

**WALKING THE TIGHTROPE:  
HOW SUPERINTENDENTS RESPOND TO CHALLENGING  
“RIGHTS” ISSUES AND THE ROLE OF LAW**

By

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**THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF**

**DOCTOR OF EDUCATION**

In  
Education Leadership

In the  
Faculty of Education

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SIMON FRASER UNIVERSITY  
Spring 2008

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Patrimoine de l'édition

395, rue Wellington  
Ottawa ON K1A 0N4  
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*Your file* *Votre référence*

*ISBN: 978-0-494-46827-2*

*Our file* *Notre référence*

*ISBN: 978-0-494-46827-2*

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## ABSTRACT

This study describes how two superintendents understood and responded to challenging ‘rights’ issues within the context of two prominent cases - *Chamberlain v. Surrey School District No. 36* and *North Vancouver School District No. 44 v. Jubran* – which raised important questions about the purpose and expectations of schooling, as well as the limits of tolerance and respect for difference.

This study confirmed the importance of collaboration in education, and found that the superintendents’ leadership was most effective while the issue was evolving within the district. Superintendents may have a dual role in that often they are mediators of different viewpoints as well as a party to the issue – roles that require different orientations to conflict. As a party, they use law strategically in the best interests of the district, but as a mediator, they may use the law to enhance their understanding of the issue through practices that encourage communication. Thus, superintendents are always moving between the collaborative practices that support the relationships that comprise school communities, as well as strategically negotiating the best position for the district. This is a constantly iterative process.

The experiences of the superintendents were analyzed using law and the theoretical perspectives of Jurgen Habermas, and law and society scholars. This analysis suggests that law has the capacity to provide substantive and procedural tools to superintendents to assist them in their communication and decision-making as a mediator between facts and norms, and between the cultural lifeworld and the systems imperatives that comprise public education. It also appears that law may be more constitutive in public education than acknowledged.

Superintendents must communicate instrumentally to meet their legal responsibilities, but they must also communicate for understanding because their work is situated in an

environment that values the transmission of social and cultural norms. The philosophies and practices of mediation and restorative justice provide resources for communicating in conflict, and share the collaborative problem solving orientation of the superintendents in this study. Understanding the influence and capacity of law, both substantively and procedurally, may assist superintendents to communicate and make decisions that are morally and legally defensible.

**Keywords:** superintendents; education law; rights; communication; decision-making; mediation

**Subject Terms:** School superintendents -- British Columbia; Educational law and legislation -- British Columbia; Educational leadership; Sociological jurisprudence

## **ACKNOWLEDGEMENTS**

I would like to thank my supervisory committee members, Dr. Michael Manley-Casimir, Dr. Geoff Madoc-Jones, and Mr. Don Avison, for their interest in, and support of, my research topic, and for guiding me with thoughtful and constructive suggestions during the writing of this thesis.

I wish to also thank Dr. Fred Renihan and Dr. Robin Brayne for their generosity in sharing their experiences for this study, together with the four superintendents who participated in the pilot interviews, and who provided additional wisdom and reflection regarding this challenging area in education.

I appreciated the ready encouragement and support of my classmates, and it was a pleasure to be part of such an interesting and collegial group.

I would also like to thank my parents, Don and Betty MacKinnon, who have shown me throughout my life, the enormous benefits of good teaching both in, and out of, school. Finally, a big thank you to my children, Ted and Simone, whose amazing travels to far-off lands provided a refreshing diversion, and to my husband, James, whose humour, love, and support made this work possible.



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## CHAPTER 1: BACKGROUND AND PURPOSE OF THE STUDY

### 1. Introduction

“You’re so gay ...faggot...homo... queer”...these were some of the homophobic slurs that students hurled at Azmi Jubran throughout his high school years. In spite of the fact that he denied being homosexual, the taunting continued. Frustrated with the school district’s actions after several years, Azmi and his parents filed a Human Rights complaint - a complaint that would take nearly 10 years of adjudication to resolve.<sup>1</sup>

A year after Jubran filed his complaint, and in another school district, Mr. Chamberlain, an elementary teacher challenged the school board’s refusal to include three books in learning resources for Kindergarten and grade one classes - books that depicted same sex parents: “Asha’s Mums”, “Belinda’s Bouquet”, and “One Dad, Two Dads, Brown Dads, Blue Dads”. In the subsequent legal challenge, parents testified to the court that, “Surrey Schools should not negate our right as parents to teach our children ... in accordance with our family and religious views”, and that the morality or worldview presented in these books was “...directly in conflict with deeply held family and religious values”.<sup>2</sup> These books, and the case to include them, would deeply divide the school district community over values about family, tolerance, and the role of a formal education.

Both cases involved accommodation of difference with respect to the issue of sexual orientation: Mr. Chamberlain’s case concerned school resources and emerged as a conflict regarding competing values; Azmi Jubran’s case concerned student bullying and discipline, and the requirements of a safe school environment for all students.<sup>3</sup>

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<sup>1</sup> *North Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733 (hereinafter *Jubran*).

<sup>2</sup> *Chamberlain v. Surrey School District No. 36* (1998), 60 B.C.L.R. (3d) 311 (S.C.) (hereinafter *Chamberlain*), at paragraph 89. This case was appealed twice after the judicial review – to the B.C. Court of Appeal in 2000 and finally to the Supreme Court of Canada in 2002.

<sup>3</sup> See Appendix 2 for a table comparing the cases

These cases presented significant and challenging issues, both legally and morally, for the school districts, and in particular, for the superintendents of those districts, and it is for this reason they were chosen as the context for this study.

**(a) Two Challenging Cases: *Chamberlain* and *Jubran***

The legal cases of *Chamberlain* and *Jubran* were important to public education in Canada because they established new legal understandings for school districts and delivered clear messages about the purpose and expectations of public schools in Canada. They also highlighted the enormity of the challenge for school superintendents to balance competing interests within a dynamic and diverse school community.

The first case, *North Vancouver School District No. 44 v. Jubran* concerned a student's *Human Rights* complaint of homophobic bullying during his high school years. The complaint was initiated with the B.C. Human Rights Tribunal, and four years later at the hearing of the complaint there was 15 days of evidence and argument. When the Tribunal rendered its decision the following year, it was appealed twice - firstly to the B.C. Supreme Court, and then to the B.C. Court of Appeal. The student, Azmi Jubran, had first notified school authorities of the bullying in the fall of 1994 (his grade 9 year) but he did not lay his complaint until 1996. Nine years later, the Court of Appeal rendered a final decision in this case, and leave to appeal to the Supreme Court of Canada was denied. The hallmarks of this case were the accommodation of difference within the school environment (in this case, individual difference), and the duty of schools to educate students about human rights. This case held that the student conduct constituted discrimination contrary to s. 8(1) of the *Human Rights Code* (discrimination on the basis of "sexual orientation") and that the School Board was responsible for such conduct. The Board had contravened s. 8 of the *Human Rights Code* by "...failing to provide a learning environment free of discrimination". The Tribunal also found that the School Board did not establish a bona fide reasonable justification for its conduct as it was required to do under the *Code* and therefore did not accommodate the needs of the bullied student, Azmi Jubran to the point of "undue hardship" as it was legally

required to do.<sup>4</sup> Although the Court of Appeal noted that “In the end, the School Board had implemented the policies and procedures that could reasonably be required to create a discrimination-free school environment; its failure was in not doing so during the time Mr. Jubran could have had some relief” (*Jubran*, Court of Appeal decision, para. 97). In many respects, this was an unusual case because the bullying students’ use of homophobic language in their taunting brought the bullied student’s claim within the scope of the *Human Rights Code*.

The second case, *Chamberlain v. Surrey School District No. 36*,<sup>5</sup> also concerned sexual orientation – but in proposed school resources, depicting same-sex parents in three books for Kindergarten and grade one students. The issue was whether these books were appropriate given the young age of the students and strong parent opposition. The school board’s decision not to approve the books as “learning resources” (which decision the Supreme Court noted appeared to rely on the same concerns expressed by the superintendent) was reviewed and quashed by the B.C. Supreme Court the following year. Two years after this, the B.C. Court of Appeal reversed this decision and noted that the parties who brought the issue before the Board were pursuing “...a broader agenda that was bound to be confrontational” (*Chamberlain*, Court of Appeal decision, para. 62). Ultimately, the Supreme Court of Canada reversed this decision two years later, on the basis that the school board’s decision violated the principles of secularism and tolerance of the *School Act*.

What is remarkable about both these cases is the nature of the issues raised in each, and the socially and morally charged understandings regarding homosexuality and homophobia. The tension for change that these cases created was evident in the fact that each case was appealed twice after the initial hearing, and in both cases, there was a reversal on each appeal. The legal decisions concerned interpretation of the law within the context of schools and schooling, and the judicial disagreement from one level of the court to the next, underlined the difficulty of the issues before the court. Additionally, both of these cases

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<sup>4</sup> The Tribunal applied the three-step test as set out in the Supreme Court of Canada decisions, *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (“*Grismer*”), and *British Columbia (Public Service Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“*Meiorin*”). The legal analysis of the Tribunal was held to be “entirely reasonable” by the Court of Appeal.

<sup>5</sup> *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 (hereinafter *Chamberlain*),

attracted considerable public and media attention, and were time-consuming and costly to pursue.

We know, or can easily find, the legal decisions in these cases because they were widely publicized and are part of the public record. However, what we do not know is how the superintendents of these districts responded to these legally and morally charged cases before they went to court or while they were before the court. What were the processes of consultation, negotiation, mediation, and decision-making that they used? What factors did the superintendents consider? What was the role of law in their understandings, and how did they perceive the influence and effect of their actions and decisions on the process?

Superintendents are an understudied group in Canadian education. Although they hold influential positions within school districts as the educational leader and CEO of the district, they have not received as much attention in research as other administrators, such as school principals. There appear to be no current studies in Canada regarding how superintendents understand their work or how they approach challenging issues in their work. Given the diversity of Canadian school populations and the importance of the values of tolerance and respect in public education as illuminated in these two cases, the superintendents' responses provide some understanding of how these professionals communicate and make decisions regarding issues that have a legal aspect – decisions that may affect whether a case is litigated or not.

When I first started school in the 1960's, teachers and administrators could, and did on occasion, hit students. Students had few, if any, rights, and school decisions were rarely challenged by students or parents. School law was in a single piece of legislation - the *Public Schools Act* - and school administrators had the authority to set their own process and make most decisions concerning student issues without any consultation with others. As my father, a former secondary principal remarked, "We just did it."

Today, it is unthinkable (and illegal), for a teacher or administrator to strike a student, and any physical contact at all with a student is made with a heightened awareness of the potential risk of harassment or assault allegations. Students have rights, and they voice them more frequently. In addition, parents are more knowledgeable about rights, and have access

to resources and support from district and provincial parent advocacy groups. Many of the issues arising in schools today have a legal aspect, and administrators must be thoughtful and careful in their decision-making to ensure that their decisions are morally and legally defensible. The growing diversity of schools and “rights” awareness of students (and their parents) in the last 25 years since the entrenchment of the *Canadian Charter of Rights and Freedoms* (the *Charter*) has contributed to the challenges of administering a school district.<sup>6</sup> These challenges include understanding the issues, communicating and negotiating with various parties, and making decisions for the benefit of all students.

Using the context of the legal cases *Chamberlain* and *Jubran*, this study describes each superintendent’s understandings, decisions, and actions, from the time the issue arose within the district until its final resolution by either the Supreme Court of Canada (*Chamberlain*) or the British Columbia Court of Appeal (*Jubran*). The evidence in both cases is described in the legal decisions; however, what is unknown is how the superintendent dealt with the issue within the district, both before and during the legal action. How did these superintendents communicate and make decisions and what was the role of law?

## **2. The Problem**

Many student issues have a legal aspect, whether acknowledged by administrators or not, and with the increasing regulation of education and the growing number of court cases, there is a need for superintendents to be more aware of the law. The proclamation of the *Charter* in 1982, was historically significant, and has contributed to major changes in public education, including the development of a higher level of “rights” consciousness in Canadian society. The *Charter* has also enabled new legal challenges over the last 25 years, which has contributed to the growth of “rights jurisprudence” in public education (Sussel, 1995). Mr. Justice LeBel of the Supreme Court of Canada has noted that the Court is aware of the critical role of schools for fostering the fundamental values of society, and that as a result, “decisions made at all levels of the school system should take into account the values entrenched in the Canadian Charter as well as in the various provincial human rights legislation” (LeBel, 2006).

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<sup>6</sup> Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.



School law is becoming increasingly complex and diverse. The proliferation of legislation concerning education in the last 30 years, and the entrenchment of the *Charter* has contributed to a “rights” oriented culture, which has created numerous challenges for educational administrators (Sussel, 1995). For example, from 1872 until 1970, all B.C. school legislation was contained in one statute – the *Public Schools Act*. Since that time, at least 13 other statutes have been enacted, which are considered “significant” and as having “important consequences for K-12 education in the province” (Clark & Nicolls, 1999). This increase in the statutory framework for public education requires that superintendents be aware of more laws, and be more skilled in statutory interpretation - tasks for which they have little, if any, training. It has been noted that, “one of the most complicated and difficult matters (for superintendents) is the involvement of school law and government regulations” (Hayes, 2002, p. 91).

How courts interpret student rights issues is becoming more relevant as students, parents, and teachers, are increasingly asking judges to make decisions in this arena through formal legal action. Historically, courts have shown considerable judicial deference to school and school board decisions, however when the issues involve tolerance and respect for diversity – goals that, “...touch on fundamental human rights and constitutional values” - the Supreme Court of Canada in setting the appropriate standard of review in *Chamberlain*, commented that the legislature “...intended a relatively robust level of court supervision”.<sup>7</sup>

These “rights” challenges arise not only in areas of school resources or bullying. Students also voice their freedom of choice for their appearance or expression – issues which are not new to schools, but which arguably may require more discussion and negotiation than in the past because of competing rights (MacKay & Burt-Gerrans, 2005, Cohen, 2005). This change is perhaps most evident in student work, such as writing, film, dance, or art, that has violent content. These media for student creativity epitomize the tension between freedom of expression and the safety and well being of the school community. And, technology has blurred the boundaries between school and home with extensive student use of computers in both locations with information shared regularly between the two sites. Given the current culture, which appears to condone a measure of violent behaviour for certain activities, such

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<sup>7</sup> *Chamberlain*, paragraph 14.

as professional hockey, it is sometimes difficult to determine when individual expression slides beyond appropriate learning and creativity, and becomes an unacceptable threat to others. Balancing these competing needs is challenging for school district administrators, and demands an informed approach to avoid misunderstanding and/or legal action.

Superintendents are not legally trained - they are the instructional leaders for school districts and their professional formation is in teaching and learning, not legal analysis and interpretation. As parents and students become more knowledgeable about their rights however, administrators generally, and superintendents in particular, need to be more aware of the legal landscape in order to make informed decisions about student issues. By having a general knowledge of law and process, a superintendent could identify potentially litigious issues, have some understanding as to whether a cause of action exists or not, some sense of the boundaries that law provides, and finally an understanding of the meaning or purpose of the law through case precedent within the school context.

Challenging student issues also present an opportunity for how superintendents approach a perceived problem. For example, is the student claim viewed as an “either/or” contest between competing individual and community interests, or alternatively, is it seen as a collaborative discussion about an issue of shared significance? How superintendents approach these challenging issues and their understanding of the law and process may influence how s/he communicates and makes decisions.

### **3. The Purpose of the Study**

The purpose of this study was to describe and interpret how two superintendents in British Columbia responded to challenging “rights” issues and how they used law in their communication and decision-making to balance competing interests in their districts.

Both the *Chamberlain* and the *Jubran* cases raised challenging “rights” issues regarding sexual orientation, and both involved district discussions with parents. On the facts, the cases are quite different: *Chamberlain* arose as a community issue of competing values, and involved many different interest groups, whereas *Jubran* arose as an individual complaint concerning personal safety and well-being at school. However, both cases raised important questions about the purpose and expectations of schooling, and both cases concerned the

limits of tolerance and respect for difference. The issues in these cases challenged the districts to discuss and negotiate difficult questions, and ultimately neither case could be resolved within the district. Additionally, in both cases, the court found against the school district – in *Jubran*, the Court of Appeal upheld the Tribunal’s finding that the school had not done enough, and had failed to provide the student with an educational environment free from discriminatory harassment; whereas in *Chamberlain* the Supreme Court of Canada found that the school board’s decision not to approve the books was contrary to the *School Act* because it was significantly influenced by religious considerations.

In both cases, the superintendent of the district was implicated, either directly or indirectly, for the actions of the school district. And both cases arose from “rights” based positions that concerned diversity and accommodation of difference. As the CEO of a public institution offering “services” and thus subject to provincial and constitutional “rights” law, how did the superintendents of these districts respond to these challenges?

Education is a collaborative and socially dynamic endeavour; the focus is on student learning and success, not rights and rules. However, law pervades the education system. It is instrumental in laying the foundation for the creation of schools and the formation of formal relationships within schools. It also describes and prescribes the rights, duties, and responsibilities of all those who work and study within the school system. As a lawyer and a teacher, I am interested in how superintendents understand and use law when a challenging student issue arises that has a legal aspect.

Multicultural student populations, access for special education students, increasing parent involvement, changing gender relationships, and student claims to individual rights and freedoms, have changed the way education is perceived and delivered. And, with this social complexity there is a broader range of accepted values, and hence, inevitably, value conflicts.

Within this kaleidoscope of “difference”, law provides a measure of predictability manifested in social and political expectations as to how the educational system will function. Law protects individual rights and freedoms while at the same time sets out expectations for living in community. Within a complex, heterogeneous community, such as school, law combines

norms with sanctions through language, process, and structures to accommodate the interests of individuals within the needs of the collective.

How do superintendents balance concurrent and competing interests in a school system that values diversity and inclusion?

**(a) Superintendents and Law**

Law is a significant factor in the organization and delivery of public education in Canada. The statutory framework sets out the parameters and expectations for this large publicly funded service and provides legislative guidance for the formal education of children. Historically, public education has been a means to create opportunity for youth through the provision of skills and knowledge, and ensure the continuation of moral values and collective identities.

Pursuant to s. 93 of the Constitution Act, 1897, education is the exclusive responsibility of the provinces with the exception of the education of aboriginal people, which is within federal jurisdiction. Provincial legislation – in British Columbia, the *School Act* - establishes the statutory framework within which education is delivered to students. Under the terms of s.22 of the *School Act* the superintendent in British Columbia works “under the general direction” of the Board and specifically has “...general supervision and direction over educational staff... (and) ...is responsible for the general organization, administration, supervision and evaluation of all educational programs and the operation of school...”

These responsibilities underline the complexity of the superintendent’s role in terms of providing leadership in the district for educational programs and initiatives, as well as being accountable to the board for the overall supervision of the school district. And because the superintendent’s role as the senior administrator complements the governance mandate of the elected school board, it is important that there is good communication and understanding between these two positions given their twin responsibilities to provide a high quality education to all students within a publicly funded organization.

Superintendents are often referred to as senior instructional leaders. However, it has been suggested that this characterization of the superintendent's role is no longer appropriate given the organizational distance between classroom teaching and the superintendent's actual duties (Leithwood (Ed.), 1995). As Leithwood indicates, a strong case can be made for characterizing the role of superintendents as political, because they must establish partnerships with school communities and other stakeholders to facilitate the "...values, aspirations and interests of the increasingly diverse constituents served by today's schools into a set of sophisticated educational services that address those values, aspirations, and interests" (Leithwood (Ed.), 1995, p. 5). As a result, superintendents' work can be more usefully described as "overwhelmingly political" given the communication and negotiation amongst the competing and value-based differences of the stakeholders in public education – communication and negotiation that is necessary for action. This study will examine the understandings, communications and actions of two superintendents in cases that involved political action both before and during the legal action.

The *2000 Study of the American School Superintendency* also provides some valuable insight into the context of the superintendency, and confirms the political and communicative aspects of the position. Although this study is American, the scope of the survey information collected – nearly one in five superintendents – makes it the largest study from the American Association of School Administrators ("AASA") to date, and therefore useful in terms of general patterns or trends in the position. This study concluded that the future of the superintendency seems to be "...tied more closely than ever to harmonious working relationships with boards and community groups" and successful superintendents will be those who have "excellent communication skills, understand instructional process, and can work to create functioning coalitions..." (Glass, Bjork, & Brunner, 2000, p.x).

Law is often broadly stated, and requires interpretation within a context. The school context is a unique environment combining adult-youth relationships, which has the hallmark of a family but within an institution that is often managed as a business. Superintendents understand the school system having worked as teachers and school administrators, and they know the context within which student issues arise. How then, do they balance the liberty of

the students with the order required for school effectiveness, and is law part of their considerations?

For example, to what extent can violent or discriminatory student expression, which is part of youth culture, co-exist with the safety and well being of all students? Where is the line between the acceptable and the unacceptable? For difficult situations, the challenge of drawing such a line is often the responsibility of the superintendent, as the CEO of the school district. And, although the superintendent has the support of legal counsel, board members, and other district administrators, ultimately, it is his or her responsibility to make a decision. In so doing, the superintendents must balance the interests of the various, and often numerous stakeholders in education, including individual and school (or district) interests, as well as consider legal and historical precedent. There is a legal aspect to many of these situations; however we don't know how superintendents understand and approach the issues, and whether they consider law in their decision-making.

In this time of increasing accountability and increasing regulation of education, superintendents must have some general understanding of law and how it applies to issues within their school districts. For example, in the *Jubran* case where a teenage youth was successful in his human rights case against the school district for enduring years of homophobic bullying, what was the 'ripple effect' of this case on other districts? Does this case influence how other superintendents respond to allegations concerning bullying within their own district?

Superintendents are expected to communicate and make decisions for the benefit of the entire school district – and the districts in British Columbia range in size from a student population of approximately 300 in rural districts to 66,000 in urban communities. Decisions that are made by the superintendent may have ramifications for all the students in the district, so there is an expectation that the superintendents will be informed to the best of his or her ability prior to making the decision.

Superintendents become involved with student issues when they cannot be resolved at the school level, as was the case in both *Chamberlain* and *Jubran*. These are the more difficult cases, where the solution is not apparent, the parties more strident in their claims, or the

value conflicts more challenging. As the senior administrator in the district, the superintendent has the responsibility for articulating the position of the school district. And because the superintendent has influence in his or her communications with the parties, the nature of such communication may determine whether the parties are able to resolve the issue locally – either collaboratively or through the district appeal process to the board - or alternatively, whether they seek a remedy outside the district through legal proceedings. In the case of a Supreme Court or Human Rights Tribunal proceeding, the cost to the district, both financially and emotionally, is significant, as is the amount of time spent preparing for, and defending, the case.

Research in special education has identified the importance of creating communicative leadership practices that recognize diversity and difference, and dialogue that tolerates uncertainty and ambiguity in order to allow more creative problem solving and decision-making (Zaretky, 2004). This kind of dialogue is often described as democratic because it concerns accommodation of difference (Benhabib, 2002; Gutman & Thompson, 1996).

School administrators, and in particular superintendents, are expected to accommodate difference by demonstrating respect and understanding in their relationships with students and their parents. At the same time however, they must carefully balance the needs of the individual student with the needs of the whole school community. There is a legal and a social expectation that schools, and school leadership, will define and model tolerance and accommodation of difference in a pluralistic environment. In the recent Supreme Court of Canada case of student Gubaj Singh Multani, this meant the right to carry a “religious object” that resembled a dagger in a school, which prohibited weapons and dangerous objects under its code of conduct.<sup>8</sup>

In that case, the Supreme Court of Canada reiterated that schools “...define the values that transcend society through the educational medium...” and that such values are “best taught by example”.<sup>9</sup> This understanding, and expectation, of education, is also explicitly expressed as one of the foundational purposes of public education in British Columbia in the preamble

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<sup>8</sup> Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 S.C.C. 6 (hereinafter Multani).

<sup>9</sup> Ibid., paragraph 78.

to the *School Act* which states that education is necessary, *inter alia*, to “...contribute to a ... democratic and pluralistic society...”

A democratic and pluralistic society is a community of difference, and therefore is a community of conflicting values. Recent literature has confirmed the increase of value conflicts in schools, and how leaders need to augment traditional methods of problem solving with more creative and morally defensible methods of communicating about differences. The expectation that school leadership will accommodate differences and student “rights” is challenging given the economic and administrative imperatives that infuse school and district operations. Additionally, because there is often a perceived power imbalance between school administrators and individual parents, the onus appears to be on the school district to accommodate students, in some cases, to the point of undue hardship.

Given the high expectations of school leadership together with the potentially high onus of accommodation, how do superintendents respond to and navigate these difficult student issues? As schools ostensibly become more democratic through the B.C. Ministry’s “citizen centered service delivery” and the growth of choice in the K – 12 system, how do superintendents understand law, and does it influence or guide their actions and decisions? The narratives of the two superintendents involved in the *Chamberlain* and *Jubran* cases provide some evidence of their experiences and understandings in working with challenging “rights” issues within a school district.

**(b) The Influence of Law and Discretion in Decision-Making Processes**

**(i) The Process of Decision-Making**

When superintendents make decisions regarding students, they are part of a process, and often issues arise initially within schools and are managed by in-school administrators, such as principals and vice-principals, before the superintendent becomes aware of the issue. Usually initial process is fairly informal, however pursuant to s.11 of the *School Act*, every school board in B.C. must establish, by policy, an appeal process from the decision of an employee that affects the “education, health or safety of a student.” This is an “in-district” process in which parents may challenge a decision regarding their child. This is the only



formal mechanism within the district for parents to pursue a complaint, and the school board's decision is final – there is no appeal, and judicial review is rare.

Superintendents often become aware of a complaint once it has become the subject of an appeal, and in most districts, if the issue cannot be resolved at the school level, then the next step in the appeal process is meeting with the superintendent. This is often the last chance for informal communication and resolution, as the next step in the process is an appeal to the school board. How the superintendent approaches the issue, and communicates with the student and his or her parents may be determinative of whether the issue is resolved or not. For example, in a recent B.C. case concerning disagreement regarding the education placement and program for an autistic child, the court found that there was “evolving resistance” on the part of the school district to listen to the parents. Furthermore, the court found repeated evidence that the school district (as directed by the decisions of the assistant superintendent) was resisting the parents’ request for a certain type of program for their son, because the district believed it was being set up for potential litigation.<sup>10</sup> In this case, although there wasn’t breach of a “right”, there was a finding that the district had breached its statutory duty to meaningfully consult with the parents about the student’s education placement and program. Even more interesting was the judge’s order that she retain “supervisory jurisdiction” over the consultation between the district and the parents, allowing her to continue to supervise the discussions between the parties.

Imagine a continuum with a collaborative process at one end, and an adversarial process at the other. There are many different ways to communicate about difference, however the closer one gets to an adversarial process, the more positional and formal the process becomes. In an adversarial process, roles are consistent with the competitive language required for winning. Alternatively, at the other end of the spectrum, the more collaborative the process, the more opportunity and flexibility there is to explore the interests and values of the parties. This dissertation will suggest that both are necessary, however, as an influential party, the manner in which a superintendent participates in the process is significant and may determine its outcome.

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<sup>10</sup> Hewko (guardian ad litem of) v. British Columbia, [2006] B.C.J. No. 2877 (hereinafter Hewko)

Law is relational; it exists to provide rules and understandings for living in community – ‘ground rules’ as it were – a common point of reference for understanding and living in relationship with others - both in public and private. Although education is public, it often steps into the private because the education of children necessarily involves families. As with other organizations, schools have increasingly experienced more public regulation of private lives, as was most evident in the *Chamberlain* case. Although superintendents work in public institutions, their work necessarily involves this crossover from public to private, and the potential conflict of family and institutional values.

This cross-over of the private into the public is part of the reason the nature of superintendents’ work has been likened to swimming in perpetual ‘white water’ – the pace and volume of their work leaves little time for reflection and discussion, and legal risk management has been described as having the lawyer’s number on speed dial. Also, discussion and dialogue take time and energy, and as another superintendent conceded, sometimes it is necessary to ‘retreat into the rules’.

Seeking legal advice is often a necessary step, however sometimes the situation calls for more discussion and exchange of information between the parties. Most people don’t want to start a formal legal process – it’s expensive, time consuming, and emotionally tiring. Also school relationships are community based – often the analogy is made to a “family” – and to step into the legal arena is to change “how” and “when” the parties communicate. In fact, once lawyers are retained, there is more formality and arguably fewer opportunities for informal, and perhaps more creative, resolution of the issue.

School boards are the last place for parents to appeal an issue within a district, before they take their case outside the district to a court, tribunal, or the Ombudsman. Consequently, school boards and principals rely on superintendents to arbitrate issues raised by parents that cannot be resolved at the school level. For this reason, superintendents have the responsibility of facilitating and /or initiating effective communication with the parents and student, and using best practices to resolve potentially difficult issues. As law is usually framed in general terms, superintendents must interpret legislation and existing case law as it applies to their context. They must also consider procedural and substantive aspects of the

issue before them, and then act within the best of their abilities. If process does shape understanding, then the manner in which a superintendent chooses to communicate, and make decisions, may determine how an issue is handled, and whether it can be resolved within the district.

**(ii) The Role of Discretion in Decision-Making**

Discretion is an integral part of decision-making, and particularly within the school context. Discretion has been defined as the space between legal rules in which officials, who have a legal mandate to make decisions, may exercise choice (Hawkins, 1992). In the formal legal arena, discretion, or the ability to choose between alternate courses of action, has always been "...an integral part of judicial decision-making", in spite of the importance of rules, and the certainty and predictability of law (McLachlin, 1992, p.167). Judges regularly exercise discretion both in choosing facts, and then applying the law to those facts. This process is very similar to administrative decision-making in school districts; the administrator chooses those facts which he or she believes to be significant, and then applies the relevant rules or principles (whether they be legal or normative) to such facts. However, administrators, while mindful of the law, have much more flexibility in both the manner of fact-finding and the process of decision-making than the judiciary, and consequently, much more discretion. In spite of this, however, superintendents still need to have an understanding of where law ends and their discretion begins (Heubert, 1997).

Although discretion does involve choice within a defined context, such choice is not only subject to law, including the rule of law, but is also significantly influenced by the normative standards within the organization (Galligan, 1995). The difficulty, of course, arises when normative standards and legal standards cannot be easily reconciled. For example, in British Columbia there used to be a truancy law for students who chose not to attend school; however, few, if any parents, were charged with truancy even though there were truancy officers, and undoubtedly a few truants (!)<sup>11</sup> This historical example underlines the type of system schools were (and still are), and how decision-makers exercised their discretion to accommodate the interests of the students and their families to build relationships of trust and

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<sup>11</sup> Fleming, T. (2005), Professional Development presentation to teaching staff at Parkland Secondary School, School District #63, B.C., Spring 2005.

respect so that children had the opportunity to learn. This was discretionary decision-making in the “best interests” of the student.

Discretionary decision-making within the school context pursuant to law or policy is also subject to social, organizational, financial, and political considerations (Hawkins, 1998, Bell, 1992). In the *Chamberlain* and *Jubran* cases, both superintendents indicated that they had a considerable amount of discretion in their work generally, however once the issues in their respective districts became the basis for legal action, their influence was significantly reduced.

**(c) Law and Social Science Theories as a Conceptual Framework**

*“Law is defined by attitude...interpretative, self-reflective, constructive, and fraternal – it is an expression of how we are united in community...for the people we want to be and the community we aim to have.”<sup>12</sup>*

Law embodies our collective values, and provides boundaries and processes for resolving conflict. By articulating moral norms as legal norms through a democratically legitimate process, law creates a “system” for education that influences every public school relationship. We understand each other - and live collectively - ‘under the law’. Law creates the boundaries that define and help shape the formal relationships within schools. Understanding these boundaries is useful when faced with a student issue as it helps superintendents (and school administrators) to ‘negotiate’ the relationship of the student to the school.

