THE EDUCATION AMENDMENT ACT, 1980

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I. INTRODUCTION

It was noted in an earlier number of this Review[1] that at the time of going to press Bill 82,[2] amending the Ontario Education Act, 1974,[3] was "the subject of amendments and counter-amendments"[4] in the Ontario Legislative Assembly. It was suggested in the same article that "school legislation is the work of civil servants, the elected representatives of the people rarely raising any objection".[5] Bill 82 is now on the statute book:[6] let us see how it illustrates what was said earlier.

Bill 82 is a law about a hot potato, and one cannot speak to the law without some explanation of the potato. Ever since The Education Act, 1974, the educational situation of handicapped children has provoked mounting discontent on the part of parents and their associations, unconvinced by the serene and impregnable confidence of Boards of Education in their own expertise in this area. Parents and their associations have access to a great deal of expertise which most boards are unwilling to accept because they do not control it. The situation has also attracted the attention of some private members in the Assembly itself.[7] Some of them have suffered personally from their own board's obstinate obtuseness and nearly all have had harrowing complaints from constituents.[8] The Ministry of Education spent six years studying the question after the 1974 Act had been railroaded through, and the Minister claims that all interested associations were consulted.[9] This is true of some (and they were sworn to secrecy), but not of all: the Ontario Society for Autistic Children was certainly not consulted. Nothing was kept

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[1] Clarence Smith, *The Right to an Appropriate Education: A Comparative Study*, 12 OTTAWA L. REV. 367 (1980).

[2] 31st Leg. Ont., 4th Sess., 1980 (3d reading, in force 12 Dec. 1980)

[3] S.O. 1974, c. 109.

[4] Clarence Smith, *supra* note 1, at 376 n. 29.

[5] *Id.* at 370.

[6] The Education Amendment Act, 1980, S.O. 1980, c. 61 (*amending* S.O. 1974, c. 109).

[7] LEG. ONT. DEB., 31st Leg., 4th Sess., No. 115, at 4392 (1980) [hereafter cited as DEBATES].

[8] *See, e.g.*, DEBATES, *supra* note 7, No. 116, at 4426, where a member of the Legislature relates a complaint he had received.

[9] DEBATES, *supra* note 7, No. 56, at 2136.

secret from the boards, and their reluctance to see any change was one reason why Bill 82 was not ready for first reading until 23 May 1980.

After second reading on 17 June, the Bill was referred to the Social Development Committee of the Assembly. This committee held public hearings in August — the writer of this comment was among those heard — and after debate on 30 September reported the Bill back to the Assembly in a very different form. The change was made possible by the two opposition parties joining against the Government. As soon as the changes became known, forceful representations were made by the boards,[10] and the Minister let it be known that she could not accept the Bill in this shape. Letters to her and to other members of the Assembly, from parents and their associations supporting the changes, drew answers but made no difference. When the Bill was debated in Committee of the Whole on 18[11] and 25[12] November, the Minister introduced a series of amendments drawing all teeth from the Social Development Committee's version; and one of the opposition parties having now agreed to support the Government, these amendments were adopted (with some further modification).

The Bill received third reading on 2 December, and Royal Assent on 12 December; and with that it came in a sense into force, but it is not applicable to any particular Board of Education until the Ministry so prescribes. The Ministry must so prescribe before the beginning of September 1985[13] — unless later amendment postpones this date. There is no sanction for failure by any board to comply with the Act by the date fixed for it.

The law as consolidated in 1974, which meanwhile remains in force, obliges public school boards and separate school boards to provide school places for all children unless they are so handicapped as to be "unable to profit by instruction in an elementary school".[14] In case of a dispute over any child's inability to profit, the question is decided (without appeal) by a committee of three. The committee is made up of a superintendent and a principal both under the same board, and a psychiatrist where the pupil has a mental handicap. All three members are appointed by the board.[15] Public school boards (under the name of divisional school boards), but not separate school boards, are obliged to maintain schools for the "trainable mentally retarded" but are not obliged to admit any particular child to them. For children who are neither "normal" nor "trainable mentally retarded" both kinds of

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[10] DEBATES, *supra* note 7, No. 115, at 4392 *passim*. For pressure by the school boards, *see id.* at 4400-01.

