

William J. Smith et William F. Foster

**Balancing Rights and Values
The Place of Religion in Québec Schools**

Groupe de travail sur la place de la religion à l'école

Étude n° 5

Québec

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Ministère de l'Éducation, 1999 — 99-0055

ISBN 2-550-34522-3

Legal Deposit — Bibliothèque nationale du Québec, 1999



*Office of Research on Education
Bureau de recherche sur la politique scolaire*

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* The authors wish to acknowledge the assistance of Alexandra Zivanovic in the research of legal materials and support throughout the entire drafting process, as well as Phillippe Dufresne for additional assistance in the compilation of legislative materials from across Canada, and Sarah Bhatti, Sarah Foster and Andrea Borrelli in the preparation of the manuscript. They also wish to acknowledge Véronique Giroux from the Services linguistiques of the Ministère de l'Éducation du Québec for all her help in the preparation of the French version of this report and Paule Morisset for her assistance in revising the French version of this report.

Balancing Rights and Values: The Place of Religion in Québec Schools

Paper presented to the Task Force on the Place of Religion in Schools in Québec (August, 1998).

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Disponible en français sous le titre: <i>Harmoniser les droits et les valeurs: La place de la religion dans les écoles du Québec.</i>

EXECUTIVE SUMMARY

Introduction

The place of religion in Québec schools is a policy issue that provokes intense views among diverse groups of stakeholders in the school system. Opinions range from the safeguarding of the status quo, a denominational system based on privileges for Catholics and Protestants, to a non-denominational system based on freedom of religion and equality rights, and a hybrid - non-denominational school board structures, while keeping Catholics and Protestant religious privileges at the school level.

The purpose of this report is to provide input to the Task Force on the Place of Religion in Schools in Québec, specifically to analyze international, constitutional and domestic law, case law and doctrine respecting human rights, especially freedom of religion, and the equality rights, and to provide one or more policy alternatives consistent with these human rights.

Historical Evolution of the Debate

Even the briefest examination of the history of education in Québec reveals the critical role of the Church. When Canada became a Dominion, existing tensions over the “management and control” of schools was set forth in section 93 of the *British North America Act, 1867* which prohibited legislation which was prejudicial to the denominational rights which Catholics and Protestants had by law in 1867. This regime lasted until 1998, when the Constitution was amended to remove the application of section 93 denominational rights to Québec, paving the way for the implementation of the Government's linguistic board reform legislation.

Throughout this century old-debate on denominational rights, the only legal frame of reference was section 93 which protected rights “frozen in time;” only those recognized by law in 1867 are protected. Contrary to section 93, society cannot be frozen in time. The original French Catholic - English Protestant dichotomy changed rapidly with successive waves of immigration. The recent advent of human rights legislation allows for

a re-framing of the debate, one that can take account of the important place of cultural communities in our education system. A human rights framework is based on certain principles, whose application can evolve with time, rather than on static rights that existed by law in 1867.

A Human Rights Perspective: An Alternative Frame for the Debate

Human rights are universal because they are not bound by time or space. They comprise a broad range of “liberty rights” - traditional civil and political liberties such as freedom of religion - and “welfare rights” that guarantee certain benefits or services such as education. They are found in a variety of international instruments.

For purposes of this study, the most important sources of human rights are the *Canadian Charter of Rights and Freedoms* and the *Québec Charter of Human Rights and Freedoms*. Both *Charters* provide for a wide spectrum of human rights subject to “reasonable limits” prescribed by law.

In this study, we examine all relevant provision of these sources of law as well as the case law, notably: *R. v. Jones*; *Zylberberg v. Sudbury Board of Education*; *Canadian Civil Liberties Assn v. Ontario*; *Adler v. Ontario*; *Bal v. Ontario*; *Islamic Schools Federation of Ontario v. Ottawa Board of Education*; *Bergevin v. Commission scolaire régionale de Chambly*; *Pandori v. Peel Board of Education*; *Caldwell v. Stuart*.

The following provides a synthesis of the human rights framework presented in this paper as a set of guiding principles from the international, constitutional and domestic law applicable to Québec.

- International law governs relations between countries; in an individual human rights dispute, it is used primarily as an interpretative guide to the human rights provided for in domestic law.
- Subject to the above, the only international instruments binding on Canada which are relevant to the issue of religion and schools are: the *International Covenant on Civil and Political Rights*; the *International Covenant on*

- *Economic, Social and Cultural Rights*; and the Section 93 acts, in part, as a constitutional shield protecting “privileged treatment” of certain denominational school rights of Catholics and Protestants; now that this shield no longer applies to Québec, there is no inherent requirement for the State to grant such privileges.
 - The *Canadian Charter* provides for a wide range of human rights subject only to “reasonable limits;” it applies to both the federal and provincial legislatures and governments, and by extension to public school boards and schools because they operate as “State agents;” section 33 allows the Government of Canada or a provincial government to adopt a law which infringes certain human rights including, freedom of religion and equality rights.
 - The *Québec Charter* establishes a comprehensive code of rights and freedoms which regulates matters between the Province and citizens as well as matters between citizens themselves; it also contains a “reasonable limits” clause and an override provision; being an act of a provincial legislature, it must respect the provisions of the *Canadian Charter*.
 - The right to education is found in all relevant international human rights instruments; the *Canadian Charter* does not include a general right to education but the *Québec Charter* does (s. 40); however, it is couched in terms which make the *right* to education conditional upon the scope and the standards provided for by law.
 - The right to minority language education is found in the *Canadian Charter* (s. 23) but not in international human rights instruments or the *Québec Charter*.
 - The right to choose private education is recognized internationally and in the *Québec Charter* (s. 42). There is no explicit provision in the *Canadian Charter*; however according to case law, there is an implicit recognition in section 7 (liberty rights) of such a parental right.
 - The State must permit “alternative structures” to the public school system such as private schools
- Convention on the Rights of the Child.*
- and home schooling but the State retains the right to regulate such schooling.
- International human rights instruments, the *Canadian Charter* and the *Quebec Charter* protect freedom of conscience and religion as a fundamental human right in public institutions.
 - Parents have a right to guide their children's education, including the choice of an educational establishment in keeping with their religious beliefs.
 - In the international instruments considered, parental rights respecting religious instruction do not give rise to any positive requirement on the part of public educational authorities. Neither is there anything explicit or implicit in the *Canadian Charter* which would require the provision of religious instruction. Section 41 of the *Québec Charter* is unique in this regard, giving parents the right to require that such instruction be provided in conformity with their convictions.
 - Respecting the prohibition against discrimination based on religion means that the State cannot favour one religion over others nor exclude one religion from benefits accorded to others.
 - Education about religions in public schools is permissible provided that it does not discriminate in favour of particular religions nor against others.
 - Religious instruction in public schools is permissible provided that such provision does not discriminate in favour of particular religions nor against others; however, with the exception of *Québec Charter* (s. 41), there is no human right to insist that such instruction be offered in public schools.
 - Religious exercises in public schools are permissible provided that such provision does not discriminate in favour of particular religions nor against others.

- Accommodation for those not wishing to participate in religious instruction or exercises where offered may be provided by permitting them to “opt out” of or, alternatively, to “opt in” to, such activities; however, Ontario case law suggests that merely allowing persons to opt out if they wish is insufficient accommodation.
- International human rights instruments, the *Canadian Charter* and the *Quebec Charter* prohibit discrimination on the basis of religion in public institutions.
- Discrimination can be viewed as treating one person differently from another without proper justification, in a manner that involves some notion of injustice, often termed *invidious* or *prejudicial* treatment; it does not matter whether the discrimination was intentional or not.
- The obligation not to discriminate requires one to accommodate, that is, to take steps to avoid the discriminatory situation but this duty is not limitless; it only requires that the accommodation be “reasonable” in light of the facts and circumstances of a particular case; thus, employers, for example, can rely on a “*bona fide* occupational requirement” to refute a charge of discrimination in employment.
- Affirmative action programs are intended to undo “past wrongs;” they are explicitly permitted, but not required, by the *Canadian Charter* (s. 15(2)); consequently, they need to be provided for in human rights legislation in order to obviate a complaint of discrimination.
- Respecting freedom of religion means not interfering with an individual's right to practice his or her religion free from any form of coercion; it does not require the State to support such practice.
- There is no obligation to provide State support of private schools but if the State chooses to do so, it cannot discriminate in favour of particular religions nor against others.
- We use the expression “special programs” to designate those situations permitted in human rights codes in Canada, such as *Québec Charter* (s. 20), which would not qualify as “affirmative action” under the *Canadian Charter*. The former provide preferential treatment to *designated* groups, while the latter are limited to those programs which ameliorate the conditions of *disadvantaged* groups.
- Denominational schools may qualify as “special programs” (s. 20) which permit *prima facie* discriminatory practices, provided there is a rational connection between the brand of discrimination practised and the nature of the institution.
- Affirmative action programs cannot be undertaken to benefit historically advantaged denominational groups such as the Catholics and Protestants.
- Reasonable *bona fide* occupational requirements of a denominational nature which are *prima facie* discriminatory may be imposed on employees who occupy positions which have denominational elements irrespective of whether the employer is a denominational or non-denominational school.
- Occupational requirements of a denominational nature which are *prima facie* discriminatory may not be imposed on employees who occupy positions which do not have denominational elements irrespective of whether the employer is a denominational or non-denominational school.
- Children have rights independent of their parents and all decisions regarding children must be made in their “best interests.”
- Legislation that vests the right to “opt in” or “opt out” of religious instruction or religious exercises in parents, as opposed to allowing parents to exercise the child's right on his or her behalf, might be held to infringe the child's human rights as the framework of choice is not based on the child's “best interest.”

Legislative Treatment of Education and Religion in Canada

In Alberta, Ontario and Saskatchewan, constitutionally entrenched rights and privileges granted by law at the time of union continue to exist for minority denominational schools, Catholic or Protestant. In Newfoundland, constitutionally protected denominational rights have been reduced to courses in religion provided they are not specific to a particular denomination; and religious observances where requested by parents. In the rest of the country there are no constitutionally guaranteed rights and privileges with respect to religion in schools.

No jurisdiction outside Québec makes use of the *Canadian Charter* override provision to protect the denominational aspects of schooling and only two jurisdictions have recourse to special provisions in their provincial human rights legislation.

In the three provinces with entrenched denominational rights, there is a network of separate school boards for Catholic and Protestant minorities. There is no legislative provision anywhere outside Québec for denominational schools in the public school system.

Manitoba is the only province where students or parents are entitled to religious instruction as a matter of right following a petition by parents. The only provinces where there is a right to religious exercises as of right are Manitoba and Newfoundland, both upon parental request. In most jurisdictions, it is assumed that everyone will participate in the religious instruction or exercises and accommodation is provided by means of a right to opt out, a right vested in parents.

In Manitoba, school staff are expressly exempted from conducting religious exercises. Nova Scotia and the Northwest Territories require teachers to maintain a respect for religion and values. In New Brunswick, teachers are permitted to include the Lord's Prayer or a scripture reading in daily exercises but may not make use of any religious catechism. Ontario teachers must "inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality"

All jurisdictions allow for private schooling as an alternative to public schooling but only British Columbia and Manitoba provide funding. There is all but no mention made of religion in the legislation governing private and home school.

Analysis of Québec Legislation

- The provision concerning school board denominational positions is an infringement of

As of January 1, 1998, the denominational rights found in section 93 do not apply to Québec. This leaves the *Canadian Charter*, especially section 23, as the sole framework for the protection of minority education rights.

The *Education Act* includes several denominational provisions which go beyond those previously required by section 93 and deals with the recognition of denominational schools and moral and religious instruction [MRI] programs offered in boards which were not constitutionally protected. These privileges - extended to only Catholics and Protestants - are shielded from a challenge under the Québec *Charter* and the *Canadian Charter* by override provisions in the *Education Act* and other legislation. The override provision respecting the Québec *Charter* has no limit in time, while those respecting the *Canadian Charter* are subject to a five year limit, which will expire in 1999.

Our analysis of Québec legislation has reached the following conclusions about its validity from a human rights perspective.

- From a strictly legal point of view, the special legislative protection of the denominational privileges granted Catholics and Protestants complies with both the *Canadian Charter* and the Québec *Charter*; however, the fact that it is used, not to permit a specific exception for particular reasons but to provide a blanket shield for such privileges offends the human rights norms of freedom of religion and equality.
- The provisions concerning the positions of Catholic and Protestant Associate Deputy Ministers are an infringement of human rights in that they grant a privilege to Catholics and Protestants to have a senior Ministry official appointed to be responsible for their needs when no such position exists for the benefit of other religious groups.
- The provisions concerning the Superior Council and its denominational committees are an infringement of human rights in that they grant a privilege to Catholics and Protestants in terms of the composition of the Superior Council itself and the creation of denominational committees with broad regulatory and supervisory powers for these two groups alone.

human rights in that it grants a privilege to Catholics and Protestants to have a senior school

board official appointed to be responsible for their needs when no such position exists for the benefit of other religious groups.

- The provisions regarding the denominational status of schools are an infringement of human rights in that they grant a privilege to Catholics and Protestants to have denominationally recognized schools when no such recognition exists for the benefit of other religious groups.
- The provisions respecting the educational project comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.
- The provisions governing admission comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.
- The provisions respecting approval of local subjects are an infringement of human rights in that they subject local non-Catholic/Protestant programs to a school/school board approval process that is not required for Catholic or Protestant programs; by contrast, they subject local Catholic and Protestant programs, as well as textbooks and materials to an external approval process that is not required of other denominationally based programs, if such programs were locally approved.
- The provisions dealing with human resources comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.
- The provisions dealing with funding comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.
- The provisions respecting the right to public schooling and a duty to attend school comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.
- The provisions concerning school choice comply with human rights norms in that they neither

impair freedom of religion nor discriminate on the basis of religion.

- The provisions dealing with religious instruction are an infringement of human rights in that they grant students and parents a right to Catholic and Protestant MRI and related services, whereas members of other faiths must obtain permission for the former and are not even given the possibility of the latter; the opt-in provisions are deemed to satisfy prevailing human rights norms, but the opt-out provision of the Protestant regulation is considered to infringe such norms in light of Canadian case law as it presently stands.
- The provisions dealing with school staff and religion comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.
- The provisions respecting private and home schooling comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Options To Consider

Our analysis considers the possible array of options in terms of two dimensions: the degree to which religion is given a place in the school; and, whether or not the option respects the human rights principles. The present Québec system can be characterized as a “mixed” option that is “below the line,” that is, one that does not respect human rights norms in several key areas. In terms of options, therefore, in addition to maintaining the status quo, one could move toward making the system more denominational or more secular in nature. Whether one moves in one of these directions or the other, one then must decide whether or not to respect human rights norms.

Respecting Human Rights Norms

The fundamental options concerning human rights can be stated as follows: maintain the use of override provisions to shield the system from legal challenge under the *Canadian Charter* or the *Québec Charter*; or, reform the system to comply with human rights norms so that it neither impairs freedom of religion nor discriminates on the basis of religion.

If one decides to make the system purely secular, human rights norms are respected provided that reasonable accommodation is provided to students, staff and others within the system so as not to unduly interfere with or adversely effect their individual religious beliefs and practices; and, private or home schooling is available as an option for those wishing a denominationally based education.

If one decides to retain some denominational aspects to the system, two basic options are available, namely: denomination-specific schools within linguistic school boards; or denomination-specific religious instruction, exercises, etc. within non-denomination-specific schools. In either of these cases, one must open up such rights to all religions, subject to reasonable limits and making appropriate accommodation to all students, staff and others in any given situation.

The Denominational-Secular Continuum

Making schools more denominational could involve some combination of the following: confer a “purely denominational” status on a school, that is, without any recognition of the “common and public nature” of the school; restrict admissions to children of the denomination of the school; provide for denominational control over all aspects of curriculum; restrict hiring of personnel to members “in good standing” of the denomination of the school; allow ratepayers to direct taxes in support of schools of their denomination.

Making schools more secular could involve some combination of the following: remove any denominational status from schools; maintain open admission policy to children of any denomination; remove compulsory MRI from the curriculum; eliminate any consideration of denomination in hiring of personnel; eliminate any consideration of denomination with respect to school taxes.

Cost and Fragmentation

Simply put, we cannot afford the luxury of parallel structures in public education. Extending denominational rights at the school level risks to create the fragmentation of structures at this level that we have just eliminated at the school board level.

Pluralism and the Role of the Public School

The public school has traditionally been conceptualized as the “common school.” The school of today must reflect the pluralistic society in which we live, just as the nineteenth century common school reflected a more or less monolithic society. If it fails to do so, it is society that will die, not merely the public school.

Avoiding Religious Strife in Schools

Maintaining the denomination recognition of schools risks to move the old denominational antagonisms from the level of the system and relocate them at the level of the school. The last situation one would want to occur in a newly formed school composed of students from previous Catholic and Protestant schools is to be immersed in a battle between two religious factions, each wishing to have its denomination recognized, and a third group wanting neither.

Conclusion

We have seen that religion has played a key role in the system from its earliest days. Throughout much of this history, the place of religion in schools was framed by the existence of section 93, which required maintaining the denominational rights and privileges enjoyed by Catholics and Protestants in 1867.

We have provided an alternative frame to this debate by outlining various elements of a human rights based approach to the question. Our scrutiny of Québec legislation has revealed that special legislation is used to shield several key provisions which are in conflict with the human rights principles outlined above. We have provided a model for considering various options regarding the place of religion in schools, as well as other factors to be considered. It is now up to the State to construct a system which transmits those norms and expectations which it wishes to guide the education system and by implication, society as a whole.

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Balancing Rights and Values: The Place of Religion in Québec Schools

1.0 INTRODUCTION

The sub-title of this paper - the place of religion in Québec schools - is a policy issue that provokes intense views among diverse groups of stakeholders in the school system. Consider the following extracts from briefs presented to the Special Joint Committee of the House of Commons and Senate on the proposed amendment of section 93 of the *Constitution Act, 1867*:ⁱ

The Citizens for the Constitutional Right to Denominational Schools:ⁱⁱ

As long as the parents continue to choose denominational schools, no one has a right to deprive them of it.¹

The Centrale de l'enseignement du Québec:ⁱⁱⁱ

In a democratic system based on the respect of fundamental freedoms, it is unacceptable that persons who are neither Catholic nor Protestant must choose between these two privileged denominations in order to exercise their right to schooling.²

¹It is not up to the state, the politicians, the religious leaders, nor even the teachers to judge for parents and their children whether or not the latter should be granted a denominational school system and Catholic instruction in the schools. One will hear the following types of comments from the proponents of a secularized school system: "the children can't even make the sign of the cross when they start school" or "the children make their First Communion and then are never again seen at Mass" or "the parents neither know nor practice [*sic*] their faith". Whether or not the above is true, is irrelevant. As long as the parents continue to choose denominational schools, no one has a right to deprive them of it.

²Remove the constraints of section 93 is to follow up on the large consensus expressed throughout Québec on the modernization of the school system.

Remove the constraints of section 93 is to express our attachment to freedom of conscience and religion as well as the principle of equality among people that transcends the legitimate diversity of their religious options.

We believe that the support for freedom of conscience and religion is a fundamental basis of our democracy. Freedom of religion would not mean much however if it did not imply equality rights for everyone, whether they profess a religious belief or not and whatever their particular religious belief may be. This implies that there cannot be an official religion and that the State must not favour any religious group.

The structure of the school system on the basis of two privileged denominations contravenes this value.... In a democratic system based on the respect of fundamental freedoms, it is unacceptable that persons who are neither Catholic nor Protestant must choose between these two privileged denominations in order to exercise their right to schooling.

The FCPPQ supports reform based on linguistic considerations, provided services that meet the religious and cultural need of Catholic and Protestant groups continue to [be] offered.³

As one can see from the foregoing, opinions range from the safeguarding of the status quo, a denominational system based on privileges for Catholics and Protestants, to a non-denominational system based on freedom of religion and equality rights, and a hybrid - non-denominational school board structures, while keeping Catholics and Protestant religious privileges at the school level.

During the hearings of the Special Joint Committee of the House of Commons and Senate, the proponents of reform downplayed the implication of the proposed amendment on the place of religion in schools. The Federal Minister of Intergovernmental Affairs cited the support of the Assembly of Bishops for the implementation of linguistic boards while alluding to the denominational guarantees contained in the *Education Act*.^v These guarantees - denominational status of schools and religious instruction - can be viewed alternatively as the unfinished part of the education reform package or the compromise that made school board reform viable. A fragile consensus exists in Québec in support of the constitutional amendment; however, the support of some groups is based on a continuation of the “Confederation compromise” by other means, namely the perpetuation of denominational schools and religious instruction in schools. To some, these reforms are “the beginning of the end” of the denominational school system; to others, the reform is so flawed that denominationalism will not only linger but linger in a more invidious form.

It is not surprising therefore that the Minister of Education decided to form a Task Force on the Place of Religion in Schools in Québec headed by Professor Jean-Pierre Proulx of the University of Montréal to report to her by the fall of 1998. The timing of this request is also noteworthy as the provisions of the *Education Act*^{vi} which shield these guarantees from a constitutional challenge lapse in 1999 unless renewed by the Government (see discussion in chapter 5 below).

These guarantees - denominational status of schools and religious instruction - can be viewed alternatively as the unfinished part of the education reform package or the compromise that made school board reform viable.

³For the past 130 years, Canadians have promoted their unique social and religious values. However, our society has also become pluralistic, outward-looking and respectful of people's right to choose.

These values which are the envy of other nations should not, however, be seen as a reason for maintaining a complex, inappropriate and inequitable school board structure given that the confessional guarantee is not one that applies to the Québec population as a whole....

From the moment the initial components of the reform plan were announced, parent committees from Montreal and Québec City school boards lost no time letting us know that they disagreed with the large number and overlapping of school boards in Montreal and Québec City.

The FCPPQ supports reform based on linguistic considerations, provided services that meet the religious and cultural need of Catholic and Protestant groups continue to [be] offered.

The Mandate

The Task Force is mandated to define the “problem statement” concerning the place of religion in schools, including both its status and the provision of educational services, with emphasis on the evolution of Québec society since the report of the Parent Commission^{vii} during the Quiet Revolution.⁴ The Minister also enjoins the Task Force to take into account the major social values of Québec society, with explicit reference to the *Charter of the French Language* [Bill 101]^{viii} and Québec immigration policy, as well as the views of various interested groups. One can therefore conclude that the Task Force has been given a very broad canvas on which to sketch out a new image of this critical policy issue.

Our mandate is to analyse international, constitutional and domestic law, case law and doctrine respecting human rights, especially freedom of religion, and the equality rights, and to provide one or more policy alternatives consistent with these human rights.

The Office of Research on Educational Policy [OREP] of McGill University has been an active participant in this policy debate regarding constitutional reform,^{ix} school board structures,^x and the distribution of powers between school boards and schools.^{xi} We are therefore pleased to have been commissioned to provide input to the Task Force, specifically to analyse international, constitutional and domestic law, case law and doctrine respecting human rights, especially freedom of religion, and the equality rights, and to provide one or more policy alternatives consistent with these human rights.⁵

Presentation of material

Conscious of the breadth of the Task Force's mandate and the volume of material with which its members will have to deal, we have attempted to present the material “in layers.” At the beginning of each chapter, we provide a summary of the main points. The second layer consist of the analysis that underpins these points. The third layer of detail is contained in various footnotes (denoted by superscript letters - a, b, etc.). Finally, the bibliographical details of the primary and secondary sources which have informed much of this paper has been placed in endnotes (denoted by superscript numbers - 1, 2, etc.) to be consulted as required. The remainder of this paper is divided into five principal sections followed by a conclusion:

⁴More specifically, the task force is asked to provide policy direction to the State based on an analysis of different conceptual models to determine the place of religion in schools and the relationship between fundamental human rights and the rights of parents respecting the religious education of their children and the rights and obligations of different stakeholders on the school system.

⁵More specifically our mandate is to: (1) complete an inventory of relevant legal provisions in international human rights instruments, Canadian constitutional law and Québec legislation in relation to (a) fundamental human rights, especially freedom of conscience and religion, and the right to equality before and under the law; (b) the rights of parents to choose the type of education they prefer for their children and the rights of parents and children respecting moral and religious instruction; (c) the rights and obligations of teachers and other personnel respecting religion; and (d) the right to accommodation of religious minorities; (2) analyse the scope, meaning and inter-relationship of international, constitutional and domestic law in light of relevant case law and doctrine; and (3) provide one or more policy alternatives consistent with human rights and the rights of parents, students, personnel and religious minorities.

- chapter 2.0 provides a brief sketch of the evolution leading up to and following this momentous time in the history of our educational system;
- chapter 3.0 develops the elements of a human rights perspective as an alternative frame for the debate, historically framed in terms of section 93;
- chapter 4.0 provides a summary of the legislative provisions respecting education and religion across Canada;
- chapter 5.0 provides our analysis of the Québec legislative provisions;
- chapter 6.0 sets forth a conceptual framework for considering various policy options and outlines various elements to be considered in deciding on an appropriate course of action for the State to take.

We would note that some of the pertinent provisions of the human rights instruments and education legislation are reproduced from time to time in the body of the paper; these provisions, and a number of others which are of particular interest, are also reproduced in the appendices to the paper. However, no attempt has been made to provide an exhaustive list of all provisions to which reference is made.

2.0 HISTORICAL EVOLUTION OF THE DEBATE

History allows us to acquire knowledge that constitutes the foundation of social literacy.... The process of becoming socially literate involves mastering a certain number of common historical references points that are signposts to understanding current events, public affairs and social issues.^{xii}

In this section, we will present a brief outline of the evolution of the debate on the place of religion in school as seen through successive attempts to restructure the school system,^{xiii} as summarized below.⁶

From New France to Confederation

Even the briefest examination of education in New France reveals the critical role of the Catholic Church and the latter's relation to the State. The role of the Church did not change with the arrival of the British in 1763. When the American colonies revolted and established the United States of America, a new vision was established: the separation of Church and State. When Canada became a Dominion, almost one hundred years later, the Constitution neither joined Church and State, nor separated them as a general precept. The compromise which resulted from existing tensions over the "management and control" of schools was set forth in section 93 of the *British North America Act, 1867*. In brief, section 93 prohibited legislation which was prejudicial to the denominational rights which Catholics and Protestants had by law in 1867.

From Confederation to the Quiet Revolution

Post-Confederation educational acts put the final denominational stamp on Québec's school system. Subsequent legislation and practice confirmed and deepened the denominational division of the school system. The system did not change in any significant way until Quiet Revolution of the 1960's, with the creation of the Ministère de l'Éducation du Québec and the establishment of the Parent Commission. The Commission proposed the abolition of denominational school boards in favour of *unified* school boards, that is, boards responsible for all education in a given territory - Catholic, Protestant and non-denominational, French and English, elementary and secondary.

From the Quiet Revolution to the Present

The massive structural reform envisaged by the Parent Report did not take place. Successive attempts at reform to substitute linguistic boards for unified boards all failed, most recently Bill 107 (1988). Even though this bill passed through the

National Assembly and was given a clean bill of constitutional health by the Supreme Court of Canada, the provisions dealing with the creation of linguistic schools boards were never implemented, allegedly because of the costly duplication of maintaining constitutionally protected structures alongside the new linguistic ones. The situation only changed in 1997 when the Government of Canada, at Québec's request, amended the Constitution to remove the application of section 93 denominational rights to Québec, paving the way for the implementation of the Government's linguistic board reform legislation, Bill 109 (1997).

The Legacy of History

Throughout this century old-debate on denominational rights, the only legal frame of reference was section 93 itself. Better described as a "grandfather clause" than a declaration of rights, section 93 rights are "frozen in time;" only those recognized by law in 1867 are protected. Contrary to section 93, society cannot be frozen in time. The French Catholic - English Protestant dichotomy changed rapidly with successive waves of immigration, a trend which did not abate but has increased markedly. The recent advent of human rights legislation in Canada, and particularly the *Canadian Charter of Rights and Freedoms* allows for a re-framing of the debate, one that can take account of the important place of cultural communities in our education system. A human rights framework is based on certain principles, whose application can evolve with time, rather than on static rights that existed by law in 1867.

⁶Much of the material in this chapter is taken from the ongoing work at OREP on the history of the Québec education system; see endnote 13; all of this material is used with the permission of the publisher.

2.1 From New France to Confederation

In 1986, commenting on yet another failed attempt to reform the education system, the Conseil supérieur de l'éducation du Québec [Superior Council] made the following observation:^{xiv}

At present, the school system is on hold. Waiting seems to suit some people but it demobilizes others who, during the last few years, had agreed to work toward setting up school structures which are more in line with reality and more open to the future. How much longer can the law continue to remain out of reach of social development.

Its statement reflects the frustration with what many observers have believed to be our inability to escape the past, notably because of section 93 of the *Constitution Act, 1867*, which has been widely regarded as the stumbling block to educational reform. By contrast, to others, section 93 has been viewed as the safeguard of minority rights. Thus, anathema to some, precious to others, these perspectives on section 93 reflect the many competing visions of the place of religion in the public education system in Canada and in Québec in particular.⁷

Even the briefest examination of education in New France reveals the critical role of the Catholic Church and the latter's relation to the State.

Even the briefest examination of education in New France reveals the critical role of the Catholic Church and the latter's relation to the State. As summarized by the Royal Commission of Inquiry on Education [Parent Commission]:^{xv}

Education in New France, as in old France during the same period, was a work of charity and, above all, the work of the Church. Elementary instruction was given in a few village schools scattered over the rural regions, by itinerant school-masters, by some parish priests and, especially, by certain religious orders. Thus Jesuits, Sulpicians, Recollets, Ursulines, nuns of the Congregation of Notre-Dame, sisters of the Québec General Hospital, the Frères Hospitaliers all made it their business to establish and operate boarding and day schools, as well as less formal classes, both in the towns and in the country....

Although, in principle, no one might teach without the educational authority belonged to the Roman Catholic Church.... In general, whatever was undertaken by the clergy and religious orders received the support of the king, the governors and the intendants.

The role of the Church did not change with the arrival of the British in 1763. One again, in the words of the Parent Commission:^{xvi}

The attitude of the government in London toward education differed little from that which had characterized the government in Paris. It left the responsibility to the Anglican Church. The idea of a public school system was as far removed from English thinking as it had been from French. After New France was

⁷In the Old World from which Canada and its education systems sprang, the dominant vision of religion and the State was one of union and mutual support. Prior to the Protestant Reformation and long before the rise of the nation state, one referred to what is now Europe as *Christendom* and the notion of separating Church and State was unthinkable. After the Reformation, the only change to this vision was *whose* Church was associated with the State, as reflected in the slogan from the "Wars of Religion" in sixteenth century Germany: *cuius regio, eius religio* ("whoever the ruler, his religion"), signifying that the religion of the State - and its people - was determined by the ruler. Two hundred years later when the New World was settled by Europeans, little had changed, and France was as Catholic as England was Anglican - or more properly put, *Church of England*.

ceded to England, the British authorities allowed the Roman Catholic Church to continue to maintain its educational institutions.

When the American colonies revolted and established the United States of America, a new - one might say antithetical - vision was established: the separation of Church and State.⁸ This doctrine had - and continues to

have - a powerful influence over the place of religion in public education, namely that there is no such place: "The First Amendment has erected a wall between church and state which must be kept high and impregnable."^{xvii} Although there are countless examples of cases reflecting this putatively hermetic seal of separation, Long and Magsino assert that the conclusion "that there is a massive and complete separation of church and state in the United States is erroneous. Closer analysis reveals that accommodation of religion is part of the overall picture".^{xviii} Although the wall may be crumbling, as these authors argue, there can be little doubt that a wall was the intent of the of the original framers.

Suffice it to say that religion remained a potent force in policy direction but that the place of religion was contested by many.

The American enthusiasm for this doctrine did not spill over into Upper or Lower Canada but many American settlers did and with them demands for public education and a greater role of the State in ensuring its provision.^{xix} It is not possible in this brief paper to trace even the major events in the development of the school system in the two Canadas from the late eighteenth to the mid nineteenth century. Suffice it to say

that religion remained a potent force in policy direction but that the place of religion was contested by many and serious proposals for the development of a non-sectarian public school system can be traced to the report of a commission of inquiry in 1787 headed by Chief Justice William Smith.^{xx}

Prior to Confederation, public education was provided in a combination of "common" and "denominational" schools, operated by local school commissioners or trustees under the authority of the Council of Public Instruction. As Confederation approached, the State sought to affirm its control over education, while, at the same time both Catholic and Protestant groups sought constitutional guarantees to protect the denominational character of public education.⁹

⁸The framers of the United States Constitution sought to establish a wide variety of changes in the fundamental law of the new land, not the least of which was an enshrined bill of rights that flew in the face of the sovereignty of the law maker, be it a monarch or a parliament. In further establishing the limits of federal power, the First Amendment (1791) declared that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...". A later interpretation of the Fourteenth Amendment instituted a similar prohibition regarding state legislative powers.

⁹Except in Montreal and Québec City, common schools were operated by non-denominational school municipalities and were open to all children. Denominational schools existed in two forms. First, there were two "confessional" school commissions in both Montreal and Québec City, one for Roman Catholics, the other for Protestants. Second, outside these cities, minority Catholic and Protestant groups could form a "dissentient" school board. It should be noted that although common schools were *de jure* neutral, they were, in the vast majority of cases, *de facto* denominational, in that they served, staffed and managed by Roman Catholics.

The role of the Church did not change with the arrival of the British in 1763.

The Constitution neither joined Church and State, nor separated them as a general precept.

When Canada became a Dominion, almost one hundred years after the American declaration of independence, the Constitution neither joined Church and State, nor separated them as a general precept and religion is only mentioned with respect to education. The “truly Canadian compromise”^{xxi} which resulted from existing tensions over the “management and control” of schools was set forth in section 93 of the *British North America Act, 1867* (as it was then known).¹⁰

¹⁰The provisions of section 93 are reproduced in Appendix B.

Section 93 gave the provincial Government *exclusive* authority to make laws in relation to education but qualified that right by stipulating that the Province did not have legislative authority with respect to *certain* denominational rights. In brief, section 93 prohibited legislation which was prejudicial to the denominational rights which Catholics and Protestants had by law¹¹ in 1867.^{xxii} This protection covered some - but not all - rights relating to the education of Catholics and Protestants in Montréal and Québec City and Catholic and Protestant minorities elsewhere in Québec - exercised through dissent.

The situation was different in the rest of the emerging nation as Manitoba,¹² British Columbia and Prince Edward Island¹³ joined between 1870 and 1873,^{xxiii} followed by Alberta and Saskatchewan¹⁴ in 1905,^{xxiv} and finally Newfoundland¹⁵ in 1949.^{xxv} The situation was different again for the two territories¹⁶ of Canada.^{xxvi}

2.2 From Confederation to the Quiet Revolution

¹¹Of the original four provinces at time of Union, only Ontario and Québec had legislation providing for denominational or separate schools; New Brunswick and Nova Scotia had none.

¹²Manitoba, the next to enter confederation, sought to preserve for minority denominational schools those rights and privileges they had “by law or practice at the time of Union”. However, it was not long before it was established, no such rights or privileges existed at the relevant time.

¹³The terms of union of British Columbia and Prince Edward Island, which included section 93, conferred no special status on denominational or separate schools - again, for the simple reason that no rights or privileges were conferred on them by law at the relevant time.

¹⁴The terms of union of Alberta and Saskatchewan contained provisions very similar to those of section 93 and preserved the special status of the minority separate schools which, in both provinces, did exist at law at that time.