This study uses law as a conceptual framework because schools and school districts function according to law, which comprises legislation, case law, and district policy. Provincial legislation sets out the working framework for the operation of schools, and the rights and responsibilities of those who work and study in schools. The B.C. *Human Rights Code* and the *Charter* describe individual freedoms and equality and legal rights. District policy sets out rules and powers for the operation of schools and the management of students. And finally, judicial decisions interpret legislation and the *Charter*, and provide guidance for

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<sup>12</sup> Dworkin, Ronald (1986). *Law's Empire*. (Cambridge: Harvard University Press), p. 413.

understanding how law is applied and interpreted within the school context. In this study, the legal and policy context, in which the superintendent's understanding, communication, and actions are situated, form a necessary part of the conceptual framework. The legal decisions in both *Chamberlain* and *Jubran* are also part of the contextual framework for the study as the legal resolution for these cases.

Courts are constantly interpreting and re-interpreting the law through application to the cases before them, and these judicial decisions illuminate our understanding of how law applies to education. For superintendents, it is the language used in these judicial decisions that can provide some guidance as to how they can interpret and apply the law within their own context.

For example, in the *Multani* case – a recent Supreme Court of Canada decision in which a school council commission's decision not to allow a Sikh student to wear his kirpan was declared null – the Court stressed the importance of religious tolerance in Canada. The safety standard in schools was confirmed as “reasonable safety”, not “absolute safety”. In considering the balance of individual rights versus collective safety in school, the court said that if students considered the decision unfair, then it was “incumbent on the schools to discharge their obligation to instill in their students this value that is...at the very foundation of our democracy.”<sup>13</sup> Therefore, tolerance was a paramount consideration in spite of the fact that the court did acknowledge that ensuring a “reasonable level of safety” in schools was a “pressing and substantial” objective.<sup>14</sup>

The importance of the values of multiculturalism, diversity, and an “...educational culture respectful of the rights of others...” in schools is a common theme in many judgments.<sup>15</sup> Superintendents could use this language and orientation in their own practice when confronted with difficult student issues, because it reflects both moral and legal norms, and would therefore support their communication and decision-making from a morally and legally defensible position.

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<sup>13</sup> *Multani*, paragraph 76.

<sup>14</sup> *Multani*, paragraph 48.

<sup>15</sup> *Multani*, paragraph 78.

This study arose out of my interest in how superintendents communicated and made decisions in situations that involved legal conflict, and as a result, it led into social science and the study of how social interaction and communication may be influenced by law. This is a diverse area of study, however my own interest and experience in alternative conflict resolution practices such as mediation and restorative justice provided a focus for communicative practices situated within an institutional context, and how law may be shaping superintendents' understandings and actions within that context. Social science theory provides alternative perspectives for viewing social interaction, and because some of these theories appear to complement the philosophy and practice of mediation and restorative justice, they may provide a useful perspective for understanding how law may influence the communication and decision-making of superintendents.

The social science conceptual frameworks used in this study include the social-legal theories of Jurgen Habermas, a German philosopher and social theorist, who has written about the competing "worlds" of instrumentalism and understanding, and characterizes law as mediating between facts and norms. His theories offer an understanding of orientation in communication, as well as the substantive and procedural benefit of law, which, by combining moral norms with legal sanctions provides a legitimate and generally understood and accepted medium for collective understanding and action. Given the nature of education as a publicly funded institution, it is incumbent on superintendents to communicate and make decisions that are both morally and legally defensible, and law provides a tool to do both.

Similarly, law and society scholarship focuses on behaviour within social structures. Public education is predominantly a social endeavour. Given the political nature of the superintendent's leadership role in which he or she is communicating both with, and between, a number of diverse stakeholder groups, a 'constitutive' view of law in education provides an alternative perspective for understanding the context of the superintendency and the role of law in some of the challenges they may face.

These theories of instrumental and communicative understandings and practices, and the influence of law as a mediator between norms and facts, or as constitutive of relationships and behaviour in education, are also considered through the lens of alternative dispute

resolution practices such as mediation and restorative justice. These practices evolve from a different philosophy and therefore orientation to conflict resolution – one that is oriented to understanding and collaborative resolution, as opposed to judicial resolution through the positional and individualized formal legal system. Given the purpose of public education to educate youth, and the socially dynamic context of public school, these alternative resolution practices share many characteristics with the culture of school communities. Additionally, the overlap of the private and the public in family law, and the growth of mediation and collaborative law in that field, suggests that these practices may be equally applicable in public education, because of the shared issues concerning youth. And, indeed, many schools have already implemented some of these practices through the use of restorative justice and restitution models as an alternative to traditional discipline practices.

#### **4. Research Questions**

This study was designed, and implemented, as an instrumental multiple case study (Stake, 1995, p. 1). The purpose of this case study was to describe and analyze the lived experiences of two B.C. superintendents, and how they responded to challenging “rights” cases in their districts, including how they made decisions, and the role of law prior to the commencement of the lawsuit. The over-arching research question was:

**How did two superintendents in British Columbia respond to challenging “rights” cases in their districts, and to what extent, and how, did they understand and use law in their communication and decision-making?**

##### **Sub-questions:**

- a) How did each superintendent respond when the case arose in the district and how did they perceive their roles? What were the competing interests in each case, and how did the superintendents respond to these interests? How did they perceive the effect and/or influence of their response?
- b) What factors did each superintendent consider when making decisions? How much discretion did they have in their decision-making, and how did they perceive the effect and/or influence of exercising such discretion?

- c) Did each superintendent consider law in their communication and decision-making, and if so, what law, and how was it part of their considerations?
- d) What was the role of values in each superintendent's response?
- e) How did the superintendents perceive the moral, practical, and legal implications of their decisions?
- f) To what extent, and how, were other district employees involved in the decision-making?
- g) Did the case change the way the superintendents did their work, and how would they have done it differently?
- h) How would they advise practicing superintendents who are facing a challenging student issue with a legal aspect? What are the key attributes of leadership in this situation?

## 5. Definition of Terms

For the purposes of this study, the following terms are defined as follows:

**Administrator:** this term includes all school district administrators, including school principals, vice principals, and superintendents as defined below.

**Common law:** Judicial decisions, which consider and build on existing decisions - also known as judge-made law or legal precedent (as opposed to decisions that apply a constitutional provision, statute or regulation).

**Law:** all laws, including the *Canadian Charter of Rights and Freedoms*, legislation and its regulations, and common law (judicial decisions), but not school district policy.

**Rights:** this term means a power, privilege, or advantage conferred on a person by law, and includes positive and negative rights under the B.C. *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*. In the context of education, rights arise from the formal relationships created by school law, and rights law applies generally to legislation and government action, which includes school boards and school board employees.



**Superintendent:** this term includes superintendents, assistant superintendents, and others in district leadership positions at the school board office that are responsible for communicating and making decisions for student issues that concern the law. It also includes retired superintendents and assistant superintendents.

## **6. Limitations and Delimitations of the Study**

The focus of this study is the personal understandings of the two superintendents in each of the two case studies, and how these superintendents understood the role of law in their communications and decision-making. The choice of superintendents is described in detail in the methodology outlined in Chapter 3, however the study was intentionally limited to two recent seminal cases in education that were each appealed to the highest court in the country. It was further limited to the understandings and experiences of the two superintendents in the case studies, and the four superintendents interviewed for the pilot study. The purpose was to present a description of the superintendents' understandings and perspectives – to provide narratives of their personal experience, and to analyse such experiences from a legal and social science perspective. The purpose was not to evaluate or critique the superintendents' past actions.

Given these limitations, this study does not consider the extent of legal knowledge possessed by each superintendent, nor does it consider (or critique) the validity or correctness of their actions or decisions in these cases. The focus, instead, is on the superintendents' personal experiences and their recollections of these experiences in dealing with issues that evolved into legal action against the school district. As with any personal recollection, there may be gaps or interpretations that could be challenged, however this study is not about the veracity of each story, but about how each superintendent understood the story – from his perspective. Consequently, given the design of this study as a collection of personal understandings, there is no consideration of school issues that may be legally actionable in tort or contract, nor is there a consideration of resource allocation issues, which underlie many of the challenges in education. Instead, this study is limited in that it attempts to describe and understand how two superintendents responded to challenging issues, and to what extent they used law to communicate and make decisions.

Context is vital to qualitative research, and because this study is focused on two former superintendents (there are presently 60 superintendents in B.C.), the results of the interview findings reflect personal and unique experiences from only these two districts, and will not be representative of other superintendents' understandings and experiences. Although the analysis and discussion in Chapters 6 and 7 does include some data from the pilot interviews and therefore additional viewpoints of superintendents from other districts, such viewpoints are also limited because they concern individual experiences and unique contexts. Case studies are context specific, or 'situational', and as a result are necessarily restricted by their particularity, and consequently not capable of being generalized to other districts. As Stake notes, "The purpose of a case report is not to represent the world, but to represent the case" (Stake, 2005, p. 460).

Additionally, the analysis of the two case studies is limited by the theoretical frameworks of social science and the boundaries of law, and is subject to other interpretations.

## **7. Potential Significance of the Study**

Superintendents work in a dynamic and challenging environment that is becoming increasingly regulated. They are often faced with exercising discretion in the application of a rule or law, particularly if there are competing tensions that must be considered before a decision is made. How do superintendents approach these issues?

Superintendents hold important and influential positions as senior educational leaders in their districts, and yet they are an understudied group in Canada. To date, there have been no studies in Canada that describe how superintendents resolve these types of issues, or how they understand and use law in their communication and decision-making. There are no studies regarding an in-depth perspective of cases like *Chamberlain* or *Jubran* from the perspective of the school superintendent – difficult cases that had a legal aspect and were adjudicated outside the jurisdiction of the school district. A recent American study from a pilot project for leadership development for new superintendents suggests that there is a need to support new superintendents in their work and that these new superintendents want support in terms of conceptual models to help them work through challenging problems and access to more experienced superintendents, among other things (Orr, 2007).

Both *Chamberlain* and *Jubran* are significant legal cases not only for B.C., but also for all of Canada, because they concern accommodation of difference, and how school districts grapple with difficult value-based issues that involve students. By studying these two cases and learning in some detail how two superintendents responded to the issues, the profession may have a better understanding of some of the challenges of this position, and whether further training is needed in specific areas. By increasing understanding and dialogue about an issue, research can contribute to improvement in practice (Cresswell, 1998, p. 94)

Lawyers and scholars have consistently noted the need for increased awareness of legal trends in education, particularly since the development of a “rights consciousness” that has arisen since the proclamation of the *Charter* in 1982 (Sussel, 1995). With the growing involvement of parents, special interest groups, and the B.C. Ministry of Education’s focus on “citizen centered service delivery”, superintendents require superior communication skills to articulate a vision for their school district, while at the same time, respecting and accommodating, as appropriate, the interests of individual students.

As noted by Fleming,

Understanding the nature and quality of school leadership is important because going to school is a social and cultural experience shared by almost everyone. Schools remain the public institutions closest and most accessible to families and communities – and the most instrumental institutions in determining a youngster’s life chances. The kind and quality of leadership that schools provide are, thus matters of public interest, and indeed public policy, particularly in British Columbia where people have wrestled for more than a century with questions about access, equity, and diversity.<sup>16</sup>

Understanding the legal parameters of student issues and the implications of their decisions would be helpful to all school administrators, including superintendents (Shariff, 2003, Bull & McCarthy, 1995). The cost of any legal action is onerous, and given the persistent financial challenges facing most school districts in B.C. with declining student enrollment, there is a significant incentive for administrators and school boards to resolve student issues

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<sup>16</sup> Fleming, Thomas (2001). Introduction. In Thomas Fleming (Ed.), *School Leadership: Essays on the British Columbia Experience, 1872-1995* (p. 15). Mill Bay: Bendall Books.

informally within the district. This is especially evident in special education cases, where it was recently noted by an education lawyer that school boards must “...take the initiative in resolving disputes with parents in a constructive and conciliatory manner or be found liable for problems that arise as a result of a breakdown in communication.”<sup>17</sup>

As the senior administrative officer, the superintendent works closely with the board and has considerable influence in his or her communication with others and in the decision-making process. The superintendent also guides the direction of the school district, and is responsible for supervising and directing all educational staff in the district. How a superintendent uses process and law in communication and decision-making will affect the other administrators in the district, and may have a wider “trickle down” effect within the system.

In the context of education, law provides a framework for how schools function, and case law provides a constantly evolving interpretation of the meaning of legislation and the *Charter* in the school context, as well as legal precedent for making appropriate decisions in schools. This is not an easy task, as the law is constantly evolving through legislative amendments to statutes and regulations, and new legal judgments from the courts. Staying current with case law and legislation requires time and expertise which is a challenge for superintendents given all the competing imperatives that they face on a day-to-day basis.

Superintendents are constantly negotiating process and resolving issues. In so doing, it would be helpful for superintendents to understand the language, intention, and boundaries that law creates for schools. The balancing of relationships, rights, and risk (including legal liability), is an analytic and interpretative process. If superintendents have a better understanding of the language and boundaries of the law, it may improve their communication and decision-making skills.

There is no certainty in law – no one, not even lawyers, can predict with consistent accuracy, the outcome of cases that are argued before tribunals and courts. As a result, there will always be some uncertainty in any interpretation of the law prior to adjudication of the case.

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<sup>17</sup> Hillborn, Terri L. (2006). *Parents of Student with Disability Successful in Human Rights Complaint*, 16 Education Law Journal 123.

What matters is that the interpretation is thoughtfully and carefully made, and that all parties involved are given a fair opportunity to present their perspectives and wishes.

Education is grounded in relationships that exist for the benefit of students. Although legal rules provide guidance for behavioral expectations, there is an interpretative aspect to the application of such rules within the context of real life problems. An understanding of the legal framework within the school context, and how an approach to an issue may influence the outcome, may assist superintendents in dealing with these issues.

This study provides detailed descriptions of two superintendents' experiences in specific court cases as an example of how they used their understanding of the law to communicate and make decisions. These shared personal experiences could enhance understanding for others who may encounter similar issues. Given that 25% of superintendents in B.C. are new to the position, and 53% in district leadership positions have less than 5 years experience, the opportunity of sharing specific experiences may have broader application in other school districts with similar issues.<sup>18</sup>

Research in this area has examined the general legal knowledge needs of teachers and principals, (Findlay, 2007, Leschied, Lewis, Dickinson, 2000), as well as the perspectives and experiences of secondary administrators with respect to school discipline (Brien, 2004), and other situations that have legal implications (Huang 2004). There is also American research regarding superintendents' experiences with their legal counsel and the role of counsel for school districts.<sup>19</sup> Additionally, there is research concerning how administrators communicate, or should communicate, with parents regarding special education issues (Zaretsky, 2004, Mueller, 2004). However, there appears to be little research that describes how administrators, and in particular superintendents, use law in their communication and decision-making for student issues.

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<sup>18</sup> *Leading the Way – BCSSA Strategic Look to 2011*, BCSSA statistics 2006, p. 19, Retrieved November 26, 2006, from <http://www.bcssa.org/>

<sup>19</sup> Shackett, Charles Joseph (2002). *Superintendent/attorney collaboration: A study of the patterns of collaboration between public school superintendents and district legal counsel in rural school districts of Idaho*. Unpublished Ed.D. thesis, Brigham Young University, Salt Lake City, Utah. Risch, Judith (2004). *The general counsel in a school district: Examining prevalence and roles*. Unpublished Ph.D thesis, University of Wisconsin, Madison, Wisconsin

It is my hope that by describing the individual experiences of two superintendents in B.C. who dealt with challenging cases and by situating these experiences within a legal framework, a description of how superintendents understand and interpret law will emerge, which will be useful to other superintendents and administrators. These shared experiences have the potential to enhance understanding of how law influences communication and decision-making in education, and to improve collective practice generally.

## **8. Organization of the Dissertation**

This chapter has outlined the purpose of this study and the use of law and social science theories as a conceptual framework for studying how two superintendents made their decisions within the legal and practical contexts of the *Chamberlain* and *Jubran* cases. Chapter 2 describes some of the scholarly work in the area of education and law, and outlines the conceptual framework and theoretical perspectives used in this study. Chapter 3 describes the methodology of this study and the method for collection and analysis of the interview data. The *Jubran* case is described through the narrative of the superintendent of the North Vancouver school district in chapter 4, and the *Chamberlain* case is described in Chapter 5 through the narrative of the superintendent of the Surrey school district. Chapter 6 is an analysis of the superintendents' understandings both generally and specifically as it includes interview data from the pilot interviews with four other superintendents in B.C. together with the *Chamberlain* and *Jubran* narratives. Chapter 7 describes how the conceptual framework and theories outlined in Chapter 2 may be applied to the communication and decision-making of superintendents, particularly with respect to the two case studies. Chapter 7 also sets out some implications for policy and practice. Chapter 8 provides a concluding look at the role of law in the communication and decision-making of superintendents and how a general understanding of the purpose and language of law, together with a communicative orientation that is both instrumental and collaborative, may assist superintendents who are faced with challenging student issues. This dual orientation serves both the accountability and relationship-based aspects of the superintendent's role, which is necessary for effective leadership of the district to meet the interests of the collective as well as the best interests of every student.

## **CHAPTER 2: REVIEW OF RELATED LITERATURE AND CONCEPTUAL FRAMEWORK**

Identifying existing scholarship on the subject of law in education is a necessary part of determining what others have written and it provides the “intellectual glue” on which to build a dissertation (Marshall & Rossman, 2006, p.45). A literature review provides the foundation or theoretical framework for the problem, and the significance of the study (Merriam, 1998, p. 51). In this dissertation, the literature will be used to help “frame” the study, and provide a “backdrop” for the research questions (Cresswell, 2003, p. 30). This chapter reviews existing literature on school law and superintendents, and then describes how the proposed conceptual framework orients this study to the legal and practical aspects of administrative decision-making.

### **1. Review of Related Literature**

There has been little research in Canada on superintendents. Most studies concerning school superintendents have been undertaken in the United States where, although public education systems are established by each state constitution, the federal government has some influence through statute law (e.g. *No Child Left Behind*) and funding. This is not the case in Canada where, although it is a federal political system as well, under the Canadian constitution, each province has exclusive jurisdiction over education. However even in the United States, it has been recognized that research regarding superintendents and their work has been “scant” (Johnson, 1996). Johnson’s study on how superintendents exercise leadership demonstrated the need for competency in the educational, political, and managerial arenas, and the importance of context for each. This study however, was oriented toward the challenges and opportunities of leadership, and did not consider the influence of law (Johnson, 1996). In addition, there has been some recognition in the literature that educators often do not recognize law as a tool they can use affirmatively such as to advance policy objectives or improve school governance and student performance. Instead law is more often characterized as litigation, a problem to which educators react, rather than a powerful tool that can be used for educational goals (Heubert, 1997).

In Canada, there have been several studies regarding law in school districts. For example, a 2000 study funded by the University of Western Ontario was undertaken to determine the, “informational needs of principals and teachers with respect to legal issues affecting school aged children” (Leschied, Lewis, & Dickinson, 2000, p.4). This study found that there was a need for more understanding of education law that provided a “...practical, problem-solving orientation...” to legal topics that were most important to educators. This survey of primarily elementary and secondary teachers and administrators found that the following areas raised the most legal concerns: school safety, teacher conduct, children in need of protection, and custody and access (Leschied, Lewis, & Dickinson, 2000).

These categories were used in a subsequent Canadian study in 2004 that examined the experiences of four Ontario secondary principals with situations that had legal implications. This study, although small, found that school safety and students’ rights and responsibilities were two of the three categories that were ranked by principals as the most serious and frequent (Huang, 2004). A subsequent study in Saskatchewan that explored the need for in-school administrators’ knowledge of education law, found that administrators scored just below 50% on a legal knowledge test, and that school administrators appeared to rely on senior administrators as a primary source of information. Additionally, it appeared that administrators were not expanding their knowledge of legal issues by keeping up with changes in law and legislation (Finlay, 2007). These studies confirm that it would be beneficial for administrators to have a foundation of some legal knowledge, and it is suggested that difficult situations that have legal implications for principals, will fall within the responsibility of the superintendent if they cannot be solved at the school level.

Other Canadian studies have focused on issues such as student discipline and student appeals (Brien, 2004; Williams, 1992); however there appear to be no studies regarding superintendents, their understanding of the law, and how they use law in their work. Much of the education law literature in Canada focuses on specific cases, or discrete subjects such as freedom of expression or student searches (Chandler, 2005; MacKay & Burt-Gerrans, 2005). These works are usually journal articles written by lawyers who describe a particular legal issue in education, and the relevant case law, and then conclude with suggestions for future practice and policy. Apart from theses and dissertations, there are few articles written



by educators regarding their experience with the law, and many of the studies that have been done focus on school administrators such as principals and vice-principals (Brien, 2004; Huang, 2004).

There appears to be little or no research with respect to how superintendents in Canada understand and use law in their work regarding student issues. Consequently, we do not know what their experiences are in this emerging and challenging area of law and education.

There is more research however in the United States regarding superintendents and the law, many of which are oriented toward legal trends in case law and/or superintendents' knowledge of the law or their relationship with legal counsel. These studies, however, are often state and statute specific. Additionally, given the differences in the educational systems between Canada and the United States, and in particular, the focus on "high stakes testing" in the U.S., it is suggested that these studies do not reflect the Canadian experience.

In some respects, the challenge of balancing the needs and rights of individual students with the rights and well-being of all other students has been illuminated by parent advocacy in special education in Canada. Legal challenges to school placement and funding for special education students have highlighted the "rights" of students within the system, and shaped how districts approach and resolve these difficult issues within the parameters of the law (Hillborn, 2006; Zaretsky, 2004). For many school districts, resolving these issues are like "walking the narrow ridge" between alternatives, which may in fact be paradoxically united (Donlevy, 2004, p. 312).

Canadian scholars who write about law and education describe the *Charter* as having a "...significant role in shaping the educational environment", and how increasingly educational leaders must "...navigate these legal currents" (MacKay & Sutherland, 2006, p xi). As noted by Sussel, in the decade after 1982, the Supreme Court of Canada was much more assertive in its interpretation and application of the *Charter* and as a result contributed to the development of rights-oriented jurisprudence which had a significant impact on public education (Sussel, 1994). This rights-oriented jurisprudence has continued to contribute to a higher level of rights consciousness amongst all Canadians. For example, students and their parents can now challenge school board policies and district decisions if they infringe on any

rights and freedoms described in the *Charter* or provincial human rights legislation. This places a substantially higher onus on decision and policy makers than in the past, and consequently has placed more responsibility on superintendents. It has also been recognized that in order to create policy that is consistent with *Charter* rights, educators require not only some knowledge of student rights, but also "...the philosophy that guides the courts' interpretation of these rights" (Watkinson, 1999, p. 13).

It has been noted that *Charter* challenges in education are becoming less frequent, perhaps because provincial legislation is now drafted to ensure compliance with *Charter* values (Anderson, 2007), and core issues have been litigated. Additionally, for most litigants, it is less expensive to pursue a human rights complaint in which the complainant's legal costs are largely covered by the province, than to fund a potentially lengthy and expensive legal action at the litigant's own expense. Those cases that are pursued are often supported by specific interest groups who have an interest in changing the law. Interestingly, neither *Chamberlain* nor *Jubran* was a *Charter* "rights" case. *Jubran* was initiated pursuant to the B.C. *Human Rights Code* (at the expense of the province), and *Chamberlain* was argued on the basis of the B.C. *School Act*, (at the expense of the respective parties), although the Supreme Court acknowledged that it had a "human rights" aspect.

Mr. Justice LeBel in reviewing Supreme Court of Canada decisions about "rights" generally in education over the past 25 years noted that these decisions have defined the significance of schools in Canadian society as a learning environment that transmits knowledge and educates students about fundamental values, including tolerance for difference (LeBel, 2006). These judgments confirm the critical role of schools in cultivating the fundamental values of Canadian society, and the role of the courts in defining such values. The superintendents in the *Chamberlain* and *Jubran* cases were faced with challenging issues concerning values and law – did they respond to these issues as moral or legal problems...or both? And, did they have any discretion in their responses to these issues?

Hawkins, in writing about the use of discretion in administrative decision-making, suggests that the study of policy making has been neglected, and that there are many questions regarding how policy makers interpret the law, discern its purposes and values, and then

translate these understandings into a practical form (Hawkins, 1998). These are similar questions to those posed in this study, and suggest that understanding *how* decision-makers make their decisions is crucial to understanding their decisions. How do superintendents interpret and apply their mandate when making decisions, and does law inform their choices?

Superintendents often apply district policy when confronted with a problem; for example, policy was considered in the *Chamberlain* case and referred to in the *Jubran* case.

Additionally, challenging issues in school districts frequently result in the adoption of new policy, particularly if the issue has been successfully litigated, and the superintendent's recommendations to the board regarding such policy would be influential. How the superintendent understands the issues, and the applicable law, would influence his or her interpretation and application of existing policy, as well as the creation of new policy. However at present, little is known about how superintendents use their understandings to make decisions.

The *Chamberlain* and *Jubran* cases concerned the values of tolerance, respect, and inclusion - values that were considered both within the school district and in the legal decisions. Law and ethics are often considered together and viewed as "...necessary to navigate the uncertain waters of leadership in today's schools" (Stader, 2007, p. 6). Stader notes that it can be difficult to balance the inherent tension between individual rights and the administrative responsibility to make decisions for school effectiveness, however combining legal knowledge with ethical considerations can "...significantly reduce the questionable application of administrative authority and the conflict inherent in administrative decision making (Stader, 2007, p. 7).

In Canada, education has frequently been described as a moral endeavour, and there has been some writing on developing a moral discourse in educational administration in a pluralistic society (Mitchell & Kumar, 2001). It has been suggested that administrators play an important role in shaping the "moral landscape" of an educational community and that they are responsible for creating a moral discourse that is inclusive, sensitive, and respectful of difference. Most writing however, is about the theory of such a discourse and there is a need

for examples of “lived experiences” (Mitchell & Kumar, 2001). This study will provide two examples of such “lived experiences” but with reference to the legal arena.

Most challenging student issues are resolved within districts by consensus, however cases such as *Chamberlain* and *Jubran*, while costly and time-consuming, are beacons of change. Such cases provide new direction for the educational community (provincially and nationally), and legal decisions that are accessible to everyone.

Law has the ability to provide the language and forums for value conflicts that are negotiated within school districts and failing agreement, litigated in court. In some cases, value conflicts cannot be resolved at the school level, or there are advocacy or special interest groups who support an individual’s case and are willing to fund a legal challenge. These cases proceed to court for adjudication, and the legal system allows the parties to ‘spar’ within a respected and orderly forum. As noted by Minow, “We can fight hard within the ideological and institutional framework that we take for granted and reaffirm daily by use” (Minow, 1997, p. 138).

Students and their parents can be passionate advocates for “something else”, and as a result, superintendents sometimes find themselves “in the fight”, and the role of law, both procedural and substantive, is significant. This study will augment existing literature by describing the understandings of two superintendents in B.C. regarding how they responded to challenging issues in their districts that had legal implications, and the effect of law on their communication and decision-making. Their experiences with these situations can then be shared and used to improve the understandings and collective practice of other superintendents in the province.

## **2. Theoretical Perspectives & Conceptual framework**

Because the interface of law and education from the perspective of the superintendent has not received much attention in Canada, I have chosen a research design that allows for the description and interpretation of two individual lived experiences together with an analysis of the legal framework (legislation, cases, and policy) within which these superintendents did their work.

The conceptual framework, or disciplinary orientation, for this study is law and social science theory. Law provides the boundaries for the issues in *Chamberlain* and *Jubran* cases, such as the scope of secularism and tolerance in the *School Act* and the extent of a student's right to be free from discriminatory harassment on the basis of sexual orientation. These decisions comprise the legal framework that guides the approach of this research (Merriam, 1998). Because law is pervasive in the education system, these cases will inform the inquiry of how law creates structures, conventions, and patterns in schools that influence superintendents' decision-making. Social science theory complements the legal analysis by providing a social and behavioural perspective that focuses on how law may be influencing social structures, relationships, and communication in discrete but significant ways.

Superintendents are often arbiters of competing positions among the various parties (parents, principals, teachers, trustees, Ministry employees, union representatives, special interest groups, etc.). Because law is broadly stated, superintendents must constantly "interpret" the law given the context of the situation and their responsibilities to the students and the school district. This interpretation is strengthened by knowing something about the "letter of the law", the particular context to which the law applies, and the positions and interests of the affected parties. It is an exercise that uses past experience and legal precedent to anticipate the future.

This study examines the influence of law within the context of these cases studies. The understandings of the superintendents, in both the pilot and case study interviews, are then considered together with the theoretical perspectives of social scientists who have studied the influence of law in society more generally. These theoretical perspectives include the work of Jurgen Habermas, and scholars from the social science area described as "Law and Society". These theoretical perspectives provide alternative ways of understanding how law may be influencing the communication and decision-making of superintendents, both in these cases, and more generally. The communicative and constitutive properties of the influence of law as described by these theories underline the competing tensions that comprise work in public education. These theories however, have no substance without some practical application; therefore this study includes a description of the philosophies and uses of several alternative dispute resolution practices, which share some common ground and a similar

philosophical orientation with the social science theories – namely, an emphasis on relationships and the importance of communication for understanding.

**(a) The Theories of Jurgen Habermas regarding communication and law**

The evolution of individual “rights” in the last part of the 20<sup>th</sup> century has been a fairly recent development since the 17<sup>th</sup> century when western society began to characterize itself as a civilization of rationality commencing with the work of Descartes. Although rationality and science have brought ‘progress’ to many aspects of our society as well as material wealth, some concern has been voiced that the “systems” we have created are dehumanizing and confine us to an ‘iron cage of rationality’ (Eriksen & Wiegard, 2003). Science has defined rationality through the objective control of the environment and its population. This is an instrumental approach to rationality in which our capacity to reason is used to manipulate our environment for the benefit of economic and administrative systems. This view of rationality has been criticized as too one-sided for being subjective and externally motivated; a ‘what’s in it for me’ kind of approach, instead of recognizing the more subtle and communicatively situated relationships between individuals that compose social life but are often unacknowledged or undervalued.

Jurgen Habermas, a German philosopher and social theorist, has developed significant social theories that use rationality to understand and enhance communication and the relationships that comprise modern society. Two of these theories are summarily considered in this study: the theory of communicative action and the procedural function of law as a mediator between facts and norms. This theoretical work is appealing because of its communicative and procedural orientation, which Habermas has linked to the mediating role and democratic function of law. Given the vast scope and abstract nature of Habermas’ work however, only some aspects of these theories will be described as offering a potential theoretical framework from which to understand the perspectives of the superintendents in this study. As this dissertation is intended to have practical application in the field of education, and is largely based on the description and interpretation of superintendents’ perspectives, an in-depth study of Habermas’ work is not undertaken. His work is briefly introduced and summarized only insofar as it seems to have some application to superintendents’ communication and decision-making as described within the parameters of this study.

The theories of communicative action and the mediating role and democratic functions of law, provide a communicative balance for the traditional scientific view of rationality which Habermas believes has been too one-sided in its emphasis on control, production, and cognitive aspects of reason. His approach emphasizes the process of communication where rationality is used to favour the best ideas and arguments, and through process can continually be challenged and changed. This perspective implies a “procedural view of rationality” in which process is tantamount – answers may be changed but the process for coming to the answers must be open and provide the opportunity for revision (Eriksen & Weigard, 2003). This attention to process is very appealing in a country such as Canada where diversity and pluralism in culture, faith, language, and values, among others, are foundational to our sense of community and country. Indeed, fairness and justice in process has been viewed as the “...only virtues that can reasonable be considered as setting norms to be universally respected (Hampshire, 2000, p. 53).

The application of such a perspective in public education given its diversity and the inevitable value conflicts is evident.

This procedural view of rationality, which Habermas later uses for law as well, is the basis for his theory of communicative action in which language or “speech acts” between people is oriented to mutual understanding (Habermas, 1996, p.18). His theory, described as “formal pragmatics” describes three necessary components for meaningful understanding to occur between people within an exchange of “speech acts”: 1) that the statement is true; 2) that the statement makes sense in the context; and 3) that the speaker’s intention is meant as expressed (Eriksen & Weigard, 2003).