[11] *Id.* at 4390-4410; DEBATES, No. 116, at 4417-34.

[12] DEBATES, *supra* note 7, No. 122, at 4610-28; DEBATES, *supra* note 7, No. 116, at 4633-48.

[13] The Education Amendment Act, 1980, s. 3(1) (*repealing and replacing* s. 10(1)5 of the principal Act).

[14] The Education Act, 1974, S.O. 1974, c. 109, s. 34(1).

[15] The Education Act, 1974, s. 34(3).

school boards have the power, but no duty, to provide "special education" classes. They are not obliged to put any particular child in these classes even if they operate them,[16] and they are not obliged to see that special education in fact benefits any child. There is, of course, equally little obligation to see that ordinary education is beneficial.

II. Bill 82: Debut

Bill 82, as officially presented in May 1980,[17] made no change in the rights of children to education. The right was still to attend school and no more, despite the Minister's express declaration that the Bill "clearly and unequivocally obliged the publicly supported system to provide *appropriate* forms of education".[18] The word appropriate occurred nowhere in this version of the Bill, nor did the idea. The Bill, however, did narrow the exception which excludes handicapped children from even this right. Children were no longer to be excluded for physical handicaps; and mentally handicapped children could be excluded only if "unable to profit by instruction".[19] The additional words "in an elementary school" which had slipped into the 1974 Act were as quietly dropped, although they have come back in a different form in the final version. The decision on whether a child is unable to profit by instruction remained in the hands of the same committee of three as before, still appointed by and reporting to the board, and still not subject to appeal.

Secondly, for those children who were not excluded but who were "exceptional", every board must (no longer "may") establish "special education programs" or purchase them from another board.[20] Programs were to be subject to Ministry Regulation in respect of their "provision, establishment, organization and administration"[21] — therefore presumably not in respect of their content. There was still no duty to see that these programs are effective: a "special education program" was carefully defined as "an instructional program that meets *or is designed to meet* the needs of an exceptional pupil".[22] No one was accountable if an exceptional pupil was given a program which in no way benefits him, even if there was impeccable outside expert evidence that there was never

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[16] This decision is made, without appeal, by a committee of the board called a "placement committee".

[17] Bill 82, 31st Leg. Ont., 4th Sess., 1980 (1st reading, 23 May 1980).

[18] Debates, *supra* note 7, No. 56, at 2135 (emphasis added).

[19] Bill 82 (1st reading), cl. 6 (*repealing and replacing* s. 34(2) of the principal Act).

[20] Bill 82 (1st reading), cl. 14 (now The Education Amendment Act, 1980, s. 17, adding para. 6 *a* to s. 146 of the principal Act).

[21] Bill 82 (1st reading), cl. 3(1) (now The Education Amendment Act, 1980, s. 3(1), *repealing and replacing* s. 10(1)5 of the principal Act).

[22] Bill 82 (1st reading), cl. 1(1) (*adding* para. 62 *a* to s. 1(1) of the principal Act) (emphasis added).

any likelihood that it would benefit him. There was no obligation to provide effective teachers, without whom no program could be effective, and no recognition of the fact that in this field few teachers will be effective without specialized training. The Minister must be aware that the special education training so far provided[23] is generally regarded as useless.[24] A further lack of legal obligation was contained in the definition of the "exceptional pupil" whose needs a special education program is "designed to meet". The idea was conveyed by the words: "a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he is . . . suited for placement in a special education program...."[25] Apart from the circularity of defining an exceptional pupil in terms of a special education program, and a special education program in terms of the exceptional pupil, the definition did not say "such that he *is* suited", but "such that he is *considered to be* suited for placement *by a committee of the board*...." These words were not in the version circulated to the Boards of Education in 1978[26] and have evidently been added deliberately as a precaution against accountability. In addition, placement committees would continue to operate without appeal. Although recourse to the courts under The Judicial Review Procedure Act, 1971,[27] is not excluded, the courts may intervene under that Act only in cases of lack of jurisdiction or unfair procedure, not on the ground that the committee is not equipped to appreciate the problem. This, in a nutshell, is the dispute between parents and the boards, and this dispute the boards are still to resolve unilaterally in their own favour.

