

## ANALYSIS OF SPECIAL EDUCATION TRIBUNAL OUTCOMES USING LUHMANN'S SYSTEMS THEORY

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*This paper examines Special Education Tribunals, in Ontario, Canada through a Luhmannian theoretical lens. A total of 58 Special Education Tribunal summary hearings were analyzed using the constant comparative method through NVivo software. The results revealed that these Tribunals appear to favour the assessment testimony of teachers and other school personnel over that of other professionals such as educational psychologists, medical doctors, and university professors. This finding is discussed in relation to the available interpretations of Luhmann's social systems theory along with the limitations of using educational tribunals to remedy social justice issues.*

### *Analysis of Special Education Tribunal Outcomes Using Luhmann's Systems Theory*

In 1984 the Canadian province of Ontario passed Bill 82, thereby mandating publicly funded school boards to assume responsibility for providing an appropriate education to all students with exceptionalities. Until that point, school boards could refuse to accept these students. This legislation was a significant step in redressing unfair treatment of those with disabilities by the education system. The legislation went further and established the right of parents to appeal educational decisions made by school boards concerning their exceptional children. Regulation 554/81 (currently Regulation 181/98) outlined the process by which students with disabilities would be identified and their placement decided. Identification, Placement, and Review Committees (IPRCs) were established to consider a range of possible placement options, from full time attendance in a regular classroom with some resource support to a segregated special education environment. Parents who disagree with an IPRC decision can appeal to a Special Education Appeal Board (SEAB) and still further to a Special Education Tribunal. This final step in the process is a highly significant one, and can be viewed as a reflection of what Mashaw (1983) refers to as the *body politic* embracing *participatory governance* (p. 2) and arising out of the politics of protest movements during the civil rights actions in the United States in the 1950s.

The mainstreaming of special education students into regular classrooms has been carried on the wave of the civil rights banner. In the United States, *Brown versus the Board of Education of Topeka* (1954) is credited with initiating the movement towards the mainstreaming of children with disabilities finally resulting in the Education for All Handicapped Children Act (1975) and then the Individuals with Disability Education Act (IDEA) (1990). Similar legislation in Canada (Bill 82) was passed in 1984 but the addition of a quasi-judicial administrative body, such as a special education Tribunal, allowing for parental involvement was especially hard won after parents of children with disabilities lobbied for the creation of a space where they could contest the educational system's treatment of their children. Thus, Ontario's Special Education Tribunals were the result of the politics of civil rights and societal justice. Both the designation of a child as 'exceptional' and the programs or services that they would/could receive could now be determined by a Tribunal (Ontario Legislature, 1980, December 12).

The Special Education Tribunal is a quasi-judicial body created from a legislative act, the Statutory Powers and Procedures Act, and is guided by section 57 of the Education Act (the Education Act, R.S.O. 1980, c.129 for Tribunal cases from 1984 to 1993; the Education Act, R.S.O. 1990, c. E.2 for Tribunal cases from 1993 to 2010). Within the Education Act, the Tribunal is also bound by Regulation 181/98 (formerly Regulation 302 in cases from 1993 to 1998; and Regulation 554/81 in cases from 1984 to 1992). As such, it is bound by legislation in its consideration of the issues at hand. Under section 57 of

the Education Act, the Special Education Tribunal has only two options: it can dismiss the appeal, or it can grant the appeal with respect to the identification or placement of a student (the Education Act R.S.O. 1990, c.E.2, section 57). The Education Act is also specific in terms of the identification labels that can be used (Special Education Information Handbook, 1984).

However, administrative tribunals are also charged with the responsibility of ensuring that decisions made by other regulatory bodies (in this case decisions by an IPRC, or SEAB) comply with processes of procedural fairness. Additionally, any administrative tribunal must decide on issues of substantive justice regarding the outcomes of their administrative decisions. Substantive justice, sometimes also called 'natural justice' brings with it the consideration of fairness in a decision aside from any inconsistencies in procedural irregularities. Substantive justice is about remedying a loss or a disadvantage that an individual has suffered as a result of incorrect rendering of legislation (Adler, 2003; Cumming, 2008).

