Civil Liberties -- Public Schools -- Segregation of Negro Students

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difficult to see how labour relations boards can proceed with their work until it is determined at the highest level.

Bora Laskin*

CIVIL LIBERTIES—PUBLIC SCHOOLS—SEGREGATION OF NEGRO STUDENTS.

On examining the school Acts, we have no doubt that it was intended by the Legislature when they passed the statute... that if a separate school should be established for coloured people under the 69th, 70th and 71st clauses of that Act, the children of people of colour residing within such section should be educated within such separate school...

The judgment¹ from which this quotation comes does not arise from the current school segregation controversy in the southern United States. The speaker is the Hon. John Beverley Robinson, Chief Justice of the Court of Queen's Bench of Ontario; the legislature is that of the Province of Canada; the statute² is an unsightly example of legislative legerdemain which, after 115 years, continues today to mock our expressed public policy "that every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin".³

This sorry chapter in our legislative history opens in 1849. In that year, reciting that negro children "by causes arising from the prejudices and ignorance of certain other inhabitants" were being prevented from attending public schools, the provincial legislature authorized municipal councils to establish separate schools for coloured people.⁴ Robinson C. J. plainly stated, however, that this expressed legislative sympathy for the plight of the negro was not intended to derogate from the strict construction of the compulsory segregation statute:

Upon a review of the several statutes, we are of opinion that the separate schools were authorized as the defendants have suggested out of deference to the prejudices of the white population—prejudices which the Legislature evidently, from the language which they used, disapproved of and regretted, and which arise, perhaps, not so much from the mere fact of difference of colour, as from an apprehension

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1 Re Hill v. Camden & Zone (1874), 11 U.C.Q.B. 573.
2 An Act for the better establishment and maintenance of Public Schools in Upper Canada, S. C., 1849, 12 Vict., c. 83, ss. 69-71; re-enacted S. C., 1850, 13 & 14 Vict., c. 48, s. 19; am. by C.S.U.C., 1859, c. 65, s. 1 et seq.; now Separate Schools Act, R.S.O., 1960, c. 368, s. 2.
4 S. C., 1849, c. 83, s. 69.
that the children of the coloured people, many of whom have but lately escaped from a state of slavery may be, in respect to morals and habits unfortunately worse trained than the white children are in general, and that their children might suffer from the effects of bad example. It can hardly be supposed that the Legislature authorized such separate schools under the idea that it would be more beneficial or agreeable to the coloured people to have their children taught separately from the whites. . . .

After the establishment of any such separate school in a division, we do not think a choice was intended by the Legislature to be left to the coloured people within that division to send their children nevertheless to the general common school. . . .

Ontario (or Upper Canada) was not alone amongst communities outside the southern United States whose liberal principles were tested by an influx of fugitive slaves during the mid-nineteenth century.\(^5\) Nebraska, for example, a way-station on the "underground railway" to Canada, similarly faced the problem of negro education—and resolved it by guaranteeing access to the public schools in 1867.\(^7\) New York legally abolished racially segregated schools in urban centres in 1900, and in rural areas only in 1938.\(^8\) Massachusetts and Indiana likewise had legally segregated schools; although the former abolished the practice over a century ago, the latter repudiated it much more recently.\(^9\) As late as 1954, the date of the historic desegregation decision in *Brown v. Board of Education*,\(^10\) four states outside the south permitted racial segregation on an optional basis.\(^11\) Following that decision, three of those states abandoned the practice, while the fourth had never in fact pursued it.\(^12\) Ontario, however, retains legal machinery for the establishment of segregated schools.

But while the statute remains on our books, it has long since ceased to present a practical barrier to equal educational opportunities. In 1849 the statute allowed the white community to forcibly exclude negroes. By 1859, the right to establish negro separate

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\(^5\) Supra, footnote 1, at p. 578.

\(^6\) See, e.g., *In The Matter of John Anderson* (1860), 20 U.C.Q.B. 124, a *cause célèbre* in which a divided court ordered the extradition of a fugitive slave accused of murdering his master when apprehended in flight, in order to escape recapture.

\(^7\) See Lake & Hansen, *Negro Segregation in Nebraska Schools—1860 to 1870* (1953), 33 Neb. L. Rev. 44.


\(^11\) Arizona, Kansas, New Mexico and Wyoming; see Sutherland, *op. cit.*, footnote 9, at p. 170.

\(^12\) Sutherland, *op. cit., ibid.*, at p. 178.
schools was vested, instead, in the negro community. There it remains today.

A change in the legislative scheme did not, unhappily, end the practice of compulsory segregation. Firstly, schools established under the earlier legislation continued to exist. Secondly, negro families could be forced by social pressures to seek refuge in segregation. In either case, the existence of a segregated school precluded attendance at the public school. Thirdly, and most significantly, municipal councillors demonstrated the same qualities of perseverance and ingenuity in excluding negroes that have characterized contemporary southern resistance to integration.

