

PERSPECTIVES ON THE STANDARD OF CARE FOR CUSTODIAL GROUPS

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Teachers and those in charge of our schools are entrusted with the care and education of our children. It is difficult to imagine a more important trust or duty.

– Supreme Court of Canada, *R. v. M.R.M.* [1998] S.C.R.

1. An Independent Perspective by Jon Heshka

No one wants a child to die in the wilderness. Teachers and parents alike want quality outdoor education programs whereby it's natural to think that students will return home at the end of the trip. While a child's safety cannot be absolutely guaranteed (even if they stay at home and play video games—as reported in the Royal Society for the Prevention of Accidents, although there has been a steep decline in tree-climbing and bike riding incidents, 600 children went to the British hospitals in 2005 for repetitive strain injury—but that's another story), the dilemma is how to best manage risk. The answer depends on who you are. Each perspective, in turn, offers its own set of Pandora's box of issues.

As a parent you want what's best for your children. Safety cannot be compromised and under no circumstances should it be possible for a child to be seriously injured, let alone die on an Outdoor Education trip. "Do whatever it takes" is a familiar refrain for parents to school officials, all the while also wanting more courses, more field trips, fewer students per class and less activity costs.

As a teacher, you too want what's best for your students. You are also preparing, teaching and evaluating students in approximately half a dozen classes daily as well as often acting as a surrogate parent, mentor and muse. This may be in addition to coaching or supervising extracurricular activities.

As a leader of a custodial group, whether it is Girl Guides, youth clubs or a church group, you're inspired by the opportunity to make a difference in the life of a boy or girl by introducing them to the wonders of the wilderness.

As a school board official who has to administer budgets and insurance policies, your duty is to create the structure to do the greatest good for the most students.

As a land manager of a protected area such as a provincial or national park, your duty is to take such care as in all the circumstances to see that student visitors will be reasonably safe in using the premises and to not create a danger nor act with reckless disregard to students' safety.

Such is the landscape of the perspectives surrounding the standard of care for students and custodial groups in outdoor education.

In 2003, when an avalanche swept through the Connaught Creek drainage of Rogers Pass killing seven students from Strathcona-Tweedsmuir School (STS) less than two weeks after another avalanche had killed seven people on the Durrand Glacier, only kilometers away, the shock waves were felt across the country. Members of Parliament were publicly opining that the backcountry should be shut down, long-standing clients cancelled heli-skiing holidays resulting in a loss of more than \$1 million to the sector, and four reviews were about to be launched trying to understand how this could happen.

Amidst the outpouring of grief and guilt was an internal review of STS's Outdoor Education Program, a Parks Canada Backcountry Avalanche Risk Review, a BC Ministry of Public Safety and Solicitor General review, and a coroner's inquest. These avalanches and the reports that followed have helped realign our expectations regarding outdoor education and have refocused our views of risk.

Such a reexamination begins with a discussion on teacher's standard of care. This introduction speaks to the complexities and confusion regarding the standard of care to be applied to a teacher leading outdoor and adventure activities.

The law is painstakingly clear that the standard of care required of a teacher to a student is that of a careful parent. From the 1893 case of *Williams v. Eady* to 2003's *Murao v. Richmond School District No. 38*, the courts are firm in their resolve that this be the standard.

The courts have been reluctant to depart from the prudent parent standard. Instead, they have chosen to issue caveats or delimit conditions as to the applicability of the

standard. Qualifiers issued from *Thornton et al. v. Board of School Trustees of District No. 57 (Prince George) et al.* and *Myers et al. v. Peel County Board of Education et al.* have included:

- the larger-than-life family size of the class
- the supra-parental expertise required of the instructor
- the nature of the activity
- the age and competency of the students
- the degree of skill and training received in conjunction with the activity
- the nature and condition of the equipment
- “a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent parent-standard to the conduct of the school authority in the circumstances”

This potpourri of preconditions has been dismissed by the dissenting judges in both the leading cases of *McKay et al. v. Board of Govan School Unit No. 29 et al.* and *Thornton et al. v. Board of School Trustees of District No. 57 (Prince George) et al.* whereby a professional standard of care rather than one of a prudent parent was recommended. Notwithstanding the flexibility and fluidity of the standard’s application, it remains set in stone. The gravity of the *Williams v. Eady* decision is such that trial and appellate courts in the common law provinces of Canada have on the whole unquestioningly considered the ruling to be of binding authority. The English prudent parent standard has withstood the test of time and has proven to be of sufficient mettle that it has been adopted in school incident cases by courts in Canada and the United States.

The 20th century is teeming with cases of students getting hurt or killed while supervised by teachers. From school gymnastics cases (*Butterworth et al. v. Collegiate Institute Board of Etobicoke, McKay and Thornton*) to school swimming cases (*Moddejonge et al. v. Huron County Board of Education et al.*) to school skiing cases (*Murao*), and school scrambling/climbing cases (*Bain v. Board of Education* (Calgary)), the law is clear that an outdoor education teacher needs to know no more and no less, subject to the seven qualifiers listed above, than a prudent parent.