In the early days of the Tribunals (1984 - 2001) there was a strong emphasis on the Education Act and the Ministry handbook which describes the categories of disabilities in guiding the decision. Tribunals appeared to adhere strictly to the letter of the law in ensuring that decisions were only about placement and identification. This ruled out discussions of programming and student needs, which is what parents really wanted to talk about (Valeo, 2003). But this changed substantially after 2001: Tribunals began to allow discussion of student programming and needs arguing that these also needed to be taken into consideration to act in the best interests of the child and determine the most suitable placement. This shift in Tribunal behaviour occurred without changes to the legislation. What is particularly interesting about this shift in perspective is that the discourse on the 'best interests of the child' was adopted from the legal system and first featured in *E. v. Brant County Board of Education*, 1993. Many of the Tribunal hearings after 1996 used this as a reason to hear or rule on an appeal. Only one case prior to 1993 used this discourse, and even then it was tied to legislation and did not arise from within the education system. In *MJS and the Board of Education for the City of Toronto* (1985), the Tribunal noted that:

The Tribunal believes that the purpose of the legislation under which it is constituted has been written with the best interests of the child in mind. Therefore this Tribunal in the spirit of the Act and within the parameters of the Statutory Powers Procedure Act intends to act accordingly, by admitting and giving appropriate weight to whatever evidence is available to decide in the best interests of the child. (p. 6)

This suggests that panel members perceived the Tribunal's structure and responsibility as belonging in the realm of law rather than that of education. Their responsibilities were judicial and seen as conforming to legal practices.

However, early analyses of Tribunal hearings revealed that parental hopes of real involvement in influencing their child's educational outcomes were limited. Tribunals ruled more often in favour of school boards than they did in favour of parents (Valeo, 2003). Understanding this finding has been difficult for parents and has raised questions about the value and role of the Tribunal in educational matters. It begs the question of whether judicial safeguards and procedures can influence educational practices. Can a Special Education Tribunal deliver on substantive justice issues concerning educational matters? This paper explores this question through an analysis of Tribunal cases from 1984 to 2010 and then applies Luhmann's theoretical framework to interpret the results in light of the question posed above.

#### *Niklas Luhmann and Systems Theory*

Niklas Luhmann (1927 – 1998) was a German sociologist who adapted systems theory for use in the social sciences. His approach has an overall framework based on general systems theory, but its real strength lies in the break-down of the bigger societal system into a number of differentiated social institutions that are unique systems in and of themselves. Rather than existing to serve the needs of society, each individual system is intent on reproducing its own unique structure somewhat independently of societal needs and independently of other institutions (Arnoldi, 2001). Luhmann spent 40 years carefully developing the particular characteristics of these individual systems. For example, he explored how the institutions of law, and economics are independent systems: although they are surrounded by an environment thought of as 'society,' they are actually closed off from that environment to some extent and their behaviour is governed by a set of internal constructs known as 'communications' that are unique to each institution (Arnoldi, 2001).

Luhmann dismissed the relevancy of actions in social systems and emphasized the role of communications. He felt that people's actions were meaningless: meaning only existed in the communications produced by the systems. These communications serve to establish a boundary around the particular institution and to make sense of the environment or society. That is, each institution is a system that engages in self-regulation, or *self-reference* (Arnoldi, 2001, p. 4) and is continuously in the process of trying to make sense of its environment and maintain internal order and consistency through a process of creating communications: these communications are always reproducing the system itself. But the key aspect of each system is Luhmann's descriptions of the manner in which communications work. Communications in each particular system, be it law, economics, the media, or education, use a different code specific to that system. This difference between codes makes each system unique and partially closed off to other institutional systems and to society itself. With regard to the origins of each code Arnoldi (2001) wrote:

Each of the function systems – law, politics, economics, art, science, family and so forth – are domains of communication that have structured their recursive meaning-processing to such a degree that they have become codified (Luhmann, 1982, 1987, 1997a: ch. 4, 1998: 131). This is to say that their communication oscillates between the negative and positive value of their code. Such a structured form of meaning-processing uses one particular distinction so often that this distinction forms a binary code (Luhmann, 1998:131). (p. 6)

Understanding the code is the key to understanding why a system behaves the way it does. Luhmann spent a considerable amount of effort attempting to outline and decipher the codes of each sub system. For example, the code for law would be 'legal/illegal' and as Nobles and Schiff (2013) commented, *What establishes that a communication is a legal communication, one that connects to other legal communications and generates legal meanings, is the code that is being applied* (p. 9). In the economic system, the code may be 'payment/nonpayment' (Arnoldi, 2001); for science Luhmann believed the code to be, 'truth/falsity', and for mass media the code may be 'information/non-information' (Mingers, 2000). The code is applied during each communication and distinguishes the system from any other (Noble and Schiff, 2013). Luhmann did not explore the educational system in as much detail as other systems. His work on the educational system was cut short by illness that ended in his death (Vanderstraeten, 2000). Additionally, the translation of his partial work in education from German to English, and exploration of what implications his findings may have on the field of education have only recently been undertaken (Vanderstraeten ,2000, 2001, 2003, 2004).