¹⁵Newfoundland went a step further than the last two provinces on joining the union and preserved the “the rights and privileges, with respect to denominational schools, common (amalgamated) schools or denominational colleges, that any class of persons” (not necessarily minorities) had by law at time of Union. Protected by Term 17 at time of Union were the Roman Catholic, Anglican, Salvation Army, Presbyterian, United Church of Canada and Seventh Day Adventist denominations.

¹⁶The Yukon and Northwest Territories are not covered by section 93 or any analogous constitutional provision. However, the statutes respecting the governance of these two Territories which provide, *inter alia*, for territorial legislative authority in the field of education, does include the right of Catholic and Protestant minorities to establish separate schools. It would appear that this right to dissent is only triggered when the majority residents in a given area elect to establish a school district. Furthermore, the Acts do not make any reference to pre-existing rights; in other words, there is no “grandfather clause” for the Territories.

Post-Confederation educational acts put the final denominational stamp on Québec's school system.

Post-Confederation educational acts put the final denominational stamp on Québec's school system. If prior to Confederation schools boards had been *de facto* (in fact or practice) denominational structures, after Confederation they became *de jure* (by law) denominational structures. In 1869, new legislation was

adopted that created a dual denominational school system throughout Québec - a system which prevailed, in one form or another, until 1998. It was this Act that reorganized the Council of Public Instruction along denominational lines and unequivocally ended the possibility of the Council acting as a unified body, as it was originally intended to do:^{xxvii} "The Protestants endeavoured to obtain through this legislation the measures that they had been promised before Confederation and that the Langevin Bill was to put into effect."¹⁷

Although these new school boards were denominational by law, they enjoyed no constitutional protection because they were created by a post-Confederation statute. Furthermore, these boards were still considered to be "common boards" because they were open to members of other religious faiths who could attend either the Catholic or Protestant board in a given territory.

Subsequent legislation and practice confirmed and deepened the denominational division of the Québec school system. In 1875, the Ministry of Education, which had only existed since 1867, was abolished and the Chief Education Officer for the Province became once again the Superintendent of Public Instruction. According to Audet:^{xxviii}

The 1875 School Act established an organizational framework that remained more or less unchanged until 1964.... The act bestowed so much autonomy on both the Catholic and Protestant Churches that from this date one can scarcely speak of one school system, but rather of two school systems that were more or less independent of each other.

The Council of Public Instruction was composed of two denominational committees, one Catholic, the other Protestant; they generally met separately but could meet for joint consideration and action. At the beginning there were sporadic joint meetings but none occurred after 1908. As Sissons says, "It appears that there have been since 1908 no joint interests."^{xxix}

The saga of education reform began with the Parent Commission during the Quiet Revolution.

The saga of education reform began with the Parent Commission during the Quiet Revolution of the 1960's and the creation of the Ministère de l'Éducation du Québec [Ministry of Education or MEQ].^{xxx} This move alone was met with considerable opposition. Opposition from the Church was assuaged when the Government entrenched the principle of parental choice in the preamble to the Act. Moreover, in creating the Ministry of Education, the Government made provision for the positions of Catholic and Protestant Associate Deputy Ministers and established the Conseil supérieur de l'éducation [Superior Council].^{xxxi} The purpose of the Superior Council was "to combat any claim that Bill 60 [creating the MEQ] would produce a state-managed educational system insensitive to the interests of the population,"^{xxxii} all of which are still in effect today (see section 5 below).

¹⁷The Langevin Bill had been introduced in the joint Parliament of Upper and Lower Canada in 1861 by Solicitor General Langevin to provide for the creation of denominational school boards, but the bill never became law.

When the Parent Commission considered the question of school board structures, it was confronted with a school system comprising more than 1600 school boards bifurcated along denominational lines.^{xxxiii} The Commission concluded that “the juridical basis of school commissions favoured fragmentation rather than amalgamation or cooperation.”^{xxxiv} Given this perspective, it is not surprising that the Report recommended major structural changes. In brief, the Commission proposed the creation of *unified* school boards, that is, boards responsible for all education in a given territory - Catholic, Protestant and non-denominational, French and English, elementary and secondary.¹⁸

2.3 From the Quiet Revolution to the Present

The massive structural reform envisaged by the Parent Report did not take place. The Government did create a council to study the school reorganization of the Island of Montreal. The council could not arrive at a consensus; the report written by council chair Joseph Pagé did not provide any clear guidelines and was “effectively politically irrelevant by the time it was submitted in October 1968.”^{xxxv}

The Government did introduce a bill the next year to create unified school boards on the Island of Montreal but it died on the order paper.^{xxxvi} A second attempt was made in 1971 but this bill was withdrawn.^{xxxvii}

The massive structural reform envisaged by the Parent Report did not take place.

Bill 27 and Bill 71

¹⁸The Parent Report set forth three conditions for the realization of unified school board structures: the participation of parents, especially through the creation of school committees, the creation of administrative units within the board for Catholic, Protestant or non-denominational education, when requested by parents and “where such requests are justified by the number of children involved,” and finally, minority representation on the school board: see Parent Report, above endnote 7, at 155.

The first real reform began several years later with the reorganization of school boards off the Island of Montreal,^{xxxviii} and then the boards on the Island.^{xxxix} Off the Island, the legislation replaced the approximately 1100 existing boards with 191 school municipalities regrouped into 63 regional school boards.¹⁹ On the Island, the 33 other existing boards were regrouped into 8 boards. On the surface, the dual denominational character of the Québec school system was maintained in this reorganization. Off the island, the new boards were divided between those “for Catholics” and those “for Protestants.” On the Island, the division was between six Catholic and two Protestant boards.

Bill 3

In 1982, the reform standoff referred to above came to an end when the Government tabled a white paper on school board reform.^{xi} In 1983, the Government introduced Bill 40,^{xli} designed to actualize the reforms proposed in the white paper, namely by creating a system of linguistic school boards. There was considerable opposition to the bill and it was withdrawn the following year. In 1984, the Government introduced Bill 3, a revised version of the unsuccessful Bill 40. In brief, the new Bill 3, which was passed into law the same year, proposed to replace all existing common denominationally based boards with common linguistic boards, while maintaining the five remaining dissentient boards and the confessional boards in Montréal and Québec City. The new act was subsequently declared unconstitutional and was therefore never put into force.^{xlii} However, public opinion largely favoured the thrust of the new act and many of those who backed the school board challenge to the act did so more from a desire to preserve some semblance of local autonomy than a desire for a denominational school board structure.

Bill 107

In 1986, the newly elected provincial government decided not to appeal the above mentioned court decision regarding Bill 3 but began to develop a completely new *Education Act*, which was adopted in 1988 and is still popularly known by its pre-passage name, Bill 107. One of the principal aims of the new Act was the replacement of denominational school boards by language based boards but it continued the denominational system, pending the transformation to a the new system. Bill 107 was drafted to avoid the constitutional pitfalls of the past. It proposed to replace common denominational boards with linguistic ones but maintain the four confessional boards and existing dissentient ones, as well as the right to dissent, while making some changes to their powers.

Successive attempts at reform substituted linguistic boards for unified boards but they all failed, most recently Bill 107.

However, even if the law was constitutionally sound, it was not immune from challenge; in fact, a legal contestation was inevitable from those who wished to preserve the existing system and the rights and privileges they believed went with it. Rather than face another court challenge regarding the constitutionality of the new bill, the Government decided to preempt the process by referring a number of constitutional questions directly to the

¹⁹According to this system, local school boards provide instruction at the elementary level; the school commissioners of a geographic grouping of these boards formed the council of commissioners of a regional school board which was responsible for secondary education.

Québec Court of Appeal.²⁰ The Court of Appeal answered the majority of constitutional questions in the negative (i.e. that the Act did not violate constitutionally protected rights).

Some degree of “coexistence” between denominational and linguistic boards had to be provided for.

The Court of Appeal ruled that subject to some modifications, the bill was constitutionally valid. The decision was appealed by some of the school boards involved and the Supreme Court of Canada agreed to hear the case.^{xliii} In the interim, the Government amended

certain provisions of the *Education Act* to respond to the decision of the Court of Appeal and the Supreme Court ruled on the amended act. In summary, the Supreme Court of Canada held that the proposed restructuring was permissible but the constitutionally protected rights of Catholics and Protestants in Montréal and Québec City, as well as the right to dissent for Catholic and Protestant minorities outside these cities meant that some degree of “coexistence” between denominational and linguistic boards had to be provided for. This decision answered some key questions about the Constitution and school board reform but it did not - and could not - predict what the Government would do.

As it turned out, the Government changed and the implementation of linguistic boards faded from the policy agenda. Gradually, the assumption that the implementation of the new system was too costly because of the coexistence of denominational and linguistic boards, especially on the Island of Montreal, became an accepted part of the policy landscape. No studies were published to support this argument, let alone any analysis of the scope or cost of the “apprehended problem.” However, even if the reasons were not clear, the results were, as no further action on school reform was taken.

Over the period in which these attempts at school board reform occurred, the Government adopted a series of laws and regulations that radically altered the power relationship between the Government and school boards - which traditionally have cloaked themselves in the mantle of defenders of denominational rights. These acts were met with a series of court challenges based on the denominational rights provided for in section 93. In brief, the plaintiffs sought to establish the right to control language,^{xliv} funding,^{xlv} curriculum^{xlvi} and overall school governance.^{xlvii} For purposes of this paper, it is important to note that these challenges were almost wholly unsuccessful. Despite various attempts to reform the system, the denominational school system remained intact until the present day. However, all that changed on July 1, 1998, as discussed below in section 5.

Better described as a “grandfather clause” than a declaration of rights, section 93 rights are “frozen in time;” only those recognized by law in 1867 are protected.

²⁰This move thereby by-passed the Superior Court level of a case that would be appealed up to the Supreme Court of Canada by whomever lost at the preceding level. The questions themselves had been formulated after extensive consultation with school board representatives.

Throughout this century old-debate on denominational rights, the only legal frame of reference was section 93 itself. Unlike the U.S. Constitutional debate which was framed by the principle of the separation of Church and State, section 93 enunciated no such principle. Section 93, perhaps, is better described as more of a “grandfather clause” than a declaration of rights. As we saw above, it was built upon *certain* pre-existing denominational rights in education *recognized by law* for *certain* classes of persons in *certain* provinces in Canada. Unlike section 23 of the *Canadian Charter* (see section 3.2) which enunciates norms for the protection of minority language rights that are meant to evolve with time, section 93 rights are “frozen in time.” Only those rights recognized by law at the time of union are protected.²¹

²¹This means that an analysis of section 93 rights when a dispute arises (e.g. a school board claims the right to control language of instruction) begins with an historical analysis - did denominational school boards have such a right by law in 1867 (or at the time the province joined Confederation). The court must then inquire if the right is necessary to protect denominational rights of Catholics or Protestants (as it is these “classes of persons” who have rights, and not school boards) and if the contemporary legislative action of the government is prejudicial to such rights. The litigation can only succeed if there is an affirmative answer to all of these questions.

Contrary to section 93, society cannot be frozen in time. Even in 1867, when section 93 was drafted, Québec society was changing. The construction of a minority rights framework on the basis of a Catholic-Protestant dichotomy, that is more aptly characterized as a French Catholic - English Protestant dichotomy, made no provision for that evolution. The situation changed rapidly with successive waves of immigration. In the Catholic system, one of the most important waves was the immigration of English-speaking Catholics from Ireland. By and large, other immigrant groups, beginning with a large number of Jewish immigrants from Eastern Europe, gravitated to the Protestant system. According to Milner, the ultramontane leaders of the Catholic system sought to maintain French Catholic schools “as free as possible of any and all outside influences.”^{xlviii} Although immigrants were more generally welcomed in the Protestant sector, all did not go smoothly, as reflected in the famous *Hirsch* case in 1928.^{xlix} This case arose over amendments to the *Education Act* which had been adopted in 1903 following a court ruling¹ that held that the Protestant School Board of Montreal could not be compelled to admit Jewish children to its schools.²² As stated by Henchey and Burgess:^{li}

The arrival of English-speaking Catholics from Ireland and of Jewish immigrants from continental Europe indicated that Québec's educational structures were not designed to easily adjust to pluralism. This problem was to intensify with the arrival of other immigrants of various ethnic and religious backgrounds in the period following the Second World War.

It is well known that this immigration did not abate but has increased markedly; unfortunately, we have not kept pace with these demographic and social changes which have only been addressed in recent years. McAndrew notes that until 1977 more than 80% of Québec's students of ethnic origin did not attend French schools creating a communication gap that has only been confronted with the reversal of this trend by Bill 101. Characterizing the educational history of ethnic groups as one of isolationism and prejudice, she states that “inter-cultural communication and education is now emerging as one of the main issues in Québec schools and society.”^{lii}

As in other important policy discussions, the Superior Council has reflected and provided its advice upon a broad range of issues relating to education and ethnic and cultural minorities. A series of reports^{liii} have emphasized the need to modify existing policies and create new ones, which would deal with the growing ethnic population in the school system, as set forth in one paper in this series:^{liv}

Québec culture, in the fullest and richest meaning of that word, is becoming pluralistic, as are the cultures of a growing number of societies....

There is little need to demonstrate at great length the importance of the educational challenges implied by this situation. The school can no more be considered a homogeneous milieu than society itself. This is well known to those who have been calling upon schools and educators to become more sensitive to the diversity of situations, needs, and aspirations....

The recent advent of human rights legislation in Canada, and particularly the constitutional entrenchment of human rights in the *Canadian Charter of Rights and Freedoms* [*Canadian Charter*]^{lv} allows for a re-framing of the debate, one that takes account of the important place of cultural communities in our education system. A human rights framework is based on certain principles, whose application can evolve with time, rather than on static rights that existed by law in 1867 (or at a later date for provinces joining Confederation after 1867). It is to this new frame for the debate to which we turn our attention in chapter 3.

²²In the final disposition of the *Hirsch* case by the Privy Council, the Court declared the law to be constitutionally sound except insofar as it enabled the appointment of Jewish persons as school commissioners on Protestant boards and insofar as it granted Jewish persons rights respecting dissentient schools.

3.0 A HUMAN RIGHTS PERSPECTIVE: AN ALTERNATIVE FRAME FOR THE DEBATE

Why do we have human rights and freedoms? Because, when they are recognized for each individual, they give all of us equal power to ensure our basic needs, to express ourselves, to take part in society, in short, to develop fully. School is a suitable place to learn about democracy: to learn how to see that everyone's rights and freedoms are respected, to exercise them while respecting those of others, and so to share relations of mutual respect with others, as equals.^{lvi}

This chapter provides a human rights perspective as an alternative frame to the debate on the place of religion in school, as summarized below.

Human rights are universal because they are not bound by time or space. They comprise a broad range of “liberty rights” such as freedom of religion and “welfare rights” that guarantee certain benefits such as education. They are found in a variety of international instruments, which govern relations between countries. In an individual human rights dispute, they are used primarily as an interpretative guide to the human rights provided for in domestic law.

Canadian Charter

The *Canadian Charter* applies to both the federal and provincial legislatures and governments. It applies to public school boards and schools because they operate as “State agents” but not to private schools. The *Canadian Charter* provides for a wide range of human rights subject only to “reasonable limits” prescribed by law. However, section 33 allows the Government of Canada or a provincial government to adopt a law which is contrary to fundamental rights (s. 2), legal rights (ss. 7-14) and equality rights (s. 15) - other *Charter* rights (e.g. section 23, minority language rights) cannot be overridden.

Québec Charter

The *Québec Charter of Human Rights and Freedoms* establishes a comprehensive code of rights and freedoms which regulates matters between the Province and citizens as well as matters between citizens themselves. It serves to complement the rights guaranteed in the *Canadian Charter*. Being an act of the provincial legislature, it falls within the purview of the *Canadian Charter*; thus, to the extent that it may unreasonably infringe upon a human freedom or right, or be otherwise inconsistent with the *Canadian Charter*, it will be inoperative. It also contains a “reasonable limits” clause and an override provision.

Right to Education

The right to education is found in all relevant international instruments. The *Canadian Charter* does not include a general right to education; the *Québec Charter* does (s. 40), but it is couched in terms which make the *right* to education conditional upon the scope and the standards provided for by law. The source of the right to minority language education is virtually the mirror image of the source of the general right to education. Absent in international instruments and provincial human rights codes, this right is entrenched in section 23 of the *Canadian Charter*. The right to choose private education is recognized internationally and in the *Québec Charter* (s. 42). There is no explicit provision in the *Canadian Charter*; however according to case law, there is an implicit recognition in section 7 (liberty rights) of such a parental right.

Freedom of Religion in Education

Freedom of religion is a “fundamental” liberty right found in international human rights instruments, the *Canadian Charter* and the *Québec Charter*. The right of parents to guide the religious education of their children is recognized internationally and in the *Québec Charter* (s. 41). Although the *Canadian Charter* does not contain any provision about freedom of religion and education, the general provision guaranteeing freedom of religion has been relied upon to defend parental interests in this regard. As a liberty right, freedom of religion prevents the State from interfering in the practice of one's religion but does not require the State to provide any support for the exercise of this right in either public or private education.

Equality in Education

Equality is a corner stone of all human rights instruments providing freedom from discrimination,

Discrimination

Discrimination can be viewed as treating one person differently from another without proper justification, in a manner that involves some notion of injustice, often termed *invidious* or *prejudicial* treatment; it does not matter whether discrimination is intentional or not. The prohibition against discrimination extends to both direct discrimination and indirect or “adverse effect” discrimination. The obligation not to discriminate is not limitless; it only requires that the accommodation be “reasonable” in light of the facts and circumstances of a particular case. In Canadian education, discrimination on the basis of religion typically arises when Catholics and Protestants receive preferential treatment in comparison to members of other faiths.

Special Programs and Affirmative Action

In this paper, we use the term “special programs” to designate situations permitted in human rights codes in Canada which would not qualify as “affirmative action” under the *Canadian Charter*. The former provide preferential treatment to *designated* groups, while the latter are limited to those programs which ameliorate the conditions of *disadvantaged* groups.

In Québec, special programs are provided for in section 20 of the Québec *Charter* which permits otherwise discriminatory behaviour by, for example, public and private denominational schools if the behaviour can be justified by the nature of the denominational school. Section 20, and like provisions in other jurisdictions, serves to insulate private action from challenge under provincial human rights codes but it cannot serve to insulate government action from *Canadian Charter* review. In other words, section 20 cannot itself be discriminatory and if it were held to be so, it could be challenged under the *Canadian Charter*.

Affirmative action programs are explicitly permitted, but not required, by the *Canadian Charter* (s. 15(2)). Consequently, they need to be provided for in human rights legislation in order to obviate a complaint of discrimination. The Québec *Charter* provides for affirmative action programs and a regulation provides for affirmative action programs in education. However, it is unclear if a school or other body could voluntarily initiate an affirmative action program on its own or whether such programs must be sanctioned by the Human

equal protection and benefit of the law and “affirmative action” for disadvantaged minorities.

Rights Tribunal upon the request of the Human Rights Commission.

■ In *R. v. Jones*, the Supreme Court of Canada held that State regulation of private schooling did not infringe the freedom of religion of a pastor who operated a private religious school.

■ In *Zylberberg v. Sudbury Board of Education*, the Ontario Court of Appeal struck down opening and closing religious exercises which had a denominational (Christian) bias and which students were obliged to attend unless an exemption was sought on their behalf by their parents.

■ In *Canadian Civil Liberties Assn v. Ontario*, the Court of Appeal found that both the provincial regulatory framework and the curriculum requirement imposing two periods per week of religious instruction in public schools constituted religious indoctrination and infringed the applicants' freedom of religion.

■ In *Adler v. Ontario*, parents, who for religious reasons sent their children to private religious schools, challenged the absence of public funding for these schools especially given that public funding was provided to the separate (Catholic or Protestant minority) schools in Ontario. The Supreme Court of Canada rejected the petition.

■ An application claiming the right to religious schools within the public school system was rejected by the Court of Appeal in *Bal v. Ontario*.

A licit affirmative program would be difficult to construct on behalf of Catholics or Protestants, historically advantaged groups, but one could be devised for members of other faiths. Such a program could provide preferential treatment to members of the faith in question but this would not allow it to discriminate on the basis of other grounds (for example, race or national origin).

Equality in Employment

Not surprisingly, employment has been a major battleground for protection from direct discrimination, adverse-effect discrimination and the

search for affirmative action. For purposes of this paper, we examined employment in relation to the

■ In *Islamic Schools Federation of Ontario v. Ottawa Board of Education*, the applicants contested a refusal by the Peel Board of Education, the local school board, to allow them to work on holy days, especially on the basis of the fact that the same board had delayed in the past in granting such a request. In *Bergevin v. Commission scolaire régionale de Chambly*, the Supreme Court of Canada upheld a complaint by three teachers of the Jewish faith who were deducted salary for being absent to observe the religious holiday of Yom Kippur.

■ In *Caldwell v. Stuart*, a Catholic teacher teaching in a private Catholic school, whose job performance was completely satisfactory, was dismissed because she married a divorced person in a civil ceremony. The dismissal was upheld by the Supreme Court of Canada.

The most typical case for our purposes is that of denominational positions for a denominational employer. In such a case, religious discrimination arises, not from a failure to accommodate the employee's religion but from the employer's reliance on religion as a *bona fide* occupational requirement. Such cases are considered first in relation to the nature of the employer and the employment setting and second in relation to the job itself. As a general rule, the courts have upheld the right to use "denominational cause" as grounds for hiring and firing.

It is possible that a non-denominational employer would hire someone for a denominational position, for example a teacher of Catholic religious instruction in a public school board. One must undertake a similar analysis, but with less emphasis on the employer and more on the position.

In the case of non-denominational positions for a non-denominational employer, religious based discrimination may occur directly - for example, refusal to employ members of a particular religious faith - or indirectly - for example, a work schedule that has an adverse effect on members of a particular religious faith. Non-denominational positions, as defined by the denominational employer or decided by the courts, are to be treated no differently from a

■ Subject to the above, the only international instruments binding on Canada which are

nature of the employer - non-denominational or denominational - and the nature of the employment position - non-denominational or denominational.

human rights perspective than employment in any institution.

Rights of Children and Parents

Historically, the expression "children's rights" would have been considered an oxymoron; rights were attained upon reaching the "age of majority." Parents were considered to have the right to make decisions about children as the parents saw fit, as stated in an early case: "The authority of the father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged, without the utmost coercive reason."

Since then, the situation has changed dramatically; today, parental authority is meant to be exercised, not *over* the child, but *on behalf of* the child. In the vast majority of cases, parents act in the best interests of the children and traditionally the State has been reluctant to interfere in the private ordering of family life except in cases where the child's well being is clearly "at risk." However, it must be accepted that the interests of children and parents will not always coincide. As observed by the Ontario Court of Appeal, parents are solely the proxies of their children and they must pursue what is in their children's best interests from the perspective of the children, and not what is in their best interests from the perspective of the parents.

Guiding Principles

The following provides a synthesis of the human rights framework presented in this paper as a set of guiding principles from the international, constitutional and domestic law applicable to Québec.

- International law governs relations between countries; in an individual human rights dispute, they are used primarily as an interpretative guide to the human rights provided for in domestic law.

relevant to the issue of religion and schools are: the *International Covenant on Civil and*

Political Rights; the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

- Section 93 acts, in part, as a constitutional shield protecting “privileged treatment” of certain denominational school rights of Catholics and Protestants; now that this shield no longer applies to Québec, there is no inherent requirement for the State to grant such privileges.
- The *Canadian Charter* provides for a wide range of human rights subject only to “reasonable limits;” it applies to both the federal and provincial legislatures and governments, and by extension to public school boards and schools because they operate as “State agents;” section 33 allows the Government of Canada or a provincial government to adopt a law which infringes certain human rights including, freedom of religion and equality rights.
- The *Québec Charter* establishes a comprehensive code of rights and freedoms which regulates matters between the Province and citizens as well as matters between citizens themselves; it also contains a “reasonable limits” clause and an override provision; it must respect the provisions of the *Canadian Charter*.
- The right to education is found in all relevant international human rights instruments; the *Canadian Charter* does not include a general right to education but the *Québec Charter* does (s. 40); however, it is couched in terms which make the *right* to education conditional upon the scope and the standards provided for by law.
- The right to minority language education is found in the *Canadian Charter* (s. 23) but not in international instruments or the *Québec Charter*.
- The right to choose private education is recognized internationally and in the *Québec Charter* (s. 42). There is no explicit provision in the *Canadian Charter*; however according to case law, there is an implicit recognition in section 7 (liberty rights) of such a parental right.
- The State must permit “alternative structures” to the public school system such as private schools and home schooling but the State retains the right to regulate such schooling.
- International human rights instruments, the *Canadian Charter* and the *Quebec Charter* protect freedom of conscience and religion as a fundamental human right in public institutions.
- Parents have a right to guide their children's education, including the choice of school in keeping with their religious beliefs.
- In the international instruments considered, parental rights respecting religious instruction do not give rise to any positive requirement on the part of public educational authorities. Neither is there anything explicit or implicit in the *Canadian Charter* which would require the provision of religious instruction. Section 41 of the *Québec Charter* is unique in this regard, giving parents the right to require that such instruction be provided in conformity with their convictions.
- Respecting the prohibition against discrimination based on religion means that the State cannot favour one religion over others nor exclude one religion from benefits accorded to others.
- Education about religions in public schools is permissible provided that it does not discriminate in favour of particular religions nor against others.
- Religious instruction in public schools is permissible if such provision does not discriminate in favour of particular religions nor against others; however, with the exception of *Québec Charter* (s. 41), there is no human right to insist that such instruction be offered in public schools.
- Religious exercises in public schools are permissible provided that such provision does not discriminate in favour of particular religions nor against others.
- Accommodation for those not wishing to participate in religious instruction or exercises where offered may be provided by permitting them to “opt out” of or, alternatively, to “opt in”

to, such activities; however, Ontario case law suggests that merely allowing persons to opt out

- International human rights instruments, the *Canadian Charter* and the *Quebec Charter* prohibit discrimination on the basis of religion in public institutions.
 - Discrimination can be viewed as treating one person differently from another without proper justification, in a manner that involves some notion of injustice, often termed *invidious* or *prejudicial* treatment; it does not matter whether the discrimination was intentional or not.
 - The obligation not to discriminate requires one to accommodate, that is, to take steps to avoid the discriminatory situation but this duty is not limitless; it only requires that the accommodation be “reasonable” in light of the facts and circumstances of a particular case; thus, employers, for example, can rely on a “*bona fide* occupational requirement” to refute a charge of discrimination in employment.
 - Affirmative action programs are intended to undo “past wrongs;” they are explicitly permitted, but not required, by the *Canadian Charter* (s. 15(2)); consequently, they need to be provided for in human rights legislation in order to obviate a complaint of discrimination.
 - Respecting freedom of religion means not interfering with an individual’s right to practice his or her religion free from any form of coercion; it does not require the State to support such practice.
 - There is no obligation to provide State support of private schools but if the State chooses to do so, it cannot discriminate in favour of particular religions nor against others.
 - We use the expression “special programs” to designate those situations permitted in human rights codes in Canada, such as *Québec Charter* (s. 20), which would not qualify as “affirmative action” under the *Canadian Charter*. The former provide preferential treatment to *designated* groups, while the latter are limited to those programs which ameliorate the conditions of *disadvantaged* groups.
- if they wish is insufficient accommodation.
- Denominational schools may qualify as “special programs” (s. 20) which permit *prima facie* discrimination, provided there is a rational connection between the brand of discrimination practised and the nature of the institution.
 - Affirmative action programs cannot be undertaken to benefit historically advantaged denominational groups such as the Catholics and Protestants.
 - Reasonable *bona fide* occupational requirements of a denominational nature which are *prima facie* discriminatory may be imposed on employees who occupy positions which have denominational elements irrespective of whether the employer is a denominational or non-denominational school.
 - Occupational requirements of a denominational nature which are *prima facie* discriminatory may not be imposed on employees who occupy positions which do not have denominational elements irrespective of whether the employer is a denominational or non-denominational school.
 - Children have rights independent of their parents and all decisions regarding children must be made in their “best interests.”
 - Legislation that vests the right to “opt in” or “opt out” of religious instruction or religious exercises in parents, as opposed to allowing parents to exercise the child’s right on his or her behalf, might be held to infringe the child’s human rights as the framework of choice is not based on the child’s “best interest.”

3.1 Introduction and Overview

The underlying ethos of human rights is that people are entitled to certain rights and freedoms just because they are human beings. In order to *qualify* as a human right, the right must be one which is possessed by all human beings, and only by human beings; it must be possessed equally by all human beings and cannot, therefore, be linked to a particular status (e.g. citizen, landowner). Human rights are universal because they are not bound by time or space.^{lvii} In other words, a human right applies to every human being, without regard to the century or country in which the person lives.²³

Human rights are universal because they are not bound by time or space.

Human rights comprise a broad range of, what has been described as, “first generation” rights, but also a range of “second generation” rights. First generation rights are represented by the traditional civil and political liberties such as freedom of speech, religion and the like, which do

not require the active conferral of a benefit. They are largely “negative” in nature in that they restrain the state’s freedom of action in relation to individuals; they guarantee individuals, within reasonable limits, freedom from state interference. Second generation rights, on the other hand, are perceived to guarantee to individuals access to certain benefits or services and, in final analysis, are seen to impose on the state the obligation to provide or, at least, to ensure provision of those benefits or services.

The word “right” is used to express a moral entitlement - what we believe people *ought* to possess. However, moral rights are small comfort to someone who is being oppressed. In order to prevent such oppression, the normative values underlying human rights have been translated into *legal* rights. Only legally enshrined rights can be enforced through the courts. At the present time, human rights are found in a variety of international, constitutional and domestic laws. In the next three sub-sections, we will provide an overview of these major sources of human rights, followed by a brief discussion of the guiding principles for interpreting these rights.

3.1.1 International Human Rights Instruments

Scope and Application

Among the various international human rights instruments, there are four to which Canada is a signatory that are of particular interest to this paper:²⁴

- *Universal Declaration of Human Rights*^{lviii} [Universal Declaration];
- *International Covenant on Civil and Political Rights*^{lix} [Covenant I];
- *International Covenant on Economic, Social and Cultural Rights*^{lx} [Covenant II]; and
- *Convention on the Rights of the Child*^{lxi} [Convention].

²³Universality underpins human rights frameworks leaving no room for the notion of “relativity of human rights.” In other words, one cannot allow for “local” customs or practices which depart from accepted norms.

²⁴We would note that there exist two international instruments which are not of importance and which we do not discuss. First, there is the UNESCO *Convention against Discrimination in Education* [(1962) 429 U.N.T.S. 93] but as Canada has not ratified this convention it is of no force and effect in this country; second, there is the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* [U.N. Doc. A/Res/36/55 (1981)] which, being a mere declaration, is not binding.

The most ubiquitous expression of human rights is contained in the *Universal Declaration* which provides for a variety of human rights and freedoms, including those pertaining to religion, education and equality. The *Covenants*, as their names imply, deal with a variety of economic, social, civil and political rights. The *Convention*, the most recent instrument on human rights, is especially noteworthy because it explicitly confers on children a broad spectrum of the rights dealt with in the *Covenants*.^{lxii}

It is important to note that the *utility* of these instruments varies considerably. Fogarty states that Canada only has a *moral commitment* to support the *Universal Declaration*, which “was not generally conceived as law, and had no binding effect on member states.”^{lxiii} By contrast, the *Covenants* and the *Convention* are *treaties* which are *binding* on member states. An international treaty, like any contractual agreement, binds only the parties to that agreement, in this case various states, and does not give rise to “third party rights.” In other words, individuals, who are not signatories to the agreement do not automatically acquire rights which can be enforced by the courts. An exception to this general rule occurs with respect to *Covenant I* because it contains an *Optional Protocol*, which Canada has signed, that provides for the investigation of individual complaints by an international Human Rights Committee. However, even here, the Committee has no authority to impose any sanction if it finds that the state has violated a right contained in the *Covenant*. The most notable such case in Canada is that of Sandra Lovelace which alleged cultural and gender discrimination under the *Indian Act*.^{lxiv} Although there was no *legal result* (i.e. a court ordered action), it ended in a *political result*, through changes to the *Indian Act* that remedied the problem.^{lxv}

Most recently the Human Rights Committee has agreed to investigate a complaint alleging that the funding of separate schools in Ontario, coupled with the lack of funding for private schools, is discriminatory despite a Supreme Court of Canada ruling to the contrary.²⁵

Although international instruments may be of little direct use in pursuing a human rights case, this is not to say that they are not important. In addition to creating political pressure, they may be resorted to as a guide to interpreting “ambiguous provisions of a domestic statute ... provided the domestic statute does not contain express provisions contrary to or inconsistent” with the international treaty.^{lxvi} The rationale for having recourse to international treaties as a guide to the interpretation of ambiguous statutory provisions is the so-called presumption of conformity: “... an enactment should be interpreted, as far as practicable and its language admits, in conformity with the rules of international law.”^{lxvii} Even instruments to which Canada is not a signatory (e.g. the *European Convention for the Protection of Human Rights and Fundamental Freedoms*^{lxviii}), can be used by the courts to interpret human rights legislation.^{lxix} As stated, by Dickson, C.J.C. dissenting in *Reference re Public Service Employee Relations Act*:^{lxx}

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.

Reasonable Limits

Guaranteeing human rights and freedoms almost always involves a ‘balancing act’, as according rights to some may affect the rights of others. Thus, to deal with such realities, human rights instruments often contain a provision which permits a government to impose “reasonable limits” on the human rights of persons. The limitation provisions found in international human rights instruments are often more restrictive than those found in the Canadian and Québec *Charters* in that they may only be resorted to by a state solely for the “purpose of

²⁵See text surrounding endnote 134, for a discussion of this recent case.

promoting the general welfare”^{lxxi} or where necessary “to protect public safety, order, health, morals or the rights and freedoms of others”.^{lxxii}

Override Provisions

Whereas limitation clauses allow a government to impose reasonable limits on guaranteed rights and freedoms, the *override* power is a political compromise and a concession to the principle of legislative sovereignty that allows a state to enact a law which negates one or more human rights. Override provisions are not generally found in international human rights instrument. The exception is *Covenant I* which permits the negation of human rights but only “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”^{lxxiii} However, the provision states that such derogation can “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” In addition to including religion in its list of protected grounds, the provision specifically states that no derogation may infringe upon the fundamental freedoms of “thought, conscience and religion.”

Override provisions are not generally found in international human rights instrument.

- International law governs relations between countries; in an individual human rights dispute, it is used primarily as an interpretative guide to the human rights provided for in domestic law.
- Subject to the above, the only international instruments binding on Canada which are relevant to the issue of religion and schools are: the *International Covenant on Civil and Political Rights*; the *International Covenant On Economic, Social and Cultural Rights*; and the *Convention on the Rights of the Child*.

3.1.2 The Canadian Charter

Scope and Application

The advent of the *Canadian Charter* in 1982 heralded a new era in human rights in Canada. Until that date, constitutional questions were largely concerned with whether a particular legislative provision fell within the competence of the legislature in question or, in the case of educational statutes, whether the provision infringed the denominational rights contained in section 93. In 1982, this situation changed dramatically with the constitutional entrenchment of the *Canadian Charter* by virtue of the *Constitution Act, 1982*,^{lxxiv} which also states that “the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.^{lxxv}

The courts have observed that while “a liberal and not overly legalistic approach should be taken to constitutional interpretation,” the interpretation of the *Canadian Charter* “is constrained by the language, structure and history of the constitutional text, by constitutional tradition, and by the history, traditions and underlying philosophies of our society”.^{lxxvi} It appears that the courts are agreed that the interpretation of the *Canadian Charter* calls for “a generous interpretation, avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to”.^{lxxvii}

The *Canadian Charter* applies to both the federal and provincial legislatures and governments;^{lxxviii} however, it was not meant, except to the extent expressly provided for therein, to otherwise alter the division of powers between the federal and provincial governments. The *Canadian Charter* does not apply to matters which do not involve government (e.g. employment in a private company). Human rights in such matters are governed by federal and provincial human rights legislation, depending on whether the matter comes under one jurisdiction or the other.