Thirdly, the retarded schools were fully integrated into the school system. They were to be operated by separate school boards as well as by public school boards, and like other "special education programs" would receive their pupils from the placement committee instead of each school having its own admissions board.[28] This reform, and others of a tidying up nature, raised no controversy.

III. REFORMATION

The alterations proposed to the Bill by the Social Development Committee were concentrated on the first two points above.

On the first point, children were still not to be given directly the right to an appropriate education. A duty was to be imposed on the

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[23] By the Ministry until two years ago.

[24] She was forcefully reminded of this on second reading of the Bill: *see* DEBATES, *supra* note 7, No. 77, at 2945-46.

[25] Bill 82 (1st reading), cl. 1(1) (*adding* para. 20 *a* to s. 1(1) of the principal Act).

[26] DEBATES, *supra* note 7, No. 77, at 2950.

[27] S.O. 1971, Vol. 2, c. 48.

[28] Bill 82 (1st reading), cl. 11 (now the Education Amendment Act, 1980, s. 14, *repealing* s. 74 of the principal Act).

Minister to "ensure that all children in Ontario have available to them a free and appropriate public education",[29] but in respect of normal children no power over possibly recalcitrant boards was conferred. In the absence of a direct right, boards could not be sued for providing an inappropriate education, and in the absence of power to ensure the Minister could not be sued for failing to ensure. There was still an exception, but further narrowed, in that boards were to be relieved of the education of any "hard-to-serve" pupil, defined as "an exceptional pupil who suffers from a mental handicap or a mental and one or more additional handicaps and for whom care and treatment are primary educational needs that cannot be met by any board".[30] Even in respect of these children, however, boards were to be responsible for purchasing a program from an appropriate public or private source.[31] Classification of a child as "hard-to-serve" was to be left to ordinary placement committees[32] (not the old committee of three, which would have disappeared), but subject to appeal as of right as under the second point below.[33]

On the second point, the provision of programs for exceptional pupils, no change was proposed in the board's duty, the Minister's regulatory powers, or the date for compliance; and, again, no sanction was provided for non-compliance with the Act by a board. Placement committees were to remain the creatures of Boards of Education, and were to be charged with determining, at the instance of "teacher, principal, parent or pupil", whether any pupil is "exceptional",[34] and if so to what "special education program" must he go. It was, however, added that the program was to be "appropriate",[35] and an elaborate definition of "appropriate" was included.[36] The vital change was the provision of an appeal to a body outside the board, the "Ontario Special Education Board", to be established by the Lieutenant Governor in Council.[37] This Board would have sat in divisions of three, each division consisting of the Chairman or Vice-Chairman, one representative of Boards of Education and one representative of parents' associations. This appellate Board would have had power[38] not only to confirm or reverse any decision of a placement committee, but also itself to place pupils and

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[29] Bill 82, 31st Leg. Ont., 4th Sess., 1980, cl. 2 (2d reading, 17 Jun. 1980, *reprinted as amended by* the Social Development Committee) (*adding* para. 1*a* to s. 8 of the principal Act) [hereafter cited as Bill 82 (S.D.C.)].

[30] Bill 82 (S.D.C.), cl. 7 (to become s. 34(1)(*c*) of the principal Act).

[31] Bill 82 (S.D.C.), cl. 7 (to become s. 34(13) of the principal Act.)

[32] Bill 82 (S.D.C.), cl. 7 (to become s. 34(3)(*d*) of the principal Act).

[33] Bill 82 (S.D.C.), cl. 7 (to become s. 34(4) of the principal Act).

[34] Bill 82 (S.D.C.), cl. 7 (to become s. 34(1)(*d*), (2), (3) of the principal Act). The definition of "exceptional" retained its subjective quality: Bill 82 (S.D.C.), cl. 1(1) (*adding* para. 1(1) to the principal Act).

[35] Bill 82 (S.D.C.), cl. 7 (to become s. 34(3)(*b*) of the principal Act).

[36] Bill 82 (S.D.C.), cl. 7 (to become s. 34(1)(*a*) of the principal Act).

