *Ibid.* at 6.

⁷³ *Ibid.* at 6.

⁷⁴ *Ibid.* at 6.

investigation be conducted expeditiously, fairly, objectively and thoroughly.⁷⁵ One important point John Sanderson makes about the selection of the person who will be conducting the investigation is that the investigator should have no direct reporting relationship with the person being investigated.⁷⁶ Thus, a principal should not investigate a complaint with respect to an educator on his or her staff.

It is imperative that the investigator is an individual who has some training and understanding about basic evidentiary matters such as the manner in which witnesses, especially children, should be questioned. This is important because if the matter goes to trial the school board wants to ensure the evidence it has collected will be admissible and will not be excluded because of the manner in which the interviews were conducted. Further, it is also necessary that the investigator understand that the purpose of questioning witnesses is to find out what happened, and it is not to make judgments about guilt or innocence or to decide what action should be taken by way of discipline.⁷⁷

If there is a process set out in the collective agreement regarding a meeting with the educator, it is up to the school board to manage the administrative procedures efficiently to ensure that all requirements have been met in the contract. John Sanderson suggests that requirements in the collective agreement, such as when documents are to be provided to the educator or when notice is to be given of the hearing, be codified in an internal document.⁷⁸ This seems to be a sensible suggestion as it clarifies to lay persons the exact steps to follow during the investigation.

⁷⁵ *Ibid.* at 6.

⁷⁶ *Ibid.* at 7.

⁷⁷ *Ibid.* at 8.

⁷⁸ *Ibid.* at 10.

The policy of the school board should also set out the procedure to be followed when dealing with the police. As some of the policies of the school districts indicated, if it is evident that criminal acts are involved, the police should be notified immediately. Although a police investigation may be taking place, this does not preclude a school board from conducting its own investigation into the matter. However, as discussed by John Sanderson it is

...vital that the employer, in making its own investigation, not prejudice the police. For example, if students, particularly young students, are interviewed by a series of persons, some whom are police officers and others are officials of the Board, it can cause serious issues to be raised regarding the appropriate role of the employer at the subsequent criminal trial, as occurred here.⁷⁹

The policy should also address the reporting requirements under the applicable child protection legislation and the person who is responsible for making the report. One suggestion is that the person who verifies the complaint makes the report.⁸⁰ This is a reasonable method of ensuring that the required report is made promptly to the necessary authorities.

II. ANALYSIS OF DECISIONS OF SCHOOL BOARDS

A. Methodology

Many sources have been examined to attempt to try to obtain as complete a collection of cases as possible to examine. For the British Columbia cases the following computer databases were examined: ADM, ARB, BCJ, BCLA, BCLB, and CJ. In addition, the British Columbia Law Reports, the Canadian Labour Arbitration Cases and the Canadian Abridgement were reviewed. The decisions held by the British Columbia Public School

⁷⁹ *Ibid.* at 13.

⁸⁰ *Ibid.* at 14.

Employer's Association were also examined as well as summaries of all the Board of Reference decisions held by the British Columbia Ministry of Education. It is very difficult to obtain a complete collection of arbitration cases. It is apparent that there are some arbitration cases that are not reported by any publisher and it is impossible to locate the entire collection of cases.

With respect to research of the Ontario and Nova Scotia cases the following computer data bases were examined: ADM, ARB, NSJ, OLRB and ORP. Paper sources reviewed were the Ontario Reports, the Canadian Labour Arbitration cases, Nova Scotia Reports and the Canadian Abridgment. In addition the entire collection consisting of sixty decisions of the Ontario Boards of Reference from 1972 to 1986 were reviewed that are held by the Legal Department of the Ministry of Education and Training.⁸¹ Surprisingly, during this period of time there was only one Board of Reference case concerning sexual misconduct of an educator.

The cases were reviewed to determine the type of sexual misconduct that the educator had engaged in, the gender of the educator and the victims who were abused, the disciplinary action taken by the school board and whether it was upheld when the matter was appealed.

1. Analysis of Cases considered by School Boards

A total of twenty-three cases in British Columbia, ten in Ontario and one in Nova Scotia were reviewed. In all cases, educators who were alleged to have engaged in sexual misconduct were male. In British Columbia and Ontario school boards have considered a

⁸¹ See S. Piddocke, R. Magsino & M. Manley-Casimir, *Teachers in Trouble: An Exploration of the Normative Character of Teaching*, (Toronto: University of Toronto Press, 1997) Table 8 at 267 the authors state that in Ontario there were a total of 61 board of reference decisions from 1973 - 1988. There was one teacher who had two different boards of reference and in calculating the total number this was counted as

wide range of sexual misconduct of educators, from possession of child pornography to inappropriate touching and comments to sexual relationships that involved sexual intercourse. In the Nova Scotia case the school board considered several complaints from female high school students enrolled in an alternative school that involved inappropriate comments and touching by their teacher.

Criminal charges were laid in six of twenty-three cases in British Columbia, leading to four convictions; in Ontario seven of ten cases resulted in criminal charges, with six convictions. In the one Nova Scotia case criminal charges were not laid against the educator. One educator in Ontario was acquitted of the criminal charges.

Instances of alleged sexual misconduct between educators and youth are viewed as extremely serious by school boards with dismissal being the most frequent discipline imposed by school boards in both British Columbia and Ontario.⁸² In eighteen of twenty-three or seventy-eight percent of cases considered by school boards in British Columbia, educators were dismissed from their positions.⁸³ In the remaining five cases, the

two separate decisions. Thus, there is a slight discrepancy in the total number of board of reference cases counted compared with S. Piddocke's total number.

⁸² For similar observations concerning American cases see M. Marmo & S. Marmo, *supra* note 10 at 321.

⁸³ *Bennest v. Burnaby School District* (1997), 30 B.C.L.R. (3d) 372 (S.C.); *Central Okanagan School District 23 v. Ledinski*, [1990] B.C.J. No. 939 (S.C.), online: QL (BCJ); *aff'd* [1992] B.C.J. No. 1285 (C.A.), online: QL (BCJ) [hereinafter *Ledinski*], also see re: *Ledinski* in *The Education Law Reporter* vol. 7 (1995 December) at 26; *Le Gallant v. School District* (1987), 16 B.C.L.R. (2d) 155 (S.C.) [hereinafter *Le Gallant*]; *Mr. M* as cited by S. Piddocke, R. Magsino & M. Manley-Casimir, *supra* note 81 at 99; *Patey v. School District No. 61* as reported in *Peterson*, *supra* note 14 at 110 [hereinafter *Patey*]; *Peterson*, *supra* note 14; *R. v. Noyes* (1986), 6 B.C.L.R. (2d) 306 (S.C.); appeal dismissed with respect to finding that Noyes was a dangerous offender, *R. v. Noyes* (1987), 22 B.C.L.R. (2d) 45 (C.A.); appeal dismissed with respect to the indeterminate sentence, *R. v. Noyes* (4 June 1991), Vancouver CA 006054 (B.C.C.A.); *School District No. 35 (Langley) v. Chand* (1982), (B.C. Brd. of Ref.); *Re School District No. 13 (Kettle Valley) and Kettle Valley Teachers' Association* (1993), 37 L.A.C. (4th) 310; *School District No. 35 (Langley) v. Langley District Teachers' Association* (28 March 1991), (B.C. Brd. of Arb.) [hereinafter *Langley*]; *School District No. 68 (Nanaimo) v. Stormess-Kress* (1983), (B.C. Brd. of Ref.); *School District No. 62 (Sooke) v. Sooke Teachers' Association* (24 July 1995), (B.C. Brd. of Arb.) [hereinafter *Sooke*]; *Stockman v. School District No. 60* (25 January 1974) (B.C. Brd. of Ref.) [hereinafter *Stockman*] as reported in *Peterson*. The facts of *Stockman* are incorrectly reported in *Peterson*. The facts of *Stockman* as reported in *Peterson* are the facts of *Van Bryce v. School District No. 39* (28 August 1979) (B.C. Brd. of Ref.) [hereinafter *Van Bryce*]. The full case report of *Van Bryce* has been reviewed and it is apparent these cases

educators were suspended for various periods. Suspensions of the educators were for allegedly sexually harassing two grade eight students⁸⁴ and for a historical sexual relationship that included fondling and oral sex with a thirteen-year-old female student that resulted in the educator being acquitted of the criminal charges.⁸⁵ In other cases the educators were suspended as a result of allegations of improper touching of female students by a male teacher,⁸⁶ of voyeurism against a male teacher looking in a girls' changing room,⁸⁷ and of sexual assault against a seventeen-year-old female student.⁸⁸

have been misreported in *Peterson*. In *Stockman* a teacher had a sexual association with a student and refused to terminate the relationship. The teacher was dismissed by the school board which was upheld by the Board of Reference. In *School District No. 46 Sunshine Coast v. Sunshine Coast Teachers' Association* (24 June 1997) Vancouver CA021737 (B.C.C.A.) [hereinafter *Sunshine Coast*] the grade eight male teacher was dismissed by the school board for touching female students and making comments, which although were not explicitly sexual, were perceived by the students as having sexual connotations. Although the Board of Arbitration upheld the dismissal, the case since that decision has had a protracted history. After the Board of Arbitration Hearing there were two hearings before the British Columbia Labour Relations Board [hereinafter *L.R.B.*]. The orders of the L.R.B. directed that there be a new arbitration hearing before a different arbitration panel. On a judicial review application by the school board, the chambers judge set aside the L.R.B. decisions. On further appeal by the Teachers' Association, the B.C.C.A. allowed the appeal and reinstated the L.R.B. decisions and held that the chambers judge erred in finding that the L.R.B. misinterpreted or exceeded its jurisdiction. Several years after the teacher's dismissal, the question is still outstanding as to whether conduct that is not explicitly sexual, but is perceived by recipients of the conduct to have sexual connotations, is misconduct that constitutes just and reasonable cause for dismissal; *Southeast Kootenay School District No. 5 and Cranbrook District Teachers' Association*, [1997] B.C.D.L.A. 500.15.40.00-11 A-168/97 (B.C.Brd. of Arb.) [hereinafter *Southeast Kootenay*]; *Van Bryce; Vancouver School Board and Vancouver Secondary Teachers' Association*, [1990] B.C.D.L.A. 53-03 A-126/90 (B.C. Brd. of Arb.); *School District No. 61 (Greater Victoria) and Smith* (6 October 1993) (B.C. Brd. of Ref.) [hereinafter *Smith*]. Also see M. Marmo & S. Marmo, *supra* note 10 at 321 wherein the authors reported that in the cases they examined, which were not solely involving educators who were alleged to have engaged in sexual misconduct but also included other support staff, eighty-four percent of employees were discharged by school boards for their behaviour.

⁸⁴ *Re School District No. 34 and Abbotsford District Teachers' Association* (1995), 38 C.L.A.S. 438 095/117/098 (B.C.Brd. of Arb.) [hereinafter *Abbotsford*].

⁸⁵ *School District No. 60 (Peace River North) and Peace River North Teachers' Association* (30 September 1995) (B.C.Arb.) [hereinafter *Peace River North*].

⁸⁶ *Hanson v. College of Teachers (British Columbia)* (1993), 110 D.L.R. (4th) 567 (B.C.C.A.) [hereinafter *Hanson*].

⁸⁷ *Re Chilliwack School District 33 and Chilliwack Teachers' Association* (1991), 16 L.A.C. (4th) 94 (Hope) [Chilliwack].

⁸⁸ *Erickson*, *supra* note 38.

In Ontario in all ten cases the educators were dismissed by school boards. In the board of reference case⁸⁹ a male teacher was alleged to have engaged in inappropriate touching of a female student. There were two cases of male educators being convicted of gross indecency after police raided a washroom in the Orillia Opera House.⁹⁰ In *Re: Campbell and Stephenson*⁹¹ a male teacher was convicted of indecent assault upon a male. Similarly, in *Re Etobicoke Board of Education and Ontario Secondary School Teachers' Federation*⁹² a male teacher pleaded guilty to several charges including sexual assault, indecent assault and gross indecency. In the case report it did not state the gender of the individuals he abused.

In *Perth County Board of Education and O.P.S.T.F.*⁹³ a male teacher was charged with sexual assault of a minor and in *Wellington* a male teacher was convicted of indecent exposure involving an adult female hitchhiker to whom he had given a ride. The other case involving a teacher who was charged criminally is *The Board of Education for the City of North York v. Ontario Public School Teachers' Federation, North York District*.⁹⁴ In *North York* a teacher was acquitted of sexual assault, sexual interference and sexual exploitation charges, but judge found that there was a sexual relationship between the student and the teacher. As a result of this and a further investigation by the school board, the teacher's employment was eventually terminated.

⁸⁹ *Re: The Matter of, pursuant to the Education Act, 1974* (24 April 1979) (Ont. Brd. of Ref.) [hereinafter *The Matter of X*].

⁹⁰ *Simcoe Board of Education and Ontario Secondary School Teachers' Federation* (1984 December 21) (Ont. Brd. of Arb.) [hereinafter *Duff*] as reported in *Re Wellington Board of Education and O.S.S.T.F.* (1991) 24 L.A.C. (4th) 110 at 113 [hereinafter *Wellington*] and *Simcoe Board of Education and Ontario Secondary School Teachers' Federation* (1984) (Ont. Brd. of Arb.) [hereinafter *Prety*] as reported in *Wellington* at 113.

⁹¹ (1984), 44 O.R. (2d) 656 (H.C.J.Div.Crt.).

⁹² (1984), 17 L.A.C. (3d) 40 (Ont. Brd. of Arb.).

⁹³ (1997), 48 C.L.A.S. 504 097/176/031 (Ont. Brd. of Arb.).

⁹⁴ *School Law Commentary*, (1998) 12(7) at 4 - 5 [hereinafter *North York*].

In *Windsor Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association*⁹⁵ the school board dismissed a high school teacher who allegedly exchanged correspondence of a sexual nature with two students and later participated in sexual activity with them. In *M.S. v. North York Board of Education*⁹⁶ the school board dismissed a male teacher after it was determined that he had sexually harassed a student and engaged in unprofessional conduct with a number of students with respect to written and photographic materials.

In *Kings Country District School Board and Nova Scotia Teachers' Union*⁹⁷ the school board dismissed a male high school alternative school teacher for inappropriate touching and making inappropriate conversation with several female students.

School boards appear to treat cases of same or opposite sexual misconduct alike. In British Columbia, twenty-one of twenty-two cases reported the gender of the victims and the one remaining case, involved the possession by the educator of child pornography. In cases in which the gender of the victims was reported, school boards in British Columbia dismissed sixteen of twenty-one or seventy-six percent of educators and five were suspended. In four of twenty-one cases male educators engaged in sexual misconduct with male adolescents and all four educators were dismissed by school boards.

In seventeen of twenty-one British Columbia cases male educators engaged in sexual misconduct with females. In twelve of seventeen or seventy-one percent of cases male educators were dismissed from employment and five were suspended. In all of these cases, school districts found that male educators did engage in the alleged sexual misconduct with female students.

⁹⁵ (1993), 29 C.L.A.S. 228 093/021/102 (Ont. Brd. of Arb.).

⁹⁶ "Teacher Dismissal for Misconduct" (1998) 13(1) *School Law Commentary* at 5 [hereinafter *M.S.*].

School boards treat same and opposite sexual misconduct cases in a similar fashion, which is different from how the British Columbia judges in the criminal courts treat these cases. While school boards found that all educators engaged in the sexual misconduct as alleged, British Columbia judges found that all educators engaged in sexual misconduct in same sexual misconduct cases, but in opposite sex abuse cases, judges found that only one educator of six or seventeen percent engaged in the alleged misconduct. Although the school board found that all educators engaged in the alleged misconduct, the penalties imposed on the educators are different. In the same sex cases, all educators were dismissed from employment, while in opposite sex abuse cases, as discussed above, twelve of seventeen or seventy-one percent of male educators were dismissed and five were suspended. In the opposite sex abuse cases considered by school districts, the sexual misconduct by the educator was of varying degrees of severity. In some cases the misconduct was something less than sexual involvement. Thus, in some cases the reduced penalties are reflective of the less serious misconduct committed by the educator rather than because they were opposite sex abuse cases.

With respect to three of the five male educators who were suspended, all of their behaviour involved something less serious than a sexual relationship with a female student. However, two cases involved school districts suspending male educators for engaging in a sexual relationship with a female student or for allegedly sexually assaulting a female student. In *Peace River North* the male teacher was involved in a historical sexual assault of a female thirteen-year-old student. It is interesting to note that although the allegations included fondling and oral sex, the school board merely suspended the educator rather than dismissing him. Perhaps, this is a result of it being a

⁹⁷ (1995), 46 L.A.C. (4th) 289 (N.S. Arb.) [hereinafter *Kings County*].

historical sexual assault which likely made it more difficult for the school board to meet the burden of proof for a dismissal given that the educator was acquitted of the criminal charges.

In *Erickson* the allegations were that the male educator sexually assaulted a seventeen-year-old female student.⁹⁸ However, the court found that the investigation conducted by the school board was severely flawed as a result of failing to provide the educator with natural justice. The educator successfully sued the student for defamation arising out of her allegation.⁹⁹

In Ontario there were five of ten case reports that reported the gender of the victims abused by educators. There were two male educators who engaged in sexual misconduct with females, one of whom was a student and one of whom was an adult woman. Three male educators engaged in sexual misconduct with male victims. As discussed above, all five educators were dismissed by the school boards.

2. Analysis of Cases considered by Boards of Reference, Boards of Arbitration and the Courts

When these matters are appealed to institutions where decision-makers have legal training, such as a board of reference,¹⁰⁰ a board of arbitration or are judicially reviewed

⁹⁸ See page 210 for further details of *Erickson*, *supra* note 38.

⁹⁹ *Erickson v. "X"*, [1990] B.C.J. No. 1965 (S.C.), online: QL (BCJ).

¹⁰⁰ Boards of reference are review tribunals that existed in British Columbia from 1974 until 1987 when the British Columbia College of Teachers was established. According to Pidcocke, Magsino and Manley-Casimir, *Teachers in Trouble*, *supra* note 82 at 44 in Ontario boards of references were established in the 1930s. In Ontario boards of reference only apply with respect to applications that were made before September 1, 1998 and have not been finally determined, see *Education Quality Improvement Act*, S.O. 1997, c. 31, s. 121. Nova Scotia did not have boards of reference. Pidcocke, Magsino and Manley-Casimir note that boards of reference are hearings set up sometimes by the minister or the parties, to review dismissals of permanent or tenured teachers and to confirm, reject or vary the decision of the school board. These authors state that in Ontario the setting up of a board of reference was not an automatic right of the teacher and was subject to the discretion of the minister of education. However, in British Columbia the minister did not have the discretion to refuse to set up the board of reference providing the applicant met all of the statutory preconditions. The *School Act*, R.S.B.C. 1989, c. 61 abolished boards of Reference in British Columbia in 1989.

by a civil court, the decision-makers, in approximately fifty percent of the cases from the three jurisdictions, either impose a less severe disciplinary sanction or find that the school board has not met the standard of proof.¹⁰¹

There were twenty-one cases in British Columbia, nine in Ontario, and one in Nova Scotia that were appealed to either a board of reference, a board of arbitration or were judicially reviewed by a civil court. However, the final outcome in some of the British Columbia and one of the Ontario cases is unknown as some of the parties settled during the hearing¹⁰² and in some cases the matters are being remitted back to a new board of arbitration.¹⁰³ In one Ontario case, there is only a report of a preliminary motion but no report of the final outcome of the arbitration.¹⁰⁴ Consequently, outcomes are only known in fifteen British Columbia and in nine Ontario cases.

In nine of fifteen or sixty percent of British Columbia cases, decision-makers either found the penalty imposed by school boards was too severe for the misconduct of the educator¹⁰⁵ or found that school boards failed to meet the standard of proof¹⁰⁶ or found that the school board did not afford the educator due process.¹⁰⁷ In Ontario there were

¹⁰¹ The courts have also considered another category of employment cases arising from decisions made by the school board in interpreting contractual and statutory provisions when an educator has been suspended as a result of an allegation of sexual misconduct. British Columbia is the only jurisdiction that has dealt with decisions of school boards to suspend an educator without pay after an allegation of sexual misconduct against the educator has been made. The British Columbia Supreme Court has held on two occasions that a school board can suspend without pay an educator charged with a criminal offence that renders the employee unsuitable to perform his or her duties. See *Bennest v. School District 41* (1997), 30 B.C.L.R. (3d) 372 (S.C.) and *Noyes v. South Cariboo School District 30* (1985), 64 B.C.L.R. 286 (S.C.).

¹⁰² *Langley*, *supra* note 83 and *Abbotsford*, *supra* note 84.

¹⁰³ *Ledinski*, *supra* note 83 but the new hearing is unlikely to happen given that *Ledinski* was sentenced to a period of incarceration in Saskatchewan resulting from sexual misconduct that occurred in the 1960s. See *Sunshine Coast*, *supra* note 83.

¹⁰⁴ *North York*, *supra* note 94.

¹⁰⁵ *Mr. M.*, *supra* note 83, *Patey*, *supra* note 83, *Peterson*, *supra* note 14, *Smith*, *supra* note 83, *Sooke*, *supra* note 83 and *Southeast Kootenay*, *supra* note 83.

¹⁰⁶ *Hanson*, *supra* note 86 and *Chilliwack*, *supra* note 87.

¹⁰⁷ *Erickson*, *supra* note 38.

three of seven or forty-three percent of cases in which decision-makers found that a dismissal of the educator was too severe of a penalty for the sexual misconduct of the educator¹⁰⁸ or that the burden of proof was not met by the school board.¹⁰⁹ In the Nova Scotia case, the arbitrator found that the penalty imposed by the school board was too harsh.

a. School Board Decisions Upheld by the Courts

In the cases discussed below, the Ontario case involves an opposite sex abuse case, while the one from British Columbia involves a same sex abuse case. In both cases the school boards dismissed the educator and the courts upheld their decisions.

In *M. S.* the Ontario Court of Justice rejected an application by a teacher to review a decision of an arbitration board that held that a teacher's dismissal from employment was justified and that the school board had established just cause for the discharge. The teacher was dismissed for failing in his duty as a teacher and for conduct unbecoming a teacher as a result of sexually harassing a student and engaging in unprofessional conduct with a number of students respecting written and photographic materials. The issue before the arbitration board and the Court was whether or not the discharge was the appropriate penalty for a teacher who had been teaching twenty-five years without a disciplinary record.