The *Canadian Charter* provides for a wide spectrum of human rights and freedoms, including fundamental freedoms, equality rights and minority language educational rights.

Although the application of the *Canadian Charter* to education has been the subject of speculation and litigation, it is now generally agreed that it applies to public school boards in Canada.^{lxxix} The *Canadian Charter* applies to public school boards and schools, as well as their officials, because they operate as “State agents” - that is on behalf of the State. Although private schools and their officials are not regarded as State agents and not subject to *Charter* standards, the legislation governing private schools, like any government legislation, must respect these standards. The *Canadian Charter* provides for a wide spectrum of human rights and freedoms, including fundamental freedoms, equality rights and minority language educational rights. The *Canadian Charter* also contains a number of general interpretive guidelines, including the requirement that it be construed in a manner:

- “consistent with the preservation and enhancement of the multi-cultural heritage of Canadians”;^{lxxx}
- consistent with the fact that the “rights and freedoms referred to in it are guaranteed equally to male and female persons.”^{lxxxi}

At first blush, one might assume that the newly entrenched freedom of religion and equality rights and these guiding principles would contradict the provisions of section 93, given that the latter were restricted to denominational rights existing by law at the time a province joined the Union. Recognizing this potential conflict, the framers of the *Canadian Charter* included section 29: “Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed under the Constitution of Canada in respect of denominational, separate or dissentient schools.” In other words, as successfully argued by the Government of Ontario in the reference case regarding Bill 30, the act which extended full funding to separate schools in Ontario,^{lxxxii} section 93 rights are immune from a *Canadian Charter* challenge.

Reasonable Limits

In the *Canadian Charter*, the “reasonable limits” clause is found in section 1:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 provides the respondent with a defence if someone challenges a law or government action as a violation of some specific human right; the burden of establishing that defence rests with the defendant. Moreover, it is important to note that under the *Canadian Charter* the reasonable limits must be “prescribed by law”, that is, it must not be an arbitrarily imposed restriction, but a legally imposed one which is “adequately accessible to the public” and “formulated with sufficient precision to enable [persons] to regulate their conduct by it”.^{lxxxiii} In other words, “reasonable limits” cannot be set by practice or administrative fiat.

The leading case respecting the interpretation of section 1 is *R. v. Oakes*,^{lxxxiv} which set forth four criteria for a law to satisfy section 1:^{lxxxv}

1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a Charter right.
2. Rational connection: The law must be rationally connected to the objective.
3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.
4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.

Override Provisions

Section 33 allows the Government of Canada or a provincial government to adopt a law which is contrary to the provisions of one or more of the following *Charter* rights and freedoms: fundamental rights (s. 2), legal rights (ss. 7-14) and equality rights (s. 15). However, if a government wishes to do so, it must declare in the law that it shall operate *notwithstanding* one of these provisions. Such a declaration is valid for a period of five years but may be renewed for an indefinite number of five-year periods. Thus the only constraints imposed on the exercise of the override power relate to matters of form, that is how it may be invoked by a legislative body, but not as to when or why it may be invoked. Thus, all that is necessary for the federal or provincial government to invoke the override power, is for it to declare in the law that the law shall operate *notwithstanding* one or more of the protected rights.

- Section 93 acts, in part, as a constitutional shield protecting “privileged treatment” of certain denominational school rights of Catholics and Protestants; now that this shield no longer applies to Québec, there is no inherent requirement for the State to grant such privileges.
- The *Canadian Charter* provides for a wide range spectrum of human rights subject only to “reasonable limits;” it applies to both the federal and provincial legislatures and governments, and by extension to public school boards and schools because they operate as “State agents;” section 33 allows the Government of Canada or a provincial government to adopt a law which infringes (among others), freedom of religion and equality rights.

3.1.3 The Québec Charter

Scope and Application

All provinces have enacted human rights codes,^{lxxxvi} which are commonly regarded as embodying “fundamental” or “quasi-constitutional” law;^{lxxxvii} that is they are “legislation ... of a very special nature ... [which] declares public policy regarding matters of general concern”^{lxxxviii} or legislation which is “not quite constitutional but certainly more than ordinary” legislation.^{lxxxix}

The *Québec Charter of Human Rights and Freedoms* [Québec Charter] establishes a comprehensive code of fundamental rights and freedoms which regulates matters between the Province and citizens as well as matters between citizens themselves. The *Québec Charter*, like other provincial codes, serves to complement the rights guaranteed in the *Canadian Charter*. Being an act of the provincial legislature, it falls within the purview of the *Canadian Charter*; thus, to the extent that it may unreasonably infringe upon a fundamental freedom or right, or be otherwise inconsistent with the *Canadian Charter*, it will be inoperative.

The Québec Charter establishes a comprehensive code of fundamental rights and freedoms which serves to complement the rights guaranteed in the Canadian Charter.

Reasonable Limits

Québec Charter:

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

This limitation has been equated to section 1 of the *Canadian Charter* and the Supreme Court of Canada has used the *Oakes*' test to determine whether a defence under section 9.1 is valid.^{xc} However, section 9.1 only applies to the fundamental rights and freedoms found in sections 1 to 9 (which include the freedoms of religion and conscience); it does not apply to the full panoply of "human rights and freedoms" embodied in the *Québec Charter* such as, for present purposes, equality rights or education rights.^{xc}

Override Provisions

The special nature of *Human Rights Codes* is underlined by the fact that the codes of most jurisdictions contain some type of "primacy clause", that is a provision which states that other legislation must conform to the rights found in the *Code*. Three jurisdictions include a blanket primacy provision.^{xcii} Six other jurisdictions, including Québec, have adopted a "notwithstanding" clause, which requires a specific declaration in an act before its provisions can override a provision of the *Code*.^{xciii} However, the primacy provision of the *Québec Charter* only applies to three of the four classes of rights provided for therein: (1) the fundamental rights and freedoms, including freedom of conscience and religion and equality; (2) political rights; and (3) judicial rights.^{xciv} It does not include the fourth class of "economic and social rights" in sections 39 to 48, such as the education rights.

- The *Québec Charter* establishes a comprehensive code of rights and freedoms which regulates matters between the Province and citizens as well as matters between citizens themselves; it also contains a "reasonable limits" clause and an override provision; being an act of a provincial legislature, it must respect the provisions of the *Canadian Charter*.

3.2 Human Right to Education

3.2.1 Right to Education

The right to education is found in all relevant international human rights instruments. By contrast, the *Canadian Charter* does not include a general right to education. At the provincial level, Québec and Saskatchewan alone include education as a human right in their respective human rights codes.^{xcv} Relevant provisions from these instruments are reproduced below.

Convention:

28 (1) States Parties recognize the right of the child to education, and with a view to achieving this right progressively on the basis of equal opportunity, they shall, in particular:

- (a) make primary education compulsory and available free to all;
- (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

Québec Charter:

40. Every person has a right, to the extent provided for by law, to free public education.

Saskatchewan Human Rights Code:

13(1) Every person and every class of persons shall enjoy the right to education in any school ... or place of learning, ... without discrimination because of his or their race, creed, colour, sex, marital status, disability, nationality, ancestry or place of origin.

On the international level, it is important to stress that the right to education is the right to *free* and *compulsory* education, at least at the elementary level. Thus, there is no requirement that it be publicly provided, merely funded. Generally, a right does not include any notion of compulsion; its inclusion here suggests that the obligation to attend school is directed toward parents and the State to ensure that children actually benefit from their right to education.

On the provincial level in Canada, the Québec provision is couched in terms which make the *right* to education conditional upon the scope and the standards provided for by law. In other words, if there were no *Education Act* conferring a right to education, this section of the *Code* would not create such a right. In a recent decision, the Québec Court of Appeal cited with approval Professor Garant's statement that Québec school law does not, strictly speaking, provide for the right to education, but rather for the right to those educational services set forth in law.^{xcvi} The Court thus affirmed that section 40 of the Québec *Charter* cannot give rise to educational rights beyond those otherwise provided for by law.

The Saskatchewan provision is arguably a stronger expression of the right to education because it is not qualified by reference to other "standards provided for by law." It can therefore be thought of as an independent right;²⁶ however, there is no requirement that such education be free. On the other hand, any substantive right arising from the Québec provision depends on the existence of another enactment.^{xcvii}

- The right to education is found in all relevant international human rights instruments; the *Canadian Charter* does not include a general right to education but the Québec *Charter* does (s. 40); however, it is couched in terms which make the *right* to education conditional upon the scope and the standards provided for by law.

3.2.2 Right to Minority Language Education

The source of the right to minority language education is virtually the mirror image of the source of the general right to education. Absent in international instruments and provincial human rights codes, this right is entrenched in section 23 of the *Canadian Charter*. It is interesting to note that in this case, the right is vested in parents who are Canadian citizens.

Section 23 protects English as a minority language in Québec and French as a minority language in every other province. It is intended to provide access to minority language instruction and facilities for children of eligible Canadian citizens, where numbers warrant.

There are three possible bases of eligibility: the "first language learned and still understood" of the parent is the minority language in question; the parent was educated at the elementary level in Canada in the minority language in question; the parent has another child who has received or is receiving primary or secondary school instruction in the minority language in question in Canada. However, the first of these criteria does not apply in Québec. According to section 59 of the *Constitution Act, 1982*, such a right will only apply in Québec when the Government of Québec so agrees

Section 23 protects English as a minority language in Québec and French as a minority language in every other province.

²⁶The Saskatchewan provision could be interpreted to mean that it does not accord a right to education per se but merely that such right (to the extent it exists independently of the *Code*) shall be exercised without discrimination. However, where the Legislature did not intend to confer a right, but rather merely prohibit discrimination, a different wording is used (e.g. "No person shall: (a) deny to any person or class of persons the opportunity to purchase any commercial unit ...", s. 10(1)).

The qualifier “where numbers warrant” is applied separately to the right of access to minority instruction and, what the courts have called, the “management and control” of minority language education. The drafters of the *Canadian Charter* foresaw that there might be situations where the number of qualified students justified the provision of minority language instruction but not the provision of distinct facilities, which presumably would require a higher number of qualified students. Within these parameters, each provincial government is free to create its own legislative scheme for education in general and minority language education in particular.

- The right to minority language education is found in the *Canadian Charter* (s. 23) but not in international human rights instruments or the *Québec Charter*.

3.2.3 Right to Choose Private Education

The right to choose private education subsumes two potential rights: the right to choose private schools and the right to choose home schooling as an alternative to public education. Internationally, the right to choose private education figures in both *Covenant II* and the *Convention*. There is no explicit provision in the *Canadian Charter*; however according to case law, there is an implicit recognition in section 7 (liberty rights) of the parental right to direct childrens education, including choice of private schooling.^{xcviii} At the provincial level, the only human rights code that provides parents with an explicit right to choose private education is the *Québec Charter*. All such rights are subject to the state's right to control private educational institutions. The relevant provisions of the foregoing are reproduced below.

Covenant II:

13(3) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

(4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Convention:

29(2) No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Canadian Charter:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Québec Charter:

42. Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.

The right of parents inscribed in *Covenant II* (art. 13(3)) is a liberty right to choose private schooling as an option but this right does not appear to extend to home schooling. It does not confer entitlement to any benefit such as the funding of private schools. It merely prevents the state from prohibiting private schools but, as suggested above, it does not prevent the state from regulating them.^{xcix} *Covenant II* reinforces this liberty right by explicitly

The Québec Charter, like the international instruments, confers no right to state support of private schooling.

recognizing the right of persons and bodies to establish private educational institutions, subject to state regulation and the parameters governing the right to education stipulated in the instrument (art. 13(4)). It is interesting to note that this latter provision is repeated in the *Convention* (art. 29(2)) but the right of parents to choose private schools for their children is not. As will be discussed below (see section 3.5), this omission is consistent with the

shift from the rights of parents “over” their children to the rights of children exercised by parents on their behalf and in their “best interest.”

On the matter of the right of parents to choose private schooling for their children, the Québec *Charter* (s. 42) conforms to the provisions of *Covenant II*; the right of choice is the parents and the right of the state to regulate private schooling is explicitly recognized. Moreover, the Québec *Charter*, like the international instruments, confers no right to state support of private schooling. As in the case of the right to education, this provision has no primacy over other legislation.

- The right to choose private education is recognized internationally and in the Québec *Charter* (s. 42). There is no explicit provision in the *Canadian Charter*; however according to case law, there is an implicit recognition in section 7 (liberty rights) of such a parental right.
- The State must permit “alternative structures” to the public school system such as private schools and home schooling but the State retains the right to regulate such schooling.

3.3 Human Right to Freedom of Religion in Education

3.3.1 Overview

As discussed above, freedom of conscience and religion is a “fundamental” liberty right and is found in international human rights instruments, the *Canadian Charter* and four provincial human rights codes,^c including the Québec *Charter*. In addition, certain rights respecting religion in education are contained in international human rights instruments and the Québec *Charter*. The relevant provisions are reproduced below.

Covenant I:

18(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Convention:

14(1) States Parties shall respect the right of the child to freedom of thought, conscience and religion.

....

(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Canadian Charter:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

Québec Charter:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

The essence of freedom of conscience and religion has been set forth in a unanimous Supreme Court of Canada decision in *R. v. Big M Drug Mart [Big M Drug]*:^{ci}

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.

The Court further stated that freedom can “be characterized by the absence of coercion or restraint” and that included in the idea of coercion are “indirect forms of control which determine or limit alternative courses of conduct available to others.”^{cii} In addition, it is made expressly clear in *Big M Drug* that section 2(a) also protects the freedom of non-believers:^{ciii}

Equally protected ... are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion.

While none of the freedoms enshrined in the *Canadian Charter* are absolute, it appears that, in the Court’s view, the circumstances in which the freedom of conscience and religion may be circumscribed are rather narrow (and may only arise when necessary to protect others from harm):^{civ}

Freedom means that subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

- International human rights instruments, the *Canadian Charter* and the *Quebec Charter* protect freedom of conscience and religion as a fundamental human right in public institutions.

3.3.2 Parents' Rights to Guide the Religious Education of Their Children

The right of parents to guide the religious education of their children is recognized in both *Covenant I* and the *Convention*; there is no provision in the *Canadian Charter* dealing specifically with this right and one must rely on the more general provisions in sections 7 (liberty rights) and 2(a) (freedom of religion) (both cited above). At the provincial level, the only human rights code that provides some recognition of parent rights in this regard is the *Québec Charter*. The relevant provisions of the foregoing are reproduced below.

Covenant I:

18(4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Convention:

14(2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

Québec Charter:

41. Parents or the persons acting in their stead have a right to require that, in public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.

In the international treatment of religion and education, we see another example of the shift in attitudes concerning parental and childrens' rights. The two *Covenants*, recognize the right of parents to ensure the religious and moral education of their children in conformity with their own convictions.^{cv} Once again, this is a liberty right and does not oblige the state to provide for religious instruction in public schools.^{cvi}

Moreover, there is some case law on the application of a provision of the *First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* that enjoins the state to "respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions,"^{cvii} namely that:^{cviii}

The right of parents to ensure the religious and moral education of their children is a liberty right and does not oblige the state to provide for religious instruction in public schools.

The second sentence of Article 2 of the Protocol does not prevent the State from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum or otherwise all institutional teaching would run the risk of proving impractical.... [Nevertheless, the State] in fulfilling the functions assumed by it in regard to education and teaching must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that may be considered as not respecting the parents' ... convictions. That is the limit of what must not be exceeded.

Commenting on this provision, Evans states that:^{cix}

Article 2 ... does not however prevent them [children] from being educated under a system to which the parents have objection. Nor does it prevent them from receiving information on matters to which parents object. What is prevented is compulsory participation in acts of religious worship and classes which teach a religious or philosophical belief as a belief: compulsory religious instruction is suspect; religious knowledge is not.

Similarly, in another case,^{cx} the mandatory participation of children in the study of the history of religion and ethics did not violate the rights of atheist parents as alleged by the complainants.²⁷ Thus, parental rights are given a restricted interpretation.

Contrary to international human rights instruments, the Québec *Charter* includes the provision cited above which gives parents the right to require public schools to provide their children with religious or moral instruction. The only caveat included in the text is that such provision must be within the curricular framework provided by law. In other words, section 41 requires that the public school curriculum include MRI which meets the wishes of parents *whatever* their denomination.

- In the international instruments considered, parents have a right to guide their children's education, including the choice of an educational establishment in keeping with their religious beliefs but these provisions do not give rise to any positive requirement on the part of public educational authorities.
- There is nothing explicit or implicit in the *Canadian Charter* which would require the provision of religious instruction. Section 41 of the Québec *Charter* is unique in this regard, giving parents the right to require that such instruction be provided in conformity with their convictions.

²⁷In this case, parents were allowed to opt out of this course provided that they arranged for comparable instruction outside school; however, this element does not appear to have been critical in reaching the decision.

Moreover, like section 42 of the Québec *Charter* which provides for education in private schools, section 41 does not have primacy over other legislation. Thus, if present or future legislation (see section 5.4.1) were deemed to be in conflict with section 41, then the normal rules of statutory interpretation for the resolution of such conflicts would apply. However, if the Government simply abrogated the provisions of the Act (or other legislation) which provided religious instruction, there would be no legislation “in conflict” with section 41. In such circumstances, parents could rely on section 41 in the absence of any provisions to the contrary to insist on the provision of religious instruction in public schools.

3.3.3 Case Law from Other Provinces

Although the *Canadian Charter* does not contain any specific language about freedom of religion and education, the general provision guaranteeing freedom of conscience and religion has been relied upon to defend parental interests in this regard. The education legislation of all Canadian jurisdictions provides for compulsory attendance at public schools unless a specified exception applies; in every jurisdiction, these exceptions include the possibility of private schooling and home schooling.^{cxii} However, the state reserves the right to verify the quality of this alternative to public schooling. Because of the provision of the private educational alternatives, the compulsory attendance requirements have never been, nor indeed could they be, the subject of a challenge based on a freedom of religion argument. However, the right of the state to regulate private schooling has been challenged in a landmark case, *R. v. Jones* [*Jones*].^{cxiii}

R. v. Jones

In *Jones*, a pastor, was prosecuted for refusing to apply for provincial certification of the instruction he was providing his and a number of other children. It was Jones' position that to seek certification would contravene his religious belief that God, not the government, had final authority over the education of his children. It appeared that Jones had no objection to his academy being inspected by government authorities; his objection lay in having to obtain state approval of his activities. The case was appealed up to the Supreme Court of Canada. There, the majority held that the certification requirement did not constitute even a *prima facie* violation of the Jones' section 2(a) freedoms.²⁸

In *Jones*, the Supreme Court of Canada held that State regulation of private schooling did not infringe the freedom of religion of a pastor who operated a private religious school.

It accommodates it. It envisages the education of pupils at public schools, private schools, at home or elsewhere. ... [It] permits the existence of schools such as the appellants It is a flexible piece of legislation which seeks to ensure one thing - that all children receive an adequate education.^{cxiii}

Zylberberg v. Sudbury Board of Education (Director)

While *Jones* dealt with parental rights in the context of private education, several more recent cases have tested these rights within the public school system, beginning with *Zylberberg v. Sudbury Board of Education (Director)* [*Zylberberg*].^{cxiv} This case challenged the validity of opening and closing religious exercises which had a denominational (Christian) bias and which students were obliged to attend unless an exemption was sought on their behalf by their parents. The complaint was upheld and maintained on appeal, where the court stated:

²⁸The minority held that requiring the appellant to seek certification was a *prima facie* violation of section 2(a) but that it was saved by section 1.

While the majoritarian view may be that ... [the scheme] confers freedom of choice on the minority, the reality is that it imposes on religious minorities a compulsion to conform to the religious practices of the majority....^{cxv}

... The exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant group. In our opinion, the conclusion is inescapable that the exemption provision fails to mitigate the infringement of freedom of conscience and religion by the ... [legislation].^{cxvi}

The majority of the court were of the view that the legislation ignored the feelings of young children, failed to accommodate the multi-cultural nature of Canadian society which is explicitly recognized by section 27 of the *Canadian Charter*, constituted a “denigration of the minorities’ freedom of conscience and religion ... which is not ‘insubstantial or trivial’”^{cxvii} and failed to impair the appellants’ section 2(a) freedoms as little as possible.^{cxviii} Indeed, it must be noted that the majority suggests that not *all* religious opening exercises need be proscribed; exercises that reflect a broad range of religious and philosophical perspectives and which give primacy to none, and which are thus in keeping with the spirit of section 27, may well be constitutionally acceptable.

In *Zylberberg*, the Ontario Court of Appeal struck down opening and closing religious exercises which had a denominational (Christian) bias and which students were obliged to attend unless an exemption was sought on their behalf by their parents.

It may be noted that the reasoning in *Zylberberg* was adopted in both the British Columbia case of *Russow v. A.G. British Columbia*,^{cxix} and *Manitoba Association for Rights and Liberties Inc. v. Manitoba*,^{cxx} where the constitutionality of school opening and closing exercises were challenged. It was also relied on in another Ontario case, *Canadian Civil Liberties Assn v. Ontario (Minister of Education) [Elgin County]*,^{cxxi} dealing with freedom of religion and religious instruction.²⁹

Canadian Civil Liberties Assn v. Ontario (Minister of Education)

At issue in *Elgin County* was the constitutionality of a curriculum requirement imposing two periods per week of religious instruction in public schools. The pertinent legislation also provided an exemption from religious instruction for pupils whose parents objected to their participation. The school board in question had developed its own curriculum on religious instruction.³⁰

The Ontario Divisional Court rejected the petition of the parents but its decision was reversed by the Court of Appeal which framed its consideration of the petition in terms of teaching *of* religion versus teaching *about* religion:

The crucial issue in this appeal is whether the purpose and the effects of the regulation and the curriculum are to *indoctrinate* school children in Ontario in the Christian faith. If so, the rights to freedom of conscience and religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms* and the equality rights guaranteed under s. 15 of the Charter may be infringed. On the other hand, it is conceded that

²⁹Although the distinctions between religious “exercises,” “instruction,” etc. are sometimes blurred, generally the term “religious exercises” refers to observances, practices or rituals, such as the recital of prayers; the term “religious instruction” is more ambiguous as it is used to refer to the teaching of a religion (e.g. catechism class) and teaching *about* a religion (e.g. course of comparative religions).

³⁰This curriculum was at first exclusively Christian, but the board subsequently modified it to incorporate sections about other religions. Parents were given three options with respect to participation in this program: (a) take part; (b) opt for an alternate program taught in clergy run classes; (c) opt out completely. A group of parents challenged both the provincial regulatory framework and the curriculum of the school board.

education designed to teach about religion and to foster moral values without indoctrination in a particular religious faith would not be a breach of the Charter. It is indoctrination in a particular religious faith that is alleged to be offensive.^{cxxii}

After a lengthy analysis, the Court of Appeal found that both the regulatory framework and the curriculum provided for religious indoctrination and that the provisions of the latter concerning other religions did not mitigate this finding. In terms of the exemption provisions, the Court restated its conclusion in *Zylberberg* (see above).

In *Elgin County*, the same Court of Appeal found that both the provincial regulatory framework and the curriculum requirement imposing two periods per week of religious instruction in public schools constituted religious indoctrination and infringed the applicants' freedom of religion.

It should be noted that *Elgin County* did not deal with the right to have religious instruction in public schools; the action was confined to a response to the opponents of such instruction, as no motion was filed by the supporters of the existing system alleging that they were entitled to religious instruction as provided. Although the absence of such a claim does not prove that it could not have been made, we feel confident in asserting that no such rights exist under human rights legislation in Canada. As shown above in relation to international law, freedom of religion is a liberty right that does not require the State to provide benefits. Furthermore, this explicit conclusion was reached by the Ontario Court of Appeal in *Bal v. Ontario* [*Bal*] which denied the applicants the right to the provision of religious schools within the public

school system.^{cxxiii} The Court likened the petition to that made in *Adler v. Ontario* [*Adler*]^{cxxiv} respecting the funding of private religious schools, which the State is not required to do either. As stated by the trial judge in *Bal*:^{cxxv}

The public school system is secular, it does not present the opportunity for education in any particular denomination or faith. The objective is to provide non-denominational education. Should parents desire that their children have a religious education, they must assume the cost.

- Respecting the prohibition against discrimination based on religion means that the State cannot favour one religion over others nor exclude one religion from benefits accorded to others.
- Education about religions in public schools is permissible provided that it does not discriminate in favour of particular religions nor against others.
- Religious instruction in public schools is permissible provided that such provision does not discriminate in favour of particular religions nor against others; however, with the exception of Québec *Charter* (s. 41), there is no human right to insist that such instruction be offered in public schools.
- Religious exercises in public schools are permissible provided that such provision does not discriminate in favour of particular religions nor against others.
- Accommodation for those not wishing to participate in religious instruction or exercises where offered may be provided by permitting them to “opt out” of or, alternatively, to “opt in” to, such activities; however, Ontario case law suggests that merely allowing persons to opt out if they wish is insufficient accommodation.

3.4 Human Right to Equality in Education

3.4.1 Overview

Equality is a corner stone of all human rights instruments providing freedom from discrimination, equal protection and benefit of the law and “affirmative action” for disadvantaged minorities. The relevant provisions of the various instruments are reproduced below.

Covenant I:

26(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Covenant II:

2(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Convention:

2(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Canadian Charter:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Québec Charter:

10. Every person has the right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such rights.

- International human rights instruments, the *Canadian Charter* and the *Quebec Charter* prohibit discrimination on the basis of religion in public institutions.

Discrimination

The following definition of discrimination is based on the *Québec Charter* and the *International Convention on the Elimination of all Forms of Racial Discrimination*:^{cxxvi}

a distinction, exclusion, restriction or preference which is “based on” one of a number of specified grounds, and which has the purpose or the effect of nullifying or impairing the right of every person to full and equal recognition and exercise of ... human rights and freedoms.

Discrimination can be viewed as treating one person differently from another without proper justification in a manner that involves some notion of injustice.

Discrimination can be broadly viewed as the obverse of equality or more narrowly construed; in other words, one can refrain from discriminating against someone, without providing equality to that person. Discrimination can be viewed as treating one person differently from another without proper justification, in a manner that involves some notion of injustice, often termed *invidious* or *prejudicial* treatment. If an act is judged to be discriminatory, it does not matter whether the discrimination was intentional or not:^{cxxvii}

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

The prohibition against discrimination extends to both direct discrimination (such as a hiring policy which denies employment to women) and indirect or “adverse effect” discrimination (such as a height requirement for employment that disproportionately affects women).

- Discrimination can be viewed as treating one person differently from another without proper justification, in a manner that involves some notion of injustice, often termed *invidious* or *prejudicial* treatment; it does not matter whether the discrimination was intentional or not.

Reasonable Accommodation

The obligation not to discriminate requires one to accommodate, that is, to take steps to avoid the discriminatory situation but this duty is not limitless. It only requires that the accommodation be “reasonable” in light of the facts and circumstances of a particular case. In assessing the reasonableness of the accommodation provided, regard could be had to such factors as “financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities, ... size of the employers operation” and safety; factors that “are not engraved in stone” but which “should be applied with common sense and flexibility in the context of the factual situation presented in each case.”^{cxxviii}

- The obligation not to discriminate requires one to accommodate, that is, to take steps to avoid the discriminatory situation but this duty is not limitless; it only requires that the accommodation be “reasonable” in light of the facts and circumstances of a particular case; thus, employers, for example, can rely on a “*bona fide* occupational requirement” to refute a charge of discrimination in employment.

Bona Fide Occupational Requirement

Arising from human rights law on discrimination in employment, a “*bona fide* [good faith] occupational requirement” refers to a quality or other job related requirement used to refute a charge of discrimination in employment (for example, requiring a bus driver to be sighted would qualify in light of a complaint by a visually impaired person). For a qualification or requirement to be acceptable as *bona fide* occupational requirement it must meet two tests. First, a subjective test, that is it “must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could” contravene protected human rights. Second, an objective test, that is it must be “reasonably necessary to

assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public".^{cxxxix}

Affirmative Action

Affirmative action is intended to undo "past wrongs;" it encompasses "any action taken to break historic social patterns of rejection, based on race, colour, religion or national origin, which have produced seriously disadvantaged minorities, whether or not these patterns result from cold-blooded, calculated conspiracies ... or merely result from thoughtlessness, apathy and lack of awareness."^{cxxx}

People opposed to the concept of affirmative action term it "reverse discrimination," assert that "wrongs cannot right wrongs" and claim that it is as unfair as the discrimination which it purports to address.

While supporting the legitimacy of affirmative action, Bosset and Caron suggest three criteria to test the legitimacy of such programmes: established past discrimination toward the "minority group," proportionality of the programme to the goals being pursued and lack of excessive prejudice toward the "majority group."^{cxxxi}

Affirmative action is intended to undo "past wrongs".

- Affirmative action programs are intended to undo "past wrongs;" they are explicitly permitted, but not required, by the *Canadian Charter* (s. 15(2)); consequently, they need to be provided for in human rights legislation in order to obviate a complaint of discrimination.

Application of Equality Rights to Education in Canada

As indicated above, provincial human rights codes prohibit discrimination on the basis of certain listed grounds in relation to certain spheres of activity. As discussed above regarding the *Canadian Charter* (see section 3.1.2), the application of the human rights codes to public education, albeit for different reasons, has been viewed as problematic.^{cxxxii} However, the matter has now been judicially resolved in enough jurisdictions that the application of the provincial human rights code to public schools is now clearly established in every jurisdiction except Nova Scotia.^{cxxxiii} We have already mentioned that Québec and Saskatchewan include education as a human right, which subsumes a prohibition against discrimination. Manitoba specifies education as a domain where discrimination is prohibited; the remaining jurisdictions likewise prohibit discrimination in education but do so by subsuming education under a general expression such as "goods and services available to the public."

3.4.2 Case Law from Other Provinces

It follows from the foregoing overview that equality rights serve to complement the right to freedom of religion in schools. In fact the two rights are often intertwined. The provision of Christian religious exercises in public schools infringes the freedom of religion of members of other faiths, as well as non-believers. By the same token,

Offering only Christian religious exercises is discriminatory and infringes the equality rights of members of other religious faiths.

offering only Christian religious exercises is discriminatory and infringes the equality rights of these same individuals and groups. To date, most of the international and domestic case law dealing with religion in schools has been litigated under freedom of religion provisions more so than under equality provisions. In Canada, this may be due in part to the fact that the equality provision of the *Canadian Charter* came into force three

years later than the freedom of religion provision. However, this does not mean that equality rights do not have a critical role to play and we have already seen one education case, *Adler*,^{cxxxiv} that has reached the Supreme Court of Canada.

Adler v. Ontario

In *Adler*, parents, who for religious reasons sent their children to private religious schools, challenged the absence of public funding for these schools especially given that public funding was provided to the separate (Catholic or Protestant minority) schools in Ontario. It should be noted, however, that in Ontario state funding is not provided to any private schools, secular or religious. The complaint in *Adler*, which was based on both freedom of religion (s. 2(a)) and equality rights (s. 15), was denied in the first instance and on appeal. The disposition of the case by the Supreme Court of Canada

is complex. Eight out of nine judges held that the application should be denied. However, their reasons were quite different. A majority of five judges held that neither of the alleged grounds need even be considered as the funding of public and separate schools in Ontario is shielded from a *Canadian Charter* challenge by virtue of section 93 (see below). Four judges disagreed that the funding policy was so shielded.³¹ All four also held that the Ontario funding policy did not violate the applicants' freedom of religion. However, they themselves disagreed about the alleged discrimination. Two held that the funding policy was not discriminatory; one that it was discriminatory, but was saved under section 1; and, one argued that it was discriminatory and not so saved. Therefore in terms of establishing guiding principles for the future application of section 15 to education, we have only minority opinions to go on.

In our view, the minority position adopted by Sopinka and Major JJ, to the effect that the Ontario funding policy did not infringe the applicants' freedom of religion nor their equality rights is the correct position. If this issue were litigated in a province where section 93 rights did not apply, this position would be adopted. First, we agree that the funding policy does not infringe upon the applicants' freedom of religion. As stated in the minority opinion:^{cxxxv}

[The parents] cannot, however, complain that the Ontario *Education Act* prevents them from exercising ... their freedom of religion since it allows for the provision of education within a religious school or at home. The statute does not compel the [parents] to act in any way that infringes their freedom of religion. Nothing in ... [it] relating to mandatory education per se involves a breach of [the parents'] ... rights under s. 2(a) of the *Charter*.

Second, we agree that the funding policy is not discriminatory because religion - which would be a prohibited ground - had no role to play in determining funding entitlement; entitlement was based on the distinction between public versus private schools:^{cxxxvi}

No private schools receive funding whether they are religious or secular. No religion is given preferential treatment within the system. The distinction between "private" and "public" institutions is neither an enumerated nor analogous ground in s. 15 of the *Charter*.

Such a position is consistent with the international jurisprudence discussed above, as well as with two subsequent Ontario cases.

³¹The arguments concerning the immunity of Ontario funding policy is based on a complex interpretation of section 93 rights that is not strictly relevant for the purposes of this paper.

Bal v. Ontario

The first, *Bal v. Ontario* [*Bal*],^{cxvii} arose following the issuance of a policy memorandum³² and amendments to the regulations,^{cxviii} by the Ontario Ministry of Education pursuant to *Elgin County* (discussed above). The Ministry memorandum stipulated, *inter alia*, that henceforth in Ontario public (but not separate) schools:

3. Schools and programs including programs in education about religion, under the jurisdiction of boards of education must meet both of the following conditions:
 - a) They must not be indoctrinational.
 - b) They must not give primacy to any particular religious faith.

A similar application claiming the right to religious schools within the public school system was rejected by the Ontario Court of Appeal in *Bal*.

Prior to this time, several school boards had established alternative religion-specific schools. These schools could no longer function under the new regime, except by becoming secular schools which would negate their *raison d'être*. Among other arguments, the complainants asserted that the policy memorandum and regulations constituted adverse effect discrimination because although neutral on

the surface, they had a disproportionate effect on the applicants (and others similarly situated). Relying on the Appeal Court decision in *Adler*, the Court rejected the argument, stating that any burdens arose from the applicants' choice of education:^{cxix}

The public school is secular, it does not present the opportunity for education in any particular denomination or faith. The objective is to provide non-denominational education. Should parents desire that their children have a religious education they must assume the cost. This does not mean that there is adverse effect discrimination. The government prohibition is just, fair and constitutional.

The question of discrimination was given very short shrift in this case as both the trial court and the Court of Appeal concluded that the underlying issue was one of funding for denominational schools and its disposition therefore followed directly from the decision in *Adler*.