In Simmons v. Chatham, for example, in response to a petition by some negro families, the municipality established two segregated schools. However, the boundaries of the segregated school districts were defined by the municipality not in the conventional manner, by metes and bounds, but rather by reference to the presence or absence of negroes on particular parcels of land. All negroes within the municipality were excluded from public schools and assigned to one of the two segregated schools regardless of whether, as a practical matter, they lived close enough to such schools to be able to attend them. Robinson C.J. stated:

This consideration, however, of the apparent inexpediency of the by-law, was one for the township council to deal with. He did quash the by-law, however, on the ground that it constructed "an arrangement fluctuating and uncertain in its nature, and which does not give to the school section any limits that can be said to be known at any point of time". An even more blatant attempt to "gerrymander" the school section boundaries was likewise struck down in Washington v. Charlottesville.

A second technique employed by municipal councils closely resembled the contemporary pupil placement schemes whereby the prior consent of some administrative official is required—and denied—to any transfer from one school to another. Thus, in Dunn v. Windsor, Ferguson J. denied the application of a negro

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13 The 1850 legislation was repealed by C.S.U.C., 1859, c. 1, s. 5, Schedule A, and replaced by the Separate Schools Act, C.S.U.C., 1859, c. 65, s. 1.
14 Separate Schools Act, supra, footnote 2.
15 Hill v. Camden & Zone, supra, footnote 1.
16 (1861), 21 U.C.Q.B. 75.
17 Ibid., at p. 79.
18 Ibid.
parent for mandamus to compel the defendant public school to admit his child:

... the plaintiff's child was a registered pupil at the coloured school during the last term. It is contended that she should have attended there at the commencement of the present term, and that the plaintiff desiring to have her transferred to the other school should have applied to the inspector for that purpose, and in this contention I am of the opinion that the defendants are right.21

A rather similar tactic was employed in *Re Hutchison and St. Catharines*,22 where the defendant municipality, having established a separate coloured school in advance of, and without regard to, the 1849 legislation, relied instead upon its general power to establish "any kind or description of schools". Morrison J. rejected this argument in a classic affirmation of the principles of our public school system:

We can see no reason why, because the applicant's son happens to be colored, that on that account he should be refused admittance to a common school situate in the ward in which his family resides, and most convenient for his children to go to, upon the same terms as his neighbours' children, and that he should be restricted to one school where only colored children are taught. . . . We cannot entertain any doubt that the Legislature never intended by the expression "kind" of schools . . . to mean or provide that in any particular school only children of color or any particular race should be admitted. If so, then upon the same reasoning the trustees might order that in certain schools none but natives of Scotland or Ireland, etc., or the children of parents of such and such religious sects, should be educated in certain schools, a system and powers totally at variance with the principles upon which our common school legislation is founded.23

Thirdly, and with considerable success, applications by negroes to enter public schools were resisted on the ground that existing school facilities were fully employed and that there was no room to accommodate additional—negro—students. In *Re Hutchison and St. Catharines*, despite his obvious lack of sympathy with the municipality's position, Morrison J. deferred to evidence of a lack of accommodation for the applicant and refused to grant mandamus to compel his admission to the school.24 Lack of accommodation was likewise assigned as a ground for denying relief in *Dunn v. Windsor*.25

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21 (1884), 6 O.R. 125, at p. 127 (Ch. Div.).
22 (1871), 31 U.C.Q.B. 274.  
23 Ibid., at pp. 277-278.
24 In support of the evidence that overcrowding would result from the admission of negro children into public schools, "the Local Superintendant of Schools, who was also a physician, stated in his affidavit that compelling the trustees to admit the colored children of the town into the several ward schools at the present time would be attended with evil consequences from a sanitary point of view". Ibid., at p. 276.
25 Supra, footnote 21.
However, Ontario’s coloured separate schools in time atrophied through lack of pupils and, no doubt, through a generally more tolerant attitude on the part of the white community. None are known to exist today. Once the coloured school disappeared from the community the legal basis for refusing admission to public schools was gone.\(^2\) Today there remains only the anomalous provision in the Separate Schools Act whose repeal would be a happy ending to a sad Ontario folk tale.

H. W. Arthurs*  

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Criminal Law—Sentencing—The Functions of the Courts and the Parole Board.—In Regina v. Holden,\(^1\) the British Columbia Court of Appeal examined the respective roles of the courts and the extra-legal agencies in the sentencing process. More recently the same court has confirmed the principles which were enunciated in that case.\(^2\) The Ontario Court of Appeal has also considered the same area of criminal justice, arriving at a somewhat different conclusion.

In Heck, the British Columbia Court of Appeal looked unfavourably on the trial judge’s concern for the part which the Parole Board should play in the sentencing of criminal offenders. It must be admitted that the situation which arose in Heck was much more susceptible to criticism than was applicable, if at all, in Holden. The magistrate had imposed a sentence of five years on the appellant who had been convicted of six counts of false pretences, and had, quite improperly, promised that he would write a favourable report for the Parole Board if the appellant would waive his right to appeal.

Naturally, the Court of Appeal had been incensed with this agreement. The appellant was also displeased when he discovered

\(^2\) Re Stewart and Sandwich East (1864), 23 U.C.Q.B. 634, at p. 638: “It is in our opinion quite impossible to hold that if a separate school is once established, the class for whose use it was brought into existence cannot, when it is no longer maintained, claim the privileges conferred by the Common School Act. The creation of a separate school does not annul those privileges, and when the separate school ceases to exist the rights revive ... We must hold that coloured people are not to be excluded from the ordinary common schools, if there be no separate school established and in operation for their use.”