In reviewing the arbitration board's findings of the teacher's conduct and its extensive reasons, the Court held that the decision of the majority of the arbitration board to uphold the dismissal of the teacher was not patently unreasonable. The arbitration board found

¹⁰⁸ *Duff and Pretty*, *supra* note 90.

¹⁰⁹ *The Matter of X*, *supra* note 89.

that the teacher had not accepted responsibility for his actions and the board had doubts about the rehabilitative potential of the teacher.

In *Le Gallant* the Court upheld the dismissal of a male teacher who had been acquitted of sexual assault of a thirteen-year-old boy, who attended a school in the district. The dismissal of the teacher occurred as a result of his statement to police during the criminal investigation that he had been sexually involved with the boy. The Court held that in order for the school board to establish misconduct it must prove on a balance of probabilities that the teacher "had sexual contact or improper verbal communication of a sexual nature with the youth in question".¹¹⁰ It was held further that although the teacher's actions were not proved to be a crime under the *Criminal Code*, they would if proved before a board of reference, constitute an act or acts of misconduct pursuant to the legislation.

b. Decisions of School Boards Overturned

i. Cases in which Decision-Makers determined the Penalty was too Severe

There are six British Columbia cases, two of three cases in Ontario and one in Nova Scotia in which decision-makers of a board of reference, a board of arbitration and a civil court determined that the penalty imposed by the school board was too harsh and the dismissal was reduced to a suspension. Interestingly, in British Columbia four of these six cases involved male educators engaging in sexual relationships with female high school students who in the majority of cases ranged in age from seventeen to nineteen years of age.¹¹¹ What is striking in most of these cases, is their male-dominated

¹¹⁰ *Le Gallant*, *supra* note 83 at 161.

¹¹¹ The ages of the female students were reported in *Peterson*, *supra* note 14, *Smith*, *supra* note 83 and *Sooke*, *supra* note 83. In *Patey*, *supra* note 83 the age of the female student was not reported. In the other

character. Almost invariably the grievors, lawyers representing the parties and the decision-makers are male.¹¹² Thus the male perspective or the male "gaze" determines the approach to the matter. Perhaps male decision-makers are sympathetic to a male educator engaging in a sexual relationship with a young female student because this type of relationship is not socially repugnant.¹¹³

However, in Ontario the two cases in which the arbitrators determined that the penalty was too severe for the conduct of the educators involved two male educators who had been convicted of gross indecency after the police raided the washroom of the Orillia Opera House.¹¹⁴ Without having access to the full case reports, it is not possible to determine if the arbitrators and lawyers were male.

One author writing about grievance arbitrations involving teachers in Quebec argues that the "almost exclusively male composition of the grievors, lawyers and tribunal members has produced collusive behaviour, disadvantaging female victims...".¹¹⁵ What is lacking in three of the four British Columbia decisions, is a discussion of the abuse of power and authority involved in the relationship between an older male educator and a much younger female student.¹¹⁶ In *Sooke*¹¹⁷ the focus is on the fact that the female student,

two cases, *Mr. M.*, *supra* note 83 and *Southeast Kootenay*, *supra* note 83 involved allegations of inappropriate touching of female students.

¹¹² This is determined by the names of the parties in the case reports and reference to CBA: *B.C. Lawyers Directory 1998* (Vancouver: CBA, 1998). E. Grace in her examination of Quebec grievance arbitrations involving educators also noticed this. See E. Grace "Professional Misconduct or Moral Pronouncement: A Study of "Contentious" Teacher Behaviour in Quebec" (1993) 5 *ELJ* 99 at 120.

¹¹³ Without having the reported decision of *M. S.*, *supra* note 96 it is not known whether the lawyers and decision-makers were male or female. The age of the female student is not reported. However, the conduct of the educator in *M. S.*, *supra* note 96 appears to be less serious than the conduct of the educators in *Peterson*, *supra* note 14, *Smith*, *supra* note 83, *Sooke*, *supra* note 83 and *Patey*, *supra* note 83.

¹¹⁴ *Duff and Pretty*, *supra* note 90.

¹¹⁵ E. Grace, *supra* note 112 at 122.

¹¹⁶ This discussion may also be lacking in *Patey*, *supra* note 83 but the complete decision is not available.

¹¹⁷ Interestingly, in *Sooke*, *supra* note 83 all three members of the board of arbitration were male.

However, all four counsel were female. Even though the majority of participating members were female, all of the decision-makers were male.

who was experienced sexually and had two children, initiated and consented to the relationship with the educator and that she enjoyed the sexual aspect of the relationship. Similarly, in *Smith* the decision-maker noted that there was enjoyment of the intimacy by both the teacher and the female student.

In *Peterson*, a male thirty-seven year old teacher had a sexual relationship with an eighteen-year-old female student who had been his student two years prior to the sexual intimacy. She was in his modified math class for students who were slow learners. However, at the time of the incident she was not a student in the school at which the teacher taught but was still a student in the district. In one of the majority judgments in *Peterson* written by Mr. Justice Lambert, his characterization of the sexual relationship was key to his decision that the educator should be suspended rather than dismissed:

...The conduct itself, with an 18-year-old female, was not, in itself, morally abhorrent, or criminal in any way.¹¹⁸

Further Mr. Justice Lambert did not put any weight on the fact that the student had two years previously been his student and that she was a slow learner. For Lambert J.A. it was significant that at the time the incidents occurred, the student was not a student of the teacher and she was not a student at the teacher's school. This analysis does not take into consideration that at some point the educator could still be in a position of authority to the student while she is in the district. Lambert J.A. stated:

...And it is a significant fact that the female student with whom these two incidents occurred was not only not a student of Mr. Peterson's, but she was not a student in his school at the time. The fact that she was a student had nothing to do with the initiatives she took to approach Mr. Peterson or with the conduct that followed.¹¹⁹

By Lambert J.A.'s last statement it appears that he was also influenced by the fact that in

¹¹⁸ *Peterson*, *supra* note 14 at 101.

his view, the female student was the initiator of the sexual intimacy. This reasoning again fails to take into account the differential in the ages and positions between the educator and a student who was a slow learner.

The other majority judgment written by Mr. Justice Anderson is similar to that of Lambert J.A. In his judgment, Anderson J.A. has reproduced a great deal of the reasons of the board of reference hearing. The board of reference found that:

The subject incidents clearly involved Mr. Peterson's taking advantage of a student for his own gratification. The disparities in age and mental capacity between them are great; as admitted by Mr. Peterson, there was never a thought in his mind of any kind of serious or meaningful relationship between them.

In cross-examination, Mr. Peterson agreed that he and F. were not "equals". Counsel for the school board asked Mr. Peterson whether this was so because of the "disparity in their power - she did not have the ability to consent to a relationship with you". Mr. Peterson agreed with this proposition.¹²⁰

Anderson J.A. fails to consider the issue of disparity in power between the educator and student and merely focuses on the fact that there was no current student-teacher relationship:

Another factor not taken into account by the board of reference was that in this case the misconduct did not result from a teacher-pupil relationship. In my opinion, while all sexual misconduct involving students involves a serious breach of trust, there is a substantial difference between this case where a teacher has taken advantage of the teacher-pupil relationship for the purpose of sexual gratification. In this case, not only was the student not a pupil of the respondent, but also the student was not a pupil at the school where the respondent taught.¹²¹

At the end of his judgment Anderson J.A. recognizes that there have been changing standards with respect to sexual abuse wherein he stated:

In conclusion, I would point out that since 1985 the attitude of society has changed greatly with respect to all aspects of sexual abuse. Much higher standards have been imposed on all persons involved in the teaching and childcare

¹¹⁹ *Peterson, supra* note 14 at 102.

¹²⁰ *Peterson, supra* note 14 at 104.

¹²¹ *Peterson, supra* note 14 at 108.

professions. Conduct which might have called for suspension in 1985 might well call for dismissal in 1987.¹²²

Clearly Anderson J.A. was of the view that a sexual relationship between a much older educator and a slow learner female student was deserving of only a twelve-month suspension and was not such a serious abuse of an educator's trust, power and authority to call for dismissal in 1987.

The perspective of a female decision-maker in *Peterson* is at odds with the decision of the majority written by two male judges. In dissent, Madam Justice McLachlin (as she then was) focussed more on the fact that the student had no real power of consent:

Some breaches of the employment relationship are so serious that they may be regarded as fundamental, entitling the employer to accept them as a repudiation of the contract of employment and terminate it. Sexual intercourse with a student in the school system with the awareness that she had no real power of consent, as admitted here, coupled with callous disregard for the student's feelings and welfare, may be viewed as constituting a fundamental breach of the teacher's obligations, irreparably undermining the relationship of trust and confidence which must exist between the school board as employer and the teacher as employee...¹²³

Madam Justice McLachlin's view of a sexual relationship of an educator with a student is similar to that of the Supreme Court of Canada.¹²⁴

In *Kings County* the arbitrator held that the dismissal of a male high school alternative teacher for inappropriate touching of and conversation with female students was too severe of a disciplinary sanction imposed by the school board. In characterizing the behaviour, the arbitrator stated:

I recognized that each or many of the confirmed incidents could, if standing alone, be seen as innocent, or misinterpreted. However, taken cumulatively, they indicate a pattern of conduct which illustrates at best a serious lack of judgment, and more likely, an attempt to get close to these female students for his own

¹²² *Peterson, supra* note 14 at 112.

¹²³ *Peterson, supra* note 14 at 115.

¹²⁴ See G. V. La Forest, "Off-duty Conduct and the Fiduciary Obligations of Teachers" (1997) 8 E.L.J. 119.

personal reasons...Mr. Buntain's approach has been to seek out opportunities for personal contact with female students, and to take advantage of those opportunities when they arose. Considering the relationship of power he held over these students, it is understandable that the students were uncomfortable, reluctant to come forward, and concerned about their marks if they reported his behaviour. Mr. Buntain has abused the students' trust. It is significant that these events occurred where there was no adult to oversee his actions in that he was physically apart from the administration of the school and the presence of his colleagues.¹²⁵

In determining whether the teacher's conduct was serious enough to impose discipline, the arbitrator noted that while the offending behaviour was inappropriate and showed extremely poor judgment, the behaviour was borderline. The arbitrator noted that dismissal should only be imposed where a lesser penalty would not be suitable. In imposing an eight and one-half month's suspension, the arbitrator considered the seriousness of the misconduct in the context of the teacher's position of trust vis-à-vis the students and the need to emphasize that such conduct will be seriously punished. The mitigating factors taken into consideration included the long service the teacher had provided to the school board and that he was well liked.

The two other British Columbia cases that were not upheld on appeal were either as a result of the appeal decision-makers concluding that the burden of proof was not applied correctly by the school boards¹²⁶ or the school board did not follow basic principles of natural justice.¹²⁷

ii. Cases in which the Burden of Proof had not been Met

In two cases in British Columbia and one in Ontario, the decision-makers held that the school board had not met the requisite standard of proof when it concluded that the educator had engaged in sexual misconduct. As discussed in chapter six, the standard of

¹²⁵ *Kings County*, *supra* note 97 at 316.

¹²⁶ See *Hanson*, *supra* note 86 and *Chilliwack*, *supra* note 87.

proof in disciplinary proceedings was set out in *Chilliwack*. In that case the school board had found that an allegation of voyeurism by a male high school teacher looking into a girls' change room had been proven and as a result the teacher was suspended for seven months. In discussing the standard of proof Arbitrator Hope, Q.C. states:

The principles require that an arbitrator approach disputed issues of fact involving allegations of criminal or immoral conduct with a firm sense of the consequences of finding the allegations to have been proven and with a careful consideration of the inherent likelihood or probability that the allegation is true...¹²⁸

Arbitrator Hope notes that the appropriate standard which was addressed by Lord Denning in *Bater v. Bater*, [1951] P. 35, [1950] 2 All E.R. 458, 114 J.P. 416 (C.A.), has been adopted by the Supreme Court of Canada and has been applied in numerous arbitration decisions. He notes that in *Normandy Hospital* at p. 404 the following extract from *Bater v. Bater*:

"It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved to a degree of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability, within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."¹²⁹

In specifically considering allegations of sexual misconduct made against a professional person, Arbitrator Hope states:

Where there are consequences flowing from a finding that a disputed fact has been proven that go beyond the imposition of discipline or a dismissal, those factors must be included in the probability equation. Allegations amounting to

¹²⁷ *Erickson, supra* note 38.

¹²⁸ *Chilliwack, supra* note 87 at 118.

¹²⁹ *Chilliwack, supra* note 87 at 118.

criminal or sexual misconduct which impact upon the issue of employability generally and allegations made against a person's professional reputation which may affect that person's career have been viewed by arbitrators as constituting consequences that require proof of disputed facts to a high degree of probability: see *Re Chilliwack General Hospital and Hospital Employees' Union, Loc. 180* (1985), 18 L.A.C. (3d) 228 (Munroe) at pp. 238-9...¹³⁰

Although the decision-maker in the Ontario Board of Reference case did not articulate the standard of proof required to prove allegations of sexual misconduct of a male high school teacher, it held that the school board failed to show by a preponderance of evidence that it was justified in terminating the employment of the teacher. In this case, a sixteen-year-old female student alleged that her teacher engaged in sexual misconduct with her, including fondling and other inappropriate touching. In considering all the evidence, the decision-maker took into consideration that the complainant did complain about the behaviour of the teacher to a friend very close to when she alleged the incident happened. However, the board of reference noted that there were some inconsistencies between her evidence and the teacher's with respect to details regarding his rooming house where the alleged events occurred and on this factual matter the evidence of the teacher was preferred. The board of reference also found that the school board did not take into consideration the teacher's alibi that was corroborated at the hearing by another person.

iii. **A Case in which the School Board failed to follow the Principles of Natural Justice**

There was one British Columbia case in which the Supreme Court held that the school board failed to follow principles of natural justice when dealing with the teacher.¹³¹

Upon receiving an allegation by a seventeen-year-old student that a male high school

¹³⁰ *Chilliwack, supra* note 87 at 119

¹³¹ *Erickson, supra* note 38.

teacher sexually assaulted her, the school board suspended him. No criminal charges were laid and no disciplinary proceedings were taken against the teacher. Pursuant to section 107 of the *School Act*,¹³² the school board required the teacher to undergo a psychiatric examination to determine if he was a risk to his students. Instead of independently determining whether the teacher could have committed the sexual assault, the psychiatrist relied on a determination made by the board that he did commit the offence. Incredibly, the board came to this conclusion without interviewing either the teacher or the student, but instead chose to rely on the superintendent's view that the student was a credible person.

The Court held that although section 107 of the *School Act* did not require a hearing, given that the psychiatric opinion depended on a finding of fact made by the board under circumstances where the teacher had no opportunity to meet the case against him, the board had a duty to act fairly. This meant that the teacher was entitled to be told the case against him and be given an opportunity to be heard. The school board's failure to hear the teacher was fatal to the suspension and the subsequent offer of a hearing by the board did not cure the defect in the process.

c. **Comparison of Different Results in cases involving Teachers engaging in a Homosexual Act while Off-Duty**

One case in British Columbia must be juxtaposed against two Ontario cases. In all three cases the educators were convicted of gross indecency. In *Van Bryce* a male teacher was charged and convicted of gross indecency involving a seventeen-year-old male. The indecent act took place in a public washroom in a department store. The teacher's dismissal by the school board was upheld by the arbitrator on the basis that the act

¹³² R.S.B.C. 1979, c. 375.

committed by the teacher could result in the public losing confidence in the school system.

In *Duff* and *Pretty* two male educators in Ontario were charged and convicted of gross indecency resulting from a police raid in a public washroom in an opera house. In each case the school boards dismissed the educators but were ordered to reinstate the teachers after an arbitration hearing. The arbitrators appeared to be influenced by the fact that the victims in each case were victimless. Perhaps, this is to mean that the victim was a willing participant who consented to the activity. Unfortunately there were no details in the case report about the ages of the victims. In the *Van Bryce* case there are no details reported about the victim, other than his age.

There are interesting similarities between the cases. In all of these cases, the male educators were charged with an indecent act that was being performed in a public building. Despite the similarities in the cases, the outcomes are quite different in the British Columbia case and the Ontario cases.

In *Van Bryce* the evidence of the school principal was that a teacher must be a leader and a model, earning the respect and inspiring emulation on the part of those in his charge. The principal gave evidence further that the necessary element of trust and confidence which the administration must have in the teaching staff had been impaired as a result of the teacher being involved in the offence. The evidence of the superintendent was that having a teacher involved in such an incident could weaken public confidence in the school system. However, it does not appear that there was any independent evidence of either students or parents stating that they would lose confidence in the system if the teacher was returned to his duties.

Without being able to read the full case reports in *Duff* and *Pretty* one wonders if there was a great deal of evidence before the arbitrators indicating that the confidence in the school system would not be reduced if these teachers were returned to their positions. As discussed by the arbitrator in *Wellington*, he notes that in the *Duff* case:

The [arbitration] board concluded that the grievor's involvement in the incident in question did not require his removal from a very successful teaching career and a very important and positive involvement in community life. There also appeared to be positive evidence that the grievor's return as a teacher was "desired by his students, colleagues and parents", and if reinstated would be of benefit to the community. The grievor was thus reinstated with suspension and a loss of sick leave credits which had been used while he was on sick leave.¹³³

Perhaps the difference in outcome in the *Van Bryce* case and the *Duff* and *Pretty* cases are a result of the evidence before the various arbitrators, but one cannot help wonder if the dismissal was upheld in *Van Bryce* partly because of a fear of contagion of a teacher who engaged in a homosexual act. Perhaps the British Columbia arbitrator's response in *Van Bryce* is reflective of the 'male gaze' which views the homosexual act committed in this case as being socially repugnant.

d. Treatment of Cases decided by Decision-Makers with Legal Training

Given the sample of cases it is impossible to determine whether decision-makers with legal training treat cases in a similar fashion regardless of whether the educator engaged in sexual misconduct with students of the same or different gender as the educators. There are no same and opposite sex abuse cases with similar facts to be able to make a comparison.

¹³³ *Wellington*, *supra* note 90 at 113.

e. Difference Between the Approach taken by School Boards and other Decision-Makers

In deciding cases of alleged sexual misconduct of educators, although school trustees generally do not have legal training, they do bring a different perspective to the hearing than arbitrators and judges. Given that school trustees are closer to the school community, they are more likely than judges and arbitrators to have an awareness of what types of misconduct the school community would or would not condone. Although written decisions of school trustees are not available, in examining the outcomes of the cases, it appears that when making decisions about the alleged sexual misconduct of an educator, school trustees are not inclined to implement a progressive discipline model as is common in a labour setting. Rather, they appear to focus on the behaviour and, in trying to protect the welfare of the students, they dismiss the educator rather than give the educator a second chance.¹³⁴

In contrast to the approach of the school trustees, many arbitrators approach the matter using a labour-grievance model. In *Sooke* the chairman of the board of arbitration, H. A. Hope, Q.C. set out the arbitral principles that govern the review of a dismissal under the provisions of the *Labour Relations Code*. He noted that discipline must be remedial rather than punitive and that the employer must prove just cause for the imposition of the particular penalty imposed.

Arbitrator Hope noted that both the employer and the union relied on a number of board of reference decisions made between school boards and teachers in proceedings conducted prior to the granting to teachers of full collective bargaining status. In

¹³⁴ M. & S. Marmo, *supra* note 10 at 311.

considering those decisions he noted that they were issued outside the collective agreement regime that exists under the *Labour Relations Code* and do not

...necessarily reflect the unique adjudicative principles that have developed under that regime". Rather, they reflect the adaptation of common law principles to s. 122 of the School Act to create what one judge describe as a jurisprudence which was in its "infancy".

The maturing of the adjudicative standards which were emerging under the board of reference process ceased with the granting to teachers of full collective bargaining rights. The adjudicative standards that now apply are those that have evolved with respect to collective agreement relationships. The significance of dismissal in such a relationship was addressed in Wm. Scott and Company where the Board wrote as follows on p. 3:

The point is that the right to continued employment is normally a much firmer and more valuable legal claims under a collective agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law, especially of one who has worked under it for some time under the agreement, is a qualitatively more serious and more detrimental event than it would be under the common law.¹³⁵

While recognizing the difference in the two regimes, Arbitrator Hope noted that the board of reference decisions provide guidance as to how the teaching profession has been viewed by courts and adjudicators in the context of sexual misconduct. Additional factors considered in assessing the teacher's conduct in *Sooke* include whether the teacher's conduct led to a loss of confidence in the school system or loss of respect of him as a teacher. Arbitrator Hope concludes that there was little apparent impact in a public dimension of the grievor's conduct.

Recognizing the uniqueness of the educational setting, the Supreme Court of Canada has stated that "it is essential that arbitrators recognize the sensitivity of the educational setting and ensure that a person who is clearly incapable of adequately fulfilling the duties of a teacher both inside and outside the classroom is not returned to the

classroom".¹³⁶ Although Arbitrator Hope recognizes that the issue of sexual misconduct in the context of an educational setting requires somewhat of a different approach than what would be required in a non-educational setting, the focus of his reasoning after he discusses the evidence is that of a labour-grievance model.

Arbitrator Hope rejects the dissenting reasoning of McLachlin J.A. (as she then was) in *Peterson* that sexual intercourse with a student constitutes a fundamental breach of a teacher's obligations and irreparably undermines the relationship of trust and confidence that must exist between the school board and the employer. The arbitrator notes that McLachlin J.A.'s reasoning is inconsistent with the principles of review dictated in *Wm. Scott and Company Ltd.*¹³⁷ an arbitral decision dealing with the discharge of an employee of a Crown corporation, for publicly criticizing her employer.

Given the Supreme Court of Canada's reasoning in *Ross v. New Brunswick School District 15*,¹³⁸ *R. v. Audet*¹³⁹ and *Toronto Board of Education* that teachers are moral exemplars and that the relationship between a teacher and a student is a fiduciary one, in considering allegations of a sexual misconduct of an educator, an arbitrator or a court must carefully examine the context in which the misconduct occurred. While considering the arbitral principles with respect to taking disciplinary action against the educator, they must be considered in the context of the relationship between the teacher and student, including the age and experiential differential between them, whether or not there will be a loss of confidence in the school system or a loss of respect for the teacher. Although in

¹³⁵ *Sooke*, *supra* note 83 at 58-59.