Islamic Schools Federation of Ontario v. Ottawa Board of Education

In the second case, *Islamic Schools Federation of Ontario v. Ottawa Board of Education*,^{cxl} the applicants contested the refusal of the school board to close its schools on two Muslim holy days, especially in light of the fact that the same board had delayed the start of its school year previously to accommodate Jewish holy days. They also challenged a regulation governing the school calendar, alleging that it provided for Christian holy days, such as Christmas, but not for holy days of other faiths.^{cxli}

The application was denied, it being held that the school board was under no obligation to consider let alone grant such a request. As far as the impugned regulation was concerned, the Court relied on *Commission scolaire régionale de Chambly v. Bergevin* [*Bergevin*]^{cxlii} (see section 3.4.4) to conclude that holidays such as Christmas are to be taken as secular in nature and therefore neutral and non-discriminatory. The adverse discrimination was likewise rejected, largely based on an analysis of the regulation - and not board policy. It was further held that assuming such discrimination existed, the board had provided *sufficient accommodation* to Muslim students by a variety of

In *Islamic Schools Federation of Ontario v. Ottawa Board of Education*, the applicants contested the refusal of the school board to close its schools on two Muslim holy days, especially in light of the fact that the same board had delayed the start of its school year previously to accommodate Jewish holy days. The application was denied, it being held that the school board was under no obligation to grant such a request.

³²A complete text of this memorandum is contained in *Bal* (see endnote 133, at 107 ff).

means, including authorized absences for students on their religious holy days and the scheduling of tests, etc.

Pandori v. Peel Board of Education

Opinions may well vary as to whether accommodation is *sufficient* in given circumstances, as reflected in *Pandori v. Peel Board of Education*,^{cxliii} which concerned board policy banning the wearing on board property of a *kirpan*, a ceremonial dagger worn by Khalsa Sikhs. Human rights complaints were filed by a student and a teacher contending that policy constituted religious discrimination and denied employment and educational opportunity. The school board contended that schools were special places and that the Ontario *Human Rights Code* should be interpreted accordingly, that its policy was reasonable in the circumstances and that it would suffer undue hardship if deprived of its policy. On appeal from the board of inquiry ruling, the court decided that there was no justification in restricting the interpretation of the *Human Rights Code* in a school setting; that the board of inquiry had acted properly in assessing the reasonableness of school board policy and in weighing the evidence presented; and that the school board would not suffer any undue hardship.

In *Pandori v. Peel Board of Education*, the court ruled that board policy banning the wearing on board property of a *kirpan*, a ceremonial dagger worn by Khalsa Sikhs, infringed the freedom of religion of the applicants.

- Respecting freedom of religion means not interfering with an individual's right to practice his or her religion free from any form of coercion; it does not require the State to support such practice.
- There is no obligation to provide State support of private schools but if the State chooses to do so, it cannot discriminate in favour of particular religions nor against others.

3.4.3 Equality and Religion in Québec

Similarly, the issue of religious accommodation has arisen in Québec schools in recent years, notably in relation to the wearing of the hijab in public and private schools. One article in *The Gazette* began a story on this issue thus:^{cxliv}

In a society in which Muslims are often portrayed as fundamentalists and terrorists, the issue has touched a raw nerve, going well beyond the simple wearing of a head scarf. It raises questions of freedom, tolerance and the equality of women in our multicultural society.

Public attention to this issue began when a secondary school refused to allow one of its students, a convert to Islam, to wear the hijab, ostensibly because it violated the school's dress code. The conflict never resulted in a court case because the student withdrew and enrolled in another school. However, the issue has arisen in other schools and has sparked considerable debate. People espousing contrary points of view relied on the Québec *Charter* to support their arguments.^{cxlv} The "hijab debate" is far from over; religious diversity is an indisputable reality of contemporary schools in Québec.

Prohibition Against Discrimination

Whereas a challenge based on the *Canadian Charter* is first examined to see if legislation or a government actor is involved, a challenge based on a human rights code is examined to see if the activity is one covered by the scope of the code. Most human rights codes in Canada contain a provision which prohibits discrimination on the basis of a set of enumerated grounds (e.g. race, religion, disability) with respect to specified domains of activity (e.g. public services, employment). The prohibition against discrimination in the Québec *Charter* is structured somewhat differently.

Section 10 defines discrimination as a *distinction, exclusion or preference* which has the effect (intentional or not) of *nullifying or impairing a human right or freedom* which is *included* in the Québec *Charter*. Accordingly, one cannot, for example, discriminate in public education on the basis of religion because public education is a Québec *Charter* human right (s. 40) and discrimination on the basis of religion is prohibited with respect to Québec *Charter* human rights. However, we must examine the problematic nature of both section 10 (discussed above) and the nexus between section 10 and section 40. The problem is perhaps best explained by an example. In *St-Jean and Chauveau*,^{cxlvi} the Human Rights Commission sought to establish that the denial of regular class placement infringed the equality rights of the complainant students with a disability. The Court of Appeal, in affirming the first case and reversing the second, approached regular class placement as a separate issue, seeking first to determine if it were protected under section 40 of the Québec *Charter* before examining the claim of discrimination under section 10. This two-stage analysis seemed to be based on the premise that if regular class placement were not protected under section 40, then there could be no claim under section 10 - you cannot be discriminated in relation to something to which you are not entitled.

This reasoning appears to suggest that the claim to equality rights in Québec education is inherently limited by the specific educational rights enumerated in Québec school law. In other words, if the right to religious instruction in non-Catholic and non-Protestant denominations (like *regular* placement as opposed to *a* placement) is not covered by section 40, then how can one lodge a complaint based on discrimination? The second issue is the nature of the equality rights protected by the Québec *Charter*. In brief, Rousseau-Houle, J.A. argues that, in contrast to the *Canadian Charter*, the equality guarantee found in the Québec *Charter* is not an autonomous right but simply a means for securing another Québec *Charter* right, in this case, the right to education. We raise this complex issue because it is part of an ongoing controversy among jurists and legal scholars^{cxlvii} on this relationship, the limitation of these rights,³³ especially in light of the non-application of the primacy clause (s. 52) to education rights (see above).^{cxlviii}

In the context of education, this debate raises the following types of questions:

- Can the inherent limits on the right to education (i.e. the standards prescribed by law) be invoked to rebut an equality rights claim?
- Given that the primacy provision of the Québec *Charter* covers equality rights but not education, what happens if the standards themselves (e.g. the *Education Act*) are discriminatory?
- If the combined meaning of these provisions allow for discrimination in education, could they be struck down for violating the equality provisions of the *Canadian Charter*?

³³For example, in *Devine v. Québec (A.G.)*, the Québec *Charter* right to freedom of expression was used to oppose restrictions regarding commercial signs provided for by the Québec *Charter of the French Language*. The Supreme Court of Canada recognized that if the freedom of expression were justifiably limited by law, then equality rights could “not be invoked to circumvent those reasonable limits and to substitute an absolute guarantee of freedom of expression” (see endnote 91, at 818).

While most people support the *principle* of freedom from discrimination on the basis of religion, there is still considerable disagreement on what this should mean *in practice*, both in terms of accommodating mainstream practice, and allowing for alternative streams of practice, including “special programs” and “affirmative action.” For purposes of this paper, we use the expression “special programs” to designate those situations permitted in human rights codes in Canada which would not qualify as “affirmative action” under the *Canadian Charter*. The former provide preferential treatment to *designated* groups, while the latter are limited to those programs which ameliorate the conditions of *disadvantaged* groups. As stated by Gibson:^{cxlix}

While most people support the *principle* of freedom from discrimination on the basis of religion, there is still considerable disagreement on what this should mean *in practice*.

True affirmative action involves preferential treatment of the target group over the group to which the equality seeker belongs, and it is permissible under section 15(2) of the Charter only if its object, in pith and substance, is the amelioration of a disadvantage to which the target group is subject. No other law, program or activity, however positive or beneficial, can properly be considered to be affirmative action under ... the Charter.

Special Programs

Although called by different names³⁴, several jurisdictions in Canada provide for special programs in their human rights codes.^{cl} In Québec, special programs are provided for in section 20 of the Québec *Charter* which permits *prima facie* discriminatory practices in non-profit organizations.³⁵

Québec *Charter*:

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

For purposes of this paper, section 20 of the Québec *Charter* means that otherwise discriminatory behaviour by public and private denominational schools is deemed to be non-discriminatory if the behaviour can be justified by the nature of the denominational school.

A recent Superior Court case (pending appeal), *Collège Notre-Dame du Sacré-Coeur v. Commission des droits de la personne du Québec* [*Notre-Dame*], held that section 20 cannot apply to public educational institutions because of their public character.^{cli} In our view, however both public and private denominational schools come under section 20. The test of whether or not section 20 applies is not a public-private one but whether the nature of the institution is one envisaged by the section 20 shield, as supported by the reasoning of the Supreme Court of Canada in *Brossard (Ville) v. Commission des droits de la personne du Québec* [*Brossard*]:^{clii}

³⁴Some of these programs are provided under the rubric of “affirmative action” even though they do not target disadvantaged groups. See discussion below re Affirmative Action Programs.

³⁵Section 20 also deal with employment but not as as “special program;” see discussion below under Equality and Employment in Education.

In every case where s. 20 may be invoked, the Charter protects the freedom of association of a non-profit institution which promotes the interests and welfare of an identifiable group of persons characterized by a factor enumerated in s. 10 [grounds of non-discrimination].³⁶

Thus, a public denominational school would be covered by section 20, while an *ordinary* public school would not. This conclusion is further supported by the application of section 20 in an earlier case involving a confessional school board.^{cliii}

There must always be a connection between the brand of discrimination practised and the nature of the institution.

³⁶It must be noted that in making this close nexus between sections 20 and 10, the Supreme Court of Canada could be seen to be “reading in” a requirement that is not explicit in the legislation in the way that, for example, permissible affirmative action is linked to groups discriminated against in employment, education, health services and public services (Québec *Charter*, s. 86).

Having established that the institution comes under the ambit of section 20, one must then determine if the otherwise discriminatory behaviour is *justified* by the nature of the institution. In brief, for our purposes, this means that the alleged discrimination must be justified by the nature of a denominational school and not arise from factors that are *incidental* to its vocation. As stated in *Brossard*: “While there need not be a direct or exclusive relationship between these factors. I am of view that there must always be a connection between the brand of discrimination practised and the nature of the institution.”^{cliv} By contrast, in an earlier case,^{clv} it was held that the refusal of the confessional school board to rent facilities to a gay rights group, based on Catholic dogma concerning homosexuality, could not be *justified* on the basis of section 20. Once again, *Notre-Dame* appears to be inconsistent with this reasoning.³⁷ However, the key question about section 20 is neither its scope of application nor reach, but whether it is inconsistent with the equality rights provisions of the *Canadian Charter*.

Section 20, and like provisions in other jurisdictions, serves to insulate private action from challenge under provincial human rights codes but it cannot serve to insulate government action from *Canadian Charter* review. In other words, section 20 cannot itself be discriminatory. The *Charter* does not impose positive obligations on governments to enact human rights legislation.^{clvi} However, “where the government has undertaken to legislate on human rights, it is required to provide those benefits and protection to all classes.”^{clvii} In *Re Blainey and Ontario Hockey Association [Blainey]*,^{clviii} the Ontario Court of Appeal struck down a provision of the *Ontario Human Rights Code* permitting distinctions to be made on the basis of sex with respect to athletic activities and facilities.³⁸

Section 20 of the Québec *Charter*, like the impugned Ontario provision, allows discrimination, for example on the basis of religion in admission to denominational schools. Accordingly, if challenged, it can only be saved if it can be demonstrated that the provision is a “reasonable limit” under section 1 of the *Canadian Charter* to the prohibition against discrimination. A section 1 defence was rejected in *Blainey* because the provision prescribed no limits and no guidelines for the application of the exception.^{clix} Arguably, section 20 contains some inherent guidelines by its reference to justification by the nature of the institution; however, it is still open to question whether it would survive a challenge under the *Canadian Charter*.³⁹

It is still open to question whether section 20 would survive a challenge under the *Canadian Charter*.

- We use the expression “special programs” to designate those situations permitted in human rights codes in Canada, such as Québec *Charter* (s. 20) which would not qualify as “affirmative action” under the *Canadian Charter*. The former provide preferential treatment to *designated* groups, while the latter are limited to those programs which ameliorate the conditions of *disadvantaged* groups.
- Denominational schools may qualify as “special programs” (s. 20) which permit *prima facie* discriminatory practices, provided there is a rational connection between the brand of discrimination practised and the nature of the institution.

³⁷In *Notre-Dame*, a private Catholic girls' school denied admission to a girl, otherwise qualified to attend, because her physical handicap would prevent her from taking part in the complete physical education program. The trial judge concluded that the exclusion was based on the educational character of the institution and that it was therefore immune from a charge of discrimination. However, there was no discussion of how the religious nature of the school justified discrimination on the basis of disability.

³⁸In this case, a girl had been refused permission to play hockey as a member of a boys' team.

³⁹It should be noted that *Brossard* was initiated before the advent of the *Canadian Charter*; although this is not true of *Notre-Dame*, the trial judge noted that no challenge under the *Canadian Charter* had been made.

Affirmative Action

As noted above, affirmative action programs are limited to those which are intended to ameliorate the conditions of *disadvantaged* groups. Affirmative action programs are explicitly permitted, but not required, by the *Canadian Charter* (s. 15(2)). Consequently, they need to be provided for in human rights legislation in order to obviate a complaint of discrimination. All jurisdictions in Canada except Alberta provide for programs which are termed to be “affirmative action.” However, only some of these target only disadvantaged groups,^{clx} and merit such a label. The others^{clxi} are more properly considered as one of “special programs” considered above. The *Québec Charter* provides for affirmative action programs whose aim is defined thus:

Québec Charter:

86. The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment, or in the sector of education or of health services and other services generally available to the public.

An affirmative action program is deemed non-discriminatory if it is established in conformity with the Charter.

The Human Rights Commission may propose that an institution implement an affirmative action program and if its proposal is not accepted, it may apply to the Human Rights Tribunal to order the establishment and

implementation of such a program which is then subject to the approval of the Tribunal. Although some authors assert that an institution could voluntarily initiate an affirmative action program on its own,^{clxii} we suggest that the text in question is far from clear in this regard.⁴⁰ It is worthy of note that a regulation of the *Québec Charter* provides for affirmative action programs in education;^{clxiii} Québec is the only jurisdiction in Canada to have adopted such a regulation. To the best of our knowledge, such an

Any affirmative action program must be genuinely designed to promote the welfare of the target group and cannot shield discriminatory practice behind an affirmative facade.

affirmative action program has only been contemplated in one case,^{clxiv} but never actually implemented anywhere.⁴¹

It is understood, as a general principle, that any affirmative action program must be *genuinely* designed to promote the welfare of the target group and cannot shield discriminatory practice behind an affirmative facade.^{clxv} As set forth in *Schewchuck v. Ricard*:^{clxvi}

Affirmative action laws or programmes must be carefully scrutinized to ascertain (a) whether the law or programme is in fact an ameliorative one for disadvantaged individuals or groups including those set out in s. 15(2) [of the *Charter*], and (b) if ameliorative, whether the effect of the law or programme is so unreasonable that it is grossly unfair to other individuals or groups.

⁴⁰Section 86 states that an affirmative action program must be established in accordance with the *Québec Charter*. Section 87, which provides for the approval of all affirmative action programs by the Human Rights Commission is not in force and the remaining relevant sections (ss. 88-91) refer to programs recommended by the Commission.

⁴¹The Human Rights Tribunal did order such that an affirmative program be implemented in *Chauveau* (see note 146) but this never occurred as the decision was quashed on appeal.

Furthermore, as held on appeal in *Roberts v. Ontario (Ministry of Health)*,^{clxvii} an affirmative action program based on the amelioration of a given target group (for example, persons with a disability) cannot be shielded from a charge of discrimination on a different ground (for example, age).⁴²

To conclude this discussion, a licit affirmative program would be difficult to construct on behalf of Catholics or Protestants, historically advantaged groups, but one could be devised for members of other faiths. However, if such a program were devised, it could discriminate on the basis of religion, that is provide preferential treatment to members of the faith in question but this would not allow it to discriminate on the basis of other grounds (for example, race or national origin).

- Affirmative action programs can be undertaken to benefit historically disadvantaged denominational groups but not to benefit historically advantaged denominational groups such as the Catholics and Protestants.

3.4.4 Equality in Employment in Denominational Institutions

Not surprisingly, employment has been a major battleground for protection from direct discrimination,^{clxviii} adverse-effect discrimination^{clxix} and the search for affirmative action.^{clxx} All human rights codes in Canada include employment as a domain in which discrimination is prohibited, as does Québec:

Québec *Charter*:⁴³

16. No one may practice discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories

⁴²In this case, the Ontario government operated a special program which supplied various assistive devices to persons with disabilities but restricted the program to persons under 23 years of age (with intention to gradually raise the age limit as time went on). The complainant, who would otherwise qualify for the program, was denied benefits because of age (he was 73).

⁴³In employment in education, it is section 16, not section 40 (right to education) that brings the right to non-discrimination (s. 10) into play.

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Employment involves a contractual relationship between an employer (person with authority to hire and fire) and an employee (anyone who occupies an employment position for remuneration). Thus, public school boards and private schools are employers; public schools are not. Teachers and secretaries are employees; parent volunteers are not.

For purposes of this paper, we will examine employment in relation to the nature of the employer - non-denominational or denominational - and the nature of the employment position - non-denominational or denominational, as illustrated below.

		Employer	
		Non-denominational	Denominational
Position	Non-denominational		
	Denominational		

Non-Denominational Employer

Generally, public school boards qualify as non-denominational employers and therefore, insofar as human rights are concerned, can be treated as any other employer. For the most part, employment positions in this situation will be non-denominational in nature but there are some exceptions, which will be treated below.

Non-Denominational Position

In the case of non-denominational positions for a non-denominational employer, religious based discrimination may occur directly - for example, refusal to employ members of a particular religious faith - or indirectly - for example, a work schedule that has an adverse effect on members of a particular religious faith. Fortunately, the former has become relatively rare but the latter continues to be problematic in the work place. A well known trilogy of cases, *Ontario Human Rights Commission and Simpsons-Sears Ltd.*,^{clxxi} *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*^{clxxii} and *Central Okanagan School District No. 23 v. Renaud*,^{clxxiii} all involved an employee's complaint that the employer was unsympathetic to the employee's religious objection to working on a Sabbath day. In every case, the employer was required to take reasonable steps to accommodate the religious beliefs of its employees. As stated by Supreme Court of Canada in *Renaud*:

More than mere negligible effort is required to satisfy the duty to accommodate.

The duty resting on an employer to accommodate the religious beliefs and practices of employees extends to require the employer to take reasonable measures short of undue hardship

... More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term “undue” infers that some hardship is acceptable; it is only “undue hardship” that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words “reasonable” and “short of undue hardship”. These are not independent criteria but are alternate ways of expressing the same concept.^{clxxiv}

In *Bergevin*, the Supreme Court of Canada upheld a complaint by three teachers of the Jewish faith who were deducted salary for being absent to observe the religious holiday of Yom Kippour

A more recent Québec case, *Bergevin*,^{clxxv} involved three teachers of the Jewish faith who were given a day off without pay to observe the religious holiday of Yom Kippour. The teachers grieved the salary deduction, claiming religious discrimination. The arbitration board concluded that the school board action was discriminatory and upheld the grievance. The school board appealed. A majority of the Québec Court of Appeal found that the award was unreasonable and should be set aside. Their decision was based on the following reasoning:

- the school calendar does not reflect the Catholic nature of the school board - as asserted by the arbitration board - and does not give any advantage in terms of holidays to Catholic teachers; it has no arbitrary aspects and merely reflects social realities;
- the award creates reverse discrimination in allowing the grievors the same annual salary as other teachers, while working one day less;
- if the award were affirmed, the school board could be forced to grant Muslim teachers religious holidays on the same basis;
- the financial burden on the teachers (loss of one day's pay) is not an obstacle to the free exercise of their religion; as there is no breach of this fundamental freedom, there is no duty to accommodate.

The Supreme Court of Canada held that the school calendar was discriminatory in its effect and that the loss of one day's pay was not insignificant. It was held that the school board had a duty to accommodate short of “undue hardship” and that, in this case, the payment of one day's pay did not constitute undue hardship. If, on the other hand, a teacher's religious beliefs required him or her to be absent every Friday, then that might be a different matter.

Denominational Position

By way of exception, it is possible that a non-denominational employer would hire someone for a denominational position, for example a teacher of Catholic religious instruction in a public school board. In such a case, religious discrimination arises, not from a failure to accommodate the employee's religion but from the employer's reliance on religion as a *bona fide* occupational requirement. In our view, all such cases should be considered first in relation to the nature of the employer and the employment setting and second in relation to the job itself.

In the case of a non-denominational employer, the first consideration would generally be moot as the employer has no religious purpose or defining characteristics. However, in the case, for example, of a teacher employed in a denominational school inside a public school board, then the denominational setting of the employment comes into play, even though the employer (school board) has no denominational characteristics. Moreover, if, for example, the denominational school were the result of an approved affirmative action program, then special attention would have to be paid to the purpose and characteristics of this program. The second consideration, the nature of the job itself, takes into account what is actually required of the incumbent of

All such cases should be considered first in relation to the nature of the employer and the employment setting and second in relation to the job itself

the position and what may be expected of him or her in terms of off-duty conduct. In our view, both of these considerations should be treated in the same manner as if it were a denominational position for a denominational employer, as dealt with below.

Denominational Employer

Generally, denominational employers in education will be confined to separate school boards, where they exist, and private religious schools. Their status provides some exception insofar as human rights are concerned,⁴⁴ but in many ways, they can be treated as any other employer. For the most part, employment positions in this situation will be denominational in nature but there are some exceptions, which will be treated below.

⁴⁴A separate school can also defend itself from a charge of discrimination by invoking the special protection afforded by section 93. Given that the latter no longer applies to Québec, our analysis is made without any reference to the additional protection section 93 may offer a separate school in defending itself.

Denominational Position

As noted above, the first consideration is the nature of the employer and the employment setting. It is recognized that a denominational school possesses certain characteristics that must be taken into account in assessing the

In *Caldwell v. Stuart*, a Catholic teacher teaching in a private Catholic school, whose job performance was completely satisfactory, was dismissed because she married a divorced person in a civil ceremony. The dismissal was upheld by the Supreme Court of Canada.

extent to which an employer can invoke religion as a *bona fide* occupational requirement. The leading case on point remains *Caldwell v. Stuart*,^{clxxvi} where a Catholic teacher teaching in a Catholic school, whose job performance was completely satisfactory, was dismissed because she married a divorced person in a civil ceremony. The dismissal was upheld all the way to the Supreme Court of Canada. McIntyre J, writing for a unanimous court, summarized the nature of the denominational institution which supported the claim that a teacher must observe the requirements and practices of the Church as a condition of

employment.^{clxxvii}

The Catholic school is different from the public school. In addition to the ordinary academic program, a religious element which determines the true nature and character of the institution is present in the Catholic school. To carry out the purpose of the school, full effect must be given to this aspect of its nature and teachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education.

As can be seen from the foregoing, the rationale for a religious exemption from a charge of discrimination tends to conflate arguments based on the nature of the institution with those based on the nature of the position. This occurs when the court recognizes a close nexus between the two. However, this does not mean that the two concepts do not have separate meaning. The distinction becomes evident in cases where the denominational nature of the school is acknowledged but the nature of position is subject to a separate analysis.

In an early arbitration case chaired by Walter Tarnopolsky, *Gore v. Ottawa Separate School Board*,^{clxxviii} a woman was refused employment as a secretary because she was not Catholic. The board of inquiry established that the job description did not contain any specifications that required the incumbent to be Catholic; however, the school board insisted that such a qualification was necessary "to maintain a Catholic atmosphere." The board of inquiry rejected this argument and disposed of the matter in the following terms:^{clxxix}

I think it would be reasonable for the Separate School Board to refuse to hire a secretary who is hostile to the Catholic faith or to the aims of the Separate School system, regardless of her religious upbringing, but I cannot see how a secretary can be expected to provide an example for the children. This is surely the responsibility of the teachers, and the religious aspect is the responsibility of the ecclesiastics as well as most of the teachers. The secretary performs secretarial and clerical functions ... under directions from, and subject to supervision by, the Principal. Requiring that she be a Roman Catholic is not, in my opinion, a "reasonable occupational qualification" within the meaning of ... the Ontario Human Rights Code.

In addition to cases decided strictly on the basis of the section 93 shield,^{clxxx} several cases have examined denominational positions in denominational schools. In *Garrod v. Rhema Christian School*,^{clxxxi} the dismissal of a teacher in a private Christian school in Ontario on the grounds that her common law relationship with a man put her in "flagrant conflict with Christian morals and ethics" was upheld. In *Parks v. Christian Horizons*,^{clxxxii} a staff assistant in a group home run by an evangelical Christian organization was dismissed on the grounds of an extra-marital relationship. In this case, the board of inquiry overruled the dismissal, largely because the employer had not made its policy clear to the employee nor had it applied the policy in a consistent manner. In *Kearly v. Pentecostal Assemblies Board of Education*,^{clxxxiii} a

Any accommodation of an individual teacher's religious non-conformance would likely either undermine part or the whole of the system of instruction, or stultify that teacher's effectiveness as a

teacher at a Pentecostal educational institution remarried following her divorce. A board of inquiry upheld her dismissal on grounds of her remarriage after having been explicitly warned that such practice was contrary to the policy of the Church in question. It is interesting to note the *obiter* comment of the board of inquiry to the effect that in the case of a *bona fide* religious occupational requirement, one need not consider employer alternatives, for as Tarnopolsky and Pentney state, commenting on this case: “Any accommodation of an individual teacher’s religious non-conformance would likely either undermine part or the whole of the system of instruction, or stultify that teacher’s effectiveness as a role model.”^{clxxxiv}

To the best of our knowledge, there are no Québec cases on dismissal or other actions for denominational cause. However, the above jurisprudence can be used to foresee results of such cases, should they arise. Section 20 of the Québec *Charter*, in addition to providing an exemption for special programs, permits employers to make *distinctions, exclusions or preferences* based on individual *aptitudes or qualifications*. This part of the section constitutes the recognition of a general *bona fide* occupational requirement as a defence against alleged discrimination, as found in other jurisdictions in Canada.^{clxxxv} As seen in the above cases, religious grounds could be invoked by a denominational employer in Québec to justify its hiring policy, etc.

Non-Denominational Position

Non-denominational positions, as defined by the denominational employer or decided by the courts, are to be treated no differently from a human rights perspective than employment in any institution, as discussed above in relation to non-denominational employers.

- Reasonable *bona fide* occupational requirements of a denominational nature which are *prima facie* discriminatory may be imposed on employees who occupy positions which have denominational elements irrespective of whether the employer is a denominational or non-denominational school.
- Occupational requirements of a denominational nature which are *prima facie* discriminatory may not be imposed on employees who occupy positions which do not have denominational elements irrespective of whether the employer is a denominational or non-denominational school.

3.5 Rights of Children and Parents

Historically, the expression “children’s rights” would have been considered an oxymoron; rights were attained upon reaching the “age of majority” - until then children were viewed as little more than “property” over whom the father had complete authority. Over time paternal authority over children gave way to parental authority; still parents were considered to have the right to make decisions about children as the parents saw fit. As observed by Casey J. in *Chabot v. School Commissioners of Lamorandiere*, that:^{clxxxvi}

The authority of the father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged, without the utmost coercive reason.

Since then, the situation has changed dramatically; today, as noted earlier in this paper, parental authority is meant to be exercised, not *over* the child, but *on behalf* of the child.

Parental authority is meant to be exercised, not over the child, but on behalf of the child.

No one would now seriously dispute the fact that children, like adults, are persons entitled to the range of human rights enshrined in international and domestic human rights instruments. After all, as the United States Supreme Court has observed: rights “do not mature and come into being magically only when [a child] attains the state-defined age of majority;”^{clxxxvii} and “students in

school as well as out of school are 'persons' under [the] ... Constitution. They are possessed of fundamental rights which the State must respect."^{clxxxviii} This fact is also explicitly recognized in the *Convention on the Rights of the Child* and implicitly in a number of cases in which students have been accorded the rights and freedoms guaranteed everyone under the *Canadian Charter*.^{clxxxix}

Exercise of Rights by Children

Children generally are viewed as persons with diminished autonomy. They are presumed to be incapable of making informed choices and therefore incapable of exercising their rights in an effective and meaningful manner. They need a proxy to exercise their rights on their behalf and in their interests; invariably the parent is a child's proxy.

However, it is accepted that the presumption of incapacity of children is a rebuttable presumption; that as children mature they can acquire the capacity to exercise their rights for themselves. This fact has been recognized, for example, with respect to medical treatment of children in the *Québec Civil Code*^{cxc} and the legislation^{cxc} and case law^{cxcii} of other provinces.

Indeed as observed by Lord Denning, the parental right over their children is "a dwindling right which the courts will hesitate to enforce against the wishes of a child the older he is. [The parental right] ... starts with a right of control and ends with little more than advice".^{cxciii} Similarly it has been recognized in the Supreme Court of Canada that children can acquire the capacity to exercise their rights independently of their parents prior to attaining majority. Thus, in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*,^{cxciv} it was observed that "until the child reaches an age where she can make an independent decision regarding her own religious beliefs her parents may decide on her religion for her and raise her in accordance with that religion." Implicit in this observation is, of course, the acceptance of the fact children may acquire the capacity to exercise their rights independently of their parents prior to attaining the age of majority.

Perhaps the best synthesis of the issues here involved is provided by Mr. Justice Douglas, in dissent on this issue, in *Wisconsin v. Yoder*:^{cxcv}

... No analysis of religious liberty claims can take place in a vacuum. If the parents' ... [wishes are followed], the inevitable effect is to impose the parents' notion of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's right to permit such an imposition without canvassing his [or her] views. ... And if ... [a] child is mature enough to have that desire respected ... [it should] override the parent's religiously motivated objection.

....

On [the] vital and important matter of education, I think the children are entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views

It is the future of the student, not the future of the parents, that is [at issue].

It is therefore helpful to view the "modern function of parental rights [as being] ... to prepare children and adolescents for maturity, and as minors come to achieve maturity and to exercise autonomy, this may be seen not as a limitation or defeat of parental control, but as a successful discharge of parental responsibility."^{cxcvi} It is understood that *maturity* can be attained before the age of *majority*.

On the vital and important matter of education, children are entitled to be heard.

Best Interests Principle

Convention:

3. (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Quebec Civil Code:

33. Every decision concerning a child shall be taken in the light of the child's best interests and the respect for his rights.

Consideration is given, in addition to the moral, intellectual, emotional and material needs of the child, to the child's age, health, personality and family environment, and to the other aspects of the situation.

However, until children attain the age or stage at which they can personally exercise their rights, as noted above, their parents have the right to act as their children's proxies. In the vast majority of cases, parents act in the best interests of the children and traditionally the State has been reluctant to interfere in the private ordering of family life except in cases where the child's well being is clearly "at risk." However, there are exceptions to this general state of affairs and *nuances* that need to be made when considering the interface of the rights of children and parents with respect to education. For it must be accepted that the interests of children and parents will not always coincide and it is unacceptable to accept as the default setting in cases of conflict that the parents always know or want what is best for a child. As was observed by the Ontario Court of Appeal in *Eaton v. Brant (County) Board of Education*, parents are solely the proxies of their children and they must pursue what is in their children's best interests from the perspective of the children, and not what is in their best interests from the perspective of the parents.^{cxcvii}

... Although the appellants in this case are the parents of Emily Eaton, the interest that they advance is her interest, not their own When it comes to asserting their daughter's constitutional right ..., as provided by ... the *Charter*, they represent her, and their own submissions to the Court are made for her and on her behalf. They are entitled to do so and their position on the *Charter* issue must not be confused with their position as parents in opposing the school board on what is best for their daughter's education.

This position was reiterated, albeit in different terms, by the Supreme Court when it observed that what matters in educational decision making is the child's best interests as determined "from a subjective child-centred perspective, one which attempts to make [in this case] equality meaningful from the child's point of view as opposed to adults in his or her life."^{cxcviii}

- Children have rights independent of their parents and all decisions regarding children must be made in their "best interests."
- Legislation that vests the right to "opt in" or "opt out" of religious instruction or religious exercises in parents, as opposed to allowing parents to exercise the child's right on his or her behalf, might be held to infringe the child's human rights as the framework of choice is not based on the child's "best interest."

Issues for Further Reflection

We have chosen to end this section which provides a human rights framework for the debate on religion in schools with these comments on the rights of the child as a way of emphasizing that we need to keep the best interest of students paramount in our minds as we examine different policy options. Accordingly, we close this section with the beginning of a list of issues that need to be addressed in this regard:

- What of a situation where the parents believe that they are acting in the best interest of the child but the child disagrees?
- At what age or stage of development and in relation to what kind of issues should a child's wishes take precedence over those of a parent?
- How does student/parental choice relate to a "best interest" standard?
- What is the difference between rights vested in parents and those given parents on behalf of their children?
- What rights are/should be granted to all students versus students of majority age?

It is beyond the scope of this paper to attempt to answer these and other similar questions but we suggest that they be retained as part of the sub-text underlying the broader discussion of the place of religion in schools.

4.0 EDUCATION LEGISLATION AND RELIGION IN CANADA

A foundation for a system, like a foundation for a house, begins with a vision and a plan. You cannot build the frames for the foundation, let alone pour the concrete, without knowing the size, shape and weight of the house it is meant to support. These elements can only be determined on the basis of the design of the house which in turn will flow from a vision of what it will look like when completed.^{cxcix}

This chapter surveys the legislative scene in Canada with respect to the place of religion in schools. The highlights of this analysis are summarized below.

Constitutional Parameters

In three provinces - Alberta, Ontario and Saskatchewan - constitutionally entrenched rights and privileges granted by law at the time of union continue to exist for minority denominational schools, Catholic or Protestant. In one province, Newfoundland, constitutionally protected denominational rights have been reduced to: courses in religion provided they are not specific to a particular denomination; and religious observances where requested by parents. In six provinces - British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Québec - and the two territories - the Yukon and Northwest Territories - there are no constitutionally guaranteed rights and privileges with respect to religion in schools.

Special Protection of Denominational Rights

In our survey, we inquired into what use, if any, is made of special legislative protection of denominationally based aspects of schooling or school governance by means of the override provisions of the *Canadian Charter*; or, the override or other provisions of the provincial human rights code? We discovered that no jurisdiction outside Québec makes use of the *Canadian Charter* override provision to protect the denominational aspects of schooling and only two jurisdictions have recourse to special provisions in their provincial human rights legislation.

Religion and the Governance of Public Schools

The comparison of religion and governance in public schools across Canada was considered in relation to governance structures and the management and control exercised by delegated bodies. The only provision for denominational structures in education are for Roman Catholics and Protestants. In the three provinces with entrenched denominational rights, there is a network of separate school boards for Catholic and Protestant minorities. School level denominational structures flow from those established at the school board level; thus, schools

within Catholic separate boards are Catholic, those within Protestant separate boards are Protestant. There is no legislative provision anywhere outside Québec for denominational schools within the public school system.

Outside Québec, except for Alberta charter schools, education legislation makes provision for the delegation of authority to school boards but not to schools. Generally, separate school boards exercise the same powers as public boards and are likewise free to delegate to schools as they see fit. It is also important to note that any delegation of authority to school boards or schools must be exercised within any parameters set forth in provincial legislation. Accordingly, a more in-depth analysis of the authority of denominational school boards in Canada is required to take into account the degree of provincial control exercised over such bodies.

