

CHAPTER 1

Introduction to the Legal Framework

CHAPTER OUTLINE

Constitutional Basis of Law 2

Indigenous Education 3

Specific Sources of Education Law 4

Related Sources of Education Law 6

Legal Procedures and Related Matters 7

Legal Role and Status of Teachers 10

Modern-Day Roles of Teachers 12

Discussion Questions and Ethical Scenarios 15

Notes 17

The field of education law has continued to expand over the past several decades. Although this expansion may present new and exciting challenges for lawyers and educational administrators, it has been a troublesome development for some teachers. The *Canadian Charter of Rights and Freedoms*,¹ now over 40 years old, continues to play a significant role in shaping the educational environment. More and more, educational administration and policy must navigate these legal currents.

Teachers are arguably the most important component in any educational structure. When the classroom door is closed, the responsibility for educating today's youth rests squarely on their shoulders. In spite of their vital role in the proper functioning of the educational system, teachers have traditionally been victimized by outdated expectations with regard to their legal roles and responsibilities, both inside and outside the classroom. This was true 30 years ago when the first edition of this book was written, and it is just as true today. The emergence and development of education law issues over these three decades have not reduced the confusion for teachers.

The law, generally, can be mystifying. Historically, judges and lawyers have not made the necessary efforts to demystify the law and legal processes. Lawyers are often guilty of resorting to legal jargon instead of using plain language to explain legal principles. Through the numerous lectures and seminars we have conducted across the country, and the many years we have spent representing school boards, teachers' unions, and parents, we have been able to gain, to some extent, a better understanding of the mysteries of the law as seen through the eyes of teachers. Although, increasingly, teachers and administrators are writing legal handbooks for

teachers, we think it is important that lawyers also provide legal information. Some areas of law—for example, constitutional law—are complex. As the field of education law has grown in size and complexity, so too have the roles and responsibilities of teachers. Rather than explore legal issues within the traditional legal framework of negligence, criminal law, and labour law, for example, we have divided this book into chapters that focus on the roles and responsibilities of teachers. The legal issues are woven into this discussion.

Before embarking on our exploration of a teacher’s many roles, we first take a brief tour through the Canadian legal system, highlighting the areas that affect education. We also examine the role and status of teachers as seen through the eyes of the law.

Constitutional Basis of Law

Canada’s Constitution is divided, essentially, into two parts: the *Constitution Act, 1867*² and the *Constitution Act, 1982*.³ The latter includes section 35, which addresses Aboriginal rights, and the Charter. The 1867 Act, in section 91, sets out a list of powers exclusively exercised by the federal government and, in section 92, a list of powers exclusively exercised by provincial governments. We can draw examples of this division of powers from our daily experiences—that is, the federal government has exclusive authority over matters such as banking, national defence, criminal law, copyright, patents, navigation and shipping, and telecommunications. The provinces have exclusive authority over matters of a “merely local or private nature,” property and civil rights, and particular items such as the court system, hospitals, and municipal governments.

Education has historically enjoyed a special status because it is defined by a separate section in the *Constitution Act, 1867*. Section 93 specifically assigns the **legislative authority** over education to the provinces, exclusively permitting them to make laws that relate to education. For this reason, education has long been considered the “jewel” of the provinces, although there are a few important exceptions. The education of Indigenous students living on reserve and the Royal Military College of Canada, for example, fall under federal power. Another exception is denominational schools, or religious-based separate schools, which are provided **constitutional protections**.⁴ These protections only apply in provinces that had separate schools prior to Confederation. Quebec⁵ and Newfoundland and Labrador⁶ obtained constitutional amendments in the 1990s that rescinded denominational school rights; however, protections for constitutional denominational schools still exist in Ontario, Alberta, and Saskatchewan.⁷

legislative authority having the authority under the *Constitution Act, 1867* to enact or make law

constitutional protections the protection of identified or enumerated rights and freedoms through the imposition of substantive legal obligations or limitations imposed on the government by the *Canadian Charter of Rights and Freedoms*

Since 1982, the most important constitutional development in education law has been the entrenchment of the Charter in the *Constitution Act, 1982*. As part of the Constitution, the Charter is the supreme law of Canada, and any legislation that is inconsistent with it is inoperative. Throughout this book, we examine the various aspects of the Charter as they relate to education. In general terms, one of the most dramatic effects of the Charter is that it continues to shape national standards in education.⁸

Before the enactment of the Charter, education (other than in denominational schools) was strictly within the purview of the provinces, and educational rights and privileges were defined by provincial education acts. Even with respect to Indigenous Peoples, the federal education jurisdiction was largely delegated to the provinces and local territorial councils. There was also considerable power left in the hands of local school boards. The Charter, however, establishes rights and freedoms for every Canadian citizen regardless of residence. As the courts hear cases that involve the impact of constitutional rights on education, the provinces are being forced to adjust their legislation to comply with the standards of the Charter as interpreted by the courts. Ontario must now pay attention to what the courts are saying in Alberta and Saskatchewan (and vice versa) if it hopes to avoid similar challenges in its own courts. Although education is a provincial matter, court decisions based on the Charter have acted as a nationalizing influence in areas as wide-ranging as minority language rights and inclusive education.