[37] Bill 82 (S.D.C.), cl. 7 (to become s. 34(4), (5) of the principal Act).

[38] Bill 82 (S.D.C.), cl. 7 (to become s. 34(6)-(13) of the principal Act).

design their programs, and (not only in the case of hard-to-serve pupils) to order the purchase of services from any public or private centre or other source. Regulation was to provide the procedure on appeal;[39] but the Bill itself laid down[40] detailed procedural provisions to safeguard pupils' and parents' rights and to enable them to present their case without surprise and to the best advantage. One must not, however, forget the drawbacks of this type of tribunal, in contrast to the ordinary courts: everything depends on the personality of the Chairman (or Vice-Chairman), who would, in effect, be selected by the Ministry of Education. The provincial government has nothing to do with the appointment of judges.

This, then, was the form in which the Bill was reported out by the Social Development Committee. It was a considerable advance towards the international obligations of Ontario[41] (though the existence of these obligations was noticed by no one), but still far from full compliance with them. The elected representatives of the people had raised objections, and strong ones, to the civil servants. In the end result, they might as well not have.

IV. COUNTER-REFORMATION

In the Committee of the Whole, at the Minister's instance, even the tenuous reference to an appropriate education for all children was removed on the ground that the Bill concerned only exceptional children.[42] This argument ignores the fact that the Bill amends the Education Act, and that Act as so amended now establishes the incongruous situation that exceptional children are guaranteed (still tenuously) an *appropriate* education, while normal children are not. It was claimed that no child is now to be excluded; but this means only that some public authority will always pay. From the point of view of boards, children can still be excluded even from the right to attend school, and the old board-appointed committee of three (two board servants and a psychiatrist) survives to judge inability to profit by instruction. It is true that in response to many protests the psychiatrist seems to have been dropped in favour of "a legally qualified medical practitioner who has expertise in respect of the mental or other handicap of the pupil";[43] but this change will probably prove illusory because the board makes the appointments and is likely to continue to prefer a psychiatrist to, for example, a neurologist. As before, either principal or parent may ask for

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[39] Bill 82 (S.D.C.), cl. 3(2) (to become s. 10(1)5*a* of the principal Act).

[40] Bill 82 (S.D.C.), cl. 7 (to become s. 34(15) of the principal Act).

[41] *See* Clarence Smith, *supra* note 1, at 367-68.

[42] DEBATES, *supra* note 7, No. 225, at 4406-07.

[43] The Education Amendment Act, 1980, S.O. 1980, c. 61, s. 7 (*repealing and replacing* s. 34(2) of the principal Act).

a decision, and the committee may decide either that the pupil "can profit by instruction *offered by the board* or determine that the pupil is a hard to serve pupil"[44] — now defined as a pupil "who under this section is determined to be unable to profit by instruction offered by a board due to a mental handicap or a mental and one or more additional handicaps".[45] This is another definition couched in terms of a specified decider and not of objective characteristics: objective characteristics might open the way to the courts. The board is not, however, bound to accept this "determination"; the board "considers" it and determines for itself.[46] Where the board "determines that the pupil is considered to need" (double subjectivity now) a special education program, it refers the matter to a placement committee,[47] or, alternatively, it "shall assist the parent or guardian to locate a placement suited to the needs of the pupil".[48] Two provisions not originally proposed by the Minister were added in the course of the debate.[49] The first of these is that the placement is to be paid for not by the board but by the province,[50] a matter of small interest to the pupil but a great concession by the province to the boards. This point had been the principal obstacle to the agreement which preceded the introduction of Bill 82. A great concession except that the Minister is confident that after all programs have been set up by the boards it will apply to only a handful of children for whom, in words distorted from the Social Development Committee's definition of hard to serve, "the requirements for care and treatment are uppermost and supersede requirements for an educational program".[51] The second added provision is that this outside placement is to be made in Ontario (since a public placement is not specified it could still be private); but "where no placement suited to the needs of the pupil is available in Ontario, a placement may be made outside Ontario".[52] Since it is not said who decides what is "suited", it would follow that recourse to the courts on this small point is not excluded, but this is hardly likely to have been intended. Against the decision of the board that the pupil is hard to serve, or its location of a placement after such a decision, there is an

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[44] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(3)(*c*) of the principal Act) (emphasis added).