In the case study of *Jubran* for example, when Azmi Jubran’s father told the administrators at Handsworth Secondary, “I’ll sue your ass if anything happens to my son”, this statement would presumably be meaningful if it was true and intended as stated (1 & 3), and, if it made sense in the context of the situation (2). Without knowing exactly how this statement was intended by Mr. Jubran or perceived by the principal and vice-principal, this statement can be viewed in several ways – that legal action would be commenced if Azmi Jubran were to be injured by other students at school, or alternatively, as simply a threat to garner more school

resources for the personal protection of his son. The costly reality of commencing legal action was not a factor in this case as it turned out because the costs associated with the laying and hearing of the complaint through the Human Rights Commission in B.C. were funded by the provincial government on behalf of the complainant.

**(i) Overview of the theory of communicative action**

Habermas situates his theory of communicative action in a concept of two worlds: the lifeworld and the system. In spite of the stark dualism of this dichotomy, and the criticisms leveled against it, this model does provide a means to examine some of the tensions within our society (Eriksen & Weigard, 2003). It also introduces a more holistic and less mechanistic view of life and in this respect pushes back against the dominating influence of science and structure that has shaped perspectives and knowledge in the western world over the last 400 years.

The two worlds – the lifeworld and the system - are in effect two different approaches to understanding social phenomena and can be differentiated as either an internal approach from the perspective of the participants (lifeworld) or an external approach from the perspective of the observer (system). These perspectives are also evident in their orientation to communication. Initially Habermas described the lifeworld as being communicatively integrated and primarily oriented towards action based on reaching understanding, whereas the system world was primarily oriented towards action for success and survival. He subsequently modified this dichotomy to acknowledge that strategic action for success could also occur in the lifeworld, and that there are intermediate categories of communicative action (Edgar, 2005; Eriksen & Weigard, 2003). For the purposes of this study however, only a simplified overview of this theory will be discussed, as the primary issue is the role of law in superintendents' communication and decision-making.

Habermas maintains that the internal viewpoint from the lifeworld, and the external viewpoint of the system, are both necessary – as is maintaining a balance between the two. In public education, these two views of the world are readily apparent and were reflected in the superintendents' responses; the imperatives of the system world appearing in legal accountability for student progress and budget targets; and the educational lifeworld of



cultural and functional learning for students. It is in this specific context that these theories are explored.

The lifeworld resides in the social world and is described as the familiar ground of culture, language, social orders and personal identities (Habermas, 1996). This is the stable “unshakable rock” of social and cultural understandings that provides a “horizon” for communicating and living. The lifeworld is all our background knowledge that we use intuitively without having to analyze or reflect; it is the resource for communicative competence (Edgar, 2005; Habermas, 1996). We are able to communicate and understand one another because of this fabric of interwoven cultural traditions, social orders, and personal identities that connect us. The lifeworld is a common context comprised of social, cultural, linguistic, and moral knowledge that is fundamental to living together as a civil society. If one accepts this viewpoint, then clearly this world is the bedrock of educational institutions – the transmission of culture, knowledge, and attitudes through communicative action at school.

The other world identified by Habermas is the system world – based on systems theory as developed in the 1900’s by Talcott Parsons and Niklas Luhmann (Eriksen & Weigard, 2003). This perspective views society as a series of autonomous but dependent subsystems, which serve to provide order in the complexity of our world and enable success-oriented action. Systems theory enables us to understand the complexity of modern organizations, which are composed of subsystems such as the “money-steered economy” or the “power-steered administration” (Habermas, 1996). This approach looks at the political and economic structures, and the functions of organizations, on a larger and more institutional scale, as opposed to the individual or community beliefs and actions of the lifeworld approach. This world viewpoint is necessary as well because in public education it provides a means to achieve some understanding of the complexity and purpose of school. It provides a theoretical perspective for analyzing superintendents’ work, and complements the communicative dispute resolution practices that are emerging both in education and in the legal system. This perspective was further enhanced by Habermas’ theoretical work regarding the function of law in modern society, and it is suggested that some of his ideas may have some application in public education and the work of superintendents.

**(ii) Overview of the proceduralist approach to law as a mediator between facts and norms**

Approximately a decade after Habermas had completed his theory of communicative action in 1981, he wrote another major theoretical essay entitled “Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.” This work is lengthy, complex, and quite abstract, and covers six topics: (1) the form and function of law; (2) the relation between law and morality; (3) the relation between human rights and popular sovereignty; (4) the epistemic function of democracy; (5) the central role of public communication in mass-democracy; and (6) the debate about competing paradigms of law (Habermas, 1999).

“Between Facts and Norms” builds on the theory of communicative action and characterizes law as a “transformer in the society-wide communication circulating between system and lifeworld” (Habermas, 1996, p. 81). This view, in which law is also described as a “hinge” or “transmission belt” provides an explanation for how ordinary language can be translated into a legal code and vice versa so that everyone can understand the expectations of law and the consequences for breach of the law. This is the socially integrative function of law.

In this work, Habermas also develops an argument demonstrating the internal relation between the rule of law and democracy as seen in the balance between private and public autonomy. Human rights secure the private autonomy of legal persons, who are then free to participate in the production of law and the exercise of popular sovereignty. Law is the medium that guarantees actionable individual liberties while at the same time provides a democratic procedure for citizens to discursively agree on the production and application of legal norms (Habermas, 1996, postscript). The modern legal order is viewed as legitimate because citizens can understand themselves both as authors of the law, and, as subjects of the law (Habermas, 1996, p. 449). Democratic process gives law its legitimacy.

There is also a complementary relationship between law and morality. While modern law is positive (created, applied, and amended by members of a specific community), morality is universal, “unlimited in social space and historical time” and applies to all natural persons (Habermas, 1996, p. 452). However, as explained by Habermas, “...in complex societies,

law is the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect even among strangers” (Habermas, 1996, p. 460).

As well, moral considerations become part of law through the legislative process (Habermas, 1996, p. 453). However, by combining moral norms with sanctions, law provides a medium for collective understanding and action, and relieves individuals from acting solely according to their conscience (Eriksen & Weigard, 2003, p. 138, Habermas, 1996, p. 452). What this means for educational administration, is that superintendents can use law (as prescribed by the *Charter of Rights and Freedoms*, provincial legislation and district policy) as a legitimate and collectively understood tool for action as opposed to only relying on an ethical framework which may be insufficient for resolving conflicts based on diverse value-based positions.

These theories also contribute to another understanding of how law may influence administrative communication and decision-making. Firstly, Habermas describes law as a “dual” system: a system of knowledge, and a system of action, which mediates between facts and norms and derives much of its legitimacy from communications within processes that most people believe are fair and just. These kinds of processes require a more democratic, participatory form of administration - more consultation, collaboration, and communication about accommodating different points of view. These kinds of processes are evident in many of the current communications between First Nations groups and the provincial and federal governments in British Columbia.

Additionally, superintendents appear to live in the two worlds described by Habermas: on the one hand, they are balancing the politics of the school Board and the Ministry of Education (the imperatives of the system world), and on the other hand, they are leading the district in educational practices and curriculum (the culture and language of the lifeworld). The time pressures and accountability expectations demand a strategic approach to their work; however their professional formation is also oriented to understanding.

Superintendents are educators first, and educators teach for understanding. They teach so that their students (or in the case of superintendents, their staff and Board), will have some understanding of both the subject and the relevant norms, and they know that if they have a

better understanding of their students, they will be better teachers. Understanding infuses good educational practices and it is suggested that communicating for understanding is at the foundation of public education.

The communicative action theory also provides a way of thinking about how superintendents communicate in legally challenging situations. Around the same time that Habermas was constructing his theory of communicative action, there were initiatives in law to develop alternate ways of resolving conflict such as mediation and interest-based negotiation (also known as alternative dispute resolution or “ADR”). These initiatives were the result of dissatisfaction with the administration of justice in the United States in the 1970’s, and of a desire to empower individuals to resolve their differences and reduce pressure on the justice system (Pirie, 2000). The shift to include ADR practices was in orientation and process. Whereas negotiation or litigation is adversarial and based on communication about positions (what we want), mediation is more collaborative and based on communication about interests (what we need). The well-known work of Fisher and Ury in their 1981 book entitled *Getting to Yes* popularized this shift, and described it as principled-based bargaining as opposed to positional-based bargaining. This was the formula for a “win-win” outcome in which mutual gain and objective criteria complemented a focus on the problem and people’s interests, as opposed to their positions. It signified the beginning of a shift in North America to include mediation and restorative justice practices within the umbrella of institutional or state justice practices for conflict resolution.

Over the last 20 years this shift has gained momentum, and mediation and collaborative law practices are commonplace, as is the growing influence of community based restorative justice practices, both in the criminal and civil arenas. Although neither of these practices was specifically described in the two cases studied here, the language of both superintendents and their understanding of the importance of collaborative practices suggested a preference for this type of communication and decision-making.

The communication and decision-making of superintendents, however, is made within a social and highly political context, therefore the theoretical perspectives of law and society

scholarship may also have some application with respect to the influence of law within the context of public education.

**(b) Law and Society**

The dual systems/lifeworld theory of Habermas which reflected an external or internal approach is also an approach that is apparent in the work of social science and legal scholars who study how law influences human behaviour within society. Drawing on the social theory work of Marx, Weber, and Durkeim, law and society scholarship views law as an integral and defining part of social life -- a powerful influence in the creation and transformation of social relations (Cotterrell, 2004; Galligan, 2007). Certainly, in both case studies, the legal decisions were influential in how the respective school districts viewed and managed either homophobic comments or same sex resources. However it is suggested that law was also influential in the communication and decision-making that preceded the judicial hearings and decisions. Law may have played a more significant role than acknowledged, not only in the formal legal action, but also in the lead-up to such action - in how the issues arose, were understood, and consequently managed within the district.

Law is ubiquitous in education. It creates and influences all the formal relationships existing in every school and school district, and it provides much of the language, rules, processes, and forums for the interpretation, application, and understanding of how public education is viewed, and delivered. And, in addition to defining relationships and boundaries, it also regulates behaviour, and contributes to the creation and support of cultural values in education. Canadian law expresses the values in Canadian culture, and the influence of law in public education shapes both values and culture. An examination of culture and social relationships in education must then necessarily include the influence of law.

From the law and society perspective, law is described as being both instrumental and constitutive. Law regulates social action and provides a strategic method for action, but it also creates or constitutes fundamental collective understandings and practices in society (Cotterrell, 2001). As an academic field of study, law and society scholarship has evolved from Max Weber's socio-legal theories and the development of a law and society movement following the Second World War. This movement focused on social structures and human

behaviour, rather than on rules, process, and decisions, and it regarded law as part of social life (Friedman, 2005; Galanter, 2006). However, the scope of ‘law and society’ studies is large and as noted by Lawrence M. Friedman in the first volume of the *Annual Review* for law and social science in 2005, the study of law and society covers a wide range of social scientists and others under a “big tent” which is continuing to grow (Friedman, 2005). Consequently, this chapter can provide no more than a selective and cursory description of some aspects of this perspective as they may relate to the superintendents’ experiences in this study.

The advantage of these theoretical perspectives is that law is studied as part of a social context, and is acknowledged as an integral part of that context. This perspective recognizes the influence of law in social interactions – and public education is predominantly a social endeavour. The relationships that are forged amongst and between students and their teachers are at the heart of school culture. As noted by Wotherspoon, “Whether viewed as preparation for work, preparation for life in general, or an essential activity in its own right, education both reflects and influences the social world of which it is a central component” (Wotherspoon, 2004, p.89). And because education helps shape personal identities and collective culture, it is also highly political – and political action often operates through the medium of law.

In Canada, the *Charter* has raised rights consciousness generally, and in public education has resulted in the development of “rights jurisprudence” which affects both legal culture and social reality through seminal legal decisions (Sussel, 1995). Individual rights arise from a social context, and this context contributes to a “legal culture” which is the attitudes, values, and opinions of those who work within the legal system, as well as the attitudes, values, and opinions of those who work outside the legal system, such as school superintendents (Friedman, 2005). Rights have been defined as not only legal instruments but also expressions of our collective moral identity (Ignatieff, 2000). Rights cases therefore drive to the heart of school culture and necessarily impact the social environment. For superintendents, the ‘rights revolution’ has presented the significant challenge of enhancing equality rights in schools while at the same time protecting individual difference. In this way, law is closely tied to culture, and culture is created by social relationships and

understandings. The social context of superintendents' work is vitally important for understanding how they are influenced by law.

This dissertation is about the personal understandings of superintendents, and not the interaction of law in society *per se*, however this area of study provides some interesting and potentially useful perspectives regarding the relationship between law and people – a relationship which existed for both the superintendents in the *Jubran* and *Chamberlain* cases. However, as I am a lawyer and an educator, not a sociologist, this chapter will merely introduce in a summary manner only a few of the law and society perspectives, and describe how they might apply to superintendents' understanding and communication about issues in education that have a legal aspect

Law and society scholarship describes law as having constitutive power because it 'names the world' as it creates roles, relationships, and obligations that are expressed, understood, and consequently lived by people in their social spheres (Ewick, 2001). Law emerges from within social life and is a dynamic and integrated part of everyday life, as well as a framework for instrumental or strategic action. From this approach, law is not just something that happens *to education* – it is an integral part *of education*, and '...in everyday life, law is appropriated for purposes that its authors and administrators often neither completely foresee nor completely understand (Sarat & Kearns, 1995, p.8).

Law and society scholarship is a useful area because it concerns human understandings and behaviour within a social context. Sarat and Kearns have identified two dominant perspectives in law and society scholarship that concern the influence of law on social action. On the one hand, there is an "instrumentalist" approach which views law as a tool, which exists outside social relations, and is used as needed. On the other hand, there is a "constitutive" approach in which law is viewed as an inseparable part of daily life. It is suggested that both these perspectives adopt a "law-first" approach (how does law influence action, as opposed to how action is influenced by law) (Sarat & Kearns, 1995).

The difference between the two approaches is one of orientation – is law an external or internal influence on human consciousness and behaviour? The instrumentalist takes an external approach and focuses on rules and effectiveness, in which law is an outside

influence in which we are "...merely pushed and pulled by laws that impinge on us from the outside" (Sarat & Kearns, 1995, p. 29). On the other hand, the constitutive understanding suggests that law works internally, from the inside out, creating meaning and shaping understandings. This is best understood from the use of such legal definitions in public education such as "minor" (no legal capacity), "parent" and "child", and professional roles such as "teacher", "student", "principal", and "superintendent". Pursuant to the constitutive understanding, law is not an external influence that pushes and pulls us, but instead has been internalized "...so much that our own purposes and understandings can no longer be extricated from them" (Sarat & Kearns, 1995, p.29). Because law is interwoven with norms in ordinary practice, it constitutes our understandings and actions.

These two approaches are merely different ways of looking at law's influence; whereas, the instrumental approach views law as an external influence, which is focused on sanctions, the constitutive approach views law as internal and focused on meaning. Sarat and Kearns argue that both approaches are necessary because law is constitutive *and* instrumental. This is comparable to the systems/lifeworld perspectives described by Habermas in his theory of communicative action. It also corresponds to his characterization of law as a "dual system" – a system of knowledge (constitutive meanings and understandings) and a system of action (instrumental use for effect).

The social science perspective of law sees law and everyday life as mutually defining in that they constitute each other. Law and society interact in a dynamic process. Engel describes how law and the culture of common sense interact to create distinctive social arenas or "domains". As an example, he describes how parents of children with disabilities must first have their children classified as 'different' pursuant to the terms of the law in order to be eligible for services that will integrate them into mainstream programs (Engel, 1995). Although his study is focused on the 'everyday' effects of law in this context, this approach may be useful because it illustrates how law acts to shape understandings, experience, and identity. The broad terms of law must be interpreted and shaped by those who are affected by the law – students, parents, teachers, and administrators – in determining how to provide the best education for disabled student. So too, must school and district administrators



interpret the law for application within their own context, as was done in both the *Jubran* and *Chamberlain* cases.

**(c) Alternative Dispute Resolution Philosophies and Practices**

Whether law is viewed as an integral part of social life, or as an external system of rules, it is a significant influence in public education. The constitutive and instrumental qualities of law infuse communication and decision-making. For superintendents who are responsible for communicating and making decisions as district leaders, law emerges from and complements ethics in terms of ensuring that their decisions are morally and legally defensible. A consideration of law brings legitimacy to communication and decision-making. Law enables superintendents to act strategically within its boundaries. However, because law is broadly and generally described in the constitution and statutes, and context dependent in case law, there is a continuing interpretative aspect of law that requires not only knowledge, but also understanding. And understanding comes from developing communication skills and processes that facilitate an exchange, not only of information or positions, but also of interests and needs.

Communication is possible because of common knowledge - what we share 'in common', and this in turn, suggests a sense of community. The influence of law on the social relationships within school districts, and in particular the relationships between the superintendent and other district administrators, as well as trustees and government, are relationships of community which are woven together in a common endeavour. And these relationships of community are largely created and influenced by law. For example, in B.C. the *School Act*, and District policy defines roles and sets out responsibilities for the management and delivery of most aspects of public education.

Law exists because of relationships within community. If these relationships didn't exist, there would be no need for law. As long as people have come together in groups there have been rules, conventions, and understandings that have guided their behaviour for living together. Law is inseparable from its social context (Galligan, 2007). However, as the complexity of communities has grown, so too has the complexity of law. It has become a major force in modern communities, and is generally regarded as not just "...a necessary part

of a tolerable society but essential to the realization of valued social goods” (Galligan, 2007, p. 33).

The concept of community is familiar to educators as it has long been recognized as the bedrock of healthy relationships within schools, and provides an understanding of how and why we come together to teach and learn in public education.

Community is constructed through communication. The intrinsic and dynamic relationship between understanding, language, and action is implicit in most social relations, including public education. We experience the world through language because we are always “in language”, and we use language to negotiate our place within a given context (Arneson, 2007). Process shapes our language, and language, in turn, shapes our understandings. Therefore “how” we communicate, and “what” we communicate, is foundational to understanding others, our community, and ourselves.

Communication skills for superintendents are becoming increasingly important and there is evidence that superintendents who communicate effectively can influence both school culture and productivity (Kowalski, 2005). The relation between organizational culture and communication has been clearly established, and the classical top-down administrative communication model is gradually being replaced with a more symmetrical and relationship enhancing type of communication. This has been held to be a more effective communication model for administrators to identify and solve organizational problems as well as initiate and sustain change in their districts (Kowalski, 2005). The conceptualization of superintendents is evolving from the mid 19<sup>th</sup> century “teacher of teachers” to the present chief executive officer who mediates and manages information, values, positions and interests amongst and between the numerous and diverse parties who have direct involvement with public education. The 2000 Study of the American School Superintendency described the future of the superintendency as being more connected to good working relationships with boards and community groups, and that in order to accomplish this, successful superintendents would need excellent communication skills, among other things (Glass, Bjork, & Brunner, 2000).

The shift from a positional and hierarchical model to a more egalitarian and collaborative model in many aspects of modern life has been recognized and described by a number of

scholars. For example, Charles Taylor is a Canadian philosopher and historian of modernity who identifies some of the social forms that have characterized Western modernity – the market economy, the public sphere, and self-governance. He argues that these characteristics of the Western world have changed the axis of our society from one that was hierarchical, religious, and well-ordered, to one that is vertical, impersonal, and egalitarian (Taylor, 2004). He argues too that this change has provided a new conception of the moral order of society – a significant change in culture and social understandings.

This “flattening” of hierarchies in society has been evident in public education. For over 100 years, public education in B.C was characterized by provincial control and a strict hierarchy. However, as the number of students has grown, along with teaching, administrative and support staff, there has been a shift toward more public participation and increasing governmental recognition of the “...legitimacy of public and parental claims to more involvement in shaping the school system” (Glegg, 2001). The increasing involvement of parents in the school system together with the “rights” of all individuals, whether described by the constitution, statute law, or contract, has all contributed to a sense of entitlement, and hence a shifting of the power or influence in relationships. This is what Taylor describes as a “direct access” society – a society where people consider themselves free and equal, and not bound by a social hierarchy of power and subordination. It is a society where everyone is “immediate to the whole” (Taylor, 2004, p. 158).

The characteristics of a “direct access” society include the recognition of “human rights” and everyone’s equal access to legal recourse to uphold such rights, not just the well positioned or the powerful. In both the *Jubran* and *Chamberlain* cases, the particular circumstances of each case provided the parties with recourse to legal remedies outside the jurisdiction of the school district. In each case, there was an actionable ‘right’, which shifted any power or influence that may have existed between the parties and the school district.

In both these cases, law provided a cause of action for this shift to occur. For example, if the bullying language had not been homophobic in nature, Azmi Jubran would not have had grounds for a case pursuant to the *Human Rights Code*. And, if the Surrey School Board had

not passed the resolution regarding the three books, there would have been no decision for a judicial review at law.

If previous hierarchies in education are being “flattened” and if there is more ‘direct access’ in education, how do superintendents manage the challenges that may arise given the range of ‘rights’ and entitlements of all those in public education? How do superintendents understand and take action on these difficult issues? Part of the answer may lie in orientation. The superintendents’ sphere of influence is within their districts, and it is in this area that superintendents’ communication and decision-making responsibilities are the most influential. Superintendents are placed between the government, trustees, parents, and school administrators, and must facilitate communication between all these parties. The superintendent is in a unique position because although he or she is employed by the school Board, there is also some accountability to the Minister of Education.<sup>19</sup> To facilitate and manage communication between different parties requires skill in mediation - the ability to understand the issues as fully as possible, and then to frame the issues in language and through a process that is accepted and understood by parties with different interests. This process involves looking back as well as looking forward and, modern law does both.

For the most part, law is retrospective – in common law jurisdictions, such as Canada (apart from Quebec which uses a civil code), civil cases are constructed and argued using precedent and building on previous case law. Knowing the law is only a preliminary step, because law is stated broadly and generally. There is an interpretative aspect to legal issues because each case is particular to its context, and the context determines the case. This includes ‘looking forward’ and anticipating the future. As a result of the uncertainties inherent in interpretation, legal advice is often carefully expressed in the conditional – in the language of “ifs” and “maybes” - because interpretation is a fluid exercise. Perspectives vary and a legal outcome can never be predicted with complete certainty.

Therefore, it is incumbent on superintendents to understand as completely as possible the nature of the issue, and knowing the law may not be sufficient. Understanding the positions

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<sup>19</sup> In B.C. this is found in section 6 of B.C. Reg. 265/89 which states in section 6(1) that the superintendent “...shall (a) assist in making the Act and regulations effective and in carrying out a system of education in conformity with the orders of the Minister...” and in section 6(2) that “A superintendent of schools shall render the assistance to the minister that the minister requires.”

as well as the motivations or interests of the parties is also necessary, and retrieving this information often requires different kinds of skills. These skills are the skills of a mediator – the ability to listen carefully, to ask open questions without anticipating answers, to bring people together in difficult situations, and to communicate about diverse interests. These skills include the ability to find the language to frame issues differently and to create processes for communicating for understanding. However, like any skill, to be most effective these skills require fluency and fluency requires practice.

Mediation is a skill that falls under the umbrella of what is commonly known as alternative dispute resolution (ADR) which is essentially an ideology for thinking about and engaging in disputes in a different way (Pirie, 2000). ADR is often seen, not only as a different practical approach, but also a different philosophical approach – a type of social justice that shifts perspectives from blaming and retribution to communal problem solving and meeting individual needs within community. This perspective is consistent with principle-based bargaining, which emphasizes people, interests, options for mutual gain (working together for a mutually acceptable resolution), and objective criteria.

Although ADR covers an extremely broad range of practices, both civil and criminal and formal and informal, this chapter will introduce only briefly two ADR areas that may have application for superintendents' communication and decision-making within the context of public education. These two areas - namely, mediation and restorative justice practices – have been chosen because they are currently being used in two arenas, family law disputes and youth criminal justice proceedings, that share some basic characteristics with public education – they both concern youth and both are forward looking. Additionally, I am familiar with these practices having had training and experience in both. However, given the broad scope of both mediation and restorative justice practices, this study will provide only a brief introduction to each and describe how some of the skills and philosophies of these practices may apply to superintendents' work.

### **(i) Mediation and Education**

Mediation is third-party assisted negotiation, and is one of the oldest forms of conflict resolution used in many different parts of the world. It has evolved from strong moral and social concerns, and appeared in Canada in the mid-1970's evolving from court-based programs based on restorative justice (Picard, 2002). Mediation moves beyond positional bargaining and focuses on uncovering parties' interests. Interests are defined as the underlying needs, desires, concerns, hopes, or fears and may be substantive, procedural, or psychological (Picard, 2002; Pirie, 2000). When interests are shown in a visual image, they are often drawn as the larger part of the iceberg which is concealed under the water, whereas positions are shown as the most visible, above-water part of the iceberg (Picard, 2002). As this image suggests, positions are easily identified and labeled, but interests are often much more complex and more difficult to describe (sometimes even to the parties themselves). And, as this image also suggests, interests can be hazardous if ignored because they are the underpinnings of how people communicate and act.

As a philosophy and a practice for decision-making, mediation is extremely flexible both in terms of its process and its outcomes. Because of this inherent flexibility and the wide range of communicative skills used in mediation, it may be a useful model for superintendents while an issue is still being managed within the school district. The loose cloak of district policy allows latitude for cultivating forums for discussion and problem solving. In addition to flexibility, interest-based mediation emphasizes collaboration, communication, and mutual interest, as opposed to positional-based processes, which originate from self-interest, focus on individual gain, and generally employ strategies oriented to winning.

Mediation is often considered as an alternative to litigation and can occur at any time prior to trial as an alternative resolution process. A comparison of the principles underlying both litigation and mediation highlight some of the important philosophical differences between the two approaches, which epitomize positional-based and interest-based conflict resolution. For example, while litigation is formal and norm imposing, mediation is informal and norm creating. While litigation focuses on actions and facts with an eye to the past, mediation focuses on people and relationships with an eye to the future. While law is professionalized,

public and accountable, mediation is peer-based, private and confidential (Boulle & Kelly, 1998).

The mediation process provides a useful comparison for senior administrative work in public education. This is because the mediator's position in many ways reflects the dual reality of superintendents' work where they often find themselves positioned between diverse and sometimes competing interests. As managers of a bureaucratic 'system' and leaders of a community of learning, superintendents require a "binocular view". They need to be able to combine the 'command and control' managerial responsibilities of their position for order and efficiency in their district, as well as articulating and fostering the values and vision of their school community in an influential and holistic way as leaders (Beairsto, 2003). This is a difficult task, and one that requires superior and diverse communication skills, because the skills required of a manager such as giving direction, are often different than those exercised by a leader, which may be more consultative or collaborative.

Mediation skills were developed for third party facilitated negotiation, and as a result they cover a wide range of communication practices. However, one of the greatest strengths in mediation lies in the mediator's attentiveness to what others are really saying, identifying the parties' needs and wants (the "interests"), and in the mediator's ability to 'reframe' the parties' communication in a more constructive and collaborative manner. This is the power of language to reorient parties in a dispute and to introduce new ways of thinking about, and talking about, a problem. Mediators are constantly adjusting their language to facilitate discussion between parties who have a problem, and it is these skills that may be useful to superintendents who are faced with difficult issues.

The orientation of mediation and interest-based conflict resolution practices may be well suited for leadership practices in school districts because they reflect the existing culture of many schools, which is often "interest" based. Additionally, from a philosophical perspective, these practices also mirror the orientation of many school districts, which emphasize the importance of community and relationships.

In some school districts, such as the Saanich School District in B.C., this orientation is already in place in the schools through the use of restorative justice practices that share some

of the values and skills of mediation. These practices, which are also sometimes called restitution, or conferencing circles, are being used in schools with some success as an alternative to traditional discipline methods for student behaviour. And Canada is not alone. Scotland has just completed a two year pilot project of restorative justice practices in their schools, and the Scottish Executive has just authorized a further two years for this study, presumably on the basis of “strong evidence of improved relationships within the school community” (Kane et al., 2007).

## **(ii) Restorative Justice and Education**

Restorative justice practices offer language and process that are familiar to educators because of their orientation toward inclusion and understanding. It is this aspect of restorative justice practices that has application for communication and decision-making for superintendents dealing with issues that may have a legal aspect. These practices are practical examples of how law can be used to set up communication forums and processes that are oriented towards understanding, relationships, and community.

Restorative justice developed in the 1970's with victim-offender reconciliation programs (Law Commission of Canada, 2003; Roche (Ed.), 2004). New Zealand incorporated family group conferencing, which was based on a traditional Maori model as an alternative response to cases within their juvenile justice system. This conferencing model, in turn, was used in Australia and expanded to include school discipline problems. Eventually, these practices found their way to Canada in 1995, and were adopted by community groups and the Royal Canadian Mounted Police (“RCMP”) as an alternative way to deal with minor summary and young offender offences. They were modified and described as “Community Justice Forums”, and in the current foreword to the RCMP Canadian Resource Guide, restorative justice is described as “...a philosophy built on the cornerstone of community healing”, and hence a priority in the community policing philosophy (RCMP, 1998). These forums complemented the criminal system because they were flexible and oriented toward collective problem solving. Restorative justice practices have also been used in many aboriginal communities for healing purposes and for governance and social control (Law Commission of Canada, 2003).



The Canadian Department of Justice presently includes within its umbrella of restorative justice programs victim offender mediation, family group conferencing, sentencing circles, consensus-based decision-making on the sentence, and victim-offender reconciliation panels (Law Commission of Canada, 2003). Although these programs are part of the criminal system and are oriented toward sentencing, they have a significant relational and communicative component which has application in the school system. They offer both a process and a set of principles that have much in common with public education, emphasizing participation, respect, interconnectedness, and accountability, among other things (New Zealand Ministry of Justice, 2004). For example, although the *Jubran* case was a human rights case, the violence of the student bullying, the in-school discipline measures, and the ongoing discussions with local police for out-of-school bullying allegations brought it close to criminal law in many respects.

These restorative justice forums are continuing to be offered in many Canadian communities (Dhami & Joy, 2007). For example, many of the communities on southern Vancouver Island in B.C. have restorative justice organizations, which accept cases and work with RCMP and municipal police forces to facilitate restitution.<sup>20</sup> These cases are referred at the discretion of local police to these community organizations, which are composed of locally trained volunteers who conduct conferences for those cases in which the accused has admitted to the offence. For example, the Peninsula Crossroads Community Justice Program, which operates across 3 municipalities on lower Vancouver Island, B.C. conducts community conferences regularly, many of them concerning youth, as a complement to the more formal justice system.<sup>21</sup>

Most of the cases referred are youth cases because alternative sentencing practices are often seen as preferable to processing the case through the legal system because these practices have an educational and a communal aspect (Green & Healy, 2003, Roche (Ed.), 2004). These alternative practices are oriented towards restoring the harm ‘as a community’ – a shift in the focus from blaming and punishing an individual, to allocating responsibility and

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<sup>20</sup> For example, the Peninsula Crossroads Community Justice Group is described in the RCMP Community Profiles for Vancouver Island at <http://www.rcmp-grc.gc.ca/bc/programs/aps/profiles/island/sind>. For the background to this Group see <http://www.connor.bc.ca/rj.html>

<sup>21</sup> Last year, the Peninsula Crossroads Community Justice Program held 24 conferences, and 19 of these concerned youth, mostly young males (L. Cox, Program Chair, personal communication October 11, 2007).

repairing the harm as a community. Whereas the adversarial process of formal legal action is based on events, restorative justice is based on relationships. These processes are often described as participatory justice because not only do they involve community members, but also because they use conflict as an opportunity for change and growth, or transformation – an opportunity for parties to actively participate in the process and create a more just society (Law Commission of Canada, 2003). Additionally, because the format of the conference invites each participant to describe how the offence affected him or her, this type of questioning (together with the physical open circle format of the conference) often uncovers interests and emotions that would not normally be disclosed at a judicial hearing. Most importantly, this type of conferencing is oriented towards communication for understanding – an orientation that fits with the culture of most school districts.

These philosophies and practices appear to inform and infuse the work that superintendents do – and they will be considered later in this study with reference to the two legal cases.