Indigenous Education

Although the provinces have legislative power over education, an important exception to this observation is federal authority over the education of First Nations students living on reserve. In such circumstances, federal power is limited to funding, with the responsibility of managing and delivering education residing directly with the First Nations or their delegate organizations. The creation and proper funding of these schools, however, remain major challenges. In 2014, a bill called the *First Nations Control of First Nations Education Act* was proposed by the Government of Canada that would allow the federal government to set and enforce standards for schools on reserves.⁹ The education bill did not become law, however, as the Indigenous community was deeply divided over whether it gave too much control to the government over Indigenous education. It remains to be decided whether Aboriginal and treaty rights—which are constitutionally guaranteed in section 35 of the *Constitution Act, 1982*—include an Aboriginal right to education and what the content of such a right might be.¹⁰ There are several self-government agreements in the western provinces that contain an education provision giving Indigenous governments law-making authority over education,¹¹ lending support to potential claims of a treaty right to Aboriginal education. Additionally, the federal government created a national panel on First Nations Elementary and Secondary Students on Reserve. In February 2012, this panel released a report called *Nurturing the Learning Spirit of First Nation*

Students.¹² This has provided a first step to more meaningful education for Indigenous Peoples in Canada, although there is much more to be done.

Although the federal government has responsibility for the education of students living on reserve, the provinces are ultimately responsible for educating Indigenous students who attend off-reserve schools. Education in Canada's northern territories raises particular issues of cultural sensitivity as well. Traditional public education methods may not always be culturally appropriate in some communities, and a more customized approach must be adopted. Most provinces have made efforts to incorporate Indigenous education into lesson plans for all students. Alberta's kindergarten-to-grade-12 provincial curriculum, for instance, includes First Nations, Métis, and Inuit perspectives, while Saskatchewan's *Inspiring Success* policy framework incorporates Indigenous knowledge at all levels of learning.¹³ Ontario is implementing an Indigenous Education Strategy to increase knowledge and awareness of all students about Indigenous histories, cultures, and perspectives and has signed partnership agreements with First Nations to improve educational outcomes.¹⁴

Several of the Truth and Reconciliation Commission's 94 Calls to Action relate to education. Recommendations include eliminating funding and achievement gaps, enabling parental involvement in children's education, and developing the culturally-appropriate curricula mentioned above.¹⁵ Relatedly, in 2019, the *Indigenous Languages Act* was passed.¹⁶ One of its purposes is to increase support for education in Indigenous languages, which are slowly being incorporated into the curriculum. For example, Newfoundland and Labrador now has three Inuit schools, Nunavut is phasing in bilingual education in Inuktitut and English, and British Columbia allows speakers to become certified to teach in 30 First Nations languages.¹⁷

The number of First Nations, Métis, and Inuit is growing at a rate far greater than the rest of Canada, and the average age of people in these communities is much younger. Now, more than ever, there is a pressing need for more meaningful education for Indigenous Peoples in Canada, both on and off reserve, and for concerted efforts at reconciliation through education. Ultimately, the solutions must come from consultation with and the involvement of Indigenous communities themselves. First Nations' control over the education of their own people can be a vital first step to broader self-government and reconciliation with the rest of Canada.¹⁸

Specific Sources of Education Law

There are various sources of education law, each with differing scope and degrees of legal force. The Charter exerts the strongest possible legal force and has the widest possible scope; however, it touches only certain aspects of education law. With the exception of denominational school rights (s. 29) and minority language education rights (s. 23), the provisions of the Charter are not aimed specifically at education, though their impact is felt in all areas of education law.

The provinces provide the most comprehensive sources of education law through their respective education statutes. These statutes codify the law of the province and cover most aspects of administration, from the powers and responsibilities of the minister of education to the duties of students. They define school districts and outline the powers and duties of school boards, teachers, and principals. Although every province's education statutes deal with similar subjects, the varying approaches from province to province reflect the unique historical development of the various provinces.

In addition to provincial education acts, there are statutes that regulate specific aspects of education.¹⁹ Laws of more general application—such as labour standards, human rights codes, and occupational health and safety legislation—also have an impact on schools.

A second source of law created by the provinces is known as “**subordinate legislation**” or “regulations.” These laws are expressly authorized in every provincial or territorial education act and may be passed by a minister of education or the Cabinet without a vote by the members of the legislature. Regulations have the same legal force as statutes but are usually more detailed and technical in scope. In January 2013, in Nova Scotia the terms “bullying” and “cyberbullying” were defined in the updated regulations, while in Ontario these terms were defined in the education statute. Regulations are attractive to governments as a means of implementing educational policies without having to debate the issues in the legislature. All provincial education statutes give the minister and the provincial Cabinet broad powers to make regulations that affect many aspects of education.

The next source of law, located a step down on the legal hierarchy, are the **by-laws** or policies implemented by school boards. These policies may be developed by either the education departments or the boards; most often, they are developed by both bodies. The policies are guidelines that school administrators and school boards may enact to govern their own activities, but they carry less weight in a courtroom. In other words, a parent may complain to a school board that a certain school policy is not being followed; however, this will rarely serve as the sole basis for legal action. A policy has legal force only if it can be tied to another source of law. Individual schools may also develop their own policies, but these are still further down the chain of authority.

The final and major source of education law in Canada is the **common law**, or judge-made law. This body of law is composed of the decisions of judges who hear

subordinate legislation a legislative instrument made by an entity under a power delegated to that entity by Parliament, for example, regulations made pursuant to an existing statute

by-law a rule or regulation made by a local authority or governing body for the purpose of regulating the affairs or conduct of its members

common law law derived from custom and judicial precedent rather than by statute

cases across the country, and it is in a state of constant evolution. As parents have become more familiar with the protections afforded by the Charter, there has been a surge of judge-made law in the field of education. This takes the form of interpretation of statutes and constitutional provisions as well as interpretation of the decisions of other judges. Some commentators have attributed this phenomenon to a new “rights consciousness” on the part of parents. Judges are, therefore, becoming prominent figures in the field of education, and in spite of attempts by the provinces to adapt their education processes to reflect the protected rights and freedoms in the Charter, judges and lawyers still play an important role in teachers’ lives.