[45] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(1)(*b*) of the principal Act).

[46] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(7) of the principal Act).

[47] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(8) of the principal Act).

[48] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(9) of the principal Act).

[49] DEBATES, *supra* note 7, No. 122, at 4620.

[50] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(17) of the principal Act).

[51] DEBATES, *supra* note 7, No. 123, at 4642.

[52] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(16) of the principal Act).

appeal[53] to a new "Special Education Tribunal" more conveniently dealt with under the second point. Against a decision that a child is *not* hard to serve — a decision that the board has a program adequate to the child's needs — there is no appeal, although parents may well want a decision of inadequacy in the board in order to qualify for an outside placement.

On the second point, the provision of programs for exceptional children, the Minister's text would have given them no more right to an "appropriate" program than she was willing to give to normal children; but she accepted in the course of debate[54] an amendment inserting this word, though without the definition proposed by the Social Development Committee. This inclusion was at least not softened to "considered to be appropriate", so that even without the definition an objective right might seem to have been created for the exceptional. But it is still "The Minister shall ensure" rather than "every child has a right", and impartial decision on what is appropriate is not assured. The decision in the first instance is made by a placement committee, and there is to be an appeal, but only as provided by Regulation,[55] not to be debated in the Assembly[56] or even revealed to it until the time of Royal Assent.[57]

The draft Regulation (Appeals) then submitted provides, first, that an Appeal Board shall consist of three members one of whom shall be nominated by a local parents' association; but which association is to be invited depends on the board's decision after only "consultation" with the parent. The board appoints the chairman and the other member who "shall hold qualifications as a supervisory officer".[58] The only hint of impartiality is that the chairman must not be a member or servant of the board. Secondly, the parent has no right to representation or to call evidence (any more than at first instance), the Appeal Board hearing only "any person who, *in the opinion of the Appeal Board* may be able to contribute information...." The parent is to be all alone (except for the pupil) in "discussion which shall be conducted in an informal manner" with "representatives of the board and of the committee" in unspecified numbers.[59] Thirdly, the board is not bound by any decision of the Appeal Board contrary to the determination of the placement committee, but may "accept or reject" it.[60]

In the heat of debate[61] the Minister offered further recourse to the new (apparently provincial) "Special Education Tribunal", both against

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[53] The Education Amendment Act, 1980, s. 7 (*repealing and replacing* s. 34(10) of the principal Act).

[54] DEBATES, *supra* note 7, No. 115, at 4407.

[55] The Education Amendment Act, 1980, s. 3(2) (*adding* s. 10(1)5*a* to the principal Act).

[56] See one protest among many: DEBATES, *supra* note 7, No. 116, at 4425.

[57] DEBATES, *supra* note 7, No. 122, at 4627.

[58] Draft Regulations, Regulation Proposed to be Made Under The Education Act, 1974, Appeals, s. 7(1)-(4) (Dec. 1980).

[59] S. 7(7).

[60] S. 7(11).

[61] DEBATES, *supra* note 7, No. 123, at 4644.

the label "exceptional" or the denial of it, and against the placement.[62] But this recourse is not an appeal; it is for leave to appeal to an *ad-hoc* regional tribunal whose decision is "final and binding upon the parties".[63] This phrase shuts out the courts without actually saying so. The Minister suggested that these tribunals might consist of "a member of the concerned association . . . a member representing the school system . . . and . . . a chairman who would be as independent as it is possible to be"[64] — an echo of the Social Development Committee's "Special Education Board". But this was late in the evening; the Act says nothing about composition, and the draft Regulation (Regional Tribunals) says that the chairman "shall be a supervisory officer employed in the Regional Office of the Ministry of Education". The other members are defined only negatively, one negation being of the "local association that nominated a member of the Appeal Board".[65] So it will not be "the concerned association", and need not be any association.