## **CHAPTER 3: RESEARCH DESIGN AND METHOD**

### **1. Method of Inquiry**

The method of inquiry was a descriptive, issue-oriented case study, which focused on the experiences and perspectives of two superintendents who faced challenging “rights” issues in their districts. Interviews with these superintendents provided an opportunity to hear their experiences from their perspective as the senior administrator in the school district as these “rights” issues became cases and gradually worked their way through the legal system to a final resolution. The method of this study emphasized “direct access to ‘experience’” as opposed to a constructed narrative such as discourse analysis or hermeneutics (Silverman, 2005, p.48).

#### **(a) Qualitative Research**

Qualitative studies look at the “how” and the “what” of a topic that needs to be explored, and are appropriate for describing a “detailed view” of individuals in their “natural setting” (Creswell, 1998). A qualitative inquiry is built inductively by focusing on the meaning or understandings within a particular context (Merriam, 1998). Given that there is no single “truth”, then a paradigm that is oriented to constructing superintendents’ subjective understandings and interpretations of law and how it influences their work in education is the most appropriate because control of meaning is shared. This anti-foundational approach has a “...relativist ontology (relativism), a transactional epistemology, and a hermeneutic, dialectical methodology” (Denzin & Lincoln, 2005, p. 184). In this paradigm, the co-creation of realities (researcher and participant) and their meanings are shared in the research findings. This approach values different interpretations of the social world, and is oriented toward the praxis of superintendents’ work.

Qualitative research seeks meaning within a particular context – in this case, the lived experiences of two superintendents. This study is oriented as an interpretative or constructivist study, whereby the individual superintendents are viewed as “constructing” their own understanding of law and how it applies to student issues in their district (Merriam,

1998; Creswell, 1998). The intent of this study was to gain an understanding of how two superintendents responded to “rights” cases and how they used law in their communication and decision-making before the issues became formal legal actions outside the jurisdiction of the school district.

This study employs qualitative research because it is interpretative research in which “...education is considered to be a process and school is a lived experience” (Merriam, 1998, p. 4). There is a “character of discovery”, as opposed to confirmation, and the nature of a constructivist inquiry, which is characteristic of qualitative research, is often graphically represented as circular and interconnecting (Flick, 2006, Marshall & Rossman, 2006). As well, qualitative research seeks to explore and discover different understandings, and it is “process-oriented” (Flick, 2006, p.103). By focusing on the understandings of superintendents and how they responded to student issues, it is possible to produce rich descriptions of their experiences that can be shared with others in the field.

This study focused on the understandings of the superintendents because at the time of the cases, this was the position that had the most responsibility and influence in the school district. For most difficult student issues, that cannot be resolved at the school level, the superintendent would be involved either informally, or as part of the appeal process. Given the hierarchical and bureaucratic organization of the school system, most teachers rely on principals for legal information, and most principals rely on superintendents (Leschied, Lewis, & Dickinson, 2000). Therefore, as the most senior administrator in the district, the superintendent is the individual who is most likely charged with understanding and applying the law to a difficult student issue.

Context is vital for qualitative research. In order to obtain detailed descriptions of individual experiences, I interviewed two superintendents who were involved with seminal legal cases in their respective districts. *Chamberlain* occurred in the Surrey school district – the largest in B.C. with a current student population of approximately 66,000. *Jubran* occurred in the North Vancouver school district, which by contrast, has a current student population of

approximately 18,000.<sup>22</sup> The disparate sizes of the two school districts are one aspect of difference between these two cases, and there are many others. These cases were not chosen for comparison; they were chosen because of their legal significance in Canadian education. The context in which each case arose within the district is described in more detail in chapters four and five of this dissertation.

### **(b) A Case Study**

A case study is descriptive, and seeks a better understanding of the “case” which is how superintendents perceive and manage challenging legal issues. A case study design was chosen for this dissertation because it is the “...preferred strategy when “how” or “why” questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context” (Yin, 2003, p.1). Case study has been defined as an “...in-depth study of instances of a phenomenon in its natural context and from the perspective of the participants involved in the phenomenon” (Gall, Gall, & Borg 2003, p. 436). The school context is significant for understanding how and why issues arise because it is a unique environment. Additionally, context is relevant for its influence in how superintendents understand and manage these issues. A case study is appropriate where the “contextual conditions” are believed to be extremely relevant to the phenomenon of study (Yin, 2003, p.13).

Stake describes a case study as being defined by an interest in an individual case, not by the methods of inquiry used (Stake, 2005). One of the purposes of choosing a case study is to produce a detailed description of the case or phenomenon (Gall, Gall, & Borg, 2003) within a particular setting or context, and “...to gain an in-depth understanding of the situation and meaning for those involved” (Merriam, 1998, p. 19). The two cases in this study were chosen for this purpose – to gain an “in-depth understanding” of the situation from the perspective of each superintendent, and the “meaning” for each of them as the case evolved. Given that school districts are socially complex and dynamic, a case study design allows for rich and holistic descriptions of the superintendents’ understandings of their experiences both before and during the legal cases. A case study format allows not only for the study of the

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<sup>22</sup> B.C. Ministry of Education, 2005/06 Summary of Key Information Report, retrieved from [www.bced.gov.bc.ca/keyinfo/pdfs/ski.pdf](http://www.bced.gov.bc.ca/keyinfo/pdfs/ski.pdf) on October 23, 2006.

understandings in these two cases, but also for the legal analysis of comparing one case to another to better understand, interpret, and apply the law in subsequent contexts. Law has been chosen as part of the conceptual framework for this study because it “bounds” the process of communication and decision-making for superintendents.

The flexibility of a case study design allows for the collection of both interview and documentary data, which will permit the perspectives and experiences of superintendents to be interpreted within the context of the legal framework. It has been noted that, “...a major strength of case study data collection is the opportunity to use many different sources of evidence” (Yin, 2003, p. 97), which contributes to the validity and reliability of the study, and is commonly described as triangulation. This study uses two seminal B.C. cases from two Vancouver area school districts.

Although the findings in these two case studies are not capable of being generalized to other districts given the unique facts of each case, it is hoped that there may be some shared general principles and understandings from these two superintendents’ experiences that can be used to improve other superintendents’ decision-making and practice

Interviews were conducted with the superintendents because such a conversation provides some access to their experiences, and at the same time, allows for the “construction” of these experiences within the conceptual framework of law and social theory.

Evidence for this study was drawn from the superintendents’ interview responses, case law, and district policy. By creating “thick descriptions” of these two superintendents’ experiences both before and during the legal action, it is hoped that their stories will provide a better understanding of how superintendents use law in their work with challenging student issues.

## **2. Procedures**

### **(a) Sampling**

Choosing a sampling strategy in qualitative research is an “integral part of the research design” and connects the research questions to the epistemological orientation of the researcher (Thomas, 2006, p. 403). In an instrumental case study, the case or cases are

chosen by the researcher, and in order to achieve the best understanding of the phenomena, the case must be chosen well (Stake, 2005, p. 450). Stake suggests that rather than selecting a case of “some typicality” that the researcher should lean “...toward those cases that seem to offer *opportunity to learn*” and that his choice would be to “...choose that case from which we feel we can learn the most.” He believes that the potential for learning is a different and sometimes “superior criterion” to merely being representative, and comments that, “sometimes it is better to learn a lot from an atypical case than a little from a seemingly typical case” (Stake, 2005, p. 451). In many ways, the two cases chosen for this study were atypical, however it is suggested that the contentious nature of the issues and the scope of the legal action in each, through all the levels of appeal possible, made these cases rich in information that could be publicly disclosed (unlike many education issues), and a unique opportunity to learn about (and from) these superintendents’ understandings and use of law.

There were two parts to this study: the pilot interviews and the two case studies. The pilot interviews were conducted with four superintendents, each having worked as a superintendent (or assistant superintendent) from between 9 years and 18 years. All were male, and their collective experience was evenly divided between larger urban and smaller rural districts in British Columbia with student populations ranging from less than 3000 students to more than 50,000 students.

The superintendents chosen for the pilot study were chosen by snowball sampling, through recommendations from other superintendents or senior Ministry of Education administrators familiar with the superintendent population in B.C., as being superintendents who had experienced legal challenges and who were highly regarded professionally by their peers. Two were retired and two were still working as superintendents.

I intentionally chose the cases *Chamberlain* and *Jubran*, because they are seminal cases for education, provincially and nationally, and both concerned very difficult student issues that were incapable of resolution within the school district. Additionally, these were both very public cases, and received considerable media attention, and therefore the evidence in each case was publicly reported, both in news reports and in the reported tribunal and court decisions. Most school issues are not public, and any student issues that are appealed

through the district appeal process are confidential. However, the public nature of both these cases allowed me to discuss them in some detail (insofar as they are described in the judgments) without the selective cloak of anonymity.

As Stake has suggested the primary criterion in case selection is the opportunity to learn (Stake, 2005). Both superintendents in this study had had considerable administrative experience, and encountered these challenging cases near the end of their professional careers as superintendents. As this study is descriptive and intended to have some practical application, narrative descriptions from these two individuals are the most useful because of their experience and seniority. It is suggested that these are the superintendents from whom we can learn the most because their experience is “information rich” (Patton, 2002, pp. 230, 237). This was confirmed early in my research when I utilized snowball sampling for the pilot interviews, before the specific case orientation of this study was chosen, and other superintendents, administrators, and senior Ministry of Education employees in B.C., who knew what cases were “information rich” recommended these two superintendents, among others (Marshall & Rossman, 2006, p. 71).

At the time the cases were chosen, and the interviews arranged, both superintendents were recently retired, which perhaps gave them more latitude to recount their experiences outside an employment relationship with a school Board. Additionally, following their retirement, both superintendents were subsequently employed by Simon Fraser University in the Educational Leadership program, presumably because of the breadth of their professional experience and their academic qualifications at the doctoral level.

There are many interesting aspects to both the *Chamberlain* and *Jubran* cases; however, I purposely chose not to interview other parties involved in these cases, because the focus of this study is on the understandings of the superintendents and the role of law in their communication and decision-making.

### **(b) Interview Process**

Interview questions were evaluated initially through a pilot study to four senior superintendents in order to ensure that the questions were appropriate and relevant. Because a pilot study is formative, it allowed for the refinement of data collection – both data content



and collection procedure – prior to the formal interviewing of the two selected superintendents (Yin, 2003, p. 79). This pilot study, however, was more of “hybrid” between a preliminary investigation to develop and test the interview questions for the two case studies, and an opportunity to ask the questions themselves to the superintendents chosen for the pilot, to ascertain their own understandings and experiences with the law. It also provided me with an opportunity to obtain a better understanding of the superintendency in British Columbia. The difference was that there was no specific context as in the two case studies, and the superintendents in the pilot study were responding to the interview questions more generally. However, these superintendents were able to describe their understandings and experiences with the law, and this information proved to be valuable in terms of appreciating the context of the superintendency and the changing nature of their role. Because this information was considered useful to the purpose of the case studies, a selection of the pilot superintendent responses to the interview questions were described and included together with the analysis and discussion of the two case studies. Specifically, excerpts from these interviews are described later in this study in Chapter 6, *Analysis of Superintendents’ Understanding and Use of Law*, which includes two sections describing the pilot superintendents’ understanding and use of law generally (Chapter 6, sections 1(a) and 2(a)), and also in Chapter 7, *Theoretical Applications and Implication for Policy and Practice*.

With the exception of one interview, which was conducted by telephone, all of the pilot interviews were conducted in person, and each interview was digitally recorded. After each interview, the proposed interview questions were amended and/or augmented depending on the suggestions of the interviewee. The interview itself was transcribed soon after the interview, and reviewed prior to the next interview in order to further hone the research questions and pursue any other relevant areas that might have arisen in the discussion. In addition, reflective notes were written immediately after each interview, and emerging themes and patterns noted.

It became apparent during this process that the chronology or sequencing of the questions was important to how individuals remembered specific events, and the kind of information that would be elicited by the sequence and scope of each question. Accordingly, the sequence and content of each research question was considered and discussed in each of the

pilot studies, and changed as necessary. Also, questions were added to clarify the relationship between the superintendent and the Board, the legal training of the superintendent or access to legal resources, and the key attributes of leadership required to lead the district through a difficult legal challenge.

As mentioned above, I also used the pilot studies as an opportunity to obtain a better understanding of the superintendency in British Columbia, and the superintendents' individual perspectives on the topic of law and education generally. Because the two cases chosen for this study were extraordinary, and therefore to a certain extent limited in their application to the daily work of superintendents, I wanted a broader understanding of how superintendents understood and used the law in their practice of educational leadership. As a result, in each of the pilot study interviews, the superintendents commented on their understanding and use of law generally from their own experiences. This was extremely helpful in understanding the challenges they faced, and the increasing dependence on legal counsel for issues arising within the district. These findings are reported in more detail later in this study in Chapter 6.

Once the questions were tested and set, data were collected through lengthy interviews with each superintendent. A standardized, semi-structured interview format was used to collect data in order to provide the superintendents with some latitude to describe their own experiences. These interviews were digitally recorded and transcribed immediately following the interview. A transcription of the interview was provided to each superintendent for verification and comments. I then used the interview data to write a narrative for each case describing the sequence of events through a combination of the superintendent's recollection, the legal judgments, and reference to district communication and policy. These narratives were then forwarded to the two superintendents for their review and comments.

Both superintendents responded with points of clarification and additional comments. Over the next six months, I exchanged emails and had several telephone discussions with both superintendents regarding their recollection of the cases, and their understanding at the time of the cases. Because of these discussions, I was able to augment the interview data with

further information from both superintendents. I was also able to revise the narrative of their stories so that it did accurately reflect their understandings.

As the superintendents were acting as agents of the school board at the time of these cases, some communications were confidential and could not be shared. I contacted both school districts regarding access to written communications from the superintendent both before and during the cases, however only communications that were considered 'public' could be released and therefore I had limited access to the superintendent's written communications in one case, and no access at all in the other.

### **(c) Data collection and analysis**

In seeking an understanding of how law may influence how superintendents make decisions, the interview data were used to provide a narrative of experiential understanding through "thick descriptions" of personal experiences. It is hoped that these descriptions may enhance our collective understanding of how the law guides, restricts, or influences superintendents' decisions. It may also provide some understanding as to how these two superintendents made their decisions and how they perceived the effect of those decisions in their districts and with respect to the case.

Collecting and analyzing data from interviews in case studies is one of the most important sources of information (Yin, 2003, p.89). Interviews provide the lived experiences, and it has been noted that, "the interview is the main road to multiple realities" (Stake, 1995, p. 64).

From these interview descriptions, an interpretation of this phenomenon (the influence of law on superintendents' decision-making and communication) is constructed, and analyzed within the context of the law and social theory. By using the personal recollections together with the case law, the analysis of each of these two stories allows the case to be "progressively focused" (Stake, 1995).

### **(d) Trustworthiness and Verification**

Trustworthiness is a term used in a constructivist paradigm in place of the usual positivist criteria of validity, reliability and objectivity (Denzin & Lincoln, 2005, p. 24).

Trustworthiness is partnered with four other criteria - credibility, transferability,

dependability, and confirmability – to describe how effective the study is in describing and explaining the reality. These criteria are used to evaluate the trustworthiness of the study and are particularly valuable given that reality from a qualitative perspective is seen to be “holistic, multi-dimensional, and ever-changing” (Merriam, 1998, p. 202).

Merriam suggests six basic strategies to enhance the validity of a study and three of these strategies were used in this study: triangulation, member checks, and researcher’s biases (Merriam, 1998, p.204).

Triangulation increases the strength or trustworthiness of a study by combining different methods of data collection, or different types of data. Triangulation is “...a process of using multiple perceptions to clarify meaning... (and by)...identifying different ways the case is being seen” (Stake, 2005, p.454). This study used “data” triangulation by including case law, legislation, and district policy as a legal context for the superintendents’ narratives.

Member checks were done by sending transcripts of the interviews as well as the resulting narratives to the two superintendents for review, and by following up with a number of telephone discussions and emails to amend and augment the superintendents’ recollection of their understandings and responses to each case. This aspect was particularly valuable as both superintendents had the opportunity to comment on the re-telling of their story, and provided me with the opportunity to provide a more accurate description of their understanding of the case.

One of the challenges in qualitative research is to demonstrate that the researcher’s interpretation and perspective will not bias the study (Marshall & Rossman, 2006). Certainly the descriptions of the two cases from the perspectives of the superintendents accurately reflect their understandings because they had the opportunity to review and comment on those chapters as they were being written. However, the remaining chapters six through eight are my analysis of the data (including data from the pilot interviews) through the lenses of several socio-legal theories and the philosophies and practices of mediation and restorative justice. I have been a lawyer for over 20 years, with experience in litigation, mediation, and restorative justice, as well as an educator, both at university and public school. These experiences together with a personal preference for collaborative resolutions have necessarily

shaped my analysis. However, in spite of the fact that communicative skills and practices from mediation and restorative justice are included in the analysis, there is also a recognition from many years spent practicing in the family law arena, that these practices complement litigation, and in some cases, a right of action which imposes a judicial remedy is a preferable course of action to collaborative dialogue, particularly if there is an imbalance of power. In both the cases described in this study, the parties chose formal adjudication for resolution of their ‘rights’, however the superintendents continued to use collaborative practices in the management of the case within the district, and it is for this reason, together with my own experience in these areas, that they were included in the analysis.

### **3. Conclusion**

The purpose of this study was to describe the experiences of two superintendents in B.C. who faced challenging issues, and to consider how law may have influenced their understandings, communication, and decision-making. My own experiences as a lawyer suggest that the more formal the process, the less opportunity there is for creativity and collaboration between the parties to construct a solution that is acceptable to all. In dispute resolution, collaborative action is interest-based whereas adversarial action is positional; they are completely different approaches to problem solving and as a result, come with structures and language that provide different understandings of process and as a result, different options for resolution. School districts however, need both types of action because not all disputes can be resolved by agreement.

Although the school districts of Surrey and North Vancouver probably wished that the *Chamberlain* and *Jubran* cases had been resolved collaboratively within the district, the litigation of these cases provided guidance for all school districts in Canada. If these cases had been negotiated, mediated, or arbitrated, the outcome would be private, and not known to other school districts, and no new law or precedent would be created. These cases are beacons in Canadian educational law – their decisions have expanded and illuminated the boundaries of “rights” law for the benefit of all Canadians, and they have clarified the purpose and expectations of Canadian schools.

Our legal system is adversarial. Education is creative and collaborative. Superintendents are educators, but they work in a system framed by law, and replete with individual rights. How these two superintendents responded to challenging issues that manifested this tension may assist other superintendents and senior administrators to better understand and respond within their own context when similar challenges arise.

## CHAPTER 4: THE JUBRAN CASE

### 1. Context for the case

#### (a) Outline of the North Vancouver School District

The North Vancouver school district lies on the heavily forested slopes of the coastal mountains in southern British Columbia. The geography of ravines, cedar and fir forest, and mountain streams is home to a healthy population of black bears, eagles, and other wildlife, as well as a growing residential and commercial community that is just across the inlet from the multicultural city of Vancouver.

On April 6<sup>th</sup>, 2005, when the British Columbia Court of Appeal rendered its judgment in *North Vancouver School District No. 44 v. Jubran*, there were 18,610 students registered in the North Vancouver school district.<sup>21</sup> Today, several years later, it is still a mid-size district with 28 elementary schools, 7 secondary schools, 2 alternate schools and a residential outdoor education centre. The superintendent of this district oversees approximately 2500 employees and, together with the Secretary Treasurer, assists the school board in managing an operating budget of approximately \$129 million.<sup>22</sup>

The district describes itself as offering “A comprehensive K-12 education program consisting of over 200 provincial and locally developed educational programs and services in the Humanities, Mathematics/Sciences, Physical Education, Fine Arts and Applied Skills.”<sup>23</sup> In addition to these programs, the district offers French Immersion and Secondary Bilingual programs, summer school, adult education, and nationally recognized local programs in math, English and music, among others. Schools are organized into “families of schools” with each of the secondary schools bringing together students from elementary schools in that geographical ‘catchment’ area.

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<sup>21</sup> B.C. Ministry of Education, 2005/06 Summary of Key Information Report, retrieved from [www.bced.gov.bc.ca/keyinfo/pdfs/ski.pdf](http://www.bced.gov.bc.ca/keyinfo/pdfs/ski.pdf) on October 23, 2006.

<sup>22</sup> North Vancouver School District website, retrieved from <http://www.nvsd44.bc.ca/About Us/North Vancouver Snapshot.asp> on May 3, 2007.

<sup>23</sup> Ibid.

Guiding the direction of this organization of more than 20,000 people (most of whom are children), are the values expressed in the mission statement of the North Vancouver school district “to promote academic, social, and personal development for all learners, to honour diversity, encourage equity, and practice democratic governance.”<sup>24</sup>

The context of the North Vancouver school district is significant because public school systems are unique in their composition, organization, and practice of education. An understanding of the complexity and dynamic nature of school systems is vital to understanding the *Jubran* case. As noted by Canadian sociologist Terry Wotherspoon “...formal education is, by nature, a political endeavour subject to competing priorities and objectives...education both reflects and influences the social world of which it is a central component” (Wotherspoon, 2004, p. 89). Given the political, economic, social, and cultural expectations of public schools, which are “*subject to competing priorities and objectives*”, the context is critical and informs how the case arose, was managed, and finally, was resolved.

#### **(b) Superintendent’s Professional Training and Experience**

Robin Brayne was the superintendent of the North Vancouver school district for 17 years before he retired in September 2006. His own recollection was that over the course of his tenure he had worked with approximately 14 Ministers of Education, 16 Deputy Ministers, and 72 trustees. This translates into working with...or for...over 100 politicians with undoubtedly a range of goals for public education – surely an indication of political acumen, professional competence, flexibility, and stamina.

Brayne arrived at the superintendency with an extensive and varied background of academic, human resources, and educational administrative experience. He had teaching experience at both the public school and university levels in Manitoba, including some university administrative experience as the Director of Student Teaching, before beginning his career as an educational administrator in British Columbia. His own academic formation included a Master’s Degree, and a Doctorate in Education, which covered a range of studies from course

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<sup>24</sup> Ibid.



work in statistics, calculus, and research design, to dissertation research regarding a political systems analysis of demands on urban school boards.

In 1978 he moved into administrative work at a school board office, starting as the Coordinator of Curriculum and Staff Development for the District of North Vancouver for several years, followed by four years in the Victoria School District as the Director of Instruction, Human Resources and Labour Relations – a position which provided him with some experience in labour relations and law. In 1984, Brayne returned to the North Vancouver school district and stayed there for the next 22 years as a district administrator, beginning with five years as an assistant superintendent in charge of curriculum and special education, before moving into the position of superintendent upon the sudden death of his predecessor.

All these experiences provided Brayne with some depth for leading his school district through the legal challenge of the *Jubran* case. Although he acknowledged that he had not received any formal legal training (other than a school law course for his Master's degree), the interpretation and application of relevant legislation was an ongoing and integral part of his work as superintendent. In addition, Brayne noted that he read widely, and would attend professional development conferences, which had a legal aspect such as the Canadian Association for the Practical Study of Law in Education ("CAPSLE"). He also commented that he knew many lawyers, both professionally and personally, so he had ready access to legal support and learned about law that way. In addition to his own experiential knowledge, the North Vancouver school district subscribed to education publications concerning law and he would "read them periodically".

### **(c) Superintendent's Use of the Law Generally**

Brayne was candid in his characterization of how he and other superintendents used law generally stating, "...our use of the law, as superintendents, was for the most part instrumental..."

He told me that whenever he needed legal advice, he would call the district lawyer. If he felt that it was a matter of provincial significance, he would contact the lawyer for the provincial school trustees' association for advice. Similarly, labour relations matters such as employee

grievances and arbitrations, would be directed to the B.C. Public School Employer Association (also known as “BCPSEA) for legal assistance. Although, by directing legal work to lawyers acting for organizations with provincial interests, the North Vancouver school board would not be responsible for legal fees, (having contributed through membership fees), the downside to requesting this kind of advice, as noted by Brayne is that “...it gets out of your hands a little bit”.

When I questioned him specifically about law, he was quite emphatic in his reply:

...we don't, as superintendents, think in those terms. That's not our training, that's not how we approach a problem, that's not how we look at an issue, that's not how we examine something, that's not a prism that we look through...

However, although law was not the guiding force that I initially had understood it to be for superintendents, Brayne believed that experienced superintendents were very good at determining when they needed assistance, advice, or direction, and noted that there were “...all sorts of opportunities for superintendents to obtain that kind of support.” Recognizing that as the CEO of the district the “...the stakes of your decision making are significant...you do spend a lot of time thinking about the decisions that you make that will have a binding effect on the system.” And, in order to accomplish this, you “...draw on all the resources that are available to you to make the best possible decision.”

He identified legal advice as an “outside resource” that he used less than any other outside resource – an outside resource that was required when something came up and seemed like “...a wee bit more than just yes or no”. Something that was not covered in policy or the *School Act* - something for which he needed help to interpret entitlements or rights of others, or the scope of his own management discretion.

In the North Vancouver school district, Brayne created a process policy for legal contact to ensure consistency and financial accountability. Under the terms of this policy, contact was always made through the secretary treasurer of the district, often together with the superintendent, and the secretary treasurer was the contact person for providing legal counsel with any necessary information.

However, for most issues such as in-district appeals or Ombudsman investigations, Brayne did not use, or require, legal advice. He would deal with it himself because it would be an informational request or in-district process, which was, in his words, “pretty straightforward”.

**(d) Superintendent’s Relationship with the School Board and the Scope of Discretion**

An important part of the context of the superintendent’s work is his or her relationship with the locally elected School Board trustees. Given the inherently political nature of trustees’ work, the relationship between the trustees and the superintendent is a significant factor in the respective and overlapping roles and responsibilities of each.

Brayne described this relationship as one of “management and governance” in which he was responsible for district policy and its implementation, together with educational advice and guidance. He characterized his management style as “communicative” and transparent, and conceded that he was quite prolific with respect to reports in order to keep the School Board informed, and in particular, to keep the Board Chair as informed as possible. Given that this was his professional practice generally, he recalls that in the *Jubran* case, he says he kept the board “quite informed” throughout the process.

In his role as the CEO of the school district, he saw himself in an “advisory role” to the Board, while at the same time “providing assistance” to the Minister of Education “as required”.

When asked how much discretion he had in his decision-making generally, Brayne acknowledged that although he had “huge amounts of discretion”, it was circumscribed by law, regulation, and policy. Such discretion is evident in the language used in the legislation. For example, the term “general” is used repeatedly in section 22 of the *School Act* in describing the duties of the superintendent as working under the “general direction” of the Board, being responsible for the “general supervision and direction” of educational staff, and the “general organization, administration, supervision and evaluation of all educational programs”, together with the operations of schools.

## **2. Superintendent's understanding of events leading to the case**

### **(a) Superintendent's Role and Response prior to Legal Action**

At the time of the Human Rights Tribunal decision, Handsworth Secondary was a school of approximately 70 teachers and 1335 students from grades 8 through 12. Brayne described it as a "High end school - High expectations and few trade programs...a privileged school...the closest public high school to a private school you could find." Students from Handsworth were often the recipients of numerous scholarships and awards every year, and the school 'scored' highly in the annual, but contentious, Fraser Report for comparative academic achievement.

When Jubran first arrived at Handsworth in grade 8 in September 1993, he said was called names such as "homo", "gay" and "faggot" and sometimes pushed or shoved in gym class and in the hallways. Although he told the students he was not homosexual, they continued to taunt him, in, and out of school, and he testified that he changed his route home to avoid being bothered. There was no evidence presented at the Tribunal hearing that he or his parents had reported these incidents to the school during his first year.

However, the next year, September 1994, when Jubran was in grade 9, he testified that the "...name-calling, hitting, punching and spitting incidents occurred both during school hours in classroom and hallways, and before and after school" (Tribunal decision, para. 10). Sometime that fall, Jubran's parents met with the principal to discuss a specific incident as well as the ongoing bullying. The school responded by taking the names of the students who were bothering him, and by asking Jubran to report all future incidents of bullying to the vice-principal.

Brayne recalled that he became aware of Jubran's problem at school at a very early date – soon after it was brought to the attention of the principal. As he recalls, "...there was the bullying and nobody knew about it because he didn't tell anyone. Then there was the bullying reported to the school...The principal knew, the vice-principal knew, the assistant superintendent knew, I knew, and we were spending time talking about bullying and anti-bullying."

That September, Handsworth formalized its student Code of Conduct pursuant to school board policy. As Brayne described,

We had a commitment to anti-bullying, we had a commitment to zero tolerance, we had a Code of Conduct - we had rules in place, and programs and curriculum. So we knew then about providing support and assistance, and mechanisms, and providing advice to the principal, with respect to suspensions, and communication with parents, and all the rest of the things...

From his perspective, there was also an expectation on behalf of the schools, that the school's actions were being supported and enhanced by the students' parents, for as he said, "We thought as we were going through this that the parents were supportive and they talked to their kids, etc."

Brayne recalled that he received the information about Jubran's situation at the school fairly quickly. He explained that he "...knew of the ongoing nature of the problem and was becoming increasingly obviously attentive to it because it wasn't going away, and the principal was getting more and more concerned." Brayne recalls that for him "it was an issue of significant concern" because there was a student being "endlessly harassed. We were very concerned about that, and we were doing our best to stop that."

Brayne was supported by two assistant superintendents in the district, and one of these superintendents was responsible for the west zone of the school district which included Handsworth secondary school. In the North Vancouver school district, there was direct reporting of school issues from the principal to the assistant superintendent, who would then report to the superintendent. Once a week, an executive committee composed of senior administration in the district – the superintendent, assistant superintendents, directors of instruction, and the secretary-treasurer – would meet and discuss issues in the district. This was the senior administrative team which, in Brayne's words, "was to provide high quality responsive, supportive educational programs in schools". As the ongoing bullying of Jubran became a "significant issue", Brayne believes that it would have been discussed at these weekly meetings. However, in spite of administrative support from the district, the bullying continued.

The evidence at the Human Rights Tribunal hearing from all the parties was that of continuous and intolerable bullying. The name-calling continued throughout Jubran's grade 10 year and on May 27, 1996, Jubran "sucker punched" another student in the face seriously injuring him and resulting in a criminal charge. Jubran testified that he had done this because the student had called him "gay". Four years later at the Tribunal hearing for discrimination, other students testified that these words were part of high school vocabulary and were used as a form of insult and not because they thought he was a homosexual.

The following month in June, Jubran's parents met with the principal and vice-principal to discuss Jubran's assault of another student, and at this meeting Mr. and Mrs. Jubran said they were not surprised that their son had "reacted the way he did" and that "the school was "not doing enough" about the harassment" (Tribunal decision, paragraph 31).

Shortly thereafter, on June 19, 1996, Jubran filed his complaint with the B.C. Human Rights Commission in which he alleged that the North Vancouver school board had discriminated against him regarding an accommodation, service or facility customarily available to the public because of his sexual orientation contrary to s. 8 of the Human Rights Code.

Brayne remembers that there was an ongoing dialogue at this time between the administration and the students (Jubran and the bullying students) and that the harassment was "quite persistent". He recalls that every time there was an incident, there was "direct action taken" in the school – "the offenders were brought in, spoken to, pursuant to the Code of Conduct, going through the steps...the warning, etc. bringing in the parents, the suspension", but that it just kept moving from one incident to another. In addition, it was his observation that "more and more it became behaviour **outside** the school."

Brayne's recollection was that Jubran was being bullied in and out of school – that "it was pervasive," and that "he was being bullied 24 hours a day." Although in his words, the bullying incidents were controlled in the school through suspensions and educational programs, he questioned the extent of parent involvement outside the school. Much of the bullying happened off school premises and outside school hours, however, it was Brayne's recollection that the police chose not to get involved because the students were of school age.

Brayne also stated that he had expectations of the assistant superintendent and administration at Handsworth that they would address the bullying – his involvement at this point was indirect because “people take action at the site.”

In fact, the Human Rights Tribunal concluded that “Handsworth was diligent in investigating Mr. Jubran’s complaints, and, for the most part, their efforts were successful in curtailing the harassing behaviour for most individual offenders” (Tribunal decision, paragraph 173).