Related Sources of Education Law

Education touches many aspects of contemporary life; consequently, it is affected by many different, though related, sources of law. Not the least of these is the criminal law, which has undergone significant changes in the past few decades. The entire juvenile justice system was overhauled in 1984 through the creation of the *Young Offenders Act*²⁰ and then again in 2003 with the passage of the *Youth Criminal Justice Act*.²¹ These acts have radically changed the way that the legal system deals with children and youth. The *Criminal Code*²² was amended in 1988 to better protect children from sexual abuse. Further amendments were made in 2015 to deal with cyberbullying and intimate images. In February 2024, the federal government tabled legislation to protect young people from the many harms they face online. This significant law, the *Online Harms Act*, includes the creation of a Digital Safety Commission, increased access to human rights remedies for hate speech, and amendments to the *Criminal Code*.

These broad protections have caused a great deal of concern among teachers. Although teachers are certainly interested in the welfare of their students, they must also be aware of the danger of falling victim to damaging allegations of sexual or other forms of physical abuse. A relatively recent change to the criminal law is the *Safe Streets and Communities Act*,²³ which was passed in 2012. Known commonly as the “omnibus crime bill” or Bill C-10, it affects multiple pieces of legislation relating to criminal justice. One significant aspect of this bill was to shift focus from rehabilitation to protection of society, and the criminal punishments teachers see given to themselves or their students may be more severe.

As the workplace becomes more complex, labour law has also proven to be an important area for teachers. In most provinces, the working conditions of teachers are regulated by distinct collective bargaining legislation. The major difference between these statutes and general labour relations legislation is the limitations on the right to strike found in some teachers’ collective bargaining acts. Even in this area, the Supreme Court of Canada has constitutionalized the right to strike in a landmark case.²⁴ We will deal with this case and its implications in Chapter 7 of this book.

Copyright law has emerged as a concern for teachers in the form of the *Copyright Act*,²⁵ which does not fully protect the use of materials for educational purposes.

Teachers with the best educational intentions may find themselves violating copyright laws by making unauthorized copies in some circumstances. However, the 2013 version of the *Copyright Act* is more positive for schools. Copyright law is created by the federal Parliament and thus affects schools in every province. We examine copyright law and its related issues in Chapter 8 of this book. We will also explore in that chapter and others some of the complex issues raised by artificial intelligence (AI).

Family law issues increasingly arise in schools as governments become more involved in regulating family relationships. Provincial child-protection statutes have been amended to focus on the best interests of the child, and there has been a strong movement toward detecting and prosecuting child abusers. This means that teachers must be aware of the warning signs of abuse and familiarize themselves with the mandates of local social service agencies. Every province's children's services legislation makes it mandatory for professionals who work with children to report suspected child abuse or neglect. Failure to do so may result in prosecution. Mental health issues and concerns about suicide prevention also implicate health departments, and there is a need for the various departments to work together to provide more integrated services to students.

Bullying and cyberbullying have become major issues in education. Because of the widespread nature of bullying and the acknowledgment of the significant damage that it causes to children, it is imperative that teachers be aware of these matters. The Senate report on cyberbullying²⁶ and the report from the Nova Scotia Task Force on Bullying and Cyberbullying, *Respectful and Responsible Relationships: There's No App for That*,²⁷ for example, are important resources for teachers. Human rights legislation and the *Criminal Code* are also possible sources for teachers who feel that bullying could amount to harassment in either human rights or criminal terms. Bullying and cyberbullying and the impact of social media are explored throughout the book.

We discuss these various sources of law in more detail as they arise in the context of the specific roles played by teachers. Because education law is connected to other legal spheres, teachers must have a general understanding of the larger framework of Canadian law.

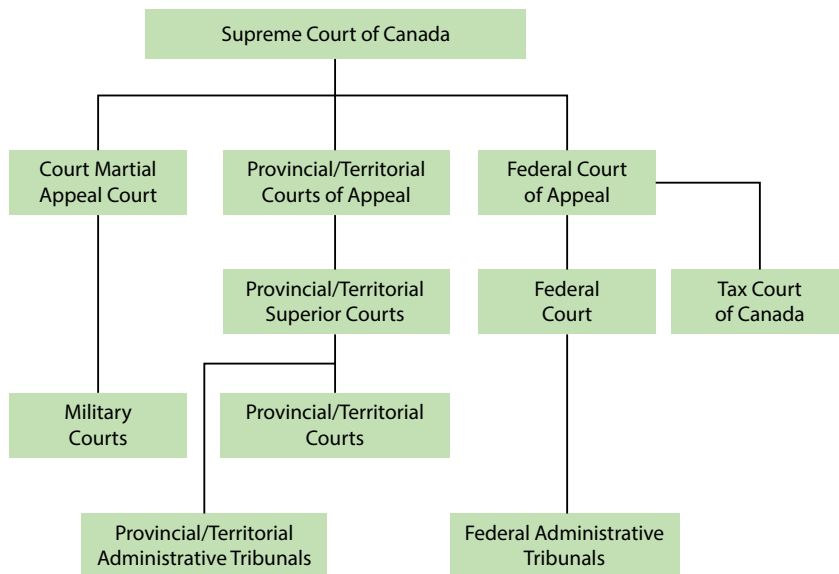
Legal Procedures and Related Matters

Canada's legal system was grafted onto British common law traditions and is similar to the legal systems in other Commonwealth countries. The preamble to the *Constitution Act, 1867* describes the Canadian governmental system as "similar in principle to that of the United Kingdom." Each province has a "**superior court**," with the inherent or historical jurisdiction to deal with any form of legal dispute.

