

THE LEGAL RIGHTS, POWERS AND
OBLIGATIONS OF EDUCATORS
REGARDING STUDENT ALCOHOL AND
DRUG ABUSE

Third Edition

2004

by Robert M. Solomon
and Sydney J. Usprich



camh

Centre for Addiction and Mental Health
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TABLE OF CONTENTS

1	INTRODUCTION	1
2	THE EDUCATION ACT	2
	GENERAL DUTIES OF TEACHERS AND PRINCIPALS	2
	DUTY OF PRINCIPALS AND TEACHERS TO MAINTAIN ORDER AND DISCIPLINE.....	2
	THE <i>SAFE SCHOOLS ACT, 2000</i>	3
	POWER TO PROTECT, INSPECT AND PRESERVE SCHOOL PROPERTY	3
	POWER TO COMPEL ATTENDANCE.....	4
	POWER TO CONTROL ENTRY	4
	POWER TO SUSPEND AND EXPEL.....	5
3	THE TRESPASS TO PROPERTY ACT AND RELATED ISSUES	8
	POWER TO DENY OR LIMIT ENTRY.....	8
	RIGHT TO ARREST.....	8
	CITIZEN'S ARREST AND THE <i>CHARTER OF RIGHTS AND FREEDOMS</i>	9
	RIGHT TO USE REASONABLE FORCE TO EJECT TRESPASSER AND PROTECT PROPERTY.....	9
	CONSEQUENCES OF COMMITTING A TRESPASS.....	10
4	THE CRIMINAL CODE	11
	A PRIVATE CITIZEN'S RIGHT TO ARREST WITHOUT A WARRANT.....	11
	SEARCH OF A SUSPECT AS AN INCIDENT OF LAWFUL ARREST.....	11
	SELF-DEFENCE AND THE PROTECTION OF OTHERS.....	12
	RIGHT TO USE FORCE TO PREVENT THE COMMISSION OF AN OFFENCE.....	12
	DEFENCE OF CORRECTION OF A CHILD BY FORCE.....	12
	PROTECTION FROM CRIMINAL AND CIVIL LIABILITY	13
	A CAUTIONARY NOTE.....	14
5	EDUCATORS' RECORDKEEPING, CONFIDENTIALITY AND DISCLOSURE OBLIGATIONS	15
	CONFIDENTIALITY AND PRIVILEGE.....	15
	RECORDKEEPING, CONFIDENTIALITY AND PRIVILEGE UNDER THE <i>EDUCATION ACT</i>	16
	DUTY TO REPORT CRIME	19
	OTHER REPORTING OBLIGATIONS AND AFFIRMATIVE DUTIES	20
6	SCHOOLS, COURTS AND THE CHARTER OF RIGHTS AND FREEDOMS.....	23
	<i>R. v. J.M.G.</i>	23
	<i>R. v. M.(M.R.)</i>	25
7	CONCLUSION	27
8	ENDNOTES.....	28
	INTRODUCTION.....	28
	THE <i>EDUCATION ACT</i>	29
	THE <i>TRESPASS TO PROPERTY ACT</i> AND RELATED ISSUES.....	32
	THE <i>CRIMINAL CODE</i>	34
	EDUCATORS' RECORDKEEPING, CONFIDENTIALITY AND DISCLOSURE OBLIGATIONS.....	36
	SCHOOLS, COURTS AND THE <i>CHARTER OF RIGHTS AND FREEDOMS</i>	40

1 INTRODUCTION

This document is intended as a companion to *Alcohol and Drug Policies: A Guide for School Boards*. The *Guide* provides educators with the information required to develop a comprehensive policy for dealing with student alcohol and drug use. In contrast, this document outlines the legal framework within which educators operate. School boards, principals and teachers have a broad range of rights, powers and obligations that are derived from various sources. Taken together, these sources give educators ample legal authority to implement a strong and effective alcohol and drug policy. The real challenge for educators is to use this authority wisely in balancing the goals of the policy, while maintaining the student and parental support that is vital to its overall success.

The following three sections of this document examine the *Education Act*,¹ *Trespass to Property Act*² and *Criminal Code*.³ Separate rights, powers and obligations exist under each Act. Although one Act may not authorize a specific action, one of the other Acts may do so. Consequently, the entire text should be read before reaching any conclusions about what an educator may or may not be empowered to do.

Following the review of the three Acts, we discuss the recordkeeping, confidentiality and disclosure obligations of educators. The focus then shifts to a detailed examination of two of the leading cases in this field. The final section summarizes the conclusions that can be drawn from this material.

2 THE EDUCATION ACT

The Education Act is a long and complex piece of legislation. The provisions most relevant for our purposes are drafted in broad terms and provide boards, principals and teachers with substantial authority and responsibility. Until recently, these provisions were rarely litigated. Moreover, the cases that were litigated indicate that the courts gave educators a relatively free hand in operating the school system.

GENERAL DUTIES OF TEACHERS AND PRINCIPALS

The *Education Act* imposes a variety of obligations on teachers¹ and principals.² It also regulates the method and content of instruction, the conduct of principals, teachers and students, and the learning environment in the school. Both teachers and principals are required to set an example for students and to instill in them “the highest regard for truth, justice, ... sobriety, industry, frugality, purity, temperance, and all other virtues.”³ Through various provisions, the Act also imposes a general duty on teachers and principals to establish a positive learning environment and to encourage students in the “pursuit of learning”.⁴ Similarly, the Act and its accompanying Regulations indicate that educators have a general obligation to preserve the safety and health of students.⁵

These broad duties indicate that educators are required to respond to student alcohol and drug use. The implementation of a comprehensive alcohol and drug policy appears to be warranted, whether one focuses on an educator’s responsibility to instill regard for sobriety and temperance, to establish a positive learning environment, or to protect student health and safety.

DUTY OF PRINCIPALS AND TEACHERS TO MAINTAIN ORDER AND DISCIPLINE

Both principals and teachers are charged with responsibility for maintaining order and discipline.⁶ Principals are ultimately accountable for ensuring order and discipline in the school, and they are expected to establish appropriate behavioural guidelines for students.⁷ Teachers, under the direction of their principals, are required to maintain order and discipline in the classroom and on school premises.⁸

Pupils have a corresponding duty to exercise self-discipline and to accept a principal’s or teacher’s disciplinary actions as those of a kind and firm parent. This duty applies to a pupil’s conduct at school, at any school-sponsored event and while travelling on a school bus.⁹

The duty of educators to maintain order and discipline gives them authority to address a broad range of conduct that threatens the safe, lawful and orderly operation of the school. The courts have generally adopted an expansive definition of this duty and have held that it justifies using force to: physically restrain students to investigate possible illicit drug possession;¹⁰ search suspected students, and their belongings and lockers for drugs and other contraband;¹¹ prevent a student from leaving school with his non-custodial parent;³⁴ eject trespassers;¹³ and subdue and restrain students who are acting out of control.¹⁴ The duty focuses on the institutional needs of the school and it is not limited to improving or correcting the behaviour of an individual student.

The concept of order and discipline is also broad enough to support school policies prohibiting any unlawful conduct, as well as any conduct that might pose a risk of injury to students, staff or school property.¹⁵ Moreover, these provisions enable principals and teachers to take whatever steps are reasonably necessary to maintain an effective learning environment.¹⁶ This may entail prohibiting students from coming to school or school events in an intoxicated condition. It may also include a general prohibition against bringing alcohol, drugs or other potentially intoxicating or harmful substances onto school property, whether or not the student's conduct is lawful. For example, a school board could prohibit any student, even those over 16, from bringing tobacco onto school property.

THE SAFE SCHOOLS ACT, 2000

This legislation gives the Minister of Education sweeping legal authority to establish rules governing the conduct of all persons in school¹⁷ and to require boards to develop policies with respect to: student conduct;¹⁸ suspensions, expulsions and other disciplinary matters;¹⁹ student safety;²⁰ and access to schools.²¹ In 2000, the Minister also introduced a *Code of Conduct*, setting out guidelines for the conduct of students, educators and all other persons in schools.²² For the most part, the *Code* simply repackages existing provisions of the *Education Act*, its Regulations and the 1994 *Violence-Free Schools Policy*.²³ The *Code* is a policy statement of the Minister and is not, in itself, binding.²⁴ In contrast, the *Safe Schools Act, 2000* is legally binding and it requires boards to establish policies on student conduct, and the review and appeal of suspensions and expulsions.²⁵ Presumably, boards will use the new *Code of Conduct* as the framework for developing these required policies.

As we shall discuss, the *Safe Schools Act, 2000* also contains relatively new suspension and expulsion provisions,²⁶ and rules governing access to schools.²⁷ Finally, the Act addresses the issue of dress codes²⁸ and requires boards to ensure that opening and closing exercises are held in each school.²⁹

Unfortunately, as illustrated by the *Safe Schools Act, 2000*, there has been a tendency to enact new educational legislation and policies without rationalizing them with, or repealing, the existing policies and legislation. As a result, the new initiatives may overlap or be inconsistent with existing legislation and policies.

POWER TO PROTECT, INSPECT AND PRESERVE SCHOOL PROPERTY

The *Education Act* and its Regulations grant school boards and principals extensive powers to protect and inspect school property. Some of these powers are custodial in nature, focusing on the repair and maintenance of school property.³⁰ However, other provisions give boards and principals virtually all the powers of other property owners.³¹ These provisions empower boards and principals to take reasonable steps to ensure that their property is not used for illegal purposes or in violation of their own alcohol and drug policies. Thus, this power may, in appropriate circumstances, be used as authority for searching school lockers and desks.

Nevertheless, three notes of caution are warranted. First, the right to search a locker would not, in and of itself, justify searching the student's property inside the locker. Similar concerns may be raised about interfering with a lock belonging to the student. However, several Canadian cases

indicate that educators, who reasonably suspect that a student is violating the law or school rules, may search that student and his or her belongings under their right to maintain order and discipline.³² Presumably, the courts would also permit an educator to remove a student's lock in such circumstances, given their broad interpretation of the order and discipline provision.

Second, the arbitrary use of the locker search power would inevitably generate administrative and legal challenges.³³ Third, regardless of the outcome of such challenges, random mass locker searches would probably alienate the student body, thereby undermining the model policy.

Consequently, this search power should be used with restraint. It is advisable for boards to establish a locker search policy and distribute it to both students and parents. In its policy, a board can specifically reserve the right to search a locker if there is a reason to believe that it contains a prohibited substance or object. This same policy could be expressly adopted for vehicles parked in a school lot and for any other property brought onto school premises.

POWER TO COMPEL ATTENDANCE

The *Education Act* requires children between the ages of 6 and 16 to attend school unless they fall within one of the listed exemptions.³⁴ Parents and guardians have a corresponding duty to ensure that their children attend school, and a breach of this duty constitutes a provincial offence.³⁵ Similarly, a child may be prosecuted under the Act for failing to attend school.³⁶ The Act also authorizes attendance counsellors to take custody of truants in some situations and return them to their parents or the school.³⁷ Moreover, boards may make persistent truancy a grounds for a discretionary suspension or expulsion.³⁸

When a pupil returns after being absent, a parent of the pupil or the pupil, if he or she is 18 or older, is required to provide, at the principal's direction, either a written or oral explanation for the absence.³⁹ This provision, coupled with attendance records and other information, might assist schools in identifying students with alcohol or drug problems.

POWER TO CONTROL ENTRY

While the *Education Act* has always given educators broad powers to control who enters and remains on school property,⁴⁰ the *Safe Schools Act, 2000* has given them even greater legal authority to control access. For example, the *Education Act* now makes it a provincial offence to enter or remain on school property unless one is specifically authorized to do so by regulation.⁴¹ Those authorized include: students and their parents or guardians; employees; all other persons on the premises for a lawful purpose; and those invited on the premises.⁴²

No person is allowed to remain on school premises if his or her presence is detrimental to the safety or well-being of another, as judged by the principal, vice-principal or other person designated by the board.⁴³ Nor can individuals remain on school premises, if they have failed to report their presence as required.⁴⁴ Moreover, principals may order the departure of anyone who they believe is prohibited from being present by regulation.⁴⁵ Thus, a principal has broad authority to prevent the entry of anyone he or she believes is intoxicated, providing alcohol or drugs to students, or in possession of alcohol or drugs in violation of school policy.