Denominational Rights School Stakeholders

Student and Parental Rights

Outside of Québec, parents have virtually no rights to choose for their children the actual school within the public system. Accordingly, there is no right to choose a religious school or one which has particular denominational characteristics or services to offer. Manitoba is the only province where students or parents are entitled to religious instruction as a matter of right following a petition by parents. The only two provinces where students or parents are entitled to religious exercises as a matter of right are Manitoba and Newfoundland, both upon parental request.

Accommodation is provided on the basis of various “opting-out” or “opting-in” provisions. The former, and more common approach, assumes that everyone will participate in the religious instruction or exercises in question and one is accommodated by being given the right to opt out. In the second, no such assumption is made and students who wish to participate in what is being offered must opt in. The

right to opt out of or in to such services is, with only minor exceptions, vested in parents; it is not a right

School Staff and Religion

The legislation of a few jurisdictions contain provisions concerning religion in schools which have a direct bearing on the rights and obligations of school staff. In Manitoba, as in Québec, teachers are expressly exempted from conducting religious exercises. Nova Scotia requires teachers to maintain a respect for religion and morality, while in the Northwest Territories, teachers must be respectful of the values and beliefs of students. In New Brunswick, while teachers are permitted both to open and close daily exercises with the Lord's Prayer or a scripture reading, they may not make use of any religious catechism in the discharge of their duties.

Finally, in Ontario it is the duty of teachers in public schools "to inculcate by precept and example

exercised by parents on behalf of their children.

respect for religion and the principles of Judaeo-Christian morality" Among the foregoing, the statutory duty of teachers in Ontario, appears to be open to challenge under sections 2(a) and 15 of the *Canadian Charter* as it prescribes adherence to the principles of Judaeo-Christian morality without mention of any other religion.

Private and Home Schooling

Every jurisdiction in Canada provides private and home schooling as an alternative to compulsory attendance at a public school. Outside Québec, British Columbia and Manitoba provide support for the private school option, and Alberta, British Columbia, Saskatchewan and the Yukon provide for support for home schooling from school boards, or in some cases, from private schools. There is all but no mention made of religion in the legislation governing private and home school. As a generalization, these options may be availed by those wishing a denominationally based education as much as by those wishing a secular one.

As alluded to in the historical evolution of the Québec school system in section 2.0, religion has played a significant part in the development of education throughout Canada, as much in the public school system as in the *separate* school system.⁴⁵ The purpose of this section, which is based on our ongoing work⁴⁶ on school governance,^{cc} is to provide a brief overview of the place of religion in schools across Canada as a backdrop to the analysis of the Québec system. To facilitate a comparison between the latter and policy and practice in the rest of the country, we will present a cross-Canada comparison of education legislation,^{cci} with respect to each province and territory,⁴⁷ on the basis of five main themes:^{cii}

- constitutional parameters governing religion in schools;
- special legislative protection of denominational rights;
- religion and the governance of public schools;
- denominational rights and obligations of school stakeholders;
- denominational provisions governing private and home schooling.

⁴⁵The separate school system refers to the network of Catholic and Protestant schools established in various provinces under the aegis of section 93 and in the territories under federal law (see section 2.1).

⁴⁶The summary of the material presented in this section is adapted from Foster & Smith, endnote 200, and is used with permission of the publisher.

⁴⁷Although the Yukon and Northwest Territories do not have the status of a province, in practice these governments exercise autonomous powers in education due to a blanket delegation of powers from the Federal Government (see text below surrounding endnote 203). Unless the context indicates otherwise, a reference to a provincial government, legislature, etc. will be deemed to include a like reference to the territories.

4.1 Constitutional Parameters

Entrenched Denominational Rights

As has already been noted, the *Constitution Act, 1867* assigns exclusive jurisdiction over education to the provinces but qualifies that authority by stipulating that the provinces can not make laws which are prejudicial to the rights and privileges with respect to denominational schools enjoyed by law by any class of persons at the time the provinces joined Confederation. Only five provinces provided for such denominational rights at the time of union.⁴⁸ The Yukon and Northwest Territories are not covered by section 93 or any analogous constitutional provision of the Constitution, as the territories come under the jurisdiction of the Federal Government. However, the federal statutes which provide blanket delegation to the territories,^{cciii} include the right of Catholic and Protestant minorities to establish separate schools.⁴⁹

As noted above in section 3.1, there is an evident conflict between section 93 rights and the equality rights under the *Canadian Charter*, as the denominational rights provided for in section 93 are restricted to Catholics and Protestants and, generally, only to those in a minority in a given jurisdiction. This conflict is resolved by the inclusion of section 29 (cited above in section 3.1) which effectively shields section 93 rights from a *Charter* challenge.

There is an evident conflict between section 93 rights and the equality rights under the *Canadian Charter*; a conflict which is resolved by the inclusion of section 29 which effectively shields section 93 rights from attack.

Controversy and Court Challenges

Not surprisingly tensions between the supporters and detractors of constitutionally entrenched denominational rights in education are almost as old as the Constitution itself,^{cciv} and include recent cases in Ontario^{ccv} and Alberta,^{ccvi} as well as those cases we have seen previously in Québec.^{ccvii} What can be distilled from these cases is what little protection section 93 offers is confined to the denominational aspects of schooling, and this narrowly defined.^{ccviii} In 1972, Chevrete, Marx and Tremblay asserted that the essence of the protection afforded by section 93 was the right to dissent *per se* and that this right did not imply the right to the management and control of denominational schools exclusive of government authority. Specifically, they claimed that the right to dissent comprised only three essential elements: (1) the privilege of Catholic or Protestant minorities to have their own denominational schools managed by administrators of their faith whom they elect; (2) the privilege to teach only their own religion and, subject to government regulations regarding academic qualifications, to hire teachers of their own faith; (3) the right to require to comparable treatment by the Government with respect to grants and taxation and to be exempted from supporting common schools.^{ccix}

The purpose of section 93 is thus limited to protecting from prejudicial interference those denominational rights granted by law in 1867; that is, it “protects powers over *denominational* aspects of education and those non-denominational aspects which are related to denominational concerns which were enjoyed at time of Confederation”.^{ccx}

⁴⁸ Alberta, Newfoundland, Ontario, Québec, and Saskatchewan (see above section 2.1); of these only Alberta, Ontario and Saskatchewan are still covered by section 93.

⁴⁹ It would appear that this right to dissent is only triggered when the majority residents in a given area elect to establish a school district. It should also be noted that the constitutional validity of these provisions has not been tested in the courts; if it were, they would in all probability be found to violate the provisions of both section 2(a) (freedom of conscience and religion) and section 15 (equality rights).

More recently, controversy has arisen because of constitutional amendments in Newfoundland, first in 1987 to extend denominational rights,^{ccxi} and then ten years later, to restrict them following a narrow margin of approval in a provincial referendum.^{ccxii} After more litigation arising from the ambiguous text of the amendment, and another referendum,^{ccxiii} the Government eliminated the role of the Churches in administering education, and this time without any ambiguity or uncertainty.⁵⁰ An attempt to block this constitutional amendment failed, and the Newfoundland reform was finally completed.^{ccxiv}

Summary of Constitutional Parameters in Force

Thus, the current cross-Canada picture with respect to constitutional guarantees of religion in schools can be summarized as follows: In three provinces - Alberta, Ontario and Saskatchewan - constitutionally entrenched rights and privileges granted by law at the time of union continue to exist for minority denominational schools, Catholic or Protestant. In one province, Newfoundland, constitutionally protected denominational rights have been reduced to: courses in religion provided they are not specific to a particular denomination; and religious observances where requested by parents. In six provinces - British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Québec - and the two territories - the Yukon and Northwest Territories - there are no constitutionally guaranteed rights and privileges with respect to religion in schools.

4.2 Special Legislative Protection of Denominational Rights

The purpose of this sub-section is to inquire into what use, if any, is made of special legislative protection of denominationally based aspects of schooling or school governance by means of:

- override provisions of the *Canadian Charter*;
- override or other provisions of the provincial human rights code?

No jurisdiction outside Québec makes use of the *Canadian Charter* override provision to protect the denominational aspects of schooling and only two jurisdictions have recourse to special provisions in their provincial human rights legislation.

In Ontario, the *Human Rights Code* states that “this Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*” and that it “does not apply to affect the application of the *Education Act* with respect to the duties of teachers.”^{ccxv}

The Saskatchewan *Human Rights Code* states that schools may follow “a restrictive policy with respect to enrolment on the basis of sex, creed, religion, or disability, where it enrolls persons of a particular sex, creed, or religion exclusively, or is conducted by a religious order or society,” and that “Nothing in this section deprives a ... school, board of education, or conseil scolaire of the right to employ persons of a particular religion or religious creed where religious instruction forms or may form the whole or part of the instruction or training provided.”^{ccxvi}

The Ontario provision first acts as a shield to protect separate school rights which might exceed those protected by section 93 (which do not require immunity from challenge under the *Canadian Charter*) from an attack under the provincial *Human Rights Code*. Second, it shields the duty of teachers to “inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality ...” from a similar attack. However, no analogous provision is included in the Code to shield these provisions from a challenge under the *Canadian Charter* and it is suggested, as stated previously, that at least the latter provision regarding teachers duties could not withstand such an attack.

⁵⁰The new Term 17 now states: “(1) In lieu of section ninety-three (2) ... the Legislature shall have exclusive authority to make laws in relation to education, but shall provide for courses in religion that are not specific to a religious denomination. (3) Religious observances shall be permitted in a school where requested by parents.”

The Saskatchewan provision is similar in intent to section 20 of the Québec *Charter* (cited and discussed in section 3.0 above). It purports to allow an activity that would otherwise be held to be discriminatory (e.g. restricting enrolment in a school to members of one religious faith) but does not invoke the *notwithstanding* provisions of the *Canadian Charter*. Accordingly, if challenged, it would have to rely on a “section 1 defence,” that is, the claim that the above provision is a “reasonable limit”.

4.3 Religion and the Governance of Public Schools

The comparison of religion and governance in public schools across Canada will be presented in relation to (1) governance structures and (2) management and control exercised by delegated bodies.

4.3.1 Denominational Structures

The only provision for denominational structures in education are for Roman Catholics and Protestants. Nowhere does any provincial legislation provide for any other religious faith.

The only provision for denominational structures in education are for Roman Catholics and Protestants.

Provincial Level

Every province has a Ministry of Education; moreover in New Brunswick recent legislation has created two “provincial boards of education”, one Anglophone and one Francophone. However, no jurisdiction in Canada outside Québec makes any provision for religion in governance at the provincial level.

School Board Level

All jurisdictions in Canada, except New Brunswick,⁵¹ provide for school boards as an intermediate level of governance. Accordingly in eleven provinces and territories, there are public school boards open to all, and some form of minority language school boards or other governing structures for the official language minority group.^{ccxvii} In the three provinces with entrenched denominational rights - Alberta, Ontario and Saskatchewan, there is also a network of separate school boards for Catholic and Protestant minorities.⁵²

School Level

Outside Québec, and subject to one exception, public schools are not recognized in provincial legislation as independent bodies but, for purposes of governance, are treated as sub-units of school boards. The exception is a “charter school” in Alberta, an *alternative* public school formed by ministerial approval, where such school has “significant support from the community” and whose program “will potentially improve the learning of students.”^{ccxviii} A number of jurisdictions do provide for parent advisory councils at the school level, but again, outside Québec and Alberta charter schools, they do not have any governing authority.^{ccxix}

There is no legislative provision anywhere outside Québec for denominational schools within the public school system.

⁵¹The Ministry of Education now fulfils the functions for school boards. The province is divided into Anglophone and Francophone school districts administered by a superintendent appointed by the Minister.

⁵²It is important to note that the right to separate school boards is restricted to situations where Catholics or Protestants are in the minority. Furthermore, the right to separate boards does not affect the right of the minority language group in the province to educational structures consistent with the provisions of section 23 of the *Canadian Charter*.

School level denominational structures flow from those established at the school board level. In other words, schools within Catholic separate boards are Catholic, those within Protestant separate boards are Protestant. There is no legislative provision anywhere outside Québec for denominational schools within the public school system. Indeed, New Brunswick and Prince Edward Island, explicitly declare that public schools are to be non-confessional, in the first instance, and non-sectarian in the second; British Columbia goes a step further declaring that schools shall be strictly secular and non-sectarian.^{ccxx} Moreover, with respect to the Alberta charter schools, the legislation expressly declares that such schools may “not be affiliated with a religious faith or denomination” unless established within the jurisdiction of a separate school board.^{ccxxi}

It may here be noted that there is no legislative provision for religion-specific public schools in Ontario. As we saw above in section 3 in the discussion of *Bal*, such schools were introduced and then discontinued as being in violation of the recently amended *Regulation 298* discussed below under Management and Control. However, if it were not for the amendment to *Regulation 298*, there appears to be nothing in the case law which suggests that religion specific alternate public schools would be unconstitutional if such alternate schools were available to persons of any denomination who so wished,^{ccxxii} especially, if secular public schools were available to those of no religious faith or who preferred to have their children educated in a secular institution.

4.3.2 Management and Control of Denominational Structures

The denominational structures outlined above can be thought of as an “organizational shell” in which those delegated authority can govern the unit in question (e.g. a school). Unless those so placed in charge are given some reasonable level of authority, then the structure becomes an “empty shell.”

The autonomy of denominational-based units means little if such units are enmeshed in a regulatory swamp of rules and regulations.

In keeping with the above comments on the general governance status of schools as sub-units of school boards, it is not surprising that outside Québec, except for Alberta charter schools, education legislation makes provision for the delegation of authority to school boards but not to schools. This is not to say that schools do not

exercise any autonomy but they do so by virtue of administrative delegation by their school board and not by any independent legislative right. It is also important to note that any delegation of authority to school boards or schools must be exercised within any parameters set forth in provincial legislation. The autonomy of denominational-based units - indeed any sub-ordinate units - means little if such units are, as one author puts it, “enmeshed in a regulatory swamp of rules and regulations.”^{ccxxiii} Accordingly, any more in-depth analysis of the authority of denominational school boards in Canada must also take into account the degree of provincial control exercised over such bodies.⁵³

Generally, separate school boards exercise the same powers as public boards and are likewise free to delegate to schools as they see fit.^{ccxxiv} The powers delegated to school boards, be they public or separate, vary considerably from one jurisdiction to another and no attempt here will be made to detail such a cross-jurisdictional comparison. However, we will provide some flavour of those provisions which deal directly with the place of religion in schools, notably with respect to religious instruction and religious exercises.

In British Columbia, it is declared that schools shall be strictly secular and non-sectarian and the teaching of any religious dogma or creed in public schools is expressly prohibited.^{ccxxv} In New Brunswick and Prince Edward Island it is explicitly declared that public schools are to be non-confessional, in the first instance, and non-sectarian in the second^{ccxxvi} and no powers are conferred with respect to religious instruction and exercises. Manitoba and Newfoundland require school boards to provide both religious instruction and religious exercises, while in every other jurisdiction it is permitted to offer religious instruction or religious exercises, according to

⁵³Section 93 rights to not shield a separate school board from such regulations. While the Government cannot indirectly by means of regulations subvert the intent of section 93, the latter cannot be used to impede the general supervisory role of the government in education; see *Greater Montreal Protestant School Board v. Québec (A.G.)*, in endnote 46.

terms and conditions that vary from one province to another. Other details regarding these matters are dealt with below in relation to student and parent rights.

4.4 Denominational Rights and Obligations of School Stakeholders

The rights and obligations of school stakeholders are concerned with *individual rights* to service delivery. It is worth noting that individual rights as envisaged in this section are those to which a person is entitled by law. In other words, a right is not merely a benefit, which a school board may, at its discretion confer or not confer; rather it is something that the school board, for example, is obliged to provide and whose compliance can be enforced through the courts.

4.4.1 The Denominational Rights of Students and Parents

In this sub-section, we will describe the rights of students and parents respecting religion in school; the treatment will be very brief as there are very few such rights provided for in law.

School Choice

As will be discussed below in section 4.5, parents throughout Canada are accorded, implicitly or explicitly, the right to make the basic choice for their children of either public schooling, on the one hand, or private or home schooling, on the other. In addition, public school choice also embraces the separate school option where such systems exist. However, outside of Québec, parents have virtually no rights to choose for their children the actual school within the public system.^{ccxxvii} Accordingly, there is no right to choose a religious school or one which has particular denominational characteristics or services to offer.^{ccxxviii}

Outside of Québec, parents have virtually no rights to choose for their children the actual school within the public system.

Religious Instruction and Religious Exercises

The rights and obligations regarding religious instruction and religious exercises are summarized below.

Cross-Canada Provisions Regarding Religious Instruction and Exercises

Prov	Religious Instruction	Religious Exercises
AB	Schools boards, public and separate, may offer “alternative programs” ⁵⁴ emphasizing a particular religion; in addition they may provide religious instruction. ^{ccxxix} Persons other than teachers may be permitted to offer religious instruction. ^{ccxxx}	Schools boards, public and separate, may provide religious exercises. ^{ccxxxi}
BC	Prohibited: “No religious dogma or creed is to be taught.” ^{ccxxxii}	

⁵⁴Although the expression “alternative program” is not defined in the Act, the word “program” appears to be used to describe a collection of courses and other activities, such as a “special education program” or a “minority language education program.”

Prov	Religious Instruction	Religious Exercises
MB	School board may offer religious instruction; however, if a petition requesting religious instruction is presented by a specified number of parents, ⁵⁵ "the school board shall pass a by-law authorizing instruction in religion in compliance with the petition," in accordance with certain parameters ⁵⁶ set forth in the Act. ^{ccxxxiii}	Religious exercises are prohibited except where a petition requesting them is presented by a specified number of parents; ⁵⁷ in such case the school shall conduct such exercises in accordance with certain parameters set forth in the Act. ^{ccxxxiv}
NB	Silent.	Teachers may open and close daily exercises with the Lord's Prayer or a scripture reading, even though the Act expressly prohibits both "symbols or emblems, religious or other" to be exhibited or employed on school property, and teachers from making use of any religious catechism in the discharge of their duties. ^{ccxxxv}
NF	School boards "shall ensure that those programs or courses of study ... in religious education ... prescribed or approved by the minister are followed in the schools under its control." ^{ccxxxvi}	Upon the request of parents that religious observances be held in the school, ⁵⁸ schools shall comply with such request in accordance with the by-laws of the school board. ^{ccxxxvii}
NT	Public school boards may provide for "instruction and discussion in spiritual values or beliefs in a manner that is respectful of the spiritual values or beliefs of all the students." ^{ccxxxviii} Separate school boards may provide religious instruction "in a manner that is respectful of the spiritual or religious values of all the students." ^{ccxxxix}	Separate schools may conduct religious exercises that reflect the religious values of the group in question. ^{ccxl}
NS	School boards may permit persons to offer religious studies in schools. ^{ccxli}	Silent.
ON	Educational religious instruction, not exceeding 60 minutes in elementary schools, may be offered in public schools but it cannot include indoctrination in a particular religion or religious belief. ^{ccxlii} In addition, public school boards may permit other persons to conduct religious instruction, including indoctrination, in a particular religion or religious belief provided certain parameters ⁵⁹ are respected. ^{ccxliii} Catholic separate school boards may establish courses and programs in religious education for	Public school opening and closing exercises (which are mandatory) may include readings, scriptural and secular, and prayers that are representative of the province's multicultural society. ^{ccxlv} In addition, public school boards may permit other persons to conduct religious exercises including indoctrination, in a particular religion or religious belief provided certain parameters ⁶⁰ are respected. ^{ccxlv}

⁵⁵Parents of 10 children in a school of one or two classrooms or of 25 children in larger schools.

⁵⁶Instruction cannot exceed 2½ hours per week and must be offered by a qualified person.

⁵⁷Parents of 75% of students in a school of fewer than 80 students or parents of at least 60 students in larger schools.

⁵⁸Implicitly, such a request covers all religious faiths.

⁵⁹The parameters are: (i) the activities are not provided by or under the auspices of the school board; (ii) the activities are conducted outside of normal school hours; (iii) no person is required to attend the activities; and (iv) the accommodation provided by the school board is the same as that provided other activities.

⁶⁰The parameters are: (i) the activities are not provided by or under the auspices of the school board; (ii) the activities are conducted outside of normal school hours; (iii) no person is required to attend the activities; and (iv) the accommodation provided by the school board is the same as that provided other activities.

Prov	Religious Instruction	Religious Exercises
	students in all its schools. ^{ccxliv}	
PE	Silent.	
SK	School boards, public and separate, are authorized to offer religious instruction, not exceeding two and one half hours per week. ^{ccxlvii}	Opening exercises may include the Lord's Prayer or a Bible reading prescribed by Minister unaccompanied by comment or explanation. ^{ccxlviii}
YT	Silent.	

In brief, therefore, rights to religious instruction and religious exercises are as follows: Manitoba is the only province where students or parents are entitled to religious instruction as a matter of right following a petition by parents. The only two provinces where students or parents are entitled to religious exercises as a matter of right are Manitoba and Newfoundland, both upon parental request.

Accommodation of Religion and Conscience

While all jurisdictions allow students to be excused from school for good and valid reasons, a number - Alberta, Manitoba, New Brunswick, Newfoundland, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan and the Yukon^{ccxlix} - explicitly recognize as a justification for non-attendance observance of a religious holiday by the religious denomination to which the student belongs. With the exception of the Northwest Territories, all jurisdictions in which religious instruction or exercises are permitted, accept that students cannot be compelled to participate in such activities. Accommodation is provided on the basis of various “opting-out” or “opting-in” provisions, as summarized in the table which follows.⁶¹

Cross-Canada Provisions Regarding Accommodation of Religion

Prov	Religious Instruction	Religious Exercises
AB	Respecting “alternative programs” students may opt in by parental choice. ^{ccl} Respecting religious instruction, students may, with parental permission: (i) absent themselves from the place where the activities are taking place for the duration of the activity, or (ii) remain in that place and abstain from participating. ^{ccli}	Respecting religious exercises, students may, with parental permission: (i) absent themselves from the place where the activities are taking place for the duration of the activity, or (ii) remain in that place and abstain from participating. ^{cclii}
BC	Not Applicable	
MB	Students may opt out of instruction; parental consent required for students of minor age. ^{ccliii}	Students may opt out of exercises; parental consent required for students of minor age. ^{ccliv}
NB	Not Applicable	Students exempted upon request of parents. ^{cclv}
NF	Students exempted upon request of parents. ^{cclvi}	Students exempted upon request of parents. ^{cclvii}
NT	Silent on exemptions.	Silent on exemptions.
NS	Silent on exemptions.	Not Applicable

⁶¹ “Not Applicable” indicates that there are no provisions governing religious instruction or exercises as the case may be, hence, the question of exemption is moot.

Prov	Religious Instruction	Religious Exercises
ON	Students in public schools may opt in to religious instruction; parental consent required for students of minor age. ^{cclviii}	Students in public schools may opt out of exercises; parental consent required for students of minor age. ^{cclix}
PE	Not Applicable	
SK	Exemptions with respect to religious instruction are granted “where a pupil does not wish to participate ... the pupil ..., with the written consent of [his] parent ... [shall] be exempted from attendance ... at religious instruction.”; student must be provided with suitable and appropriate alternative studies. ^{cclx}	Exemptions from religious exercises are granted to students simply at the request of parents. ^{cclxi}
YT	Not Applicable	

The first and by far most ubiquitous of these two approaches - requiring students to opt out - constitutes an unacceptable interference with their section 2(a) freedom according to *Zylberberg* and *Elgin County* - students are compelled by the state to make a statement about their religious faith if any. On the other hand, it is suggested that where students are given the choice of opting in to religious activities, the State is not compelling them to act - rather it is their parents who, or their conscience which, compels them to act: “It should be noted that *Zylberberg* and ... [*Elgin County*] are aimed at preventing religious observance by a school as an institution, not voluntary observance by students in the school.”^{cclxii} Similarly it has been stated: “The child who is forced by his parents to participate in a religious activity may not claim that his religious freedom is abridged by the state. The latter is merely facilitating the practice of religion. Therefore, in such a case, pressure to make a religious statement emanates from the home rather than from classmates.”^{cclxiii}

Accommodation is provided on the basis of various “opting-out” or “opting-in” provisions. The former, and more common approach, assumes that everyone will participate in the religious instruction or exercises in question and one is accommodated by being given the right to opt out. In the second (confined to optional religious programs in Alberta and Ontario), no such assumption is made and students who wish to participate in what is being offered must opt in.

Student and Parental Rights

As noted above, the only rights to religious instruction and exercises outside Québec, occur in two provinces (Manitoba and Newfoundland) and these are triggered by parental request.

The right to opt out of or in to such services is, with the exceptions noted below, vested in parents; it is not a right exercised by parents on behalf of their children. The exceptions are:

- In Alberta, Manitoba and Ontario, the above rights are vested in students of majority age as defined in these respective jurisdictions.^{cclxiv}
- In Saskatchewan the exemption from religious instruction is triggered by a student's wish not to participate, but even here his or her wish is contingent upon parental consent.^{cclxv}

4.4.2 School Staff and Religion

The legislation of a few jurisdictions, namely Manitoba, New Brunswick, the North West Territories and Ontario, contain provisions concerning religion in schools which have a direct bearing on the rights and obligations of school staff.

- In Ontario it is the duty of teachers in public schools “to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all virtues.”^{cclxvi}
- In Nova Scotia it is the duty of teachers to maintain, *inter alia*, a respect for religion and morality.^{cclxvii}
- In Manitoba, as in Québec, school staff are expressly exempted from conducting religious exercises.^{cclxviii}
- In New Brunswick, also as noted above, while teachers are permitted both to open and close daily exercises with the Lord's Prayer or a scripture reading,^{cclxix} they may not make use of any religious catechism in the discharge of their duties.^{cclxx}
- In the Northwest Territories, the right of teachers to make statements about spiritual and religious values is restricted to statements required to explain an aspect of a subject in a manner respectful of the values and beliefs of students.^{cclxxi}

Among the foregoing, the statutory duty of teachers in Ontario, appears to be open to challenge under sections 2(a) and 15 of the *Canadian Charter* as it prescribes adherence to the principles of Judaeo-Christian morality without mention of any other religion (see discussion above in section 4.2). Similarly, the New Brunswick provision makes reference to Christian observances to the exclusion of all others and is likewise open to challenge. However, it should be noted that the most important issue respecting staff and religion in schools - dismissal for denominational cause - is not dealt with in education legislation (see discussion above in section 3.4.3).

4.5 Denominational Provisions Governing Private and Home Schooling

As alluded to above, every jurisdiction in Canada provides private and home schooling as an alternative to compulsory attendance at a public school. State support for these options, however is another matter as the funding of private schools is a much broader policy issue than the provision for denominational private schools.^{cclxxii} Outside Québec, British Columbia and Manitoba provide support for the private school option,^{cclxxiii}

Every jurisdiction in Canada provides private and home schooling as an alternative to compulsory attendance at a public school.

and the remaining jurisdictions provide the right to unsupported private schooling.^{cclxxiv} Alberta, British Columbia, Saskatchewan and the Yukon not only provide for home schooling but they also provide for its support from school boards, or in some cases, from private schools.^{cclxxv} The remaining jurisdictions provide for the right to unsupported home instruction.^{cclxxvi}

There is all but no mention made of religion in the legislation governing private and home schooling. As a generalization, these options may be availed by those wishing a denominationally based education as much as by those wishing a secular one.

5.0 ANALYSIS OF QUÉBEC LEGISLATIVE PROVISIONS

Confessionality must be unlocked at all levels of the system, so that all students can be taught the shared values that we as a society wish to embrace.

First, we must **continue moving towards a non-confessional education system** - in other words we must continue the separation of Church and State. There is now no reason, other than historical impediment, for confessional privilege to restrict the public education system. A fairly general consensus exists regarding the **transformation of confessional school boards into linguistic school boards**.^{cclxxvii}

This chapter provides an analysis of the Québec legislative provisions in light of the human rights principles outlined in chapter 3. The results of this analysis are summarized below.

Constitutional Parameters

As of January 1, 1998, the denominational rights found in section 93 do not apply to Québec. This leaves the *Canadian Charter*, especially section 23, as the sole framework for the protection of minority education rights.

Special Protection of Denominational Rights

When the Government of Québec adopted Bill 107 in 1988, it included several denominational provisions which went beyond those required by section 93 and which deal with the recognition of denominational schools and moral and religious instruction [MRI] programs offered in boards which were not constitutionally protected. These privileges - extended to only Catholics and Protestants - are shielded from a challenge under the Québec *Charter* and the *Canadian Charter* by override provisions in the *Education Act* and other legislation. The override provision respecting the Québec *Charter* is open ended (no limit in time), while those respecting the *Canadian Charter* are subject to a five year limit, which will expire in 1999.

- From a strictly legal point of view, the special legislative protection of the denominational privileges granted Catholics and Protestants complies with both the *Canadian Charter* and the Québec *Charter*; however, the fact that they are used, not to permit a specific exception for particular reasons but to provide a blanket shield for such privileges offends the human rights norms of freedom of religion and equality.

Religion and the Governance of Public Schools

Denominational Structures

Ministry of Education - Unlike other jurisdictions, however, the Québec Ministry includes the positions of Catholic and Protestant Associate Deputy Minister.

Superior Council - The Superior Council is an advisory body whose composition is mostly reserved for Catholics and Protestants. It comprises two denominational committees, one Catholic and one Protestant, which fulfil a number of functions in relation to denominational schools.

School Boards - Although each school board decides on its own organization chart, it must appoint a person to be responsible for administrative support to schools recognized as Catholic and Protestant and for MRI and pastoral or religious care and guidance services provided in its schools.

Schools - The *Education Act* provides for the existence of three classes of public common schools: schools with no confessional status, Catholic schools and Protestant schools. According to the *Education Act*, a school board may apply to the Catholic or Protestant Committee of the Superior Council to have one of its schools legally recognized as being Catholic or Protestant, provided that it has consulted the parents of the school and the school governing board. No such provision is made for other faiths. The recognition of denominational schools could be viewed as a “special program” under section 20 of the Québec *Charter* because of the religious nature of such institutions, but could not be considered as “affirmative action,” given their historically privileged position in the Québec education system.

- All of the foregoing provisions are an infringement of human rights in that they grant privileges to Catholics and Protestants which are not extended to other religious groups.

Management and Control

General Policy Direction - Schools have the power to set their general policy direction and mission. Much of this is done through the establishment and implementation of the school's "educational project."

Admissions - Schools cannot determine their own admission policy. Authority in this area is conferred upon school boards but even they have little discretion in setting admission policy.

Curriculum and School Organization - The Act and the regulations contain provisions dealing with MRI, local courses of study, textbooks and teaching materials but none on religious exercises, which may be subsumed under pastoral/religious care and guidance services.

- These provisions are an infringement of human rights in that they subject local non-Catholic/Protestant programs to a school/school board approval process that is not required for Catholic or Protestant programs; by contrast, they subject local Catholic and Protestant programs, as well as textbooks and materials to an external approval process that is not required of other denominationally based programs, if such programs were locally approved.

Human Resources - School Boards are the employer but the majority of working conditions of administrators and employees are determined provincially by regulation for the former and collective bargaining for the latter.

Funding and Taxation - With the advent of linguistic school boards, the traditional denominational funding issue, namely the right to raise taxes in support of denominational schools is now moot. Denominational schools, like any school may charge user fees for educational services not foreseen by the *Basic School Regulations*.

- This provision is an infringement of human rights in that it grants students and parents a right to Catholic and Protestant MRI and related services, whereas members of other faiths must

- All of the foregoing, with the exception of the treatment of Curriculum and School Organization as noted, comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Denominational Rights of School Stakeholders

Student and Parental Rights

Right and Duty to Attend School - The *Education Act* provides for both the right to public schooling and a duty to attend. There are, however, several exemptions from the duty to attend school, including attendance at a recognized private school and approved home schooling.

- This provision complies with human rights norms in that it neither impairs freedom of religion nor discriminates on the basis of religion.

School Choice - The *principle of* - but not the right to - parental choice is included in the preamble to the *Act Respecting the Conseil supérieur de l'éducation*: "Whereas parents have the right to choose the institutions which, according to their convictions, ensure the greatest respect for the rights of their children." The *right* to school choice is provided for in the *Education Act*.

- This provision complies with human rights norms in that it neither impairs freedom of religion nor discriminates on the basis of religion.

Religious Instruction and Religious Exercises

According to the *Education Act*, every student has right every year to choose between Catholic MRI, Protestant MRI, moral instruction and, if offered by a school, MRI in another religious denomination. The exercise of this right is vested: in students of full age; in students in second cycle of secondary school; in parents of other students.

obtain permission for the former and are not even given the possibility of the latter; the opt-in provisions are deemed to satisfy prevailing human rights norms, but the opt-out provision of

the Protestant regulation is considered to infringe such norms in light of Canadian case law as it presently stands.

Student and Parental Rights

Student and parent rights come to the fore in the choice of school - students of majority age or parent; MRI - student in secondary cycle II or parent on behalf of student; and, activities of a religious nature in Protestant schools - parent. In the first instance, the right of school choice for students of minority age is vested in parents and not merely assigned to parents to be exercised on behalf of their children, as is the case respecting MRI. The latter is thus more respectful of the doctrine of children's rights than the former, and is more advanced in this regard than that generally observed across Canada.

School Staff and Religion

Catholic education consultants and pastoral animators must maintain a pastoral mandate issued by the local Bishop as a condition of employment. Inasmuch as this requirement has been sanctioned by a collective agreement, we conclude that it qualifies as a *bona fide* occupational requirement under section 20 of the Québec Charter.

It is therefore is deemed to be non-discriminatory. In the absence of specific legislative or contractual language in this area, it would appear that the general principles governing hiring and firing for denominational cause outlined above are applicable here.

- The Québec provisions comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Private and Home Schooling

The principle of parental right to private schooling is included in the preamble to the *Act Respecting the Conseil supérieur de l'éducation*. This non-binding principle has been transformed into a right by including choice of private or home schooling as alternatives to the general rule of compulsory attendance at a public school. The right to home schooling is subject to verification by the local school board that the child is receiving an *equivalent* educational experience. Private schools are heavily subsidized by the State but no provision is made in the Act for support of home schooling.

- These provisions comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Having briefly outlined the historical backdrop to the current scene in Québec, set forth a human rights framework as an alternative for the debate, and provided an overview of the legislative scene across Canada, we focus in this section on the Québec legislative provisions governing education and religion. Following a brief introduction, we will present our analysis by means of the same five themes used in section 4.0 to describe the pan-Canadian scene.

- constitutional parameters governing religion in schools;
- special legislative protection of denominational rights;
- religion and the governance of public schools;
- denominational rights and obligations of school stakeholders;
- denominational provisions governing private and home schooling.

The current legislative scene in Québec has been influenced by the expression of popular opinion in favour of the structural reform of the education system. In 1995, the Government established the Commission for the Estates General on Education, whose mandate was to consult the general public with a view to producing the "broadest possible social consensus" on the future direction of education in Québec. According to the interim report of the Commission, there were sharp divisions among

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- **The repeal of section 93 of the Constitution**
 - **legislative implementation of linguistic boards;**
 - **a new distribution of powers.**
-

stakeholders regarding all denominational aspects of the school system, with as many partisans for the status quo as those for change. However, this divergence of opinion did not deter the Commission from articulating the recommended course of action for the Government to take, as reflected in the passage cited above. The Commission went on to recommend that the constitutional impediment to reform be settled once and for all by either amending or repealing section 93.