superior court the highest level of court in a province or territory, usually divided between a trial and an appeal division; superior courts have inherent jurisdiction to hear serious civil and criminal cases; they have different names: e.g., Supreme Court, the Court of King's Bench, or the Superior Court of Justice

This **jurisdiction** is inherent in the sense that it goes with the court even if the statute is silent on the issue. The superior court may be broken into a trial division and an appeal division, but in all provinces there is a separate appeal court. There are also “**inferior courts**” created by statute. These courts—for example, family courts and small claims courts—have defined purposes and limited mandates. The final level of appeal is the Supreme Court, whose decisions are **binding** on all courts federal and provincial. The decisions of the various provincial appeal courts are **persuasive** but not binding on courts outside their province of origin. There are also federal courts whose powers are defined by statute, but school issues are rarely, if ever, raised there. For a visual illustration of Canada’s court system, see Figure 1.1. As an example of a provincial court hierarchy, Figure 1.2 illustrates the example of British Columbia.

FIGURE 1.1 Outline of Canada’s Court System



From the perspective of a parent pursuing an education law issue, the road to final resolution is often long and expensive. The first line of attack is to discuss the problem with the relevant school board authorities and perhaps attend a meeting of

jurisdiction the scope of the authority or powers conferred on a government body or official by legislation or common law

inferior court a provincial or territorial court created by legislation and that usually hears criminal matters; also includes specialized courts, e.g., family or youth court

binding requiring a lower court to follow a precedent from a higher court in the same jurisdiction

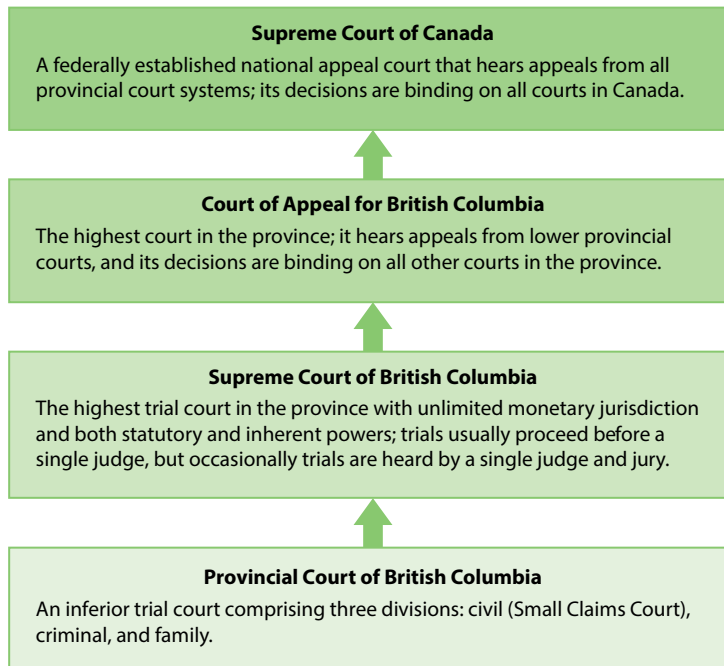
persuasive of a precedent from another jurisdiction or from a lower court, convincing but not binding

This excerpt is for review purposes only and may not be shared, reproduced, or distributed to any person or entity without the written permission of the publisher.

© 2025 Emond Montgomery Publications. All Rights Reserved.

the full school board. It is becoming increasingly popular to have lawyers represent the interests of parents at these school board meetings. If parents remain unsatisfied at this administrative level, they may choose to institute legal proceedings in the superior court of the province. It can take as long as two years to prepare a case for court and complete the trial. Considering the expenses involved for both parents and school boards, there is a substantial incentive to settle these disputes before going to trial.

FIGURE 1.2 Court Hierarchy in British Columbia



If a case proceeds through the trial process, the losing party must decide whether to accept defeat or appeal the ruling. The next step in the litigation process is an appeal to the provincial court of appeal; the appeal can take up to a year to be heard, depending on the court's schedule. If, after the appeal, a party is still dissatisfied, they may appeal to the Supreme Court. If the issue is deemed to be of sufficient national importance, the Supreme Court may choose to hear the appeal. The majority of cases are declined. To take a case from trial to the Supreme Court can take as long as seven years and cost hundreds of thousands of dollars. This means that the courts are not easily accessible to average Canadians.

Given the high cost and significant time involved in bringing matters before the courts, remedies are often sought through mediation or particular administrative

structures. Some education statutes include administrative structures that allow parents, students, and teachers to appeal decisions to a statutorily created administrative board. There are also specialized labour boards, where teachers may pursue employment-related matters. A common administrative route for resolving rights disputes in schools is bringing a complaint before the human rights commission. Most of the legal costs of pursuing a human rights complaint are borne by the commission and not the complainant. Unfortunately, these administrative procedures can also take a long time and are usually subject to review or appeal in the courts. The wheels of justice grind slowly.

Legal Role and Status of Teachers

Against this tapestry of interwoven sources of law, we now turn to the status of teachers. The question of a teacher's legal status has been a neglected issue for many years. Perhaps this explains why the law's intervention into educational policy continues to cause such a stir throughout the teaching community. Traditionally, teachers have been largely immune from examination under the legal microscope; however, as the law becomes increasingly involved in education, teachers are also swept into the legal process.

If one were to ask any teacher what they consider their role and legal status in the classroom to be, they would probably reply, "I stand in the place of a parent for the purpose of teaching children." Ask a teacher about the standard of care that is expected of them, and they would probably answer, "I must exercise the care of a reasonable and prudent parent." Ask another teacher about the appropriate scope of their discipline, and they would tell you that they are to exercise the discipline of "a kind, firm, and judicious parent." Teachers are inundated with role references based on parental delegation of authority. This is the common law origin of the status of a teacher.