POWER TO SUSPEND AND EXPEL

The *Safe Schools Act, 2000*, contains new suspension and expulsion provisions. Like their predecessors, these provisions give educators broad authority to discipline students who violate a school's alcohol and drug policy, whether or not the conduct in question is illegal.

a) Suspensions

Students who commit specified infractions must be suspended from school and all school-related activities for a period of between 1 and 20 school days, unless these minimums and maximums have been altered by provincial regulation.⁴⁶ These infractions include: uttering a threat of serious bodily harm; possessing alcohol or illegal drugs; being under the influence of alcohol; swearing at a teacher or other person in authority; vandalism causing extensive property damage to the school; and other infractions carrying a mandatory suspension under board policy.⁴⁷ A teacher who observes an infraction must suspend the student or refer the matter to the principal.⁴⁸ Teachers may only suspend a student for the one-day minimum period,⁴⁹ but may recommend to the principal that he or she extend the suspension.⁵⁰ A teacher or principal who suspends a student must ensure that written notice is given promptly to the student and, if he or she is a minor (under 18), to the student's parents or guardians.⁵¹

Boards may also establish policies for discretionary suspensions.⁵² Unlike mandatory suspensions, discretionary suspensions may merely prohibit a student from attending some classes or some school-related activities.⁵³ The other rules governing discretionary suspensions parallel those applicable to mandatory suspensions.⁵⁴

The Act contains detailed provisions on the right of a student to seek a review of the suspension⁵⁵ and, if still aggrieved, appeal the suspension.⁵⁶ If the student is a minor, his or her parents or guardians have the right to seek a review or appeal.⁵⁷ There is no right to review or appeal a one-day suspension.⁵⁸ Reviews are conducted by the person designated by board policy.⁵⁹ If there is an appeal following the review, it is heard and determined by the board or a board committee.⁶⁰

b) Expulsions

Students who commit any of the following infractions at school or school-related events must be expelled: possession of a weapon; use of a weapon to cause or threaten bodily harm; physical assault causing bodily harm that requires medical treatment; sexual assault; trafficking in weapons or illegal drugs; robbery; giving alcohol to a minor; and any other conduct that carries a mandatory expulsion under board policy.⁶¹ A principal must suspend a student who he or she believes has committed one of these infractions and then either conduct an inquiry to determine if the student committed the infraction or refer the matter to the board.⁶² Notice of the suspension must be given to the student and, if he or she is a minor, to his or her parents or guardians.⁶³

If the principal chooses to handle the matter personally, conducts an inquiry and concludes that the student committed the infraction, the principal may then impose a limited expulsion.⁶⁴ A limited expulsion prevents the student from returning to the school he or she was attending or engaging in any school-related activity for not less than 21 days and not more than one year, or until the student meets the requirements that have been imposed for re-admission.⁶⁵

If the principal refers the matter to the board, the board or a board committee must conduct an expulsion hearing in accordance with board policy.⁶⁶ If the board or board committee concludes that the student committed the infraction, it must impose a limited or full expulsion.⁶⁷ A student who is subject to a full expulsion cannot attend any public school in the province, until he or she meets the requirements set by regulation for returning to school.⁶⁸ Written notice of the expulsion must be given to the student and, if he or she is a minor, to his or her parents or guardian.⁶⁹

Boards may also establish policies for imposing discretionary expulsions.⁷⁰ The rules governing discretionary expulsions parallel those applicable to mandatory expulsions. The board or board committee hears appeals of limited expulsions imposed by principals. Appeals of expulsions imposed by boards or board committees are heard by the Child and Family Services Board.⁷¹

c) Additional suspension and expulsion issues

The Act creates the impression that educators have no discretion concerning mandatory suspensions and expulsions. However, the regulations specifically provide that mandatory suspensions and expulsions do not have to be imposed if: the student does not have the ability to control his or her behaviour; the student is unable to understand the foreseeable consequences of his or her behaviour; or the student's presence does not create an unacceptable risk to the safety of any person.⁷²

Boards have broad authority to establish conditions that must be met prior to a student's re-admission following an expulsion.⁷³ Thus, a board could require a student who is expelled for violating the alcohol and drug policy to seek an assessment and/or treatment prior to his or her re-admission.

The Minister may require boards to establish and maintain specific courses, programs and services for suspended or expelled students.⁷⁴ Finally, it should be noted that in addition to any right to a review or appeal under the *Education Act*, students and their parents can challenge a school's decisions in the courts.

d) The suspension and expulsion cases

As the following cases illustrate, Canadian courts tend to support educators' suspension and expulsion decisions. For example, in *Wilkes v. Municipal School Board of the County of Halifax*,⁷⁵ the board concluded that a student had been selling marijuana at school and expelled him. The student challenged the board's authority to expel him for conduct that constituted a criminal offence "unless and until" he was convicted by the courts. In rejecting this argument, the Court clearly indicated that a school's authority to suspend and expel is not dependent upon what the police, Crown and courts choose to do in the criminal justice system. Similarly, in *Mazerolle v. Coughlin and School Board, District No. 7*,⁷⁶ the New Brunswick Court of Appeal upheld the board's decision to expel a grade 10 student following his third violation of the school's smoking policies.

In contrast, the judge in *Re Peel Board of Education and B*,⁷⁷ held that a board's authority to suspend and expel was limited by section 38(1) of the *Young Offenders Act (YOA)* (the predecessor to the current *Youth Criminal Justice Act*).⁷⁸ The *YOA* specifically prohibited the

publication of any report that alleged or stated that an identifiable young person has committed an offence under the Act. The Court accepted the students' argument that conducting the expulsion hearing would fuel rumours and would inevitably result in their being publicly identified.⁷⁹ Consequently, the Court prohibited the board from proceeding with the expulsions.

However, this decision was inconsistent with earlier authority⁸⁰ and was expressly overturned in *F.G. v. Board of Education of Scarborough*.⁸¹ In so doing, the Court stated:

In our opinion, the *Young Offenders Act* was never intended to deprive principals and school boards of the ability to enforce order and discipline in their schools. To interfere with the mandate of principals and school boards in the exercise of disciplinary proceedings, would require very clear and concise language, which is nowhere to be found in the *Young Offenders Act*. In our view, it was never intended by Parliament that the *Young Offenders Act* would be used as a shield against the enforcement of school discipline. ... For these reasons, we conclude that the *Young Offenders Act* does not preclude the board from proceeding with the expulsion hearing.⁸²

Finally, in *Central Etobicoke High School v. K.K.*,⁸³ the Court agreed to release a young offender's record to the board for use in an expulsion hearing, provided steps were taken to limit public disclosure. The Court acknowledged the board's "valid and substantial" interest in the record when making the expulsion decision.

3 THE TRESPASS TO PROPERTY ACT AND RELATED ISSUES

The Trespass to Property Act (TPA) specifically states that school boards and those acting on their behalf have the same rights as other “occupiers” of land.¹ By making it a provincial offence to trespass, the TPA creates a sanction that “occupiers” can use to control who may enter and remain on their property.

POWER TO DENY OR LIMIT ENTRY

Anyone who enters, without the occupier’s consent, a premises where entry is prohibit-ed, or who remains after being directed to leave, is guilty of trespassing and may be fined up to \$2,000.² An occupier may prohibit entry by posting signs or by giving written or verbal notice.³ The prohibition can be inferred from the manner in which the property is enclosed.⁴ Moreover, an occupier may permit entry for some purposes or under specific circumstances, but prohibit entry in all other situations.⁵

These provisions do not apply to a person who has a legal right to enter.⁶ Since students have an obligation to attend school until they are 16 and have a general right to a public education,⁷ they have a legal right to enter school property.⁸ However, surely this right is conditional upon the student complying with reasonable rules of conduct.⁹ Consequently, a board may only be able to prohibit or restrict student entry if it has some justification for doing so.

It is reasonable for a board to prohibit entry by anyone who is violating the school’s alcohol and drug policies. Such a restriction is compatible with a board’s educational responsi-bilities¹⁰ and does not unduly limit a student’s right of entry. Considerable care should be taken in formulating procedures to enforce these entry policies. For example, a board might permit only its own students to attend school dances and other social events. Provided the policy was made known in advance, it might be acceptable to require students entering a school dance to open their purses, knapsacks and similar belongings to ensure that they do not contain alcohol. However, a board would have much greater difficulty justifying such searches as a condition for attending classes, because students have a legal right to attend.¹¹ Regardless of the entry policies adopted, boards should ensure that copies of the policy are distributed to students and parents, and posted prominently on school grounds.

RIGHT TO ARREST

A police officer, an occupier and any person acting on an occupier’s behalf may arrest, without a warrant, any person on the property who is reasonably believed to be trespassing.¹² For example, in *Nagel v. Hunter*,¹³ the Court upheld the warrantless arrest of a woman who was handing out anti-semitic literature on school property. Since she was committing an offence under the British Columbia *Petty Trespass Act* and *Safe Schools Act*, the Court concluded that she was lawfully arrested in accordance with section 495(1)(b) of the *Criminal Code*.

Even if an occupier is wrong and the person arrested was not trespassing, the arrest would be lawful provided the occupier acted on reasonable grounds. The *TPA* requires a private citizen who arrests a trespasser to call the police and hand the suspect over to them.¹⁴ Once the police are involved, the occupier can no longer control how the case is handled. Thus, a principal could

not stop the police from laying a trespassing charge against a student who had been handed over to them under the *TPA*.

CITIZEN'S ARREST AND THE CHARTER OF RIGHTS AND FREEDOMS

Once an educator or other private citizen arrests, detains or searches an individual under the *TPA* or other penal legislation, they must comply with the *Charter*. For example in *R. v. Lerke*,¹⁵ the staff of a tavern arrested the accused for trespassing and, in searching him, found marijuana. The police were called and Lerke was charged with possession under the *Narcotic Control Act* (the predecessor to the *Controlled Drugs and Substances Act*). The Court of Appeal held that arrest and search are government functions to which the *Charter* applies, whether the person making the arrest is a police officer or a private citizen. Consequently, a suspect who is arrested or searched by a private citizen is entitled to a broad range of rights under the *Charter*, including: the right not be subject to unreasonable search and seizure;¹⁶ the right not to be arbitrarily detained or imprisoned;¹⁷ the right to be informed of the reasons for the arrest;¹⁸ the right to retain and instruct counsel;¹⁹ and the right to be informed of the right to counsel.²⁰ Pursuant to section 24(2) of the *Charter*, evidence seized in violation of the *Charter* must be excluded if its admission into evidence would, in all the circumstances of the case, bring the administration of justice into disrepute.²¹

The Court of Appeal held that the staff had lawfully arrested Lerke, but then violated section 8 of the *Charter*, which prohibits unreasonable search and seizure. Consequently, the marijuana the staff seized was excluded from evidence under section 24(2) and Lerke was acquitted. As we shall discuss in section 6, school officials acting under the *Education Act* may avoid some of the *Charter* problems that other private citizens face when acting under the *TPA*, *Criminal Code* or other penal legislation.²²

RIGHT TO USE REASONABLE FORCE TO EJECT TRESPASSER AND PROTECT PROPERTY

Except in the case of a violent intruder, an occupier cannot use any force to eject a trespasser until after that person has been given an opportunity to leave peacefully.²³ If a trespasser refuses to leave after being asked to do so, an occupier can physically remove him or her.²⁴

There are two major limits on the right to eject trespassers. First, an occupier cannot use deadly force or force likely to cause serious bodily injury simply for the purpose of ejecting a trespasser.²⁵ Rather, an occupier must call the police and tolerate the presence of the trespasser until they arrive. Second, an occupier cannot eject a trespasser if doing so would foreseeably endanger the trespasser.²⁶ For example, a tavern was held civilly liable for ejecting an extremely intoxicated patron who was subsequently hit by a car while attempting to make his way home,²⁷ because it was foreseeable that he would be injured.