¹³⁶ *Toronto(City) Board of Education v. O.S.S.T.F.* (1997), 144 D.L.R. (4th) 385 (S.C.C.) at 403 [hereinafter *Toronto Board of Education*].

¹³⁷ [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B.).

¹³⁸ [1996] 1 S.C.R. 825.

¹³⁹ (1996) 135 D.L.R. (4th) 20 (S.C.C.).

Sooke there could have been more of a consideration of situating the misconduct in an educational setting, the result might have still been the same if this was considered.

III. CONCLUSION

Given that child sexual abuse has for more than a decade been recognized as a serious national problem, school boards have had ample time to ensure they have developed clear policies on the investigative process when dealing with allegations of sexual misconduct by an educator. The goal of these policies is to ensure that the investigation is conducted expeditiously, fairly, objectively and thoroughly. This will result in students being sufficiently protected as well as treating the educator in accordance with principles of natural justice.

Although any conclusions of the surveys conducted of school boards in the three jurisdictions must be interpreted cautiously, it appears that those school boards in British Columbia and Ontario that responded to the survey have a good understanding of reporting requirements under the child protection legislation and of when they should involve the police. Most school boards appear to have an understanding that when they are considering taking disciplinary action, such as suspension or termination, against an educator, they owe a duty of procedural fairness to the educator. It appears most school boards have some understanding of the standard of proof that they must meet in proving just cause to discipline a teacher for sexual misconduct.

When school boards are faced with allegations of sexual misconduct by an educator, they view the misconduct very seriously and take strong action against the educator by terminating the person. Although the potential consequences of an allegation of sexual misconduct can be devastating to an educator's career and employment prospects, the

common law, legislation and collective agreements do not require a school board to provide the educator with a full hearing with the opportunity to cross-examine witnesses before a legally trained decision-maker. Ideally, it would be fairer from the educator's perspective if he or she was provided with a full hearing before an individual with legal training. However, just as decisions of the professional regulatory bodies can be judicially reviewed by an institution with a legally trained individual, so can the decisions of lay school board officials.

Another aspect of determining the fairness of school board hearings is whether the decision-maker treats all cases alike. It appears that when school boards hear cases of sexual misconduct they treat all cases similarly, regardless of whether the educator engaged in sexual misconduct with a student of the same or opposite gender as the educator. Because of the small number of cases, it is impossible to determine whether decision-makers with legal training treat all cases similarly.

Not having legal training, school trustees bring a different perspective to the hearing compared with decision-makers who have legal training. Given that school trustees are closer to the school community, they are more likely than judges and arbitrators to have an awareness of what types of misconduct the school community would or would not condone. It appears that school trustees are not inclined to implement a progressive discipline model but rather, they appear to focus on the behaviour and in trying to protect students, they dismiss the educator rather than give the person a second chance.

When cases of sexual misconduct are appealed to or judicially reviewed by institutions where decision-makers have legal training, the decision-makers in approximately fifty percent of cases, either impose a less severe sanction than that imposed by school boards

or find that school boards did not meet the requisite standard of proof. In contrast to the approach of school trustees, many arbitrators approach the matter using a labour-grievance model focussing on whether the educator has had a previous disciplinary record and whether the educator can be rehabilitated. A labour-grievance model may not always be appropriate in sexual misconduct cases.

In deciding these cases, arbitrators and courts should be mindful of the Supreme Court of Canada's requirements of arbitrators that they must recognize the sensitivity of the educational setting by ensuring that a person who is clearly incapable of adequately fulfilling the duties of a teacher is not returned to the classroom. This sensitivity requires courts and arbitrators to recognize that teachers are moral exemplars, that the relationship between a teacher and a student is a fiduciary one and in considering allegations of sexual misconduct of an educator, the context in which the misconduct occurred must be carefully examined. The arbitral principles with respect to disciplining an educator who has engaged in sexual misconduct must be considered in the context of the relationship between the teacher and student, including the age and experiential difference between them, whether or not there will be a loss of confidence in the school system or a loss of respect for the teacher. If the school district is going to argue that there is a loss of confidence in the school system as a result of the educator's misconduct, then it will have to lead that evidence. School trustees and arbitrators can learn from each other. School trustees can learn about such things as the burden of proof and principles of natural justice and arbitrators can learn about the special context of the educational setting.

8. SEXUAL HARASSMENT IN THE EDUCATIONAL SETTING

One of the reasons the public/private divide,¹ which denotes the distinction between state regulation and private economic activity or the market, has shifted is due to the influx of women into the work force.² Over the years, the state has increasingly regulated the workplace and has passed legislation to help protect employees from various hazards and types of exploitation.³ The state has set standards in human rights legislation that attempt to deal with power issues in the private and public sphere, such as the workplace.

Concurrent with increased regulation in the workplace, there were other challenges to the public/private divide in the realm of gendered patterns of behaviour that were previously hidden in the private sphere; specifically sexual abuse and child abuse.⁴ As a result of sexual abuse and child abuse no longer being hidden in the private sphere,⁵ Canadian society finally recognized child sexual abuse as a national tragedy in the early 1980s.

With these shifts in the public/private divide as well as the increased focus on violence that women and children endure in their daily lives, sexual harassment was recognized as a form of discrimination in the early 1980s in British Columbia, Ontario and Nova Scotia.⁶ In 1989 the Supreme Court of Canada definitively established that sexual harassment is a form of sex discrimination.⁷

¹ The term "public/private" denotes both the division between state regulated activities, such as work and private activities such as family. It also denotes the division between state-regulated activities and private economic activity (the market). See S. B. Boyd, "Can Law Challenge the Public/Private Divide? Women, work and Family" (1996) 15 Windsor yearbook of Access to Justice 161.

² P. Armstrong, "Women's Paid and Unpaid Work" in S. B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 37 at 52.

³ *Ibid.* at 52.

⁴ *Supra* note 1 at 170.

⁵ *Supra* note 1 at 161.

⁶ The first jurisdiction to recognize that sexual discrimination constituted sexual harassment was Ontario in *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 (Ont. Bd. Inq.) (Shime) [hereinafter *Bell*]. Nova Scotia recognized that sexual harassment was sexual discrimination in 1983 in *Mackay v. Mackinnon*, 6 C.H.R.R. D/2861 (N.S.C.A.); leave to appeal to S.C.C. dismissed Nov. 21/85, 69 N.S.R. (2d) 450. In 1984 British Columbia recognized that sexual discrimination constituted sexual harassment in *Zarankin v. Johnstone* (1984), 5

Sexual harassment has been described as the "crime of the nineties".⁸ Although to date it appears that very few sexual harassment claims against educators have been filed in British Columbia, Ontario or Nova Scotia, it is imperative that educators understand what behaviour constitutes sexual harassment. The public has become more aware of this type of harassment and as a result, more people are more willing to seek redress against the harasser when the misconduct occurs.

British Columbia leads the country in the number of complaints of sexual harassment that are filed. In 1997 to 1998, two hundred and ninety-eight people filed complaints with the British Columbia Human Rights Commission which is more than a third of all sexual harassment complaints in Canada.⁹ "Only Ontario, which has a population three times the size of B.C., came close to the B.C. total, with 188 sexual harassment complaints last year".¹⁰ There were sixty-two formal complaints of sexual harassment filed in Nova Scotia for 1997 to 1998.¹¹

This chapter begins with a definition of sexual harassment. Thereafter the legislation in British Columbia, Ontario and Nova Scotia will be discussed to provide a framework for an analysis of the jurisprudence in each of these jurisdictions. There are very few decisions in these various jurisdictions of alleged sexual harassment involving educators at the elementary or secondary levels. The thesis of this chapter is that although sexual harassment exists in the school system, students and educators likely initiate a complaint

C.H.R.R. D/2274 (B.C. Bd. Inq.) aff'd (sub nom. *Johnstone v. Zarankin*) (1985), 6 C.H.R.R. D/2651 (B.C.S.C.) [hereinafter *Zarankin*].

⁷ *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 [hereinafter *Janzen*] and *R. v. Robichaud*, [1987] 2 S.C.R. 84, sub nom. *Robichaud v. Canada (Treasury Board)* [hereinafter *Robichaud*].

⁸ M. Jimenez, "Sexual harassment an epidemic in B.C." *National Post* (7 Nov. 1998) A8.

⁹ *Ibid.* at A8.

¹⁰ *Ibid.* at A8.

¹¹ N.S., *Human Rights Commission Annual Report for the fiscal years 1996-97 and 1997-98* (Halifax, 1998) at 31 - 32.

of sexual harassment in a forum other than the provincial human rights commissions. As a result, there are very few decisions with respect to sexual harassment involving educators of provincial human rights councils or boards.

I. DEFINITION OF SEXUAL HARASSMENT

Sexual harassment is a complex issue involving the perceptions of men and women and the social norms of society¹² which change over time and, as a result, it is difficult to define. While the legislation in Ontario and Nova Scotia assists somewhat in understanding the term, the British Columbia *Human Rights Code*¹³ does not specifically list sexual harassment as a form of discrimination or "expressly refer to, or prohibit"¹⁴ it and as such the term is not defined. In Nova Scotia sexual harassment is defined as:

- (i) vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome,
- (ii) a sexual solicitation or advance made to an individual by another individual where the other individual is in a position to confer a benefit on, or deny a benefit to, the individual to whom the solicitation or advance is made, where the individual who makes the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
- (iii) a reprisal or threat of reprisal against an individual for rejecting a sexual solicitation or advance.¹⁵

¹² A. P. Aggarwal, *Sexual Harassment in the Workplace*, 2nd ed. (Toronto: Butterworths, 1992) at 1.

¹³ R.S.B.C. 1996, c. 210, as am. by *Human Rights Code (Supplement)*, R.S.B.C. 1996, c. 210 [hereinafter the *B.C. Code*].

¹⁴ Zinn & Brethour, *The Law of Human Rights in Canada* (Aurora: Canada Law Book Inc., 1998) at 11-4.

¹⁵ *Human Rights Act*, R.S.N.S. 1989, c. 214, as am. S.N. 1991, c. 12. The Ontario *Human Rights Code*, R.S.O. c. H.19, as am. [hereinafter the *Ontario Code*] defines harassment but does not specifically define sexual harassment. However, it provides in s. 7 in the context of employment that every person has a right to be free from sexual solicitation or a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance. The language is very similar to the language used in the Nova Scotia definition of sexual harassment.

The Supreme Court of Canada has defined sexual harassment as:

...[U]nwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences of the victims of the harassment.¹⁶

Recognizing sexual harassment is an abuse of power, the Court continued:

It is,...and has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice; one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.¹⁷

The Supreme Court of Canada has dispensed with the American bifurcation of sexual harassment into the *quid pro quo* variety in which employment related benefits are dependent upon participation in sexual activity, and conduct that creates a "hostile environment" by requiring employees to endure sexual posturing in the employment environment. The Court held that there was no longer any need to characterize harassment as one of these two forms. It held further:

The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity.¹⁸

Sexual harassment includes a wide range of physical and verbal behaviours. It may manifest in such blatant forms as leering, grabbing and even sexual assault, while subtle forms of sexual harassment may include sexual innuendoes and propositions for dates or

¹⁶ Janzen, *supra* note 7 at 1284.

¹⁷ Janzen, *supra* note 7 at 1284.

¹⁸ Janzen, *supra* note 7 at 1283.

sexual favours.¹⁹

In describing sexual harassment, Patricia Hughes has stated:

Sexual harassment thus slips past the boundary between public and private: it takes the private treatment of women (men's personal/collective prerogative to treat women sexually as they (men) define it) into the public to diminish women's increased participation in the world.

Thus a full understanding of sexual harassment requires acknowledging the relationship between gendered workplace conditions and gendered conditions outside the workplace: these are gendered power (sexualized) relations. Sexual harassment, then, is not about "misdirected sexual attention...[but] about power".²⁰

II. HUMAN RIGHTS LEGISLATION

At the core of human rights legislation are fundamental values which reflect Canadian society's views of how individuals are to be treated in certain situations. As such, human rights legislation has a special status in Canada²¹ and protects against discrimination by government, private persons and corporations.²² The Supreme Court of Canada has stated that human rights legislation is "remedial" in nature and should be given a large and liberal interpretation:

Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary...The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for victims of discrimination.²³

The primary purpose of human rights legislation is to restore a victim through the awarding of damages to the position he or she would have been in but for the harassment, and to educate members of society about human rights. Unlike in civil matters where

¹⁹ *Supra* note 12 at 1.

²⁰ P. Hughes, "The Evolving Conceptual Framework of Sexual Harassment" (1995) 3 C.L.E.L.J. 1 at 20 - 21[footnote omitted].

²¹ B. J. Bowlby & J. Wootton Regan, *An Educator's Guide to Human Rights* (Aurora: Canada Law Book Inc., 1998) at 1.

²² Zinn & Brethour, *supra* note 14 at 1-1.

damages are awarded in personal injury cases to plaintiffs who suffer injuries, in human rights cases, the commissions compensate victims with a small measure of recompense for humiliation and loss of dignity caused by sexual harassment.

No court to date has found a school board vicariously liable for sexual misconduct of its employees or directly liable in negligence for negligently hiring or supervising an educator who engaged in such misconduct.²⁴ Thus, if a student is successful in an action for damages for personal injury arising from the sexual misconduct of an educator, the student will have to attempt to enforce the judgment against the educator. This may be difficult if the educator no longer has a source of income or has dissipated most of his or her assets to pay for legal fees to deal with the allegations. As a result, a student may not want to proceed with the matter through the civil court process but may be satisfied with having the matter framed as sexual harassment and processed through the Human Rights Commission with the possibility of receiving some nominal form of compensation for the injury.

The Supreme Court of Canada has held that unless legislation statutorily restricts a corporation's liability for sexual harassment of its employees, it is liable for the harassment, regardless of whether it was caused by supervisory or non-supervisory employees.²⁵ Thus, a school board would be liable for the sexual harassment of its employees and if a plaintiff received a damage award from the Human Rights

²³ *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 as cited in B. Bowly, *supra* note 20 at 1.

²⁴ Given that the Supreme Court of Canada has recently in *B.(P.)(A.) v. Curry*, [1999] S.C.J. No. 35 [hereinafter *Curry*] expanded the doctrine of vicarious liability of employers for sexual assaults committed by their employees, to employers of non-profit residential treatment centers for youth, civil courts might in limited circumstances, find a school board vicariously liable for sexual misconduct of an educator. See also the companion case, *T.(G.) v. Griffiths* [1999], S.C.J. No. 36. See chapter five for a detailed discussion on vicarious liability of a school board.

Commission, he or she would be able to enforce it against the educator and the school board.

The human rights legislation in British Columbia, Ontario and Nova Scotia is generally similar in approach.²⁶ Each province has stipulated in the legislation the grounds upon which discrimination will be prohibited²⁷ as well as the limited exceptions where discrimination is permitted.²⁸

The legislation in British Columbia, Ontario and Nova Scotia contains two provisions that are applicable to allegations of sexual misconduct of an educator. One section is directed towards the provision of services and the other addresses the employment context.

A. SERVICES

The legislation in all three jurisdictions generally provides that no person shall be denied a service on the basis of various grounds of discrimination, one of which is because of a person's sex. The Supreme Court of Canada has held that "services" includes the provision of educational services.²⁹ Thus, students are entitled to access these services free of discrimination.

There are limited exceptions stipulated in the legislation in each jurisdiction. In British Columbia and Nova Scotia, one exception permits discrimination on the basis of sex in the provision of a service if the provider of the service can prove that she or he has a bona

²⁵ A. P. Aggarwal, *supra* note 12 at 196. Liability of employers for the sexual harassment of their employees is discussed further in this chapter.

²⁶ B. J. Bowlby, *supra* note 21 at 2.

²⁷ B. J. Bowlby, *supra* note 21 at 2.

²⁸ B. J. Bowlby, *supra* note 21 at 2.

²⁹ *Ross v. New Brunswick School Act*, [1996] 1 S.C.R. 825 [hereinafter *Ross*].

bona fide and reasonable justification for discriminating against the individual.³⁰ Later in this chapter, a British Columbia case will be discussed wherein the adjudicator rejected arguments of parents of a thirteen-year-old boy who sexually harassed his nanny, that sexual harassment was a bona fide occupational requirement of her job. There would be extremely limited factual situations where an argument could be made that sexual harassment is a bona fide occupational requirement of a job.

In *Ross* the Court considered a case of an educator discriminating against students based on religious grounds by espousing anti-Semitic views when he was off-duty. The Court held that section 5 of the New Brunswick *Human Rights Act*,³¹ which is similar to section 8 of the *B. C. Code* and sections 5 and 6 of the *Nova Scotia Human Rights Act*, guarantees individuals freedom from discrimination in educational services available to the public. Thus based on *Ross*, students attending educational services available to the public are protected from discrimination and harassment, including sexual harassment and could potentially bring a claim against an educator who espoused misogynist views of females when he was off-duty.

B. EMPLOYMENT

In all three jurisdictions there is another provision in the legislation that is relevant to allegations of sexual misconduct of an educator. This provision prohibits discrimination against a person in employment on the basis of his or her sex.³² Of these three jurisdictions, British Columbia is the only jurisdiction that has not specified that sexual harassment is prohibited. However, as noted above, in 1984 British Columbia recognized

³⁰ See s. 8(1) of the *B. C. Code*, *supra* note 13 and s. 6(1)(f)(i) of the *Nova Scotia Human Rights Act*, *supra* note 15.

³¹ R.S.N.B. 1973, C. H-11.

sexual harassment as discrimination on the basis of sex.³³ Under this provision an employee of a school board could file a claim either if there is a poisoned environment or if certain conditions of employment are subject to him/her enduring behaviour of another employee that constituted sexual harassment.

1. DIRECT AND ADVERSE IMPACT DISCRIMINATION

Given that in British Columbia sexual harassment is a form of discrimination, it is important to distinguish between different types of harassment. The Supreme Court of Canada has held that there are two types of discrimination; direct discrimination and indirect or adverse impact discrimination.³⁴ Direct discrimination in employment arises where a rule, standard or action of an employer on its face differentiates on the basis of a prohibited ground of discrimination.³⁵ An employer rule that teachers in a Roman Catholic School must adhere to tenets of the Roman Catholic faith constitutes direct discrimination.³⁶ This type of discrimination is absolutely prohibited unless the legislation provides an exception that permits it.³⁷ In British Columbia where sexual harassment has been determined to be discrimination on the basis of sex, most cases involving sexual harassment are cases of direct discrimination. In all three jurisdictions, the legislation sets out certain exceptions, some of which have been discussed earlier in this chapter.

Adverse impact discrimination includes any action of an employer which is not on its face discriminatory and applies equally to all employees, but has the effect of adversely

³² *B. C. Code*, s. 13, *supra* note 13; *Ontario Code*, s. 5, *supra* note 15; *Nova Scotia Human Rights Act*, s. 5, *supra* note 15.

³³ See note 6.

³⁴ *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.* [1985], 2 S.C.R. 536 at 551.

³⁵ D. K. Lovett, "Duty to Accommodate" *Human Rights in the Workplace* (Vancouver: CLE) 2.1 at 2.1.04.

³⁶ *Caldwell v. Stuart* [1984], 2 S.C.R. 603 as cited by D. K. Lovett, *ibid.*

³⁷ B. J. Bowby, *supra* note 21 at 19.

affecting a group identified by a prohibited ground of discrimination.³⁸ An example of this type of discrimination is the imposition of height and weight requirements for a particular job that results in excluding women and generally small-boned racial groups.³⁹ The imposition of such a requirement will be considered to have infringed the legislation unless it can be brought under a statutory exception.⁴⁰ In cases of adverse impact discrimination, a *bona fide* occupational requirement defence has no application, unless the governing statute provides otherwise.⁴¹

III. LIABILITY FOR SEXUAL HARASSMENT

Personal liability for sexual harassment can be found against the harasser. Although under the common law there is no tort of sexual harassment and "human rights statutes in Canada do not directly or clearly make employers responsible for sexual harassment of their employees",⁴² the Supreme Court of Canada has held that as a result of human rights legislation a corporation is liable for the sexual harassment in the workplace, whether it was caused by supervisory or non-supervisory employees, unless the legislature statutorily restricts this liability.⁴³

The human rights legislation in British Columbia and Nova Scotia has not statutorily restricted the liability of corporations for sexual harassment or discrimination of employees. However, the *Ontario Code* specifically exempts employers from liability in relation to acts of sexual harassment committed by employees or agents.⁴⁴ Nevertheless, the Ontario Human Rights Commission has found employers liable for harassment under

³⁸ B. J. Bowlby, *supra* note 21 at 20.

³⁹ J. Keene, *Human Rights in Ontario*, 2nd ed. (Scarborough: Carswell, 1992) at 12.

⁴⁰ J. Keene, *ibid.* at 12.

⁴¹ D. K. Lovett, *supra* note 35 at 2.1.08. Ontario is the only jurisdiction that includes a *bona fide* occupational requirement defence to adverse impact discrimination in its Code. See s. 11.

⁴² A. P. Aggarwal, *supra* note 12 at 181.

⁴³ Robichaud, *supra* note 7..

the organic theory of corporate liability. Professor Cumming has explained this theory of liability:

...For the organic theory to be operative, the wrongdoer must be part of the "directing mind" of the employer corporate entity, and the offending acts must occur in the course of carrying on the employer's business. As sexual harassment situations commonly involve a supervisor or person otherwise in authority abusing that authority, as in *Robichaud, supra*, the criteria of the organic theory would often be met in any event.

Thus, under the Ontario *Code*, unlike the federal *Act* as interpreted by the Supreme Court of Canada in *Robichaud, supra*, there is not vicarious liability in harassment situations. Therefore, in respect of Ontario human rights law the organic theory of corporate responsibility remains very pertinent in harassment situations.