In beginning to think about the code for formal education, we must first think about what formal education aims to do. Few would argue with the premise that formal education is intended to instruct young children in order to prepare them for society. Education can be thought of as socialization to help integrate young people into adult society; it aims for a *specific output* (Vanderstraeten, 2003, p. 137) and makes a concerted effort to ensure its control of this process. Vanderstraeten (2003) wrote, *It aims to attain something that cannot be left to chance socializing events.* (p. 137). Education involves two systems: that of the personal (the child) and that of the educational system with education seen as attempting to change the child's psyche. Consequently the possibility of a child's resistance to and rejection of the communications is a very real threat in education (Vanderstraeten, 2003). According to Vanderstraeten (2003), Luhmann's conceptual framework means that the act of taking part in communications in education cannot *result in the transfer of knowledge, nor in the internalization of the norms and value orientations of a social group* (p. 137) because the child can always choose to reject the information contained in the communication. An added complexity within the educational system is that what students are asked to learn is intended to be used at a much later time and in a different context. Vanderstraten (2003) wrote:

At school, students are prepared for entirely different situations; they learn things that might be of use in another context and at another moment in time (e.g., in professional life). Decisions about what is to be learned and how something is to be learned there are made without consulting the family of the students. (p. 137)

Furthermore he noted:

There is, however, no immediate access to the results of educational interventions. Nobody can look in the heads or souls of other human beings. A teacher has to deduce

the results of his or her own action from these external characteristics. What can be done in the interaction to resolve this problem? What kind of *Ersatz* is available if immediate observation is not possible? With regard to these questions, Luhmann argues that educational initiatives automatically produce a situation within which particular patterns of behaviour are acceptable, while others are not. What occurs is compared with what is expected. Students are continually confronted with questions, remarks, tests, exams, and other kinds of communicated expectations (Luhmann and Schorr, 2000: 318-25). Seen this way, it can be argued that the educational intention produces its own characteristic distinction (Luhmann, 2002: 102-10). The difference between acceptable and unacceptable patterns of behaviour, between approval and disapproval, between good and wrong, etc., develops within the school system. (p. 138)

For this reason, face-to-face interaction is thought to be the most effective way of monitoring the success of communications in the educational system (Vanderstraeten, 2003). This also means that assessment of learning and the success of schooling can only be done within the educational setting and by those who are certified (as for example, teachers) and belong to the system. Vanderstraeten commented:

...the school socializes for the school, not for society. At school, it becomes important to be a good student. Its way of working generates its own, special side effects. It promotes attitudes that make it possible to handle educational problems in special ways via educators, teachers, and schools. (p. 142)

It would appear then, that 'schooling' cannot be divorced from its setting, and that problems of education can only be solved by educators working within that milieu because its problems are unique creations of the system itself. Testing and direct teacher observation of students is the key to assessing whether education is accomplishing its task and is the only way that the communications can be deemed effective or ineffective. While testing and schooling are easily paired, and summative, formative, and diagnostic assessments have long played a large role in educational theory and practice, it is not yet clear how this aspect of education supports Luhmann's theory. What evidence supports the claim that assessment and teachers' observations are critical to the functioning of the educational system and its communication codes of 'acceptable/unacceptable behaviour', 'approval/disapproval', and 'good/wrong'? The following discussion explores the nature of a system's boundaries as they are viewed in Luhmann's theory.

Understanding the nature of boundaries in Luhmann's theory is vital to understand what a system is for Luhmann. While it may be intuitive to think of a boundary as a fixed, given structure that separates the system from society, this would be an incorrect characterization of boundaries in the Luhmannian sense. Instead of focusing on the structures that differentiate a system from its surroundings, Nobles and Schiff (2013) focused on the restrictions of the system, commenting:

...we prefer to focus on the more general point that systems develop boundaries, not in the sense that nothing passes through those boundaries, but in the sense that the system closes itself to its environment by establishing restrictions on what can enter or leave. Only by doing this can a system differentiate itself from its environment. Finding out how a system establishes restrictions on its openness to its environment, its closure, is the basis of its openness to its environment. (p. 6)

According to Nobles and Schiff (2013) it is the particular codes, as applied to the communications of a system, that determine and reflect the particular restrictions in the system. Application of the codes creates communications, which in turn creates meaning within the system. Additionally the system is also constantly creating new communications from older communications, still using the same codes. Therefore, knowing the codes in the system is vital to understand the system itself. When one system comes up against another system, the codes of the system *link these communications to each other* (Nobles & Schiff, 2013, p. 11) that limit and curtail communications from other systems with different codes from entering. Consequently the codes of a particular system are much more likely to be revealed when that system comes up against another system that uses a different code. Therefore, in looking for an event when situations in which the educational system is forced to interact with another system may yield evidence of the codes used in the educational system, and help clarify why the system reacts as it does.