Following the publication of the Estates General reports, the Minister published a policy paper that likewise promoted the restructuring of the school system along the lines suggested by the Commission.^{cclxxviii} This paper initiated a *trilogy of legislative actions* designed to completely restructure the Québec education system from top to bottom. First, the Minister announced that the Government would seek an amendment of section 93; second, that on the basis of this new constitutional arrangement, the Government intended to proceed with the implementation of linguistic boards; third, shortly thereafter, the Minister announced that legislation would be drafted to provide for a new distribution of powers among the various stakeholders of the system, notably at the school level.

Québec uses the override provisions of both *Charters* to shield many of the relevant provisions of the *Education Act*.

Our analysis is therefore based on the current state of legislation as a result of these reforms. This includes an examination of statutes and regulations but not other subordinate legislation, such as school board by-laws. Although it is beyond the scope of this paper to deal with the latter, it is important to remember that school board/school policy and practice are often the source of the

infringement of human rights, as illustrated by the *Bergevin* case discussed in section 3.4.3. As will be discussed below in section 5.2, Québec uses the override provisions of both the *Canadian Charter* and the *Québec Charter* to shield many of the relevant provisions of the *Education Act* and other laws. Much of our analysis will be predicated on the viability of such provisions in the absence of such protection. In examining various topics, we will attempt to ascertain the extent to which the legislative provisions in question comply with the two key human rights norms developed in section 3.0: freedom of religion and equality rights. In each case, we will first describe the provision. Then we will analyze it in light of the human rights norms presented in section 3.0 and with reference to other legislation in Canada as presented in section 4.0, by asking the following questions:

Does the provision infringe *Charters'* standards respecting freedom of religion or equality rights on the basis of religion?

- by interference;
- by coercion;
- by direct discrimination;
- by adverse effect discrimination?

Is the provision deemed a non-infringement?

- by virtue of a standard of “reasonable limits,” “reasonable accommodation” or a *bona fide* occupational requirement;
- by virtue of a special program;
- by virtue of an affirmative action program?

If the provision infringes the above standards, is it saved by a “reasonable limits” defence?

Finally, we will present our answer to these questions, stating whether the provision infringes the above rights, and so forth. However, to simplify the text, we will only make explicit those findings which are relevant to the provision in question.

5.1 Constitutional Parameters

Constitutional amendments are not put forward to solve minor problems nor are they taken lightly, especially when they involve the abrogation of minority rights, as found in section 93. Accordingly, although the National Assembly voted unanimously to support the proposed constitutional amendment, the consensus in the wider community, especially the Anglophone community, was more elusive. There were many who felt that abandoning constitutionally protected denominational guarantees for linguistic structures without concomitant linguistic guarantees was not acceptable. However, a seminar hosted by McGill University presented a contrary view,^{cclxxix} arguing that section 93 did not provide the kind of protection that, despite 20 years of lost court battles,^{cclxxx} the Anglophone community believed that it afforded. Despite the misgivings of some, the Federal Government introduced a bill into Parliament in the spring of 1997 to accede to the Québec request.

In December 1997, following public hearings by the Special Joint Committee of the House of Commons and Senate, the Federal Government amended section 93 of the *Constitution Act, 1867*.^{cclxxxi} Simply put, the constitutional amendment, in force as of January 1, 1998, abrogates the denominational rights found in the Constitution, by inserting the following at the end of section 93: “Subsections 93(1) to 93(4) do not apply to Québec.”

Long seen by many as the major stumbling block to education reform, the denominational rights of section 93 are now eliminated from the constitutional framework governing education in Québec. This leaves the *Canadian Charter*, especially section 23, as the sole framework for the protection of minority education rights and paves the way for other changes to come, as will be discussed below.

In Québec, this means that the Anglophone minority is guaranteed access to English language instruction and their own educational facilities, “where numbers warrant.” We recognize that the case law on section 23 is still emerging; however, it seems clear to us that the thrust of jurisprudence to date is much more expansive and generous than that which has characterized section 93 cases and incorporates the broader principle of the minority group’s “management and control” of its own schools. However, as far as denominational rights are concerned, henceforth they will have to be provided by statute and without the benefit of a constitutional shield.

5.2 Special Legislative Protection of Denominational Rights

From our experience, many people in Québec believe that all of the preferential treatment accorded Catholics and Protestants in the Québec education system is based on section 93 of the *Constitution Act, 1867* and could not be changed by the Government, except by constitutional amendment. In other words, preferential provisions of the *Education Act* and other legislation were enacted because the Government had no choice, in order to respect section 93. In fact, this is only partly true.

When the Government of Québec adopted Bill 107 in 1988, it included several denominational provisions which went beyond those required by section 93. These include all provisions which deal with the recognition of denominational schools and moral and religious instruction [MRI] programs offered in boards which are not constitutionally protected.⁶² Arguably, given the case law on section 93, the Government could have eliminated all such provisions in relation to “common boards,” which include all school boards in the province except the four confessional boards in Montréal and Québec City and the five dissentient boards elsewhere in the province. Accordingly, it has been provincial education policy, not section 93 that has extended denominational rights throughout the system.

Bill 107 included several denominational provisions which went beyond those required by section 93.

⁶²The formal recognition of schools as Catholic and Protestant predates Bill 107: see *Regulation Respecting Consultation of Parents Concerning an Application for Recognition or Withdrawal of Recognition of a School as Catholic or Protestant*, see endnote 297; *Regulation Respecting the Recognition of Elementary and Secondary Schools of the Public School System as Catholic and their Confessional Character*, see endnote 299.

Such policy would normally be expected to conflict with both the Québec *Charter* the *Canadian Charter*. However, as noted above, a provincial government may “override” certain human rights in the *Canadian Charter* or the Québec *Charter* if it includes an express provision to this effect in a statute.⁶³ In 1982, in order to protest the patriation of the Constitution and the *Canadian Charter* as a restraint on provincial legislative power without its consent, Québec adopted legislation to include a “general override” provision in all Québec statutes in force at that time.^{cclxxxii} The effect of this provision lapsed in 1987; Since then, Québec has included an override in specific statutes for specific purposes as it saw fit. For our purposes, the following enactments contain override provisions regarding denominational rights:

Education Act (ss. 726-727 - reproduced below);
Act Respecting the Conseil supérieur de l'éducation (ss. 31-32);
Act Respecting the Ministère de l'éducation (ss. 17-18);
Act Respecting Private Education (ss. 175-176).

Education Act:

726. The provisions of this Act which grant rights and privileges to a religious affiliation shall apply despite sections 3 and 10 of the Charter of human rights and freedoms (R.S.Q., chapter C-12).

727. The provisions of this Act which grant rights and privileges to a religious confession shall operate notwithstanding the provisions of paragraph *a* of section 2 and section 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of Parliament of the United Kingdom).

The override provision respecting the Québec *Charter* is open ended (no limit in time), while those respecting the *Canadian Charter* are subject to a five year limit, which will expire in 1999 for all the enactments cited above, except the *Act Respecting Private Education*.⁶⁴

The use of the override of *Canadian Charter* rights is all but non-existent outside Québec.

As mentioned above (footnote b, p. 68), the use of the override of *Canadian Charter* rights is all but non-existent outside Québec. This reflects the view that the *political* compromise that led to section 33 being included in the *Canadian Charter* anticipated that *political* pressure to keep its effect minimal:^{cclxxxiii}

⁶³According to Hogg (see above endnote 83 at 36.3, 36.8), outside of Québec, only Saskatchewan has ever used the override provision and this to protect “back to work” legislation pending appeal of an earlier decision on a similar provision; as it turned out, the provision did not violate the *Canadian Charter* and the override was unnecessary. The only other known instance where section 33 has been considered is in Alberta where the Government recently proposed to introduce “override protected” legislation to limit compensation to victims of Alberta’s previous sterilization laws for persons with disabilities; the proposal was quickly withdrawn in the face of massive public outrage.

⁶⁴We are uncertain as to the status of s. 176. The Act came into force on July 1, 1993; thus, s. 176 lapsed on June 30, 1998 unless re-enacted. We have been unable to find such re-enactment.

It is clear that governments are extremely reluctant to use s. 33. The reluctance stems partly from a principled commitment to the Charter (not at present shared by Quebec) and partly from the political resistance that could be expected from opposition parties, the press, the organized bar and civil liberties groups. In practice, therefore, it seems clear that s. 33 will be used infrequently and only when the legislating government is persuaded that there are powerful reasons of public policy to justify its use.⁶⁵

The use of a provision to override the provincial human rights code is almost as rare. Ontario and Newfoundland each include a provision in their respective human rights codes that is analogous to the override of the Québec *Charter* included in the *Education Act* (s. 726).^{cclxxxiv} However, both of these provisions are much narrower in scope. They explicitly refer to denominational rights protected by section 93 and would not shield from human rights review any privilege granted, for example to Catholics and Protestants which went beyond that required by section 93. Arguably, the Ontario and Newfoundland provisions are unnecessary, as section 29 of the *Canadian Charter* is sufficient to protect section 93 rights.

The only other similar provision is another Ontario one which has a very narrow purpose, namely to remove from human rights scrutiny: “the application of the *Education Act* with respect to the duties of teachers.”^{cclxxxv} Within the list of teacher duties provided for in the Act, the most obvious one that would require such protection is the duty of teachers in public schools “to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all virtues.”^{cclxxxvi} With this one exception, Québec stands alone as the only jurisdiction in Canada to provide a blanket protection of denominational rights from human rights review.

Québec stands alone as the only jurisdiction in Canada to provide a blanket protection of denominational rights from human rights review.

As we have already noted in section 3.4 regarding section 20 of the Québec *Charter*, provisions which aim at shielding legislation from review under the Québec *Charter* do not shield it from review under the *Canadian Charter*. Accordingly, were the Government to allow the sections of the education legislation which override the *Canadian Charter* to lapse in 1999, the residual protection of the legislation from the Québec *Charter* would be ineffective. By contrast, if the Government does not let the provision lapse, it will signify a policy decision to continue the protection of denominational privilege in Québec education.

- From a strictly legal point of view, the special legislative protection of the denominational privileges granted Catholics and Protestants complies with both the *Canadian Charter* and the Québec *Charter*; however, the fact that they are used, not to permit a specific exception for particular reasons but to provide a blanket shield for such privileges offends the human rights norms of freedom of religion and equality.

5.3 Religion and the Governance of Public Schools

As we have seen in other jurisdictions, questions regarding religion and governance involve structures and the nature and scope of management and control delegated to denominational and other educational bodies.

5.3.1 Denominational Structures

Provincial Level

⁶⁵The lack of commitment of Québec referred to by Hogg, stems from this province's refusal to consent to the patriation of the Constitution, including the *Canadian Charter*, in 1982 (see text above surrounding endnote 282). Hogg notes that the Act did not override the Québec *Charter*, “thus making it clear that the purpose was not to abridge civil liberties, but only to protest the national Charter.” (see Hogg, endnote 83 at 36.2, n. 5).

Ministry of Education

The Associate Deputy Minister positions sends a signal that a system based on privilege for two denominations remains.

As elsewhere, the key structure at the provincial level is the Ministry of Education. Unlike other jurisdictions, however, the Québec Ministry includes the positions of Catholic and Protestant Associate Deputy Minister. According to the *Act Respecting the Ministère de l'Éducation*: "... each associate deputy minister is responsible for ensuring that the confessional status of

educational institutions recognized as Catholic or Protestant is respected and for securing the exercise of confessional rights by Catholics and Protestants in other educational institutions."^{cclxxxvii} Historically, these positions were created to facilitate the creation of the Ministry in 1964. Given the evolution of the system from a denominationally based to a language based one, they are largely symbolic in importance. However, that symbol sends a signal to the educational community that a system based on privilege for two denominational groups remains.

- The provisions concerning the positions of Catholic and Protestant Associate Deputy Ministers are an infringement of human rights in that they grant a privilege to Catholics and Protestants to have a senior Ministry official appointed to be responsible for their needs when no such position exists for the benefit of other religious groups.

Superior Council

As mentioned in the historical sketch, the Superior Council was created "to combat any claim that Bill 60 would produce a state-managed educational system insensitive to the interests of the population."^{cclxxxviii} The Superior Council consists of 24 members, of whom at least 16 must be Catholics; at least 4 must be Protestants and there must be at least 1 other.^{cclxxxix} It comprises two denominational committees, one Catholic and one Protestant, and five commissions respecting different levels of education. The Superior Council is mandated to give its opinion to the Minister on such matters as he or she may choose to refer to it and submit to the Minister an annual report on the "state and needs of education."

Each denominational committee consists of 15 members, plus the associate deputy minister, *ex officio*. In addition to providing input to the Minister and other general functions, the two denominational committees are responsible to:

- make regulations respecting Catholic or Protestant MRI, pastoral care and guidance;
- make regulations respecting teacher qualifications for Catholic or Protestant MRI, pastoral care and guidance;
- approve curricula, guides, textbooks and teaching materials for Catholic or Protestant MRI;
- approve handbooks of objectives and teacher guides for Catholic or Protestant pastoral care and guidance;
- make regulations to recognize educational institutions as Catholic or Protestant and to ensure the confessional character of educational institutions so recognized;
- recognize educational institutions as Catholic or Protestant and to withdraw such recognition when such an institution no longer fulfils the necessary conditions;
- make recommendations to the Superior Council or the Minister on matters within its competence.

Despite the denominationally based composition of the Superior Council, in our view, it would be difficult to characterize its input as being denominationally based. In fact, the Council has emphasized the need to modify

existing policies and create new ones, which would deal with the growing ethnic population in the school system.^{ccxc}

The larger question respecting the Superior Council concerns its denominational committees which fulfil a key role in supporting the privileged treatment of Catholics and Protestants. Logically, the future of these committees should flow from the conclusions reached regarding the denominational status of schools, discussed below. Suffice it to say at this point, that it is inconsistent with the current thrust of government policy to maintain such structures solely for the Catholic and Protestant denominations.

It is inconsistent with the current thrust of government policy to maintain such structures solely for the Catholic and Protestant denominations.

- The provisions concerning the Superior Council and its denominational committees are an infringement of human rights in that they grant a privilege to Catholics and Protestants in terms of the composition of the Superior Council itself and the creation of denominational committees with broad regulatory and supervisory powers for these two groups alone.

School Board Level

In June 1997, the Government adopted Bill 109 to provide for the implementation of linguistic boards in 1998-99, with interim provisions for the establishment of “confessional councils” as structures within the new linguistic school boards in Montréal and Québec City and the provision for the creation of dissentient boards elsewhere, pending the amendment of section 93. However, given that the amendment of section 93 was given Royal assent before January 1, 1998, this provisional regime never came into force. Accordingly, as of July 1, 1998, there are no denominational board structures of any kind in Québec.

Although there is much to consider in the implementation of the new boards, including allocation of schools, shifts of students population, transfer of personnel and so forth, for purposes of this discussion, the matter is rather straightforward. As of July 1, 1998, the present network of Catholic and Protestant confessional boards, Catholic and Protestant dissentient boards and common boards for Catholics and for Protestants has been completely replaced by a non-denominational network of French and English language school boards. At the level of the school board, no denominational structures remain. However, that does not mean that religion no longer has a formal place in the Québec education system, though the vast majority of these provisions now focus on the school, there is one new provision which is relevant here.

At the school board level, although each school board decides on its own organization chart, it must appoint one person to be responsible for administrative support to schools recognized as Catholic and Protestant and for MRI and pastoral or religious care and guidance services provided in its schools. If it prefers, the school board may appoint two persons, one to be responsible for services for each denominational group. It could be argued that this new requirement is analogous to the creation of the Catholic and Protestant Associate Deputy Minister positions in the 1960's to facilitate the creation of the Ministry. It seems incongruous, given the thrust of current reforms to mandate such positions when school boards are generally free to determine their own staffing needs.

- The provision concerning school board denominational positions is an infringement of human rights in that it grants a privilege to Catholics and Protestants to have a senior school board official appointed to be responsible for their needs when no such position exists for the benefit of other religious groups.

School Level

As alluded to above, the third enactment in the trilogy of education reform was Bill 180, adopted in December 1997. It provides for the redistribution of powers within the system, especially at the school level. Although this legislation will cause significant changes in the governance and operation of schools, notably through the creation

of school governing boards, it does not, in general, alter existing provisions regarding the place of religion in schools.^{ccxc}

Denominational Status of School

The *Education Act* provides for the existence of three classes of public common schools: schools with no confessional status, Catholic schools and Protestant schools. According to the *Education Act*, a school board may apply to the Catholic or Protestant Committee of the Superior Council to have one of its schools legally recognized as being Catholic or Protestant, provided that it has consulted the parents of the school and the school governing board.^{ccxcii} It may similarly apply for the withdrawal of such recognition but it must do so at the request of the governing board following consultation of parents. The consultation of parents must take place in

accordance with a regulation adopted under the *Education Act*.^{ccxciii} The regulation^{ccxciv} provides for certain information to be provided to parents within certain delays and prescribes the use of a standard ballot form, where the choices are: Catholic; Protestant; neutral.

-
- The ~~Schools with no confessional status;~~
 - ~~existing Catholic schools~~ classes of public
 - ~~common Protestant schools.~~
-

As a transitional measure in the implementation of linguistic boards, schools from the former confessional or dissentient boards or those previously recognized as Catholic or Protestant will remain Catholic or Protestant until the Catholic or Protestant Committee revokes it of its own initiative or a request for the withdrawal of this recognition is made by the provisional council (to June 30, 1998) or the new school board (as of July, 1998).^{ccxcv} In any event, the new school board must consult parents and the governing board before the end of three years on the advisability of maintaining or withdrawing the confessional status of a school.^{ccxcvi}

Schools so recognized are governed by regulations of the Catholic or Protestant Committee of the Superior Council. The Catholic Committee regulation^{ccxcvii} contains the two following general provisions regarding the recognition of a school as Catholic.

The Catholic Committee Regulation

4. A public school recognized as Catholic shall integrate the beliefs and values of the Catholic religion into its educational project, while maintaining respect for freedom of conscience and of religion.

23. The staff of a public school recognized as Catholic, as well as any person working there, the parents and the pupils shall be respectful of both the public and Catholic character of the school.

The “educational project” referred to in section 4 above is mandated by the *Education Act*, among others, to provide a statement of the specific aims and objectives of the school (see section 5.3.2 below).^{ccxcviii} The principal is responsible for ensuring the implementation of such an educational project and must report at least every five years, via the school board, to the Catholic Committee on the evaluation of the school as a denominational institution. The regulation requires adherence to the programs of Catholic MRI and pastoral animation (discussed below).

Section 20 can be used to provide special programs for religious groups, but not for some to the exclusion of others.

The Protestant Committee regulation^{ccxcix} contains the two following general provisions regarding the recognition of a school as Protestant.

The Protestant Committee Regulation

4. An educational institution recognized as Protestant may organize activities of a religious nature which are intended to create a sense of belonging to the same religious tradition, to provide an opportunity to celebrate important events of a religious nature and to contribute to the development of a sense of personal identity.

No pupil, however, shall be required to participate in such activities if, for reasons of conscience, an exemption is requested in writing from the head of the educational institution by the parent.

A pupil who has reached the secondary three level may make that request.

5. A teacher shall respect the philosophy and confessional character of a recognized educational institution.

In the performance of his duties, a teacher shall respect the pupil's personal religious or ideological point of view.

Every teacher shall have a knowledge of the moral development of the child.

Any such school must also follow the prescriptions contained in the regulation governing moral and religious instruction (see below).

The recognition of denominational schools could be viewed as a “special program” under section 20 of the Québec *Charter* because of the religious nature of such institutions. However, as can be seen from the foregoing, this treatment is reserved for Catholics and Protestants alone which constitutes *prima facie* discrimination. In our view, section 20 can be used to provide special programs for religious groups, but not for some to the exclusion of others. If a contrary view were advanced, this would open up section 20 to scrutiny under the *Canadian Charter*. If the court found that section 20 did permit such discrimination, it is our view that section 20 would be struck down as it could not be construed as a reasonable limit under section 1 of the *Canadian Charter*.

Recognition of denominational schools for Catholics and Protestants could not be considered as “affirmative action,” given their historically privileged position.

It should also be pointed out that the recognition of denominational schools for Catholics and Protestants could not be considered as “affirmative action,” given their historically privileged position in the Québec education system. Affirmative action in this regard could only be offered to other religious groups. The other alternative is open up the denominational recognition of schools to all faiths.

Such a policy alternative would satisfy prevailing human rights norms, depending on how it was articulated and implemented. Structures analogous to the current denominational committees of the Superior Council would have to be created or all such structures would have to be abolished. More importantly, the policy would have to take into account the geographic, demographic, programmatic and other exigencies of the school system. Thus, the policy could not, directly or indirectly, compel students to attend such schools who did not wish to do so because no reasonable alternative was available in that locality. Accordingly, any such policy must include “reasonable limits” on the exercise of a right to establish and operate denominational schools.

- The provisions regarding the denominational status of schools are an infringement of human rights in that they grant a privilege to Catholics and Protestants to have denominationally recognized schools when no such recognition exists for the benefit of other religious groups.

5.3.2 Management and Control of Denominational Structures

As mentioned briefly in section 4.2.2, unless those placed in charge of educational structures, be they school boards or schools, are given some reasonable level of authority, then the structure becomes an “empty shell.” Whereas the delegation of authority in other provinces is all but exclusively limited to school boards, Bill 180 provides for considerable delegation to schools and their new governing boards, as well as school boards. School boards and schools are “creatures of statute;” that is, they may only do what they are required or permitted to do by law. Their authority may be expressed in broad general terms or target specific areas of activity. However, any such delegation is subject to the parameters set provincially and, in the case of schools, by school boards as well. Below is a brief analysis of key areas of authority that are relevant to our question about the place of religion in

schools, either because their general terms encompass denominational issues or because they specifically envisage the latter.

General Policy Direction

In addition to choosing to be officially recognized as either Catholic or Protestant, schools have other powers in relation to setting their general policy direction and mission. Much of this is done through the establishment and implementation of the school's "educational project"⁶⁶ under the direction of the school governing board.^{ccc} Contrary to the limitation of denominational status to Catholic and Protestant, there is nothing in legislation that would prevent a school from adopting an educational project that embraces a different religion, or indeed many religions. Like any general policy direction, its viability depends on the more specific policy elements discussed below.

- The provisions respecting the educational project comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Admissions

School boards cannot set enrolment criteria for schools simply based on their denominational status.

⁶⁶A school pursues its mission within the framework of an "educational project," which contains the specific aims and objectives of the school and the measures to ensure its implementation and evaluation, a process that includes the participation of students, parents, the principal, teachers, other school staff, representatives of the community and the school board.

Despite their ability to set general policy direction, schools cannot determine their own admission policy. Authority in this area is conferred upon school boards,^{ccci} but even they have little discretion in setting admission policy. As a general rule, they may only establish enrolment criteria for cases where admission demands exceed the capacity of a school. By contrast, it may set the enrolment criteria for a school approved by the Minister as a “special project,” which might have a denominational focus.⁶⁷ However, it cannot set enrolment criteria for schools simply based on their educational project or denominational status. These parameters governing admission policy are linked to the right of students and parents to school choice (see below).

- The provisions governing admission comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Curriculum and School Organization

Setting forth the provisions governing discretion regarding curriculum and school organization is complex because of the interplay of the *Education Act*, the *Basic School Regulations* and the Catholic and Protestant regulations adopted under the *Act Respecting the Conseil supérieur de l'éducation*. Furthermore, Bill 180 has introduced another complication by replacing previous school board obligations (“the school board shall do x”) with new language when these powers have shifted to schools (“the school board shall ensure that x is done”). Although these differences may appear to be purely semantic, they raise the question of whether certain obligations must be acquitted in each school or merely in some schools of the board.

Schools have no discretion whether to offer Catholic or Protestant MRI; they must do so upon the request of students or parents (see below).⁶⁸ Insofar as MRI in other denominations is concerned, the school governing board may request the school board that it be offered, but the decision rests with the latter. According to Bill 180,

⁶⁷These provisions are new (Bill 180) and no guidelines have been published to indicate how the Minister may deal with applications for “special project” schools. However, the policy discourse during the legislative hearing on Bill 180 suggests that the thrust of this new provision is to limit the proliferation of such schools in favour of fostering neighbourhood schools.

⁶⁸Neither do schools have any discretion regarding the minimum time to be devoted to Catholic and Protestant MRI, as the *Education Act* (s. 86(2)) states that school governing boards must respect the minimal time prescribed by the denominational committees of the Superior Council in accordance with the regulatory power respecting MRI and related services in *all* schools (CSE Act, s. 22(a)) and the recognition of Catholic and Protestant schools (CSE Act, s. 22(e)). The Protestant regulation explicitly covers both these regulatory functions and the provisions dealing with Protestant MRI (ss. 6-9) clearly apply to all schools. The Catholic regulation appears to be concerned exclusively with schools recognized as Catholic and therefore it is unclear if the provisions dealing with Catholic MRI (ss. 8 ff) apply to all schools.

from now on schools, not school boards, have the authority to develop local programs.⁶⁹ The only mention of locally developed religious programs is the obligation to have local programs for Catholic or Protestant MRI approved by the appropriate denominational committees of the Superior Council. It seems inconsistent with this new devolution of local program authority to schools that MRI programs respecting other religions still require school board approval as they did when school boards were responsible for all local programs. While Bill 180 is generally neutral respecting denominational matters, in this instance it renders the development of local religious programs to meet the need so students of other faiths more difficult.⁷⁰

It seems inconsistent with this new devolution of authority to schools that MRI programs respecting other religions still require school board approval.

The principal, following the proposal made by teachers and after consultation of the governing board, is now responsible for approving textbooks and materials from among those authorized by the Minister (s. 96.15(3)). This general power applies to texts and materials for MRI, it being noted that in the case of Catholic and Protestant MRI, they must also be approved by the appropriate denominational committees (s. 227).

There is no explicit provision in the Act or the regulations about the conduct of religious exercises. For purposes of this discussion, we assume that they are embraced by the “pastoral/religious care and guidance services” provided for therein. In responding to parental rights to these services, schools must follow the prescriptions of the regulations. However, the Catholic regulation only makes reference to these services in schools recognized as Catholic; the Protestant regulation is silent on these matters. In the absence of any effective constraints, the general terms governing the provision of educational services prevail. According to the *Education Act* (s. 224), the school board retains the authority to establish a program for each “student service” contemplated in the *Basic School Regulations* which include pastoral/religious care and guidance. Moreover, the school board still determines the educational services to be provided by each of its schools (s. 236). The school governing board is responsible for approving the approach proposed by the principal for the implementation of these and other student services (s. 88). Thus, it appears that school discretion in this area is limited to matters of implementation which only arise if the school board has first decided that such services should be offered at the school.

- The provisions respecting approval of local subjects are an infringement of human rights in that they subject local non-Catholic/Protestant programs to a school/school board approval process that is not required for Catholic or Protestant programs; by contrast, they subject local Catholic and Protestant programs, as well as textbooks and materials to an external approval process that is not required of other denominationally based programs, if such programs were locally approved.

⁶⁹The school governing board is responsible for approving the “overall approach” *proposed by the principal* for local programs of studies to meet specific needs of the students at the school but it is the principal, not the governing board, that approves actual programs which are *proposed by the teachers*. According to Bill 180 (s. 198), every school board shall establish, after consulting with the governing boards, the approach to be taken for 1998-99 and 1999-2000 for the gradual implementation of the powers arising from specified sections of the new Act, including these provisions regarding local programs.

⁷⁰Once fully implemented, the following steps would appear to have to be followed in order to approve a local MRI program for another religious faith: (1) the governing board approves the “general approach” to local programs that embraces such a possibility; (2) the teachers propose a local MRI program; (3) the principal approves their proposal; (4) the governing board requests the school board’s permission for this program; (5) the school board grants or withholds its permission.

Human Resources

Bill 180 did little to effect the prevailing situation regarding the management of human resources. School boards remain the employer but the majority of working conditions of administrators and employees are determined provincially by regulation for the former,⁷¹ and collective bargaining for the latter. Thus all hiring and assignment of personnel to schools, be it for denominational purposes or other, is decided by the school board in accordance with the provisions of the applicable personnel regulations and agreements. However, the *Education Act* provides that the school board must consult the school governing board on the criteria for the hiring of the principal of the school (s. 79(2)). Thus, for example, a denominational school could advance the criterion that the principal be a member in good standing of the denomination of the school but it cannot require that this criterion be retained, let alone decide or exercise a veto on who is actually hired.

- The provisions dealing with human resources comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Funding and Taxation

With the advent of linguistic school boards, the traditional denominational funding issue, namely the right to raise taxes in support of denominational schools is now moot. Denominational schools, like any school under the new provisions enacted by Bill 180, may charge user fees for educational services not foreseen by the *Basic School Regulations*, including “instructional service outside teaching periods during the school day ... or on non-school days” (s. 90). Thus, it would appear that schools may organize and charge fees for after-school MRI of any denomination but could only organize and charge fees for counseling and related services for denominations other than Catholic or Protestant, as the latter are foreseen by the *Basic School Regulations*.

A school board must now distribute the bulk of its resources to its schools in “an equitable manner” while taking into account the needs of each school.^{ccci} The needs of schools could include denominational needs but the distribution could not be based on denominational status per se. The parents committee must be consulted by the school board on the objectives, principles and criteria governing the allocation of financial resources among its schools, as well as on the aims, principles and criteria which serve to determine the amount which the board retains for its own uses. School budgets reflect the needs and priorities of each school, including any denominational aspects. Under the new provisions of the *Education Act*, school budgets are *proposed* by the principal, *adopted* by the governing board and *approved* by the school board.^{ccciii}

- The provisions dealing with funding comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

5.4 Denominational Rights of School Stakeholders

5.4.1 The Denominational Rights of Children and Parents

As mentioned in the previous section, the discretionary authority of schools and other bodies is subject to the legal rights of stakeholders to service delivery. As in the analysis of such rights across Canada, we have organized this presentation in relation to three key rights, namely, those to school choice, religious instruction and exercises, and accommodation, followed by a brief discussion of the overall rights of students and parents.

Right and Duty to Attend School

⁷¹To date the working conditions of administrators in Protestant school boards were not determined by regulation but through a non-regulatory consultative process.

The *Education Act* provides for both the right to public schooling and a duty to attend. There are no explicit provisions dealing with valid reasons for non-attendance for students subject to the latter. There are, however, several exemptions from the duty to attend school, including attendance at a recognized private school and approved home schooling. These provisions comply with freedom of religion/non-discrimination norms. Thus, for example they do not infringe the freedom of religion of parents who might wish to send their children to a private religious school. The state regulation of the private education options satisfy the requirements set forth in *Jones*. The absence of exceptions to school attendance for religious reasons (e.g. absence for a holy day) is not itself problematic; however, if a school were to deny such exceptions, then such policy or practice would infringe these human rights norms.

Lack of legislative recognition of religious holidays as an excuse for non-attendance is not in itself a problem provided that in practice it is accepted as a justification.

- The provisions respecting the right to public schooling and a duty to attend school comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

School Choice

The principle of - but not the right to - parental choice is included in the preamble to the *Act Respecting the Conseil supérieur de l'éducation*: "Whereas parents have the right to choose the institutions which, according to their convictions, ensure the greatest respect for the rights of their children."^{ccciv} No entitlement is provided by this statement as it is merely a declaration in the preamble and not even part of the statute itself. The right to school choice is provided for in the *Education Act*. According to this Act, a student of full age or the parent has a right to choose the school which best reflects their preferences. This right is restricted to schools within the jurisdiction of school board to which student belongs; it does not entitle the student to transportation beyond school board norms, and is subordinate to enrolment criteria established by school board (discussed above).^{cccv} Within these parameters, students and parents are free to choose any denominational school that may exist within their school board.

- The provisions concerning school choice comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

Religious Instruction and Religious Exercises

According to the *Education Act*, every student has right every year to choose between Catholic MRI, Protestant MRI, moral instruction and, if offered by a school, MRI in another religious denomination. The exercise of this right is vested: in students of full age; in students in second cycle of secondary school; in parents of other students. The school board must ensure that students/parents indicate their choice at the time of registration. Failing such indication, if a choice has been made in a prior year, a student/parent will be deemed to have made the same choice; if no prior choice has been made, a student/parent will be deemed to have chosen moral instruction. Catholic and Protestant students have a right to student services of pastoral care and guidance if Catholic, and religious care and guidance if Protestant.

The discrimination in favour of Catholic and Protestant MRI and related services is obvious.

As noted above there is no provision in the *Education Act* or the regulations which explicitly address the matter of religious exercises, therefore no right exists in this regard. However, the Protestant regulation (cited above in section 5.3.1) makes mention that schools recognized

as Protestant may organize “activities of a religious nature ...” - this could possibly subsume religious exercises. The same regulation also includes an opt-out provision upon the request of the parents.

The discrimination in favour of Catholic and Protestant MRI and related services is obvious. Not only does it violate the general human rights norms governing discrimination, it also contradicts the specific right conferred on every one by section 41 of the Québec *Charter*. To bring the *Education Act* into line with section 41 it is necessary to extend the *right* to MRI to all faiths.⁷² However, the means by which choice is exercised does merit a brief discussion. The exercise of choice respecting MRI constitutes an “opt-in” procedure, with moral (neutral) education as the “default setting” in the absence of choice. Accordingly, this approach is deemed acceptable, as observed by Stephenson:^{ccvii}

The child who is forced by his parents to participate in a religious activity may not claim that his religious freedom is abridged by the state. The latter is merely facilitating the practice of religion. Therefore in such a case, pressure to make a religious statement emanates from the home rather than from classmates.

By contrast, the provision of the Protestant regulation constitutes an “opt-out” approach and does not meet the standard set forth in *Zylberberg* and the other cases referred to in section 3.2. However several provinces still employ such a standard and it has never been considered by the Supreme Court of Canada which might reach a contrary conclusion in this regard, especially in light of international jurisprudence which appears to be more accepting of opting out provisions than the Canadian courts have been to date.

- The provisions dealing with religious instruction are an infringement of human rights in that they grant students and parents a right to Catholic and Protestant MRI and related services, whereas members of other faiths must obtain permission for the former and are not even given the possibility of the latter; the opt-in provisions are deemed to satisfy prevailing human rights norms, but the opt-out provision of the Protestant regulation is considered to infringe such norms in light of Canadian case law as it presently stands.

Student and Parental Rights

For purposes of this discussion, student and parent rights come to the fore in the following instances:

- choice of school - students of majority age or parent;
- MRI - student in secondary cycle II or parent on behalf of student;
- activities of a religious nature in Protestant schools - parent.

In the first instance, the right respecting school choice for students of minority age is vested in parents and not merely assigned to parents to be exercised on behalf of their children, as is the case respecting MRI. The latter is thus more respectful of the evolving doctrine of children's rights than the former, and is more advanced in this regard than that generally observed across Canada. In the third instance, student rights are ignored completely. In order to, fully respect the human rights of students, all three provisions would need to be reformulated to vest rights in students, while allowing for the exercise of that right by parents on behalf of and in the best interests of the student, according to some objective “cut-off” point, such as grade level or age. However, using the age of majority - by which point students are no longer considered children - seems to be a rather high cut-off point, as 14 years is the age of consent for medical treatment in Québec.^{ccviii} Given the sheer number of decisions to made respecting choice in the above areas, an objective cut-off point seems preferable to a subjective rule where an evaluation of the student's capacity to exercise his or her own right must be made on a case-by-case basis.

5.4.2 School Staff and Religion

⁷²By contrast, if these sections of the *Education Act* were eliminated there would be no conflict with section 41; nevertheless, this provision of the Québec *Charter* would still give rise to an entitlement to MRI on request by members of all faiths.