V. Conclusion

The general result, then, is that the two objectives of the democratically constituted Social Development Committee — to secure the implementation of *effective* programs and to provide *impartial* compulsion in case of resistance — have both been expertly torpedoed by officialdom. Boards of Education, the sole suppliers of the service, are still the sole judges of the adequacy of that service, a monopoly-squared situation which would not be tolerated for a moment in any other context except perhaps the Post Office. In respect of the over-gifted, the under-gifted and the handicapped, the boards may now have to arrange for programs which they were able to shrug off before; but they are still the sole arbiters of what special program, if any, is best to develop the intellectual potential of these students, subject now to a right of appeal, which may well prove illusory.

Even control by the Ministry might be better than no control at all, but pressed in debate the Minister has explicitly renounced legal power to control, preferring "to utilize the powers of persuasion, cooperative activity and consultation".[66] There is no corresponding withdrawal of the criminal sanction against parents who do not send their children to school in favour of "persuasion, cooperative activity and consultation";

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[62] The Education Amendment Act, 1980, s. 7 (*adding* s. 34*b*(1), (2) to the principal Act).

[63] The Education Amendment Act, 1980, s. 7 (*adding* s. 34*b*(5) to the principal Act).

[64] DEBATES, *supra* note 7, No. 123, at 4646.

[65] Draft Regulations, Regulation Proposed to be Made Under The Education Act, 1974, Regional Tribunals, s. 2(2), (3).

[66] DEBATES, *supra* note 7, No. 123, at 4641.

and even in relation to the boards this is not what the Minister said at the public hearings before the Social Development Committee. When it was put to me that Ministry control was preferable to court control, I said that such control would have to have teeth and the Minister replied: "I have very sharp teeth." Has she capitulated? Or is it that legal power to control might imply a legal duty to exercise that power, and that that duty might be controllable by the courts?

It is possible that Bill 82 will have such a psychological impact on boards that they will now establish an adequate program for every child. Many people with experience of the past will be skeptical, but this is a question of fact, not law. Looked at as law, Bill 82 permits hardly anything that was not permitted already, gives no enforceable rights, and compels no one to obey it. That is not much of a law.

VI. POSTSCRIPT

A court in Quebec City[67] has recently entertained an action by anglophone parents of an autistic child. The child had been a year in a kindergarten class in an anglophone school with the help of a specialized aide subsidized by the Ministry of Education, and had been found to benefit from this. For the following year the school board considered the subsidy inadequate and gave the parents a choice between a special autistic class for francophones set up locally, or separation of the child from his family by residential treatment in an anglophone setting in Montreal. The court held that since the 1979 amendments to the Quebec School Code[68] every school board was bound itself, without the option of purchasing elsewhere, to provide "special educative services" to children "incapable . . . of profiting from instruction in the normal classes or programs"; and further that these parents had the right to refuse a francophone school. An interlocutory injunction ordered the board to put the child in the anglophone school at kindergarten level, and there to provide him with "the special educative services required by his condition". The law does not say that the services must be of the kind required, but the court evidently thought it a necessary implication. The court abstained from specifying the services in the order, but it did make the suggestion that they should be the same as the previous year had shown to be effective. One more point: the board's offer of two

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[67] M. v. Commission Scolaire Ste. Foy (unreported, Que. C.S., 12 Dec. 1980) (No. 200-05-003597-80).

[68] Loi modifiant de nouveau la loi sur l'instruction publique, S.Q., 1979, c. 80. In particular, *see* s. 48, *repealing and replacing* s. 480 of the principal Act. Section 480 had, before amendment, given boards a discretion to set up special classes. Section 481, as amended, authorizes the definition by Regulation of the nature of the special educational service. No Regulation had been issued, but the court held that if the right had to wait for the Regulation, a Ministry would have the power to postpone indefinitely the will of the legislature.

unacceptable alternatives was dated 22 October. The parents had their interlocutory injunction by 9 December, a mere seven weeks later. This alacrity on the part of counsel and court deserves to be imitated elsewhere.

The tide of "horrendous lawsuits"[69] is creeping slowly closer to Ontario's boundaries.

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[69] This was how a recent Ontario Minister of Education described developments in the United States: *see* Clarence Smith, *supra* note 1, at 372, 389-90.