This second exception is important in formulating school policies regarding students who are intoxicated. Since educators are considered to have a special relationship with students, they are required to take greater care than other types of occupiers.²⁸ Consequently, it would be inadvisable simply to turn away an intoxicated student at the door of a school dance, especially if there was reason to believe that the student may be driving. In these situations, a school's primary concern should be the student's safety and that of others who may foreseeably be

endangered. The courts would probably require school officials to take reasonable steps to protect the student in this situation.²⁹ This may involve calling the student's parents or another responsible adult, arranging to have the student taken home, and perhaps even calling the police if there was no other way of preventing the student from driving.³⁰

If, despite such efforts by the school staff, an intoxicated student left and was injured, the staff would not be held liable. Nor would teachers be expected to endanger themselves by attempting to subdue an intoxicated student who has threatened anyone who tries to stop him.

The *Criminal Code* and the common law give occupiers the right to use reasonable force to protect their property.³¹ An occupier should attempt to resolve the issue peacefully before using any force. In no circumstances can deadly force or force likely to cause serious bodily harm be used simply to protect property.³² While it is appropriate for an educator to use physical force in an effort to protect students from injuring themselves or others, it is more difficult to justify using force simply to protect property.

CONSEQUENCES OF COMMITTING A TRESPASS

As indicated, a person convicted of trespassing may be fined up to \$2,000 under the *TPA*. With the permission of the prosecutor and the occupier, the court may also issue a judgment of up to \$1,000 against the trespasser to compensate the occupier for his or her damages.³³ As an alternative, an occupier can bring a common law tort action against the trespasser, in which case there is no limit on the size of the damage award.³⁴ If the Crown prosecutor decides not to proceed with charges under the *TPA*, the occupier can initiate a private prosecution. In addition to any fine, the convicted trespasser may be required to compensate the occupier for the costs of bringing the private prosecution.³⁵

4 THE CRIMINAL CODE

The Criminal Code grants private citizens broad powers to arrest without a warrant. These powers are similar in scope to those of the police. As well, the Code authorizes all individuals to use reasonable force in self-defence and the defence of others. Teachers, parents and those standing in the position of a parent are granted special authority to use reasonable force to correct a child's behaviour. Finally, the Code protects those exercising legal authority from both criminal and civil liability, provided they act on reasonable grounds and use only reasonable force.

A PRIVATE CITIZEN'S RIGHT TO ARREST WITHOUT A WARRANT

The *Criminal Code* authorizes private citizens to make arrests without a warrant in three situations, two of which are relevant in the school context.¹ First, a private citizen may arrest any person whom he or she finds apparently committing an indictable offence.² The fact that the suspect was not actually committing the offence at the time will not render the arrest unlawful. The term indictable offence³ includes a broad range of *Criminal Code* offences, all of the common federal drug offences, and all of the federal drinking and driving offences. Consequently, school officials can arrest without a warrant any student who is found apparently committing a federal drug offence or a federal drinking and driving offence.

Second, an owner or person in lawful possession of property, or a person acting on his or her behalf, may arrest without a warrant any person found apparently committing a criminal offence “on or in relation to that property”.⁴ The term criminal offence includes all offences under federal jurisdiction.⁵ This second power to arrest is more comprehensive than the first, because it includes offences which can only be tried by summary conviction. For example, these offences would include the offences of causing a disturbance under the *Criminal Code* and furnishing tobacco to a person under 18 in public, contrary to the *Tobacco Act*.⁶

The *Criminal Code* requires private citizens who make an arrest to “forthwith deliver” the suspect to the police.⁷ Once the police are involved, they are responsible for determining how the matter is handled. For example, the police may charge a student with assault for participating in a minor schoolyard scuffle, despite the principal's and teacher's requests that the matter be resolved informally.

SEARCH OF A SUSPECT AS AN INCIDENT OF LAWFUL ARREST

In the absence of specific statutory authority, there is no general right to search an individual until after he or she has been lawfully arrested.⁸ Following an arrest, an officer or private citizen may search the suspect, his or her belongings, and the area within his or her immediate control for evidence of the offence or for weapons.⁹ If other incriminating evidence is found, it may be seized and additional charges may be laid.

In order to invoke this search power, school officials must formally arrest the student. They are then required to call the police.¹⁰ Unless there is concern about a weapon or destruction of evidence, it is advisable to wait and let the police search the student. Undertaking personal searches may prove embarrassing to both school officials and students. Moreover, personal

searches, the seizure of evidence and the questioning of suspects pose complex legal issues that often generate legal challenges.¹¹

SELF-DEFENCE AND THE PROTECTION OF OTHERS

The *Criminal Code* authorizes individuals to use reasonable force in self-defence.¹² In order to invoke this defence, the individual must have been assaulted or reasonably believe that he or she is about to be assaulted.¹³ The offence of assault includes not only striking or touching an individual without his or her consent, but also threatening or attempting to do so.¹⁴ Individuals who make a reasonable and honest mistake as to the need to defend themselves or others may still invoke the defence.¹⁵

A person asserting the defence must also establish that he or she used no more force than was reasonably necessary.¹⁶ For example, punching a student in response to his or her verbal threat may constitute excessive force and negate the defence. But a teacher who attempts to restrain an aggressive student and inadvertently causes him or her to fall and break an arm would most likely be viewed as having used only reasonable force. The courts assess the amount of force used, not the results of its application.¹⁷ Force that is likely to cause death or serious injury can only be used if a person reasonably believes that it is necessary for protection from death or serious harm.¹⁸ Similar principles apply to using force to protect others.¹⁹

RIGHT TO USE FORCE TO PREVENT THE COMMISSION OF AN OFFENCE

The *Criminal Code* authorizes individuals to use force to prevent the commission of many federal offences.²⁰ In practical terms, this right applies to virtually any criminal offence that “would be likely to cause immediate and serious injury” to any person or property.²¹ This power might authorize school officials to use reasonable force to prevent an intoxicated student from driving. This section provides additional authority for school officials to prevent assaults, destruction of school property, drug offences, and a wide range of other crimes.

DEFENCE OF CORRECTION OF A CHILD BY FORCE

It is important to distinguish between an educator’s broad authority to use force to maintain order and discipline under the *Education Act* and the much narrower *Criminal Code* defence of using force for correcting student behaviour. As indicated, the duty to maintain order and discipline supports a broad range of conduct that is directed at ensuring the safe, lawful and orderly functioning of the school. Unfortunately, the boundary between the duty and the defence is not always clearly explained in the cases.²²

Section 43 of the *Criminal Code* states that “every school teacher, parent, or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child under his care, if the force does not exceed what is reasonable under the circumstances ...”. As the following case illustrates, Canadian courts traditionally interpreted this provision as authorizing physical punishment for violations of school disciplinary rules.²³

In *R. v. Haberstock*, three pupils were thought to have called the vice-principal names as they were leaving on a Friday afternoon.²⁴ The following Monday morning, the vice-principal confronted the boys in the schoolyard and slapped each of them in the face. The Court of Appeal

acquitted the vice-principal of assault. The Court simply assumed that this use of corporal punishment served a corrective function and was justified under section 43. Even though one of the pupils may have been innocent of any wrongdoing, the Court held that the vice-principal was justified because he honestly believed that the child had participated in the incident.

It is most unlikely that the result would be the same if the case came to court today. There have been significant changes in attitudes towards the use of corporal punishment within the school system, as reflected by the increasing number of boards that have expressly prohibited this practice. Public and judicial attitudes have also changed. These changes have been coupled with sharp increases in the number of educators that are being charged with assault and sexual assault.

The decisions since *Harberstock* have consistently narrowed the defence. For example, in *Ogg-Moss v. The Queen*, a 1984 case involving the use of force to discipline a developmentally-delayed adult, the Supreme Court of Canada stated that section 43 had to be strictly interpreted and applied.²⁵ In affirming the residential counsellor's assault conviction, the Court emphasized that the force must be used to benefit the student's education. Quoting earlier authority, the Court stated that the power of correction can only be invoked "in the interests of instruction" and that "any punishment ... motivated by arbitrariness, caprice, anger or bad humour constitutes an offence punishable like ordinary offences".²⁶ Furthermore, the Court stated that the defence was not available to the counsellor because it was limited to parents, teachers and persons standing in the position of a parent.²⁷

In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,²⁸ the appellant challenged the validity of section 43 under the *Charter*. The appellant claimed that section 43 violated the right to life, liberty and security of the person and the prohibition against cruel and unusual treatment or punishment, which are guaranteed under sections 7 and 12 of the *Charter* respectively. The appellant also argued that section 43 violated the guarantee of equal treatment and benefit of the law under section 15 of the *Charter*. While the Court upheld the constitutionality of section 43, it stated that the judgment should not be interpreted as a "wholehearted endorsement" of section 43. Rather, the Court went to considerable lengths to review the evidence that warrants limiting the defence.³⁰ The Ontario Court of Appeal and, in turn, the Supreme Court of Canada upheld the trial decision and further narrowed the ambit of the defence.³⁵

These recent developments alone should discourage educators from relying on section 43 of the *Criminal Code*. Finally, this use of force may also undermine the positive atmosphere that is needed for the successful implementation of a comprehensive alcohol and drug policy.

PROTECTION FROM CRIMINAL AND CIVIL LIABILITY

In addition to authorizing arrests and other enforcement procedures, the *Criminal Code* protects those who act under legal authority. Section 25(1) states that everyone who is authorized or required by law to act is, "if he acts on reasonable grounds", justified in doing that act and in "using as much force as is necessary for that purpose". For example, school officials who are lawfully arresting a student for a drug offence would be justified in using as much force as necessary to subdue the student. The courts have held that the term "justified" means protected from both criminal charges and civil lawsuits.³⁶ Common law defences would also provide protection from civil liability in these situations.

A CAUTIONARY NOTE

Despite the breadth of these criminal powers, it is prudent for educators to avoid making arrests unless it is necessary to protect someone from injury. The law is complex, the legality of an arrest may turn on technicalities, and the suspect may physically resist. Staff should make every effort to resolve confrontations peacefully, without invoking their formal legal powers. If an arrest appears to be unavoidable, the safer course is to call the police because they are trained to handle such matters and possess broader powers. Apart from the potential legal problems, the heavy-handed resort to these *Criminal Code* powers or outside authority may unnecessarily alienate students.

5 EDUCATORS' RECORDKEEPING, CONFIDENTIALITY AND DISCLOSURE OBLIGATIONS

CONFIDENTIALITY AND PRIVILEGE

The legal obligation of confidentiality is the obligation to not willingly disclose information obtained in confidence from a person, without that person's consent. In certain limited situations (i.e. search warrants, subpoenas and mandatory reporting obligations), individuals may be required by law to disclose what would otherwise be confidential information without consent.¹ Such disclosures do not constitute breaches of confidentiality, because they are not made willingly. Thus, educators who disclose confidential information in reporting suspected child abuse, as required by the *Child and Family Services Act*,² are not in breach of their confidentiality obligations.

A confidentiality obligation may be imposed on a person by statute. For example, educators are required by section 266(10) of the *Education Act* to maintain the secrecy of information contained in Ontario Student Records (OSRs).³ Teachers are under a general duty not to disclose any confidential information about a student, except as required by their educational responsibilities.⁴ As well, a confidentiality obligation may be imposed on any person who promises to maintain confidentiality.⁵ Finally, even in the absence of a statute or an undertaking, a court may simply infer from the nature of the relationship that a confidentiality obligation exists between the parties.⁶

An individual who breaches his or her statutory duty to maintain confidentiality may be prosecuted under the relevant statute. As well, the person whose confidence is breached may be able to recover damages in a civil suit⁷ and may initiate disciplinary action against the offending parties if they have breached their professional obligation to maintain confidentiality.⁸

The term "privilege" refers to the right to refuse to disclose confidential information even when faced with a court order or when giving testimony.⁹ The only professional relationship to which privilege automatically applies is that between a lawyer and his or her client.¹⁰ Thus, neither the client nor the lawyer can be compelled to disclose any confidential information that was revealed in the course of their professional relationship. Other individuals, such as doctors and their patients, may apply to a court to request that their confidential communications be exempted from compulsory disclosure in legal proceedings.¹¹ However, the courts have been reluctant to grant privilege to such communications. If the information has a bearing on a case, the courts will usually rule that the interests of justice outweigh the importance of maintaining confidentiality and will require disclosure.¹²

As we shall discuss, a great deal of the information educators receive is confidential, but very little is privileged. Consequently, it is important that school officials accurately describe to students the limits of confidentiality in counselling and treatment situations. Moreover, school officials are well advised to adopt a working assumption that they and their records may one day be examined in open court.