The theory of parental delegation is drawn from the historical doctrine of *in loco parentis*. This is a Latin phrase meaning "in the place of a parent." Historically, this doctrine served as the basis for a teacher's legal authority. In the early 1900s, for example, parents were often left to their own devices to form community school boards and build their own schools. Parents were thus able to prescribe the manner in which their children were to be taught, and they bore the primary responsibility for hiring and firing teachers. Most commentators agree that teachers in that era had little autonomy or privacy. Furthermore, the fact that the one-room school contained students from grades 1 to 12 meant that it was possible for the same teacher to teach the same child for ten or more years while simultaneously teaching several children from the same family. This is the model of education that existed when many education statutes were first drafted.

Although the doctrine of *in loco parentis* may well have been operative in the early part of the past century, it has been eroded almost to the point of extinction in

the past several decades. The doctrine may still have some life in the common law duties of teachers, but it has largely been supplanted by statute.

Without recourse to developments in case law, we need only look at the realities of the school setting to realize that *in loco parentis* has little or no place in today's schools. Although the one-room schoolhouse and community school boards may once have provided a setting for parents to delegate their inherent authority to teachers, the post-1960 world of centralized school authority and legislative regulation leaves little room for similar delegation. Parents are now separated from teachers by a vast maze of administrative and governmental structures. In fact, in recent years, we have seen provinces moving even further away from local governance of school boards to create larger regional “mega-boards” or, in some cases, eliminate school boards in favour of a parental governing authority.²⁸ Discretion has been replaced with legislation and even larger and more distant governing bodies that often leave both parents and teachers with a sense of powerlessness.

In addition to their former status of *in loco parentis*, teachers, as agents of the state, have also exercised an additional legal role under the common law principle of ***parens patriae***. This principle has been defined as follows:

The sovereign as *parens patriae* has a kind of guardianship over various classes of persons who, from their legal disabilities, stand in need of protection, such as infants, idiots and lunatics.²⁹

The provinces hire teachers in a *parens patriae* capacity to act as state agents for the purpose of providing education to children. Although this dated language is no longer acceptable, there is still a *parens patriae* jurisdiction over children and similarly vulnerable individuals.

Given that teachers have exercised their role under both the *in loco parentis* and *parens patriae* principles, which of these principles is the primary basis for the present legal status of teachers? Even in the early 1900s, state authority was the predominant basis for teachers' legal authority. This is most clearly seen in the areas of compulsory education and corporal punishment. If a parental delegation were the primary basis for a teacher's authority, then parents would be able to revoke or define that delegation. In cases that involved compulsory education, parents attempted to revoke the delegation of authority to teach their children by refusing, for various reasons, to send their children to provincial schools. They were told by the courts (in most cases) that the government's compelling interest in the education of children should prevail. The role of the state in protecting the child trumped that of the parent.

In cases that involved corporal punishment, parents attempted to “define” their *in loco parentis* delegation by restricting the use of force on their children. If *in loco*

parens patriae the jurisdiction of superior courts to act in place of the parent for the protection of a child

parentis were the primary basis for a teacher's authority, then a teacher could be found to have "assaulted" the student in circumstances where the parents had expressly instructed that their child not be touched. As early as 1910, the courts upheld the statutory role of teachers to use reasonable force by way of correction to maintain order and discipline in the classroom. In fact, this statutory authority has been and continues to be contained in section 43 of the *Criminal Code* as a specific defence available to teachers on a charge of assaulting a student. This section has also survived a constitutional challenge based on the Charter.³⁰

When we combine the growth of statutory authority with the historical evolution of the school setting, it is simply not realistic to suggest that in today's schools, teachers may rely on the doctrine of *in loco parentis* as a primary source of authority. This was confirmed by the Supreme Court in *Ogg-Moss v. The Queen*.³¹ This case involved an assault charge against a counsellor in a facility for adults with mental disabilities. In his discussion of the application of section 43 of the *Criminal Code*, then Chief Justice Dickson examined the history and application of the *in loco parentis* doctrine. He concluded that the courts will be reluctant to imply a delegation of parental authority and that *in loco parentis* has little, if any, relevance in institutional settings. Today, teachers' primary source of authority comes from the state and is regulated by statute and related rules.

Modern-Day Roles of Teachers

Today's teachers face many complex and varying roles. Certainly, many teachers would welcome a return to the traditional *in loco parentis* model of teaching, when it was possible simply to rest on their judgment as a parent. In today's schools, the teacher is seemingly required to act not only as a parent but also as a police officer, social worker, mental health professional, and professional educator. The increasing amount of violence educators face in schools adds additional complexity to this role. In Ontario, for instance, 70 percent of elementary teachers reported experiencing or witnessing violence during the school year, with many teachers feeling that they were not in a position to defend themselves.³² It is no wonder that many teachers are confused and frustrated in their present circumstances and, in particular, with the conflicting signals sent to them by government officials, school administrators, and the courts. The chapters that follow attempt to identify and demystify these roles. In particular, they focus on the law's effect on each of the modern teacher's roles. In many cases, the law has served to create and enhance a particular role for teachers, and in other cases, it has simply served to shift the boundaries of existing roles.