If it is a situation of sexual harassment by a mere employee (i.e. not someone who is part of the directing mind) of the corporate employer, then by virtue of the excepting provision in subsection 44(1) [now s. 45(1)] vicarious liability does not attach to the employer. However, if the employee sexually harassing is part of the directing mind of the employer, then while subsection 44(1) does not apply (i.e. there is no deeming of the discriminatory act of the employee to be the act of the employer) there can be personal liability on the part of the employer on the theory as advanced...

Why did the Ontario legislature except "harassment" from the operation of the new vicarious liability provision - s. 44(1)? [now s. 45(1)] One can only speculate. Perhaps the legislature was of the view that vicarious liability for non-harassment discrimination is fair, because it typically is seen through business decisions and practices that ought to be known and guarded against: for example, hiring practices, membership rules, and methods of providing services. However, harassment is less predictable in respect of specific employees and preventable in the relative sense. Perhaps the concern is that an employer can and should always be familiar with its business practices, for example, the application forms prepared by its staff, but even with educational and preventive programs and effective supervision, may encounter situations of sexual or racial harassment it cannot reasonably know about until an aggrieved employee advises the employer. When the employer is made aware of harassment reasonable steps must be taken promptly to eradicate it.⁴⁵

⁴⁴ s. 45 (1); A. P. Aggarwal, *supra* note 12 at 196.

⁴⁵ *Persaud v. Consumer Distributing Ltd.* (1990), 14 C.H.R.R. D/23 (Ont. Bd. Inq.) (Cumming) at paras. 43, 45 and 46.

A school board in British Columbia and Nova Scotia may be held liable for the sexual harassment of an employee based on the *Robichaud* principle. In *Robichaud*, the Supreme Court of Canada rejected arguments that employer liability should be limited through the application of fault-oriented theories of employer liability developed in the context of criminal or quasi-criminal conduct or through the doctrine or vicarious liability that has developed in tort.⁴⁶ The Court also held that employer liability was not restricted to situations where an employee was acting in the course or scope of one's duties.⁴⁷ The Court stated:

It is clear to me that the remedial objectives of the *Act* would be stultified if the above remedies were not available as against the employer...Who but the employer could order reinstatement? This is true as well of para. c which provides for compensation for lost wages and expenses. Indeed, if the *Act* is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy - a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the *Acts* carefully crafted remedies effective. It indicates that the intention of the employer is irrelevant at least for purposes of section 41(2) [the remedy provision]. Indeed, it is significant that section 41(3) provides for additional remedies in circumstances where the discrimination was reckless or wilful (i.e. intentional). In short, I have no doubt that if the *Act* is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.⁴⁸

However, in Ontario in order for the school board to be liable, the employee who engaged in sexual harassment must be part of the "directing mind" of the school board. If so, the act of the employee becomes the act of the school board and the board will be liable even in situations where it did not condone the harassment and has addressed the

⁴⁶ *Guzman v. Dr. T.* (1997), 27 C.H.R.R. D/349 (B.C.C.H.R.) (Attafuah) at D/360 [hereinafter *Guzman*].

⁴⁷ *Ibid.* at D/360.

⁴⁸ *Robichaud*, *supra* note 7 at D/4332, para. 33942.

harassment immediately upon learning of it.⁴⁹ The reasonableness of the school board's actions will be a factor when the remedy is considered.⁵⁰

A school board may be legally responsible for discriminatory acts of individual trustees if the acts are related to their position and connected to the educational environment.⁵¹

Thus, if a trustee sexually harassed a school secretary or educator the school board may be held liable for this misconduct.⁵²

Under human rights legislation in the three jurisdictions a school board has an obligation to provide students and employees with a harassment free environment. An overlapping obligation to provide employees with a harassment free environment arises from most collective agreements. Given that a school board is a statutory corporation and acts through its employees, responsibility arises when an employee with supervisory or management authority becomes or ought to reasonably be aware that a student or an employee is being sexually harassed.⁵³

When the school board's obligation has been breached, an employee covered by a collective agreement has, in most instances, two avenues to pursue a claim of sexual harassment. An employee can either pursue the claim through the grievance procedure under the collective agreement and/or through the Human Rights Commission by filing a complaint. Currently, the law is fairly clear that an employee cannot be required to elect one process over the other and is free to pursue both avenues.⁵⁴ However, policies of some commissions, such as the Nova Scotia Human Rights Commission, may require a

⁴⁹ *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 as cited by B. J. Bowlby, *supra* note 21 at 65.

⁵⁰ B. J. Bowlby, *supra* note 21 at 65.

⁵¹ B. J. Bowlby, *supra* note 21 at 58.

⁵² B. J. Bowlby, *supra* note 21 at 59.

⁵³ B. J. Bowlby, *supra* note 21 page 52.

complainant to exhaust all other avenues of resolving the matter prior to a complaint being filed with the commission.

British Columbia is the only province that has stipulated in the legislation that the Human Rights Commission has jurisdiction to defer or dismiss all or part of a complaint where "the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding".⁵⁵ For purposes of this section, "another proceeding" may include employer policies and procedures designed to deal with issues of discrimination in the workplace that provide appropriate remedial relief to a complainant; a grievance arbitration under a collective agreement or a professional disciplinary proceeding.⁵⁶ Despite section 25, there is a risk to a school board that it could be exposed to two different remedies.

Even though the legislation in Ontario and Nova Scotia does not have a provision allowing the commission to defer or dismiss the substance of or part of a complaint that has been dealt with in another proceeding, a party could bring an application and argue that the board did not have jurisdiction to hear the matter on the basis of the doctrine of *res judicata*. However, it appears that in Ontario this argument has not been very successful.

Although there are very few cases of sexual harassment against educators and the following comments must be treated with caution, it appears that in the few cases that have been reported, educators pursue their claims against another educator through the

⁵⁴ A. Zwack, "Some Issues in the Interaction of Human Rights and Labour Law Processes" (Human rights '97, Vancouver, Oct. 1997) (Vancouver: CLE) 1 at 2. See also J. Keene, *Human Rights in Ontario*, *supra* note 39 at 278 - 281.

⁵⁵ S. 25 of the *B. C. Code*.

⁵⁶ D. K. Lovett, "Pre-Hearing Determinations under B.C. Human Rights Legislation - Putting your Best Foot Forward: (1997) 55 *The Advocate* 217 at 222.

grievance process rather than through the Human Rights Commission.⁵⁷ Similarly, students who have alleged that an educator has sexually harassed them appear to make the complaint to the school board rather than file a complaint with the Human Rights Commissions.⁵⁸

There are several reasons why educators and students may not file complaints with the Human Rights Commissions, including the length of time it takes to deal with the complaints. A complaint made to the school by a student or to the educator's union will likely be proceeded with more quickly through the processes used by the schools or the arbitrators than through the Human Rights Commission.⁵⁹ Further, the student or educator may not be concerned with obtaining a monetary damage award against the educator but rather would like to simply have the complaint dealt with and have some form of discipline imposed against the educator. In addition, in the past Human Rights Commissions have had a low profile in the education setting with educators viewing it as a foreign, unfamiliar process. However, it appears that in recent years the profile of the commissions has been raised which is evidenced by some of the complaints being filed by students and other educators. Another possible reason for few human rights complaints made against educators is the mediation focus of human rights commissions.⁶⁰ Victims of sexual harassment may not want to be part of a mediation process.

⁵⁷ The case of Dr. Tindill, *infra* note 83.

⁵⁸ *Kings County District School Board and Nova Scotia Teachers' Union* (1995) 46 L.A.C. (4th) 289 (N.S. Arb.) [hereinafter *Kings County*] *infra* note 83 and *School District No. 36 (Abbotsford) v. The Abbotsford Teachers' Association*, (14 February 1995) (B.C. Arb.) [hereinafter *Abbotsford School District*], *infra* note 83.

⁵⁹ See *Hall v. A-1 Collision & Auto Service* (1992), 17 C.H.R.R. D/204 (O.H.R.C.) wherein the respondent brought an application to stay proceedings because of excessive delay. From the time the complaint was filed, it took the Commission six years to appoint a board of inquiry. His application was dismissed because the respondent did not show actual prejudice to himself as a result of the delay.

⁶⁰ *Supra* note 11 at 10 wherein it is noted that intervention and mediation are two forms of alternate dispute resolution that the Nova Scotia Human Rights Commission practices.

IV. DECISIONS OF HUMAN RIGHTS COMMISSIONS

There are very few decisions of alleged sexual harassment involving educators at the elementary or secondary levels. However, the principles established in cases involving educators at the college and/or university level, as well as other cases, are useful in determining what conduct does and does not constitute sexual harassment. In addition, these cases are instructive in that they provide some guidance as to the damages that are ordered.

In a case of sexual harassment, the complainant must prove on a balance of probabilities that there was a contravention of the legislation. This involves proving that the alleged conduct by the respondent occurred and that it constituted sexual harassment in the circumstances. Specifically, the complainant must prove the conduct was sexual, unwanted and either detrimentally affected the work environment or led to adverse job-related consequences. If the complainant leads evidence satisfying these requirements and establishes a *prima facie* case, then the respondent has an evidentiary burden to respond with some evidence that the acts did not occur or that they did not constitute sexual harassment or that the respondent's actions were justified under one of the exceptions listed under the human rights statutes.⁶¹ According to Aggarwal it seems that this last defence is not available to a respondent in respect of a complaint of sexual harassment because the councils and boards have held that there is no justification for sexual harassment in the workplace.⁶²

⁶¹ *Cox v. Jagbrite Inc.* (1983), 3 C.H.R.R. D/609 (Ont. Bd. Inq.) (Cumming) [hereinafter *Cox*]; *Zarankin*, *supra* note 6 at para. 19221. See also *McLellan v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 (N.S. Bd. Inq.) (Bright). See also A. Aggarwal, *supra* note 12 at 130 - 137.

⁶² A. P. Aggarwal, *supra* note 12 at 137.

A. Cases of Sexual Harassment involving Non-Educator Complainants

In the reported cases⁶³ from 1980 to 1998, there are eighty-one cases from British Columbia, forty-five cases from Ontario and five cases from Nova Scotia that deal with sexual harassment.⁶⁴ There is only one reported case involving an educator at the elementary or secondary level. Sexual harassment was proven in eighty-four percent of cases from British Columbia, seventy-eight percent of cases from Ontario and one hundred percent of cases from Nova Scotia.

In Ontario and Nova Scotia all cases involved sexual harassment by a male harasser against a female victim. In British Columbia all cases, with the exception of two, involved sexual harassment by a male harasser against a female victim. In *Van-Berkel v. M.P.I. Security Ltd.*⁶⁵ a female employee alleged that her female boss sexually harassed her and in *Cassidy v. Sanchez*⁶⁶ a male trainee short-order cook alleged that his male employer touched him and made sexual advances to him.

In all three jurisdictions women complained of similar behaviour that the councils or boards determined was sexual harassment. It has been held that the human rights legislation proscribes conduct as blatant and offensive as that which might constitute a trespass to or an assault of the person, such as repeated grabbing and touching of a complainant's body,⁶⁷ forced intercourse⁶⁸ and as subtle as implicitly suggestive

⁶³ If there was a decision reporting a preliminary motion or an appeal of a decision of a board of inquiry or council, it was only counted as one case.

⁶⁴ Given that there were so few cases reported from Nova Scotia, an examination of all cases from 1970 to February 1999 on file at the Nova Scotia Human Rights Commission were examined. During this period of time there were a total of seven cases involving sexual harassment allegations that were heard by a board of inquiry. It appears that there are only two cases that have not been reported from Nova Scotia.

⁶⁵ (1997), 28 C.H.R.R. D/504 (B.C.H.R.C.) (Atafuah).

⁶⁶ (1988), 9 C.H.R.R. D/5278 (B.C.H.R.C.) (Wilson).

⁶⁷ *A v. Ruby's Food Services Ltd.* (1992), 16 C.H.R.R. D/394 (Ont. Bd. Inq.) (Gorsky); *Bonthoux v. L.S.Y. Holdings Ltd.* (1992), 16 C.H.R.R. D/327 (B.C.H.R.C.) (Patch); *Bruce v. McGuire Truck Shop* (1993), 20 C.H.R.R. D/145 (Ont. Bd. Inq.) (Mendes); *Burton v. Chalifour Bros. Construction Ltd.* (1994), 21 C.H.R.R. D/501 (B.C.C.H.R.) (Williamson); *Carignan v. Mastercraft Publications Ltd.* (1984), 5 C.H.R.R.

remarks,⁶⁹ including comments that denigrate a woman's sexuality or vexatious conduct which is directed at a woman because of her sex.⁷⁰ A complaint may be brought under the legislation if an employer dismisses or refuses to hire a complainant as a result of her failure to comply with sexual advances⁷¹ or if an employer, by sexually harassing his

D/2282 (B.C.Bd. Inq.) (Rankin); *Chand v. Vig* (1995), 28 C.H.R.R. D/463 (B.C.C.H.R.) (Williamson) [hereinafter *Chand*]; *Cox, supra* note 61; *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Ont. Bd. Inq.) (Bayefsky); *Darke v. Talos Enterprises Ltd.* (1987), 8 C.H.R.R. D/4152 (B.C.H.R.C.) (Verbrugge); *Fields v. Willie's Rendezvous Inc.* (1984), 6 C.H.R.R. D/2550 rev'd (1985), 6 C.H.R.R. D/3074 (B.C.C.H.R.) (Powell); *Graesser v. Porto* (1983), 4 C.H.R.R. D/1569 (Ont. Bd. Inq.) (Zemans); *Green v. 709637 Ontario Inc.* (1987), 9 C.H.R.R. D/4749 (Ont. Bd. Inq.) (Plaut); *Hall v. Sonap Canada* (1989), 10 C.H.R.R. D/6126 (Ont. Bd. Inq.) (Plaut); *Hong v. Kandola* (1987), 9 C.H.R.R. D/4441 (B.C.H.R.C.) (Joe); *Hughes v. Dollar Snack Bar* (1981), 3 C.H.R.R. D/1014 (Ont. Bd. Inq.) (Kerr); *Huhn v. Hunter's Haus of Burgers* (1987), 8 C.H.R.R. D/4157 (B.C.C.H.R.) (Wilson) [hereinafter *Hunter's Haus of Burgers*]; *Jakob v. Mirkovich* (1992), 16 C.H.R.R. D/386 (B.C.C.H.R.) (Patch); *Jalbert v. Moore* (1996), 28 C.H.R.R. D/349 (B.C.C.H.R.) (Vallance) [hereinafter *Jalbert*]; *Joss v. T. & C. Gelati Ltd.* (1986), 8 C.H.R.R. D/3941 (B.C.C.H.R.) (Edgett) [hereinafter *T. & C. Gelati Ltd.*]; *Kennedy v. Vulcan Lumber Building Supplies Ltd.* (1990), 14 C.H.R.R. D/252 (B.C.H.R.C.) (Wilson); *Lampman v. Photoflair Ltd.* (1992), 18 C.H.R.R. D/196 (Ont. Bd. Inq.) (McCamus); *Langevin v. Air Tex Industry Ltd.* (1984), 6 C.H.R.R. D/2552 (B.C.C.H.R.) (Powell); *MacKay v. Ideal Computer System* (1987), 8 C.H.R.R. D/4339 (N.S. Bd. Inq.) (MacKinnon), rev'd (*sub nom. Mehta v. MacKay*) (26 November 1990), SCA No.01842 (N.S.C.A.); *MacLaren v. Pinocchio's on Third and Columbia* (1989), 10 C.H.R.R. D/6437 (B.C.H.R.C.) (Wilson); *McGregor v. McGavin Foods Ltd.* (1990), 12 C.H.R.R. D/15 (B.C.C.H.R.) (Joe); *McPherson v. "Mary's Donuts"* (1982), 3 C.H.R.R. D/961 (Ont. Bd. Inq.) (Cumming) [hereinafter *"Mary's Donuts"*]; *Miller v. Sam's Pizza House* (1995), 2 C.H.R.R. D/433 (N.S. Bd. Inq.) (Meltzer); *Noffke v. McClaskin Hot House* (1989), 11 C.H.R.R. D/407 (Ont. Bd. Inq.) (Zemans); *Olarte v. Commodore Business Machines Ltd.*, (1983) 4 C.H.R.R. D/1705 (Ont. Bd. Inq.) (Cumming), aff'd (*sub nom. Commodore Business Machines Ltd. v. Ont. Minister of Labour*) (1985), 6 C.H.R.R. D/2833 (Ont. S.C.) [hereinafter *Commodore Business Machines Ltd.*]; *Penner v. Gabriele* (1987), 8 C.H.R.R. D/4126 (B.C.C.H.R.) (Joe); *Philpot v. The Royal Canadian Legion* (1987), 8 C.H.R.R. D/4308 (B.C.C.H.R.) (Joe); *Sansome v. Dodd* (1991), 15 C.H.R.R. D/393 (B.C.C.H.R.) (Barr); *Sharp v. Seasons Restaurant* (1987), 8 C.H.R.R. D/4133 (Ont. Bd. Inq.) (Springdale); *Teichroeb v. Marciel* (1987), 8 C.H.R.R. D/4306 (B.C.C.H.R.) (Joe); *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.) (Cumming) [hereinafter *Torres*]; *Yoshell v. Red Baron Restaurant Ltd.* (1987), 8 C.H.R.R. D/4250 (B.C.C.H.R.) (Edgett); *Wales-Callaghan v. C.N. Office Cleaning Ltd.* (1993), 26 C.H.R.R. D/64 (Ont. Bd. Inq.) (Carter) and *Zarankin, supra* note 6.

⁶⁸ *Cajee v. St. Leonard's Youth and Family Services Society* (1997), 28 C.H.R.R. D/284 (B.C.C.H.R.) (Williamson); *Chand, ibid.*

⁶⁹ *Anderson v. Guyett* (1990), 11 C.H.R.R. D/415 (B.C.C.H.R.) (Barr); *Bell, supra* note 6; *Korda v. P.K. and J.P. Enterprises Ltd.* (1990), 12 C.H.R.R. D/201 (B.C.H.R.C.) (Barr); *Mitchell v. Traveller Inn (Sudbury) Ltd.* (1981), 2 C.H.R.R. D/590 (Ont. Bd. Inq.) (Kerr) [hereinafter *Mitchell*].

⁷⁰ *Egolf v. Watson* (1995), 23 C.H.R.R. D/4 (B.C.C.H.R.) (Affafuah); *Lobzun v. Dover Arms Neighbourhood Public House Ltd.* (1996), 25 C.H.R.R. D/284 (B.C.C.H.R.) (Attafuah); *Shaw v. Levac Supplies Ltd.* (1991), 14 C.H.R.R. D/36 (Ont. Bd. Inq.) (Hubbard) [hereinafter *Shaw*]. In this case a co-worker had harassed a woman for a period of over fourteen years. In determining whether such comments as "waddle", "waddle", or "swish", "swish" when the complainant walked by were sexual in nature, the adjudicator held that negative and demeaning comments directed at a person's gender can constitute sexual harassment. The adjudicator found that the purpose of these comments was to indicate to the complainant that she was physically unattractive and sexually undesirable.

⁷¹ *Bishop v. Hardy* (1983), 8 C.H.R.R. D/3868 (Ont. Bd. Inq.) (Soberman); *Commodore Business Machines Ltd., supra* note 67; *Giouvanoudis v. Golden Fleece Restaurant* (1984), 5 C.H.R.R. D/1967 (Ont. Bd. Inq.)

employees, imposes discriminatory terms or conditions of employment.⁷² A complaint can also be brought if a co-worker engages in sexually harassing behaviour.⁷³ Complaints brought by women are usually against her employer, a person in a position to confer a benefit who is usually her supervisor, a co-worker and a third party.⁷⁴

The range of general damages in these cases is a low of \$100 to a high of \$20,000. In *Torres*, Professor Cumming set out the following factors that are considered in awarding general damages in sexual harassment cases:

- i) The nature of the harassment, that is, was it simply verbal or was it physical as well?
- ii) The degree of aggressiveness and physical contact in the harassment;
- iii) The ongoing nature, that is, the time period of the harassment;
- iv) The frequency of the harassment;
- v) The age of the victim;
- vi) The vulnerability of the victim; and
- vii) The psychological impact of the harassment upon the victim.⁷⁵

In all three jurisdictions, the human rights commissions and boards have wide powers to actively prevent and correct discriminatory behaviour,⁷⁶ including the power to order damages and also to make non-monetary awards. In awarding damages in discrimination

(Cumming); *Graham v. Sunrise Poultry Processors Ltd.* (1988), 9 C.H.R.R. D/4771 (B.C.C.H.R.) (Barr); *Hunter's Haus of Burgers*, *supra* note 67; *Johnson v. Dell Canada Marketing Corporation* (1988), 10 C.H.R.R. D/5425 (B.C.C.H.R.) (Barr); "*Mary's Donuts*" *supra* note 67; *Mitchell*, *supra* note 69; *Piazza v. Airport Taxi Cab (Malton) Assoc.* (1985), 7 C.H.R.R. D/3196 (Ont. Bd. Inq.) (Zemans); *Robinson v. The Company Farm Ltd.* (1984), 5 C.H.R.R. D/2243 (Ont. Bd. Inq.) (Cumming); *Waroway v. Joan & Brian's Upholstering* (1992), 16 C.H.R.R. D/311 (Ont. Bd. Inq.) (Bayetsky).

⁷² *Bell*, *supra* note 6; *Coutroubis v. Sklavos Printing* (1981), 2 C.H.R.R. D/457 (Ont. Bd. Inq.) (Ratushny); *Cox*, *supra* note 61; *T. & C. Gelati Ltd.*, *supra* note 67; *Webb v. Cyprus Pizza* (1985), 6 C.H.R.R. D/2794 (B.C.C.H.R.) (Wilson).

⁷³ *Shaw*, *supra* note 70.

⁷⁴ *Jalbert*, *supra* note 67.

⁷⁵ *Torres*, *supra* note 67 at para.7758.