RECORDKEEPING, CONFIDENTIALITY AND PRIVILEGE UNDER *THE EDUCATION ACT*

(a) Recordkeeping

The *Education Act* requires principals to maintain an index card and an OSR file for each student enrolled in the school. The index card contains basic biographical information, and the OSR provides a synopsis of the student's educational progress through the school system. The index card remains with the school, whereas the OSR is transferred with the student when he or she changes schools. There are no longer any express provisions that prevent educators from maintaining additional records outside the OSR.¹³

Section 266 of the *Education Act* sets out the rules governing the content, use and disclosure of information in the OSR. These rules are supplemented by the Ontario Ministry of Education's *Ontario Student Record (OSR) Guideline*. Unfortunately, the Act and Guideline are not completely consistent. It should be noted that where there is an inconsistency between the two, the Act takes precedence.

The Guideline indicates that the OSR contains five major components: an OSR folder (form 1A); report cards; transcripts of marks for secondary school courses; an office index card; and a documentation file. The documentation file typically contains name changes, custody orders, referrals, and individual health, education and psychological assessments. The Guideline provides that third-party reports can only be included in an OSR with the student's written consent or, if he or she is a minor, the consent of his or her parents or guardians. Finally, the Guideline states that an OSR cannot contain any information that discloses the commission or alleged commission of an offence under the *YOA* (the predecessor to the *Youth Criminal Justice Act (YCJA)*) or Part V-A of the *Provincial Offences Act*. Presumably, this provision was partially based on *Re Peel Board of Education and B*,¹⁴ which was discussed earlier in the text.

Section 266 of the *Education Act* does not directly limit the contents of the OSR. Rather, it allows students and, if they are minors, their parents or guardians to challenge information in the OSR if they believe it is inaccurate or "not conducive to the improvement of the student's instruction." In contrast to the Guideline, section 266(13) states that nothing in the section prevents the use of the OSR for the purpose of any disciplinary hearing. Thus, it could be argued that section 266 permits educators to record alcohol and drug infractions in the OSR, even if these violations constitute offences under the *YCJA*. First, the fact that a student has an alcohol or drug problem may be relevant to his or her instruction. Second, knowing that a student has previously violated the school's policy is important in properly responding to the student's current disciplinary infraction.

Since the Act prevails over the Guideline, it appears that boards can record disciplinary infractions in the OSR.¹⁵ Despite the technical legal merits of this position, there is a legitimate need to protect students from the unwarranted stigma that may arise from a criminal conviction or allegation of criminality. Consequently, it is probably preferable not to include infractions of a school's alcohol and drug policy in the OSR.

There is one further complication regarding OSRs. In 1994, the Ministry released its *Violence Free Schools Policy*, which contains recordkeeping guidelines. This Policy requires boards to record in a student's OSR, on a "violent incident form", information about any "serious violent incident" that resulted in a report to the police or in a suspension or expulsion.¹⁶ However, since

alcohol and drug infractions are not included in the list of what constitutes a “serious violent incident”, this recordkeeping guideline does not apply to violations of a school’s alcohol and drug policy.¹⁷

In our view, infractions of the alcohol and drug policy should be maintained, but in a record of disciplinary offences that is separate from the OSR. This information is important in identifying students who may be experiencing alcohol and drug problems, protecting student health and safety, maintaining order and discipline, and appropriately disciplining students who have previously violated the school’s policies. As indicated, there does not appear to be anything preventing educators from maintaining a separate set of disciplinary files. The contents should be limited to factual information concerning violations of the school’s disciplinary policies.

Given the current state of the law, it is impossible to provide more definitive advice. Nevertheless, the proposed approach attempts to strike a balance between a school’s need for adequate disciplinary records and a student’s legitimate educational and privacy concerns.

(b) Confidentiality and access

The *Education Act* grants teachers, principals and other school officials access to OSRs, but requires them to “preserve secrecy”.¹⁸ Unless otherwise stated by the Act, this position precludes willingly disclosing information contained in the OSR without the student’s written consent, or that of his or her parents if the student is a minor.¹⁹ The Act gives all students the right to examine their OSR. Parents are only entitled to examine their child’s record if the child is a minor.²⁰ As indicated, students and their parents may request that the principal correct any inaccuracies in the OSR²¹ and remove any information that is not conducive to improving the student’s instruction.²²

Unless the appropriate written consent is provided, school officials must refuse requests for information from an OSR. Even police requests must be denied.²³ Similarly, a teacher cannot willingly disclose to the parent of an adult student information contained in that student’s record without the student’s written consent.²⁴

(c) Privilege

The *Education Act* severely limits how information contained in the OSR may be used. It provides that the record is inadmissible in any trial, inquest, inquiry, examination, hearing, or other proceeding except for the purpose of establishing the record’s existence.²⁵ Although this provision suggests that the record is privileged from disclosure in any legal proceeding, the courts have greatly narrowed its impact in criminal cases. This issue was addressed in *R. v. B.*, a case in which a 16-year-old was charged with the murder of an elderly woman.²⁶ The Court concluded that there was a conflict between the *Canada Evidence Act*, which permitted the admission of the record, and the *Education Act*, which prohibited admission. In admitting the student record, the Court stated that it must “accept the direction and authority of federal legislation”.²⁷ Moreover, the Court held that, despite the provisions of the *Education Act*, the school officials were required to testify.

Even in matters within provincial jurisdiction, the courts may rule that the interests of justice require the admission of the student record. For example, a student’s record may be important in

proceedings brought by the Children's Aid Society to remove a child from his or her abusive family situation.²⁸

(d) Handling other confidential information

Educators may be privy to confidential information that is not contained in a student record. Generally speaking, if a student provides information in confidence or if an educator agrees to maintain confidentiality, the information must not be willingly disclosed without the student's permission. For example, if a student seeks alcohol or drug counselling that is being offered on a confidential basis, the counsellor cannot willingly disclose this information to other school officials or the student's parents.

It appears that a school board can offer counselling services on a confidential basis to a minor, provided the minor is capable of understanding the nature of the service. If the counsellor thinks that the student's family should be involved, he or she may ask the student for permission to involve them. A school board can choose not to offer alcohol or drug counselling services without parental approval. However, this policy may discourage students who need help from seeking it. Regardless of the specific policies adopted, school officials must honour the confidentiality commitments they make.

(e) The *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*²⁹

This Act serves three basic goals. First, it grants the public a general right of access to all non-personal information recorded by municipal institutions, subject to stipulated exceptions.³⁰ Second, the Act protects the privacy of individuals by limiting the right of institutions to disclose personal information.³¹ Third, it grants individuals a right to review and challenge personal information that municipal institutions have recorded about them.³² While the goals are clear, the specific provisions are complex.

The Act does not apply to all information, rather its application is generally limited to "records". This term is defined as "any record of information, however recorded whether in print form, on film, by electronic means or otherwise".³³ Apparently, personal observations that have not been documented do not constitute a "record".³⁴ Consequently, a teacher who witnessed an intoxicated student stagger out of a school dance would not be subject to the provisions of the Act. Moreover, it is unclear whether the Act extends to personal notes that staff make which are not part of the institution's records. Nevertheless, the OSR, disciplinary records and other official documents created pursuant to the *Education Act* would be subject to the *MFIPPA*.

As indicated, if a record contains general information, the public has a basic right of access that is subject to enumerated exceptions.³⁵ Under these exceptions, a principal could refuse to disclose private deliberations, advice of employees and consultants, information relating to an internal or police investigation, or legal advice.³⁶ Moreover, a principal must refuse to disclose confidential information received from a federal or provincial government agency.³⁷

However, of greater concern for our purposes are the provisions of the Act governing "personal information".³⁸ This term is defined to include any educational, medical, psychological, or criminal history information, as well as the address, telephone number or family status of an identifiable individual. As a general rule, personal information cannot be disclosed to anyone other than the individual to whom it relates without that person's written consent or request.³⁹

The rights conferred in the Act can be exercised by anyone 16 years of age or older, or by a person who has lawful custody of a person under 16.⁴⁰

This general prohibition against disclosure is subject to several exceptions. For example, a principal may disclose a record containing personal information in compelling circumstances affecting an individual's health or safety.⁴¹ Personal information may also be disclosed if that disclosure is specifically authorized by federal or provincial law.⁴² Thus, a principal would not violate the *MFIPPA* if he or she was complying with the *Education Act* in sending out suspension notices, contacting the medical officer of health or granting parents access to their minor child's OSR. As indicated, the *Education Act* imposes broad duties on educators which include promoting and protecting student health and safety, and maintaining order and discipline. In our view, educators who disclose personal student information in a reasonable and good faith attempt to discharge these duties would be viewed by the courts as being statutorily authorized. Consequently, such disclosures would not be in violation of the *MFIPPA*.

Disclosure of personal information is also permitted if it would not constitute an "unjustified invasion of personal privacy".⁴³ In any event, section 16 of the Act permits disclosure of general or personal information, if "a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption" from disclosure.

Part II of the Act creates a somewhat parallel set of provisions covering the institutional or inter-agency use of records.⁴⁴ In addition to the exceptions already noted, an institution may disclose personal information: for the purpose for which it was obtained or a consistent purpose; to employees of the institution who need the information to perform their duty; to a law enforcement agency; or in compassionate circumstances to notify next-of-kin of the death or injury of the individual.⁴⁵

Individuals have a general right of access to records that institutions have concerning them.⁴⁶ However, the general right is subject to most of the disclosure exemptions that apply to requests from third parties.⁴⁷ Individuals also have a right to request that any inaccuracies in the institutional records be corrected.⁴⁸ The Act requires institutions to safeguard the confidentiality of their records and to ensure that the information is current.⁴⁹ Furthermore, there are elaborate provisions for resolving disputes about access, disclosure and the accuracy of the records.⁵⁰

The *MFIPPA* complicates the law relating to school records and adds new uncertainties. Complying with it may be time-consuming and costly. Nevertheless, it does not significantly limit a school's ability to respond to alcohol and drug concerns. Nor does it pose any major obstacle to the implementation of a comprehensive alcohol and drug policy.

DUTY TO REPORT CRIME

Unless required by statute, individuals in our society have no general legal obligation to report federal or provincial offences, to assist the police or to answer police questions.⁵¹ With the exception of treason, the *Criminal Code* does not require individuals to report federal crimes.⁵² There are several provincial reporting obligations, but few deal with penal matters. Thus, educators are rarely required to report offences. Nevertheless, there is nothing preventing them

from reporting crimes to the police, provided the information was not obtained in confidence. Although a person may lawfully refuse to answer police questions, lying or consciously misleading the police may constitute the federal criminal offence of obstructing an officer in the execution of his or her duty.⁵³

OTHER REPORTING OBLIGATIONS AND AFFIRMATIVE DUTIES

School authorities should not create the impression that confidential student information will never be released. Aside from disclosure through police seizure and court proceedings, provincial law imposes several statutory obligations on educators to report information to provincial officials. Moreover, in some limited circumstances, an educator may face civil liability for failure to report certain information.

The *Education Act* imposes several reporting obligations on school officials. For example, principals must report to the board and health officials any suspicions about infectious or contagious diseases in the school.⁵⁴

Principals must also report promptly to parents or guardians any neglect of duty or infraction of the school rules by a student, regardless of the student's age.⁵⁵ Principals have an obligation to contact the parents or guardians of any student under the age of 18 for an oral or written explanation of the student's absence.⁵⁶ The new suspension and expulsion provisions require that students and, if they are minors, their parents or guardians be given written notice of any suspension or expulsion.⁵⁷ Finally, the broad duties to promote and protect student health and safety, to maintain order and discipline, and to instill values may also be seen as requiring educators to report student information to parents and others.