In preparing this book, we have relied to a considerable extent on our legal experience representing both parents and school authorities. However, the primary basis for the particular definition of the roles of teachers was drawn from extensive seminars and lectures across the country—seminars where teachers have had the opportunity to voice their concerns and ask questions. This interaction has allowed us to focus on the issues that cause the greatest concern among teachers. In a real

way, teachers and administrators have shaped the structure of this book. We are also grateful to the many professors and instructors across the country who have provided helpful commentary on the format and topics. This book is divided into nine chapters, each of which includes discussion questions. This fifth edition contains additional case studies, and we have also expanded our coverage of Indigenous education. Because we recognize that teachers are often making decisions on the spot, without the benefit of a lawyer to guide them through the intricacies of the law, this edition also places an increased emphasis on ethical decision-making. Teachers respond to complex issues on a daily basis, and working through ethical dilemmas can be particularly challenging when children are involved. The purpose of this first chapter is to introduce the legal framework within which schools operate.

Chapter 2 deals with the parental role of teachers. Although *in loco parentis* may no longer be a major doctrine for defining the legal status of teachers, its effects still linger in certain quasi-parental roles. Chapter 2 includes a discussion of negligence and liability for teachers, as well as a discussion of corporal punishment. It examines the sexual abuse provisions of the *Criminal Code* and points out the dangers that these provisions present for teachers. We also briefly touch on the matter of educational malpractice in Canada.

Chapter 3 focuses on teachers as educational state agents. This is an area of immense growth in the law. Chapter 3 includes a discussion of the duties of teachers as defined in the education statutes, as well as the impact of the Charter and provincial human rights codes on teachers' actions in the classroom. We also discuss the right to an education, the validity of religious instruction in schools, and other constitutionally entrenched rights enjoyed by parents and students—for example, freedom of expression and freedom of association. Chapter 3 also explores sexting and the distribution of intimate images as a growing challenge. Finally, we move on to another equally difficult area: making and enforcing school rules.

Chapter 4 focuses exclusively on equality issues. Teachers have a unique and pivotal role in practising and educating their students about the Charter's equality rights as one of the foundational principles of Canadian society. Chapter 4 discusses human rights tribunals as an alternative route to equality, using the landmark example of *Moore v. British Columbia*.³³ Here, we tackle the challenging issue of special education, focusing on inclusive education, reasonable accommodation, and the importance of appropriate and meaningful education. Other equality issues, including sex, age, race, multiculturalism, sexual orientation, and gender identity, are also canvassed. This edition includes an increased focus on what equality should mean for Indigenous students and LGBTQ2S+ (Lesbian, Gay, Bisexual, Transgender, Questioning, Intersex, Asexual, and Two Spirits) people—gender identity, in particular, is a topic that has been frequently in the news of late, with some governments saying they are willing to go to the polls over how it is handled in schools.³⁴ Chapter 4 also looks at the disturbing issues of bullying, cyberbullying, and school

violence that have become almost omnipresent in today's society. Far too often, the victims are among the most vulnerable students in the schools.

Chapter 5 centres primarily on criminal law and the teacher as a state agent for the police. This involves an examination of the *Youth Criminal Justice Act*, the juvenile justice system in Canada, and the roles played by teachers in that system. We look at various case law examples as well as pressing legal issues, such as search and seizure, detention, and the questioning of students. Chapter 5 also explores the difficult balance between order and students' rights in our schools.

Chapter 6 deals with the teacher as a social welfare agent. Increasingly, teachers are required to assume a social welfare responsibility for students. The most prominent example of this role is the requirement to report any suspected child abuse to the proper authorities. The social welfare role has been expanded in recent years. Where they are available, guidance counsellors are expected to provide more assistance to students than mere advice on course selection. They may provide personal counselling, advocacy, and a host of other services. Teachers are often caught in the middle of family disputes and are required to act as mediators. Teachers may also be seen as resources for the various social agencies in the community. It is not unusual for a teacher to become extensively involved with the parents, social workers, and group homes that affect the lives of particular students. Chapter 6 also examines the teacher's role as paramedic and health care provider. The legal parameters of this role are not well understood.

Whereas the earlier chapters deal primarily with teachers in relation to the needs of others, Chapter 7 focuses on teachers' rights and obligations and examines the role of the teacher as an employee. The school is a complex workplace with a myriad of administrative structures and potential labour relations problems. Teachers are subject to strict collective bargaining procedures and various disciplinary proceedings. They may also experience lifestyle restrictions as a result of their career choice, in addition to occupational safety issues when responding to violence in school settings. Chapter 7 examines the labour and employment rights and duties of teachers, as well as teachers' rights under the Charter, including new and evolving rights to privacy. This chapter also explores the dramatic legal and human consequences that can flow from alleged and actual abuse by teachers in our schools.

Chapter 8 explores the growing need for teachers to come to grips with the ever-changing world of technology. We explore the practical implications of the *Copyright Act* for teachers, as well as other issues related to technology. There have been many changes to copyright and technology issues over the past decade, not least of which was the sudden switch to hybrid and online learning during the COVID-19 pandemic. Technology is now a vital aspect of good teaching and a necessary component of the competent teacher's tool kit. Although there are many positive aspects to technology, its darker underbelly, cyberbullying, cannot be ignored. In addition, generative artificial intelligence is sure to change the educational landscape for both teachers and students.

Teachers continue to face new and challenging roles in our rapidly changing world, and understanding the relevant legal framework and implementing ethical decision-making has never been more important. Chapter 9 summarizes the challenges faced by the “omnicompetent” teacher. Since the last edition of this book, much has changed. Students, teachers, parents and school administrators alike have lived through the educational challenges of the COVID-19 pandemic and have adapted to masking, vaccination policies, and switches to online learning. Many teachers are now teaching in a context in which misinformation and disinformation have become societal-level threats. Social media has changed how we interact, with less respectful and empathetic communications becoming more common. There is widespread talk of a mental health crisis among youth. All of these developments present ethical and legal conundrums that the modern teacher must be prepared to face. We therefore conclude by reinforcing the need for legal awareness and the flexibility to adapt to changing circumstances.