⁷⁶ *Zinn & Brethour*, *supra* note 14 at 16-1.

cases the purpose is to prevent further discrimination rather than to punish the wrongdoer.⁷⁷ In addition, tribunals will also try to place the complainant in the position he or she would have been had the discriminatory conduct not occurred.⁷⁸

Ontario is the only jurisdiction which has a legislative cap on the amount of damages that may be awarded for hurt feelings and mental anguish.⁷⁹ Pursuant to section 41(10)(b) of the *Human Rights Code*, general damages in Ontario are capped at \$10,000. In order for a complainant in Ontario to be awarded general damages, there must be proof that the respondent acted either recklessly or wilfully.⁸⁰

All jurisdictions have the power to award various types of special damages, including wage loss. Tribunals are divided with respect to awarding punitive damages.⁸¹ In the reported cases, it appears that only Ontario has addressed this issue. Professor Cumming in *Torres* stated that while punitive damages should generally not be awarded, it was not "a proper interpretation of the *Code* to say that they never can be awarded".⁸²

B. Cases involving Educators

There are very few cases involving allegations of sexual harassment against educators that come before the various human rights commissions. However, this does not mean that educators do not engage in sexual harassment as there certainly are cases of educators engaging in this type of misconduct⁸³ but some victims choose to deal with the

⁷⁷ Zinn & Brethour, *supra* note 14 at 16-1.

⁷⁸ Zinn & Brethour, *supra* note 14 at 16-1.

⁷⁹ Zinn & Brethour, *supra* note 14 at 16-27.

⁸⁰ Zinn & Brethour, *supra* note 14 at 16-27.

⁸¹ A. P. Aggarwal, *supra* note 12 at 260.

⁸² *Torres*, *supra* note 67 at para. 7729.

⁸³ See the case of Dr. Tindill that came before the British Columbia College of Teachers; B. C., *British Columbia College of Teachers: Report to Members*, 8(4) (Vancouver: The British Columbia College of Teachers, 1997); See also *Kings County*, *supra* note 58 and *Abbotsford School District*, *supra* note 58.

problem in another forum. Below is a discussion of cases involving educators that have come before human rights commissions.

An important case for educators, especially for principals who have young teachers on staff is *Dupuis v. British Columbia (Ministry of Forests)*.⁸⁴ In this case, the complainant was a twenty-six-year-old female graduate student. The respondent, Seip, was her thesis supervisor who had influence in funding decisions that could affect her thesis opportunities. The complainant accepted Seip's offer of riding with him to a research project located outside of Vancouver. The journey required them to stay overnight in a hotel on two nights.

On the first night, Seip booked only one motel room with two beds. Although the complainant rejected his initial request that they should have sexual intercourse, she did not object when Seip made the request during the night. On subsequent occasions, when Seip suggested that they continue to have sexual intercourse, the complainant did not overtly object. However, on one occasion she removed his arm that he put around her and on other occasions she became hostile and angry towards Seip.

The adjudicator found this to be a difficult case as it explored the boundary between permissible social conduct and sexual harassment. The council noted that human rights legislation does not prohibit consensual social and sexual interactions between managers and employees. However, as a result of the power imbalance that exists between managers and employees, managers must be exceedingly careful to ensure that they are not taking advantage of their position of authority to import sexual requirements into the job. The manager has the burden of showing that sexual conduct is welcome and continues to be welcome by the employee.

It was held that the fact that the complainant voluntarily engaged in sexual intercourse is not determinative of whether the sexual conduct was unwelcome by the complainant. Rather, voluntariness is one factor to consider in determining whether the conduct was welcome. The council held that a complainant does not have to confront the harasser directly so long as her conduct demonstrates explicitly or implicitly that the conduct is unwelcome. Body language can suffice to demonstrate objection. In looking at all the circumstances in this case, the council concluded that it is more likely than not, that the complainant did not welcome the sexual conduct.

The second issue considered was whether Seip should have known that the conduct was unwelcome. The council states that although the perception of the harasser is relevant in determining whether the conduct was unwelcome, the test is whether a reasonable person⁸⁵ would find that the conduct in these circumstances was unwelcome. While the council does not inform us as to who the reasonable person is, it does state that what is reasonable depends on the circumstances, including the nature of the conduct and the relationship. The council finds that there were circumstances from which Seip should have concluded that the complainant did not welcome sexual contact with him:

Dupuis may have welcomed or been ambivalent about Seip's initial sexual advances. That does not mean that any subsequent sexual conduct was acceptable. Dupuis drew a line at sexual intercourse. In my view what followed that night and subsequently in the Queen Charlottes was sexual harassment.⁸⁶

In considering damages, counsel for the complainant urged the council to award damages

⁸⁴ (1994), 20 C.H.R.R. D/87 (B.C.C.H.R.) (Patch) [hereinafter *Dupuis*].

⁸⁵ The reasonable person standard has been criticized by Kathleen Gullivan in "Sexual Harassment after *Janzen v. Platy: The Transformative Possibilities*" (1991) 49 U. of T. Faculty of L.R. 27. She states that the Supreme Court of Canada did not explain the standard by which "unwelcomeness" will be established. She argues that this leaves open the door for the reasonable person, which may reflect the male experience. Her suggestion is that the standard of the reasonable victim should be applied.

⁸⁶ *Supra* note 84 at para. 65.

to provide the complainant with full compensation and to do this she argued that the council should consider awards granted in civil cases for damages for sexual assault. The council noted that human rights tribunals do not ordinarily give such high awards as compared with awards in civil cases. It was noted that by eliminating the \$2,000 ceiling in the legislation,⁸⁷ the legislature wanted to ensure that full compensation for injury to dignity, feelings and self-respect were awarded. The council stated:

The right not to be discriminated against in employment is not a civil cause of action: *Seneca College of Applied Arts and Technology v. Bhaduria* (1981), 2 C.H.R.R. D/468 (S.C.C.) The remedies are statutory: *Robichaud, supra*. Though the facts that form the basis of a sexual assault action may also be the basis of a sexual discrimination complaint, the elements required to establish a sexual assault differ from those required to prove sexual harassment. The defences available and the principles of liability may also differ. In my view, in the interests of consistency, it is generally more appropriate to consider damages in other human rights cases than to consider damages in sexual assault cases.⁸⁸

In awarding damages of \$5,000 for injury to dignity, the council held that the harassment was at the higher end of the spectrum. The complainant was also awarded \$14,976 as compensation for lost wages.

Although human rights legislation does not prohibit consensual social and sexual interactions between managers and employees, any principal who engages in sexual relations with teachers, especially those who are young, must be exceedingly careful. A young teacher may find it difficult because of inexperience and the power imbalance to tell the principal that he or she is not interested in having a relationship with his or her boss. The teacher, like *Dupuis*, may enter into the relationship, but may be ambivalent about it and may use subtle body language to try to communicate to the principal that the

⁸⁷ On July 13, 1992, the *Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43 was proclaimed. This Act eliminated the \$2000 ceiling on general damage awards.

⁸⁸ *Supra* note 84 at para. 89.

conduct is unwelcome. If the principal fails to read the body language and continues with the conduct, he or she could be faced with a sexual harassment complaint.

C. A Case involving a Non-Educator that has Implications for Educators

In *Guzman* the parents of a thirteen-year-old boy were found liable for their son's sexual harassment of his nanny. Although the adjudicator rejected the argument of counsel for the parents that being subjected to sexual harassment by the children in her care is a *bona fide* occupational requirement for a nanny, he did indicate that in some very limited circumstances sexual harassment may be a *bona fide* occupational requirement of some jobs for which an employer may not be liable. For example, an employer may not be liable for the inappropriate and harassing behaviour of children who are being treated in a residential setting and which behaviour is directed at the group home workers.

A similar argument could also be made with respect to a special education teacher who deals with students who have severe behaviour or emotional problems. These students are often in a specialized programme because they have behaviour problems. Some of their behaviours could be considered to constitute sexual harassment (i.e. gender-based swearing). However, even with these types of students there would be a point at which some of the behaviours of these students had gone beyond a *bona fide* occupational requirement such as if a student inappropriately touched or sexually assaulted a teacher. If the teacher discussed such behaviours with a union representative and a school board official and no effective steps were taken to rectify the situation, the union and school board could be found to be liable.⁸⁹

⁸⁹ *Renaud v. Central Okanagan School District 23* (1992), 71 B.C.L.R. (2d) 45 (sub nom. *Central Okanagan School District 23 v. Renaud*) [1992], 2 S.C.R. 970 [hereinafter *Renaud*]. In *Renaud*, the union was found to be liable with the school district for adverse impact discrimination based on the complainant's religion and for failure to accommodate him. It was held further that a union that is liable as

The adjudicator then went on to consider the issue of liability of the parents for the behaviour of their son that constituted sexual harassment. In applying the interpretive principles set out in *Robichaud* the adjudicator held that the parents were liable because they had knowledge of their son's harassment and they failed to take adequate steps to stop the harassment. Based on this case and other tribunal decisions⁹⁰ a school board could be liable for acts of sexual harassment committed by non-employees, such as volunteers, if the school board is aware of the harassment but does not take adequate steps to ensure a harassment-free environment.

D. Cases where Sexual Harassment was not found by the Councils

1. Cases involving Non-Educators

In some cases, the councils or boards found that the complainants had not proven the allegations of sexual harassment, on the basis that the complainants lacked credibility. In other cases, the councils or boards found that a complaint of sexual harassment cannot be based on vulgar comments, such as the use of "pubic hair" or "crater face" to describe individuals, when these comments were not directed at the complainant or were not gender-related.⁹¹

Offensive comments made about other women could create a poisoned environment for a complainant, but one offensive comment about females is of insufficient severity to constitute harassment.⁹² In a workplace where there is a general atmosphere of crude and

codiscriminator, shares a joint responsibility with the employer to seek to accommodate the employee and both are liable if nothing is done.

⁹⁰ *Jalbert*, *supra* note 67.

⁹¹ *Hornsby v. Paul's Restaurant Ltd.* (1996), 24 C.H.R.R. D/516 (B.C.C.H.R.) (Finnegan).

⁹² *Ibid.* para. 28. Also see *Switzer v. Jim Pattison Industries Ltd.* (1996), 26 C.H.R.R. D/449 (B.C.C.H.R.) (Williamson). In *Watt v. Regional Municipality of Niagara* (1984), 5 C.H.R.R. D/2453 (Ont. Bd. Inq.) (McCamus) the complainant's application was dismissed because she failed to meet the burden of establishing that the gender based comments occurred with a combination of frequency and offensiveness which warrants the inference that the exposure to such conduct was a discriminatory condition of

sexually-oriented banter, sexual harassment will not be established if a complainant merely showed that the workplace culture was distasteful but fails to prove that the discomfort was related to his or her gender⁹³ or that the sexual atmosphere of teasing and joking was generally accepted and participated in by the employees but the complainant did not directly express her feeling that she did not wish to participate in it.⁹⁴ Some gestures or swear words of a sexual content may not constitute sexual harassment if the comments are made to both male and females.⁹⁵ In British Columbia it has been held that it is not sexual harassment if the complainant proves that the alleged harasser abused his power with both males and females.⁹⁶

2. A Case involving an Educator

In *MacKenzie v. School District No. 48 (Howe Sound)*⁹⁷ a female teacher sought an order quashing a decision of the British Columbia Council of Human Rights to discontinue her complaint. In addition, she was seeking an order that the matter be referred back to the council for reconsideration with a recommendation that the hearing be reconvened.

The teacher taught at an elementary school and began a personal relationship with Alex Marshall, the principal of the school. She alleged that she was discriminated against on the basis of sex and that the school board denied her teaching positions as a consequence of her personal relationship with Mr. Marshall. It was also alleged that while she was

employment. Also in *Cameron v. Giorgio Lim Restaurant* (1993), 21 C.H.R.R. D/79 (N.S. Bd. Inq.) (Girard) it was held that the complainant was sexually harassed when a co-worker grabbed her breast, but the occasional reference to a female member of the staff as a "stupid bitch" while offensive, was not sufficient in itself to constitute a poisoned work environment because of sex-based harassment.

⁹³ *Switzer, ibid.* at para. 99.

⁹⁴ *Aragona v. Elegant Lamp Co. Ltd.* (1982), 3 C.H.R.R. D/1109 (Ont. Bd. Inq.) (Ratushny).

⁹⁵ *Bailey v. Village of Anmore* (1994), 19 C.H.R.R. D/369 (B.C.C.H.R.) (Patch) at para. 47.

⁹⁶ *Ibid.* at para. 50.

⁹⁷ (27 September 1997), Vancouver A971466 (B.C.S.C.).

employed at the elementary school, she was subjected to behaviour by Mr. Marshall that constituted sexual harassment.

In dismissing her action, the British Columbia Supreme Court held that it was clear from the evidence that was before the human rights council that the relationship was entirely consensual. One of the key pieces of evidence was a letter the complainant wrote to Mr. Marshall expressing her love for him, that she was using sex to lure him and that she was recognizing in this note that Mr. Marshall did not reciprocate her feelings. The Court held that the reasons for the petitioner's failure to obtain employment were that she lacked seniority or that she was not the best candidate for positions in the district.

V. CONCLUSION

Consistent with other forms of sexual misconduct, males are largely the aggressors and females are the victims in sexual harassment cases. In the sexual harassment cases discussed, males were harassers in ninety-nine percent of cases and the victims are females in ninety-nine percent of cases. It appears from the reported cases that only British Columbia has considered cases of an individual harassing a victim of the same sex. In the two cases that were considered, the adjudicators found that the complainant was sexually harassed. The number of cases is far too limited to make any conclusions as to whether adjudicators treat all cases in a similar fashion regardless of whether the victim is the same or the opposite gender to the harasser.

Although sexual harassment was recognized as a form of discrimination at around the same time that child sexual abuse entered public discourse, cases of sexual harassment against educators are relatively uncommon in comparison to cases of educators who are charged with sexual offences. Educators do commit sexual harassment against students

as well as other educators, but victims appear to deal with the matter in a forum other than by making a complaint to the provincial Human Rights Commissions.

Since there is no tort of sexual harassment or sex discrimination, victims cannot resort to the courts for a remedy. When the victims are educators they either make a complaint to the disciplinary body for teachers or if they are covered by a collective agreement, they may file a grievance. Students who have been sexually harassed by an educator appear to make a complaint to the principal and have the complaint dealt with internally rather than externally.

Victims may prefer to deal with the matter outside of the provincial Human Rights Commissions because of the inordinate amount of time it takes for these institutions to deal with the matter. Further, victims may be more interested in having the harasser disciplined than they are in seeking any other remedy, such as a monetary remedy.

In those few cases where complainants did resort to the commissions for a remedy, the human rights process is fair to both the alleged harasser and the complainant. Since the focus is on whether the conduct occurred and whether the complainant was harmed and experienced a loss of dignity, both are key participants in the proceedings. In addition, the alleged harasser is provided with a full complement of the elements of natural justice.

This thesis examined the development of Canadian society's awareness of the problem of child sexual abuse as well as changes in the legal system to the prosecution of child sexual offence cases and then situated the problem within the educational system in three jurisdictions; British Columbia, Nova Scotia and Ontario. Further it examined to what extent the Canadian legal system provides a panoply of remedies for victims of sexual misconduct by educators. In examining the various remedies available to victims, an evaluation was made from both the perspectives of the accused educator and the victim as to the efficacy of the various institutions that provide the remedies. In evaluating the efficacy of the various institutions, one of the major factors analyzed is the objectivity and impartiality of the various decision-makers and whether they treat same sex abuse cases involving educators, the same as opposite sex abuse cases. Finally, it also examined whether it is fair that educators who engage in sexual misconduct should be faced with multiple proceedings before many different institutions.

Over the past couple of decades the increase in the prosecution of sexual offence cases against educators has been a result of two factors. First, the division between public or state regulated and private activities has shifted. Sexual abuse, rape, and child abuse, previously hidden in the private sphere, entered the public discourse in a visible fashion,¹ resulting in raising the awareness of the problem of child sexual abuse. Recognition of the problem within the educational setting has also been achieved by the media's focus on high profile cases, such as the Robert Noyes case in British Columbia and the Shelburne residential school in Nova Scotia.

¹ S. B. Boyd, "Can Law Challenge the Public/Private Divide? Women, Work and Family" (1996) 15 Windsor U.B. Access Just. 161 at 170.

Secondly, there was a reluctance to prosecute these cases because there was a generally held belief that children fabricated stories of abuse. This notion and the requirement that evidence of a child had to be corroborated made it difficult to prosecute sexual offences committed against children. However, with the repeal of provisions in the *Criminal Code*² and *Canada Evidence Act*³ requiring corroboration of children's evidence and with a greater understanding by courts of children's evidence, it has made these offences easier to prosecute.

Child sexual abuse by educators is a much larger problem than alluded to in this thesis. The cases analyzed merely touch the tip of the iceberg. The criminal cases discussed in chapter four only deal with cases wherein the educator did not plead guilty to the sexual offence. There are many more cases of educators pleading guilty to charges of sexual misconduct and of juries finding educators guilty of various sexual offences. Further, it is difficult to know the exact number of cases of allegations of sexual misconduct made against educators to school boards because there are no published reports of decisions of school board that deal with these cases.

This thesis will end with where it began and answer the issues raised in the beginning of this chapter. Thereafter, the discussion will focus on some general findings that have been made following the analysis of the decisions of various courts and tribunals that deal with cases of sexual misconduct by educators. Finally, various recommendations will be made that are aimed at strategies some of the institutions could adopt in an attempt to eradicate or at least decrease the number of educators who sexually abuse youth.

² R.S.C. 1970, c. c-34.

³ R.S.C. 1970, c. E-10.

I. THE EXTENT TO WHICH THE LEGAL SYSTEM PROVIDES REMEDIES TO VICTIMS OF SEXUAL MISCONDUCT BY EDUCATORS

Since society has recognized child sexual abuse is a problem and has recognized that sexual harassment is a form of discrimination based on gender, there is now an array of institutions a victim of sexual misconduct by an educator can access to seek redress for the misconduct. Complaints against educators can be made in diverse forums, including the school board, the college or Union of Teachers, the Human Rights Commission and the courts. With a greater understanding by society about child abuse, legislators in British Columbia and Nova Scotia amended limitation legislation making it easier for victims to commence civil actions against educators. Of the three jurisdictions, British Columbia provides sexual assault victims with the greatest access to bringing a civil action against an educator, as there no longer is a limitation period governing the commencement of most sexual assault actions.

II. EFFICACY OF THE COURTS AND OTHER INSTITUTIONS

In considering the efficacy of the courts and various institutions that deal with allegations of sexual misconduct, it will be approached from the perspective of both the accused educator and the alleged victim. Since most court cases are criminal, the focus will be on the criminal courts.

1. The Criminal Courts

In criminal cases because the severest penalty that can be imposed is a restriction of the liberty of the accused, it is obviously critical that the accused be afforded the full repertoire of due process rights. In addition, it is crucial that justice is, and is also perceived to be blind, without any preconceived biases operating on behalf of the judiciary. In British Columbia, Nova Scotia and Ontario educators in same or opposite

sex abuse cases are afforded the full range of due process. However, in British Columbia the judiciary appears to treat homosexual acts of sexual abuse as more serious than those in opposite sex abuse cases. Thus, in same sex abuse cases in British Columbia, victims are more likely to be believed than those in opposite sex abuse cases. Further, after examining various factors it appears that judges in British Columbia approach same sex abuse case with a fear of conversion/infection of children by homosexuals or homosexuality which results in the perception that justice is not blind. However, more expansive research is required before a conclusion can be drawn in this regard.

In opposite sex abuse cases, female victims appear to have a better chance with the judiciary in Ontario than in British Columbia of having their evidence scrutinized objectively. In British Columbia it appears that in most opposite sex abuse cases, female victims were found to be less credible than male educators. Two American researchers made similar observations as to how superintendents viewed evidence of complainants while conducting an investigation into child sexual abuse in schools in New York. They concluded:

A male who reported being sexually abused by a teacher was seldom suspected [by the superintendent] of lying or of complicity - something that was not true of female accusers.⁴

Thus, in opposite sex abuse cases from the female victim's perspective, the criminal courts in British Columbia do not treat their cases as efficacious as judges treat female or male victims in same sex abuse cases. The high rate of acquittals by judges in British Columbia hearing opposite sex abuse cases, is perhaps reflective of judges sympathizing and identifying with male educators engaging in sexual misconduct with young female

⁴ C. Shakeshaft & A. Cohan, "Sexual Abuse of Students by School Personnel" *Phi Delta Kappan* (1995 March) 513 at 517.

students. It could also indicate that male judges hearing opposite sex abuse cases still carry with them the mindset of John Wigmore that females and children in sexual assault cases are not to be believed unless there is independent corroborative evidence of the sexual misconduct. However, more research is needed in this area before any definitive conclusions can be made.

Another aspect in determining the efficacy of the criminal system is a consideration of the resources available to the various parties in prosecuting and defending charges of sexual misconduct. While the state has significant resources available to prosecute sexual offences, an educator does not have great resources to defend him or herself. Although research suggests that false allegations by children are uncommon,⁵ they nevertheless do occur.

In cases where an allegation is false or the Crown is unable to meet the burden of proof, an educator may be faced with more than one criminal trial if there has been a successful appeal of the original trial. While it is rare that an educator will have to face three trials, this was the case for a British Columbia educator, Mike Kliman.⁶ As a result of defending himself in three trials all dealing with the same matter, Mr. Kliman was over five hundred thousand dollars in debt as a result of having to pay legal fees.⁷ While allegations of child sexual abuse must be prosecuted vigorously, it appears to be a

⁵ See results of studies by D. P. H. Jones & J. M. McGraw, "Reliable and fictitious accounts of sexual abuse to children" (1987) 2(1) *J. of Interpersonal Violence* 27 as reported in W. Harvey & P. E. Dauns, *Sexual Offences Against Children and the Criminal Process*, (Toronto: Butterworths, 1993) at 26. See also M. D. Everson, B. W. Boat, S. Bourg & K. R. Robertson, "Beliefs Among Professionals About Rates of False Allegations of Child Sexual Abuse" (1996) 11(4) *J. of Interpersonal Violence* 541c at 542.

⁶ See chapter 4 note 32.

⁷ M. Wente, "Days as black as coal" *The Globe and Mail* (15 November 1997) at D7. Although the educator is unnamed in this article, it is about Mike Kliman because the writer intimately knows the details of his case. See also R. Ouston, "The long ordeal of Mike Kliman" *The Vancouver Sun* (17 January 1998) G1, G4.

miscarriage of justice and unfair to the educator when the individual has to face three different trials arising from the same set of facts.