The *Violence-Free Schools Policy* contains several mandatory reporting obligations.⁵⁸ These include: reporting to the police any "serious violent incident" committed by a student who is 12 or older;⁵⁹ contacting the parents or guardians of a student when a violent incident is reported to the police or when a student is interviewed by the police during an investigation of a violent incident;⁶⁰ and reporting violent incidents on an annual basis to the Ministry.⁶¹ Even though the *Violence-Free Schools Policy* does not have the force of law, boards are required to follow Ministry policy unless it conflicts with the Act or regulations.⁶² In any event, since the definition of a serious violent incident does not include alcohol and drug infractions, the Policy would not apply in routine alcohol and drug cases.⁶³

In 2000, the Ministry of Education and the Ministry of the Solicitor General jointly released the *Provincial Model for a Local Police/School Board Protocol*.⁶⁴ This Model outlines the required elements of local protocols between individual police services and school boards.⁶⁵ Like many recent Ministry initiatives, the Protocol is a statement of policy and does not have the force of law. Moreover, some of the provisions are inconsistent with the *Violence-Free Schools Policy*. For example, the Protocol requires police involvement in drug offences,⁶⁶ whereas the Policy does not. Similarly, the Protocol indicates that police and school officials should determine who will notify parents, if notification is required, before the police interview a student.⁶⁷ These, and other inconsistencies, have generated uncertainty on how educators should handle school-related alcohol and drug incidents.

The *Child and Family Services Act* requires educators, who have reasonable grounds to suspect that a child has suffered or is at risk of suffering abuse, to forthwith report the suspicion and the grounds on which it is based to the Children's Aid Society.⁶⁸ The term abuse is defined broadly,⁶⁹ and the phrase "reasonable grounds to suspect" creates a low threshold of belief for reporting. The duty to report is on-going, in that a person must report each separate incident giving rise to a suspicion of abuse, even if Children's Aid is already involved with the family.⁷⁰ The person with the suspicion must make the report directly to Children's Aid. It is not sufficient to delegate reporting to a third party.⁷¹

These duties to report apply even if the information was obtained in confidence or was privileged, except in the case of solicitor and client privilege.⁷² No action can be brought against a person for complying with these reporting obligations unless he or she acted unreasonably or in bad faith.⁷³ Consequently, despite the *Education Act's* confidentiality and secrecy obligations, school officials must report all instances of suspected child abuse to the appropriate Children's Aid Society. Failure to do so constitutes a provincial offence, which is punishable by a fine of up to \$1,000.⁷⁴

Traditionally, the law did not require an individual to control the conduct of another in order to protect that individual or others who may be foreseeably endangered.⁷⁵ In other words, the law did not make you your "brother's keeper". Nevertheless, the courts have recognized an increasing number of special relationships in which one party can be held civilly liable for the conduct of another.⁷⁶ It is well established that a special relationship exists between school officials and their students.⁷⁷

Several challenging issues arise in applying these principles to alcohol and drug-related situations. First, a civil action may be brought against a teacher for negligently allowing an intoxicated student to participate in activities that pose a foreseeable risk of injury.⁷⁸ Similarly, this claim would likely succeed if the teacher had been negligent in failing to recognize that the student was impaired.

Second, a teacher may be sued for turning away or ejecting an intoxicated student who subsequently causes a car accident or other mishap. The more obvious the risk, the greater the likelihood of liability. The court would likely consider various factors, including: whether the student was visibly intoxicated; whether he or she was known to be irresponsible; whether the teacher should have realized that the student was driving; and whether the teacher took reasonable steps to protect the student.

Finally, a teacher may become aware that a student's alcohol or drug problem poses a serious and immediate threat. If the parents of the student are partially responsible for this situation, the matter may have to be reported to the Children's Aid Society, even if the information had been obtained in confidence. However, if the student is 16 years of age or older, this reporting obligation under the *Child and Family Services Act* would not apply.⁷⁹ The teacher is then faced with a difficult choice. In order to protect the student, the teacher may have to breach his or her promise of confidentiality and the confidentiality provisions of the *Education Act*. Although it is possible, it is most unlikely that a teacher would be sued civilly or prosecuted for breaching a student's confidence in making an honest and reasonable attempt to protect him or her from an immediate threat.

If, in the alternative, the teacher complies with the *Education Act* and honours his or her confidentiality obligations and the student is injured, the teacher may be sued civilly for failing to protect the student. Although there have been successful suits against American health care professionals for failing to act in these types of circumstances, there have been no comparable suits in Canada.⁸⁰ While there is no clear legal answer, it is likely best to intervene and err on the side of student safety.

6 SCHOOLS, COURTS AND THE CHARTER OF RIGHTS AND FREEDOMS

In the previous sections, we examined educators' rights, powers and obligations separately under the *Education Act*, *Trespass to Property Act*, *Criminal Code*, and other legislation. We have changed the approach in this section to focus on two specific cases, namely *R. v. J.M.G.*¹ and *R. v. M.(M.R.)*², which are the leading Canadian cases on educators' powers. These cases explain the broad authority of educators to investigate violations of the school rules under their duty to maintain order and discipline and analyze the impact of the *Charter*. Moreover, the cases demonstrate that the Canadian courts will give educators a relatively free hand to respond to alcohol and drug problems.

R. v. J.M.G.

The principal was told that a student, identified as J.M.G., was seen putting drugs in his sock just prior to class. The principal contacted a police officer and another principal for advice on how to handle the matter. The principal then went to J.M.G.'s class and asked him to come to the office. Once in his office, the principal informed J.M.G. of the allegation and requested that he remove his shoes and socks. During this process, J.M.G. managed to swallow a hand-rolled cigarette which was presumed to contain marijuana. However, in the ensuing struggle, some marijuana wrapped in foil was seized from J.M.G.'s sock or pant leg. It was only after J.M.G. swallowed some of the evidence that the principal decided to hand the case over to the police. The principal called the police, who arrested J.M.G. for possession of a narcotic and informed him of his right to counsel.

J.M.G. was tried under the *Young Offenders Act*, convicted and fined \$25. He appealed to the Divisional Court, which overturned the conviction on the basis that the marijuana had been seized in violation of the *Charter* and was inadmissible in evidence. The Crown appealed the Divisional Court's decision to the Ontario Court of Appeal.

The Court of Appeal had to resolve three issues. First, did the principal violate section 8 of the *Charter* which prohibits unreasonable search and seizure? Second, did the principal violate section 10(b) of the *Charter* by detaining J.M.G. without informing him of his right to legal counsel? Third, if J.M.G.'s rights were violated, should the marijuana that was seized be excluded from evidence? Section 24(2) of the *Charter* requires that evidence seized in violation of the *Charter* be excluded if its admission into evidence would, in all of the circumstances of the case, bring the administration of justice into disrepute. In resolving these issues, the Court of Appeal discussed at length the powers of school officials under the *Education Act*.

a) A principal's powers and duty to investigate

The Court stated that the *Education Act* imposed on the principal a duty to maintain order and discipline and that he would have breached this duty if he had ignored the allegation. The principal might also have breached his duty if he had simply called in the police without first investigating the matter himself. The Court expected school officials to use their judgment in deciding whether to involve the police in minor offences and viewed the possession of marijuana as falling within this category.

With respect to the nature of the infraction, it is suggested that the principal should have turned the whole matter over to the police upon his initial receipt of the report. There may indeed be circumstances where that would be advisable. For instance, the crime might be so obvious and so heinous that police participation was inevitable. But those circumstances did not exist here. There was no indication of the extent of the crime; nor was there any certainty that an offence had actually occurred. ...

In my view, calling the police initially would have been quite unnecessary and might even have amounted to a dereliction of duty. The offence was a very serious breach of discipline but in an absolute sense, as the small fine would indicate, it was not a crime of great magnitude. A principal has a discretion in many minor offences whether to deal with the matter himself, whether to consult the child's parents and whether to call in the law enforcement authorities. He cannot exercise that discretion until he knows the nature and extent of the offence.³

Thus, it was incumbent upon the principal to investigate the allegation and then decide on an appropriate course of conduct. As far as the Court of Appeal was concerned, the principal was exercising his investigatory powers under the *Education Act* in bringing J.M.G. to his office, requesting that he remove his shoes and socks, and seizing the marijuana. This characterization of the principal's conduct as an internal disciplinary matter greatly influenced the Court's analysis of the other issues. The Court clearly recognized that educators have authority to discipline students for violations of the school rules that happen to constitute criminal offences.

b) Was the search unreasonable?

The Court emphasized that the principal searched J.M.G. as part of his effort to confirm or negate an allegation, which he had a duty to investigate. A credible allegation had been made against an individual student concerning a specific offence. The case did not involve a random search or speculation about a student who was thought to be involved in drug use. The Court stated that the search served a legitimate purpose, was founded on reasonable grounds, was conducted in a reasonable fashion, and was not overly intrusive. On this basis, the Court concluded that the search was "eminently reasonable", and thus did not violate section 8 of the *Charter*.⁴

c) Did the principal violate J.M.G.'s right to counsel?

Section 10(b) of the *Charter* provides that "everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right." The Court of Appeal concluded that the principal did not arrest or detain J.M.G., at least not in the sense meant by the *Charter*. It reasoned that J.M.G. was already under a detention of sorts by virtue of his school attendance. The Court stated at page 284:

He was subject to the discipline of the school and required by the nature of his attendance to undergo any reasonable disciplinary or investigative procedure. The search here was but an extension of normal discipline such as, for example, the requirement to stay after school or to do extra assignments or the denial of privileges.

This form of detention under the *Education Act* was distinguished from detention that arises following an arrest or other criminal proceedings. The principal had not changed J.M.G.'s status

or the nature of his detention in taking him to the office and searching him.⁵ Since J.M.G. was not detained, in the sense meant by the *Charter*, the principal was not required to inform him of his right to counsel.⁶

d) The outcome in *R. v. J.M.G.*

Since the Court held that the principal had not violated J.M.G.'s rights, section 24(2) of the *Charter* was inapplicable and the marijuana was admissible. Consequently, the Court of Appeal overturned the decision of the Divisional Court and restored the conviction and sentence imposed at trial. J.M.G. subsequently applied to the Supreme Court of Canada to hear an appeal, but it dismissed the application.

R. v. M.(M.R.)

Several students had previously told the vice-principal that a fellow, referred to as M.(M.R.) was selling drugs at school. On the day of the school dance, one of the informants indicated that M.(M.R.) would be bringing drugs to the dance. The vice-principal called a police officer and asked him to come to the school that evening. The vice-principal approached M.(M.R.) at the dance and asked him to come to the office where they met the officer. After confronting M.(M.R.), the vice-principal searched him and seized a cellophane bag containing marijuana. The officer who had watched the process to that point, then arrested the accused for possession.

There were two major issues that had to be resolved at the Supreme Court of Canada level. First, did the vice-principal violate M.'s rights to protection from unreasonable search and seizure under section 8 of the *Charter*? Second, did the vice-principal violate section 10(b) of the *Charter* by detaining M. without informing him of his right to counsel and allowing him to contact counsel?

a) Did the search comply with section 8 of the *Charter*?

The Supreme Court of Canada rejected the argument that the vice-principal was an agent of the police and held that the rules governing criminal investigations and searches applied. The fact that the vice-principal and officer co-operated, and that the officer was present did not make the vice-principal an agent of the officer. The Court reasoned that the vice-principal would have acted in the same way had there been no police involvement.⁷

The Court stated that the normal expectation of privacy that individuals enjoy in society is diminished in the school context. Educators have a statutory duty to create a safe environment and maintain order and discipline, despite the challenges posed by the increase in illicit drugs and weapons in schools. Requiring a warrant or other prior authorization for a search would be "impractical and unworkable" in schools. The Court stated that educators may search a student, without a warrant, if they reasonably believe that he or she has violated the law or a school rule and is in possession of evidence of that offence or infraction. In the Court's view, an educator's duties provide, by necessary implication, the required statutory authorization for searching suspected students.⁸

The reasonable grounds for the search may be based on information received from just one student if he or she is considered credible, information received from several students, observations of teachers or principals, or a combination of these sources which together are

believed to be credible. The manner in which the search is conducted and its extent must also be reasonable in the circumstances. The student's age and gender, as well as the seriousness of the infraction, should be considered in determining the reasonableness of the search. The Court specifically noted that a physical search of a female student by a male educator might well be inappropriate and unreasonable.⁹

Applying this modified standard to the facts of the case, the Court concluded that the vice-principal did not violate M.(M.R.)'s rights under section 8 of the *Charter*. The vice-principal had ample grounds to believe M.(M.R.) was in possession of drugs, the search was conducted in the relative privacy of the principal's office, and the search was minimally intrusive and carried out in an appropriately sensitive manner.

b) Were M.(M.R.)'s rights to legal counsel under section 10(b) of the *Charter* violated?