### Methodology

In Ontario approximately 58 appeals were heard by an English Special Education Tribunal between 1985 and 2010. It should be noted that the following analysis did not include the full transcripts of the proceedings, but rather the summaries of hearings including summaries of the reasons for the appeal, the evidence presented by each side (the appellants and the school boards), the decision of the Tribunal panel and reasons for this decision. Initially all of these summaries were read to get a sense of the issues and discussion, but only the sections on the Tribunal's reasons/basis for their decision were coded. Analysis focused on questions such as: What kind of evidence did they use? What kinds of recommendations did they make? According to Luhmann, the selection of information is a critical feature in the creation of a communication (Vanderstraeten, 2000). Additionally, a communication cannot be said to have taken place unless the receiver (in this case the members of a Tribunal) has demonstrated an understanding of the information by *addressing herself to the information component*. (Vanderstraeten, 2000, p. 10) An analysis of the Tribunals' decisions would appear to satisfy both of these features of communication in Luhmann's theory.

All 58 appeals were analyzed using the constant comparative method through NVivo software. Initially 48 separate codings were made and these were collapsed into six broad sub-themes: 1) legislative influences, 2) daily school performance, 3) assessment information, 4) best interests of the child, 5) lack of communication among professionals, and 6) parental evidence. It should be noted that category five, lack of communication among professionals, did not directly influence Tribunal decisions, but was often noted in the Tribunal's recommendations, indicating the Tribunal's frustration with this aspect of the behaviour of educational personnel and the lack of coordination in assessment. These six categories were then collapsed into two major categories: 1) assessment considerations, and 2) legislative considerations. The 58 hearings included appeals from parents desiring both congregated and inclusive classroom placements for their children, and cases involving a range of disabilities such as Down syndrome, autism, learning disabilities, developmental disabilities, behavioural and giftedness.

### Findings

What is surprising in the Tribunals' decisions is the amount of consideration given to assessment information. Much of the evidence presented by both appellants (parents) and the school boards took the form of presentation of standardized test results by expert witnesses such as psychologists, medical doctors, and speech-language pathologists. Considerable presentation of testimony also came from parents, teachers, and school officials. In 53% of cases, the Tribunal made specific reference to assessment information in its decision. The more controversial or complex the case under consideration, the more substantial was the presentation of assessment data and its notation in decision-making. But not all assessments presented were noted by the Tribunal as helping shape their decision. More than half of the cases in this category (36%) noted teacher in-put and teacher observation as a playing a large role in Tribunal panel decisions. This was the largest category of evidence and revealed that Tribunal members appeared to favour one particular type of assessment information over others. That is, they gave substantially more weight to the witness testimony of teachers and others who had direct observation of the student in the classroom than to diagnostic assessment. Classroom performance was the largest sub-category. In many cases teacher observations and testimony trumped expert testimony.

In *E. & E. S. v. The Carleton Board of Education* (1993), an appeal in which parents sought an identification of exceptionality on the basis of environmental sensitivities for their two children, the Tribunal dismissed the testimony of a physician with expertise in the field of environmental medicine and who had treated the children for 3-5 years, noting that he, had *not observed the child in the classroom*. (p. 23). *Furthermore, this witness also acknowledges that he has no first hand observations of the child in school* and that he has no objective measures of the child's cognitive functioning; instead he relies on what he is told by the mother and what he observes in his office. (*E. & E. S. v. The Carleton Board of Education*, 1993, p. 21)

Viewing expert knowledge as detached from the authenticity of classroom and professional practice is a recurring theme in Tribunal deliberations and became more evident in the comments on the teacher's testimony in the same case. The Tribunal noted:

This testimony of two expert medical witnesses, appearing for the appellants, makes clear to the Tribunal that no direct link between the child's physical school environment and the child's behaviour and learning style is established. Our conclusion is reinforced by the evidence of the child's present teacher, [name of teacher], who is

able to observe the child in school on a daily basis, and testifies that she does not see any of the physical symptoms in the child that [name of child's family physician] attests may show up in a person who is environmentally hypersensitive. (E. & E. S. v. The Carleton Board of Education, 1993, p. 24).

The teacher's testimony was further substantiated by the testimony of the speech and language pathologist:

This observation is independently confirmed by [name of speech language pathologist], the speech and language pathologist who is also in a position to observe and evaluate the child's behaviour and learning style on a regular basis. (E. & E. S. v. The Carleton Board of Education, 1993, p. 24).