As Cullens J. of the Federal Court of Canada ruled in *Tobler v. Canada* (Minister of the Environment, Parks Canada owes an affirmative duty to take reasonable care to ensure the park is safe to the public. The question becomes what is reasonable? Risk is integral and inherent to climbing, skiing, paddling and most every form of wilderness activity. Canadian courts have recently weighed in on the balancing act of purposefully situating people in hazardous situations against unnecessarily exposing them to unnecessary risk. Taylor J. of the Court of Appeal for British Columbia in *Scurfield v. Cariboo Helicopter Ltd.*, in a case involving two clients killed in an

avalanche, captured the tension between intentionally situating people into a risky arena and the duty to safeguard them. “It is not contended that the defendants had a duty to ensure that their guests were kept away from all places where avalanches could occur—in the context of helicopter skiing that would be impossible.” Thus, the court recognized that risk is essential and condones the practice of heli-skiing recognizing that avalanches are an unfortunate but tragic possible byproduct to the activity.

Returning to the tragic winter of 2003, the school system and Parks Canada responded with initiatives that would affect and alter how outdoor education would be delivered.

As the Crown is the occupier of the parks, the response of Parks Canada to the Connaught Creek avalanche was to implement regulations and policies whose ostensible goal is “to ensure that custodial groups [including schools] receive the right leadership, in the appropriate terrain, during good avalanche conditions.” An Avalanche Terrain Exposure Scale (ATES) with three classifications was developed—Simple, Challenging and Complex. Parks’ policy is that custodial groups may travel in Simple (Class 1) terrain without additional supervision and it is recommended that backcountry travel be avoided when avalanche conditions are poor. Parks’ policy is that custodial groups must hire a professional mountain or ski guide in Challenging (Class 2) terrain, that the group size must not exceed 10 and that travel on avalanche terrain be permitted only when the guide rates the slope specific snow stability as either good or very good. Lastly, Parks’ policy is that custodial groups are not permitted into Complex (Class 3) terrain under any conditions. These policies developed by Parks Canada provide a clear direction for custodial groups traveling in the backcountry of Canada’s National Parks.

2. Parks Canada’s Perspective by Grant Statham

Parks Canada’s custodial group winter policy was implemented in 2004, following the tragic avalanche accident where seven students on an outdoor education field trip were killed in a large avalanche in Glacier National Park. In the aftermath, several independent reviews identified the need for government to establish higher standards of care for institutions leading minors into hazardous areas. This higher standard would contrast the long since established standard of care for the general public, which Parks Canada manages on the principle of self-reliance. Clearly, risk control for custodial groups required a different approach than all other National Park visitors.

First was the need for Park’s Canada to define these groups under the term Custodial Group, as no definition existed. The term refers to the concepts of legal custody over minors, and the responsibilities when in loco parentis (in the place of the parent), and speaks directly to the

increased responsibilities for institutions catering to these groups. A specific and well-crafted definition was essential to ensure that regulations referring to custodial groups were targeted correctly.

The resulting Parks Canada definition is: *A custodial group means a group affiliated with an institution, where at least one person is below the age of majority and that minor is not in the company of his/her parent or legal guardian.* Institutional groups include but are not limited to school groups, Scout/Guide groups, church groups, cadet groups and community youth groups. Custodial groups do not include groups of families or friends.

All of this is underpinned by the legal inability of a minor to accept responsibility for decisions regarding their own welfare. Minors cannot waive their rights. Although outdoor programs may have known this for years (primarily because minors can't sign waivers), how many people stopped to think about what this actually meant? Beyond the obvious increased liability from the lack of waiver protection, what this really means is that the standard of care must be higher for minors, and risk thresholds when in loco parentis must be lower.

There is no doubt that Parks Canada's custodial risk control policies have changed the landscape for outdoor youth programs. However, the model offers flexibility. It provides many areas of low risk terrain where custodial groups can travel unburdened by regulations; identifies areas with increased risk where professional leadership is required; and defines high risk areas where the threshold for in loco parentis leaders likely exceeds that of a prudent parent. To date, this model has been applied only to the winter avalanche situation; however a more comprehensive year round policy is being considered. Expect a similar three-step model to be employed with respect to mountaineering, rock/ice climbing and whitewater with the requirements linking directly to terrain ratings.

This link to terrain is a critical element of any alpine risk control strategy. Mountain hazards such as avalanches, rockfall, and whitewater will always exist, and managing the risk that results from exposure to these hazards depends most strongly on terrain choice. Avalanche hazard may be high, but the risk to your group will be low if you avoid avalanche terrain. This is why Parks Canada's custodial regulations are directly linked to terrain ratings.