In summary, from the perspectives of the accused in same sex cases and of female victims in opposite sex cases, the criminal system in Ontario appears to be fairer than the system in British Columbia. All educators should be treated the same during the investigation and the court process. The educator in same sex abuse cases should not be held to a higher standard of conduct than an educator in an opposite sex abuse case. Further, evidence of both groups of educators and complainants must be treated in a similar fashion.

2. The Colleges of Teachers and the Nova Scotia Teachers' Union

In dealing with sexual misconduct cases, the processes of the Colleges and the Nova Scotia Teachers' Union are generally similar. However, in British Columbia and Ontario the processes are more formalized than they are in Nova Scotia. An educator in British Columbia and Ontario would have a better understanding of the processes than an educator would have in Nova Scotia. In British Columbia the procedures to be followed are outlined in the bylaws of the College and in Ontario they are specified in the legislation, while in Nova Scotia they are not spelled out in any detail.

When these matters proceed to a hearing, educators in all jurisdictions are provided with a least the minimum requirements of procedural fairness. The hearings in British Columbia are generally oral, while in Ontario the Discipline Committee has discretion to hold either an oral or electronic hearing and with the consent of the parties the hearing can be written. Thus, because hearings are generally oral in British Columbia and are not always in Ontario, it appears that the College in British Columbia, more so than in

Ontario, provides educators with much more than the minimum requirements of procedural fairness. In British Columbia and in Ontario in those cases where the College determines that the matter should be heard orally, educators have the right to give oral evidence and cross-examine witnesses and have the right to appear before the ultimate decision-maker.

Since legislators in each jurisdiction have determined that the accused's peers rather than legally trained individuals decide on whether or not an educator has engaged in sexual misconduct, these lay decision-makers may not have an in depth understanding of rules of evidence and the standard of proof required to make a finding that the educator has engaged in professional misconduct. It appears that there are inconsistent disciplinary sanctions imposed by lay decision-makers of the Colleges when the cases involve male educators engaging in sexual misconduct with youths who are fifteen to nineteen years of age. Because the Colleges do not explain in detail the factors they take into consideration when imposing the disciplinary sanction, it is difficult to determine in these types of cases why in some instances an educator is suspended while in other cases the educator is dismissed.

It does appear that lay decision-makers of the British Columbia College of Teachers treat same and opposite sex abuse cases in a similar fashion. The most frequent penalty imposed by the Colleges in both British Columbia and Ontario is cancellation of the educator's certificates of qualification and termination of their membership.

In difficult cases where an educator has not been charged with a criminal offence but has allegedly engaged in sexual misconduct with a youth, it may not be fair to an educator that the decision-maker does not have legal training, especially given the serious

consequences to the educator. However, there is a check on the decision-makers, as the decision can be appealed to or can be judicially reviewed by an individual with legal training. In British Columbia there have been relatively few decisions of the College that have been judicially reviewed by the courts. It appears that lay decision-makers are applying principles of natural justice while considering the educational context and the trust relationship between teachers and their students. Despite the fact that there have only been a few decisions of the British Columbia College that have been judicially reviewed, ideally it would be best if the decision-maker hearing these matters had legal training with a background in education. Because the College in Ontario is of recent origin, the courts have not yet had to consider any decisions by way of judicial review. In professional disciplinary proceedings the alleged victim may be quite removed from the proceedings and may not be a major actor, particularly if the educator has been convicted of a sexual offence. Because the focus of the hearings is not about the harm done to the victim, but rather it is whether the educator engaged in conduct that constitutes professional misconduct, the hearing from the victim's perspective may not appear to be fair.

3. School Boards and Institutions that Consider their Appeals or Applications for Judicial Review

Instances of alleged sexual misconduct between educators and youth are viewed seriously by school boards, with dismissal being the most frequent discipline imposed by boards in both British Columbia and Ontario. Given that the common law, the legislation and collective agreements do not require a school board to provide educators with the full panoply of natural justice rights, an educator accused of sexual misconduct is not entitled to a full hearing with the opportunity to cross-examine witnesses. Rather, educators are

entitled to have the opportunity to be heard. Given that the Supreme Court of Canada has recognized the importance of work to an individual⁸ and given that repercussions of allegations of sexual misconduct against an educator can be devastating to an educator's reputation and employment prospects, ideally the process would be fairer if the educator was given a full hearing. Despite the fact that in a full hearing before lay school trustees, rules of evidence would not be applied with the same rigor as they are in a courtroom, at least the educator would be able to present his or her side of the story before the ultimate decision-maker.

There appears to be no significant difference in treatment by school boards when considering same or opposite sex abuse cases. In British Columbia all male educators who engaged in sexual misconduct with male students were dismissed from their employment. Similarly, with the exception of two, all male educators who engaged in sexual misconduct with female students were dismissed. In one case no criminal charges were laid against the educator and the court found the investigation of the school board to be severely flawed. This educator successfully sued the student for defamation. The other case involved a historical sexual assault and the educator was acquitted of the criminal charges.

Given that there was only one case in Nova Scotia, no conclusions can be drawn as to whether school boards in this jurisdiction treat all educators who engage in sexual misconduct the same, regardless of whether they engaged in sexual misconduct with youths of the same or opposite gender as the educators.

The old board of reference system and now the current grievance arbitration process plays an important role in protecting educators from abusive and arbitrary discipline by

⁸ *Reference Re: Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 368.

employers.⁹ However, from the perspective of alleged victims of child sexual abuse or harassment, it is not a sympathetic forum for them.¹⁰ Unlike human rights adjudications, where the impact of sexual harassment of the alleged victim is of utmost concern, and the alleged perpetrator's intent is mainly irrelevant in board of reference and arbitration proceedings, the focus is on the alleged perpetrator and his or her employment relationship with the school board.¹¹ As was seen in professional regulatory hearings, the alleged victim in school board and arbitration hearings is quite removed from the proceedings. Once the allegations are proven to the requisite standard, arbitrators consider factors such as seniority and previous disciplinary record in deciding the appropriate penalty rather than considering the extent of the injury of the alleged victim.¹² Thus, for the educator the process is fair, but for the alleged victim it appears that the individual is a minor actor in the proceedings with no real consideration of his or her injuries suffered.

4. Human Rights Commissions

Complainants of sexual harassment by an educator rarely seek a remedy through the provincial Human Rights Commissions. In the few cases that have come before the commissions, the human rights process appears to be fair for both the alleged sexual harasser and the alleged victim. The alleged harasser is afforded the principles of natural justice and the alleged victim and the alleged perpetrator equally participate in the proceedings.

⁹ E. Grace, "Professional Misconduct or Moral Pronouncement: A Study of "Contentious" Teacher Behaviour in Quebec" (1993) 5 E.L.J. 99 at 137.

¹⁰ *Ibid.* at 137.

¹¹ *Ibid.* at 137.

¹² *Ibid.* at 137.

III. THE FAIRNESS TO THE EDUCATOR OF THE MULTIPLICITY OF PROCEEDINGS

It may seem unfair that an accused educator might have to participate in a multiplicity of proceedings to deal with the allegations of sexual misconduct. However, if the scourge of child sexual abuse by individuals in a position of trust is to be eradicated or at least decreased, educators must be powerfully motivated to not engage in this serious misconduct. By subjecting educators to the various proceedings, each with a different purpose, educators should see that there are serious consequences when an individual engages in this high risk activity and hopefully these proceedings will be a deterrent to educators from engaging in sexual misconduct.

IV. GENERAL CONCLUSIONS

1. The Perpetrators

No matter what institution is dealing with allegations of sexual misconduct of an educator, all institutions in British Columbia, Ontario and Nova Scotia overwhelmingly deal with allegations involving male abusers. While female perpetrators exist, they are relatively small in number. This is consistent with other studies that have investigated child sexual abuse.¹³

In the criminal context, there were nineteen of twenty-two or eighty-six percent of cases in British Columbia, forty-eight of fifty-one or ninety-four percent of cases in Ontario¹⁴ and four of four cases in Nova Scotia that involved male perpetrators. In contrast, there were three of twenty-two or fourteen percent of cases in British Columbia and two of

¹³ Canada, *Changing the Landscape: Ending Violence - Achieving Equality* (Ottawa: Ministry of Supply and Services Canada, 1993) at 9; Canada, *Sexual Offences Against Children*, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984) at 215; C. Shakeshaft & A. Cohan, *supra* note 4 at 516 and R. Gunn & R. Linden, "The Processing of Child Sexual Abuse Cases" in J. V. Roberts & R. M. Mohr, eds. *Confronting Sexual Assault - A Decade of Legal and Social Change* (Toronto: U. of T. Press) 84 at 85.

¹⁴ In one of the case reports the gender of the educator was not stated.

fifty-one or four percent of cases in Ontario involving female educators engaging in sexual misconduct. There were no reported criminal cases of female perpetrators in Nova Scotia.

2. The Victims

When the offence is the most serious type of sexual misconduct and the educator is criminally charged with the offence, the complainants are generally both male and female. When the criminal law is invoked, in British Columbia and Nova Scotia male and female youth were victimized equally by educators. In British Columbia and Nova Scotia, allegations in criminal cases were made equally by male and female complainants.¹⁵ However, of fifty-one cases in Ontario there were twenty-one or forty-one percent that involved male complainants and thirty-four or sixty-seven percent that involved female victims.¹⁶

When the conduct is of a less serious nature and does not warrant the imposition of criminal charges,¹⁷ such as sexual harassment, it appears that most victims are female.

3. Fewer Civil Cases

There are far fewer civil cases commenced against educators compared with the number of criminal prosecutions brought against educators for allegedly engaging in sexual offences with youths. British Columbia has three reported civil cases brought against educators for damages for assault and battery which is the highest number of cases of the

¹⁵ In British Columbia eleven criminal cases involved allegations made by male complainants and eleven cases involved allegations made by female complainants. In Nova Scotia there were two criminal cases that involved allegations by male complainants and two cases that involved allegations made by females.

¹⁶ In four cases, the educators were alleged to have engaged in sexual misconduct with male and female students. Thus, these four cases were actually counted twice.

¹⁷ It is recognized that the effects on victims of all sexual misconduct by educators may be equally devastating. The term "seriousness of the sexual misconduct" refers to how the misconduct is treated by the law. The most serious sexual misconduct results in criminal charges being brought against the educator.

three jurisdictions. Although Ontario appears to have one reported case, the outcome of the case is unknown as the report deals with only a preliminary motion. Nova Scotia has no reported civil cases of an educator being sued civilly for damages for assault and battery.

There are many reasons as to why there are far fewer civil actions brought against educators as compared with criminal prosecutions against educators. In criminal prosecutions there is no cost to the victim as the costs are borne by the state. However, in civil actions the cost of bringing the action is borne by the plaintiff and can be a deterrent to a victim. Further, in criminal cases there is no limitation period governing the prosecution of criminal sexual assault offences against children. However, until quite recently, the three jurisdictions had limitation periods governing civil sexual assault cases.

When plaintiffs bring civil actions against educators for damages for assault and battery, they are generally coupled with an action against the school board in negligence for negligent hiring and/or supervision of the educator, for vicarious liability of the school board or for breach of its fiduciary duty. Although Canadian courts recognize an allegation that an employer was negligent in hiring a particular employee within the general tort of negligence, to date Canadian courts have not considered the issue of negligent hiring within the context of a student suing a teacher and school board for damages for personal injury arising from sexual abuse by an educator. However, this may soon change, as there likely will be an increase in these types of cases brought before the courts. British Columbia is the most likely jurisdiction where the civil courts may see an increase in the number of cases brought against educators given the

elimination of the limitation period governing civil cases brought in tort or negligence for sexual assault.

Courts are generally reluctant to impose vicarious liability against school districts for acts of sexual misconduct of its employees against students. However, given the Supreme Court of Canada's reasoning in *P.A.B. v. Curry*,¹⁸ the door has been left open for the possibility of a school district being held vicariously liable for sexual misconduct of its employees in cases whereby the school district created or enhanced the risk of child sexual abuse. In determining the sufficiency of the connection between the school district's creation or enhancement of the risk and the sexual abuse engaged in by an educator, some factors that are relevant to determining liability include the amount of time an educator was authorized to be alone with a child, whether the employee is expected to supervise the child in intimate activities and the nature of the relationship the employment established between the employee and the child.

These factors would be assessed by the court in light of policy considerations that justify the imposition of vicarious liability such as fair and efficient compensation for the wrong and deterrence. Thus, applying the principles and policy considerations enunciated in *Curry* to a case of a special education teacher who had responsibility for intimate activities with a child on an extended camping trip could result in the principles in *Curry* being extended on a case by case basis to a school setting.

4. Victims do not seek Remedies through Provincial Human Rights Commissions

Even though it has been over a decade since the three jurisdictions have recognized sexual harassment as a form of sex discrimination, there have been very few human

¹⁸ [1999] S.C.J. No. 35 (S.C.C.); online: QL (SCJ) [hereinafter *Curry*].

rights cases of sexual harassment involving educators in these jurisdictions. Although British Columbia has the highest number of sexual harassment cases that are filed in all three jurisdictions, there have only been two reported cases of allegations of sexual harassment involving educators. In Nova Scotia and Ontario there have been no cases of allegations of sexual harassment involving educators.

It is apparent from decisions of other institutions considering complaints of sexual harassment involving educators that educators do engage in this type of sexual misconduct. However, complainants who have been allegedly sexually harassed by an educator do not appear to deal with the matter through the various provincial Human Rights Commissions. In British Columbia educators have dealt with complaints of sexual harassment against other educators by complaining to their professional disciplinary body. Students in both Nova Scotia and British Columbia appear to make their complaints internally regarding a teacher who has allegedly sexually harassed them by complaining to the teacher's superior.

There are many reasons why victims of sexual harassment in a school setting do not file complaints with provincial Human Rights Commissions. The victims likely want the matter dealt with expeditiously and may not want to wait the length of time it takes the commissions to process the complaints. Further, the victims may not be interested in receiving a small monetary award if she or he proves the allegations, but may be satisfied with the educator being disciplined. In addition, since the focus of some of the commissions is to mediate a settlement of a dispute, a victim of sexual harassment may not want to participate in this process with the harasser.

V. RECOMMENDATIONS

1. Overhauling Male Sexualization

One of the major conclusions in this thesis is that, overwhelmingly, sexual misconduct in the educational setting is committed by male educators. Although the number of educators engaging in sexual misconduct is relatively small in comparison to the total number of educators, there appears to be a problem with male sexual socialization.¹⁹

Clark is of the view that "things will go on just as they have, so long as men are socialized to regard women and children as property and to link male sexuality with power, authority and violence".²⁰

According to Lorene Clark the problem of child sexual abuse will not be solved until adult males "give up their fantasies of nubile fourteen to seventeen year olds as ideal sex objects, their beliefs that control necessitates the use of sex as an act of power and domination, and their insistance [*sic*] that acquiescence to force or violence is a hallmark of "love".²¹ In proposing solutions to confronting the fact that male sexualization needs to be overhauled, Lorene Clark has written:

Males who are unable to obtain sexual gratification from persons other than children and youths, or without the use or threat of violence, have to be viewed as suffering from serious psychosexual problems. But it is time we stopped letting boys be boys, especially when they are adults. It is time we started ensuring that the male sexual socialization that begins when males are boys is better directed to producing responsible adult males who are not alienated from their own sexuality by their need to deploy their sexuality as in instrument of power.

...

Similarly, there must be changes in many of our institutions. New institutions must be developed which reflect a single standard of behaviour for all interpersonal and sexual relationships. These institutions have to be based on the equality of men and women and on their equal and shared responsibility for

¹⁹ L. Clark, "Boys Will Be Boys: Beyond the Badgley Report" (1985) 2 C.J.W.L. 135 at 143.

²⁰ *Ibid.* at 143.

²¹ *Ibid.* at 145.

ensuring that all children are given the opportunity to become healthy adults. These changes cannot be brought about without facing the facts that patriarchy has to go. And paternalism must go with it. To fail to see that these problems are deeply rooted in patriarchal institutions related to the distribution and control of sexual property and in the socialization of male sexuality appropriate to that system is to mislocate the nature of the problem and the measures necessary to eliminate it.²²

Rix Rogers, Special Advisor, has made a similar recommendation to the Minister of National Health and Welfare on child sexual abuse in Canada. In his report he stated:

One of the most disturbing discoveries for me has to do with the impact of underlying social attitudes and values related to male and female sexuality. More than I ever realized, these tend to condition males to be sexual predators and females to be victims. Our patriarchal society has set the conditions for sexual assaults and harassment, including the sexual abuse of children. I am increasingly uncomfortable with the realization that such behaviour has for too long been tolerated in our society. In my opinion, one of the most significant tasks ahead of us is to make major changes in the underlying deeply rooted attitudes of sexism.²³

Schools are only one of many institutions that can and do play a large role in the socialization of students²⁴ and it is one institution that can educate students about systemic inequalities and sexual harassment:

[I]nside and outside of education, many groups have organized themselves and raised questions about the nature and structure of a society that permits ongoing systemic inequalities. Much of the questioning has focused on the role of schooling as the major social institution of the young. It is argued that equality of opportunity and a change in attitude must begin with the education of our youth.²⁵

In trying to change social attitudes and values to male and female sexuality, schools need

²² *Ibid.* at 149.

²³ Canada, *Reaching for Solutions - The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* (Ottawa: Minister of Supply and Services Canada, 1990) at 11.

²⁴ The family is the major institution that plays the largest role in the socialization of children. For ideas on how parents can help prevent child sexual abuse, see A. Parrot, "Vital Childhood Lessons: The Role of Parenting in Preventing Sexual Coercion" in E. Grauerholz & M. A. Koralewski eds., *Sexual Coercion: A Sourcebook on Its Nature, Causes and Prevention* (Toronto: D. C. Heath and Company, 1991) at 123.

²⁵ A. Varpalotai, "Affirmative Action for a Just and Equitable Society" in R. Ghosh & D. Ray, eds., *Social Change and Education in Canada*, 3d. ed. (Toronto: Harcourt Brace, 1995) 240 at 242 as cited by W. MacKay, "Human Rights and Education: Problems and Prospects" (1996) 8 E.L.J. 69 at 78.

to focus on teaching children to develop healthy relationships between male and female children as well as on teaching them about sexual coercion and harassment. Janet Enke and Lori Sudderth, who believe there is a need to educate young people about sexual coercion, argue that a comprehensive multi-level approach to educational reforms is needed which begins at pre-school and ends at college or university. Some of their recommendations at the elementary and secondary level include the following:

1. Children must be taught skills that will enable them to state their needs clearly and directly so that manipulation and coercive behaviours do not have to be used to get one's needs and desires met. This process should begin with pre-schoolers in child-care facilities, with teachers serving as role models as well as facilitators. Young children must be taught the connection between their feelings and their bodies...such messages can help to instill a sense of trust in their own perceptions and bodily responses, which can help them distinguish appropriate and inappropriate touch. Rather than rewarding children for gender-appropriate behaviour, teachers can encourage children to play with any toys and engage in any activities, enabling both boys and girls to develop masculine and feminine qualities.²⁶
2. Children need many opportunities for cross-sex interaction and friendships that are not dominated by sexual and romantic overtones. If mutual interests and activities, rather than gender become the basis of friendships, children will learn how to relate to peers as human beings first and sexual beings second...²⁷
3. [C]hildren should be encouraged to participate in a wide variety of activities within the school. It is critical for children to begin building self-esteem that is based on both individual achievement and cooperation with others...²⁸
4. Sex education programs in secondary school...should address the discourse and ideology surrounding sexuality in our culture, which includes fear, victimization, violence, compulsory heterosexuality, the negative labeling of women, and silence. We need to empower young women to be participants in their own experience. Similarly, men need to

²⁶ J. L. Enke & L. K. Sudderth, "Educational Reforms" in E. Grauerholz & M. A. Koralewski eds., *Sexual Coercion: A Sourcebook on Its Nature, Causes, and Prevention* (Toronto: D. C. Heath and Company, 1991) at 155.

²⁷ *Ibid.* at 155.

²⁸ *Ibid.* at 156.

learn how to be more interactive in their relations with women and peers...²⁹

5. Programs on sexual coercion should focus on both male and female students...Since peers are highly influential at this age, it would be helpful if presenters were as close to the students' ages as possible, although adults could supervise the program and be available for guidance. For example, college students could talk with high school students and high schoolers with adolescents in middle school...³⁰

In addition to the above recommendations, schools also need to develop an anti-harassment programme given that sexual harassment is "only one of the manifestations of gender inequality in schools and in society".³¹ Chantal Richards notes that educators June Larkin and Pat Stanton have developed the AICE Model to deal with gender inequity. To improve the learning environment for female students, these educators identified four broad objectives: access, inclusion, climate and empowerment.³² The first objective focuses on improving female students' access to leadership roles and courses, such as math and science. The second objective of inclusion recognizes the need to adapt curriculum to include the female perspective. Improving the climate for female students is the objective of the anti-harassment programme. The goal of empowerment focuses on improving female students' self-esteem by teaching them to confront sexism in their lives.

Schools must also deal with incidences of sexual harassment effectively so that when students experience it in the school milieu they will understand that it is not tolerated. In trying to teach children about sexual harassment, it is easier if a "school has committed

²⁹ *Ibid.* at 156.

³⁰ *Ibid.* at 157.

³¹ C. Richards, "Surviving Student to Student Sexual Harassment: Legal Remedies and Prevention Programmes" (1996) 19 Dal.L.J. 169 at 196.

³² *Ibid.* at 196-197.

itself to infuse a spirit of equity and a critique of injustice into its curriculum and pedagogy".³³ Students must be encouraged to critique the "sexism of the curriculum, hidden and overt",³⁴ otherwise "they are less likely to recognize it when they confront it in their midst".³⁵ Children must be taught to view the issue of sexual harassment as one of gender violence and injustice and must be taught to view the problem from the "vantage points of the targets, the harassers and the observers".³⁶ As such, children will be taught empathy and intervention strategies to deal with sexual harassment.³⁷ As Nan Stein notes, "[i]n this way we teach children to see themselves as "justice makers" as opposed to social spectators".³⁸ In addition to working with students, educational institutions must continue to promote women to senior administrative board office positions so that patriarchal assumptions can be challenged.