This decision clearly revealed a preference for direct observation of the child in the classroom setting by educational professionals such as the teacher; and in this particular case, the principal's testimony was also accepted and influenced the decision to deny the appeal.

References to the regularity of observation also appear to be a consideration for the Tribunal. In E v. The Brant County Board of Education (1993) concerning the inclusive placement of a child with cerebral palsy into the regular classroom of her neighborhood school, the Tribunal did not take into serious consideration the expert testimony of an associate professor from the Ontario Institute for Studies in Education because he, *only saw one class for a period of about two and one-half hours, and in our opinion therefore, would not be competent to make such a judgment.* (E v. The Brant County Board of Education, 1993, p. 41). Additionally the Tribunal in this case dismissed research evidence for lacking empirical support but added the caveat that the experts did not observe the child in the classroom:

Given the absence of clear research support and clear empirical support for the integration of exceptional children like the student; viz., the uncertainty in the area for which they are presented as expert, and given that they did not...observe the student in a school setting, we do not find their testimony significant in the specific matter of the student's placement. (E v. The Brant County Board of Education, 1993, p. 48)

It would appear that empirical research is valued, but that expertise lacking observation in a school setting is not valued. It also would appear that empirical research can be dismissed if classroom observation of the student did not occur. In B. T. & B. T. v. Simcoe County District School Board (1995), despite acknowledging an expert witness as being a prodigious scholar in the area of autism, the Tribunal dismissed the expertise because the witness' research focused on a specific area of research and because the doctor did not know the child and had no knowledge of the classroom particulars.

Teacher observations also appear to trump parental observations. In R. v. York Board of Education (1986), the Tribunal members gave the following rationale in denying the placement of a child with Down syndrome into the regular classroom:

In the light of the parents' wishes and desires for the child, the Tribunal has had to weigh carefully, the evidence of the child's present, daily functional level. To a significant extent, the practical and professional observations of the child's teachers, and of others involved with the child, seem to be somewhat at odds with what the parents anticipate, at least at present. (R. v. York Board of Education, 1986, p. 23)

Not only teacher observations were highly valued: the observations of educational assistants were also given enough weight to affect a decision. Again, in E. v. Brant County Board of Education (1993) the Tribunal notes:

The mother testifies that the student uses and comprehends a small number of manual signs. She also testifies that the student rarely repeats signs, and that the student often presents them quickly and idiosyncratically. The mother and the educational assistants testify that to learn sign, the student needs repetitive, hand-over-hand instruction; they testify further that this practice has indeed been followed with the student for several years. Nevertheless the testimony of the teachers and educational assistants is that they have very rarely, if ever, seen the student use signs spontaneously, or at least in a

manner that adults versed in sign can interpret. Based on this testimony, the Tribunal concludes there is reasonable doubt that the student will be able to use sign meaningfully. (p. 40)

While some Tribunals scrutinized the expertise of many of the professionals called as witnesses, they had no difficulty underscoring what they believed to be the professional qualifications of teachers:

Teachers learn behavioural principles and techniques in their teacher education programs. How children learn using behavioural principles is one of the classical learning theories and is not exclusive to ABA [the Lovas term] or IBI. (C. v. Dufferin-Peel Catholic District School Board, 2003, p. 8)

Furthermore, the Tribunal opinion in T. & Simcoe County District School Board (2004) noted *the level of training and support for the teachers and EA's in the Primary ASD/PDD class was very appropriate to help [the child], a child with autism, to learn.* (T. & Simcoe County District School Board, 2004, p. 71). In this hearing statements reinforcing the credentials of teachers were considered more accurate than the testimony of a psychologist who was also a professor at a Canadian university:

The consistent reference to IBI as the only way to teach children with autism, in the opinion of the Tribunal, has led to a lack of understanding of and appreciation on the part of the parents of the extensive knowledge that educators have about child development and how children learn, including children with autism. [psychologist's name] comment that T.'s education program was 'babysitting' and that his daily schedule was *bunk* did not help instill confidence in the significant work that the school and Board were doing in providing a comprehensive program for T, a placement that had materials and activities that were developmentally and cognitively appropriate for [the child's] learning needs. (T. & Simcoe County District School Board, 2004, p. 76)

These comments suggest that the psychologist's strong words regarding the programming provided at school was incorrect and served to undermine the child's educational progress. Teacher evidence was also used to support research literature findings:

The teachers testified that the child does not imitate or transfer spontaneously. This is consistent with the evidence in much of the literature on Down syndrome children. (R v. York Board of Education, 1986, p. 23)

However, this Tribunal did not cite nor directly indicate any of the literature on Down syndrome children in their deliberations.