In grade 11, the administration at Handsworth documented over 12 incidents of harassment reported by Jubran, and all but 3 students did not re-offend after being warned. There was a meeting between Jubran’s parents and the principal and vice-principal about half way through his grade 11 year, at which Jubran’s father swore and threatened, “I’ll sue your ass if anything happens to my son” (Tribunal decision, paragraph 55).

The following year, Jubran’s final year at Handsworth in grade 12, there were several more bullying incidents, and student suspensions. In fact, the principal of the school testified that “in all of his experience as an administrator teacher, he had never seen a student harassed to the extent that Mr. Jubran was” (Tribunal decision, paragraph 74). And unfortunately, in spite of the school and district efforts to create a safe school, the bullying of Jubran “did not seem to get fully solved.”

Brayne’s recollection is that the school was responding when it became aware of any bullying, that there were programs in place, students were being suspended, parents were notified, letters were written to parents, announcements were made on the PA system, and school administrators were talking to classes, and to the police (because some of the incidents happened off school property and outside school hours). In his view, the district was “doing all the right things correctly”, and he was not aware of anything else that he had at his disposal to stop the bullying.

**(b) Superintendent’s Understanding of the Role of Law prior to Legal Action**

When I asked Brayne about his use of law, he referred to policy and district culture. He said he used policies and structures to enable a “unity of purpose” so that everyone was working to the same end which included a culture that valued safe schools and student safety. He

described bullying as “corrosive” and because it was so hard on students, he said they as administrators “paid attention”. As Brayne noted, “...you have to understand how hard the school was working to solve this...”

Brayne described the district culture in North Vancouver as a team approach:

...it was just our culture that we worked together, that we solved problems, we put programs into place, we supported our principals, we had very clear expectations of our principals with respect to maintaining good order and conduct in schools, we supported them 100% with advice, and suspensions, and how to do it procedurally. So, it would stick.

When I asked Brayne whether he thought about law when the problem arose, he said that he thought about law in terms of process, but not specifically in terms of human rights law because he viewed the bullying as harassment, and not discrimination based on difference:

I thought of the law in relation to, obviously, the processes that you have to go through with respect to calling in parents...suspending students – it needs to be procedural. That’s law. You don’t just...the first time you hear about it, interview the kids and then suspend them ... there’s the warnings. So, I thought about law...we think about due process all the time. That’s what the Code of Conduct policy is - due process.

He described the direction of the district as being the policies and the regulations, together with the requirements and expectations of school administrators – and how they were working with this “...social, legal, policy framework of the school district” which was expressed through the Code of Conduct.

Brayne doesn’t believe that he sought legal advice when the bullying problem arose, although he says they probably would have asked other school districts what they were doing. As Brayne recalls they were trying to understand what was happening at the school, and so they were, “...trying to get at the bottom of this.” He noted that, “there are schools and school communities...that are trying to solve these problems daily – in other words, we weren’t looking at it as a legal issue. We were looking at a safe and educational environment for students. Teaching for a civil society. Teaching social responsibility...”



There was a sense of frustration throughout this time that the police were continually referring bullying incidents back to the school to manage – in particular, those incidents that occurred **outside** school property and **outside** school hours. As Brayne understood it, “You can’t stop bullying; you can’t stop harassment, so say it’s the school’s problem – Right?”

Although the police were not willing to deal with the bullying, the North Vancouver school district had created a policy that empowered school principals to suspend students directly, as opposed to referring the suspension decision to the school board, or a district committee, which is the case in some other districts. Brayne explained that by empowering principals to suspend it enabled them to exercise authority at the school level. It was the responsibility of the assistant superintendent to ensure that the school process for any suspensions was procedurally proper. To assist principals, the district provided legal in-service support as well as “template suspension letters” to ensure a uniform procedure. This devolution of authority was part of the philosophy of the organization of the school district, and Brayne in describing his role stated, “...as senior people in the organization, I would never substitute my judgement of an issue onto the principal.”

When the complaint was laid on the basis of discrimination, Brayne said it was the first time he, and others in the district had seen the problem characterized in that manner. The school and the district had been looking at it as a bullying or harassment problem – not as discrimination, because everyone knew that Jubran did not identify himself as a homosexual. It was high school bullying language that was intended to be abusive and in Brayne’s words, “it was bad behaviour.” As a result, he said they never viewed or addressed the problem as a discrimination problem:

We never addressed it as a problem that way because we never defined it as a problem that way. It only got defined as a problem that way when the complaint was laid, and it comes back to us from the Human Rights Commission that there’s a charge of discrimination against him, and we go...that’s the first time we’d seen the noun.

**(c) Superintendent's Understanding and Response following the Commencement of Legal Action**

As soon as the school district was served with the Human Rights complaint, there was a dramatic shift in how Brayne (and others in the district) viewed the issue as a result of how it had been reframed by the Human Rights Commission as “discrimination”. Although they continued to manage the issue within the school as a bullying problem – which it undoubtedly was – they also now needed to consider the issue in relation to the allegation of homophobic discrimination.

The bullying problem also moved from a matter that had been exclusively managed within the school district, to a matter that was now under the scrutiny of a legal “rights” administrative system which set in place procedural and informational requirements. As Brayne noted, “... we realized now it has gone into this legal or quasi-legal domain.”

When Brayne received formal notice of the Human Rights complaint, he contacted the School Protection Program, which is a provincial government insurance program for school districts administered through the Ministry of Finance. Once he had provided them with a lot of material regarding the complaint, they made a decision to provide a legal defence on behalf of the school board.

As Brayne recalls, the district provided the information required by the Human Rights Commission with the assistance of legal counsel (appointed by the School Protection Program), and then it “...just kind of goes into this time thing. You know, you wait for a long time, and then you get a notification that they’ve decided to hear the case...”

This case occurred at a time when there were long delays in the Human Rights ‘system’ between the time of complaints being laid and the time of the hearings – in this case, the complaint was filed in June 1996 but was not heard by the Human Rights Tribunal until September 2000, a period of four years. In addition, once the hearing started, it too became a relatively lengthy process. There were 15 days of evidence and argument for the hearing, which started in September 2000 and finished the following year in July 2001. Then, the parties waited almost another year for the decision, which was released on April 8<sup>th</sup>, 2002.

When I asked Brayne what he was doing between the time of the complaint and the time of the hearing, he said they continued to do the same things, they intensified their efforts to stop the bullying but in addition, they were "...beginning to examine it from the point of view now of sexual stuff." He believed that they were doing the "rights things again correctly" such as implementing provincially required curriculum, which contained sexual orientation components, as well as "putting in harassment awareness packages." He understood it as an "intensifying" and "redoubling" of their efforts, because harassment was so debilitating.

As a result, the administrative approach once the complaint was filed was to "bear down on this harassment and provide all sorts of resources and support for schools." Significantly as well, Brayne noted that the district was not "doing it specifically in reference to Jubran" – it had been part of the accountability contract that the school district had with the Ministry of Education all along to foster "safe and secure learning environments." In 1997, the School Board produced a harassment awareness resource package that defined harassment and strategies for coping with it, for all North Vancouver staff and teachers. Additionally there were workshops organized by the School Board that district administrators attended, and then they returned to their respective schools to pass along this information to their teaching staffs. There was also a "Button-Up" campaign at Handsworth during this time in which peer counsellors visited classrooms to talk about the use of hurtful language and if students agreed that the words were hurtful, they would wear a special button signifying they would be careful about their language (Tribunal decision, para. 153-154).

While the safe school initiatives such as this continued as part of the district goals, the presence of the Human Rights complaint started to fade: "...you forget about it because you forget about the hearing thing because it's just out of sight, out of mind, and then they schedule a hearing." As Brayne recalls while the Human Rights investigation and fact gathering was happening, their involvement in the process was largely reactive:

We were out of it. We weren't an actor anymore. We were being asked regularly from a lawyer to provide information, but...or they would come to us and say, "They said this. Do you have anything on that?" So, it would be that kind of thing...

It was also at this time while the complaint was under investigation that Brayne was asked to give a presentation to Vancouver area superintendents about the legislative framework and process of a human rights complaint, from his perspective. As part of his presentation, Brayne prepared a two page handout which described the applicable law, the “actors”, the complaint in his district, and the administrative and quasi-judicial process for a human rights hearing. He also raised some issues and arguments including whether the students’ name-calling was discrimination or harassment within the meaning of the *Human Rights Code*, or whether it was “bullying behaviour” not based on true discrimination or hatred. At that time, and presumably applying the legal advice he had been given, he wrote: “The only way a school could be guilty of discrimination in its own right for acts committed by students is where the incidents are reported and the school authorities were indifferent to the problem or took no action.”

Brayne’s presentation concluded with suggestions for “A Safe and Caring School Policy”, and a “Service Delivery Model for Safe Schools and a Compilation of Resources and Support Structures to Ensure Safe and Secure Learning Environment, which includes policies, procedures related to positive school climate, codes of behaviour, violence prevention curricula, conflict resolution programs, intervention strategies, and safe school planning.”

In addition, during this pre-hearing stage, there was some media coverage, and Brayne recalls going “through a period of time” where he was being asked questions locally and nationally about the case. At the beginning of this period he would answer the questions himself but eventually he referred media questions to the district’s lawyer because as he realized, “...this isn’t doing me any good, because they are asking me too about it from the point of view of discrimination, so why am I giving my testimony before I give my testimony?”

And throughout this entire pre-hearing process, Brayne recalls that they, as a school district, were being “...really pro-active, really energetic, really interventionist, really supportive - materials, programs, curriculum, policies, resources, expectations, audits, everything” to make their schools safe.

### **3. Superintendent's Understanding and Response during the case**

At the time of the *Jubran* case, human rights services were delivered by three publicly funded agencies: the Human Rights Commission, the Human Rights Tribunal, and the Human Rights Advisory Council. The Human Rights Commission included three commissioners who were responsible for public education, research, and investigation of complaints, among other things. In particular, the Deputy Chief Commissioner could initiate human rights complaints and participate as an intervener, in complaints filed by others, as was the case in *Jubran*. As a result, the Commission generally had a broad mandate to both investigate the complaint and participate in the hearing of the complaint once it was referred to the Tribunal. The Human Rights Tribunal was the quasi-judicial adjudicative body which heard the complaints and had the power to order a remedy.

#### **(a) B.C. Human Rights Tribunal**

The Human Rights Tribunal heard the case over 15 days starting in September 2000 and finishing in July 2001. There were 6 witnesses for the complainant, Jubran, and 12 witnesses for the respondent Board of Trustees for the North Vancouver school district. Normally, most legal proceedings are bi-lateral; however in this case, there was also a third party to the proceeding – the Deputy Chief Commissioner (DCC) of the Human Rights Commission, who had added himself as a party to the proceedings more than 3 years **after** the complaint was laid. The DCC was also represented by separate legal counsel, and from Brayne's perspective, proved to be the most aggressive party towards the school district, at the hearing.

At the hearing of Jubran's Human Rights complaint, Brayne was asked to appear as one of the witnesses for the respondent Board of Trustees. He had never given evidence at a legal proceeding before, and so prepared carefully, ready to be purposeful, thoughtful, and honest in his response to the lawyer's questions. Because he was called as the spokesperson for the district at the hearing (none of the trustees were called), he understood that his evidence was the "vehicle for putting evidence in." As a result, there was a lot of time spent on "lead up stuff", including curriculum requirements. Interestingly, one of the curriculum requirements was "personal planning" which was the only course with an 'opt out' provision because of its sexual content – the same curriculum requirement that was at issue in the *Chamberlain* case.

Brayne's recollection of the hearing process was that a lot of the questions he was asked to answer "...had to do with programs in place, expectations, supports, policies, etc." However, he remembers the focus of the hearing suddenly took a different turn when the Deputy Commissioner's counsel started asking questions "...on what anti-homophobic programs and curriculum we had in place, what programs...that were advocated by gay and lesbian associations and organizations."

Brayne remembers that:

...all of a sudden the questions had to do with what programs we were **not** providing. It took this complete program shift. I think they were mining low grade ore when they were going on this thing about anti-harassment policies, and procedures, and support they had in place, and they knew we did because I was testifying to that effect, so...they asked what programs we had in place, and I told them what programs we had in place, and then it shifted from ...not what programs we had in place but ...these programs that are out there, e.g. the Massachusetts one..."

At this point, Brayne said the lawyers for the DCC weren't "...questioning me anymore, they were arguing with me." He said they were suggesting that he didn't want to put this type of program in place because there was "some sensitivity in the community" regarding homosexuality. Although he denied this, he recalls the experience as similar to being asked one of those "do you still beat your wife questions."

Brayne recalls what really caught him by surprise was "...encountering the fact that the Deputy Commissioner was autonomous from the Commission, and in fact, was another party...an intervener...In other words, the Commission is making testimony to the Commission...and that's when I realized what is this about..."

His understanding of the purpose of the hearing was that it was a legal process to determine whether discrimination did occur, and that witnesses were called to give evidence to "answer that question." However, as he learned while under cross-examination at the hearing, the involvement of the DCC "was one of advocacy for a point of view as to what programs should be mandatory at school, and for the inclusion of particular programs in schools." He

realized that the DCC was “trying to get out of the hearing an order – a remedy that certain programs be provided, and interestingly enough they didn’t come out with that remedy.”

For example, during the hearing Brayne recalls being asked if he had contacted any groups of gay or lesbian educators. He found this a surprising approach because from his perspective, the issue concerned a serious harassment problem, which was not founded on sexual orientation – the problem “...didn’t have to do with his feelings as a gay person.” And, as noted by all parties, the student had never identified himself as a homosexual. Therefore, it was reasonable to conclude that the harassment at school was not happening because of his sexual orientation.

His recollection is that although an objection was made by the board’s counsel to this line of questioning and Brayne recalls the Tribunal Chair acknowledging that Dr. Brayne “...would have no way of knowing whether or not Hudson Valley public schools introduced this program in response to an incident of homophobic bullying”, the line of questioning was allowed because it was ruled to be relevant to the proceedings.

Brayne was concerned and surprised at the Tribunal Chair’s decision to allow this kind of “advocacy” because, in his opinion, counsel for the DCC was “speaking not to the case at hand, but to the Ministry of Education through the medium of the hearing.”

He viewed this as an abuse of office and was concerned about the effect of the DCC involvement in the Human Rights hearing on the “fairness and integrity of the proceedings”. From his perspective, the issue had been defined as one of discrimination - not of programming or curriculum. And, because he did not have any notice prior to the hearing that part of the DCC’s case was going to include questions, evidence, and argument that the school board had not implemented certain programs for dealing with homophobic harassment, it came as a complete surprise, and from his perspective, affected not only the process but also the outcome.

After all the evidence had been called and the submissions made by the three parties to the proceedings, the hearing was concluded on July 16, 2001 and all the parties waited until April 8, 2002 for the Tribunal’s Reasons for Decision. In the Reasons, the Tribunal found

that “Handsworth was diligent in investigating Mr. Jubran’s complaints and, for the most part, their efforts were successful in curtailing the harassing behaviour for most individual offenders” (Tribunal Decision, para. 173). However, the Tribunal also found on the evidence that “...staff at Handsworth required more in-service training to address sensitive topics such as sexual orientation, and that resources to address these issues only became available in 1999” (Tribunal Decision, para. 156). As a result, although the school’s administration did “turn their minds to Mr. Jubran’s situation” ... “the School Board did nothing to address the issue of homophobia or homophobic harassment with the students generally, nor did it implement a program designed to address that issue.” On the whole therefore, the Tribunal found, applying the principles from the *Meiorin* case, that the School Board did not accommodate Mr. Jubran to the point of undue hardship as it was required to do (Tribunal Decision, para. 160-161).

Although Mr. Jubran had asked for monetary compensation of approximately \$105,500.00, he was awarded only \$4,000.00 as compensation for the injury to his dignity, feelings and self respect, together with an order that the “School Board cease its contravention of the Code, and refrain from committing the same or a similar contravention” (Tribunal decision, para. 232). In addition, although the Deputy Chief Commissioner had asked for an Order that required the school board to implement a comprehensive strategy dealing with harassment and discrimination, and that the school board “...provide him with information respecting the implementation of the order on an annual basis for a period of four years”, no such Order was made, nor was any particular program, such as the American programs suggested by the DCC, required to be implemented (Tribunal decision, para. 199-200). In fact, the Tribunal found that the school board had established a strategy for addressing harassment and discrimination, which incorporated all the specific remedies sought by the DCC (Tribunal decision, para. 230).

The district issued a press release through the office of the Secretary Treasurer, a week after the Tribunal decision was made public, noting that,

Despite findings that the Board and its staff acted in a responsible and effective manner, the Human Rights Tribunal found the Board liable for student behaviour that occurred between September, 1995 and June 1998.



The press release went on to quote sections of the decision and ended with the following statement:

The School Board questions the correctness of a decision that appears to hold the Board responsible for student conduct without any fault on the part of the Board or its staff. Accordingly, it is reviewing with its legal counsel the prospect of seeking a judicial review of the decision by the British Columbia Supreme Court. It is anticipated that the Board will decide whether to undertake that review within the next few weeks.

**(b) B.C. Supreme Court decision**

As the legal work was being handled through the provincial School Protection Program, the superintendent and the board were not directly involved in the decision to appeal. Brayne recalls that the school district had no further involvement other than that he was called to the lawyers' offices "a couple of times...to clarify a couple of points." However, the case had been appealed on questions of law, so there was no further need for information from the district.

Brayne does remember getting telephone calls after the Tribunal decision – from the public regarding expenditure of public funds on legal proceedings as opposed to school resources – and also from the media regarding the grounds of appeal. Brayne said he would always talk about the legal proceedings in the third person "because I got text from the lawyers in terms of how to do that...exact text from the law...and after about the 14<sup>th</sup> meeting, I actually made it sound like I was speaking naturally rather than off notes (!)"

The appeal of the Tribunal's decision was heard the same year, by way of judicial review, on December 3<sup>rd</sup> and 4<sup>th</sup>, and judgment was rendered a month later on January 2, 2003. In the decision, Mr. Justice Stewart described Jubran's high school years as a "living hell", but, because he was not a homosexual and the students who bullied him did not believe that he was a homosexual, the facts of the case were outside the scope of the *Human Rights Code*, and therefore it didn't apply. Accordingly, he quashed the decision of the Tribunal.

Shortly thereafter this decision was appealed by the Commission on behalf of Azmi Jubran to the B.C. Court of Appeal, on the basis of whether a person who complains of discriminatory harassment on the basis of sexual orientation, must actually be homosexual or perceived by

his harassers to be homosexual. A second issue was if student conduct does violate the *Human Rights Code*, can the School Board be held responsible?

Between the judicial review of the Tribunal's decision to the B.C. Supreme Court and the appeal to the B.C. Court of Appeal, there were significant changes to the structure of Human Rights services in B.C. The Commission (and therefore the Deputy Chief Commissioner's position) was completely eliminated together with the Advisory Council, leaving the Human Rights Tribunal as the sole agency for human rights services in B.C. As a result, the Deputy Chief Commissioner was now no longer a party in the legal proceedings, and the appeal proceeded between Mr. Jubran, the School Board, and the Human Rights Tribunal.

**(c) B.C. Court of Appeal decision**

Brayne told me that after the matter was appealed to the Court of Appeal, he didn't hear much. His perspective was that this case was far from the day-to-day work of the district: "... you know, by now we're a footnote...the district. This is now just a point of principle, a point of law."

The case was heard October 18<sup>th</sup>, 2004, by three members of the B.C. Court of Appeal, and judgment delivered on April 6<sup>th</sup>, 2005. The appeal was allowed by all three justices – two reinstated the Tribunal's order and the third ruled to send the matter back to the Tribunal for a new hearing. After considering the purposes of Human Rights legislation – its special quasi-constitutional status – and the fact that it should be interpreted broadly to advance its objects and purposes of equality and dignity and the prevention of discrimination, the court found that Azmi Jubran had proved his claim of discrimination.

The justices also found that the School Board was liable to this student for the discriminatory conduct of other students as a result of its duty to provide a discrimination-free school environment (established in *Ross v. New Brunswick School District No. 15*). Although Mr. Justice Levine recognized the efforts of the District in holding that, "in the end, the School Board had implemented the policies and procedures that could reasonably be required to create a discrimination-free school environment; its failure was in not doing so during the time Mr. Jubran could have had some relief" (Court of Appeal decision, para. 97).

The School Board applied for leave to appeal this decision to the Supreme Court of Canada, which was denied, without reasons, on October 20<sup>th</sup>, 2005.

#### **4. Superintendent's perspective after the case**

Brayne says that after the case, although he did his job in the same manner, the experience of this case changed some things in the district:

...it changes in the sense that certainly it sensitizes you to the issue. I think we became more acutely aware of the importance of doing things. Like, we...spent ...time with principals talking about - not so much homophobia because remember we never viewed it as that. But the fact that we had it as a goal in the school district Accountability Contract, and resourced strategies from that goal quite considerably. So, we hired a Safe Schools Coordinator...and the importance we assigned to it was that I had this position reporting directly to me.

Brayne recalls that the significance of school safety generally was “so high on the priorities”, given the tragic school shootings in Columbine, Colorado, and Camrose, Alberta, and parents’ strong desire generally to have safe schools. As he remembers, parents wanted time, money, and resources spent on keeping schools safe, so the district, “...amped up the police liaison program etc...developed very sophisticated emergency response programs and then in-serviced them, with respect to school lockdowns, and bomb alerts, and chemical spills, and all those kinds of things...”

And he says that along the way “we all learned a lot about the – we did some collateral learning – about the importance of logs, record keeping, documentation.” In fact, when asked if he would have changed anything regarding his response to the case, he replied, “Oh yes. I think in terms of our record keeping, our log, our summary of actions...and the time, and the date with what effect...more documentation.”

As Brayne recalls, “We just sort of got better at it, more sophisticated, and we introduced annual audits. We would audit what we were doing. I closed school an hour early once a year, so that everybody would participate.”

From Brayne's perspective, changes in the district weren't "defined" in relation to the legal proceedings – they were "...just juxtaposed with the fact that safe and caring schools was an enormous provincial priority...a policy driving framework."

Brayne's experience as a superintendent in this case will never be replicated, but his recollection of the process and his own understanding and response provides a useful historical perspective. When asked what advice he would give to practicing superintendents who encounter a challenging student issue that has a legal aspect, his response was to:

Address it. Address it forcefully; address it collaboratively; address it from a variety of strategies, using a variety of policy instruments, using a variety of incentives, and disincentives. In other words, solve problems. The advice I would give to people is to be very, very solution oriented. When you see problems, just address them. Involve people, and address them. Be very clear on expectations, be very clear on supports.

When asked about the key attributes of leadership for a superintendent facing a similar case, Brayne commented that the things that a superintendent needs to draw on are, "...your ethical compass, your morality, your sense of what's right, your sense of what's proper to do, your responsibility to students, your responsibility to safety, and the enormous importance of your role..."

From Brayne's perspective, this was a "severe bullying and harassment problem that was just systemic to that situation". He believes that when the Human Rights Commission introduced this "artefact" of homophobic discrimination, there was a shift, and attention was diverted from the serious problem of bullying:

I think it prevented more widespread provincial government action because you can put it to the side by saying that this is a special case because it was homophobia...it's sort of, like, social workers, the police, the community, parents, just...they're getting excused from being part of the solution because it's being presented to them as a "gay" issue...and I think it got in the way of solving it.

At the end of the day, this was a highly unusual case – a bullying case that was re-characterized as discrimination by the provincial Human Rights Commission because some of the student language used to taunt Jubran was homophobic in nature. However, it

sent a message throughout Canadian school districts that student behaviour may constitute discrimination and incur liability on behalf the district if not addressed proactively as both a disciplinary and educational issue. Brayne's perspective, as superintendent, is valuable because it provides insight into the management of challenging legal issues, and how such issues may be characterized and managed within the district quite differently than they are characterized and judged outside the district, and within a legal forum.

## **CHAPTER 5: THE CHAMBERLAIN CASE**

### **1. Context for the Case**

#### **(a) Outline of the Surrey school district**

If the *Jubran* case could be compared to a smouldering fire which grew slowly and incrementally with student bullying incidents, and building gradually to a hearing date seven years later, in contrast, the *Chamberlain* case was like a forest fire, ignited from a flash flame which quickly grew into an intense inferno.

The Surrey school district is located 40 minutes from Vancouver and has the largest student enrolment in British Columbia with over 65,000 students. In fact, it is one of the few districts in the province that is growing each year with increased student enrolment. Evidence of this growth is reflected in the construction of schools. For example, most of the 124 schools in the district have been built within the last 16 years, including 20 elementary schools within the last 11 years. With an operating budget of approximately \$450 million, the school district is Surrey's largest employer, with 7,900 employees working in - or for - 99 elementary schools, 19 secondary schools, and 6 learning centres. Setting the direction for this significant public service is the mission statement of the district, "To provide safe and caring environments in which all learners can achieve academic excellence, personal growth and responsible citizenship"<sup>25</sup>

As a suburb of Vancouver, Surrey shares its multi-cultural population, but unlike Vancouver, is both urban and agricultural. The Supreme Court of Canada in the *Chamberlain* case described Surrey as a "...culturally and religiously diverse community...(with) large Protestant and Catholic Christian communities, including a large Evangelical Christian community...a Sikh population of over 50,000 persons, the largest Muslim community in British Columbia, and a Hindu community" (S.C.C. Judgment, para. 81).

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<sup>25</sup> Surrey School District website, <http://www.sd36.bc.ca>. Retrieved August 3, 2007.

This was the school district that wooed Fred Renihan from Manitoba in 1995 - the district where he worked as superintendent for just over 10 years – and the district in which the *Chamberlain* case erupted and was fought through every level of court to the Supreme Court of Canada.

**(b) Superintendent’s Background and Use of the Law Generally**

Renihan was born in Ireland, but educated in London and later Saskatchewan, earning a B.A., a B.Ed., and a M.Ed. in leadership while he worked as a teacher and then as principal. By the time he was 32 years old, he was working as the CEO and superintendent of the North Battleford school district in Saskatchewan. However, after 4 years, he felt that a Masters degree wasn’t enough, and so enrolled in a PhD program at the University of Saskatchewan. Here, he taught and worked on his dissertation for two years, but was soon back in public education as a school superintendent in Swift Current, Saskatchewan. He spent five years in public school administration before moving into administration with the provincial government: firstly, as an Executive Director of curriculum and then Assistant Deputy Minister responsible for core curriculum and curriculum reform, finishing with a short period as the Acting Deputy Minister of Education. A provincial election swept out senior Ministry bureaucrats after six years, and Renihan moved to Manitoba to become the Dean of the Faculty of Education at Brandon University. He held this position for two years before moving west to Surrey as the superintendent sacrificing a sabbatical and a tenured full professorship to return to public education.

Renihan characterized his professional training as “on the job” experience in teaching and administrative positions, which was “enhanced” by his university experience. In addition, throughout his professional career, he attended workshops and conferences that were associated with his realm of responsibility in order to continue to learn and to hone his practice “on the anvil of what other people were successfully doing and what the literature was pointing to in terms of informing best practice”. This rich complement of practical, political, and academic experience provided him with significant depth and breadth in public education that few others have.

When asked specifically about any formal legal training he may have had prior to the *Chamberlain* case, he said that he had taken “a couple of graduate classes...under the rubric of legal issues in education” for administrators. Additionally, in his work as an administrator he had attended many workshops or meetings in which legal cases and legislation were discussed and analyzed. He described this work as important because he viewed legislation as guiding the district’s interests – as being “the fulcrum of policy” - in terms of ensuring that district structures and processes would comply with legislative requirements, and be fair and just. In addition, from his perspective, case law provided “a nexus of administrative practice and legislation” that could be learned from. His practice was to share these cases with his assistant superintendents and management groups and to take “...some time to talk about them and learn from them”, so that the law could be reflected in district policies.

In addition, he acknowledged that he had “lots of access” to legal information as the Surrey superintendent, as well as an ongoing relationship with legal council retained by the district.

**(c) Superintendent’s Relationship with the School Board and the Scope of Discretion**

Renihan described his relationship with the board as “always a good one” – a relationship that was “forthright” in terms of their respective roles. He told me that he frequently talked to the trustees about their roles and would describe the trustees’ work as ‘laying the tracks’ and the superintendent’s work as ‘running the trains.’ The *Chamberlain* case, as it turned out however, was a situation in which the trustees “wanted to play with the trains.”

In terms of pedagogy, Renihan believed that the trustees would have never questioned him on issues “related to pedagogy ...or issues related to educational reform or leadership and those kinds of things.” The Board respected his leadership in these areas and looked to him for guidance on educational matters. It was a different matter though for political matters as the composition of the Board in Surrey was clearly political and many decisions were made along political lines. Renihan had confidence in the Board in terms of their political abilities and knew that the trustees had a clear understanding of their responsibilities to represent their constituents. When Chamberlain’s request was made, Renihan recognized that it was headed directly for the political arena:



The whole issue of the books is a different one because it came through a different sort of psycho-emotional space, you know, philosophic orientation, values, and where they (the trustees) saw themselves as the guardians of the values and the mores and the expectations of the community that they were elected to serve...They saw their community mirrored in them...That's why it was so emotional and so...viscerally charged.

Generally however, Renihan said he had “a whole lot of discretion” in terms of decision-making. As he commented, “...the superintendent in Surrey, and this is written large in policy, has a whole lot of power. Not that one would want to wear it on their sleeves but I was actually quite surprised to see reflected in the policy, how much latitude or how many final decisions rested with the superintendent.”

From his perspective, Renihan saw his role as superintendent, to use policy to guide action, to facilitate collaborative action, to use the right language, and to create certainty out of ambiguity, among other things.

## **2. Superintendent's understanding of events leading to the case**

### **(a) Superintendent's Role and Response prior to Legal Action**

In 1995, the same year that Renihan assumed the position of superintendent in Surrey, the Minister of Education implemented a new curriculum for “Personal Planning” from kindergarten to grade seven. Learning outcomes for this new curriculum were described, as were instructional and assessment strategies, but choice in the matter of educational resource materials was not centrally prescribed. Part of this curriculum was “family life education”, the stated purpose of which was “to develop students' understanding of the role of the family and capacity for responsible decision-making in their personal relations.” It further stated that, “The family is the primary educator in the development of children's attitudes and values” and that all learning resources to be used in school be recommended or authorized by the Ministry of Education or “...be approved through district evaluation and approval policies” (B.C. Supreme Court judgment, para. 40).

James Chamberlain was a kindergarten teacher in the Surrey school district who was a member of the Gay and Lesbian Educators of B.C. (“GALE”) association – an

unincorporated association of educators who advocated change in the school system to create a positive environment for homosexual and bisexual persons. He was perceived by his superintendent as “a very good teacher... a very warm, empathetic, kind person”. And, as events in the district from 1996 on evolved, the ideology of GALE and the acceptance of gay lifestyles also became a significant and influential focus for this teacher.

As the Court of Appeal noted in their decision: “Sexual orientation issues raise strong emotions and Mr. Chamberlain must have known that by advancing these three books for status as recommended learning resources for the Surrey School District he was inviting a confrontation before the Board” (B.C. Court of Appeal, para. 57).

Beginning in the fall of 1996, there were issues beginning to emerge at Chamberlain’s elementary school about the use of same-sex parent resources for students. Earlier that year, the school board had adopted a policy clarifying that “teachers having responsibility for teaching the family life component of the Career and Personal Planning curriculum should use resource material contained in the Minister recommended or District approved lists” (District Policy B64-95/96). And then later, in October, the school principal had written to Chamberlain directing him to use “only provincially or district approved learning resources” in his classroom.

Renihan became aware of the issue when it was still at the school level because he was advised through the Area Superintendent and the Curriculum Instruction Services group. He recalls being told by the Area Superintendent that there was going to be a problem at the elementary school in which Chamberlain taught.

In December 1996 and January 1997, Chamberlain submitted a request to the office of the superintendent for district approval to use three books depicting same sex parents (from the GALE list of resources) as “educational resource material” at the kindergarten and grade one in the district. The list of books – “Asha’s Mums”, “Belinda’s Bouquet”, and “One Dad, Two Dads, Brown Dad, Blue Dads” – was submitted to the district administrative staff and reviewed three times by different district committees. The books were also reviewed by the deputy superintendent and Renihan, in his position as superintendent, and “upon each review the books were seen as sensitive and likely to cause parental concern over their presentation

of same-sex parents to kindergarten and grade one students” (B.C.S.C. Judgment, para. 45). Renihan’s view was that the three books were not necessary to achieve the learning objectives of the provincial curriculum, and anticipating that a decision to approve such books would be controversial, felt that any decision should be made by the elected school board.