As in *R. v. J.M.G.*, the Supreme Court of Canada held that students detained by educators during investigations of possible school infractions are not "detained" within the meaning of section 10(b) of the *Charter*. That section was not meant to apply to the relationship between students and teachers. Rather, the section was intended to regulate state-imposed detentions that typically arise in the context of the criminal law. Since M.(M.R.) was not detained within the meaning of section 10(b) of the *Charter*, there was no violation of his rights to counsel.¹⁰

c) The outcome in *R. v. M.(M.R.)*

Since the Supreme Court of Canada ruled that the vice-principal had not violated either M.(M.R.)'s section 8 or section 10(b) *Charter* rights, the marijuana was admissible in evidence. The Supreme Court reiterated the sentiments of the Ontario Court of Appeal in *R. v. J.M.G.* Although educators are subject to the *Charter*, they are only required to meet modified standards in recognition of their duties to protect students and maintain order and discipline. Like *R. v. J.M.G.*, *R. v. M.(M.R.)* suggests that the Canadian courts will defer to educators, giving them considerable latitude to respond to substance abuse problems in the schools.

7 CONCLUSION

This manual has identified the legal issues and explained the legal principles that underlie a school alcohol and drug policy. Our analysis indicates that school officials have ample legal authority to implement such a policy. It is clear that the current law, rather than constituting an obstacle, provides strong support for these initiatives.

Nevertheless, certain approaches generate fewer legal difficulties than others. Educators will often have authority to respond to an incident under either the *Education Act* or the more formal powers of the *Criminal Code*, *Trespass to Property Act*, or other penal legislation. In such situations, it is generally advisable for educators to rely on the *Education Act*, rather than the penal legislation.

There are five reasons for adopting this approach:

- First, Canadian courts have broadly interpreted and applied the provisions of the *Education Act*, whereas there is an established tradition of interpreting penal legislation narrowly in the interests of the accused.
- Second, educators are much more likely to understand what is expected of them under the *Education Act*, than to appreciate the finer points of other, less familiar legislation.
- Third, as the cases of *R. v. J.M.G.* and *R. v. M.(M.R.)* illustrate, an educator acting pursuant to the *Education Act* will not face the same *Charter* problems that he or she would if acting pursuant to penal legislation.
- Fourth, in addition to complying with the *Charter*, a principal or teacher who arrests a student must call in the police. Once the police are involved, they are responsible for deciding how the case will be handled.
- Finally, if educators rely too heavily on their penal authority, they are put in an adversarial position with their students. This may undermine the effectiveness of their alcohol and drug policy.

It is appropriate at this point to return to our basic theme. The current law enables educators to respond to alcohol and drug problems in the school. Although some of the legal issues are complex, there are no legal obstacles to implementing a comprehensive alcohol and drug policy. The real challenge for educators is to use their legal authority with restraint to maintain the type of positive learning environment which is essential to the policy's overall success.

8 ENDNOTES

INTRODUCTION

1. R.S.O. 1990, c. E.2.
2. R.S.O. 1990, c. T.21.
3. R.S.C. 1985, c. C-46.

THE EDUCATION ACT

1. *Education Act*, s. 264.
2. *Ibid.*, s. 265.
3. *Ibid.*, ss. 264(1)(c) and 265.
4. *Ibid.*, s. 264 (l)(b).
5. *Ibid.*, s. 265(j), (k), (l) and (m); and *Operation of Schools – General*, R.R.O. 1990, Reg. 298, ss. 11 (3)(e), (f) and (l), and 20 (a) and (g).
6. *Education Act*, ss. 264(1)(a) and 265(a); and Reg. 298, ss. 11(1)(a) and 20(h).
7. *Education Act*, s. 265(a); and Reg. 298, s. 11(l).
8. *Education Act*, s. 264(1)(e). See also *R. v. Trynchy* (1970), 73 W.W.R. 165 (Yukon Mag. Ct.), in which it was held that the power to discipline extends to the driver of a school bus.
9. Reg. 298, s. 23 (l) and (4).
10. See *R. v. Sweet* (November 7, 1986), unreported (Ont. Dist. Ct.) [hereinafter *Sweet*], in which the Court upheld the teacher’s conduct in tackling a student who was attempting to leave. The student had been repeatedly ordered to remain during an investigation of possible drug use.
11. See *R. v. W. (J.J.)* (1990), 83 Nfld. & P.E.I.R. 13 (Nfld. S.C.); *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.) [hereinafter *J.M.G.*]; *R. v. Z.(S.M.)* (1998), 131 C.C.C. (3d) 436 (Man. C.A.); and *R. v. M. (M.R.)* (1998), 166 D.L.R. (4th) 261 (S.C.C.) [hereinafter *M.(M.R.)*]. These issues will be discussed in greater detail in section 6 of the text.
12. *Pilieci v. Lockett* (1989), O.J. No. 953 (Dist. Ct.).
13. *Nagel v. Hunter* (1995), 162 A.R. 230 (Alta. C.A.) [hereinafter *Nagel*]; and *Fairchels (Guardian ad litem of) v. West Vancouver School District No. 45* (1996), 33 C.C.L.T. (2d) 240 (B.C. S.C.) [hereinafter *Fairchels*].
14. *R. v. Lauzon*, [1991] O.J. No. 968 (Prov. Ct.); and *R. v. Collins* (Nov. 21, 1996), unreported (Alta. Prov. Ct.).
15. The Canadian courts have been reluctant to question or limit the power of school officials to maintain order and discipline. See for example, *J.M.G.* and *M.(M.R.)*, *supra* note 11, which are discussed in section 6 of the text. See also *Sweet*, *supra* note 10, and *Wilkes v. Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (S.C.) [hereinafter *Wilkes*].
16. In *J.M.G.*, *supra* note 11, the Court stated at page 283: “First, the principal has a substantial interest not only in the welfare of the other students but in the accused student as well. Secondly, society as a whole has an interest in the maintenance of a proper education environment, which clearly involves being able to enforce school discipline efficiently and effectively.”
17. *Education Act*, s. 301(1).
18. *Ibid.*, s. 302(1) and (2).
19. *Ibid.*, s. 302(6) and (2).
20. *Ibid.*, s. 302(3).
21. *Ibid.*, s. 302(4).
22. Ministry of Education, *Code of Conduct* (Ontario: Queen’s Printer, 2000).

23. Ministry of Education and Training, *Violence-Free Schools Policy* (Ontario: Queen's Printer, 1994).
24. As stated in the *Code of Conduct*: "This is the Government's policy framework with respect to mandatory consequences. Legislation would be required to give effect to this framework."
25. *Education Act*, s. 302(1) and (6).
26. These are now contained in ss. 306-315 of the *Education Act*.
27. *Ibid.*, s. 305.
28. *Ibid.*, s. 302(5).
29. *Ibid.*, s. 304.
30. *Ibid.*, s. 265(j).
31. *Ibid.*, s. 265(j); and Reg. 298, s. 11(3)(l).
32. See the cases referred to in note 11.
33. *Ibid.* In these cases, the court emphasized that the school officials had reasonable grounds to suspect the student of violating the law.
34. *Education Act*, s. 21(1) and (2).
35. *Ibid.*, ss. 21(5), and 30(1) and (2). See *R. v. Prentice*, [1985] O.J. No. 771 (Prov. Ct.).
36. *Ibid.*, s. 30(5).
37. *Ibid.*, s. 26(1).
38. *Ibid.*, ss. 307(1) and 310(1).
39. Reg. 298, s. 23(2).
40. Educators' broad duties to instill values, protect and promote student health and safety, and to inspect and protect school property provide implicit legal authority to control who enters and remains on school premises. Similarly, educators have an affirmative duty to maintain order and discipline in school, on school grounds and at school-related activities. Indeed, the courts have relied on this duty to justify the forced removal of disruptive parents from schools and school grounds. See *Nagel* and *Fairchels*, *supra* note 13. See also the *Education Act*, s. 265(m), which gives principals authority to deny entry to anyone whose presence would, in their judgment, be detrimental to the physical or mental well-being of students.
41. *Education Act*, s. 305(2) and (5).
42. *O. Reg.* 474/00, s. 2(1), (2) and (3).
43. *Ibid.*, s. 3(1). Note the similarity to s. 265(m) of the *Education Act*, which remains in effect.
44. *Ibid.*, s. 3(2).
45. *Education Act*, s. 305(4).
46. *Ibid.*, s. 306(2).
47. *Ibid.*, s. 306(1).
48. *Ibid.*, s. 306(3).
49. *Ibid.*, s. 306(6).
50. *Ibid.*, s. 306(7).
51. *Ibid.*, s. 306(10).

52. *Ibid.*, s. 307(1).
53. *Ibid.*, s. 307(2).
54. *Ibid.*, s. 307(4) – (7).
55. *Ibid.*, s. 308(1) – (3).
56. *Ibid.*, s. 308(4) – (7).
57. *Ibid.*, s. 308(4).
58. *Ibid.*
59. *Ibid.*, s. 308(3).
60. *Ibid.*, s. 308(6) and (7).
61. *Ibid.*, s. 309(1).
62. *Ibid.*, s. 309(2) and (4).
63. *Ibid.*, s. 309(5).
64. *Ibid.*, s. 309(7).
65. *Ibid.*, s. 309(14).
66. *Ibid.*, s. 309(9).
67. *Ibid.*, s. 309(11).
68. *Ibid.*, s. 309(16).
69. *Ibid.*, s. 319(20).
70. *Ibid.*, s. 310.
71. O. Reg. 37/01, s. 4(1).
72. O. Reg. 37/01, s. 2; and O. Reg. 106/01, s. 1.
73. *Education Act*, s. 309(14)(b) and (16).
74. *Ibid.*, s. 312.
75. *Wilkes*, *supra* note 15.
76. (1987), 83 N.B.R. (2d) 389 (C.A.).
77. (1987), 59 O.R. (2d) 654 (H.C.J.) [hereinafter *Re Peel Board*].
78. R.S.C. 1985, c. Y-1.
79. *Re Peel Board*, *supra* note 77.
80. *J.M.G.*, *supra* note 11.
81. (1994), 68 O.A.C. 308 (Div. Ct.).
82. *Ibid.*, at 312.
83. [1994], O.J. No. 2410 (Prov. Div.).
84. However, in other cases the courts have refused to release a student's record. See *Scarlett Heights Collegiate Institute v. K.M.*, [1995] O.J. No. 3750 (Prov. Div.).

THE TRESPASS TO PROPERTY ACT AND RELATED ISSUES

1. R.S.O. 1990, c. T.21, s. 1(2).
2. *Ibid.*, s. 2(1).
3. *Ibid.*, s. 5. Posting a sign at only one of several entrances may be insufficient. *Evans v. Latullippe* (1990), 20 A.C.W.S. (3d) 1087 (Ont. Div. Ct.).
4. *TPA*, s. 3(1)(b).
5. *Ibid.*, s. 4(1).
6. *Ibid.*, s. 2(1).
7. *Operation of Schools – General*, R.R.O. 1990; Reg. 298, s. 23(1)(d); and *Education Act*, ss. 21(1)(a) and (b), and 32(1).
8. *Education Act*, ss. 31, 32 and 39.
9. *Reg. 298*, s. 23(1) and (4).
10. For example, the *Education Act* requires school officials to maintain order and discipline and to safeguard student health and safety. See for example, s. 265(j), (k) and (l). Consequently, any reasonable restrictions on entry that are designed to prevent the commission of illegal acts or to protect students would be warranted. As the following cases illustrate, the Canadian courts have been very supportive of school officials' efforts to deal with student drug use. See *Wilkes v. Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (S.C.); *R. v. Sweet* (Nov. 7, 1986), unreported (Ont. Dist. Ct.); *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.); and *R. v. M.(M.R.)* (1998), 166 D.L.R. (4th) 261 (S.C.C.).
11. See section 6 for a discussion of section 8 of the *Charter*, which guarantees everyone the right not to be subject to unreasonable search and seizure.
12. *TPA*, s. 9(1).
13. (1995), 162 A.R. 230 (Alta. C.A.). See also *R. v. Brisson*, [2000] A.J. No. 286 (Prov. Ct.).
14. *TPA*, s. 9(2).
15. (1986), 25 D.L.R. (4th) 403 (Alta. C.A.).
16. *Charter*, s. 8. The leading cases on section 8 include: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Therens*, [1985] 1 S.C.R. 613 [hereinafter *Therens*]; *R. v. Collins*, [1987] 1 S.C.R. 265 [hereinafter *Collins*]; and *R. v. Caslake* (1998), 155 D.L.R. (4th) 19 (S.C.C.).
17. *Charter*, s. 9. See *Therens, ibid*; *R. v. Hufsky*, [1988] 1 S.C.R. 621; and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.
18. *Charter*, s. 10(a). See *R. v. Evans*, [1991] 1 S.C.R. 869.
19. *Charter*, s. 10(b). *Therens, supra* note 16; and *R. v. Black*, [1989] 2 S.C.R. 138 [hereinafter *Black*].
20. *Ibid.*
21. For a discussion of section 24(2), see *Therens* and *Collins, supra* note 16; and *Black, supra* note 19.
22. See *infra* section 6 and the accompanying notes.
23. *MacDonald v. Hees* (1974), 46 D.L.R. (3d) 720 (N.S. S.C.); *Brown v. Wilson* (1975), 66 D.L.R. (3d) 295 (B.C. S.C.); and *Revill v. Newberry*, [1996] 1 All E.R. 291 (C.A.). See also *Criminal Code*, ss. 40 and 41.