This is not to suggest that Tribunal panels did not, sometimes, accept the testimony of psychologists and parents over that of teachers. Psychological data took precedence over teacher opinion in two cases both involving children identified as gifted. But in the majority of cases, and particularly in cases involving children with developmental delay, Tribunals clearly demonstrated a strong bias toward daily classroom-based evidence to the exclusion of professional testimony and research presented. This bias was so strong that, in at least two of the examples above, Tribunal members made broad, unsubstantiated references regarding the qualifications of teachers and their knowledge of the literature on disabilities.

### **Discussion**

Continual references to the expertise of teachers and teaching staff as well as the acceptance of the belief in observation as holding the key to understanding a child's current level of functioning continued through many of the Tribunal decisions. In light of the emphasis on this type of evidence, questions arise regarding the fairness and justice in giving substantial weight to evidence which is considered to be of questionable objectivity and reliability (Allal, 2013). Hall et al. (1997) found that teachers themselves do not trust the assessments of their colleagues who have also worked with the same child. Morgan & Watson (2002) conducted a study of typically developing students' mathematical abilities and found that, not only did different teachers offer different evaluations, but a teacher's early perceptions of a child could influence later assessments. In her review of the literature on assessment over the last 100 years, Brookhart (2012) found:

...whether in classroom grading or in research studies using standardized test scores as a criterion, teachers mix judgments of students' attainment of intended learning outcomes with judgments of students' efforts, work habits, and other 'academic enabler' traits. (p. 84)

She surmised that teachers have difficulty separating achievement from personal characteristics and this appears to be more complicated in the assessment of children with disabilities. Teacher bias often more negatively skews assessments of children with disabilities (Reeves, Boyle, & Christie, 2001) and teacher assessments of children with disabilities has been criticized for adhering to ideas of normalization (Loyd, 2008). This is not to say that Tribunals should rely on standardized assessments in their decisions. Standardized testing has a long and cruel history of use in segregation: these tests are development based on theories of normalization and do not adequately capture the intellectual functioning of children with disabilities (Green, 2005; Schneider, 1992). According to Jackson (2011), psychological assessments are also "value-laden" as "...all observers interpret evidence in the context of their own personal histories, assumptions, and values." (p. 71). A more prudent approach would be to consider all assessment information equally with the goal of creating a full picture of the child's functioning (Wortham, 2008), but this is not what has been happening.

It is not always clear whether teacher testimony was seen as more objective than other testimony. In all fairness, Tribunal decisions did not explicitly state that teacher testimony was more objective than other information. Teacher testimony was highly valued because of its link to curriculum and classroom practices. To some extent there seemed to be a belief that assessment of a child's capabilities could not be assessed outside of the context in which they must function, and this would certainly be consistent with the principles of assessment which maintain that context is important in getting the big picture (Wortham, 2008). Crossouard and Pryor (2012) explored this insistence on knowing the child's level of functioning in the classroom incorporating Foucault's work on the development of state institutions. They found that assessment practices are:

...embedded in the apparatus of modern schooling, with classification and normalizing judgment woven into the production of the schooled subject. As a process that makes the subject visible and knowable within a particular regime of truth, this introduces a less idealistic view of schooling than informs Enlightenment associations of education with emancipation. It locates assessment (and schooling) as a historically contingent practice, productive of material realities and of particular subjectivities, rather than a neutral measurement process. (p. 253)

Not only are school based assessment practices at the heart of teaching, they are essential to producing the very act of what we can refer to as schooling, and can never be considered to be anything but a solid strand of that system. Furthermore, subjectivity in assessment would appear to be inevitable. The value of assessment in education, then, would be directly related to its function in the classroom. In this respect, perhaps Tribunals are correct to value teacher observations highly. Shay (2008) referred to assessment, "as a socially-situated interpretive act" (p. 162) in which discrimination cannot be avoided and is at the very centre of the "judgment making process" (ibid, p. 162). All assessment practices, then, are caught-up in their respective professional cultures and will bear the particular subjectivity of that profession. This is equally true of assessment by teachers or those with medical or psychological training, and there can never, in any context, be a situation where an assessment is value-free. Given the choice of information from a number of different professionals, Tribunals generally appear to favour the opinion of teachers, especially in cases involving children with significant developmental disabilities.

Scholars such as Crossouard and Pryor (2012), Shay (2008) and Jackson (2011) have confirmed the entwined nature of educational practice and assessment, but their findings do not reveal why assessment would be so highly linked to the internal practices of a classroom. Additionally any discussion or evaluation of the fairness or unfairness of relying so heavily on teacher observations needs to focus on why this is the case. This question of why is closely linked with Luhmann's discussion of the educational system.