As a result, the books were not approved by the district committees, and Chamberlain’s request was referred to the school board, accompanied by an administrative memorandum written by Renihan requesting that the board “consider” the three books.

As Renihan recalls, certain other things were happening at the same time that were in some ways “serendipitous”, and created a ‘rushing in’ of all these issues together. For example, the Board Chairman, attended a conference in Victoria on the Career and Personal Planning curriculum (which included “family life education”), and returned with some very graphic information regarding alternative sexual material, which he insisted on sharing at a public board meeting. From Renihan’s perspective, the Chair’s attendance at this conference and the resulting information that he shared with other trustees “escalated” the progression of the book review process. Once the trustees became aware of Chamberlain’s request, and given the uncertain scope of “family life education”, they wanted to see the books and be seen to be acting on the issue.

Renihan was also aware that Chamberlain, and another teacher from Coquitlam, Murray Warren (who was later also named as a petitioner in the legal action against the school district), were “levering the political action of GALE B.C.” He was told that the book request was being, “pushed by GALE”. This aspect of the issue was later confirmed in the Court of Appeal decision when Mr. Justice McKenzie noted that the petitioners “...were pursuing a broader agenda that was bound to be confrontational at the adult level...” (B.C. Court of Appeal Judgment, para. 62).

This staged confrontation was further confirmed, when the three books were brought formally before the trustees at a board meeting, and each one was marked with a GALE sticker, clearly identifying the political nature of Chamberlain’s request. As Renihan remembers, one trustee “...who actually supported the books, actually pointed out in one of

the meetings that he's supporting the books but he is not supporting the way they were brought to the Board table for approval..."

Renihan's advice to the board at this time was to "...get it back into policy" because he recognized that the book review needed to go back to the school committee, which included parent representation. It would have then come forward according to policy, accompanied by written reports, but "...it got out of the box before that..."

There was a process for the approval of locally developed resources, but in this case that process was not followed because of the controversial nature of the issue.

**(b) Superintendent's Understanding of the Role of Law prior to Legal Action**

As soon as the book request was formally submitted by Chamberlain, Renihan knew that it was "...going to be a big issue in the community, in that community..." because it was "very conservative in terms of the preservation of traditional family values." Renihan recognized that there was a political agenda and in his words, "...could see that (it)...wasn't going to go away."

Accordingly, he looked to policy to have the books evaluated – to follow the steps prescribed in the policy, but "...the first go around, we never got there." When the book request was put in, people started talking in the community, including trustees, and it was pushed forward by the Board Chair who made it clear he wasn't going to approve the books. Within district policy, Regulation No. 8800.1 set out the process and criteria for approval of both learning resources and library resources, as well as the process for dealing with "challenged material". The criteria for approval as set out in the policy were age appropriateness, relevance to the curriculum, and suitability in the local community, among other things (Surrey Regulation 8800.1). This regulation complemented Policy No. 8425, which had just been approved by the board to provide some general guidance regarding resource selection for Personal Planning.

In terms of the constitution and legislation, Renihan recalls that they also looked at the "whole issue of what we understood by the *Charter of Rights and Freedoms* and how they might come into place." The district staff also looked at the provincial *School Act*, but found

it “less than helpful in term of ...making sure the issues are secular and not religious”. From Renihan’s perspective however, he didn’t believe that it was an issue of religion because he characterized it as an issue that had to do with the parent’s right to choose.

During this time the district was in contact with their regular legal counsel, however, once legal action was initiated, the board chose to retain another law firm that had had successful experience with a challenging rights case concerning an educational institution (*Trinity Western University v. B.C. College of Teachers*).

The district also looked to the Ministry of Education for direction, but was told that the books were local resources and it was up to the school board to decide. The Ministry refused to put the books on the recommended list of resources or provide any formal direction regarding the books. Unofficially, Renihan recalls that, “the Ministry came right out and said that Surrey ought to get up and approve the books”. As Renihan recalls the Minister of Education was “openly critical” of the Surrey School Board’s stance in this matter, a position that publicly underlined the philosophical divergence between the Board and the Ministry.

When I asked Renihan about the effect or influence of his response on the school board, he replied that, “it was quite interesting. The board really liked me. And they knew that I was uncomfortable with the process that we were following...” Although he acknowledged that his values regarding family, students, and the role of parents in public education, “were fairly well in line with theirs” having been raised in a large Catholic family, he understood the need for tolerance and diversity, particularly in terms of family lifestyles and models. As he noted, he could accommodate this diversity within his worldview, but he was not sure that the trustees could, and they recognized that. He said that they would tell him,

We’re sorry we’re putting you in this tough position. I’m saying, “Well, my job is to help you get things right within the scope of what I can do and what I know. And what your own policies will tell you what to do.” I mean, you can decide not to approve the books. But you better do it within the terms of your own policy.

When Renihan read the books, his own view was that they were not age appropriate.

He believed that kindergarten and grade one are “very formative years” and that the teaching of family models with same sex parents should be at home with the parents.

As a result, prior to the Board’s formal consideration of Chamberlain’s request, there was considerable discussion amongst all the parties, however, there was no formal written report evaluating the books as “learning resources”, as was usual, because the process had been accelerated by the trustees.

With the acceleration of this issue came publicity and the press started calling the board office for more information. Renihan recognized that at this point, they were “into big media” and he didn’t want all the trustees speaking about the issue. As a result, the board of trustees met and appointed one spokesperson - the vice chair of the board – to be the voice of the board and to work with the Associate Superintendent of Human Resources. This was the individual whom everyone believed could best represent the Board’s position in the stormy waters that lay ahead. Renihan did not want any “off the cuff comments” and so,

...everything is scripted, everything is very carefully edited, everything is carefully reviewed, often with legal counsel. And then it’s out. I spent a lot of time writing and rewriting stuff myself from press releases to...you’re making sure that you’ve done your best to get the language right... to find the language to talk about this stuff...the right language...the measured language.

This language was crucial given the political activity that was swirling around the issue. Renihan was aware that there was a political slate of elected officials, The Surrey Electors Team (SET) comprised of city council and school board in Surrey who met regularly to discuss issues. These political discussions occurred outside full Board meetings and because they did not include all Board members, created the possibility of surprise at the next public meeting. Although the Board was respectful of keeping Renihan informed, when he suspected that some of the trustees may have “orchestrated” their opposition to GALE’s political activity, he met with them and told them he needed to know what was going on, where they stood. He was explicit in telling them: “You can’t expect me to provide leadership unless I know what is happening.”

While Renihan understood the political activity at work as a result of his previous experience in government, he also realized that this could be a significant confrontation and that he might be caught in the eye of the storm. Renihan commented that if the trustees had blind spots, it was their dedication and enthusiasm to act in the best interests of their constituents. However, he recognized and respected the principles they upheld through their actions and their firmly held belief that parents should be the first and primary educators.

While Chamberlain's request was being considered within the district, the B.C. Teachers Federation passed a resolution that was broadly publicized to authorize the establishment of a committee to "develop recommendations or strategies for achieving the elimination of homophobia and heterosexism in the public school system." As noted in the Supreme Court judgment, this resolution "was the subject of forceful comment within the Surrey school district...(and)...Many parents contacted school trustees expressing concern that material on a GALE list of resources were being used in the Surrey school district" (B.C. Supreme Court Judgment, para. 47).

On April 10, 1997, the school board met and passed a resolution that any resources from "gay and lesbian groups such as GALE or their related resource lists are not approved for use or redistribution in the Surrey School District" (B.C. Supreme Court Judgment, para. 48). At this meeting, Renihan publicly advised the board that Chamberlain's request for permission to use the three books as "educational resource material" for students in Kindergarten and Grade One would be on the agenda for the next meeting.

Two weeks later, the school board held its meeting and it was well attended - about 80 people pressed into a room built for 40. In spite of the presence of security people hired by the district in anticipation of a large and vocal turnout, there were problems immediately. Renihan recalls that people were waving signs and placards and shouting "insulting comments at the particular trustees" in addition to saying some "horrendous things". The scene was briefly described by the Court of Appeal in the following way: "Passions were raised to the point where gross and vituperative epithets were shouted at Board members by spectators during the Board meeting when the resolution was being considered. No doubt

some supporters of the Board were also insulting to their opponents...” (B.C. Court of Appeal, para. 57).

Finally, the board chair tried to restore some order by clearing out the signs, but as Renihan recalls, one man remained standing on a chair and he refused to leave. He told the board chair, “I will not leave this room until somebody in authority - not the board – but an administration (sic) comes and tells me to do so.” “So I had to stand up and walk there and say, “Sir, I’m the Superintendent of Schools. I would really appreciate it if you got down off that chair and leave the boardroom.” He said, “Okay” and immediately stepped down.

The meeting finally got underway, and the board heard submissions from a number of parties such as GALE, the B.C. Civil Liberties Association, and a parent group from Chamberlain’s elementary school. After discussing the request, the school trustees decided, in a vote of 4 to 2, not to approve the three books as learning resources for personal planning in Kindergarten and Grade One.

**(c) Superintendent’s Understanding and Response following the Commencement of Legal Action**

Shortly after this meeting and the trustees’ decision not to approve the three books, a legal action was initiated. The two teachers, Chamberlain and Warren, together with a parent and a student, and one of the book authors, applied to the Supreme Court of B.C. for judicial review of the school board’s decision. In particular, they wanted an Order approving the books for use in Kindergarten and Grade One on the basis that the two resolutions infringed the *School Act* and the *Canadian Charter of Rights and Freedoms*.

If the battle lines had not already been clearly demarcated, the initiation of legal action had the effect of polarizing the parties on one side or the other of the issue. As Madame Justice Saunders noted in her decision, the issues in the case had “...emerged in an atmosphere of strong public debate in Surrey, in which ideas on civil liberties and human rights are advanced on one side and ideas on parental rights, early education and the role of an elected school board are advanced on the other” (B.C. Supreme Court, para. 3). As an indication of the breadth of public participation in the legal process, there were 180 affidavits filed either in support or against the petition for judicial review.



Not only was there a legal issue between the school board and the petitioners, but it was also the beginning of legal issues between the board and the government in terms of who would pay for the legal costs of this action – and this would be an ongoing debate for many years resulting in a separate legal action between the government and the school board.

Within the school district, and anticipating possible consequences of the board's decision, Renihan, following a lengthy meeting with legal counsel, the Associate Superintendent of Human Resources and Executive Committee, sent out a fairly strongly worded memo to administrators on May 9, 1997, entitled "Tolerance for Sexual Orientation" to clarify the district's expectations. In this memo he stated,

...Let there be no confusion with regard to the District's expectation in terms of how we treat the matter of sexual orientation. The District will not accept any action of intolerance or discriminatory treatment of students, staff, or parents on the basis of their sexual orientation. Administrative officers must be vigilant in their responsibility and must confront instances of intolerance to ensure that they cease and that appropriate action results...Parents need to know that they already have the right to be informed in advance of what will be taught in the Personal Planning and the CAPP curriculums. Parents also have the right to assume responsibility for teaching their own children the sensitive topics in the "Personal Development" component of these programs...

Renihan said that this type of informational memo was often drafted in collaboration with others in the district because of the significance of getting the language right and sending a clear message reaffirming the values and position of the district. Often the Associate Superintendent of Human Resources or legal counsel would review the wording before it was sent out, or alternatively, they would draft the message and Renihan would review it. This collaboration ensured that messages being sent out from the district regarding the case were carefully and consistently constructed using language that was clear, thoughtful, and informative.

These communications also provided Renihan with the opportunity to provide "symbolic leadership" by using language which focused on the district's values. It was an opportunity to shift the tension created by such an extremely difficult case, and reorient the focus of the district's work to pre-ordinate issues such as teaching and learning.

During this time, Renihan characterized his leadership style as "...very open...very collaborative... (and)... value based", and so he needed to spend some time thinking and talking about the issues with his executive committee. In a large school system like Surrey, he viewed his leadership as facilitating opportunities for district staff to reflect on what they were doing. He described this as:

...how we're going to talk...finding the language to talk about stuff. Getting the issues straight. And how we're going to frame those issues. You know, the art of framing, what it is you've got to frame...And then how we are going to support our principals in, you know, sort of what it is they do...So that we're keeping our administrators, regardless of what trustees are doing, on the high ground...so that the language is clear and resonant and compelling.

The regularly scheduled executive committee meetings influenced Renihan's decision making because it provided an opportunity for senior management to talk "frankly and openly." As he acknowledged, "No one had the corner on this" and this kind of forum provided him and other district leaders with the time to meet and work through the issues within the context of their district. As he described it, the legal case created,

...an emotionally charged issue and people are all over the place with it...people from all walks of life, all creeds and, you know, sort of different philosophic and religious sort of considerations and it's interesting. But unless you can find a forum to talk openly about those kinds of things and where we are with our communities, then you really don't move very far in terms of being able to get a good handle on things...

From a legal, and practical, perspective, he saw these discussions as "...getting an understanding of what all this is about...and...how can we find the way to talk about this – respecting the rights of everyone to hold different viewpoints and different lifestyles within the *Charter of Rights and Freedoms* that governed our behaviour in this country."

Recognizing that within the challenges of a diverse community there were also tremendous strengths, these discussions provided an opportunity to sit down with other leaders in the district and "revisit what it is we are about." Renihan viewed this legal and political crisis as a leadership opportunity to "extol what's important" and to focus on the strengths of the district.

Although he described these discussions as being “open and free willing”, anything that was subsequently written for the purpose of being shared with a larger audience was usually written in collaboration with others, and “...very carefully reviewed.”

The Surrey school district had a fairly ‘defined structure’ in which the Associate Superintendent of Human Resources was the main resource and contact for legal information in the board office. Renihan said that he relied on the Associate Superintendent “a lot” to ensure that Executive Committee (Superintendent, Deputy Superintendent and Secretary Treasurer) and Trustees were apprised of legal issues and developments. He considered the Associate Superintendent the labour relations expert, the “lead man” for information, as he was the individual who had the most frequent and sustained contact with the district’s legal counsel. Because of this, he was the person who provided the most detailed and current information about the progress of the case throughout its duration, through reporting to both district staff (Board and school administrators), and the Board of trustees. By delegating the technical and practical aspects of the case, Renihan was able to concentrate his leadership of the district through more “symbolic communication” – communicating directly to staff about the values of the district and providing opportunities for district and school administrators to discuss specific issues with reference to these values. As he noted, this is the real “stuff of leadership” – framing the legal issue within the context of the bigger picture of teaching and learning.

In addition, this delegation was used intentionally by Renihan to provide some separation between the superintendent’s position and the board of trustees during the *Chamberlain* case because it was so politicized:

When we were in this issue around the *Chamberlain* case with the books, he was the point man for, you know, where we were. He talked with the trustees and I didn’t talk to them at a personal level about their stands or their perspective or their positions regarding the books or the issues associated with that. I asked him to do that. That allowed me to be free to talk about the bigger issues around where we were without getting into it with the individual trustees.

Renihan also used the Associate Superintendent of Human Resources to report to administrators in the district as he had the most current and detailed information about the

case. This allowed Renihan to focus on the things that superintendents are “supposed to do” such as keeping learning at the centre, supporting teachers, and watching “where the system is going”. As a superintendent, he said:

It’s very easy to get distracted, particularly with big cases like that. And as important as such cases are, they can get you away from the main thing, which is how you support everyone involved in student learning and development.

The competing interests and values of the *Chamberlain* case made it especially difficult. As Renihan said, “GALE had made it quite clear that not only did they want their lifestyles in terms of family models legitimated but they wanted them equally valued”, and for some, this was a challenging perspective.

Not only was there fundamental disagreement about how to define a “family”, but, in addition, Renihan observed that between the parties, there was “...never, ever any middle ground...and when you don’t have middle ground, it’s hard to achieve a consensual outcome.”

### **3. Superintendent’s Understanding and Response during the case**

It was Renihan’s practice to speak to all school based administrators and management in the school district once a month – all 200 or so of them – and in this way he was able to communicate what it was that he valued, and what he was doing about leadership. This was his regular practice for all educational issues, both before and after the *Chamberlain* case, but as he acknowledged, for this case in particular, it was really important to ‘get it right’.

In terms of his response, Renihan acknowledged that although there were some things he couldn’t do, he did see his role as superintendent as one in which he could ensure that the processes that he was responsible for implementing were “...open and decent and honest and respectful...” in how issues got sorted out. He viewed his role as “making decisions about process”. He would assist the board by providing direction about the factors in their decisions such as cost, or the possible consequences of their actions. As he noted, this is sometimes expressed as “Is this the hill you want to die on?”

In the *Chamberlain* case, he knew that the financial cost to the district would be significant given the legal action, and he said he talked about it a lot with the board. As he said, “what you do as an administrator, as a leader, is to lay it out so that people can see it. And the second thing is - what is this doing?” How is this affecting the school district?

Renihan viewed his job as keeping a focus on teaching and learning, and he wanted to keep his “eye on that ball.” He recognized that “at some point, you’re a gate keeper in terms of allowing this to encroach on everything else.” So, in his position as superintendent, he would find ways to make the case less of a distraction such as delegating key tasks to other executive district members such as the Associate Superintendent, Human Resources or the Area Superintendent. And, although these decisions freed him up “to work with the system”, he needed to be “right with it as well”, because this case was so big. It was also important to him to ensure that students were not “caught in the middle” or “compromised as a result of the policy decisions that a board makes, or that families aren’t compromised as a result of capricious actions in the school.”

He viewed his decision-making as a process of constantly reviewing where they were, and where they were going, and trying to anticipate what they needed to do next.

In terms of his values, Renihan reiterated that he viewed parents as the first educators – “the prime educators at this stage in the development of children” – and he wouldn’t “dream of disenfranchising parents.” As a result, he and district staff spent a long time on the ‘opting out’ provision for students (for that part of the family life curriculum), and how it could be used as an option for those parents who requested it.

Within the school district, Renihan was confident that the case was “contained” in terms of consistent and carefully worded information being sent out – the Vice Chair of the school board communicated with the public and with media, and Renihan communicated with district staff. However, Renihan saw all the communications that were sent out, even those that went out under the name of the Board. He said they had worked hard in Surrey to help the Board develop a “very clear understanding of the executive function” and so the division of responsibilities was clearly understood by all parties.

Renihan was also aware that as a public figure, sometimes “people want to get in your face” and that he could be a target for challenge. But, as he wryly noted, “the messenger mustn’t become larger than the issue.” Accordingly, any media requests were redirected to a designated spokesperson within the district – someone other than the superintendent.

Given the influence of any message in a highly charged political and emotional case such as *Chamberlain*, Renihan was intentional regarding the respective spheres of responsibility for the superintendent and the board. As he noted, “I think there are kinds of things that superintendents ought to talk about like pedagogy and teaching and learning. That’s what gives them their influence, their credibility and their legitimacy...”

From his perspective, there were things that trustees should talk about, such as the interests of the parents they are elected to represent. Although the superintendent could be seen to be representing the parents as well, most of the time, the superintendent represents the staff – “the people he or she is responsible for” and “the agenda that he shapes with them so that when the superintendent writes or talks, he’s talking to staff. And he does not talk to parents unless it’s about pedagogy and teaching and learning conditions and opportunities and threats to kids.”

**(a) B.C. Supreme Court judicial review**

An application for judicial review of a decision, as in the *Chamberlain* case, proceeds on the basis of affidavit evidence. Unlike a trial, or Human Rights hearing, there are no witnesses called, although parties can be cross-examined on their affidavits (as Renihan and one trustee were), and the case is presented through its pleadings, affidavit evidence, and the lawyers’ arguments and submissions. As a result, it was not necessary for Renihan to attend the proceedings, nor did he choose to. Instead, only the Associate Superintendent of Human Resources and one of the trustees who had been chosen by the board as a representative, attended each day. Renihan believes some the other trustees may have attended sections of the case as well because they were interested, but by not attending, he was able to “get out of that distraction.”

Once the case was underway, with the lawyers taking a lead in its preparation and presentation, it became ‘business as usual’ for Renihan, as superintendent of the district. The

“distraction” of the case was set to one side, and his responsibilities of leading the work of public education continued.

The case was heard over 9 days in the summer of 1998, approximately one year after the board’s decision not to approve Chamberlain’s book request. Madame Justice Saunders rendered her decision on December 16<sup>th</sup> of that same year. After reviewing the extensive affidavit evidence, and eliminating some as inadmissible, she held that the board’s “Books resolution” (as it had come to be called), was contrary to s. 76(1) of the *School Act* and was therefore outside the jurisdiction of the board. The resolution was quashed, but rather than making an order compelling the board to approve the books as requested by the petitioners, she remitted the matter back to the board for consideration in accordance with her reasons for judgment.

In her judgment, she quoted Renihan as giving an accurate description of the books when he said, “that there are alternative family models, that these family models include models which (sic) same-sex parents, that these ought to be valued in the same way as other family models, that they are peopled by caring, thoughtful, intelligent, loving people who do give the same warmth and love and respect that other families do” (B.C. Supreme Court judgment, para. 98). She noted as well that in cross-examination on his affidavit, he testified that, “he had questions regarding the age appropriateness of the concepts in the books” but that it was clear from the record “that he did not recommend that the books not be approved” (B.C. Supreme Court, para. 88).

There were two board resolutions in dispute at the hearing for judicial review – the first one being the GALE resource list. Regarding this resolution, the judge held that the school board had no jurisdiction to disapprove teachers’ reference material, which the board had done with the GALE resource list. She found that resolution unclear, and held that the board had failed to take into account “highly relevant considerations” such as consideration of the resources themselves on the list, or further, the educational value of such resources.

Regarding the second board resolution – the “Books resolution” – after reviewing the history of public education in B.C. as a non-denominational publicly supported school system, Madame Justice Saunders held that “by giving significant weight to personal or parental

concern that the books would conflict with religious views, the Board made a decision significantly influenced by religious considerations, contrary to the requirement in s.76 (1) that schools be “conducted on strictly secular...principles” (B.C. Supreme Court, para. 95).

The case was now characterized as “book banning”. As Renihan noted, the board’s resolution had not “banned” the books, but instead had restricted their use as direct instructional resources for students in Kindergarten and Grade one. The books could be, and were, in the school library and could also be used by teachers for their own use although as Renihan recalls, few teachers actually used the books. But it was too late - the “book banning” label had stuck, and as Renihan noted, the specifics of the case were lost on the media and “...we could never win that battle – no matter how hard we tried to present the case.”

The legal decision was received and reviewed by the board of trustees, and the district executive, and following legal advice, the board decided to appeal the decision.

**(b) B.C. Court of Appeal decision**

Once the appeal was initiated, Renihan said that work was “business as usual” in the district. His recollection is that “things were getting quieter in our lives now” and the issue and legal action became “just a side bar.”

However, costs were climbing and that was a “worry” for him. From his perspective, it was “no accident” that the case happened in Surrey – it was the place “to push it out” – and his district was arguing the issue as a precedent for the entire province and country.

By June 2000, the district reported through a newsletter to parents that it had been compelled to spend nearly \$800,000.00 in its defence to date. The district had applied to the Schools Protection Program, the insurance program for school districts that was administered by the provincial government, but had not been successful in persuading the government to cover the costs of litigation to date. As Renihan recalls the documentation and negotiation with the provincial government “went on for ages.” Ultimately, the district was unsuccessful in its application for financial support from the government for the cost of the litigation of this case.



On June 21, 2000, a newsletter insert was sent out to all schools and their students through the district office entitled “B.C. Court of Appeal: Surrey School District and the “Three Books” Update.” This insert described the background to the case and the board’s decision, at their meeting on January 11<sup>th</sup>, 1999, to appeal the decision of Madame Justice Saunders. It also said that, “To our knowledge, the three books have not been approved for classroom use by any other BC School Board”, and clarified that the Board had not prohibited the placement of the books in school libraries and that, in fact, it had permitted schools to acquire the books for the use of parents and teachers.

The appeal was based on law only, as there was no appeal from the evidentiary issues. The legal issue was the correct interpretation of sections 76(1) and (2) of the *School Act*, and as the Mr. Justice McKenzie noted, included “three formidable questions of interpretation. What is the relationship of religion to morality in the public schools? What is the meaning of “strictly secular” in its context? What is the “highest morality” that must be inculcated?” (B.C. Court of Appeal judgment, para. 2)

Noting the irony of a legal battle over the issue of how to convey the value of loving and caring family relationships, the Court recognized that although the case was an “adult confrontation”, because it involved parents, teachers, and the school board that “...children would inevitably be drawn in” (B.C. Court of Appeal judgment, para. 59).

In its decision, the Court of Appeal made the distinction between “recommended learning resources” and “library resources”, and noted that all the parties agreed that the resolution was not a blanket prohibition, and that the books could be part of library resources. The Court of Appeal also noted that the parties appeared to agree that issues of sexual orientation do not belong in the K-1 classroom, and accordingly found that the board’s “Three Books resolution” was consistent with that objective and hence within their jurisdiction to make.

The appeal was heard in June 2000 and judgment rendered a few months later on September 20<sup>th</sup>, 2000. As Renihan recalls, “...there was sort of much jubilation around and the board was happy, and then... they appealed it.”

Immediately following the provincial appeal, Renihan sent out a signed memo dated September 25, 2000, to district staff describing the legal situation regarding the books, and including parts of the appellate decision. He confirmed that the three books had always been available to school libraries for teacher use “to amplify or support curricular learning outcomes” and concluded with,

It is my belief and the Board’s that teachers will be reflective in using their professional judgement and will continue to make prudent decisions in their selection and use of both learning and library resources. As always, they will consider the needs of students and their parents.

While awaiting the appeal in the district, it was back to “business as usual.”

And then, two years later, the lawyers for the board, one trustee, and the Director of Human Resources headed off to Ottawa for the hearing of the appeal in the Supreme Court of Canada.

**(c) Supreme Court of Canada decision**

By the time the case reached the Supreme Court of Canada, there were 10 parties intervening, in addition to the petitioners and the respondent school board. These parties represented provincial and federal civil liberty associations, religious groups, conservative groups, and gay groups, adding their voices to the heated moral, social, and legal debate of appropriate family model resources for students in Kindergarten and Grade One.

At the Supreme Court, the only issue before the court was whether the “Books resolution” was valid. The Supreme Court of Canada heard the appeal on June 12<sup>th</sup>, 2002. There was considerable media coverage of the issue, and CBC News reported on the day of the hearing that Warren (a teacher in Coquitlam and one of the petitioners in the case) was using the books in his classroom and that his board didn’t object, and that Surrey was “the only board in the country to have banned the books.” ([www.cbc.ca](http://www.cbc.ca))

On December 20<sup>th</sup>, 2002, the court finally rendered its judgment. Seven justices quashed the board’s resolution and remanded the question of approval of the books to the Board to be “considered according to the criteria laid out in the Board’s own regulation, the curriculum guidelines and the broad principles of tolerance and non-sectarianism underlying the *School*

*Act.* (Supreme Court of Canada judgment, para. 74). Two justices dissented saying that the Board's resolution was within the law.

In part of the majority decision, Madame Justice McLachlin, in writing for the majority of the court, set out a fairly lengthy part of Renihan's evidence and added emphasis as follows:

... I questioned whether the Three Books were appropriate for the Kindergarten and Grade One level. The PP K-7 curriculum refers to family models but does not specifically address homosexuality or same-sex couples. In my view, the Three Books were not necessary to achieve the learning objectives of the PP K-7 curriculum. I was of the view that if the Ministry had intended that homosexuality and/or family models involving same-sex couples be a component of the PP K-7 curriculum for Kindergarten and Grade One, given the contentious and sensitive nature of the topic, such would have been expressly included in the Ministry's PP K-7 Integrated Resource Package ("IRP"). As the Ministry had not specifically included such in the IRP or included any other resources on homosexuality or same-sex couples for K-1, I anticipated that any decision by the District to approve such would be very controversial amongst parents in the District and a decision in this regard must come from the Board as elected representatives of the community. I was also concerned that the right of parents to be the primary educators in the development of attitudes and values of Kindergarten and Grade One children be maintained. I found it difficult to conclude that by approving the Three Books for Kindergarten and Grade One, the school would be providing a supportive role and maintaining a partnership between home and school. [Emphasis added.] (Supreme Court of Canada judgment, para. 47).

She went on to find that "Although the final decision was the Board's and not the Superintendent's, the above passage appears to express the concerns on which the Board relied" and that these concerns revealed a particular interpretation of the *School Act* and the curriculum. Further, she noted that what the Superintendent and the Board did not consider was as telling as what they did consider. (Supreme Court of Canada judgment, para. 47-48).

As a result, the Court found that the Board's decision was unreasonable, that it did not apply the appropriate criteria for book approval, and that it did not consider the relevance of the books to the Ministry learning outcomes. The Court held that the Board failed to act in accordance with the *School Act* and its decision not to approve the books was unreasonable and should be remanded back to the Board to be considered according to "...the criteria laid

out in the Board's own regulation, the curriculum guidelines and the broad principles of tolerance and non-sectarianism underlying the *School Act*" (Supreme Court of Canada judgment, para. 73).

Renihan succinctly summarized his understanding of the Court's decision at the time: "Essentially it all boils down to you didn't follow your own policy. Do it again."

#### **4. Superintendent's perspective after the case**

After the decision, the matter came back to the school district for the board's reconsideration of the books with the court's comments to provide guidance. The board retained its legal counsel to assist them with the process. District staff prepared material and provided some in-service guidance for the trustees to prepare for the book review process again. As Renihan remembers,

So we got copies of books for everyone. They (the trustees) read the books again. We all read them again. And they wrote their evaluation of the books which culminated in their decision. And that's when we got into the business and the board decided (for pedagogical and other considerations, in keeping with the dictates of the Supreme Court and their own policy) to not approve the particular books under review. Instead, the Board directed administration to get other books, alternative resources that would better meet the requirements of the curriculum...

As Renihan acknowledged, "without putting too fine a point on it, we were a bit more diligent about going out there and getting books."

The district also organized an open forum over two nights on behalf of the trustees and contacted all the people who had appeared at the first board meeting in which the books were not approved. As Renihan recalls, people just came "out of the woodwork" – and not just from Surrey, but from Abbotsford, and North Vancouver, and other suburbs of Vancouver. There were more insults and rudeness spewed out by some of the participants and it lasted over two evenings. As Renihan remembers, "it was awful...a deeply pathological exercise."

When the dust had settled, and everyone had gone home having had their say in a public forum, the trustees deliberated and finally chose some books for the "family life education" of Kindergarten and Grade One students that portrayed same sex parent families – better

books because there was more choice by this time – and everything settled back to normal. A press release from the district office stated: “The Superintendent of Schools for the Surrey School District has taken steps to have two books depicting same-gender parents placed on the District’s list of recommended resources...” (Press Release dated June 26, 2003) The two books, *Who’s in a Family?* and *A Family Alphabet Book*, were chosen on the advice of the District Standing Advisory Committee for Learning Resources, with an implementation plan to follow to include information and options for parents as outlined by the Ministry.

When I asked Renihan whether the experience of the case had changed anything in the district he replied,

Well, we learned that...you have to be ever so mindful. And I think we’re pretty good looking after policy on policy. We spend a lot of time looking at our policies and reviewing them. And this was one that needed work and we had a major re-haul of this policy, which is much tighter now...

From Renihan’s perspective, part of the review of teaching materials included looking to the Ministry of Education for direction, but as he noted, “They’re not willing to touch this stuff.” As a result, it was important to “get more assertive” about policy development in the district, and be vigilant about ensuring that “boiler plate” components were included.

He also commented more generally on changes in the district:

I think if anything changed in the district there is a heightened awareness of our diversity. And a heightened awareness of the sensitivities around our need to be much more careful about the language that we use to talk about issues, and...our need to be more proactive in engaging those communities so that we can bring potential issues to the surface sooner.