Catholic education consultants and Catholic pastoral animators must maintain a pastoral mandate issued by the Bishop of the diocese in which the school board is situated as a condition of employment. Recalling that section 16 of the Québec *Charter* (cited above in section 3.4.3), prohibits discrimination, *inter alia*, in establishing employment categories, it could be argued that this condition is discriminatory, unless considered as a *bona fide* occupational requirement under section 20. Inasmuch as this requirement has been sanctioned by a collective agreement,^{cccviii} we conclude that it does so qualify and therefore is deemed to be non-discriminatory. There are no other provisions in either the law or the applicable personnel regulations and agreements, including the recent protocol governing the transfer of personnel to the new linguistic school boards, which deal with hiring or firing for denominational cause.⁷³ Neither is there any case law on point.

⁷³The appointment of a person to be responsible for Catholic or Protestant services must be approved by the local Bishop or Protestant authority (*Education Act*, ss. 262-263). However, the Act is silent about the need to maintain such approval for purposes of retaining the position, let alone employment.

Accordingly, in the absence of specific legislative or contractual language in this area, it would appear that the general principles governing hiring and firing for denominational cause outlined above in section 3.4 are applicable here. Whereas at least the former confessional and dissentient school board could claim the status of denominational employer,⁷⁴ no school board can now claim that status. Hence, the only claim that can now be made is in respect of a denominational position in an officially recognized denominational school or in any other setting (non-denominational school, board office). As reflected in the case law from other jurisdictions, the strength of any argument to hire or fire on the basis of denominational cause will depend on a variety of factors, including the job description, existing policy and its general application, as discussed above in section 3.4.

Within the school, assignment of duties is decided by the principal; however, he or she must ensure that teachers assigned to Catholic or Protestant MRI are qualified in the meaning of denominational regulations.^{cccix} Teachers have a right to refuse to teach Catholic or Protestant MRI or that of another religion for reasons of conscience.^{cccx} It should be noted that rights and obligations respecting assignment are distinct from rights and obligations respecting retention of employment.

- The provisions dealing with school staff and religion comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

5.5 Denominational Provisions Governing Private and Home Schooling

The principle of parental right to private schooling is included in the preamble to the *Act Respecting the Conseil supérieur de l'éducation*:

Whereas persons and groups are entitled to establish autonomous educational institutions and, subject to the requirements of the common welfare, to avail themselves of the administrative and financial means necessary for the pursuit of their ends; ...^{cccxi}

This non-binding principle has been transformed into a right by including choice of private or home schooling as alternatives to the general rule of compulsory attendance at a public school.^{cccxi} Private schools are subject to their own legislation and regulations,^{cccxi} but contrary to most Canadian provinces are heavily subsidized by the State (currently at approximately 60% of the grants provided to public schools). The right to home schooling is subject to verification by the local school board that the child is receiving an *equivalent* educational experience to that he or she would receive in a public school.^{ccciv} No provision is made in the Act for support of home schooling by either the Ministry or school boards, although the latter do often supply support on an *ad hoc* basis.

The *Act Respecting Private Education* makes reference to MRI programs but these provisions are not relevant for purposes of an examination of human rights and religion. In addition, there is a separate regulation of the Catholic Committee respecting the recognition of private schools as Catholic,^{ccciv} while the aforementioned Protestant regulation applies to private as well as public schools. For purposes of this paper, the comments made previously about these regulations apply equally to their application to private schools.

- The provisions respecting private and home schooling comply with human rights norms in that they neither impair freedom of religion nor discriminate on the basis of religion.

⁷⁴It is unclear whether the former common school boards “for Catholics” and “for Protestants” could have claimed such status.

6.0 OPTIONS TO BE CONSIDERED

Having outlined both a human rights framework and an analysis of the Québec legislative provisions in light of this framework, we now turn briefly to the options that one could consider for the public school system. While one could imagine a large number of options, each with their particular characteristics, it seems to us to be more helpful to limit the presentation to a small number of more broadly defined options, each of which could later be sub-divided in a more fine grained analysis. On the assumption that the options available at the provincial and school board levels do not require any elaboration beyond that already provided in section 5.0, we will confine our consideration to options to the school level.

6.1 Fundamental Considerations

We begin by presenting the possible array of options in terms of two dimensions: (1) the degree to which religion is given a place in the school; and, (2) whether or not the option respect human rights principles.⁷⁵ This approach can be illustrated as follows:

Options/Respect for Human Rights Norms	Denominational	Mixed	Secular
Respects human rights norms			
Does not respect human rights norms		(Status Quo)	

The present Québec system can be characterized as a “mixed” option that is “below the line;” that is, one that does not respect human rights norms in several key areas. In terms of options, therefore, in addition to maintaining the status quo, one could move toward making the system more denominational or more secular in nature. Whether one moves in one of these directions or the other, one then must decide whether or not to respect human rights norms.

Respecting Human Rights Norms

The fundamental options concerning human rights can be stated as follows:

- maintain the use of override provisions to shield the system from legal challenge under the *Canadian Charter* or the *Québec Charter*;
- reform the system to comply with human rights norms so that it neither impairs freedom of religion nor discriminates on the basis of religion.

It should be noted that the second option does not imply a purely secular system. As illustrated by the above figure, there is no inherent correlation between the extent to which a system is denominational or secular and the extent to which it respects human rights; the relationship between the two is orthogonal not linear. A denominational system could operate in manner that is very respectful of human rights, while a purely secular system could operate in the opposite manner.

⁷⁵The matrix was developed in earlier work by the authors and is reprinted here with their permission.

In the event that one decides to make the system purely secular, human rights norms are respected provided that:

- reasonable accommodation is provided to students, staff and others within the system so as not to unduly interfere with or adversely effect their individual religious beliefs and practices;
- private or home schooling is available as an option for those wishing a denominationally based education.

There is no inherent correlation between the extent to which a system is denominational or secular and the extent to which it respects human rights.

In the first case, for example, one should accommodate religious holidays, religious garb and the like. In the second case, although it would not be necessary for the State to fund such an alternative, if it chose to do so then it must do so without discrimination in favour of one denomination over any other.

In the event that one decides to retain some denominational aspects to the system, two basic options are available, namely:

- denomination-specific schools within linguistic school boards;
- denomination-specific religious instruction, exercises, etc. within non-denomination-specific schools.

In either of these cases, one must open up such rights to all religions, subject to reasonable limits and making appropriate accommodation to all students, staff and others in any given situation. Thus, if it is decided to permit denomination-specific schools, human rights norms would dictate that the right to such schools be available to all denominations and that, in addition, secular public schools must also be available to those who object to attending a denominational school. This right may be subject to reasonable limits and, thus, may not be available in all localities given geographical and demographic realities of particular school boards and schools. In such circumstances alternative accommodation would have to be provided such as the second option mentioned above, to which we now turn.

In lieu of denomination-specific schools, schools could provide denomination-specific MRI.

In lieu of denomination-specific schools, schools could provide denomination-specific MRI, exercises, etc. as well as well as appropriate alternative instruction and activities to accommodate students who do not wish religious instruction or to participate in such exercises. Such alternative could take the form of instruction about

religion delivered in a neutral and objective manner or moral instruction.⁷⁶ Moreover, such schools would have to ensure that reasonable accommodation is provided to students, staff and others so as not to unduly interfere with or adversely effect their individual religious beliefs and practices.

⁷⁶The Ontario Ministry of Education in *Policy/Program Memorandum No. 112: Education about Religion in Public Elementary and Secondary Schools* (1990) (cited in *Bal*, see endnote 123 at 107), adopted a set of guidelines developed by the American Association of School Administrators which help define the nature of religious instruction which would not infringe students freedom of conscience and religion or equality rights. These guidelines are as follows:

The school may sponsor the *study* of religion, but may not sponsor the *practice* of religion.

The school may *expose* all students to all religious views, but may not *impose* any particular view.

The school's approach to religion is one of *instruction*, not one of *indoctrination*.

The function of the school is to *educate* about all religions, not to *convert* to any particular religion.

The school's approach is *academic*, not *devotional*.

The school should *study* what all people believe, but should not *teach* a student what to believe.

The school should strive for student *awareness* of all religions, but should not press for student *acceptance* of any one religion.

The school should seek to *inform* the student about various beliefs, but should not seek to *conform* him or her to any one belief.

Moreover, in non-denomination-specific schools denomination-specific instruction, etc. could be made available to students either as: (i) part of the regular curriculum; (ii) extra-curricular activities under the official auspices of the school; (iii) outside of the regular instructional program by third parties who are given access to school facilities in the same manner as any other community group.⁷⁷

The Denominational-Secular Continuum

Becoming More Denominational

Making schools more denominational could involve some combination of the following:

- confer a “purely denominational” status on a school, that is, without any recognition of the “common and public nature” of the school;
- restrict admissions to children of the denomination of the school;
- provide for denominational control over all aspects of curriculum;
- restrict hiring of personnel to members “in good standing” of the denomination of the school;
- allow ratepayers to direct taxes in support of schools of their denomination.

Taken to its extreme, a move in this direction provides for the creation of “dissentient” schools similar to those permitted under the former section 93 regime.

Becoming More Secular

Making schools more secular could involve some combination of the following:

- remove any denominational status from schools;
- maintain open admission policy to children of any denomination;
- remove compulsory MRI from the curriculum;
- eliminate any consideration of denomination in hiring of personnel;
- eliminate any consideration of denomination with respect to school taxes.

⁷⁷Stephenson (see endnote 263) questions the validity of any of these options but her analysis seems to be unduly influenced by American case law and does not take sufficient account of the significant constitutional differences between the U.S. doctrine of the separation of church and state and the Canadian approach of constitutional neutrality toward religion.

Taken to its extreme, a move in this direction would completely eliminate any place for religion in the regular curriculum and official activities public schools. If this were to occur religious instruction and activities nevertheless could still be accommodated, as it may be in Ontario, by schools permitting religious denominations to use school premises (on the same basis as any other community group) to conduct religious instruction and exercises outside of the official school day.⁷⁸ However, such accommodation would have to be extended to all religious denominations on a non-discriminatory basis.

6.2 Other Considerations

Deciding on the most appropriate option on the basis of the foregoing is complex enough; however to limit one's considerations to the place of religion in schools and human rights would ignore other important factors. For purposes of this synthesis, we will assume a decision that respects the human rights norms set forth above and consider three other major factors: cost and fragmentation; pluralism and the role of the public school; and, avoiding religious strife in schools.

Cost and Fragmentation

As observed by several commentators, providing quality education is no longer enough, we must do so at the least possible cost. Simply put, we cannot afford the luxury of parallel structures in public education. Extending denominational rights and privileges at the school level risks to create the fragmentation of structures at this level that we have just eliminated at the school board level. Furthermore, fragmentation

engendered by parallel structures could lead to a situation where the number of minority language students would be reduced to the point of failing to meet the threshold numbers test for instruction or facilities for, as noted in *Mahé v. Alberta*:^{cccxi}

Extending denominational rights and privileges at the school level risks to create the fragmentation of structures at this level.

Denominational school guarantees could split up an eligible group of minority language students in such a way as to preclude the creation of a minority language school which would otherwise be required. But such a possibility, though unfortunate, does not affect the validity of the interpretation ... given to s. 23.

Pluralism and the Role of the Public School

The public school has traditionally been conceptualized as the “common school,” which originally meant the teaching of the *same* curriculum and transmitting the *same* culture to *all* students in a *common* school.^{cccxvii}

Creating a network of denominationally based schools would detract from the role of the public school in bringing people together.

The recent amendment of the *Education Act* by Bill 180 recognizes the importance of the common school by limiting the spread of “alternative” schools. Creating a network of denominationally based schools would run counter to this policy direction and detract from the role of the public school in bringing people together, rather than keeping

them apart, as stated by the Québec Human Rights Commission:^{cccxviii}

Finally, it is useful to note that the school's educational mandate confers major social responsibilities, including the responsibility to provide the young people in its care with equal opportunities for self-fulfilment and success. Because the school is charged with promoting social insertion, it must also ensure, by teaching mutual respect, that no student is ostracized by his or her peers or rejected by the group for

⁷⁸Before school, after school or on a non-school day.

religious reasons or because of a symbol used to express a religious belief. Whatever the situation, exclusion or prohibition are never valid choices, either in terms of equal rights, or from a strictly educational point of view.

The school of today must reflect the pluralistic society in which we live, just as the nineteenth century common school reflected a more or less monolithic society. If it fails to do so, it is society that will die, not merely the public school.

Avoiding Religious Strife in Schools

The spirit of the transition to linguistic boards is to remove the denominational strife of the past and revitalize school boards as support agents of schools whose mission, “ in keeping with the principle of equality of opportunity, ... is to instruct, socialize and qualify students ...”.^{cccxi} As stated in our submission on Bill 109:^{cccxx}

Maintaining the denomination recognition of schools risks to move the old denominational antagonisms from the level of the system and relocate them at the level of the school. The last situation one would want to occur in a newly formed English school composed of students from previous Catholic and Protestant schools is to be immersed in a battle between two religious factions, each wishing to have its denomination recognized, and a third group wanting neither imprimatur on the school.

In the same vein, we concur with the sentiments expressed in a recent article to the effect that henceforth the real centre of power in the education system will be the school. “The threat of one religious group or another seizing control over the agenda is immense and, given the two year mandate of parent representatives on governing boards, any harm that is done will have a long shelf life and will not be easily reversed.”^{cccxxi}

Maintaining the denomination recognition of schools risks to move the old denominational antagonisms from the level of the system and relocate them at the level of the school.

7.0 CONCLUSION

We began this paper with a sketch of the historical evolution of the place of religion in education. We have seen that religion has played a key role in the system from its earliest days but also noted that the questioning of that role is not a new phenomenon but can be traced back to at least as far as the Royal Commission of 1787. Throughout much of this history, the place of religion in schools was framed by the existence of section 93, which

One has to question, at the end of the 20th century, the maintenance of school privileges for two denominations in a multicultural, pluralistic Québec.

required maintaining the denominational rights and privileges enjoyed by Catholics and Protestants in 1867. As the constitutional imperative for these privileges has now been eliminated, one has to question, as stated by Professor Pierre Foucher at a symposium on school board reform at McGill, whether “the maintenance of school privileges for two denominations in a multicultural, pluralistic Québec” should be continued.^{cccxxii}

In section 3.0, we provided an alternative frame to this debate by outlining various elements of a human rights based approach to the question. In brief, this perspective entails respecting freedom of religion and ensuring non-discrimination on the basis of religion. We have seen that these broad principles require the State not to interfere in the right of individuals to practise their own religion nor coerce anyone, directly or indirectly, to participate in any State sponsored religious activity. We have also noted that discrimination can occur directly or indirectly and that it is the effect, not the intent, of any State action that may give rise to discrimination. Like any human right, freedom of religion and from discrimination on the basis of religion is subject to reasonable limits and reasonable accommodation.

Our examination of legislation and case law across the country has revealed a variety of approaches, some of which were crafted in response to litigation. In conducting this brief cross-Canada survey, we used a simple analytical framework that we also applied in analyzing the Québec legislation. We began the latter task with a brief overview of the relevant constitutional parameters and moved quickly to an examination of the use of special legislation to shield various enactments from a challenge under either the *Canadian Charter* or the *Québec Charter*. Our scrutiny of the education legislation revealed that such a shield was indeed necessary, as several key provisions are in conflict with the human rights principles outlined in section 3.0.

With these analyses in mind, we provided a conceptual model for considering various options regarding the place of religion in schools, as well as other factors to be considered. As noted therein, the respect of human rights does not require a purely secular system. Both denominational and secular systems may be constructed so as to respect human

rights. However, as our analysis as shown, whatever denominational structures or services are provided, they must, subject to reasonable limits, be made available to members of all faiths, while being respectful of non-adherents.

Whatever denominational structures or services are provided, they must, subject to reasonable limits, be made available to members of all faiths, while being respectful of non-adherents.

The relationship between human rights and education is more subtle and pervasive than the simple provision by law of entitlement to schooling or other educational benefits:^{cccxxiii}

Both law and education form part of the normative order of society.... In this normative order and stated simply, the school is expected to transmit or impart these norms or expectations about behaviour to the young while the law serves to adjudicate conflicts that arise in the living out of these norms or expectations.

With the removal of section 93, it is now up to the State to construct a system which transmits those norms and expectations which it wishes to guide young people and society as a whole.

APPENDIX A⁷⁹
EXCERPTS FROM INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights
(A/RES/217 A (III), 10 December 1948)

2. (1) Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ...

18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

26. (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

International Covenant on Civil and Political Rights
(A/RES/22000 A (XXI), 16 December 1966)

4. (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

(3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through

the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

18. (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

26. (1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷⁹This appendix has been prepared for the convenience of the reader only. For accurate reference, recourse should be made to the official texts of the instruments reproduced.

International Covenant on Economic, Social and Cultural Rights

(A/RES/2200 A (XXI), 16 December 1966)

2. ...

(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

4. The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

13. (1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and among all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) primary education shall be compulsory and available free to all;
- (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the

14.(1) States Parties shall respect the right of the child to freedom of thought, conscience and religion.

material conditions of teaching staff shall be continuously improved.

(3) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

(4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Convention on the Rights of the Child

(A/RES/44/25, 20 November 1989)

2.(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

3. (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to

provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

18.(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

(2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of the children.

(3) States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

28. (1) States Parties recognize the right of the child to education, and with a view to achieving this right progressively on the basis of equal opportunity, they shall, in particular:

- (a) make primary education compulsory and available free to all;
- (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) make educational and vocational information and guidance available and accessible to all children;
- (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.

(2) States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

(3) States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular

account shall be taken of the needs of developing countries.

29.(1) States Parties agree that the education of the child shall be directed to:

- (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) the development of respect for the natural environment.

(2) No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

APPENDIX B⁸⁰
EXCERPTS FROM CANADIAN INSTRUMENTS

Constitution Act, 1867
(30 & 31 Vict., c. 3)

93. In each and for every Province the Legislature may exclusively make laws in relation to Education, subject and according to the following Provisions:-

(1) Nothing in any such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Constitution Amendment Act (Québec)

(Canada Gaz., Pt. II Extra, no.8, vol.131 Dec 22, 1997)

1. The *Constitution Act, 1867*, is amended by adding, immediately after section 93, the following:
"93A. Paragraphs (1) to (4) of section 93 do not apply to Québec".

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and

Canadian Charter of Rights and Freedoms

(Part 1 of the *Constitution Act, 1982*
being Schedule B of the *Canada Act 1982* (U.K.)
1982, c. 11)

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province have the right to have their children receive primary and secondary school instruction in that language in that province.

secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

⁸⁰This appendix has been prepared for the convenience of the reader only. For accurate reference, recourse should be made to the official texts of the instruments reproduced.

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided for out of public funds.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or provision of an Act in respect of which a declaration made under this section is in effect shall have such operation it would have but for the provision of this Charter referred to in the declaration.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

- a) the *Canada Act 1982*, including this Act;
- b) the Acts and orders referred to in the schedule; and
- c) any amendment to any Act or order referred to in paragraph a) or b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

59. (1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.

(3) This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

APPENDIX C⁸¹
EXCERPTS FROM QUÉBEC INSTRUMENTS

Charter of Human Rights and Freedoms
(R.S.Q. c. C-12)

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well being of the citizens of Quebec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

10. Every person has the right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such rights.

16. No one may practice discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

40. Every person has a right, to the extent and according to the standards provided by law, to a free public education.

12. Division II applies *mutatis mutandis* and subject to the provisions of this Division to affirmative action programs in an institution providing educational services.

41. Parents or the persons acting in their stead have a right to require that, in public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.

42. Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.

43. Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group.

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

53. If any doubt arises in the interpretation of a provision of the act, it shall be resolved in keeping with the intent of the Charter.

86. The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment, or in the sector of education or of health services and other services generally available to the public.

An affirmative action program is deemed non-discriminatory if it is established in conformity with the Charter.

Regulation Respecting Affirmative Action Programs
(*Charter of Human Rights and Freedoms*
[R.S.Q., c. C-12, s. 97, subpar. 2])

1. This Regulation applies to any person devising, implementing or carrying out an affirmative action program upon a recommendation by the Commission or under a court order.

The object of an affirmative action program is to remedy the situation of any group subject to discrimination as prohibited by section 10 of the Charter, particularly women, members of cultural communities, the handicapped and Native peoples.

13. The objectives of a program in an institution providing educational services shall be established on the basis of an analysis of the school population, availability and the educational system in the institution.

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14. An analysis of the school population will indicate the situation of target group students in relation to the institution's other students in terms of:

- (1) the number of students;
- (2) their programs and conditions of study;
- (3) their previous schooling.

15. An analysis of availability will indicate what percentage target group members represent among all persons who, within and outside the educational system, have the training required to enter the institution's study programs or are fit to acquire such training within a reasonable time.

16. An analysis of the educational system in the institution will allow identification of those practices from among the rules, directives, policies, decisions, contracts, agreements and the like, as well as the way they are applied, which though apparently neutral have a discriminatory effect in the services provided by the institution.

The analysis will bear on the following matters in particular:

- (1) procedures and requirements for accepting and rejecting applications for admission;
- (2) the grouping of students;
- (3) areas of study;
- (4) studying conditions;
- (5) academic organization;
- (6) graduation, failure and dropout rates.

Education Act
(R.S.Q., c. I-13.3)

1. Every person is entitled to the educational services of preschool education services and elementary and secondary school instructional services provided for by this Act and by the basic school regulation made by the Government under section 447, from the first day of the school calendar in the school year in which he attains the age of admission to the last day of the school calendar in the school year in which he attains 18 years of age, or 21 years of age in the case of a handicapped person within the meaning of the Act to secure the handicapped in the exercise of their rights (R.S.Q., chapter E-20.1).

Every person is also entitled to other educational services, student services and special educational services provided for by this Act and the basic school regulation referred to in the first paragraph and to the educational

He also has a right to choose, every year, moral and religious instruction of a religious affiliation other than Catholic or Protestant where such instruction is given at the school.

In elementary school and in the first two years of secondary school, the parents shall exercise the right of choice on behalf of their child.

services prescribed by the basic vocational training regulation established by the Government under section 448, within the scope of the programs offered by the school board.

The age of admission to preschool education is 5 years on or before the date prescribed by the basic school regulation; the age of admission to elementary school education is 6 years on or before the same date.

2. Every person no longer subject to compulsory school attendance is entitled to the educational services prescribed by the basic regulations established by the Government under section 448, within the scope of the programs offered by the school board pursuant to this Act.

3. The educational services provided for in this Act and prescribed by the basic school regulation established by the Government under section 447 shall be provided free to every resident of Québec entitled thereto under section 1.

Literacy services and the other learning services prescribed by the basic school regulation for adult education shall be provided free to residents of Québec contemplated in section 2, subject to the conditions prescribed by the said regulation.

The educational services provided for in the basic school regulation for vocational training shall be provided free to every resident of Québec, subject, however, to the conditions determined in the basic school regulation if the person is 18 years of age or older or 21 years of age or older in the case of a handicapped person within the meaning of the Act to secure the handicapped in the exercise of their rights (chapter E-20.1).

4. Every student or, if he is not of full age, his parents, shall have a right to choose, every year, among the schools of the school board to which he belongs, the school best suited to their preferences or having the educational project best suited to their personal values.

The exercise of the right is subject to the student enrollment criteria established by the school board.

The exercise of the right does not entail the right to require transportation services where the transportation services required for the student concerned exceed the limits established by the school board.

5. Every student other than a student enrolled in vocational training or adult education has a right to choose, every year, between either Catholic or Protestant moral and religious instruction or moral instruction.

6. Catholic students other than those enrolled in vocational training or adult education are entitled to student services of pastoral care and guidance.

Protestant students other than those enrolled in adult education are entitled to student services of religious care and guidance.

15. The following students are exempt from compulsory school attendance:

(4) a student who receives home schooling and benefits from an educational experience which, according to an evaluation made by or for the school board, are equivalent to what is provided at school.

20. Every teacher has a right to refuse to give moral and religious instruction of a religious affiliation on the grounds of freedom of conscience.

No teacher may be dismissed, suspended or disciplined in any other way for exercising his right under this section.

21. A teacher wishing to exercise the right described in section 20 shall so inform the principal, in writing, within the time and in the manner determined by the school board.

Any refusal to give moral and religious instruction of a religious affiliation stands until the principal receives notice in writing to the contrary.

36. A school is an educational institution whose object is to provide to the persons entitled thereto under section 1 the educational services provided for by this Act and prescribed by the basic school regulation established by the Government under section 447 and to contribute to the social and cultural development of the community.

In keeping with the principle of equality of opportunity, the mission of a school is to impart knowledge to students, foster their social development and given them qualifications, while enabling them to undertake and achieve success in a course of study.

A school shall pursue its mission within the framework of an educational project defined, implemented and periodically evaluated in collaboration with the students, the parents, the principal, the teachers and other school staff, representatives of the community and the school board.

37. A school's education project shall set out the specific aims and objectives of the school, and the means by which the educational project is to be implemented and evaluated.

The aim and objectives of the project, and the means by which it is to be implemented, shall be designed to

90. The governing board may organize educational services other than those prescribed by the basic school regulation, including instructional services outside teaching periods during the school days of the school calendar or on non-school days, and may organize social, cultural or sports services.

It may also allow other persons or organizations to organize such services on school premises.

ensure that the provincial educational policy defined by law, the basic school regulation and the programs of studies established by the Minister are implemented, adapted and enriched to reflect the needs of the students and the priorities of the school.

79. The school board must consult with the governing board concerning

- (1) the amendment or revocation of the deed of establishment of the school;
- (2) the selection criteria for the appointment of the principal;
- (3) the recognition of the confessional status of the school.

85. The governing board is responsible for approving the overall approach proposed by the principal for the enrichment or adaptation by the teachers of the objectives and suggested content of the programs of studies established by the Minister and for the development of local programs of studies to meet the specific needs of the students at the school.

86. The governing board is responsible for approving the time allocation proposed by the principal for each compulsory or elective subject and shall satisfy itself

- (1) that the compulsory objectives of the programs of studies established by the Minister will be achieved and their compulsory contents will be acquired;
- (2) that the minimum time prescribed by the Catholic committee or the Protestant committee, as the case may be, for Catholic or Protestant moral and religious instruction is respected;
- (3) that the rules governing the certification of studies prescribed by the basic school regulation are complied with.

88. The governing board is responsible for approving the approach proposed by the principal for the implementation of the student services and special educational services programs prescribed by the basic school regulation and determined by the school board, or provided for in an agreement entered into by the school board.

96.8. The principal of a school shall be appointed by the school board in accordance with the selection criteria established by the school board after consulting with the governing board.

The school board may designate a person to fill the position of principal temporarily, having regard to the provisions of the applicable collective agreements or regulations of the Minister.

96.15. The principal is responsible for approving, on the proposal of the teachers or, in the case of matters referred to in subparagraph 5, of the members of the staff concerned and after consulting with the governing board in the case of proposals under subparagraph 3,

- (1) in accordance with the policies determined by the governing board, the local programs of studies developed to meet the special needs of students;
- (2) the criteria for the introduction of new instructional methods;
- (3) in accordance with this Act and in keeping with the school budget, the textbooks and instructional material required for the teaching of programs of studies;
- (4) the standards and procedures for the evaluation of student achievement in keeping with the prescriptions of the basic school regulation and subject to the examinations that may be imposed by the Minister or the school board;
- (5) the rules governing the placement of students and their promotion from one cycle to the other at the elementary level, subject to the rules prescribed by the basic school regulation.

The proposals of the teachers or the staff members under this section shall be made according the procedure determined by the teachers or the staff members at general meetings called for that purpose by the principal or, failing that, according to the procedure determined by the principal.

A proposal of the teachers or the staff members concerning a subject referred to in this section must be made within 15 days after the proposal is requested by the principal, failing which the principal may act without such proposal.

If the principal does not approve a proposal of the teachers or the staff members, the principal shall give reasons, in writing, for the decision.

96.16. With the authorization of the Minister, a greater number of credits may be assigned to a local program of studies than the number of credits prescribed by the basic school regulation.

Local programs of studies for Catholic or Protestant moral and religious instruction shall be submitted to the

After consultation with the parents of the students of the school in accordance with the regulation of the minister and after consultation with the governing board, the school board, unless it is a confessional or dissentient school board, may apply to the Catholic committee or the Protestant committee for recognition as a Catholic or Protestant school; it may similarly apply for the withdrawal of such recognition.

After consulting with the parents of the students attending the school in accordance with the regulation of the Minister, at the request of the governing board, the school board must apply for such a withdrawal where the governing board so requests.

Catholic committee or Protestant committee for approval in accordance with section 22 of the Act respecting the Conseil supérieur de l'éducation (chapter C-60).

96.21. The principal is responsible for the management of the staff of the school and shall determine the duties and responsibilities of each staff member in accordance with the provisions of the applicable collective agreements or regulations of the Minister and, where applicable, with the agreements between the school and university-level institutions concerning the training of future teachers or the mentoring of newly qualified teachers.

The principal shall ensure that every teacher assigned to Catholic or Protestant moral and religious instruction has the qualifications required by the Catholic or the Protestant committee established by the Act respecting the Conseil supérieur de l'éducation (chapter C-60).

The principal shall see to the organization of such professional development activities for the school staff as agreed with the staff, in accordance with the provisions of the applicable collective agreements.

193. The parents' committee shall be consulted on the following matters:...

- (5) the distribution of educational services among the schools;
- (6) the criteria referred to in section 239 for the enrollment of students in schools;
- (6.1) the dedication of a school to a special project pursuant to section 240 and the criteria for the enrollment of students in that school;
- (7) the school calendar;

218. Every school board shall facilitate the accomplishment of the educational project of each school and of the aims and objectives of each centre; for that purpose, it may delegate, by by-law, certain of the functions and powers conferred on it to the orientation committee of the school.

222. Every school board shall ensure that the basic school regulation established by the Government is implemented in accordance with the gradual implementation procedure established by the Minister under section 459.

For humanitarian reasons or to avoid serious harm to a student, the school board may, following a request, with reasons, made by the parents of the student, by the student, if of full age, or by the school principal, exempt the student from the application of a provision of the basic school regulation. In the case of an exemption from the rules governing certification of studies referred to in section 460, the school board must apply therefor to the Minister.

The school board may also, subject to the rules governing certification of studies prescribed by the basic school regulation, permit a departure from a provision of the basic school regulation so that a special school project applicable to a group of students may be carried out. In the case of a departure from the list of subjects, the school board must obtain the authorization of the Minister in accordance with section 459.

222.1 Every school board shall ensure that the programs of studies established by the Minister under section 461 are implemented.

However, a school board may, at the request of a school principal, after consulting with the student's parents and subject to the rule governing certification of studies prescribed by the basic school regulation and to the by-laws of the Catholic committee or Protestant committee, exempt a student who needs a special support services in the language of instruction, second language or mathematics program from a subject prescribed by the basic school regulation; no exemption may be granted, however, in respect of those programs.

As well, a school board may, with the authorization of and subject to the conditions determined by the Minister, allow a school to replace a program of studies established by the Minister by a local program of studies designed for a student or a category of students who are unable to benefit from the programs of studies established by the Minister. Every local program of studies must be submitted by the school board to the Minister for approval.

222. A school board may, with the authorization of and subject to the conditions determined by the Minister, develop and offer, in addition to the vocational education programs that it is authorized to organize, programs of studies leading to an occupation or a profession and award an attestation of qualification for such programs.

The basic school regulation does not apply to a program of studies referred to in the first paragraph.

224. Every school board shall establish a program for each student service and special educational service contemplated in the basic school regulation except in

239. Each year, every school board shall enroll students in its schools in keeping with the choice of each student's parents or the choice of the student, if of full age. However, if the number of applications for enrollment in a school exceeds the capacity of the school, enrollment shall be effected according to the criteria established by the school board after consultation with the parents' committee.

The enrollment criteria must give priority to students coming under the jurisdiction of the school board and, as far as possible, to students whose place of residence is nearest to the school premises. They must be adopted, put

matters coming under the jurisdiction of a minister other than the Minister of Education.

It may enter into an agreement with any person or body with regard to the contents of the programs in those matters which do not come under the jurisdiction of the Minister of Education.

The programs must be in conformity with the basic school regulation.

225. Every school board shall ensure that school provide Catholic or Protestant moral and religious instruction, or moral instruction, according to the choice of the student or his parents.

The arrangements for Catholic or Protestant moral and religious instruction and for moral instruction must enable each student to achieve the objectives and acquire the contents defined in the programs of studies established by the Minister.

226. Every school board shall ensure that schools offer

- (1) student services of pastoral care and guidance to Catholic students;
- (2) student services of religious care and guidance to Protestant students.

227. Every school board shall ensure that Catholic or Protestant moral and religious instruction and Catholic pastoral care and guidance services or Protestant religious care and guidance services are provided in accordance with the regulations of the Catholic committee or the Protestant committee, as the case may be.

228. A school board may, at the request of a governing board, provide moral and religious instruction of a religious affiliation other than Catholic or Protestant.

The school board shall, however, ensure that the compulsory objectives are achieved and that the compulsory contents defined in the programs of studies established by the Minister are acquired, regarding moral instruction in particular.

236. Every school board shall determine the educational services to be provided by each of its schools. into force and sent to each governing board at least 15 days before the beginning of the student enrollment period.

The conditions or criteria for participation in a special project may not serve as criteria for enrollment in a school; nor may they operate to exclude a student from the school of the student's choice if the student has a right to enroll in that school pursuant to the criteria referred to in the first paragraph.

240. By way of exception, at the request of a group of parents and after consulting with the parents' committee, a school board may, with the Minister's approval, establishing a school for the purposes of a specific

project, subject to the conditions and for the period determined by the Minister.

262. Every school board shall appoint a person to be responsible for administrative support to schools recognized as Catholic schools and schools recognized as Protestant schools and to the moral and religious instruction and pastoral or religious care and guidance services provided in those schools; the person's time shall be devoted primarily to the exercise of such functions.

The appointment of the person must be approved by the bishop of the Catholic diocese in which the head office of the school board is situated and by a committee formed by the Protestant churches within the territory of the school board.

The person appointed shall consult and inform, on a regular basis, the parents of Catholic students and the parents of Protestant students, and the religious authorities, both Catholic and Protestant, having jurisdiction within the territory of the school board, concerning the matters under the person's responsibility. The person shall, once a year, report to the director general on the status and needs of the schools and the services under the person's responsibility; a copy of the report shall be sent without delay to the council of commissioners.

263. A school board, if it considers it expedient, may, instead of appointing the person referred to in section 262, appoint a person responsible for administrative support to schools recognized as Catholic schools and to Catholic services and a person responsible for administrative support to schools recognized as Protestant schools and to Protestant services.

The provisions of section 262 apply to each person so appointed.

275. Every school board shall allocate among its schools, vocational training centres and adult education centres, in an equitable manner and in consideration of social and economic disparities and of the needs expressed by the institutions, the operating subsidies granted by the Minister, including equalization grants, if any, school tax proceeds and income derived from the investment of all or part of those proceeds, reserving the amount determined by the school board to be necessary for its own needs and the needs of its committees.

The allocation shall include resources for the operation of governing boards.

The school board shall make public the objectives and principles governing the allocation of subsidies, school tax proceeds and other revenues among its educational institutions as well as the criteria pertaining thereto, and the objectives, principles and criteria used to determine the amount reserved for its own needs and the needs of its committees.

276. Every school board is responsible for approving the budget of its schools, vocational training centres and adult education centres.

The budget of an educational institution shall be without effect until it is approved by the school board. However, the school board may, subject to the conditions it determines, authorize an institution to incur expenses that have not been approved.