#### *Luhmann's Theory Revisited*

The finding that assessments and in-classroom observations are critical evidence for Special Education Tribunals would appear to support Luhmann's idea of the dependency of education on face-to-face interaction which is linked with the idea of the need to alter a child's inner being. A personal bond is



required between the child and the teacher. Only this allows the effects of teaching to be assessed. This bond between the teacher and the student is especially significant given that the process of educating is somewhat elusive in that it is not grounded in the present: whether or not education has succeeded (in whatever context that is defined) can only be established many years after the very act itself. It is not always clear to students why they are being asked to learn what the teacher is teaching: they are asked to perform in the present for a loosely defined expectation in the future. Under these circumstances the threat of rejecting the act of 'being taught' is a possibility for students (in either a latent way, or more immediate way through behaviour), and Luhmann's theory recognizes this. Therefore, the bond that is created between the teacher and the student is highly significant in ameliorating or managing any opportunity to reject the instruction. This means that the teacher is at the core of any educational endeavour. Tribunals appear to have an intuitive sense of this centrality of a teacher's role in education and tend to give way to this idea. However, it is not easy to interpret the fairness or unfairness of this situation because the actions of teachers cannot be examined independently of the teachers themselves. In other words, it is not possible to deduce meaning from a teacher's actions (Arnoldi, 2001). According to Luhmann's theory, actions are meaningless. According to Herting and Stein (2007) "The real 'impertinence' of Luhmann's systems theory is the radical abstraction from the human being as a communicative actor." (p. 11). They went on to comment:

Luhmann's unique view on communication as constituent of social processes helps us to understand interpersonal communication from a different perspective: The individual is not responsible for the things that are said, but the autopoietic communication system itself. As absurd as this may sound in the first place, such an approach to social exchange can help to understand one's counterpart and to develop some empathy for his or her views. The abstraction from personal responsibility and guiltiness opens the doors to a new way of mutual respect and understanding. (p.11)

In reality, then, it may not be correct to think in terms of 'Tribunals favouring teacher' observations'. Communications are what create, order, and perpetuate the system and assessments can be viewed as playing a part in the codification of these communications. In this sense, the idea of whether it is fair or unfair to accept a teacher's interpretations of daily classroom observations is a moot point. It is no longer about the teacher, but about the self-regenerating communicative events of the system.

The key point here is the autopoietic nature of the system and the communications created as a result of the codes applied. If it is accepted that a system is autopoietic, then it must also be agreed upon that it is a system that works to maintain its identity, cohesiveness, and independence/autonomy (Vanderstraeten, 2000). This is significant because it means that the system is not directly influenced by outside sources that may be present in the environment. It is not a mirror of society in that it simply replicates the struggles and tensions present in the broader environmental society in an educational setting. In an autopoietic system, the outside environment (society) is messy and chaotic and the system's goal is to maintain order (its own kind of order) within this environment. So to some extent, it is a closed system, but not entirely. Further, the system is assessing itself rather than the child's outcomes.

The system is capable of adapting and changing over time and outside influences can enter, but they can only enter the system once they have been translated into a pattern that the system recognizes as its own and has been coded with the particular code of that system (Schiff and Nobles, 2013). Or as Vanderstraeten (2000) noted, "It means that autopoietic systems use the environment according to their own standards." (p. 7). Further, although different systems such as law or education may co-exist in the same environment, Vanderstraeten (2000) noted that they "cannot participate in each other's autopoiesis." (p. 10). The codes that are applied are at the heart of the system. If education can be thought of as applying codes of 'acceptable/unacceptable behaviour', 'approval/disapproval', and 'good/wrong', then the codes of a quasi-judicial body such as a Tribunal, whose communications are governed by codes such as procedural 'fairness/unfairness', or 'just/unjust' cannot be reconciled with those of the educational system. Within this context, asking a Tribunal to implement ideas of 'justice/injustice' in a system with completely different codes is not feasible. Special Education Tribunals cannot deliver on substantive justice, because the education system is not about justice. In light of Luhmann's theory, the efficacy of Special Education Tribunals to influence educational practices is and was limited from the beginning.

## References

Adler, M. (2003). A socio-legal approach to administrative justice. *Law & Policy*, 25(4), 324-352.