When I asked him if, in hindsight, he would have changed anything regarding his response to the case, he replied no, because the case was “politically inspired” and the timing was right. He did concede only that he might have got legal advice sooner. Overall, however, he viewed his response to the case as “measured”. There was satisfaction in knowing that throughout this entire ordeal, there had been no issues with respect to administration or staff - it was clearly an issue between the trustees and GALE – the rest of the district staff, administrators, teachers, and non-teaching staff were able to continue with their daily work concerning the

education of children in spite of the legal, moral, social, and political challenges presented by the case. In fact, Renihan described the case as one that the trustees were battling – “they wanted to carry that ball” – but from his perspective, that didn’t mean that district staff needed to be on the battlefield (or as he described it, “out there”) as well.

One of the final questions that I asked Renihan was what advice he would give to practicing superintendents who encounter a challenging student issue that has a legal aspect. His response was thoughtful and candid:

...my advice, first of all is to examine your policy. What are your policies telling you? And probably before the event happens, whatever it is, you know...where are you vulnerable? ...Talk to the BCSTA and the Superintendents Association. Look at other people’s policy handbooks and sort of...how you’re covered off in that way. And what ways are you likely to be vulnerable in your district? I mean, in my district I know where we’re going to be vulnerable. We’re going to be vulnerable on issues that reflect that diversity which describes the district and it is fraught with issues. You know, everything from bullying to deep divisive sort of employee relations issues. They’re all there. And the other thing I would say is get close to your legal counsel...and get them involved early. But above all else, I think, it’s be open and be inclusive in how you respond to those kinds of things.

Renihan described himself as being fortunate to be working in a large sophisticated system with support from the gifted, talented, and thoughtful people surrounding him. He believed that if he and his colleagues engaged in discourse on a regular basis, that when it came to the hard issues, they would know how to talk about them – they would be able to “find the language”.

He described the key attributes of leadership for a superintendent facing a similar situation to be

the ability...to recognize the context in which you are in. To be able to read the environment and to be able to define the issue. Because it’s not always apparent...the ability to be able to widen the circle of responsible actors in order to get a handle on this issue, to talk about the issue and find the language to talk about it. I think the ability to be able to trust other people to play pivotal roles like the, Associate Superintendent of Human

Resources, the Area Superintendents, the Directors of Instruction and principals and so on. Being able to trust them and so on...in other words, not getting involved in violating the principle of subsidiarity, the idea that you don't rob someone of their responsibility to do their own job because that's eminently counter-productive. You know, doing other peoples' jobs. And I think the whole issue of being open in terms of communicating information.

Now there's another issue which I think, is tops and that has to do with finding ways to ensure that the focus is always on kids and teaching and learning. That's your first job. And however much of a distraction other issues present, you have to find time to allow teaching and learning to become the pre-ordinate focus.

From his perspective, these are the attributes that span the "relationships of communication", and enable superintendents to do the job of leading their districts in a direction focused on teaching and learning for students, through all the challenges that might arise. This and an ongoing discourse - the "practice" of using language that is thoughtful and intentional to understand other perspectives in the district - the ability of the superintendent and others in the district, to be able to listen attentively, reflect, and communicate in an accurate and fluent manner.

If one accepts that all conflict is relational, then being able to communicate, in a complex and dynamic situation that is comprised of multiple and diverse understandings, requires skill and patience. It is in this space, that the medium of law provides some "translation" as a legitimate and non-violent tool for conflict resolution. Law provides language and process for these interests to be expressed and considered in a forum that is understood and accepted by everyone. The complementary relationship between values and norms and the law is embedded in both language and process, which in turn, create certain understandings. How language and process are used, whether reactively or intentionally, in legal challenges concerning public education issues will be explored in the next chapter.

## **CHAPTER 6 – ANALYSIS OF SUPERINTENDENTS’ UNDERSTANDING AND USE OF LAW**

### **1. Superintendents’ Understanding of Law**

#### **(a) Understanding of Law Generally**

Superintendents are not lawyers, nor are they politicians; however their work appears to require the skills of both. Poised between the politics of accountability to the government and the regulatory policy wishes of school Boards, superintendents require superior communication and interpersonal skills in their leadership of school districts, as well as the ability to act strategically and responsively. They are acutely aware of the growing influence of law in education and its impact on their work. As one superintendent in the pilot interviews noted, “...the parameters of law are becoming more influential...we can’t rely on our gut.... on a day-by-day basis now... (and as a result)... the amount of analysis needs to be more thoughtful, more cautious.”

This analysis considers, in part, the role of communication. Superintendents are ‘communicatively situated’ within the context of their district. Effective communication with trustees, district staff, the Ministry of Education, parents, and the public, is foundational to superintendents’ work. Their ability to hear and understand other perspectives, engage in discourse with others, and think critically and reflectively, influences how they communicate, particularly when faced with an issue that may have a legal aspect.

The research question that guided this study was to describe and interpret how two superintendents in British Columbia responded to challenging “rights” cases in their districts, and to what extent and how, they used law in their communication and decision-making. Their stories of how they understood and met the challenges presented by the issues, which evolved into legal action, in their respective districts, provides some insight into how superintendents approach legal issues, and how they communicate and make decisions when faced with legal action.



The superintendents interviewed for this study, both for the pilot study and the case studies, while not representative of the superintendent population in B.C., do provide perspectives from a wide range of experiences and all of them - with the exception of one - had worked as an assistant superintendent or superintendent for more than 14 years. As a result, they have had the benefit of more experience in that position than the majority of superintendents currently working in B.C.

Almost all of the superintendents interviewed had very little educational law education, and some had none. Once in the position as superintendent however, they all attended seminars or informational sessions put on by legal counsel who practiced in the area of education law, or counsel acting for provincial organizations. If they had taken a law course, it was usually through a master's program, although as one superintendent noted it was "pretty haphazard" whether this would happen as law courses are not required for any degree programs. Some also attended education and law conferences occasionally, such as the annual national conference sponsored by the Canadian Association for the Practical Study of Law in Education ("CAPSLE"), although again attendance appeared sporadic. All superintendents had access to legal periodicals and journals, but they were candid in acknowledging that they did not spend a lot of time reading case reports or summaries simply because they did not have time. One superintendent from the pilot interviews, was fairly blunt in confessing that he did not professionally assign the amount of time and attention to legal developments that he should, and in stating that he believed that "...the majority of the system is playing 'catch up' rather than real preparation for that."

This was a common theme throughout the interviews – the reality of the superintendency is that the position does not afford the time for legal education, other than being briefed by counsel on legal developments as cases occur. And while legal issues are becoming more prevalent in education, they do not comprise the bulk of the superintendents' workday. Perhaps because of this, there was a general awareness of unfamiliarity with the law, which was expressed by one superintendent from the pilot interviews in the following manner:

...if I were re-winding the film on my own professional development, my preparation and professional development, I would say that I would benefit...from much more of a grounding and again therefore informed

frame mind...for the place of law and the how and when of law in relation to issues.

However, the professional preparation of superintendents is not the focus of this study, and is described here simply as part of the context – to sketch a general understanding of the scope of their legal knowledge - not to evaluate or assess such knowledge.

Although these superintendents indirectly acknowledged the benefit of more legal knowledge for their work, they all spoke to the benefit of experience and how, with time, they had become more adept at recognizing and dealing with issues that had a legal aspect. Even given the advantage of experience, however, there was a collective sense that there was still a fairly high level of dependence on legal counsel for interpretation, advice, and direction in any legal or quasi-legal matter. As one superintendent from the pilot interviews noted, although he had picked things up ‘along the way’, the practical reality is that, “the *School Act* is as much as most people can handle let alone delving into case law.”

Overall, the superintendents’ understanding of the law was quite general, and seemed to be viewed as a system external to the district’s work. The volume and complexity of law coupled with the lack of time seemed to place law in a ‘side bar’ category that was acknowledged as important, but, required the frequent and ongoing support of outside legal expertise.

Several of the superintendents described their understanding and use of law as ‘strategic’ and ‘instrumental’ suggesting a result-oriented approach which would be consistent with the responsibilities and expectations of their position. They were very familiar with district policy and when faced with an issue, would use such policy to provide guiding principles or a process for resolution. Their experience provided them with the ability to determine what was needed in a particular context – whether it was routine management and policy implementation, or whether it went beyond “everyday stuff” and had a ‘rights’ or entitlement aspect. In these cases, there was a readiness to engage legal advice, particularly if the matter appeared to have a legal aspect.

**(b) Understanding of Law in *Jubran and Chamberlain***

**(i) *Jubran***

The superintendent's understanding of the law in *Jubran* was the result of collaboration with others in the district, and was eminently practical; there was a bullying problem at one of his high schools and the Code of Conduct set out behavioural expectations and consequences for breach of Code requirements. There was no evidence that Azmi Jubran was being bullied because he was a homosexual – he did not identify himself as a homosexual and the bullying students said they didn't perceive him to be a homosexual – therefore the bullying had nothing to do with his sexual orientation. The school's Code of Conduct had been developed in accordance with the *School Act* and Board policy, and although sexual orientation was not specifically mentioned, the superintendent understood it to be broad enough to cover this (B.C. Court of Appeal decision, paras. 70 – 73).

He described the Code of Conduct as law - “due process” - which was an immediate and practical procedural response to the bullying problem by managing student behaviour. He also viewed the Code of Conduct as part of the “social, legal, policy framework of the school district” situating law more generally as part of the norms and rules that constituted the district culture and direction.

The characterization of the problem as “discrimination” came as a surprise because sexual orientation was not part of the problem experienced by the student at school and therefore had never been defined by the superintendent or his colleagues in that way. There was no evidence of discriminatory behaviour by the school and it was only the other students' use of homophobic language in their taunting that provided grounds for a complaint pursuant to the *Human Rights Code*.

Once the complaint was laid with the Human Rights Commission however, the superintendent acknowledged that the district staff began to look at their practices regarding sexual orientation generally as well as “intensifying” their efforts with respect to the specific reported incidents of bullying. His understanding of law therefore was oriented to practice and the implementation of safe school initiatives for all students – a practical and action oriented approach.

## **(ii) Chamberlain**

For the superintendent in this case, his understanding of law included the *Charter of Rights and Freedoms* (“*Charter*”), provincial legislation, and case law, which taken together, he viewed as being the “fulcrum of policy”. He often brought case law to management group meetings as a tool for discussion, education, and to “reflect” the law in district policy. In the *Chamberlain* case, his understanding of law (as in *Jubran*) was the result of collaboration with colleagues within the district. The characterization of the issue was crucial here, as it was in *Jubran* – in fact, in both cases, the issue was characterized differently by external legal process and forums than it was within the district. In the *Chamberlain* case, the superintendent looked to the *School Act* and the legislative requirement for secular education, but finding it “less than helpful” for the circumstances, characterized the issue as the parents’ right to choose, as opposed to religious influence.

His understanding of law was practical as well, because he recognized the importance of following the procedure laid out in policy, but the politics of the case accelerated and distorted the process. The result was that the superintendent and his staff were thrust into managing process, and their understanding of law became focused on the practical ramifications of the trustees’ decision not to approve the books.

## **2. Superintendents’ Use of Law**

### **(a) Use of Law Generally**

The superintendents interviewed for this study (in both the cases studies and the pilot interviews), did not approach issues from a legal perspective or framework even if they were aware that the issue had a legal aspect. As one superintendent from the pilot interviews noted,

I think our first reaction is to see things inside a framework of common sense and shared values and to filter the situation through that, through those lenses, and one of the challenges that we have is that those lenses are no longer sufficient...We’re not in a power relationship where the system is simply to say, “Yes sir” or “Yes ma’am” because the superintendent says so. We’re in a litigious environment...where rights and responsibilities aren’t necessarily well balanced...We’re looking at things through...multiple lenses now.

This wider perspective that considers the social, political, educational, and legal aspects of educational leadership work was common to the six superintendents interviewed. As well, it was noted that legal issues hardly ever arrive “pre-packaged and fully articulated”. Instead, it would be far more common for a superintendent to get “pieces of the situation” and to be a “player” in the unfolding scenario, as well as having responsibilities to provide advice and to lead. This dual role as a “player” and as a decision-maker holds the potential for inherent conflict between the position of superintendency and the personal values of the superintendent.

Throughout most of the interviews there was the growing recognition that there has been a shift over the last 25- 30 years in how superintendents communicate and make decisions. This is a change in culture. For example, the past was described in the pilot interviews as a time of “power, influence, and deal-making.” It was a time when “...the deal making that went on was just to keep a lid on things and keep it quiet.” It was a time of “...influence peddling and massaging things past the bumpy spots.”

However, there was a sense that this type of leadership is increasingly ineffective (and possibly even negligent) and that issues need to be handled differently including a wider perspective, less reliance on positional power, and employing processes that are transparent, fair and just. In addition, there was also a recognition that any discussions that may occur, or documents that may be created, could resurface later as evidence against the district in legal proceedings either in a sworn affidavit or through a witness’ testimony – appropriately and realistically described by one superintendent as the “...artifacts of ...what you did and what you said.”

Past leadership practices of ‘keeping things quiet’ or shuffling problems away from the district are no longer feasible given the increasing influence of law and rights. As one superintendent from the pilot interviews explained, “Nothing goes away anymore. We can deal with it in a way that addresses your needs and our system needs and so on without it becoming overly formal, but ‘make it go away’ isn’t any of the options anymore.”

Given this shift, the question was then posed by one superintendent as, “...so how do we manage it (an issue) in a way that is completely transparent, above-board, and that isn’t going

to embarrass us, or come back?” How can superintendents continue to be effective and efficient leaders in a time of increasing legal regulation, accountability, and legal rights? This analysis will suggest that the answer may lie in a different understanding of law and communicative practices; a different understanding that will effect a change in orientation, and lead to procedures that facilitate these practices

Such a change in orientation seems necessary, as it does not appear as though decisions can be made, as they were in the past, based solely on common sense. In several interviews there was some frustration expressed that instead of using ‘common sense’ to make a decision about what was “educationally best” for the student, or the school community, that law and legal requirements were “shaping decisions.” It is no longer a question of deciding what is best for everyone, without being aware of “some touchstones” that may be inconsistent with ‘common sense’. The increasing complexity of decision-making arises in situations where there is a common sense solution or a response that seems morally right, but the requirements of the law demand more. Examples that were offered by some of the superintendents included legislation prescribing class sizes and the integration of special needs students.

As well, there was a recognition that decision-making now requires “attention to law” and that superintendents must attempt “...to reach a set of circumstances that allow for the best decisions to be made within the bounds of the law.”

Education law is generally recognized as an “evolving field”, particularly since power and influence based on position are diminishing, however a heightened awareness and understanding of the law may not be enough, or even practically feasible, given the responsibilities and the pace of the superintendency.

If more legal knowledge is not possible, how can superintendents continue to lead effectively? And even if the legal knowledge of superintendents is augmented, as one superintendent from the pilot interviews noted, each case at law is unique and will never be replicated so, “...how do we as education leaders develop a resource that’s going to allow us to scan and identify and zero in on some of the key issues as we deal with situations that are new?”

Part of the answer which emerged through the responses of the superintendents themselves seems to be through collaboration and communication. This was described as using ‘people skills’ and taking the time to understand and analyze the issue. A cooperative orientation to problem solving as opposed to adversarial positioning because, “...as a superintendent, often part of your task is making sure you’ve got the right people working with you, not against you...and that speaks to the culture before these incidents arose...”

When asked about advice for other superintendents, one of the most experienced superintendents from the pilot interviews offered this suggestion:

I think the ability to step back and sense where this might go. You know, we tend to live in such a tight sort of schedule day and need to deal quickly with decisions at a fanatic pace and you need that time to have thoughtful reflection before you conclude. Do you have a mental process you use to systematically analyze the situation you are dealing with...an ethical frame...?

That this may be a helpful approach was confirmed by the experiences of another superintendent from the pilot interviews regarding a difficult legal issue, in which he was able to say looking back after the fact, that “...none of us stopped long enough to really deal with it...” - in part because they were dealing with the “heavy, heavy pressure” of budget balancing. These types of pressures (which abound in school districts), conspire to restrict the time required to gather alternate viewpoints and resources, and to make an informed decision.

Recently, professional education workshops for superintendents in British Columbia regarding ethical decision-making have provided some superintendents with a “fundamental change in orientation” away from managing issues “reactively” to a more reflective, value-based approach to decision-making. This provides another lens for understanding and managing difficult issues, but it is suggested that such an analysis must still be made within the legal framework.

There was also a general recognition that the superintendent has more influence while the issue is developing within the district. As one superintendent noted, “I think the superintendent, the leader, is able to exercise more influence before all of the formalities

impose themselves”. This may be stating the obvious, but it does provide a certain understanding of how an “issue” may be managed within the district before it becomes a “case” outside the district, when there is significantly less opportunity for collaboration and informal resolution.

**(b) Use of the Law in *Jubran* and *Chamberlain***

In both cases, the use of the law was directly related to how the superintendent, in consultation with other district administrators, interpreted the issue. For example, in the *Jubran* case, the student was being bullied so the district’s legal power to discipline, through the school’s Code of Conduct, was applied. In *Chamberlain*, the superintendent and the Board interpreted the issue as the parent’s right to choose family models for 5 and 6 year old children. Although the applicable law – the book approval policy – was foreshortened by Board politics, the process for final approval would still have arrived at the Board table eventually. The only difference may have been more time and consultation with parents and district staff.

The law was used practically and expediently in both cases for the problem at hand. And once the superintendents’ had arrived at an interpretation of the law for that situation, the implementation of process - “due process” - figured prominently in both districts for resolution of the problem. In *Jubran*, the in-school discipline process was the law (as outlined in district policy and the school Code of Conduct) used by school administrators to manage and correct student behaviour. Similarly, in *Chamberlain*, the district policy for book approval, although “accelerated” by the trustees, was the legal process for resolving the conflict emerging in the district.

In both cases as well, there was a point at which the superintendent had significantly more influence regarding resolution of the issue, that point being the initiation of formal legal proceedings. Once proceedings were initiated, both superintendents acknowledged the secondary nature of their role, and described their involvement being described as a “footnote” or a “side bar”. Although they continued to lead the district in terms of providing information about the case to district staff, their own involvement in the case was restricted substantially as the management of the case was conducted exclusively by the lawyers. They



provided evidence on behalf of the district as required, but seemed content to be able to pass this “distraction” over to legal counsel, and carry on with the educational work of the district.

### **3. Superintendents’ Advice from the Case Studies**

When asked what advice they would give to practicing superintendents who encountered a challenging student issue with a legal aspect, the superintendent from the *Jubran* case said, among other things, to “address it collaboratively, address it from a variety of strategies...be very solution oriented. When you see problems, just address them. Involve people and address them. Be very clear on expectations, be very clear on supports.” This speaks to a culture of collaboration that maximizes its resources and strengths through communication and process.

Similarly, in the *Chamberlain* case, when asked about the key attributes of leadership for a superintendent facing a similar case, the superintendent replied that besides the ability to recognize the context, read the environment, and define the issue, “...the ability to widen the circle of responsible actors in order to get a handle on this issue, to talk about the issue and to find the language to talk about it.” This speaks to the creation of opportunities and abilities to communicate thoughtfully and collaboratively.

Because, as he noted, “...if we have engaged in discourse and we continue practicing that when it comes to the hard issues we know how to talk about them. And we can find the language.”

The advice from both these superintendents suggests that a dual orientation in communication is necessary – an orientation that is both strategic and oriented to understanding, together with processes that facilitate collaborative participation.

Leadership practices that encourage “finding the language” and developing processes that promote participation and trust, prepare district staff for the “hard issues”. The philosophies and practices of mediation and restorative justice used in young offender and family law may be useful to superintendents who are dealing with student issues that have a legal aspect. At a minimum, they offer a range of communication skills and an orientation to conflict, which is consistent with the philosophies and culture of public education.

The understandings and use of the law as described in the cases above are unique to their particular contexts. By examining these cases through the lens of different theoretical perspectives, it may be possible however to gain a greater understanding of some of the communicative and professional practices of the superintendents interviewed for this study, and how theory may be used to understand and potentially enhance practice. The next chapter will look at how the theoretical perspectives of Jurgen Habermas, law and society, and alternative dispute resolution practices may apply to the communication and decision making of superintendents, particularly given their role as mediators of competing positions and interests.

## **CHAPTER 7: THEORETICAL APPLICATIONS AND IMPLICATIONS FOR POLICY AND PRACTICE**

This chapter returns to the theoretical perspectives which were outlined in Chapter 2 as alternative ways to understand how law may be influencing the communication and decision-making of superintendents, both in the *Jubran* and *Chamberlain* cases, and more generally. All of these theoretical perspectives focus on the communicative and constitutive properties of law, and how law influences personal understandings and social interactions in both discrete and obvious ways. These theories also accommodate the tensions inherent in any complex organization such as public education through competing concepts of systems theory versus personal relationships, administrative efficiency and accountability versus inclusive caring communities of understanding and finally, formal and informal participatory processes. This chapter applies these theoretical perspectives to the case studies described in this dissertation and suggests that superintendents need to balance instrumental action as well as communicative skills and processes for understanding. Additionally, given that superintendents' work is changing, the 'pull' of imperatives from the "system" may need to be consciously balanced with communication and decision-making that is inclusive, ethical, and legal. This suggests that there may be a role for alternative dispute resolution practices and skills such as those found in mediation and restorative justice which emphasize relationships and the importance of communication for understanding.

### **1. Theoretical Applications**

#### **(a) The communicative and legal theories of Jurgen Habermas**

The communicative action theory of Habermas provides an alternative perspective for understanding the influence of law on the communication and decision-making of the superintendents in these case studies. Habermas identified two worlds in his theoretical framework – the 'lifeworld', which is our common context, comprised of social, cultural, linguistic and moral knowledge fundamental to living together, and the 'system' which is comprised of economic and administrative subsystems. Although this theoretical framework has been criticized, it is helpful in the sense that it provides contrasting perspectives for

understanding the complexities of public education. It also provides one means of explaining the inherent tensions in public education where the imperatives of the system often appear to be infringing on the social and normative aspects of the lifeworld.

For example, the theory of these two viewpoints and their respective orientations was implicit in the response of one experienced superintendent from the pilot interviews who commented:

We're all working out of the tyranny of the urgent...but it's also a matter of basic orientation. As a profession, even though it's decades old now, we really are still in a certain amount of transition from the highly sanctioned and therefore highly deferred-to institutional authority from the 50's, let's say, and a certain amount in the 60's, to be highly publicly responsible and accountable...in a very complicated way....So I don't know that the basic orientation to the role has caught up with that.

The transition from the “institutional authority” of the past to the public responsibilities of the present suggests a “system” outcome that is dependent on both a “lifeworld” and a “system” perspective. The ability to communicate and reach understanding requires a ‘macro’ view of the system and its political and economic realities, as well as the creation of opportunities to communicate for understanding through an orientation to the “lifeworld”. In public education, this kind of communication relies on institutional support through its culture and process, both of which are within the domain and influence of the superintendent as leader of the district.

For example, in the *Chamberlain* case, the superintendent was well aware of the political and economic factors of the situation – politically, a very conservative Board versus gay activists and a liberal government; and financially, the costly prospect of protracted legal proceedings. He was also aware of the importance of communicative action – the need for a forum within the district for senior administrators to meet regularly in order to talk “frankly and openly.” He believed that as a leader it was his responsibility to provide these opportunities to ‘find the language’, and ‘frame’ the issues.

Hence, a theory that provides an awareness of one’s orientation to communication – whether for understanding or strategic purposes - as well as a concept of law and process for

facilitating opportunities for communicative action within the district, is applicable to the work of the superintendents interviewed for this study. In their own words, the need to “look through multiple lenses,” or, to “stop long enough” to deal with an issue, is the practical reality of superintendents’ work today. Because “nothing goes away anymore” superintendents are increasingly faced with communicating for understanding in order to accommodate the diversity of interests within their districts, and the expectations of the law in their communication and decision-making.

The communicative aspects of superintendents’ work, particularly in the case studies described in this dissertation, often arise from law – either from an explicit rule or policy, or more generally from procedural and organizational understandings of what is “right” and what is “legal”. The socially integrative function of law as described by Habermas in his theory of law as a mediator between norms and facts complements the philosophies of the alternative restorative justice practices, which have mushroomed in the last 20 years. This perspective expands the role and purpose of law as more than an external system of rules and characterizes law as a flexible medium that offers both process and understandings that are accepted as legitimate because of law’s participatory and democratic genesis. Additionally, because law combines moral norms with sanctions, it allows for collective understanding and action, and offers a process for resolving conflicts based on diverse value-based positions which may be incapable of being resolved by ethical considerations alone.

Using law and particularly the range of alternative conflict resolution processes that have evolved within, or beside, the legal system may enhance opportunities for resolution of challenging issues. For example, the processes used in mediation and restorative justice provide an approach to problem solving that is a natural orientation for superintendents given their inherent communicative and collaborative skills as education leaders. Both superintendents in the case studies set out in this dissertation, described the collaborative nature of their work for understanding issues and for communicating about the district’s position in the legal process. This collaborative orientation was also described in one of the pilot interviews in response to a question about decision-making:

...very rarely, in my experience...was it just me...I’d be talking to other senior staff, I’d be talking to lawyers, I’d be talking to the

Ministry...they'd be involved if not officially, at least peripherally, and they would be helping me shape my perspective and also what I took to the Board...so there's a lot more people involved, even at the initial stages...

This is communication oriented to understanding – communicative action, which can be used strategically when appropriate.

Law is useful to superintendents both substantively and procedurally. Applying Habermas' procedural paradigm of law, and the socially mediating influence of law between facts (what is) and norms (what ought to be), law provides a substantive framework for generally described legal boundaries (eg. such as the requirement in the *School Act* for secular education), as well as a legitimate process for communicating and resolving conflict. It is a legal framework of knowledge, as well as a process for conflict resolution, which can be used by superintendents to enhance understanding and provide legitimacy to their communications and decision-making.

**(b) Theory from Law and Society**

It is suggested that law may be more ubiquitous in education than acknowledged because it creates, names, and influences all formal relationships in every school district, and provides much of the language, rules, and processes for how public education is interpreted, understood, and delivered. It is an expression of values and culture, both of which are fundamental aspects of public education. Law and society scholarship characterizes law as both instrumental and constitutive – that it is instrumental through its regulation of social action by rules, but that it is also constitutive because it creates collective understandings and practices. As public education is inherently social, theory from this area provides another useful conceptual framework for looking at the influence of law in superintendents' work, particularly when a challenging and difficult issue arises within a school district

For example, in the *Jubran* and *Chamberlain* cases, both superintendents, (and indeed all the affected parties), would not have known with any certainty at the outset how the law would be interpreted by the courts. There are no certainties in law given the complexity of the legal system and the ongoing dynamics between parties within the system through the formal and informal processes of negotiation, discovery, and court hearings. In the *Jubran* and

*Chamberlain* cases, the superintendents' communication and decision making was based on their understanding of the problem, which - in both cases - was influenced by their characterization of the problem: bullying in the *Jubran* case; and, the family's right to choose, in the *Chamberlain* case. The superintendents' understandings were constructed collaboratively, with other district administrators, and each had a fundamental legal aspect - both substantively and procedurally - whether overtly acknowledged or not. For example, substantively, the 'problem' in each case study concerned "rights" - the student's right to be safe at school in the *Jubran* case, and the competing rights of the parents' to be the primary educators of their children, and teacher use of same sex resources in an elementary curriculum. And, "rights" are embedded both in law and in our moral consciousness. Procedurally, in both cases the superintendents made their decisions in accordance with district policy which was an initial touchstone for both - what did the policy say about student harassment in *Jubran*, or curriculum requests in *Chamberlain*? Seen from this perspective, law is an integral part of education because it 'constitutes' behaviour and expectations through the language of district policy - policy which operates as quasi-law within the district because the authority for the Board to make policy comes from statute law, (in B.C. the *School Act*), and the constitutional right of the province to make law in relation to education. The legal aspects of policy are also apparent in the need for such policy to be consistent with provincial and constitutional "rights" law, so as to avoid any legal challenges to its validity.

Law has also been described as a "bridge" - something created by social demand (or need) that once in place exerts influence on behaviour and attitudes, again a constitutive approach to understanding the impact of law. This influence, through the legal system, can also be viewed as an expression of power within society (Friedman, 2004). In both the *Chamberlain* and *Jubran* cases, law as an expression of power was evident in the evolution of the cases - once Mr. Jubran and Mr. Chamberlain initiated legal action there was a significant shift in the amount of influence the district could exert over the 'problem'. The problem became a "case" and the locus of control moved outside the district to legal counsel and the judicial process. Both superintendents acknowledged that once legal action was started, their role was substantially diminished and they were essentially just managing information regarding

the case within the district as it moved into the judicial system through processes which were completely outside the districts' sphere of influence.

Law and society theory suggests that because law is interwoven with norms in ordinary practice, it constitutes our understandings and actions. Law is also instrumental because it is part of a system of rules and sanctions which compel certain behaviour. These twin aspects of law were evident in the *Jubran* and *Chamberlain* cases, in which law appeared to function both instrumentally and constitutively.

For example, in *Jubran*, the instrumental use of law was evident in the remedies sought by both the complainant and the Deputy Chief Commissioner: the student, Azmi Jubran, asked for monetary compensation of over \$100,000.00 (among other remedies), and the Deputy Chief Commissioner asked for educational/social change through a comprehensive strategy within the district to deal with harassment and discrimination. Both parties were using law instrumentally to compel compensation and change.

In the same case, but from a constitutive perspective however, the interpretation of law by the Human Rights Tribunal within the Handsworth Secondary context resulted in new understandings – the ever-widening scope of “rights” law in education to include student use of homophobic language. And, these new understandings preceded instrumental action by the district including the employment of a ‘safe schools coordinator’ who reported directly to the superintendent and a specific district policy on homophobia (North Vancouver Policy No. 412).

In *Chamberlain*, the instrumental use of law was more overt given the political (and presumably financial) support of GALE, and the resistance of the Board, through its decision-making process, to not approve the same-sex parent books for Kindergarten and Grade One use. The constitutive aspect of law was apparent in the eventual Board approval of new curriculum resources for the district, which included same sex family models.

In both cases, law was used as a tool to change understandings and culture regarding sexual orientation in schools. And, in both these cases, law created new practices and



understandings in education for these two school districts, and for other school districts in Canada.

The social science perspective of law sees law and common understandings interacting in a dynamic process that is mutually defining. In education, administrators are constantly interpreting law using their experience, common sense, and ethical compass, for application within their own context. This was done in both the case studies described in this dissertation.

For example, in the *Jubran* case, the superintendent did not view the students' bullying as a legal problem, until it became the grounds for initiating a legal process. The practical effect of the students' actions demanded a practical and immediate response, which came from the disciplinary authority accorded through the school's Code of Conduct. It was a response to stop the bullying and harassment that was occurring at the school. The superintendent in this case explained that they didn't think of it as a 'rights' issue at the time. He thought about law in terms of process – the appropriate procedural requirements for administrative discipline action. And, he thought about school culture - providing a safe and educational environment for students, and teaching social responsibility. Although he did not think about 'rights' law because it was not obviously a 'rights' case, clearly the law applied both procedurally and substantively, to the bullying problem within the school district (although the scope of the law's application would not be known definitively until all the legal appeals had been exhausted).

The advantage of the law and society perspective is that it provides a broader view of how law may be impacting schools and districts (as a part of 'everyday life'), and influencing understandings and actions on an ongoing basis. For example, Engel describes four aspects of the processes by which social "domains" or common understandings are continually constructed using law and common sense (Engel, 1995). The first is the "actors" who are defined by their role, status and personal qualities – in this case study, the superintendents whose roles and responsibilities are defined broadly by the *School Act* and then interpreted by district staff, trustees, parents, Ministry staff, and the superintendent themselves.

The second aspect is “space and time”, and Engel notes that school programs are shaped by the educational cycles required by law – the school year with its temporal subdivisions of months, days, and classes inevitably shape identities and activities within the domain, and are closely connected to legal concepts such as rights and responsibilities (Engel, 1995, p. 130).

Given the current scope and torrid pace of delivering public education, these “constructs” are generally accepted as given, and are not considered as a means in which law is fundamentally shaping identities and relationships within the school system.