24. *Ibid.* For cases involving schools see also *R. v. Rent* (January 20, 1993), unreported (N.B. Prov. Ct.); *Fairchels (Guardian ad litem) v. West Vancouver School District No. 45* (1996), 33 C.C.L.T. (2d) 240 (B.C. S.C.); and *R. v. Brisson*, *supra* note 13.
25. For example, in *R. v. Figueira* (1981), 63 C.C.C. (2d) 409 (Ont. C.A.), the Court held that section 41 of the *Criminal Code* could not be invoked to justify stabbing a trespasser to prevent him or her from entering. See also *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.). For common law authority, see *Bigcharles v. Merkel*, [1973] 1 W.W.R. 324 (B.C. S.C.); *Veinot v. Veinot* (1977), 81 D.L.R. (3d) 549 (N.S. C.A.); and *Hackshaw v. Shaw* (1984), 56 A.L.R. 417 (H.C. Aust.).
26. See *Dunn v. Dominion Atlantic Ry. Co.*, [1920] 2 W.W.R. 705 (S.C.C.); and *Murphy v. Little Memphis Cabaret Inc.* (1998), 167 D.L.R. (4th) 190 (Ont. C.A.).
27. *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239 [hereinafter *Jordan House*].
28. For a discussion of the duty of care imposed upon school officials, see *Myers v. Peel County Board of Education* (1981), 123 D.L.R. (3d) 1 (S.C.C.); *Piercey (Guardian ad litem of) v. Lunenburg (County) District School Board* (1998), 41 C.C.L.T. (2d) 60 (N.S. C.A.); *MacCabe v. Westlock Roman Catholic Separate School District No. 110*, [2002] 1 W.W.R. 610 (Alta. C.A.); and J. Batzel, “Negligence and the Liability of School Boards and Teachers Towards Students” in W. Foster and W. Smith, eds., *Reaching for Reasonableness: The Educator as Lawful Decision-Maker* (Châteauguay: Lisbro Inc., 1999) 111.
29. *Ibid.*
30. Similar obligations were imposed on a tavern owner to protect one of his intoxicated patrons. See *Jordan House*, *supra* note 27.
31. See *supra* notes 23 and 24. See also the *Criminal Code*, s. 449(2), which authorizes owners, people in lawful possession or those acting on their behalf to arrest, without a warrant, anyone apparently found committing a criminal offence on or in relation to their property.
32. See *supra* note 27.
33. *TPA*, s. 12(1).
34. If the trespasser acts in a high-handed, malicious or otherwise outrageous manner, the court may award punitive damages. See for example, *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 (Ont. H.C.); and *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42 (B.C. S.C.).
35. *TPA*, s. 12(2).

THE CRIMINAL CODE

1. *Criminal Code*, s. 494(1)(a) and (2).
2. *Criminal Code*, s. 494(1)(a) states that: “anyone may arrest without warrant a person whom he finds committing an indictable offence.” However, the Supreme Court of Canada has interpreted the phrase “finds committing” to mean “finds apparently committing.” *R. v. Biron*, [1976] 2 S.C.R. 56. Although *Biron* dealt with section 495, this same broad interpretation of the phrase “finds committing” should also apply to section 494(1)(a). See *Besse v. Thom* (1979), 96 D.L.R. (3d) 657 (B.C. Co. Ct.); and *R. v. Cunningham and Ritchie* (1979), 49 C.C.C. (2d) 390 (Man. Co. Ct.) [hereinafter *Cunningham*].
3. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1)(a); *R. v. Seward*, [1966] 4 C.C.C. 166 (Yukon Mag. Co.) [hereinafter *Seward*]; and *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.).
4. *Criminal Code*, s. 494(2).
5. See *R. v. Pollard* (1917), 39 D.L.R. 111 (Alta. C.A.); *R. v. Suchacki*, [1924] 1 D.L.R. 971 (Man. C.A.); and *Seward*, *supra* note 3.
6. S.C. 1997, c. 13, s. 8.
7. *Criminal Code*, s. 494(3). The term “forthwith” has been interpreted to mean as soon as reasonably practical under all the circumstances. *Cunningham*, *supra* note 2.
8. The classic cases in this area include: *Semayne’s Case* (1604), 77 E.R. 194 (K.B.); *Money v. Leach* (1765), 19 How. St. Tr. 1002 (K.B.); and *Entick v. Carrington* (1765), 95 E.R. 807 (K.B.).
9. *Leigh v. Cole* (1853), 6 Cox C.C. 329 (Q.B.); *Mayer v. Vaughan* (No. 2) (1902), 6 C.C.C. 68 (Que. K.B.); *Gottschalk v. Hutton* (1921), 66 D.L.R. 499 (Alta. C.A.); and *R. v. Caslake* (1998), 155 D.L.R. (4th) 19 (S.C.C.).
10. *Criminal Code*, s. 494(3).
11. For example, in *R. v. Lerke* (1986), 25 D.L.R. (4th) 403 (Alta. C.A.), the Court held that the staff of the tavern had lawfully arrested the accused, but then violated section 8 of the *Charter* in searching him. As a result, the marijuana the staff seized was excluded from evidence and the accused was acquitted. The Court’s comments about private citizens’ powers of search on pages 413-414 are relevant to school officials:

A citizen may, on occasion, have greater need of a right to search than does the peace officer. ... The citizen has neither side-arm, badge nor uniform, let alone warrant, on which to rely. He lacks the coercive presence of these attributes of authority which help the peace officer to avoid violence. The right to search, at least to disarm, is essential.

...

Where the search is not for weapons, but only to seize or preserve property connected to the offence, different considerations apply. The urgency present in the search for weapons would not ordinarily be present in those cases. Often the triviality of the offence charged or the improbability, in the circumstances, that any evidence will be uncovered, or will be destroyed even if search is delayed, will mean that search by a citizen would not be a reasonable search. Both the *Petty Trespass Act* and s. 449 of the *Criminal Code* contemplate that the offender will be turned over to persons in authority without delay. That being the case, it will be rare that the citizen making an arrest will need to search for evidentiary purposes only. The course of wisdom and the requirement that the search be reasonable will usually dictate that the search for evidence be left until the person arrested is turned over to authority.
12. *Criminal Code*, s. 34.
13. *Ibid.*, s. 34(1); and *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.) [hereinafter *Scopelliti*]; and *R. v. Ryan* (1989), 49 C.C.C. (3d) 490 (Nfld. C.A.).

14. *Criminal Code*, s. 265(1).
15. *R. v. Fennel*, [1970] 2 All E.R. 215 (C.A.); and *R. v. Reilly*, [1984] S.C.R. 396.
16. *Criminal Code*, s. 34(1). The issue of what constitutes reasonable force is based on the specific facts of each case. See for example, *R. v. Antley*, [1964] 2 C.C.C. 142 (Ont. C.A.); *R. v. Bogue* (1976), 30 C.C.C. (2d) 403 (Ont. C.A.) [hereinafter *Bogue*]; and *R. v. Deegan*, (1979), 49 C.C.C. (2d) 417 (Alta., C.A.) [hereinafter *Deegan*].
17. *R. v. Matson* (1970), 1 C.C.C. (2d) 374 (B.C. C.A.).
18. *Criminal Code*, s. 34(2); *Bogue* and *Deegan*, *supra* note 16; and *Scopelliti*, *supra* note 13 .
19. *Criminal Code*, s. 37.
20. *Ibid.*, s. 27. Many of the principles concerning self-defense are equally applicable to s. 27.
21. *Ibid.*, s. 27(a)(ii).
22. See for example, *R. v. Benoit* (I.) (1989), 140 N.B.R. (2d) 210 (Prov. Ct.); *R. v. Lauzon*, [1991] O.J. No. 968 (Prov. Ct.); and *R. v. Collins* (Nov. 21, 1996), unreported (Alta. Prov. Ct.).
23. See for example, *R. v. Metcalfe*, [1927] 3 W.W.W.R. 194 (Sask. Dist. Co.); *R. v. Corkum*, [1937] 1 D.L.R. 79 (N.S. Co. Ct.); *Murdock v. Richards*, [1954] 1 D.L.R. 766 (N.S. S.C.); and *R. v. Imbeault* (1977), 17 N.B.R. (2d) 234 (Co. Ct.).
24. *R. v. Haberstock* (1970), 1 C.C.C. (2d) 433 (Sask. C.A.).
25. *Ogg-Moss v. The Queen* (1984), 11 D.L.R. (4th) 549 (S.C.C.) [hereinafter *Ogg-Moss*]; and *Nixon v. The Queen* (1984), 12 D.L.R. (4th) 762 (S.C.C.). See also *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453 (Sask. C.A.).
26. *Ogg-Moss*, *ibid.* at 566, quoting *Brisson v. Lafontaine* (1864), 8 L.C. Jur. 173 at 175.
27. *Ibid.* at 563. For other cases limiting the defence see *R. v. Duggan* (E.) (1993), 348 A.P.R. 304 (Nfld. S.C.); and *R. v. Graham* (D.) (1995), 412 A.P.R. 306 (N.B. Q.B.). In *Graham*, the Court noted that the child's conduct must merit punishment, the force used must be reasonable, the force must be used to ensure respect for authority, and the child must be capable of appreciating correction.
28. [2000] 49 O.R. (3d) 662 (Sup. Ct. J.).
29. *Ibid.* at 698.
30. *Ibid.* at 669-698.
31. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2002), 207 D.L.R. (4th) 632 (Ont. C.A.), *aff'd*. [2004] S.C.J. No. 6 (S.C.C.).
32. *Priestman v. Colangelo*, [1959] S.C.R. 615; *Poupart v. Lafortune* (1973), 41 D.L.R. (3d) 720 (S.C.C.); *R. v. Biron*, [1976] 2 S.C.R. 56, per Laskin C.J.C.; and *Swansburg v. Smith*, [1995] 1 W.W.R. 324 (B.C. S.C.).