We hope that our delineation of each of these roles provides some answers to the troubling questions that teachers face every day as they are required to make difficult decisions in response to the diverse situations that arise in the classroom. By exploring the varied roles of teachers, we are not attempting to answer all the questions that may arise in the day-to-day operation of the classroom. By providing a framework for discussion, though, we hope that teachers, administrators, and provincial policy-makers will share their experiences and create a more comfortable teaching environment—one with clearer expectations about the roles that teachers should play in the school.

In the chapters that follow, it is important to keep in mind that our purpose is to identify and discuss some of the teacher’s roles rather than to dissect them in a comprehensive legal fashion. This book is designed to be a practical reference for teachers—to assist their understanding of the complex legal issues they face. We have not attempted to survey each issue exhaustively but have carefully researched the concepts underlying each one. Where a comprehensive work by another author addresses a specific topic, we make reference to that work in our endnotes for our readers’ convenience and further exploration. It is our hope that this book will provide a useful framework for the exploration of important legal issues and demystify the law as it relates to teachers.

DISCUSSION QUESTIONS AND ETHICAL SCENARIOS

1. Why is it important that courts in Saskatchewan pay attention to what is happening in courts in Nova Scotia or any other province?
2. What do you consider some of the greatest new challenges facing teachers over the last decade, and how have they changed the roles teachers need to play in our schools?

3. Create a chart of the legal hierarchy of educational laws. Which would you find easiest to access? Explain your reasoning.
4. In addition to being a teacher, what other roles are today's teachers expected to assume?
5. In today's world, do teachers stand in place of the parent? Supply a rationale for your answer and indicate how legislation and case law have modified the *in loco parentis* standard for teacher conduct.
6. Hypothesize which traditional public education teaching strategies may not be culturally appropriate for First Nations, Métis, or Inuit students in off-reserve classrooms. Explain your reasoning.
7. How are "the law" and "ethics" different? What does "ethical decision-making" mean in an educational context? For example, does it mean acting for the common good of all children or respecting the rights of an individual child? Does it mean acting in a way that aligns with the teacher's values or belief system or acting in a way that aligns with the curriculum?
8. Think of a difficult decision that a teacher might have to make when interacting with a student, a parent, and a school administrator. What steps could the teacher take to make an ethical decision? Compare the steps you identified to the steps outlined in the Framework for Ethical Decision-Making in the Chapter 9 Appendix.

NOTES

- 1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. All references to the “*Canadian Charter of Rights and Freedoms*” and to “the Charter” in this book are to the above-cited legislation.
- 2 *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3.
- 3 *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- 4 Charter, s. 29. The special status of denominational schools within the original confederation deal was earlier emphasized in section 93 of the *Constitution Act*, 1867. The Terms of Union in Saskatchewan and Alberta also refer to religion in schools.
- 5 *Constitutional Amendment*, 1997 (Quebec).
- 6 *Constitution Amendment*, 1997 (Newfoundland Act).
- 7 In *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212*, 2017 SKQB 109, the Court found that it is unconstitutional to fund non-Catholic students at Catholic separate schools. The Saskatchewan Court of Appeal reversed this decision and leave to appeal to the Supreme Court of Canada was denied. *Saskatchewan v. Good Spirit School Division No. 204*, 2020 SKCA 34, leave to appeal to S.C.C. denied, *Good Spirit School Division No. 204 v. Government of Saskatchewan*, 2021 Carswell 113, 2021 Carswell 114 (S.C.C.).
- 8 A.W. MacKay, “The Judicial Role in Educational Policy-Making: Promise or Threat?” (1988-89) 1 Educ L J 127.
- 9 Bill C-33, *First Nations Control of First Nations Education Act*, 2nd Sess, 41st Parl, 2014 (second reading May 5, 2014).
- 10 For examples of the Supreme Court’s interpretation of Aboriginal and treaty rights, see *R. v. Marshall*, [1999] 3 S.C.R. 456, refusing consideration, [1999] 3 S.C.R. 533. See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
- 11 For an example of a self-government agreement that includes provisions for the delivery of education, see Government of Canada, *Maa-nulth First Nations Final Agreement*, April 9, 2009, <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/final_maanulth.pdf>.
- 12 National Panel on First Nation Elementary and Secondary Education for Students on Reserve, *Nurturing the Learning Spirit of First Nation Students*, February 8, 2012, <<https://www.opsba.org/wp-content/uploads/2021/02/nationalPanelreportFirstNationsFeb0812.pdf>>.
- 13 Alberta, *The Guiding Framework for the Design and Development of Kindergarten to Grade 12 Curriculum*, last updated April 26, 2024, <<https://education.alberta.ca/media/3575996/curriculum-development-guiding-framework.pdf>>. Saskatchewan, *First Nations and Métis Education*, last visited September 13, 2024, <<https://www.saskatchewan.ca/residents/education-and-learning/first-nations-and-metis-education>>.
- 14 Ontario, *Strengthening Our Learning Journey: Third Progress Report on the Implementation of the Ontario First Nation, Métis and Inuit Education Policy Framework*, last updated January 5, 2022, <<https://www.ontario.ca/page/strengthening-our-learning-journey-third-progress-report-implementation-ontario-first-nation>>; Indigenous Watchdog, *Strengthening Our Learning Journey*, March 9, 2019, <<https://www.indigenousswatchdog.org/update/mar-9-2019>>.
- 15 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.
- 16 *Indigenous Languages Act*, S.C. 2019, c. 23.
- 17 Nunatukavut Community Council, “Nunatukavut Community Council Signs Education MOU with Province and Newfoundland and Labrador English School