If the careful and prudent parent is the clear legal standard that custodial group leaders will be held to, then one should place this standard into an alpine context. What would a prudent parent do when faced with the uncertainty of avalanche risk decisions? Consider the general Canadian society and a representative Canadian parent (not one who is a lifetime member of the Alpine Club), realizing that we live in a culture who views an ascent of Mt. Everest as the pinnacle of alpinism, or imag-

ines avalanches alongside earthquakes as a rare occurrence. This is the reality of the general society's understanding of natural hazards and alpine risk.

When considering this, it only seems obvious that a careful and prudent parent would NOT expose their child to complex avalanche terrain. They would seek skilled leadership to make those decisions on their behalf, and would expect those leaders to exercise restraint in objectives and not accept unnecessary additional risk.

There is no doubt that some outdoor education leaders are frustrated with restrictions placed on where they can lead their groups. With all due respect to the many hard working and pressured teachers, overburdened with policy and paperwork, we live in an increasingly specialized society with higher accountabilities each day. Teachers are called upon to do many things, and they cannot hope to be specialized at them all. They should by design, lead their kids at a minimum level in a variety of things. Most are not avalanche forecasters, and they should not be guiding their class and exposing their group to avalanche risk simply because they believe they are good enough. Understanding our motivations and placing the objectives of our group ahead of ourselves is a fundamental principle of outdoor guiding.

Parks Canada's mandate relates directly to the education and experience of park visitors. Canadians who come to understand the true value of ecosystem protection, often do so most effectively by way of outdoor experiences. These experiences shape our values, and breed a familiarity and a sense of personal ownership with nature that cannot be found in the classroom. Participants in custodial groups are the next generation of decision makers and despite the challenges described in this paper; their continued participation in outdoor activities is essential to the very fabric and future of Canada's national parks.

3. The Calgary School Board's Perspective by Scott McLarty

Within the Calgary Board of Education (CBE), the procedures for outdoor pursuit activities have been revised to reflect the requirements of Parks Canada. The challenge of school board's is to know where to draw the line between trusting teacher judgment, and where to interfere or support by a labyrinthine of policies and procedures. In spite of the best of intentions, teachers can overestimate their own and their student's abilities, underestimate risk, and make mistakes that cannot be erased on a blackboard, resulting in injuries to students. We must also be mindful that there are also countless examples of good outdoor education programming being delivered by teachers without incident. The CBE is not above criticism and has had its share of incidents, deaths and investigative reports. The challenge of the CBE is to identify where to place the ful-

crum, i.e. the tipping point on the lever, which balances teacher competence with policies and procedures.

The CBE employs a fulltime system coordinator for off-site activities who has authorized nineteen different outdoor pursuit activities. This includes overseeing outdoor education teacher professional development and the development and implementation of supportive procedures and processes.

Each of the CBE activities has procedures that identify, in detail, the following:

1. Context of the activity in relation to a K-12 school system
2. Pre-Trip Preparation
 - a. ensure the activities and location are congruent with curricular goals
 - b. communicate with parents the nature of the activity, schedule, gear, possible weather, etc.
 - c. identify students with allergies and medical conditions
 - d. detailed route planning
 - e. outline behavioural expectations
 - f. have contingency plans
 - g. develop instruction, progressions and demonstrations
 - h. conduct safety briefings
3. Common Hazards
4. Control Measures
 - a. conduct a hazard assessment of activities and locations
 - b. take necessary precautions for the identified hazards
 - c. develop an emergency response plan
 - d. monitor weather reports
 - e. be familiar with route or area
 - f. be competent, i.e. navigation, first aid, etc.
 - g. wildlife management
5. Leader Competence
 - a. knowledge, skill and ability
 - b. qualification and certification
 - c. experience

6. Terrain Guidelines

7. Group Size and Supervision Ratios

Teachers may be hesitant to embrace such rules and regulations that are ostensibly designed to be supportive, prescriptive and enabling. The CBE is sensitive to such concerns and believes that a reasonable balance has been achieved; each activity's procedures are no longer than two pages in length. Although the legal standard of outdoor education teachers, as argued in this paper, is that of a prudent parent, the CBE sets its requirements higher than this standard.

4. Concluding Remarks by Jon Heshka

On the surface, these measures appear reasonable and protective of our greatest legacies, our children. There may be a darker and unintended legacy however, of students not being able to participate in the outdoors for reasons described in this paper and others not referred to. A potential middle ground bridging this curricular crevasse may be an enhanced qualification such as that urged by Woods J in *McKay* or Virtue J in *Bain* for an ordinarily competent instructor. The door is open to such a possibility. Connecting the dots between BC Court of Appeal Justice Carrothers' ruling in *Thornton* accounting for supraparental expertise and Supreme Court of Canada Justice McIntyre's clever caveat in *Myers* that the application of the prudent parent standard may be further offset by other considerations, then it is possible that these rulings represent the thin tip of the wedge towards an expanded standard. Such a qualification could be legitimated if there were real opportunities for teachers to access professional development, specialized resources and outdoor education specific teacher training programs.