- Allal, L. (2013). Teachers' professional judgment in assessment: A cognitive act and a socially situated practice. *Assessment in Education: Principles, Policy & Practice*, 15(2), 123-135.
- Arnoldi, J. (2001). Niklas Luhmann: An introduction. *Theory Culture and Society*, 18(1), 1-13.
- Brookhart, S. M. (2013). The use of teacher judgment for summative assessment in the USA. *Assessment in Education: Principles, Policy & Practice*, 20(1), 69-90
- Brown v. the Board of Education of Topeka. (1954). United States District Court for the District of Kansas.
- C. v. Dufferin-Peel Catholic District School Board. (2003). Ontario Special Education (English) Tribunal, Ministry of Education. Toronto, Ontario, Canada.
- Crossouard, B., & Pryor, J. (2012). How theory matters: Formative assessment theory and practices and their different relations to education. *Studies in Philosophy of Education*, 31, 251-263.
- Cumming, J. J. (2008). Legal and educational perspectives of equity in assessment. *Assessment in Education: Principles, Policy, & Practice*, 15(2), 123-135.
- E. & E. S. v. The Carleton Board of Education. (1993). Ontario Special Education (English) Tribunal, Ministry of Education. Toronto, Ontario, Canada.
- Eaton v. The Brant County Board of Education. (1996). Ontario Special Education (English) Tribunal, Ministry of Education. Toronto, Ontario, Canada.
- Green, T.D., McIntosh, A. S., Cook-Morales, V. J., Robinson-Zanartu, C. (2005). From old schools to tomorrow's schools: Psychoeducational assessment of African American students. *Remedial and Special Education*, 26(2), 82-92.
- Hall, K., Webber, B., Varley, S., Young, V., & Dormant, P. (1997). A study of teacher assessment at key stage 1. *Cambridge Journal of Education*, 27(1), 107-122.
- Herting, S., & Stein, L. (2007). The evolution of Luhmann's systems theory with focus on the constructivist influence. *International Journal of General Systems*, 36(1), 1-17.
- Jackson, M. R. (2011). Psychology and social justice. *A Journal of Social Justice*, 23(1), 69-76.
- Lloyd, C. (2008). Removing barriers to achievement: A strategy for inclusion or exclusion? *International Journal of Inclusive Education*, 12(2), 221-236.
- Mashaw, J. L. (1983). *Bureaucratic justice: Managing social security disability claims*. New Haven and London: Yale University Press.
- Mingers, J. (2000). Can social systems be autopoietic? Assessing Luhmann's social theory. *The Sociological Review*, 50(2), 278-299.
- Minow, M. (2013). Brown v. Board in the world: How the global turn matters for school reform, human rights, and legal knowledge. *San Diego Law Review*, 50(1), 1-27.
- MJS v. The Board of Education for the City of Toronto. (1985). Ontario Special Education (English) Tribunal, Ministry of Education. Toronto, Ontario, Canada.
- Morgan, C., & Watson, A. (2002). The interpretative nature of teachers' assessments of students' mathematics: Issues for equity. *Journal for Research in Mathematics Education*, 33(2), 71-110.
- Nobles, S., & Schiff, D. (2013). *Observing law through systems theory*. Portland, Oregon: Hart Publishing Limited.
- Ontario Legislature. (1980). Office of the Legislative Assembly of Ontario. <http://hansardindex.ontla.on.ca/>
- R. v. York Board of Education (1986). Ontario Special Education (English) Tribunal, Ministry of Education. Toronto, Ontario, Canada.
- Reeves, D. J., Boyle, W. F., & Christie, T. (2001). The relationship between teacher assessments and pupil attainments in standard test tasks at key stage 2, 1996-98. *British Educational Research Journal*, 27(2), 141-160.
- T. v. Simcoe County District School Board. (2004). Ontario Special Education (English) Tribunal, Ministry of Education. Toronto, Ontario, Canada.
- Schneider, W. H. (1992). After Binett: French intelligence testing 1900-1950. *Journal of the History of the Behavioural Sciences*, 28, 111-132.
- Shay, S. (2008). Researching assessment as social practice: Implications for research methodology. *International Journal of Educational Research*, 47, 159-164.
- Valeo, A. (2003). Special Education Tribunals in Ontario. *International Journal of Special Education*, 18(2), 18-30.
- Vanderstraeten, R. (2000). Luhmann on socialization and education. *Educational Theory*, 50(1), 1-23.
- Vanderstraeten, R. (2001). The school class as an interaction order. *British Journal of Sociology of Education*, 22(2), 267-277.
- Vanderstraeten, R. (2003). An observation of Luhmann's observation of education. *European Journal of Social Theory*, 6(1), 133-143.
- Vanderstraeten, R. (2004). The social differentiation of the educational system. *Sociology*, 38(2), 255-272.

Wortham, S. (2008). *Assessment in Early Childhood Education*, (5<sup>th</sup> ed.). Upper Saddle River N.J.: Pearson/Merrill Prentice Hall.