- District,” September 30, 2022, <<https://nunatukavut.ca/article/nunatukavut-community-council-signs-education-mou-with-province-and-newfoundland-and-labrador-english-school-district>>; Nunavut, *The Next Steps on our Learning Journey: A User Guide to the Revised Education Act 2020 and the Inuit Language Protection Act 2020*, <https://www.gov.nu.ca/sites/default/files/policies-legislations/2022-04/a_user_guide_to_the_revised_education_act_2020.pdf>; British Columbia, “B.C. First Nations Language Authorities,” last updated July 2, 2024, <<https://www2.gov.bc.ca/gov/content/education-training/k-12/teach/become-a-teacher/types-first-nations-language-first-nations-language-authorities#language-authorities>>.
- 18 Canada, *Report of the Royal Commission on Aboriginal Peoples, Renewal: A Twenty-Year Commitment*, vol. 5 (Ottawa: Canada Communication Group, 1996).
- 19 See *Teaching Profession Act*, R.S.Y. 2002, c. 215; *Northwest Territories Teachers’ Association Act*, R.S.N.W.T. 1988, c. N-3; *Teaching Profession Act*, R.S.B.C. 1996, c. 449; *Teachers’ Pension Plans Act*, R.S.A. 2000, c. T-1; *Teaching Profession Act*, R.S.A. 2000, c. T-2; *Teachers’ Dental Plan Act*, S.S. 1984-85-86, c. T-6.1; *Teachers’ Federation Act*, R.S.S. 1978, c. T-7; *Teachers’ Life Insurance (Government Contributory) Act*, R.S.S. 1978, c. T-8; *Teachers Superannuation and Disability Benefits Act*, S.S. 1994, c. T-9.1; *Teachers’ Pension Act*, C.C.S.M. c. T20; *Teachers’ Society Act*, C.C.S.M. c. T30; *Teachers’ Pension Act*, R.S.O. 1990, c. T.1; *Teaching Profession Act*, R.S.O. 1990, c. T.2; *Teachers Pension Act*, R.S.N.B. 1973, c. T-1; *Teachers’ Collective Bargaining Act*, R.S.N.S. 1989, c. 460; *Teachers’ Pension Act*, S.N.S. 1998, c. 26; *Teaching Profession Act*, R.S.N.S. 1989, c. 462; *Teachers’ Superannuation Act*, R.S.P.E.I. 1988, c. T-1; *Teacher Training Act*, R.S.N. 1990, c. T-1; *Teachers’ Association Act*, R.S.N.L. 1990, c. T-2; *Teachers’ Collective Bargaining Act*, R.S.N.L. 1990, c. T-3; *Teachers’ Pensions Act*, S.N.L. 1991, c. 17.
- 20 *Young Offenders Act*, R.S.C. 1985, c. Y-1 [repealed].
- 21 *Youth Criminal Justice Act*, S.C. 2002, c. 1.
- 22 *Criminal Code*, R.S.C. 1985, c. C-46.
- 23 *Safe Streets and Communities Act*, S.C. 2012, c. 1.
- 24 *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245.
- 25 *Copyright Act*, R.S.C. 1985, c. C-42.
- 26 Senate Standing Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age*, December 2012, <<https://sencanada.ca/content/sen/committe/411/ridr/rep/rep09dec12-e.pdf>>.
- 27 A. Wayne MacKay (Chair), on behalf of the Nova Scotia Task Force on Bullying and Cyberbullying, *Respectful and Responsible Relationships: There’s No App for That*, February 29, 2012, <https://www.researchgate.net/publication/256029553_Respectful_and_Responsible_Relationships_There’s_No_App_for_That_The_Report_of_the_Nova_Scotia_Task_Force_on_Bullying_and_Cyberbullying>.
- 28 Nova Scotia, for example, in 2018 made the dramatic decision to eliminate all of the school boards in the province in favour of one provincial governing board for francophone schools and parent advisory groups for the English districts. Prince Edward Island in 2015 dissolved its English-language board in favour of a public school branch governed by provincial appointees. New Brunswick had abolished school boards in 1996 in favour of “school districts,” which were consolidated into seven districts based on language in 2012. Newfoundland and Labrador has reduced school board numbers from five to two—one English language and one French language. In 2020, Quebec’s Bill 40 replaced francophone school boards with School Service Centres (Centres de Services Scolaires). See Bartley Kives, “Are Fewer School Boards an Answer to What Ails Education in Manitoba?” *CBC News*, February 11, 2019, <<https://www.cbc.ca/news/canada/manitoba/school-boards-manitoba-1.4995964>>. Also, Edward S. Hickcox,

- “School Boards,” *The Canadian Encyclopedia*, last edited September 29, 2022, <<https://www.thecanadianencyclopedia.ca/en/article/school-boards>>.
- 29 *Jowitt’s Dictionary of English Law*, 2nd ed. (London: Sweet and Maxwell, 1977).
- 30 *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76.
- 31 *Ogg-Moss v. The Queen*, 1983 CanLII 139, [1984] 2 S.C.R. 171.
- 32 CBC Radio, “‘I Felt Helpless’: Teachers Call for Support amid ‘Escalating Crisis’ of Classroom Violence,” February 17, 2019, <<https://www.cbc.ca/radio/thesundayedition/the-sunday-edition-for-february-17-2019-1.5017616/i-felt-helpless-teachers-call-for-support-amid-escalating-crisis-of-classroom-violence-1.5017623>>.
- 33 *Moore v. British Columbia (Education)*, 2012 SCC 61.
- 34 Hina Alam, “Five Things to Know About the Changes to New Brunswick’s LGBTQ School Policy,” *Canadian Press*, June 19, 2023, <<https://globalnews.ca/news/9778957/new-brunswick-policy-713-changes-5-things-to-know>>.