EDUCATORS' RECORDKEEPING, CONFIDENTIALITY AND DISCLOSURE OBLIGATIONS

1. For example, in *Fraser v. Evans*, [1969] 1 Q.B. 349 (C.A.), the Court stated at page 361:
 No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence.
 See also *Parry-Jones v. The Law Society and Others*, [1968] 1 All E.R. 177 (C.A.); *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.); and *Cronkwright v. Conkwright* [1971], 14 D.L.R. (3d) 168 (Ont. H.C.).
2. R.S.O. 1990, c. C.11, s. 72(1). For case illustrations of the reporting obligations under the *Child and Family Services Act* see: *J. (L.A.) v. J.(H)* (1993), 13 O.R. (3d) 306 (Gen. Div.); *Police Complaints Commissioner v. Dunlop* (1995), 26 O.R. (3d) 582 (Gen. Div.); and *Brown v. University of Alberta Hospital* (1997), 33 C.C.L.T. (2d) 113 (Alta. Q.B.).
3. This provision applies only to the OSR and not to other educational records.
4. *Teaching Profession Act*, R.S.O. 1990, c. T.2, s. 14(e).
5. For example, a teacher who agreed to meet with a student to discuss a “private and personal matter” may be viewed as having implicitly promised confidentiality.
6. In most professional relationships, such as those involving lawyers, health care professionals, accountants, and engineers, it is simply assumed that all patient or client information is confidential.
7. See H. Glasbeek, “Limitations on the Action of Breach of Confidence” in D. Gibson, ed., *Aspects of Privacy Law* (Toronto: Butterworths, 1980) 217.
8. The legislation governing most professional conduct specifically provides that the wrongful disclosure of confidential information constitutes professional misconduct and may result in disciplinary proceedings. In regard to educators, see Professional Misconduct, O. Reg. 437/97, s. 1.6.
9. See B. McLachlin, “Confidential Communication and the Law of Privilege” (1977), 11 U.B.C. L. Rev. 266.
10. *Ibid.*
11. See *Slavutych v. Baker*, [1976] 1 S.C.R. 254; and *R. v. Gruenke*, [1991] 3 S.C.R. 263.
12. See for example, *R. v. R.S.* (1985), 19 C.C.C. (3d) 115 (Ont. C.A.); *Gibbs v. Gibbs* (1985), 48 C.P.C. 163 (Ont. S.C.); and *R. v. O'Connor*, [1995] 4 S.C.R. 411.
13. Although Reg. 271, R.R.O. 1980, s. 5(2) limited an educator’s right to maintain records outside of the OSR, this section was repealed by O. Reg. 380/86, s. 2. Consequently, the current regulations no longer contain any express provisions concerning records kept outside of the OSR. However, any such records would be subject, like the OSR, to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.
14. (1987), 59 O.R. (2d) 654 [hereinafter *Re Peel Board*].
15. Two additional factors call into question the recordkeeping prohibition in the Guideline. First, *Re Peel Board*, the case upon which the prohibition was partially based was specifically overturned in *F.G. v. Board of Education of Scarborough* (1994), 68 O.A.C. 308 (Div. Ct.). Second, as we will discuss, this prohibition was ignored or abandoned by the Ministry in its 1994 *Violence-Free Schools Policy*. Ministry of Education and Training, *Violence-Free Schools Policy* (Toronto: Queen’s Printer, 1994), Part V, A, p. 39.

16. Ministry of Education and Training, *ibid*.
17. The *Violence-Free School Policy*, like the 1989 Guideline, is a policy statement which does not have the force of law. Nevertheless, boards would be well advised to follow the *Violence-Free Schools Policy* and record serious violent incidents in a student's OSR.
18. *Education Act*, s. 266(10). See also s. 266(2); and the *Teaching Profession Act*, *supra* note 4, Regulation, s. 14(e).
19. *Education Act*, s. 266(2), and (10)(b) and (c). Students under the age of 18 are considered minors.
20. *Ibid.*, s. 266(3).
21. *Ibid.*, s. 266(4)(a).
22. *Ibid.*, s. 266(4)(b). The Act sets out detailed procedures for resolving disputes about the accuracy or appropriateness of the information in the record. *Ibid.*, s. 266(5).
23. It is important to distinguish between situations in which the police are demanding, as opposed to requesting, information. If a school principal is served with a search warrant or subpoena, he or she is required to comply with it.
24. This confidentiality provision applies only to information that properly belongs in the OSR. For example, in *Cook v. Dufferin-Peel Roman Catholic Separate School Board* (1983), 34 C.P.C. 178 (Ont. S.C.), it was held that students' statements concerning injuries to another student should not have been included in the students' OSRs, because this information was not relevant to their instruction.
25. *Education Act*, s. (2)(b).
26. *R. v. B.* (1979), 2(3) F.L.R. 213 (Ont. Prov. Ct.). See also *R. v. Germain* (Nov. 3, 1994), unreported (Ont. Prov. Ct.).
27. *R. v. B.*, *ibid.* at 218.
28. As indicated earlier, the courts have been reluctant to extend privilege to various relationships and to interpret statutes as granting privilege. See *supra* notes 11 and 12.
29. R.S.O. 1990, c. M.56.
30. *Ibid.*, s. 4(1).
31. *Ibid.*, s. 32.
32. *Ibid.*, s. s. 36(1) and (2).
33. *Ibid.*, s. 2(1) "record".
34. *Ibid.* See also s. 2(1); "personal information", which is defined as recorded information about an identifiable individual.
35. *Ibid.*, s. 4(1)(a) and (b), and ss. 6-15.
36. *Ibid.*, ss. 6(1)(b), 8(1)(a) and (b) and 12 respectively.
37. *Ibid.*, s. 9.
38. *Ibid.*, s. 2(1) "personal information".
39. *Ibid.*, s. 114(1)(a).
40. *Ibid.*, s. 54(c).
41. *Ibid.*, s. 14(1)(b).

42. *Ibid.*, s. 14(1)(d).
43. *Ibid.*, s. 14(1)(f). Section 14(2) provides that an individual must consider all relevant circumstances, including nine specific criteria, in determining what constitutes an unjustified invasion of privacy. Section 14(3) provides that disclosure of educational, medical, psychological, as well as other specific types of information is presumed to constitute an unjustified invasion of privacy. Consequently, it appears that important countervailing considerations must be established to justify disclosing such information.
44. *Ibid.*, ss. 27-33. The exact relationship between Parts I and II of the Act remains unclear. The definition of personal information in Part II of the Act includes information that has not been recorded. See s. 28(1).
45. *Ibid.*, s. 32 (c),(d), (g), and (i).
46. *Ibid.*, s. 36(1).
47. *Ibid.*, s. 38.
48. *Ibid.*, s. 36(2).
49. *Ibid.*, s. 30(2).
50. *Ibis.*, ss. 39-44.
51. See for example, *Koechlin v. Waugh* (1957), 11 D.L.R. (2d) 447 (Ont. C.A.); *R. v. Carroll* (1959), 23 D.L.R. (2d) 217 (Ont. C.A.); *Rice v. Connolly*, [1966] 2 Q.B. 414; *Kenlin v. Gardiner*, [1967] 2 Q.B. 510; and *Colet v. The Queen*, [1981] 1 S.C.R. 2.
52. *Criminal Code*, s. 50(1)(b).
53. *Ibid.*, s. 129.
54. *Education Act*, s. 265(k).
55. Regulation 298, s. 11(3)(n).
56. *Ibid.*, s. 23(2).
57. *Education Act*, ss. 306(10), 307(7), 309(5) and (20), and 310(3).
58. Ministry of Education and Training, *Violence-Free Schools Policy* (Toronto: Queen's Printer, 1994).
59. *Ibid.*, Part IV, B., p. 36. The serious violent incidents that must be reported include: possession of a weapon; threats of serious physical injury; physical assault causing bodily harm; sexual assault; robbery and extortion; hate-motivated violence; and vandalism causing extensive damage.
60. *Ibid.*, Part IV, D, p. 37 and E, p. 38.
61. *Ibid.*, Part VI, p. 41.
62. See generally, *R. v. Kenkens* (1995), 23 O.R. (3d) 582 (Gen. Div.).
63. However, the Policy permits school boards to add other categories of violent incidents to those that must be reported to the police. *Ibid.*, Part VI, A, p. 42.
64. Ministry of Education and Ministry of the Solicitor General, *Provincial Model for a Local Police/School Board Protocol* (Toronto: Queen's Printer, 2000).
65. *Ibid.*, p. 2.
66. *Ibid.*, p. 5.
67. *Ibid.*, p. 10.

68. R.S.O. 1990, c. C.11, s. 72(1).
69. *Ibid.*
70. *Ibid.*, s. 72(2).
71. *Ibid.*, s. 72(3).
72. *Ibid.*, s. 72(7) and (8).
73. *Ibid.*, s. 72(7).
74. *Ibid.*, s. 72(4) and (6.2).
75. See C. Wright, “Negligent ‘Acts or Omissions’ ” (1941), 19 *Can. Bar Rev.* 465; and H. McNiece and J. Thorton, “Affirmative Duties in Tort” (1949), 58 *Yale L. J.* 1272.
76. See for example, *Jordan House v. Menow*, [1974] S.C.R. 239; *Arnold v. Teno* (1978), 83 D.L.R. (3d) 609 (S.C.C.); *Toews v. MacKenzie* (1980), 109 D.L.R. (3d) 473 (B.C. C.A.); and *Q. v. Minto Management Ltd.* (1985), 49 O.R. (2d) 531 (Ont. H.C.), *aff’d* (1986), 34 D.L.R. (4th) 767 (Ont. C.A.).
77. For a discussion of the duty of care imposed upon school officials, see Endnotes – Part 3, *supra*, note 28.
78. In *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 44 C.C.L.T. 225, the Supreme Court of Canada unanimously held that sponsors of potentially dangerous activities have a legal obligation to take whatever steps are necessary to prevent intoxicated individuals from participating. Although there are no comparable Canadian cases dealing with schools, the cases referred to above clearly illustrate the courts’ concern that students not be exposed to undue risk.
79. R.S.O. 1990, c. C.11, s. 37(1) “child”.
80. See Ferris *et al.*, “Defining the Physician’s Duty to Warn: Consensus Statement of Ontario’s Medical Expert Panel on Duty to Inform” (1998), 158(11) *Canadian Medical Association Journal* 1473. Although not directly on point see *Smith v. Jones*, [1997] 1 S.C.R. 455.

SCHOOLS, COURTS AND THE CHARTER OF RIGHTS AND FREEDOMS

1. (1986), 33 D.L.R. (4th) 277 (Ont. C.A.) [hereinafter *J.M.G.*].
2. (1998), 166 D.L.R. (4th) 261 (S.C.C.) [hereinafter *M.(M.R.)*].
3. *J.M.G.*, *supra* note 1, at 282.
4. The Court in *J.M.G.* simply assumed that the principal was entitled to possess the marijuana he seized from the student. The issue is complicated by the fact that possession of a narcotic is an offence under s. 4 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Section 8(3) of the Act authorizes certain individuals, including agents of the police, to possess narcotics in specified circumstances. Presumably, the Court in *J.M.G.* considered the principal to be an agent of the police when he seized the marijuana and contacted them to hand it over.

However, it is unclear what authority a principal would have to possess drugs seized from a student and then dispose of them without calling the police. For example, the *Provincial Model for a Local Police/School Board Protocol* requires police involvement in drug offences, whereas the *1994 Violence Free Schools Policy* does not. Furthermore, the Court in *J.M.G.* suggested disposal of the drugs would be appropriate in minor drug cases. Unfortunately, no court has specifically addressed the issue. In these circumstances, it may be advisable for a school board to contact the local Crown prosecutor and the police to reach some informal agreement about how to handle these matters.

In any event, school boards should develop internal guidelines governing the seizure, possession, storage, and disposal of property that is taken from students. It may be appropriate to return to a student's parents any property that may be lawfully possessed by the parents, but may not be lawfully possessed by the student. Alcohol seized from a 16-year-old would fall into this category. Property which is taken from a student because of a violation of the school rules, but which the student may otherwise lawfully possess, could be returned to the student at the end of the term. For example, this may include cigarettes taken from an 18-year-old student caught smoking on school property. A school official should not return property to students that they cannot lawfully possess. For example, a principal who returned alcohol to an 18-year-old student could be charged under s. 30 (1) of the *Liquor Licence Act*, R.S.O. 1990, L.19, with providing alcohol to an underaged person. Nor should school officials use or consume any property seized from students. Regardless of the specific guidelines adopted, they should be compatible with the board's overall alcohol and drug policies.

5. *J.M.G.*, *supra* note 1 at 282-283.
6. However, the Court suggested that the result might have been different had the principal arrested J.M.G. and then brought him to the office, or had called in the police immediately and held J.M.G. until they arrived. The Court emphasized that the principal only decided to involve the police after J.M.G. swallowed part of the evidence. Nevertheless, from the suspect's perspective it is difficult to justify distinguishing between an investigation of potential criminal conduct under the *Education Act* to which s. 10(b) would not apply, and a citizen's arrest or detention to which s. 10(b) would likely apply.
7. *M.(M.R.)*, *supra* note 2 at 275-276.
8. *Ibid.* at 276-282.
9. *Ibid.* at 283-286.
10. *Ibid.* at 290.