For example, in the *Jubran* case, the bullying regularly spilled outside the school’s “domain” and sometimes involved police, if the bullying occurred off school property and outside school hours. However, as the superintendent in that case noted, there seemed to be a police expectation that if the students were of school age, then it was a school responsibility, regardless of where the bullying occurred. This raises the question why is there this enormous expectation of schools to control behaviour outside their jurisdiction or mandate, and is law an influence in creating this expectation? From the North Vancouver superintendent’s perspective, it was frustrating to be held accountable for student action outside the jurisdiction of the school, and as he questioned, “When does something, behaviour like that, get beyond the capacity of the school...?”

In the *Chamberlain* case, time was a factor. The trustees accelerated the approval process for the books, because the issue of same sex parent books in Kindergarten and Grade One was receiving some public attention in Surrey. As representatives of the community, the trustees made a decision that provided a cause of action for the plaintiffs.

The remaining two ways in which common understandings are shaped by law and common sense are “community”, including understandings of inclusion and exclusion, shared values and purpose, and “norms” – the normative expectations that shape behaviour and communication within the school system. Engel uses special education to demonstrate how education law and school life converge to form the identity and social status of disabled children – how a student must first be characterized as “abnormal” according to legal language before he or she may access resources for a normalized social identity (Engel, 1995).

From this perspective, law is more than process – law is an integral part of how school systems are constructed, how those involved with the school system understand themselves and others, and how they interact within the system. From a practical perspective, these perspectives widen our understanding of how law may be shaping the understandings of school superintendents not only from the large cases, such as *Jubran* and *Chamberlain*, but also from the myriad of ways that law influences the roles and responsibilities of superintendents within the school system.

From the law and society perspectives, law is more than external prescriptions and processes – it is an integral part of public education and helps shape the social and cultural context of schools and districts. Whether law is seen as instrumental or constitutive, law directs and regulates social action and relationships (Galligan, 2007). We teach, learn, and live, collectively, within or under the influence of the law.

The understandings of superintendents are constructed within the social and institutional context of public education, and it is suggested that the influence of law on their understandings prior to the initiation of legal action may be more significant than acknowledged.

### **(c) Theory and Practice from Mediation and Restorative Justice**

As district leaders, superintendents are well aware of the power and influence of the concept of community. Community is built by the construction of shared understandings between people - and understandings are articulated through communication with others. Both superintendents in this case study spoke of a collaborative culture for shaping understanding and decision-making in their districts. Their discussions regarding the issues, both before and after the issues became legal “cases”, were frequently with other senior administrators and in the interviews for this study both superintendents almost exclusively used the plural “we” when talking about their decision-making. This implies that these superintendents viewed themselves as part of a group – a community – and that their own understandings and decision-making were developed collaboratively with others. For example, the superintendent in *Jubran* specifically mentioned that he worked as part of “a team” and that there was a “unity of purpose” with his colleagues. When the issue arose, he said, “we were

looking at it as a problem and **we** were working together and doing everything **we** could to solve this problem” (emphasis added).

Additionally, both superintendents talked about language and how they understood and managed the issues before legal action was initiated. It was in this period, before the issue became a formal “case” that the influence of language was within the superintendent’s domain – the language that was chosen to describe or frame the issue may have determined how others perceived and reacted to it. The superintendent in the *Chamberlain* case underlined this influence when he commented that, “We’ve got to find the language to talk about such stuff...the right language...the measured language.”

Finding the ‘right language’ may also determine the type of process that is used for resolution of the issue. How the issue is characterized by leadership in the district may be influential in determining how the issue will be addressed within the district, and the type of communication there will be about the issue. And sometimes, the language will necessarily change because of events beyond the control of the district. For example, in the *Jubran* case, although the district continued to work towards eradicating bullying behaviour, once the Human Rights complaint was laid, it also started to look at homophobic language in the school. However, as noted by the superintendent when the issue was being dealt with solely within the district, it was never viewed as a discrimination issue because the student was not homosexual. In the superintendent’s words, it was never “...addressed as a problem that way...” because, it was never “...defined as a problem that way...”

The increasing importance of communication skills has been acknowledged both in literature and professional work (B.C. School Superintendents Association, 1998; Kowalski, 2005). For example, the B.C. School Superintendents Association *Dimensions of Practice*, which was adapted from the American Association of School Administrators Professional Standards, includes the ability to “...demonstrate consensus-building and conflict mediation” and the use of “...communication skills to strengthen community support...” (B.C. School Superintendents Association, 1998, p.2). As well, the 2000 Study of the American School Superintendency underlined the role of excellent communication skills in building relationships with boards and community groups (Glass, Bjork, & Brunner, 2000).

Several of the superintendents interviewed for the pilot of this study confirmed this evolution in the leadership role of superintendents. They identified a shift from positional and hierarchical power as superintendent – described by one as a time of “deal making” and “influence peddling” - to a time of facilitation and mediation based on developing more understanding regarding issues and interests, and more extensive collaboration. This reflects a change in culture, which is also evident in the legal system with increasing opportunities for alternative dispute resolution such as mediation and collaborative law practices, particularly in the family law arena. The area that is most noticeable however in public education is that of restorative justice, and conference circles, which are used as alternatives to traditional and more penal, disciplinary measures for students.

The process for these conferences reflects an orientation toward communication for understanding, which is constructed through a collective approach. Restorative justice conferences that involve youth typically bring together the young offender, his or her parents, and any supporters the offender chooses to include, the ‘victim’, together with his or her supporters, and depending on the circumstances of the conference there may be a community member as well (in one conference I facilitated, this community member was a representative of the student council as the offence had occurred within the school). The conference itself brings the parties together to sit facing each other in a circle, without any furniture (such as a table) between the parties. This physical format appears to contribute to a more open and affective discussion. The circumstances of the offence and how it affected others is recounted by each party through the use of open-ended questions posed by the conference facilitator - questions which are usually scripted for consistency. Once the story of the offence is told from the various perspectives, the parties are invited to make suggestions on how to restore the harm. This collaboration of the circle (the community) expands the options for an appropriate remedy by involving everyone in the process, unlike a judicial decision, and all those sitting in the circle must agree to any remedy or restitution. The strength of this practice lies in its orientation toward understanding and its focus on community. Like mediation practices, it too is forward-looking and norm creating, focusing on the relationships between the parties and the stability of the community as a whole. Additionally, because it is relatively informal, it allows for a wider range of expression

(including emotion) and communication between the parties than that of a court hearing and judicial sentencing, which is bound by legal rules and formalities.

These kinds of practices – mediation and restorative justice - are instructive for district superintendents because they are premised on collaboration and community, and are oriented toward understanding which is a valuable precursor to any strategic decision or communication.

However, knowing when and how to implement these practices and skills can be challenging because some situations do not lend themselves to a process that is most effective when the parties respect the process and are willing to collaborate. These practices introduce an element of vulnerability, both in the physical arrangement for discussion, and the range of the inquiry, which is designed to uncover feelings, values, and beliefs as well as facts. As a result, these practices may not be suitable if the process is being used for ulterior motives, such as to gather additional information, to punish the other party, or if it involves some risk (personal or psychological) for one or more of the parties. Clearly, restorative justice practices are not a panacea for all issues. Additionally if the issue is purely legal and requires judicial interpretation, if it is a matter that requires complicated findings of fact or credibility, or a matter that requires a legal remedy, then these processes may not be appropriate (Boulle & Kelly, 1998). For example, in *Chamberlain*, because the case concerned a ‘rights’ issue, and involved parties who were unwilling to compromise their differences regarding the meaning and influence of “family”, there was no ‘middle ground’, nor any inclination to work toward middle ground. Therefore, while the communication skills and practices of mediation and restorative justice may have been helpful to the superintendent to manage the issue and the conflict it engendered, it is highly unlikely that any of these practices on their own would have been capable of resolving this case outside the legal arena.

#### **(d) Family law and Education law**

Another area that shares some of the characteristics of education law is family law.

Family law is one area of the law that has benefited enormously from alternate dispute resolution practices such as mediation and collaborative law to resolve legal issues concerning children. Competing values in cases concerning the development of children are

some of the most problematic cases faced by the courts, and yet the judges must render a decision. The test at law is therefore “the best interests of the child”, an approach that focuses on the child as opposed to the parties, and allows some flexibility in judicial decision-making. This is an approach, which is consistent with many issues in public education – what is best for the student or students?

Some of the hallmarks of family law, particularly in custody and access cases, resemble those in education because both involve children and both are forward-looking. Both custody and education issues are concerned with the development of the child – the “best interests” of each child, which includes providing the best opportunities for each child to thrive and grow to his or her potential. The legal principle of the “best interests” of the child provides an orientation away from adversarial sparring and positional rhetoric towards common ground (the child) and collaborative dialogue. While it is not perfect, it is an example of how law provides some flexibility and an opportunity to shift the orientation of communication between parties in conflict, as well as to provide the court with considerable latitude in making the best decision for the child. Additionally, both family law and education law often concern ongoing relationships. Unlike many civil cases, which usually focus on a one-time allocation of property or money between the parties, custody and access cases concern the ongoing relationship between the children and their parents, together with the parents’ guardianship responsibilities for the children as long as they are minors. These relationships resemble relationships between teachers and students in public education – teachers are legally responsible for the students while in their care, and are expected to model superior social and moral behaviour.

Education, like the family, bridges the private and the public, and concerns how children develop and understand their culture, their values, and ultimately, their identity. Law is instrumental in shaping legal identities at school and in the family through statutory definitions such as “student”, “parent”, or “child”.

For example, in the *Chamberlain* case, part of the issue concerned the definition of “family”. Furthermore, section 76 of the *School Act*, which was used by the court to find that the Board’s decision was *ultra vires*, while emphasizing a secular education also clearly states,

“The highest morality must be inculcated...” There are few institutions that demand the “highest morality” and this underlines the significance of public education for society. As noted by the Supreme Court of Canada in *Ross v. School District No. 15* over a decade ago, and confirmed in many cases since (including the *Chamberlain* and *Jubran* cases) schools are “communication centres” for all the values and aspirations of society, and schools “to a large part” define the values of society through the “educational medium”.<sup>26</sup>

Similarly, family law, like education, is about much more than the monetary remedies that concern most cases – in custody cases, it is about parenting a child and having the opportunity to contribute to the moral and social development of the child. The state, through the legal system, determines which parent should have custody of the children – a public remedy for private relationships. This legal remedy does not have a monetary equivalent because it is about relationships – relationships which are forged (or not) over the time that the parent and child spend together. Nor can a custody or access remedy be easily deferred to a later date, as a child’s development and the parenting opportunities change with the passing of time. As a result, therefore, these cases often raise strong emotions between the parents who are competing for the parenting rights to their children, particularly at holiday times.

This is true in education as well, where although knowledge and skill may eventually translate into an economic return, a great deal of public education concerns social responsibility and interaction, and as a result, values and culture infuse all aspects of schooling. Parents expect their children’s teachers to be good role models – to be socially and morally responsible - in other words, to be good people.

Communication about interests, as well as positions, is vital to understanding both strategic and underlying motivations for behaviour.

Legal process and rules are generally used strategically to maximize positions. The legal system is designed to resolve conflict through legal process – a rule bound process in which positions are developed, evidence is exchanged, and a neutral third party – the court – hears argument and makes a decision. In family law cases, this process is often used to shift power

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<sup>26</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.



in family relationships through the exercise of legal rights such as the right to custody, access, or financial support. And because these rights, once recognized, can be enforced through judicially sanctioned remedies, they force change in family relations, such as the payment of support or the physical transfer of a child from one parent's care to another.

It is suggested that in education, the emergence of 'rights' pursuant to the *Charter* or provincial legislation, has similarly provided strategic means for such a shift. For example, in *Chamberlain*, the 'right' to a secular education was used politically by the petitioners to compel the Board to make a curriculum decision and raise the issue of same sex parent families. Similarly, in *Jubran* the student's 'right' to a safe educational environment free from discrimination, including homophobic taunting, shifted the management of the issue from in-school bullying into a larger arena encompassing both harassment and homophobic behaviour, and provided the student with an alternative remedy which included monetary compensation (although the compensation awarded was significantly less than that claimed).

## **2. Implications for Policy and Practice**

Case studies are useful in reflecting on human experience, and that experience can sometimes be transferred to other cases. It is this extension of experience that makes case research helpful to practitioners and policy makers (Stake, 2005). The experiences of the superintendents in the two case studies described here illustrate the importance of communication and collaboration while an issue is emerging in the district. Both superintendents also emphasized the importance of involving others in the district, and attention to the language used to communicate about an issue. They also referred to the importance of district policy, and how it guided their decision-making. Policy is created pursuant to law, and therefore must be authorized by and consistent with the law in order to be valid. Therefore, careful attention to the language and scope of district by-laws, and the early involvement of legal counsel, may help superintendents to resolve difficult issues when they arise.

It would also be helpful for superintendents to have a general knowledge of the boundaries and influence of law in education. Having some legal knowledge would assist superintendents in recognizing and understanding the legal aspects of issues, and could

provide some guidance in communicating and responding to challenging issues. Additionally, knowing the parameters of law could allow superintendents to act more strategically in their work, as law can be used both as a means to gain an advantage, or to restrict influence.

However, using law instrumentally, or strategically, needs to be balanced with communicating for understanding given the important social and cultural aspects of public education, and the complex role of the superintendent who is often situated between diverse and competing interests. Having the benefit of a range of communication skills and practices would help superintendents to facilitate different processes within their districts that increase understanding between parties, and potentially lead to a wider range of options for resolution.

The communicative skills and practices used in mediation and restorative justice are instructive for district superintendents because they are premised on collaboration and community, and are oriented toward understanding which is a valuable precursor to any strategic decision or communication.

In education law, as in family law, because the issues often go beyond monetary remedies and concern the development of a child, or children, “how” parties communicate will often affect “what” they communicate. Opportunities to hear about and understand other perspectives may influence how parties understand the issues. And, by approaching the issue from the “best interests of the child” there is an orientation away from positions towards a shared purpose, which benefits the child or student. Superintendents may have some influence when a problem arises within the district, and by being both strategic (identifying potential legal issues associated with the problem and the risk to the district), and communicative (by approaching the problem from the perspective of the “best interests of the child” and communicating for understanding with all affected parties), they will be able use their influence to make decisions that are grounded in facts, interests, and law.

It is suggested that professional development opportunities for superintendents include programs that provide a general understanding of the law and its influence in education, and how it does, or might, affect the work that superintendents do. Additionally, exposure to alternative dispute resolution practices such as mediation and restorative justice, and the

opportunity to practice the range of communicative skills that are regularly used in these practices, would complement the collaborative orientation of superintendents' professional formation. Experience using these skills and facilitating processes that are inclusive and participatory may provide superintendents with more opportunities to understand the complexity of an issue, and provide more opportunities for resolution.

## CHAPTER 8: CONCLUSION

*We cannot change the wind, but we can adjust our sails...*

For those who believe in, and work, in public education these days, this may be an appropriate metaphor– the shifting winds of political, legal, economic, and social expectations demand flexibility, creativity, and vision from those who work within the system, and particularly from those who lead the system - the superintendents.

This study explores two cases in which superintendents in B.C. were faced with very challenging legal cases involving student issues – one concerning an individual student who endured homophobic bullying throughout his high school years; and the other concerning the expansion of school resources to include same sex parent family models for Kindergarten and Grade One students. The purpose of this study was to describe and interpret how these two superintendents used law in their communication and decision-making to balance competing interests in their districts – interests that became legal positions through the initiation of a *Human Rights* complaint in one case, and a judicial review in the other.

It has been suggested in this study that law pervades education. Although it is most obvious in statutory requirements such as those prescribed in the *School Act* in B.C. or Ministry directives issued as Ministerial Orders or regulations, or even as school Board policy, and school rules of conduct, it is also influencing relationships, language, practices, and culture within school districts. Every time a legal decision is written that signals a change, it has a ‘ripple effect’ in other school systems. And, although each case is context-dependent, and to a certain extent limited to its particular facts, there are often more general statements in the decision in which the court articulates the significance of law and its application to the educational context more generally which provide some guidance for educators and the educational system.

As noted earlier, the two cases chosen for this study were quite different. In North Vancouver, the problem was personal and administrative and concerned the safety of a specific student; whereas in Surrey, the problem was political and cultural and concerned

resources for the entire district. However, in spite of these differences, both superintendents commented on the heightened sensitivity or awareness of the issues as a result of the legal action, and the importance of collaboration with others.

With the benefit of hindsight, both superintendents in these case studies commented on aspects of their work that they may have done differently, either procedurally or communicatively.

For example, in the Surrey case, the superintendent suggested that when faced with a challenging student issue with a legal aspect that it was important to get legal counsel involved early. However, above all, he stressed the importance of being “open” and “inclusive” in responding to these kinds of challenges. He underlined the importance of communication that facilitates finding the “right” language and engaging in practices that would enhance understanding - understanding that may also lead to increased options for resolution.

Clearly, language and practice reflect an orientation to issues. When challenges arise in school districts, *how* superintendents engage in collaborative practices with other administrators or their Board may also influence *what* they communicate. And, if the issue could become a legal issue, (for example, capable of being pursued formally through the courts or an administrative tribunal such as the Human Rights Tribunal), then the evidentiary trail of how the school district has handled the issue will be examined in some detail, and it is here that careful documentation and notes made contemporaneously with incidents are crucial for accurately recreating the context.

For example, in the North Vancouver case, the superintendent said that his district received some “collateral learning” from the case which included the importance of more documentation such as keeping logs and records regarding the actions taken, including recording the date and time of such actions, and the effect of the actions. Additionally, following the hearing of this case, the district, under the leadership of the superintendent, introduced annual audits and encouraged full participation by every school by closing an hour early once a year. Not only was documentation important, but the superintendent of North Vancouver also stressed the collaborative nature of problem solving in his role as

superintendent – how important it was to involve other people to address problems of this nature.

He also said that the *Jubran* case affected his work, and work in the district, by instilling a “heightened sensitivity systemically”. Although he continued to view it as a case of severe bullying and harassment, the case did make the district more aware of student language that may have been discriminatory because it was homophobic.

This study examined these two case studies through the frameworks of three theoretical perspectives that may have some application to law and education, and in particular how superintendents understand, and communicate about, issues that may have a legal aspect. For example, Habermas’ theory of communicative action, which is situated in a concept of two worlds, or perspectives – a world of systems (the external macro perspective) and the lifeworld (internal relationship perspective), provides an awareness of different kinds of communication for different purposes. It is suggested that the education system reflects both perspectives. As noted earlier, the public education system is a unique environment comprised of adult-youth relationships, which has the hallmarks of a family, but is managed like a business. Superintendents must communicate strategically for the business of the “system”, however they must also communicate for understanding to build relationships of trust and foster a sense of community. Habermas suggests that law is socially integrative because it can transform communication between both systems – it is a means for translating ordinary language into legal language and vice versa. And because law has a “complementary” relationship with morality, law enhances an ethical framework for decision-making by providing a legitimate medium for collective understanding and action. Law is both a system of knowledge (substantive law), and a system of action (procedural law), and so it provides language and process for discussing and resolving challenging issues. Substantively, law can be a point of reference for superintendents, which together with educational purposes and moral or ethical considerations provides a strong basis for discussion and dialogue. Procedurally, law offers a range of processes, which facilitate the exchange of information between parties to increase a collective understanding of different perspectives.

Habermas' theory of communicative action, which he describes as communication oriented to mutual understanding, shares common ground with alternative dispute resolution practices such as mediation. These are practices that seek understanding of not only positions, but also interests – they encourage a curiosity to understand not only the positions of the other party or parties, but also their hopes, concerns, feelings, beliefs, and values, among other things. This is a wider spectrum of understanding, and as a result may provide more options for resolution. Superintendents may have little influence over what issues arise in their districts, but they are able to choose their response to the issues, and a wider understanding may provide a wider range of resolution strategies.

Habermas' ideas of communicating for understanding and the role of law as a mediator between facts and norms, characterize law as a versatile and legitimate medium for collective action and an approach that seems to fit well with the administration of public education.

A slightly different approach regarding the role of law is offered through the theoretical perspectives of law and society scholarship, which suggests that law is more constitutive in education. Although both approaches recognize the socially integrative function of law and similar analogies are offered – for example, law as a “bridge” which is comparable to Habermas' image of law as a “hinge” or “transmission belt”, there appears to be less of a focus on communication *per se* and more of an emphasis on social relationships. This focus on the social suggests that law may be much more influential than acknowledged, and that it may be fundamentally shaping understandings, identities, and relationships in education. If this is the case, then a heightened awareness of how law may be influencing public education on a regular or everyday basis may assist superintendents to better understand difficult situations when they arise within the district. Although in both the cases described in this study, law was used for change – to expand the scope of discriminatory practices and to introduce a wider range of elementary curriculum resources – the communication and action taken in both school districts was a direct result of policy or law. And there seemed to be some sense, particularly in the pilot interviews, that an awareness of law was becoming more of a necessary reality for the work of superintendents.

If one accepts that law is an integral part of public education and does influence both relationships and the context in which they exist, then some understanding of the breadth of law within public education may be helpful for building a better understanding of difficult situations when they arise.

The final theoretical perspective discussed in this study was that of alternative dispute resolution practices such as mediation and restorative justice. Both these practices have evolved from philosophies of social justice, which emphasize understanding, relationships, and collaboration. These practices also seek to expand the range of solutions for problem solving and attempt to do so in a collaborative and inclusive process. It is suggested that these practices may be appropriate and useful to superintendents because they are based in community, are used for difficult issues regarding youth, and are forward-looking. Additionally, both these practices include a wide range of communication skills for facilitating and mediating communication between parties who are in conflict.

Superintendents have a dual role in their position – they must act both as a mediator of different points of view, but also as a party to the issue. In their role as a party to the issue, they use law strategically and instrumentally in the best interests of the school district, but they can also use the law to enhance their understanding of the issue, to bring together parties with different viewpoints, and to facilitate practices and processes that encourage communication for greater understanding. Thus, superintendents are constantly moving between the collaborative practices that support the relationships that comprise community, as well as strategically negotiating the best position for the district. This is a constantly iterative process. As an issue develops within the district and more information is gathered, having both strategic and communicative practices provides superintendents with a wider range of options. And both these practices are familiar to superintendents as educators – for example, the somewhat opposing combinations of collecting facts *and* being receptive to feelings, enforcing rules *and* accommodating interests, following due process *and* having procedural flexibility, looking back and ensuring incidents are documented *and* looking forward to collaborative resolution. Law provides substantive and procedural support for all these practices, both formally and informally, and in this way it is an appropriate and useful reference for superintendents in their work.



Education law, like family law, is a dynamic and social endeavour that includes the transmission of values and culture to the next generation. The theories discussed in this study have suggested a broader view of how law may influence the practice and understandings of superintendents, and the importance of communication in providing district leadership. Additionally, because law combines norms with sanctions, it complements ethical decision-making and provides substantive and procedural legitimacy to communication and decision-making because of its genesis in the democratic process.

In the two case studies, the superintendents identified the importance of collaborative problem solving to both understand the issue and then take action on it. Both these cases were unique to their contexts; however the understandings and actions of the superintendents involved in both cases provide some illumination as to the challenges of legal issues both within the district, and while being a party to a legal action. As well, both cases demonstrate the superintendent's and the district's loss of control once the issue became a case and was subsequently turned over to legal counsel. This underlines the importance of the superintendent's leadership within the district as the issue is evolving. Because the superintendent has the most influence before the issue becomes a case and leaves the district, language and communication are key. This is the time when superintendents may implement communication skills and practices that enhance understanding for all parties through collaborative forums as well as possibly providing a wider range of options for resolution. And, it appears that law is a necessary part of this process.

Therefore, a general understanding of the influence and purpose of law, together with an approach that is receptive to change and reflective in practice, may provide superintendents with more opportunities to "adjust" their sails and chart a course that is best for the district and more importantly, all its students.

## **APPENDIX 1: INTERVIEW QUESTIONS FOR THE TWO SUPERINTENDENTS**

### **A. Background Information:**

1. Would you describe your professional training and experience in education prior to the time the case arose in your school district?
2. Did you have any legal training (formal or informal) before the case arose, or access to legal information?
3. What was the nature of your relationship with the school board? For example, how much discretion did you have in your decision-making?

### **B. Superintendent's role and response before the case was litigated:**

4. How did the issue come to your attention?
5. What was your understanding of the issue or issues initially and how did you respond? What do you think was the effect or influence of your response?
6. What was the sequence of events that led to legal action?
7. Describe your involvement in the issue, and how you perceived your role in the process.
8. To what extent, and how, were other district employees or board members involved in this case? (eg. Secretary Treasurer)
9. What opportunities did you have to discuss the issue(s) with others? Who were they and how did this discussion influence or affect your decision-making?
10. What were the competing interests in the case, and how did you respond to these interests?
11. What factors did you consider when making decisions?
12. How much discretion did you have in making decisions at this stage?
13. What kinds of decisions did you make at this stage, and why?
14. What was the role of values in your response? (Yours and the Boards')
15. Did you consider law in your communication and decision-making, and if so, what law, and how was it part of your considerations?

16. What did you think were the moral, practical, and legal implications of your decisions at this stage?
17. How did you decide when to obtain legal advice and what effect do you think this had?

**C. Decision-making during legal action (questions for each stage of the process):**

- (a) School board decision; (b) Supreme Court hearing; (c) Court of Appeal; (d) Supreme Court of Canada**

18. Describe the sequence of events and your involvement in the case.
19. What kinds of decisions did you make; how, and when did you make them, and why?
20. What factors did you consider when making decisions?
21. How much discretion did you have?
22. What did you think were the moral, practical, and legal implications of your decisions?
23. To what extent, and how, were other district employees involved in the decision-making?

**D. After the Legal Decisions**

24. Did this case change the way you did your work, and if so, how?
25. Did the case change anything in the district, and if so, how? Was there any district policy created as a result of this case?
26. In hindsight, would you change anything regarding your response to the case, and if so, what and how?
27. What advice would you give to practicing superintendents who encounter a challenging student issue that has a legal aspect?
28. Given your experience with this case, what would you say are the key attributes of leadership essential for a superintendent facing a similar case?

## APPENDIX 2: CASE SIMILARITIES & DIFFERENCES

<b>Jubran</b>	<b>Case similarities</b>	<b>Chamberlain</b>
<ul style="list-style-type: none"> <li>• Student initiated; bullying complaint</li> <li>• Informal and spontaneous, in-school pattern of student to student bullying; reactive processes</li> <li>• Complaint to the Human Rights Tribunal by student – resulting in Tribunal decision, application for judicial review, and consequent appeal</li> <li>• B.C. Court of Appeal decision based on s. 8(1)(b) of the B.C. <i>Human Rights Code</i></li> </ul>		<ul style="list-style-type: none"> <li>• Teacher initiated; resource request</li> <li>• Formal consultation and decision-making processes</li> <li>• Request to school district by teacher – resulting in school board decision, and consequent appeals</li> <li>• Supreme Court of Canada decision based on s. 76 of the B.C. <i>School Act</i></li> </ul>
	<ul style="list-style-type: none"> <li>• Both cases had a human rights aspect</li> <li>• Both cases were concerned with the vulnerability of students, and the expectations and purpose of school</li> <li>• Both cases concerned sexual orientation, and the values of tolerance and respect</li> </ul>	
<ul style="list-style-type: none"> <li>• Appeal decision focused on school safety and district’s responsibility to foster a discrimination-free school environment</li> </ul>		<ul style="list-style-type: none"> <li>• Appeal decision focused on tolerance and diversity through secularism and non-sectarianism</li> </ul>

## APPENDIX 3: CASE HISTORIES AND SEQUENCE OF EVENTS

### a) *North Vancouver School District No. 44 v. Jubran*

- 1993 – Harassment of Azmi Jubran started when he was in grade 8.
- 1994 – School administration first became aware of students’ harassment of Jubran.
- 1996 – June 19; the Human Rights complaint was filed alleging that the school district had discriminated against Azmi Jubran regarding an accommodation, service or facility customarily available to the public because of his sexual orientation, contrary to s.8 of the B.C. *Human Rights Code*.
- 2001 – 2002 – Human Rights Tribunal heard evidence from Jubran, his family, and school district employees, including the superintendent; dates of the hearings were Sept. 11- 15, 19 – 22, 2000, and June 11 – 13, July 12, 13, 16, 2001.
- 2002 – The Human Rights Tribunal rendered its decision on April 8, 2002, finding that there was discrimination and that the school board was liable.
- 2002 – The Tribunal decision was appealed by the school district by way of judicial review to the Supreme Court of British Columbia and argument (law only) was heard by a judge Dec. 3-4, 2002.
- 2003 – Mr. Justice Stewart rendered his judgment on January 2, 2003, and found that the “cruel and disgusting” conduct of the students towards Jubran was not within the ambit of the *Code* because Jubran was not a homosexual and the students knew it. As a result, he quashed the decision of the Tribunal, as it was “incorrect”.
- 2004 – Jubran appealed to the B.C. Court of Appeal, and the appeal was heard October 18, 2004.
- 2005 – The Court of Appeal rendered its judgment on April 6, 2005, finding that the Mr. Justice Stewart had interpreted s.8 of the *Code* too narrowly – the effect of the students’ actions constituted discrimination – and reinstated the Order of the Tribunal
- 2005 – The school board appealed to the Supreme Court of Canada; however, leave to appeal was dismissed without reasons on October 20, 2005.

**b) *Chamberlain v. Surrey School District No. 36***

- 1997 – Mr. Chamberlain, an elementary teacher in the Surrey school district asked that three books be approved as educational resource material for kindergarten and grade one students; a number of people in the district reviewed the books, including the superintendent. Anticipating controversy, the superintendent referred the matter to the board for a decision.
- 1997 - April 10, the Surrey school board passed a resolution stating that resources from gay and lesbian groups were not approved for use in the district; April 4, the board passed a resolution (4 – 2), not approving three specific books for use as learning resources for kindergarten and grade one students.
- 1998 - Mr. Chamberlain, 4 other petitioners, and the B.C. Civil Liberties Association as an intervener, applied to B.C. Supreme Court for a judicial review of the board’s decision; the case was heard June 29 – 30, and July 2,3, 6 -10, 1998.
- 1998 - Judgment was delivered December 16 in favour of the petitioners; the resolutions of the school board were quashed on the basis that it had made a decision that was significantly influenced by religious considerations contrary to s.76 (1) of the *School Act*.
- 2000 - The Surrey school district appealed the decision to the B.C. Court of Appeal, and argument was heard June 21- 23, 2000. The Court delivered its judgment on September 20, 2000, allowing the appeal and finding that the school Board was within its jurisdiction in making the resolutions.
- 2002 - Mr. Chamberlain and the other petitioners appealed to the Supreme Court of Canada; ten other parties joined the action as interveners with an interest in the income of the case. The case was heard June 12, 2002, and judgment rendered on December 20, 2002, allowing the appeal; the majority of the court (7 justices) found that the school board’s resolution violated the principles of secularism and tolerance in s. 76 of the *School Act*, departed from its own regulation regarding resource decisions, and applied the wrong criteria (necessity instead of diversity). The Court remitted the matter back to the Board for consideration on the proper basis. (The minority dissenting judgment (2 justices) found that the Board’s decision was reasonable).

## **APPENDIX 4: CASES & LEGISLATION**

### **Cases**

*Chamberlain v. Surrey School District No. 36* (1998), 60 B.C.L.R. (3d) 311 (S.C.).

*Chamberlain v. Surrey School District No. 36* (2000), 80 B.C.L.R. (3d) 181 (C.A.).

*Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710.

*Hewko (guardian ad litem of) v. British Columbia*, [2006] B.C.J. No. 2877 (S.C.).

*Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

*North Vancouver School District No. 44 v. Jubran*, [2002] B.C.H.R.T.D. No. 10.

*North Vancouver School District No. 44 v. Jubran* (2003), 9 B.C.L.R. (4th) 338 (S.C.).

*North Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733 (B.C.C.A.).

### **Legislation**

*B.C. Human Rights Code*, R.S.B.C. 1996, c. 210.

*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

*School Act*, R.S.B.C. 1996, c. 412.

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