School boards should work with the Human Rights Commissions to develop age appropriate programmes on sexual harassment. One such partnership has been developed in Nova Scotia. The Human Rights Commission in Nova Scotia has developed the Coalition Against Sexual Harassment ("CASH") in Schools project. CASH is a coalition of groups trying to combat sexual harassment in schools and it has developed a pilot project to be used at the junior high level.³⁹ Phase one of the programme was implemented during the summer of 1996.⁴⁰ Unfortunately at this point, there has not been anything written about the effectiveness of the programme.

³³ N. Stein, "Sexual Harassment in School: The Public Performance of Gendered Violence" (1995) 65(2) *Harv. Educ. Rev.* 145 at 159.

³⁴ *Ibid.* at 159.

³⁵ *Ibid.* at 159.

³⁶ *Ibid.* at 159.

³⁷ *Ibid.* at 159.

³⁸ *Ibid.* at 159.

³⁹ W. MacKay, *supra* note 25 at 88.

⁴⁰ W. MacKay, *supra* note 25 at 88.

2. Reconceptualization of Sexual Misconduct by Decision-Makers

In cases of opposite sex abuse, legally trained decision-makers must reconceptualize the problem and recognize that sexual abuse by educators is fundamentally an issue of violence against children, rather than an employment issue between management and labour.⁴¹ In approaching these cases, legally trained decision-makers must focus their analysis on the essence of the misconduct which is an abuse of power and betrayal of trust by the educator, rather than on whether the complainant was sexually experienced.

3. Further Research

Given that there is such a divergence in the conviction rates in same and opposite sex abuse cases when judges in British Columbia hear these cases, there needs to be further research conducted to determine whether judges in this jurisdiction do treat same sex cases more harshly than opposite sex abuse cases. There also needs to be further research conducted in opposite sex abuse cases to determine if judges are requiring corroboration of the evidence of female complainants before judges view them as credible witnesses.

4. Clearly Articulated Standards of Conduct of Educators

While it may be obvious to many educators that sexual contact of any kind with students is unprofessional, for some young teachers entering the profession who are not much older than some of the senior high students, it may not be obvious to them. Thus, in all jurisdictions there should be a clearly articulated code of conduct for educators, similar to the misconduct regulation of the Ontario College of Teachers which stipulates that sexual conduct of any kind between educators and students is forbidden.

⁴¹ E. Grace, *supra* note 9 at 139.

Teacher misconduct that deals with contentious behaviour belongs in the public realm and should not be defined and regulated in a private employment context.⁴² Given that the mandate of the teachers' union in British Columbia and Ontario is to bargain on behalf of teachers for the best working conditions and it is not to regulate the conduct of its members, the regulating body is the most appropriate body that should be charged with consulting with legislators to articulate the standard of conduct to be expected of its members. In British Columbia and Ontario this body is the College of Teachers and in Nova Scotia it is the Teachers' Union. The appropriate place to specify standards of conduct is in a public, legislative scheme, such as the regulation of the Ontario College of Teachers.

5. Policies of School Boards

School boards must be highly motivated to stamp out the scourge of child sexual abuse.⁴³ In motivating employers to take effective steps to eradicate or at least reduce child sexual abuse, courts have imposed vicarious or strict or no-fault liability on employers for sexual misconduct of its employees. Although to date, courts have been reluctant to find school districts vicariously liable for the sexual misconduct of its employees or to find school districts personally liable for negligently hiring and/or supervising educators, school boards should not wait until a court provides the motivation, but rather, they should ensure that they have effective hiring and supervision policies in place.

Although school districts likely have improved their hiring procedures from the 1980s and are likely consistently checking references in all cases when new staff is hired or transferred, the hiring process is only one part of the process in ensuring that educators

⁴² E. Grace, *supra* note 9 at 139.

⁴³ Curry, *supra* note 18 at para. 32.

are not given the opportunity to sexually abuse children. Both British Columbia and Ontario require prospective teachers to undergo a criminal records check. While this process screens out individuals with criminal records, it is not going to catch educators who engage in paedophilic behaviour and have never been caught for this serious misconduct.

The solution may not lie in the hiring process but in the education and supervision of staff. Administrators must be vigilant in educating their staff about appropriate standards of interaction with students and must also make supervision of staff a priority.

6. Education of Staff and Students

It is not only staff who must be educated about the appropriate standards of interaction between educators and students, but students must also be taught about the types of touch that are appropriate. Although most jurisdictions have programmes that teach children about the appropriate kind of touch, such as the C.A.R.E. kit in British Columbia, these programmes must continually be improved and enhanced. Students must also know whom in the school system they can speak to if they are being touched inappropriately by a staff member and they must know that their discussions will be taken seriously and acted upon if the circumstances warrant it.

7. Publication of Discipline Decisions

Once allegations of sexual misconduct have been made against an educator and the professional regulatory body or the union has imposed a disciplinary sanction, these bodies should publish the details of the educator's behaviour, the factors that were taken into consideration in determining the penalty and the disciplinary sanction that was

imposed on the educator. These decisions act as a beacon for the profession⁴⁴ and inform educators as to what types of sanctions that will be imposed for sexual misconduct.

8. Notification of Disposition of Discipline Hearings

In all jurisdictions, the institutions that cancel an educator's certificate of qualification must follow the lead of the British Columbia College of Teachers⁴⁵ and notify other provincial Ministers of Education and other relevant institutions, so that the educator is prevented from teaching in another jurisdiction.

VI. CONCLUDING THOUGHTS

If child sexual abuse committed by educators is going to be eliminated there needs to be major changes in male sexualization and in many of our institutions. There also needs to be recognition that the problem of child sexual abuse is rooted in patriarchal institutions related to the control of sexual property and in the socialization of male sexuality appropriate to that system.⁴⁶ To begin with, there needs to be one standard of behaviour for both the public and private spheres.⁴⁷ However, this requires a major restructuring of the family, so that it is a partnership of equals, with both adults equally sharing the power.⁴⁸ Other institutions, including educational institutions, must be based on the equality of men and women and must not tolerate sexual coercion or harassment.

⁴⁴ M. E. Baird, "Regulating the Conduct of Educational Professionals - The Disciplinary Process" (CAPSLE '97, May 1997) 1.

⁴⁵ B. C., *The British Columbia College of Teachers Bylaws and Policies* (Vancouver: British Columbia College of Teachers, 1998) policy P6.P.01 at 29.

⁴⁶ L. Clark, *supra* note 19 at 148.

⁴⁷ L. Clark, *supra* note 19 at 148.

⁴⁸ L. Clark, *supra* note 19 at 149.

APPENDIX "A"

A.1. Calculations for Total Convictions for Same Sex Abuse Cases and Opposite Sex Abuse Cases in British Columbia¹

a.	Total convictions for same sex abuse cases:	11
b.	Total same sex abuse cases:	12
c.	Total convictions for opposite sex abuse cases:	2
d.	Total opposite sex abuse cases: ²	8
e.	Total convictions for both groups/total cases:	$\frac{13}{20} = 65\%$

A.2. Calculations for Total Convictions for Same Sex Abuse Cases and Opposite Sex Abuse Cases in Ontario³

a.	Total convictions for same sex abuse cases:	8
b.	Total same sex abuse cases: ⁴	18
c.	Total convictions for opposite sex abuse cases:	19
d.	Total opposite sex abuse cases: ⁵	30
e.	Total convictions for both groups/total cases:	$27/48 = 56\%$

¹ Includes both judge alone and judge and jury cases.

² *R. v. Armstrong*, [1993] B.C.J. No. 1412 (C.A.), online: QL (BCJ) and *R. v. Cocker*, [1997] B.C.J. No. 992 (C.A.), online: QL (BCJ) have been excluded from analysis because these cases involved applications to stay the charges against the educators.

³ Includes both judge alone and judge and jury cases.

⁴ *R. v. McKay*, [1995] O.J. No. 3306 (Gen.Div.), online: QL(ORP) has been excluded from analysis because on appeal a new trial was ordered and the result is not known.

⁵ *R. v. D.O.*, [1998] O.J. No. 3981 (Gen.Div.), online: QL (ORP), *R. v. Carosella*, (1997), 112 C.C.C.(3d) 289 (S.C.C.), *R. v. J.C.G.*, [1992] O.J. No. 2037 (C.A.) and *R. v. Gauthier*, [1995] O.J. No. 4239 (Gen.Div.), online: QL (ORP) have been excluded from analysis as these cases involve applications to quash the indictment and to stay the charges against the educator. In *R. v. J.C.G.*, *supra*, on appeal the stay was overturned and the matter was remitted to trial. The results of the trial are unknown. In addition, *Gauthier* the appeal was successful but the outcome of the new trial is unknown. In addition, *R. v. Gagne* which is included in both groups of cases because the educator was accused of engaging in sexual misconduct with both male and female students, has only been counted once. Thus, only thirty of thirty-five opposite sex abuse cases have been included in the analysis.

**A SUMMARY OF CASES OF THE BRITISH COLUMBIA COLLEGE OF
TEACHERS**

The cases outline the types of sexual misconduct alleged to have been engaged in by educators and the range of disciplinary penalties imposed on them by the College. To preserve the confidentiality of the educators, names have not been used.

- I. *Report to Members - Discipline Decisions - Winter 1990¹*
1. A - The male teacher pleaded guilty in criminal courts to one count of sexual assault, one count of gross indecency and one count of having sexual intercourse with a female under the age of fourteen. The two young girls were former students of the teacher and were also employed by him as babysitters. The College found the teacher guilty of conduct unbecoming a member and terminated his membership in the college and cancelled his certificate of qualification.
- II. *Report to Members - Discipline Decisions - Spring 1991²*
2. B - In December 1989 the male teacher was found guilty of four counts of sexual assault against four males in their early teens. Two of the assaults were committed against students in the school at which the teacher taught but were not in his class. The other two assaults were committed against boys in the member's extended family. The College found the member guilty of conduct unbecoming a member, terminated his membership in the college and cancelled his certificate of qualification.
3. C - In August 1990 the member was found guilty of sexual assault, in addition to three counts of common assault against female students in his classes. The

¹ B.C., British Columbia College of Teachers (Vancouver: British Columbia College of Teachers, 1990).

College found him guilty of professional misconduct, terminated his membership in the college and cancelled his certificate of qualification.

III. *Report to Members - Discipline Decisions - Fall 1991*

4. D - The member was convicted of two counts of sexual assault upon a minor. The report does not state the gender of the minor. The College found the teacher guilty of conduct unbecoming a member, terminated his membership in the college and cancelled his certificate of qualification.
5. E - After considering the allegations in the citation, the College determined that over a period of years, the member had improperly and repeatedly touched some of his female students on their backs, buttocks and breasts. The College found the teacher guilty of professional misconduct, terminated his membership in the college and cancelled his certificate of qualification.
6. F - When the member learned he was under investigation for improper conduct with a student, he abandoned his teaching position. Police and other authorities conducted a search for him. The College found the teacher had abandoned his teaching position while under investigation for improper conduct with a student. As a result, the College found him guilty of professional misconduct, terminated his membership in the college and cancelled his certificate of qualification. In the case summary, the gender of the student was not reported.

IV. *Report to Members - Discipline Decisions - Winter 1991/92³*

7. G - The member pleaded guilty in late 1990 to three counts of indecent assault and was convicted by a jury of three other counts of indecent assault and two

² B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1991).

³ B.C., British Columbia College of Teachers (Vancouver: British Columbia College of Teachers, 1992).

counts of sexual intercourse with a female under fourteen years of age. The events took place while the teacher was employed as a teacher during the period September 1, 1966 to June 30, 1980. The College found the teacher guilty of professional misconduct and terminated his membership in the college and cancelled his certificate of qualification.

V. *Report to Members - Discipline Decisions - Spring 1992⁴*

8. H - In February 1988 the member pleaded guilty to five counts of indecent assault and two counts of sexual assault involving six children, five males and one female, ranging in ages from nine to twelve years. The assaults occurred between the years 1971 and 1983. Although the children were not his students, three were in his foster care, two others were in foster care but not with the member and he was the Cub leader of one of the victims. The College found the educator guilty of conduct unbecoming a member, terminated his membership in the college and cancelled his certificate of qualification.
9. I - The College determined that the male teacher had engaged in an inappropriate and sexual relationship with a female student. It commenced when the student was fifteen years of age and was being taught by the member. It continued from 1985 until 1990. The College found that the teacher was guilty of professional misconduct, terminated his membership and cancelled his certificate of qualification.

VI. *Report to Members - Discipline Decisions - Fall 1992*⁵

10. J - The male teacher pleaded guilty to nine counts of sexual assault involving boys, ranging in age from eight to ten years. The assaults occurred between September 1989 and May 1990. The sexual misconduct took place while the member was employed as a teacher in an elementary school and eight of nine children were his students. The College found the member guilty of professional misconduct, terminated his membership in the college and cancelled his certificate of qualification.
11. K - The College found the male teacher guilty of professional misconduct as a result of a sexual relationship with a fifteen-year-old female student and a second incident of an improper, but not a sexual relationship with another female student. The teacher was employed at a junior secondary school at the time of the misconduct. He taught one of the girls and both girls participated in extra-curricular activities he supervised. Upon graduation of the first student, the teacher lived with her for a period of approximately eighteen months. Concurrently, the teacher made advance to the second student who was in grade nine.
- Criminal charges were laid against the member but they were later dismissed. The College suspended for an indefinite period of time his membership in the College and his certificate of qualification. It was held that the teacher was not eligible for reinstatement prior to June 1995.

⁴ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1992).

⁵ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1992).

12. L - Two citations were issued against the male teacher. One alleged that he invited a recent graduate to his home, served her alcohol and made sexual advances to her. The second citation alleged that the member invited a second graduate to his home, served her alcohol and engaged in sexual activities with her. The College held that the member was only guilty of serving alcohol to the student in the first citation. None of the allegations of sexual misconduct were proven. As a result, the College found the member guilty of professional misconduct for serving a minor alcohol and issued a reprimand to him for that conduct.

VII. *Report to Members - Discipline Decisions - Winter 1992/93⁶*

13. M - In November 1991 the male teacher pleaded guilty to a charge that between the 1st of January, 1972 and the 1st of January, 1983 he did indecently assault a female person. The victim of the assault was a family member and it occurred while he was employed as a teacher in the North West Territories. The College found the member guilty of conduct unbecoming a member, terminated his membership in the College and cancelled his certificate of qualification.
14. N - The male teacher was found guilty of one count of sexual assault and two counts of indecent assault of female students in his care. All of the sexual assaults were committed against thirteen-year-old female students. The assaults occurred in 1978, 1980 and 1988 and occurred during school-sponsored field trips and one assault occurred on the school premises. In finding the member guilty of professional misconduct, the College cancelled the teacher's membership and his certificate of qualification.

15. O - In the citation it was alleged that a male teacher engaged in professional misconduct by involving female students in his class as models for inappropriate photographs. The events took place while the teacher was employed as a teacher in an intermediate classroom. The College found the member guilty of professional misconduct, suspended his membership in the College and his certificate of qualification until he has provided a psychiatric report that he is not a risk to students. The suspension would not be lifted before May 31, 1993.

VIII. *Report to Members - Discipline Decisions - Spring 1993*⁷

16. P - The College determined that the male teacher had engaged in professional misconduct on or about June 28/29, 1988 and other occasions during 1987/88 when he invaded the space of his female students by standing too close to them and by touching their hair and shoulders of the students who were the complainants. The school board suspended him without pay for five days for his conduct but it continued after the suspension despite verbal and written warnings to cease such behaviour. The College suspended his membership in the College and his certificate of qualification until at least August 31, 1993; a period of approximately nine months after the commencement of the hearing.
17. Q - The teacher was found guilty of six sexual offences including one count of indecent assault, three counts of gross indecency with a male person and two counts of attempted buggery, which occurred between 1977 and 1979. The sexual offences took place while the member was employed as a teacher in St. John's, Newfoundland. The children involved were not his students, but were young

⁶ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1993).

⁷ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1993).

boys under his care at the Mount Cashel orphanage, where he worked as a supervision assistant. The College found him guilty of conduct unbecoming a member, terminated his membership in the College and cancelled his certificate of qualification.

18. R - The citation alleged that the member engaged in professional misconduct as a result of pleading guilty on November 4, 1991 to a charge that between 1972 and 1974 he had sexual intercourse with a female who was fourteen years of age and under sixteen years of age. At the time of the misconduct, the girl was his student. It was also alleged in the citation that he had engaged in sexual intercourse with another female student from December 1978 to June 1979 and sexually assaulting another student between March 1988 and June 1988. As a result of finding the educator guilty of professional misconduct for each of the allegations listed in the citation, the College terminated his membership and cancelled his certificate of qualification.

IX. *Report to Members - Discipline Decisions - Summer 1993*⁸

19. S - The member pleaded guilty to a sexual offence of a child under the age of sixteen which occurred in August 1991, while the member was a vice-principal in a British Columbia school district. The child abused was a former student of the member. The College found the member guilty of conduct unbecoming a member, terminated the teacher's membership in the College and cancelled his certificate of qualification. The case summary does not state the gender of the educator.

⁸ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1993).

20. T - The member admitted professional misconduct when he made inappropriate comments to students in his Grade 3 class and by sexually harassing female adults, including two teachers, a school secretary and two swimming coaches. The misconduct occurred between April, 1988 and November, 1989. The College reprimanded the member for his conduct and ordered that a summary of his case be published in the Discipline Decisions.
- X. *Report to Members - Discipline Decisions - Fall 1993⁹*
21. U - The female teacher was found guilty of two counts of sexual exploitation of young persons. Between January 1988 and February 1991, she engaged in sexual liaisons with two of her female students, both of whom were fifteen years of age at the time of the initial contact. The College found the member guilty of professional misconduct, terminated her membership in the College and cancelled her certificate of qualification.
22. V - The male teacher was found to have engaged in inappropriate and unnecessary touching of three female students, aged eleven and twelve, during the 1990 to 1991 school year. He touched the students on their backs and shoulders and stood in unnecessarily close proximity to the students when they were either seated or standing. It is difficult to determine from the case summary whether the allegations were that the touching was of a sexual nature. However, it is reported that the contact was not of a sexual nature. The College found the member guilty of professional misconduct, suspended his membership in the College and his certificate of qualification for one and one half years.

- XI. *Report to Members - Discipline Decisions - Winter 1993/94*¹⁰
23. W - The member was convicted in April 1991 for indecent assault upon a thirteen-year-old male student and for assault upon a male under the age of consent. The offences occurred in 1965 and 1963 respectively. The offences took place while the member was a teacher in Saskatchewan. One of the males was a student of the educator and the other was either a student or an athlete being coached by him. The College found the member guilty of conduct unbecoming a member, terminated his membership in the College and cancelled his certificate.
24. X - The member pleaded guilty to a charge of sexual exploitation of one of his female students. The offence occurred while the educator was employed as an administrative officer in a junior secondary school. The student who was abused was in grade ten at the school. The member agreed that a finding of professional misconduct would be appropriate along with the cancellation of his certificate of qualification. On November 27, 1991 the educator resigned his membership in the College.
- XII. *Report to Members - Discipline Decisions - Spring 1994*¹¹
25. Y - On January 12, 1990 the member was found guilty of sexual exploitation of one of his female students. The College held that the member was guilty of professional misconduct, terminated his membership in the College and cancelled his certificate of qualification.
26. Z - The College found the teacher guilty of professional misconduct as a result of developing improper relationships with a number of his female students, most of

⁹ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1993).

¹⁰ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1994).

whom were between twelve and fifteen years of age. The misconduct occurred between 1973 and 1988 and it included supplying alcohol to minors, hugging, kissing and sexual contact. The teacher's membership in the College was terminated and his certificate of qualification was cancelled.

27. AA - The male teacher was accused of two charges of sexually assaulting a young female employee in 1991 and one charge of sexually assaulting a teenage female student in 1989. The assaults involved the grabbing of breasts and the pinching of bottoms. In the case summary it is not stated whether the charges were criminal charges or whether the charges of assault were the allegations in the citation. If they were criminal charges, the outcome of the charges is not reported. The College found the teacher guilty of conduct unbecoming a member for all of the charges made against him. The member had resigned from the College. His certificate of qualification was cancelled.

XIII. *Report to Members - Discipline Decisions - Fall 1994*¹²

28. BB - The member was found guilty of two counts of indecent assault against female persons. These offences were committed against his foster daughter between the first day of January 1980 and the 31st day of December 1981. The College held that he was guilty of conduct unbecoming a member, terminated his membership and cancelled his certificate of qualification.

XIV. *Report to Members - Discipline Decisions - Winter 1994/95*¹³

29. CC - On March 31, 1992 the member pleaded guilty in the Court of Queen's Bench in Alberta to three counts of sexual assault upon male students occurring

¹¹ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1994).

¹² B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1994).

between August 31, 1990 and February 2, 1992. At the time of the offences, the member was a principal at the school of the students he assaulted. The College found him guilty of professional misconduct, terminated his membership and cancelled his certificate of qualification.

30. DD - The member was found guilty of one count of gross indecency against a male child. The offence occurred when the victim, a former student of the member, was in grade seven. The College found the member guilty of professional misconduct, terminated his membership and cancelled his certificate of qualification.

XV. *Report to Members - Discipline Decisions - Fall 1995*¹⁴

31. EE - The female member was found guilty of one count of gross indecency resulting from events that occurred approximately twenty years ago involving a fourteen-year-old female student at the school at which the educator taught. The College held the member guilty of professional misconduct, terminated her membership and cancelled her certificate of qualification.
32. FF - The College found that the male teacher was guilty of professional misconduct as a result of repeatedly touching in 1979 - 1980, the breasts, buttocks and thighs of two grade eight female students in his classes or in his charge. The member had resigned from the College and he consented to the cancellation of his certificate of qualification.

¹³ B.C., British Columbia College of Teachers, (Vancouver: British Columbia College of Teachers, 1995).

XVI. *Report to Members - Discipline Decisions - Winter 1996*¹⁵

33. GG - The College found the member guilty of professional misconduct as a result of entering into an inappropriate relationship with a student. The relationship involved counselling that was inappropriate and corruptive of the teacher/student relationship. The member published and distributed obscene and/or pornographic material to a student both at and away from school. The member's membership was terminated with the certificate of qualification being cancelled. The gender of both the teacher and student is not stated in the case summary.
34. HH - The male member was charged with seven counts of sexual misconduct but pleaded guilty to two counts. Each charge included sexual intercourse with a female student who was under the age of sixteen and over the age of fourteen. The College found the member guilty of professional misconduct. He agreed to the termination of his membership and the cancellation of his certificate of qualification.

XVII. *Report to Members - Discipline Decisions - Summer 1996*¹⁶

35. II - On October 3, 1994 the member was convicted of indecently assaulting a male person. The offence occurred between January 1, 1967 and December 31, 1970 while he was employed as a teacher in an elementary school. The College found him guilty of conduct unbecoming a member, terminated his membership and cancelled his certificate of qualification.

¹⁴ B.C., British Columbia College of Teachers, 7(1), (Vancouver: British Columbia College of Teachers, 1995).

¹⁵ B.C., British Columbia College of Teachers, 7(3), (Vancouver: British Columbia College of Teachers, 1996).

¹⁶ B.C., British Columbia College of Teachers, 7(5), (Vancouver: British Columbia College of Teachers, 1996).

36. JJ - The male member was convicted of two counts of committing a sexual assault of a male person and one count of indecently assaulting a male minor. Two of the victims, were brothers the member had befriended. The third victim was a student at the Independent school at which the member was teaching. The relationships began when one boy was seven years of age, when another was nine and when the oldest was twelve years old. The member carried on the relationships for a number of years, spanning a fourteen-year period. Finding him guilty of professional misconduct and conduct unbecoming a member, the College terminated his membership and cancelled his certificate of qualification.

XVIII. *Report to Members - Discipline Decisions - Fall 1996*¹⁷

37. KK - The College found the male teacher guilty of professional misconduct as a result of engaging in a one month sexual relationship with a nineteen-year-old female who was a student at the school at which the teacher taught but was not in any classes taught by the teacher. The hearing panel found that the relationship was sexual but the evidence was conflicting as to its nature. The College suspended the member's certificate of qualification and his membership for one year.

XIX. *Report to Members - Discipline Decisions - Winter 1996/97*¹⁸

38. LL - The male member pleaded guilty to a charge of sexual exploitation of a female student. The College recommended and the member consented to having his certificate of qualification cancelled and his membership terminated.

¹⁷ B.C., British Columbia College of Teachers, 8(1), (Vancouver: British Columbia College of Teachers, 1996).

¹⁸ B.C., British Columbia College of Teachers, 8(2), (Vancouver: British Columbia College of Teachers, 1997).

39. **MM** - The male member had pleaded guilty to sexual exploitation of a fifteen-year-old male student. The sexual exploitation of the student continued over a period of ten months. As a consequence of finding the member guilty of professional misconduct, the College terminated his membership and cancelled his certificate of qualification.
40. **NN** - The male member was convicted of sexual exploitation of a female student. The College found him guilty of professional misconduct and cancelled his certificate of qualification. The member had previously resigned his membership.
- XX.** *Report to Members - Discipline Decisions - Spring 1997*¹⁹
41. **OO** - The male member pleaded guilty to counts of gross indecency involving two female students. The offences occurred between October 1, 1976 and June 30, 1978 and between October 29, 1981 and June 30, 1983. The young girls were fourteen and fifteen years of age when these relationships began. The College found the member guilty of professional misconduct, recommended that his membership be terminated and his certificate of qualification be cancelled. The member consented to these recommendations.
42. **PP** - The female teacher was convicted of gross indecency arising from a sexual relationship commencing in 1977 with a female student. The College found that the member was guilty of professional misconduct, terminated her membership and cancelled her certificate of qualification.
43. **QQ** - The College found the female member guilty of professional misconduct as a result of providing alcohol to students, engaging in an inappropriate and sexual

¹⁹ B.C., British Columbia College of Teachers, 8(3), (Vancouver: British Columbia College of Teachers, 1997).

relationship with a student and counselled that student to drop out of school. Consequently, the member's membership was terminated and her certificate of qualification was cancelled.

XXI. *Report to Members - Discipline Decisions - Summer 1997*²⁰

44. RR - The College found that Dr. Tindill over various time periods between September, 1985 and June, 1994, when he was an Assistant Superintendent of Schools, engaged in conduct which amounted to a pattern of abuse of power and discriminatory sexual harassment towards six female employees, including administrators, teachers and clerical workers. The harassing behaviour included unwanted touching of the shoulders, neck, back, buttocks and jewelry on the women. It also included kissing on the lips, licking the back of one victim's hand and putting his head in one victim's lap at a social event. Other behaviour included inappropriate comments, while at a conference frequent requests for an invitation to go to victims' hotel rooms, telling personal stories out of context and tuning in a pornographic movie at an administrator's social event.

Dr. Tindill abused his power by manipulating district rules about conference attendance so that one of the victims could attend the same conference as himself, providing negative references to victims who rejected his sexual advances and denigrating principals in front of teachers and senior administration.

As a consequence of the College finding that Dr. Tindill had engaged in professional misconduct and conduct unbecoming a member, his membership was terminated and his certificate of qualification was cancelled.

²⁰ B.C., *British Columbia College of Teachers*, 8(4), (Vancouver: British Columbia College of Teachers, 1997).

XXII. *Report to Members - Discipline Decisions - Fall 1997*²¹

45. SS - The member was convicted of two counts of sexual assault of a female person. One charge related to a twenty-one year old woman and the other related to a grade seven student whom Mr. Cameron was counselling. In finding Mr. Cameron guilty of professional misconduct, the College terminated his membership and cancelled his certificate of qualification.

XXIII. *Report to Members - Discipline Decisions - Winter 1997/98*²²

46. TT - The College found that during 1975 and 1976 the male member engaged in an inappropriate sexual relationship with a female student who was enrolled in the same school at which he taught. The sexual misconduct included sexual comments about her body and kissing and kissing and fondling her body. He also provided her with alcohol. As a consequence of finding the member guilty of professional misconduct, the College recommended and he consented to the cancellation of his certificate of qualification. The member submitted his resignation from membership in the College.

47. UU - The male member was convicted of sexual exploitation of a fourteen-year-old female who had in the previous term been his student. In finding the member guilty of professional misconduct, the College terminated his membership and cancelled his certificate of qualification.

48. VV - The College held that the male member was guilty of professional misconduct as a result of engaging in a sexual relationship between September

²¹ B.C., *British Columbia College of Teachers*, 9(1), (Vancouver: *British Columbia College of Teachers*, 1997).

²² B.C., *British Columbia College of Teachers*, 9(2), (Vancouver: *British Columbia College of Teachers*, 1998).

1987 and July 1982 with a female student. The relationship included engaging in sexual intercourse with the student. Although the member had entered into a written agreement with the student's parents that he would not see her, he failed to abide by this agreement. His membership was terminated and his certificate of qualification was cancelled.

XXIV. *Report to Members - Discipline Decisions - Summer 1998*²³

49. **WW** - The member pleaded guilty of sexual assault of a minor. In the case summary neither the gender of the student who was assaulted or of the educator was reported. The College held that the educator was guilty of conduct unbecoming a member, cancelled the member's membership and certificate of qualification.

50. **XX** - The male member pleaded guilty to thirteen counts of indecent assault of young males. These offences occurred between 1961 and 1971. In finding the member guilty of professional misconduct, the College terminated his membership and cancelled his certificate of qualification.

XXV. *Report to Members - Discipline Decisions - Fall 1998*²⁴

51. **YY** - The College found that the male member had engaged in professional conduct when he engaged in conduct towards a female employee which amounted to a pattern of abuse of power and sexual harassment and for using inappropriate disciplinary methods when dealing with students in the Behaviour Disorder

²³ B.C., *British Columbia College of Teachers*, 9(3), (Vancouver: British Columbia College of Teachers, 1998).

²⁴ B.C., *British Columbia College of Teachers*, 10(1), (Vancouver: British Columbia College of Teachers, 1998).

Program. The member's certificate of qualification was cancelled and his membership was terminated in the College.

52. **ZZ** - The male member pleaded guilty to possession of child pornography. The hearing panel found that the educator used his position as a principal to obtain the cooperation of a twelve-year-old boy to what appeared to be an innocent videotape. The photograph was then used to depict the student as being naked and engaging in sexual activity. This material was used for the member's own use. At no time was the student involved in sexual activity with the educator. In finding the member guilty of conduct unbecoming a member, his membership was terminated and his certificate of qualification was cancelled.
53. **AAA** - The male member admitted to engaging in a sexual relationship with an eighteen-year-old female student who was enrolled at the school at which he taught but was not in any of the classes he taught. The member agreed that his actions constituted professional misconduct and also consented to terminating his membership in the College and to the cancelling of his certificate of qualification.

XXVI. *Report to Members - Discipline Decisions - Winter 1998/1999*²⁵

54. **BBB** - In considering the citation which alleged sexual assault of several students between Sept. 1, 1983 to March 1, 1990, the College took into consideration that after a second criminal trial, the male member was acquitted of all charges. As such, the College dismissed the citation.
55. **CCC** - In finding the male member guilty of professional misconduct, the College determined that he had engaged in an inappropriate relationship with a female student who was not in his classes. The relationship continued after the member

was suspended from the school board and throughout the grievance procedure despite the fact that he had assured the student's parents and his employer that he had ceased the relationship with the student. The College cancelled his certificate of qualification and it was noted by the College that his membership had previously lapsed. The member has filed an appeal with the British Columbia Supreme Court.

XXVII. *Report to Members - Discipline Decisions - Spring 1999*²⁶

56. **DDD - In finding the male member guilty of professional misconduct, the College determined that he had sexually assaulted students by touching the bodies of young persons for a sexual purpose; made jokes and comments of a sexual nature or with sexual innuendo to and in the presence of students; and had showed a video to students which depicted scenes of a sexual, demeaning and vulgar nature. In the case summary, the gender of the students is not stated. The College terminated his membership and cancelled his certificate of qualification.**
57. **EEE - The College found the male member guilty of conduct unbecoming a member as a result of his conviction for sexual assault of a child. The gender of the student who was assaulted was not stated in the case report. His membership in the College was terminated and his certificate of qualification was cancelled.**
58. **FFF - The male member admitted that he had made comments of a sexual, demeaning and offensive nature to the students in his class and that this behaviour constituted professional misconduct. His membership and certificate of**

²⁵ B.C., *British Columbia College of Teachers*, Vol. 10, No. 2

²⁶ B.C., *British Columbia College of Teachers*, 10(3), (Vancouver: *British Columbia College of Teachers*, Spring 1999).

qualification were suspended for three months. The gender of the students was not stated in the case summary.

59. GGG - The male member admitted that he had been involved in an inappropriate sexual relationship with a young Grade nine or ten female student. The relationship continued from 1984 until some time in 1994. The College found that the member had been in a position of trust to the victim by being a family friend and an "employer" of her as a babysitter. The College held that the member was guilty of conduct unbecoming a member. The member's interim certificate had expired and the member was barred from reapplying for a certificate of qualification and membership in the College for a period of two years. If and when he reapplies to the College, it will be determined whether he is a fit and proper person to engage in teaching.
60. HHH - The College found the male member had engaged in inappropriate behaviour towards a female student who was a student in his math class. The member and the student had conversations in his classroom after school on two successive days. On the first day, the educator made some inappropriate remarks to the students. On the second day, the member touched the student around the waist and asked her out for dinner. The College suspended for five months his certificate of qualification and his membership. The member did not grieve the school board's decision to terminate his employment.

XXVIII. *Discipline Decisions - Report to Members - Summer 1999*²⁷

61. III - The male member was found guilty of engaging in professional misconduct as a result of engaging in inappropriate sexual touching of two female students. The College cancelled his certificate of qualification. The member's membership had previously lapsed.
62. JJJ - The female teacher was found guilty of engaging in professional misconduct as a result of making a series of unfounded allegations that she had been the victim of threats, assault, sexual assault or abuse by, or under the direction of, fellow staff members. The College suspended her membership and certificate of qualification for one year.
63. KKK - The male member was found guilty of professional misconduct as a result of engaging in inappropriate conduct with female students by violating the boundaries of the student teacher relationship. The inappropriate behaviour included giving gifts, visiting students workplaces for the purpose of gift-giving, taking a student out for dinner and checking into grades in a course for which he was not the teacher and subsequently reporting the grade to the student. The College suspended his membership and certificate of qualification for a period of four months.

²⁷ B. C., *British Columbia College of Teachers* 10(4) (Vancouver: British Columbia College of Teachers, 1999).

A SUMMARY OF CASES OF THE ONTARIO COLLEGE OF TEACHERS

The cases discussed below outline the types of sexual misconduct that educators were alleged to have engaged in and the disciplinary sanctions imposed on them by the College. To preserve the confidentiality of the educators, names were not used.

I. SEPTEMBER 1998¹

1. A - The male member was found guilty of professional misconduct for sexually assaulting a young woman while she was under his care. In 1997 he was convicted of sexual assault. The discipline panel ordered the revocation of his certificates of registration and qualification.
2. B - The male member was found guilty of professional misconduct for touching a fourteen-year-old male student. In September 1996 he was convicted of sexual exploitation. The discipline panel revoked his certificates of registration and qualification.
3. C - In 1996 the male member was charged with forty-two sexual offences including sexual assault, indecent assault, gross indecency and possession of child pornography. He was convicted of thirty-three of the offences and was declared a dangerous offender. The member sexually abused fifteen young boys over a period of twenty-seven years. The discipline panel found him guilty of professional misconduct and ordered the revocation of his certificates of registration and qualification.
4. D - The fifty-six year old male teacher was found guilty of professional misconduct as a result of sexual improprieties towards female students. In 1997

¹ "Discipline Panels Render First Decisions, *Professionally Speaking* (September 1998) at 33 - 35.

he was convicted of sexual assault and assault. His certificates of registration and qualification were revoked.

5. E - The fifty-four year old male teacher was found guilty of professional misconduct as a result of sexually assaulting a ten-year-old female youth. In 1996 he pleaded guilty to indecent assault. His certificates of registration and qualification were revoked.
6. F - The fifty-year-old male teacher was found guilty of professional misconduct for sexually abusing two students in his care. The gender of the students was not reported. In 1997 the member was convicted of sexually touching these students. His certificates of registration and qualification were revoked.
7. G - The fifty-two year old male teacher was found guilty of professional misconduct for sexually assaulting current and former female students. In June 1996 the member was found guilty of sexual assault and indecent assault. His certificates of registration and qualification were revoked.

II. MARCH 1999²

8. H - The fifty-nine year old former male music director and consultant was found guilty of professional misconduct as a result of sexually abusing two female students that occurred between 1971 and 1978. In 1977 he was convicted of exposing himself in public and he failed to advise his employers of the conviction. In December 1996 he was convicted of sexual intercourse with a female less than sixteen years of age and over fourteen years of age, indecent assault and gross indecency. His certificates of registration and qualification were revoked.

² "Discipline Panel Decisions", *Professionally Speaking* (March 1999) at 29 - 30.

9. I - The fifty-three year old male teacher was found guilty of professional misconduct as a result of sexually assaulting students and former students of his Grade 5 and 6 class. The gender of the students is not reported. In March 1995 he was convicted of indecent assault and sexual assault. His certificates of registration and qualification were revoked.
10. J - The fifty-five year old teacher was found guilty of professional misconduct for convictions involving sexual offences involving youth under the age of eighteen and for showing inappropriate movies in his classroom. In December 1989 he was convicted of communication with a male over the age of eighteen for the purposes of prostitution. In addition in 1996 he was also convicted of gross indecency and procuring or attempting to procure sexual services of persons under the age of eighteen. His certificates of registration and qualification were revoked.
11. K - The thirty-year veteran male teacher was found guilty of professional misconduct as a result of engaging in a sexual relationship with a seventeen-year-old former student. The gender of the student is not reported. The teacher was found guilty of sexual assault. The discipline panel accepted his resignation on the condition that he never reapplies for reinstatement.
12. L - The male teacher was found guilty of professional misconduct for sexually assaulting a young person. The gender of the student is not stated. In 1994 he was found guilty of touching for a sexual purpose a young person over whom he was in a position of trust or authority. His certificates of registration and qualification were revoked.

III. JUNE 1999

13. **M - The fifty-eight year old male teacher was found guilty of professional misconduct as a result of possessing child pornography. In June 1998 he pleaded guilty of the possession and importation of child pornography. His certificates of registration and qualification were revoked.**
14. **N - The forty-seven year old male teacher was found guilty of professional misconduct as a result of engaging in a sexual relationship with a seventeen-year-old female student. In February 1998 he pleaded guilty to sexual exploitation of the student. His certificates of registration and qualification were suspended for eighteen months.**
15. **O - The fifty-one year old male teacher was found guilty of professional misconduct as a result of engaging in a variety of sex acts with former male special education students. His certificates of registration and qualification were revoked.**

**QUESTIONNAIRE RE: PROCEDURES FOR DEALING WITH EDUCATORS
WHO HAVE BEEN ACCUSED OF SEXUAL MISCONDUCT**

A. DEFINITIONS

Educator - teacher, principal, supervisor, assistant superintendent, superintendent and any other supervisory/administrative staff who holds a teaching certificate.

Sexual Misconduct - includes both sexual abuse and sexual harassment. Child sexual abuse occurs when a child is used for the sexual gratification of an adult and involves exposing a child to sexual contact, activity or behaviour. This may include invitation to sexual touching, intercourse or other forms of exploitation such as prostitution or pornography.¹ For a definition of sexual harassment, please refer to the definition in your collective agreement. **Kindly attach a copy of the definition of sexual harassment in the collective agreement.**

B. PROCEDURES/POLICIES

1. Do you have written procedures/policies to follow when dealing with a situation involving a teacher or other educator who has been accused of sexual misconduct with a student in the district or with a child who is under the age of majority?
Yes _____ No _____

2. Who developed the written procedures/policies?

3. Are those written procedures/policies part of the collective agreement concerning allegations of sexual misconduct of a teacher? Yes _____ No _____

If so, please attach a copy of the provision of the collective agreement or policies outlining the procedures.

4. Are the written procedures/policies the same for teachers and other educators who are not governed by a collective agreement? Yes _____ No _____

If the procedures/policies are different, how are they different?

5. What are the procedures/policies?

- a. Conduct an investigation? Yes _____ No _____

If so, who conducts the investigation? (Please check)

Director _____ Superintendent _____ Employee Relations Supervisor _____
Other (please specify) _____

What is done in the investigation? (Please check)

¹ A.F. Brown & M.A. Zuker, *Education Law* (Scarborough: Carswell, 1994) at 119-120.

Interview witnesses _____
 Interview witnesses _____
 Inform the police _____
 Contact the children's aid society _____
 Inform the Ontario College of Teachers _____

- b. Inform the teacher/educator of the allegations? Yes _____ No _____

When is the teacher/educator informed of the allegations?

How is the teacher/educator informed of the allegations? In writing?
 Yes _____ No _____

By meeting with the teacher/educator? Yes _____
 No _____

- c. Interview the teacher/educator? Yes _____ No _____

Are signed witness statements taken from all witnesses?
 Yes _____ No _____

C. **REPORTING TO A CHILDREN'S AID SOCIETY**

At what stage of the investigation is a report made to a Children's Aid Society?

D. **REPORTING TO THE POLICE**

At what stage of the investigation is a report made to the police?

E. **HEARING**

Prior to making a decision of disciplinary action, is the teacher/educator given a hearing before the board of school trustees? Yes _____ No _____

Is the hearing oral or by way of written submissions?

F. **WITNESSES**

If the hearing is oral, is the teacher/educator permitted to call witnesses?
 Yes _____ No _____

G. **LEGAL REPRESENTATION**

Is the teacher/educator permitted to be represented by a lawyer at the hearing?
 Yes _____ No _____

H. **WRITTEN RECORD OF HEARING**

Are minutes recorded as to the content of the meeting? Yes _____ No _____

I. **DISCIPLINARY ACTION**

When is the decision made regarding the initial disciplinary action to be taken with the teacher/educator? Before or after hearing the teacher/educator?

What disciplinary action is generally taken at the initial stage?

Have there been circumstances where no disciplinary action has been taken?

Yes ____ No ____

If yes, what were the circumstances?

J. BURDEN OF PROOF

What is the standard of proof applied by the Board when determining whether an allegation of sexual misconduct involving a teacher/educator has been proven?

What is your understanding of this burden of proof?

K. LEGAL COUNSEL

When dealing with a matter concerning allegations of sexual misconduct involving a teacher/educator do you rely on the advice of legal counsel in conducting the investigation and determining the appropriate disciplinary action to be taken? Yes ____ No ____

If so, to what extent do you rely on the advice of legal counsel?

L. NUMBER OF CASES

Over the past ten years, how many cases has the Board had to deal with?

It would be of great assistance if you could answer the following questions. Hopefully the information I am seeking is not a great inconvenience for you to produce.

How many educators pleaded guilty to the charges? ____

How many were convicted of the offences after a criminal trial? ____

If possible could you kindly **attach the reasons for judgment for these criminal trials** or if you are not willing to do this, would you kindly provide the style of cause, registry name and case number and date of trial. (e.g. Regina v. Brackenbury, Ottawa Registry No. XXXXX, April 28, 1998). Not all cases are indexed in Quicklaw (a database for case law) or other reporting series, but if I have the case name, registry name and number and date, I will be able to obtain it directly from the registry.

CIVIL LAW SUITS

How many actions have students brought against the school board for civil damages as a result of being sexually abused by an educator?

How many settled without a trial? _____

How many went to trial? _____

If possible could you kindly **attach the reasons for judgment for these civil cases?**

Name

School District

Position

Address

Date

If you have any questions, kindly contact Barbara J. Murray at (902) 420-9128 or bjmurray@is2.dal.ca. Kindly return this questionnaire by **May 31, 1999** to Barbara J. Murray at #1406 - 5959 Spring Garden Road, Halifax, Nova Scotia B3H 1Y5.

Thank you for your assistance.

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PROVINCIAL

British Columbia

- Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46.
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School Act, R.S.B.C. 1996, c. 412.
School Act, R.S.B.C. 1979, c. 375.
Teaching Profession Act, R.S.B.C. 1996, c. 449.

Nova Scotia

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