726. The provisions of this Act which grant rights and privileges to a religious confession shall apply despite sections 3 and 10 of the Charter if the human rights and freedoms (chapter C-12).

727. The provisions of this Act which grant rights and privileges to a religious confession shall operate notwithstanding the provisions of paragraph *a* if section 2 and section 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of Parliament of the United Kingdom).

Catholic Committee Regulation

(Regulation Respecting the Recognition of Secondary Schools of the Public School System as Catholic and their Confessional Character [An Act respecting the Conseil supérieur de l'éducation, R.S.Q., c. C-60, subparas. a, c and d] - O.C. 1857-87 dated 9 December 1987; after consolidation: R.R.Q., c. C-60, r. 7.2)

1. A school board wishing to apply for the recognition of a school under its jurisdiction as Catholic shall so apply to the Catholic committee and shall include with that application a resolution duly adopted by the school commissioners of the school board.

2. A school board applying for recognition must:

- (1) consult with orientation committee and the school committee, in accordance with section 218 of the Education Act (R.S.Q., c. I-13.3);
- (2) consult with the parents of the students attending the school, in accordance with section 218 of the Education Act (R.S.Q., c. I-13.3);
- (3) send the Catholic committee the results of the consultation with the orientation committee, the school committee and the parents.

3. Recognition of a public school as Catholic shall be effected by a resolution duly adopted by the Catholic committee.

4. A public school recognized as Catholic shall integrate the beliefs and values of the Catholic religion into its educational project, while maintaining respect for freedom of conscience and of religion.

5. Repealed.

6. The principal of a public school recognized as Catholic is responsible for ensuring:

- (1) the implementation and evaluation of the educational project of the school, in accordance with sections 45 and 46 of the Education Act (R.S.Q., c. I-13.3);
- (2) the orientation, animation, coordination and evaluation of activities of Catholic moral and religious instruction and pastoral animation.

7. At least once every five years, the principal of a public school recognized as Catholic shall forward to the Catholic committee, by way of the school board, a report on the evaluation of the school's functioning as a

- (2) have acquired, in a training program prescribed in the regulations made under section 30 of the Act, not less than 9 university credits pertaining to the moral and religious dimension of the person and the essential content of the Catholic faith as well as the

confessional institution. That evaluation shall be conducted with the participation of the orientation committee, the school committee, the parents, the staff and, to the extent possible, the pupils.

8. In each year of elementary and secondary school, a public school recognized as Catholic shall offer a Catholic moral and religious instruction course.

8.1 A public school recognized as Catholic shall follow the Catholic moral and religious instruction programs approved by the Catholic committee. It shall also follow the local programs of studies in Catholic moral and religious instruction approved by that committee. It shall use the textbooks and the teaching material approved by the Catholic committee for that type of instruction.

9. Repealed.

10. In each year of elementary school, not less than 60 hours shall be devoted to Catholic moral and religious instruction.

11. In each year of secondary school, not less than 50 hours shall be devoted to Catholic moral and religious instruction.

12. The provisions of section 11 do not apply to a program of studies leading to a Secondary School Vocational Certificate, to a Secondary School Vocational Diploma or to an Attestation of Vocational Specialization, in accordance with the Regulation made under section 447 of the Education Act (R.S.Q., c. I-13.3).

13. The hours prescribed in sections 10 and 11 shall be apportioned in a manner and at a rate appropriate to pedagogy, the needs of the pupils and the educational project of the school.

14. A public school recognized as Catholic must ensure that a pupil following a Catholic moral and religious instruction program is evaluated in order to determine whether he has achieved the objectives of the program.

15. In order to be eligible to dispense Catholic moral and religious instruction in an elementary school, a teacher shall:

- (1) be of the Catholic faith;

programs of Catholic moral and religious instruction approved by the Catholic committee, or possess equivalent training;

- (3) repealed.

16. In order to be eligible to dispense Catholic moral and religious instruction in a secondary school, a teacher shall:

- (1) be of the Catholic faith;
- (2) have acquired, in a training program prescribed in the regulation referred to in subparagraph *b* of the first paragraph of section 30 of the Act, a minimum of 30 university credits pertaining to the spiritual, moral and religious dimension of the person, the essential content of the Catholic faith, religious diversity as well as the programs of Catholic moral and religious instruction approved by the Catholic committee, or possess equivalent training;
- (3) repealed.

16.1 In order to be eligible to dispense Catholic moral and religious instruction in special education in an elementary or secondary school, a teacher shall:

- (1) be of the Catholic faith;
- (2) have acquired, in a training program prescribed in the regulation referred to in subparagraph *b* of the first paragraph of section 30 of the Act, a minimum of 9 university credits pertaining to the moral and religious dimension of the person and the essential content of the Catholic faith as well as the programs of Catholic moral and religious instruction approved by the Catholic committee or possess equivalent training.

17. Repealed.

18. A public school recognized as Catholic must provide student services of Catholic pastoral animation during the time devoted to educational services or outside that time.

19. In an elementary school, any person in charge of pastoral animation shall:

- (1) have acquired 30 credits in theology, catechetics or Catholic pastoral animation, possess equivalent training or, after evaluation of his qualifications, have relevant experience;
- (2) have authorization in writing from the bishop of the diocese in which the school is located.

20. In a secondary school, any person appointed by the school board as a pastoral animator shall:

- (1) hold an undergraduate university degree comprising not less than 60 credits in theology, catechetics or Catholic pastoral animation or, in

Where a person has not fulfilled his undertaking at the expiry of the period indicated in the third paragraph, he may no longer dispense such instruction.

exceptional cases and after evaluation of his qualifications, have relevant experience;

- (2) have authorization in writing from the bishop of the diocese in which the school is located.

21. The person in charge of pastoral animation in an elementary school and the pastoral animator in a secondary school shall conduct Catholic pastoral animation activities in accordance with the handbooks of objectives approved by the Catholic committee.

22. A public school recognized as Catholic shall allot funds and provide premises for conducting pastoral animation activities.

23. The staff of a public school recognized as Catholic, as well as any other person working there, the parents and the pupils shall be respectful of both the public and Catholic character of the school.

24. This Regulation replaces the Regulation of the Catholic committee of the Conseil supérieur de l'éducation respecting confessional educational institutions recognized as Catholic (R.R.Q., 1981, c. C-60, r. 2) in respect of the elementary and secondary schools of the public school system.

25. The first evaluation report prescribed in section 7 shall be forwarded not later than July 1993.

26. Paragraph 2 of section 15 and paragraph 2 of section 16 and 16.1 apply from 1 July 1994.

They do not apply to persons who, in the five years preceding that date, dispensed Catholic moral and religious instruction for at least one year on a full-time basis or the equivalent on a part-time basis.

Subject to the second paragraph, any person hired or assigned to dispense Catholic moral and religious instruction from 1 July 1994 and who does not meet the requirements prescribed in paragraph 2 of section 15 or paragraph 2 of section 16 and 16.1 may dispense such instruction where he undertakes in writing to meet those requirements within two years following the year in which he gave such an undertaking, in the case of a teacher at the elementary level or a special education teacher at the elementary or secondary level and within five years following the year in which he gave such an undertaking, in the case of a teacher at the secondary level.

27. Paragraph 1 of section 19 applies only to persons who, from 1 July 1992, are placed in charge of pastoral animation for the first time.

28. Paragraph 1 of section 20 does not apply to persons classified as pastoral animators on 30 June 1988.

28.1 Division I does not apply to confessional or dissentient school boards and the other provisions of this Regulation shall apply to them only on the date to be fixed by Order in Council of the Government to make section 22 of the Act respecting the Conseil supérieur de l'éducation (R.S.Q., c. C-60) applicable to them.

29. This Regulation comes into force on 1 July 1988.

Protestant Committee Regulation

(Regulation of the Protestant Committee of the Conseil Supérieur de L'éducation Regarding Protestant Moral and Religious Educaiton as Well as the Recognition Educational Institutions as Protestant [Act respecting the Conseil supérieur de l'éducation, R.S.Q., c. C-60, a. 22])

1. In this regulation, the following meanings apply:
 "school authority": a school board governed by the Education Act (R.S.Q., c. I-13.3) and by the Education Act for autochthonous Crees, Inuit and Naskapi (R.S.Q., c. I-14) and the administration of an educational institution governed by the Private Education Act (R.S.Q., c. E-9);

"educational institution": a school or a private educational institution administered by a school authority;

"parent": the holder of parental authority, or barring opposition by the former, the person who has custody of the pupil.

2. The school authority which wants to request recognition of an educational institution as Protestant Committee and if it is a corporation it must attach to that request a resolution of its governing body.

3. In order to be recognized as Protestant and to have this recognition maintained by the Protestant Committee, and educational institution must:

- 1° observe the requirements of and conform to this regulation;
- 2° teach the curricula and use the textbooks and teaching materials or categories of teaching materials approved for moral and religious education by the Protestant Committee;
- 3° teach only local curricula of Protestant moral and religious education approved by the Protestant Committee.
- 2° by fostering an understanding of the moral and religious values of the community in which the pupil lives;
- 3° by cultivating respect for all religious traditions including the pupil's own religious tradition;
- 4° by helping the pupil to become aware of the moral principles directing the pupil's actions;

4. An educational institution recognized at Protestant may organize activities of a religious nature which are intended to create a sense of belonging to the same religious tradition, to provide an opportunity to celebrate important events of a religious nature and to contribute to the development of a sense of personal identity.

No pupil, however, shall be required to participate in such activities if, for reasons of conscience, an exemption is requested in writing from the head of the educational institution by the parent.

A pupil who has reached the secondary three level may make that request.

5. A teacher shall respect the philosophy and confessional character of a recognized educational institution.

In the performance of his duties, a teacher shall respect the pupil's personal religious or ideological point of view.

Every teacher shall have a knowledge of moral development in the child.

6. Any educational institution which teaches Protestant moral and religious education shall offer to every pupil who receives this subject, the curriculum approved by the Protestant Committee.

In elementary level, a minimum of 100 minutes per week or the equivalent, shall be devoted to the moral and religious education program.

In secondary level, a minimum of 50 hours per year shall be devoted to the moral and religious education program.

7. The pupil who enrolls in a Protestant moral and religious education program shall be evaluated in order to ascertain whether the pupil has attained the objectives of the program.

8. Notwithstanding article 6, Protestant moral and religious education is not required in a program of vocational education.

9. The aim of Protestant moral and religious education is to foster the personal development of the pupil:

1° by providing knowledge of the Bible;

5° by contributing to the development of the reasoning used to make moral judgements.

Moreover, within the framework of an educational project and within the limits of the Protestant moral and religious educational program, instruction of a denominational character appropriate to the pupil's own denomination may be given, at the request of the parent's,

or, where it applies, the pupil who has reached the secondary three level.

10. After 1 July 1994, only a teacher having the following qualifications may be assigned to Protestant moral and religious education:

1° to teach Protestant moral and religious instruction in elementary schools, a teacher must have taken, in a university training program, a three-unit course dealing with moral and religious development in children and young people and the pedagogy specific to Protestant moral and religious instruction in elementary schools;

2° to teach Protestant moral and religious instruction in the first cycle of the secondary level, a teacher must have taken, in a university program, a three-unit course in each of the following five fields: moral and religious development in young people and relevant pedagogy, the curriculum content and the pedagogy relevant to Protestant instruction, Bible studies, world religious and ethics;

3° to teach Protestant moral and religious instruction in the second cycle of the secondary level, a teacher must have taken, in a university program, a certificate with specialization in Protestant moral and religious instruction or have obtained a 30-unit diploma in moral and religious instruction.

11. Article 10 does not apply to a teacher who gave Protestant moral and religious education during the 1993-1994 school year and to the teacher who did not teach during that year owing to a leave provided for in the employment conditions but who gave that instruction before the leave.

12. Any teacher hired or assigned for the first time from 1 July 1994, who does not meet the requirements of paragraphs 1 to 3 of section 10, may give that instruction provided that the teacher undertakes in writing to meet the requirements within two years following the date on which the undertaking was signed in the case of a teacher in an elementary school, and within four years following the date on which the undertaking was signed in the case of a teacher at the secondary level. At the expiry of the time period, a teacher who has not respected the undertaking may no longer teach Protestant moral and religious education.

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- i. *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3 (formerly the *British North America Act, 1867*).
 - ii. Citizens for the Constitutional Right to Denominational Schools, "Brief on the amendment to section 93 of the Constitution to

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- the Joint Committee of the Government of Canada". *Mémoires présentés au Comité mixte spécial pour modifier l'article 93 de la Loi constitutionnelle de 1867 concernant le système scolaire au Québec* (Cartable 1, No. 13) (Ottawa: Comité mixte spécial pour modifier l'article 93 de la Loi constitutionnelle de 1867 concernant le système scolaire au Québec, 1977) at 3.
 - iii. La Centrale de l'enseignement du Québec, "L'article 93 de la loi constitutionnelle de 1867 doit être modifié: Mémoire présenté au Comité mixte special au sujet de la modification de l'article 93". *Mémoires présentés au Comité mixte spécial pour modifier l'article 93 de la Loi constitutionnelle de 1867 concernant le système scolaire au Québec* (Cartable 1, No. 11) (Ottawa: Comité mixte spécial pour modifier l'article 93 de la Loi constitutionnelle de 1867 concernant le système scolaire au Québec, 1977) at 9 [free translation].
 - iv. Fédération des comités de parents de la province de Québec inc., "Brief to the Special Joint Committee of the House of Commons and Senate". *Mémoires présentés au Comité mixte spécial pour modifier l'article 93 de la Loi constitutionnelle de 1867 concernant le système scolaire au Québec* (Cartable 1, No. 27) (Ottawa: Comité mixte spécial pour modifier l'article 93 de la Loi constitutionnelle de 1867 concernant le système scolaire au Québec, 1977) at 2.
 - v. See S. Dion, *Notes for the Evidence Presented by the Honourable Stéphane Dion President of the Privy Council and Minister for Intergovernmental Affairs to the Special joint Committee of the Senate and House of Commons Studying the Resolution to Amend Section 93 of the Constitution Act, 1867* (Ottawa: Author, 1977) at 9.
 - vi. *Education Act*, R.S.Q., c. I-13.3., ss. 726, 727.
 - vii. *Report of the Royal Commission of Inquiry on Education in the Province of Québec* (Vols. I-V) (Québec: Government of Québec, 1963-1966) [Parent Commission].
 - viii. *Charter of the French Language*, R.S.Q., c. C-11.
 - ix. P. Foucher, *Constitutional Guarantees and Linguistic School Boards in Québec* (Montréal: McGill University, Office of Research on Educational Policy, 1997); W.J. Smith, *Policy Talk: Restructuring School Boards in Québec: Can the Window of Opportunity be Opened?* (Montréal: McGill University, Office of Research on Educational Policy, 1997); W.F. Foster & W.J. Smith, *Restructuring Education in Québec: The Amendment of Section 93*

- (Montréal: McGill University, Office of Research on Educational Policy, 1997).
- x. W.J. Smith, *Policy Talk: Restructuring School Boards in Québec: Bill 109 and Linguistic School Boards* (Montréal: McGill University, Office of Research on Educational Policy, 1997); W.J. Smith, & W.F. Foster, *Policy Talk: Restructuring School Boards in Québec: First Steps Toward School-based Renewal* (Montréal: McGill University, Office of Research on Educational Policy, 1997).
- xi. W.F. Foster, & W.J. Smith, *Policy Talk: Decentralizing Authority to Schools* (Montréal: McGill University, Office of Research on Educational Policy, 1997); W.J. Smith, & W.F. Foster, *The Governance of Education in Québec: A Comparison of Present and Proposed Provisions* (Montréal: McGill University, Office of Research on Educational Policy, 1997).
- xii. Task Force on the Teaching of History. *Learning from the Past*. (Québec: Ministère de l'Éducation, 1996) at 3.
- xiii. W.J. Smith, *The Constitutional Protection of Protestant School Boards in Québec: A Legal Oxymoron* (Montréal: McGill University, Office of Research on Educational Policy, 1993); W.J. Smith, "Constitutional Protection and School Reform in Québec" (1997) 6:4 *Capsle Comments* 4; W.J. Smith, *Themes and Traditions in Québec Education: A Source Book for Educators* (Montréal: McGill University, Office of Research on Educational Policy, 1998).
- xiv. Conseil supérieur de l'éducation du Québec, *For a Fair Evolution of School Structures in Québec* (Québec: Author, 1986) at 2.
- xv. Parent Commission, above endnote 7, Vol. I at 3.
- xvi. Ibid. at 4.
- xvii. *McCullum v. Board of Education*, 333 U.S. 203 (1948) at 212.
- xviii. J.C. Long & R.F. Magsino, "Legal Issues in Religion and Education" (1992) 4 *E.L.J.* 189 at 198.
- xix. F. Peters, "Religion and Schools in Canada," in W.F. Foster & F. Peters (eds.), *Education and Law: Strengthening the Partnership* (Proceedings of the conference of the Canadian Association for the Practical Study of Law in Education, Edmonton AB, May, 1991) (Welland ON: Soleil, 1992) 234 at 236.
- xx. C.F. Goulson, *A Source Book of Royal Commissions and Other Major Governmental Inquiries in Canadian Education, 1787-1978* (Toronto: Toronto University Press, 1981).
- xxi. *Operation Dismantle v. R.*, [1985] 1 S.C.R. 440 at 449 per Wilson J.
- xxii. See *Ex parte Renaud* (1873), 14 N.B.R. 273 (C.A.); *Mahe v. Town of Portland*, [1874] Wheeler's Confederation of Canada, 338.
- xxiii. See for Manitoba: *Manitoba Act, 1870*, 33 Vict., c. 3, s. 22(1)) and *City of Winnipeg v. Barrett*, [1892] A.C. 145 (P.C.); British Columbia: *British Columbia Terms of Union*, 1871, Order of Her Majesty in Council admitting British Columbia in the Union dated 16th day of May, 1871; and Prince Edward Island: *Prince Edward Island Terms of Union, 1873*, Order of Her Majesty in Council admitting Prince Edward Island in the Union dated 26th day of June, 1873).
- xxiv. See for Alberta: *Alberta Act, 1905*, 4-5 Edw. VII, c. 3 (Can.); and Saskatchewan: *Saskatchewan Act, 1905*, 4-5 Edw. VII, c. 3 (Can.).
- xxv. See *Newfoundland Act, 1949*, 12-13 Geo. VI, c. 22 (U.K.), s. 17.
- xxvi. See for North West Territories: *Northwest Territories Act*, R.S.C. c. N-22, s. 16; and Yukon Territory: *Yukon Act*, R.S.C. c. Y-2, s. 17).
- xxvii. L.P. Audet, "Education in Canada East and Québec: 1840-1875", in J.D. Wilson, R.M. Stamp & L.P. Audet (eds), *Canadian Education: A History* (Scarborough, Ont.: Prentice-Hall, 1970) 167 at 184 (footnote omitted).
- xxviii. L.P. Audet, "Educational Developments in French Canada after 1875", in J.D. Wilson, R.M. Stamp & L.P. Audet (eds), *Canadian Education: A History* (Scarborough, Ontario: Prentice-Hall, 1970) 337 at 338.
- xxix. C.B. Sissons, *Church and State in Canadian Education: An Historical Study* (Toronto: Ryerson, 1959) at 146.
- xxx. *Act Respecting the ministère de l'Éducation*, R.S.Q., c. M-15.
- xxxi. *Act Respecting the Conseil supérieur de l'éducation*, R.S.Q., c. C-60.
- xxxii. P. Gallagher, "Power and Participation in Educational Reform" (1972) 7 *McGill J. of Ed.* 149 at 152.
- xxxiii. Parent Report, above endnote 7, Vol. 3 at 136-145.
- xxxiv. Ibid. at 139.
- xxxv. H. Milner, *The Long Road to Reform: Restructuring Education in Quebec* (Montréal: McGill-Queens Press, 1986) at 27.
- xxxvi. See Bill 62, *Act Respecting School Organization on the Island of Montreal*, 4 Sess., 28th Leg., Québec, 1969 (first reading 4 November 1969).
- xxxvii. See Bill 28, *Act Respecting the Reorganization of School Boards of the Island of Montreal*, 2d

- Sess., 29th Leg., Québec, 1971 (1st reading 6 July 1971).
- xxxviii. *Act Respecting the Regrouping and Management of School Boards*, S.Q. 1971, c. 67.
- xxxix. *Act to Promote School Development on the Island of Montreal*, S.Q. 1972, c. 60.
- xl. Ministère de l'Éducation du Québec, *The Québec School: A Responsible Force in the Community* (Rev. ed.) (Québec: Author, 1982).
- xli. Bill 40, *An Act Respecting Public Elementary and Secondary Education*, 4th Sess., 32d Leg., Québec, 1983 (1st reading 20 June 1983).
- xlii. *Quebec Association of Protestant School Boards v. Québec (A.G.)* (1985), 21 D.L.R. (4th) 36, [1985] C.S. 872.
- xliii. *Reference Re Education Act of Québec*, [1990] R.J.Q. 2498 (C.A.), aff'd [1993] 2 S.C.R. 511, 105 D.L.R. (4th) 266.
- xliv. *Protestant School Board of Montreal v. Minister of Education of Québec* (1976), 83 D.L.R. (3d) 645 (Que. Sup. Ct.), [1976] C.S. 430; leave to appeal refused (1978), 83 D.L.R. (3d) 679n (Que. C.A.). The statute had by then been repealed and replaced by the *Charter of the French Language*, R.S.Q., c. C-11.
- xlvi. *Québec (A.G.) v. Greater Hull School Board*, [1984] 2 S.C.R. 575 aff'g (*sub nom. Lavigne v. Québec (A.G.)*) [1983] C.A. 370, rev'g (1981), 133 D.L.R. (3d) 606 (Que. Sup. Ct.), [1981] C.S. 337.
- xlvi. *Greater Montreal Protestant School Board v. Québec (A.G.)*, [1989] 1 S.C.R. 377, aff'g (1987), 41 D.L.R. (4th) 229, [1987] R.J.Q. 1028 (Que. C.A.), aff'g (1985), [1986] R.J.Q. 48 (Que. Sup. Ct.).
- xlvi. *Reference Re Education Act (Que)*, above, endnote 43.
- xlvi. Milner, H., above, endnote 35 at 16.
- xlix. *Hirsch v. Montreal Protestant School Commissioners* (1928), 1 D.L.R. 1041 (P.C.), aff'g [1926] 2 D.L.R. 8, [1926] S.C.R. 246, rev'g (in part) 31 Rev. de Jur. 440 (Que. K.B.).
- i. *Pinsler v. Protestant Board of School Commissioners* (1903), 23 Que. C.S. 365.
- li. N. Henchey & D. Burgess, *Between Past and Future: Québec Education in Transition* (Calgary: Detselig, 1987) at 26-27.
- lii. M. McAndrew, "Ethnicity, Multiculturalism, and Multicultural Education in Canada", in R. Gosh & D. Ray (eds), *Social Change and Education in Canada* (2d) (Toronto: Harcourt Brace Jovanovich, 1991) at 138.
- liii. Conseil supérieur de l'éducation du Québec, *School and the Children of Various Ethnic and Religious Groups* (Advice to the Minister of Education) (Québec: Author, 1979); Conseil supérieur de l'éducation du Québec, *Intercultural Education* (Advice to the Minister of Education) (Québec: Author, 1983); Conseil supérieur de l'éducation du Québec, *The Educational Challenges of Plurality* (Advice to the Minister of Education). (Québec: Author, 1987); Conseil supérieur de l'éducation du Québec, *Pour un accueil et une intégration réussis des élèves des communautés culturelles* (Advice to the Minister of Education) (Québec: Author, 1993).
- liv. Conseil supérieur de l'éducation du Québec, *The Educational Challenges of Plurality*, above endnote 53, at 4.
- lv. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act*, 1982 (U.K.), 1982, c. 11 [*Canadian Charter*].
- lvi. C. Leduc & P.R. DeMassy, *Sharing a Better Life Together Through Human Rights* (Montréal: Modulo Éditeur, 1989) at 14.
- lvii. J.D. van der Vyver, "Introduction: Legal Dimensions of Religious Human Rights: Constitutional Texts" in J.D. van der Vyver & J. Witte Jr. (eds), *Human Rights in Global Perspective: Legal Perspectives* (The Hague: Martinus Nijhoff Publishers, 1996) at xiv.
- lviii. *Universal Declaration of Human Rights*, UN Doc. A/Res/217 A(III), 10 December 1948 [*Universal Declaration*].
- lix. *International Covenant on Civil and Political Rights*, UN Doc. A/Res/2200 A (XXI), 16 December 1966 (acceded to by Canada on 19 May 1976) [*Covenant I*].
- lx. *International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/Res/2200 A (XXI), 16 December 1966 (acceded to by Canada on 19 May 1976) [*Covenant II*].
- lxi. *Convention on the Rights of the Child*, UN Doc. A/Res/44/25, 20

- November 1989 (acceded to be Canada on 11 December 1991) [Convention].
- lxii. S.Toope, "The Convention on the Rights of the Child" in M. Freeman (ed.), *Children's Rights: A Comparative Perspective* (Aldershot, UK: Dartmouth Publishing, 1996) 33.
- lxiii. K. H. Fogarty, *Equality Rights and Their Limitations in the Charter* (Toronto: Carswell, 1987) at 162.
- lxiv. See A.F. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 *Canadian Yearbook of International Law* 244.
- lxv. *Indian Act*, S.C., 1985, c. 27, s. 4.
- lxvi. *Re Mitchell and the Queen* (1984), 150 D.L.R. (3d) 449 (Ont. H.C.).
- lxvii. *International Fund for Animal Welfare Inc. v. Canada*, [1987] 1 F.C. 244.
- lxviii. *Convention for the Protection of Human Rights and Freedoms* (1955), 213 U.N.T.S. 221.
- lxix. *R. v. Rahey*, [1987] 1 S.C.R. 588.
- lxx. *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 349.
- lxxi. *Covenant II*, art. 4.
- lxxii. *Covenant I*, art. 18(3); *Convention*, art. 14(3).
- lxxiii. See e.g., *Covenant I*, art. 4.
- lxxiv. *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.
- lxxv. *Ibid.*, s. 52(1).
- lxxvi. *Reference re Public Service Employee Relations Act (Alta.)*, above endnote 70, at 394 per McIntyre J.
- lxxvii. *Min. of Home Affairs v. Fisher*, [1980] A.C. 319 (P.C.) at 328 per Lord Wilberforce quoted with approval in *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 156. See also *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 509; *Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 179.
- lxxviii. *Canadian Charter*, s. 52.
- lxxix. W.J. Smith, "Rights and Freedoms in Education: The Application of the *Charter* to Public Schools" (1993-94) *E.L.J.* 107.
- lxxx. *Canadian Charter*, s. 27. See also *Québec Charter*, s. 43: "Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group".
- lxxxi. *Canadian Charter*. *Ibid.*, s. 28.
- lxxxii. *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.
- lxxxiii. Hogg, P., *Constitutional Law of Canada* (Toronto: Carswell, 4th ed., 1996) at 677.
- lxxxiv. *R. v. Oakes*, [1986] 1 S.C.R. 105.
- lxxxv. Hogg, above endnote 83, at 682.
- lxxxvi. The provincial and territorial statutes dealing with human rights are listed below. For purposes of discussion, the generic term *Human Rights Code*, or when the context permits, *Code*, will be used for every jurisdiction except Québec when the term *Québec Charter* also will be used in the text.
- Alberta [AB] - *Citizenship and Multiculturalism Protection Act* R.S.A. 1980, c. H-11.7 ("AB Code");
- British Columbia [BC] - *Human Rights Act*, S.B.C. 1984, c. 22 ("BC Code");
- Manitoba [MB] - *Human Rights Code*, S.M. 1987-88, c. 45 ("MB Code");
- New Brunswick [NB] - *Human Rights Act*, R.S.N.B. 1973, c. H-11 ("NB Code");
- Newfoundland [NF] - *Human Rights Code*, R.S.N. 1990, c. H-14 ("NF Code");
- North West Territories [NT] - *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2 ("NT Code");
- Nova Scotia [NS] - *Human Rights Code*, R.S.N.S. 1989, c. 214 ("NS Code");
- Ontario [ON] - *Human Rights Code*, R.S.O. 1990, c. H-19 ("ON Code");
- Prince Edward Island [PE] - *Human Rights Act*, R.S.P.E.I. 1988, c. H-12 ("PE Code");
- Quebec [QC] - *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Québec Charter*");
- Saskatchewan [SK] - *Saskatchewan Human Rights Code*, R.S.S. 1978, c. S-24.1 ("SK Code");

- Yukon [YT] - *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11 ("YT Code").
- lxxxvii. H. Brun & P. Brun, *Chartres des droits de la personne: législation, jurisprudence et doctrine* (10th ed.) (Montreal: Wilson & LaFleur, 1997).
- lxxxviii. *Winnipeg School Division No. 1 and Cranton, Re*, [1985] 2 S.C.R. 150 at 156 per McIntyre J.
- lxxxix. *Ontario Human Rights Commission and Simpson Sears Ltd., Re*, [1985] 2 S.C.R. 536 at 547 per McIntyre J.
- xc. See *Ford v. Québec (A.G.)*, [1988] 2 S.C.R. 712; *Godbout v. Longueuil (City)* (1997), 152 D.L.R. (4th) 577 (S.C.C.).
- xc. See *Ford v. Québec (A.G.)*, above endnote 90; *Devine v. Québec (A.G.)*, [1988] 2 S.C.R. 798.
- xcii. *Human Rights Codes*, above endnote 86: BC, s. 1.2; NF, s. 5; PE, s. 1(2).
- xciii. *Human Rights Codes*, above endnote 86: AB, s.1; MB, s. 58; ON, s. 47; QC, ss. 52-53; SK, s. 44; YT, s. 36.
- xciv. *Québec Charter*, above endnote 86, s. 52.
- xcv. *Human Rights Codes*, above endnote 86 : QC, s. 40; SK, s. 13. And see MB, ss. 1, 13.
- xcvi. *Québec (Commission des droits de la personne) and Commission scolaire Saint-Jean-sur-Richelieu*, [1994] R.J.Q. 1227 (Que. C.A.) at 16; see also P. Garant, *Droit Scolaire* (Cowansville: Yvon Blais Inc., 1992) at 205.
- xcvii. H. Côté, *Le droit à l'éducation élémentaire publique au Québec* (Cowansville, Qc: Yvon Blais, 1984); J.-Y. Morin, "La constitutionnalisation progressive de la Charte des droits et libertés de la personne" in Les éditions Thémis (Ed.). *De la Charte québécoise des droits et libertés: Origine, nature et défis* (Montréal: Thémis, 1989) 25.
- xcviii. See *R. v. Jones*, [1986] 2 S.C.R. 284.
- xcix. See M.D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997) at 360.
- c. *Human Rights Codes*, above endnote 86: AB, s. 1; QC, s. 3; SK, s. 4; YT, s. 3.
- ci. *R. v. Big M Drug Mart*, above, endnote 77 at 336.
- cii. *Ibid.* at 347.
- ciii. *Ibid.* at 336, 337.
- civ. *Ibid.* at 337.
- cv. *Covenant I*, art. 18(4); *Covenant II*, art. 13(3).
- cvi. Evans, above endnote 99, at 220.
- cvi. *First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (1955), 213 U.N.T.S. 262, art. 2.
- cvi. *Kjeldsen, Busk, Madsen and Pedersen v. Denmark*, Ser. A, No. 23 (1976) at para. 53.
- cix. Evans, above endnote 99, at 356.
- cx. *Hartikainen v. Finland*, No. 40/1978 cited in M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Arlington: N.P. Engel, 1993) at 333.
- cx. *Education Acts*, below endnote 201: AB, ss. 8(3)(e), 24.1; BC, s. 3(3)(a); MB, ss. 60(5), 262(2)(a); NB, s. 57(3); NF, s. 70; NT, s. 11; NS, ss. 113(b), 130; ON, s. 21(2); PE, s. 69(4)(b); QC, s. 15(4); SK, s.157(a.1); YT, ss. 19, 22(e).
- cxii. *R. v. Jones*, above endnote 98.
- cxiii. *Ibid.* at 312 per Wilson J.
- cxiv. *Zylberberg v. Sudbury Board of Education* (1988), 52 D.L.R. (4th) 577 (Ont. C.A.).
- cxv. *Ibid.* at 591.
- cxvi. *Ibid.* at 592.
- cxvii. *Ibid.* at 592-593
- cxviii. *Ibid.* at 599.
- cxix. *Russow v. A.G. British Columbia* (1989), 62 D.L.R. (4th) 98 (B.C.S.C.).
- cxx. *Manitoba Association for Rights & Liberties Inc. v. Manitoba*, [1992] 5 W.W.R. 749 (Man. Q.B.).
- cxxi. *Canadian Civil Liberties Assn v. Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1 (C.A.).
- cxxii. *Ibid.* at 4.
- cxxiii. *Bal v. Onatrio* (1994), 121 D.L.R. (4th) 96 (Ont. Ct. (Gen. Div.)), aff'd (1997) 34 O.R. (3d) 484 (C.A.).
- cxxiv. *Adler v. Ontario*, [1996] 3 R.C.S. 609.
- cxxv. *Bal*, above, note 123 (Ont. Ct. (Gen. Div.)) at 130.
- cxxvi. W.S. Tarnopolsky & W.F. Pentney, *Discrimination and the Law* (Toronto: Carswell, 1985) at 4/3.
- cxxvii. R.S. Abella, *Report of the Commission on Equality in Employment* (Ottawa: Ministry of Supply and Services, 1984) at 2.
- cxxviii. *Commission scolaire régionale de Chambly v. Bergevin* [1994] 2 S.C.R. 525 at 545-46 per Cory J. for the majority, citing with approval from *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489.
- cxxix. *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202 at 208.

- cxxx. Tarnopolsky & Pentney, above endnote 126, at 4/80-4/81 citing Black.
 cxxxi. P. Bosset & M. Caron, "Un nouvel outil de lutte contre la discrimination: Les programmes d'accès à l'égalité" in Les éditions Thémis, ed., *De la Charte québécoise des droits et libertés: Origine, nature et défis* (Montréal: Thémis, 1989) 151.
- cxxxii. See *University of British Columbia v. Berg*, [1993] 3 S.C.R. 353.
 cxxxiii. A.W. MacKay & V.C. Kazmierski, "And on the Eighth Day, God gave us...Equality in Education: *Eaton v. Brant (County) Board of Education* and Inclusive Education" (1997) 7 *National Journal of Constitutional Law*, 1; W.J. Smith, "Integrating Students with Disabilities: Is there Justice for All?" (1994) 4:1 *Capsle Comments* 3.
 cxxxiv. *Adler v. Ontario*, above endnote 124.
 cxxxv. *Ibid.* at 700 per Sopinka J.
 cxxxvi. *Ibid.* at 708-709.
 cxxxvii. *Bal v. Ontario*, above endnote 123.
 cxxxviii. Ontario Ministry of Education, *Policy/Program Memorandum No. 112: Education about Religion in Public Elementary and Secondary Schools* (1990) (cited in *Bal v. Ontario*, above endnote 123, at 107). And see *Regulation 298: Operation of Schools - General*, R.R.O. 1990, ss. 4, 28, 29.
 cxxxix. *Bal v. Ontario*, above endnote 123, at 130.
 cxl. *Islamic Schools Federation of Ontario v. Ottawa Board of Education* (1997), 145 D.L.R. (4th) 659 (Ont. Ct. (Gen. Div.)).
 cxli. *Regulation 304: School Year Calendar*, R.R.O. 1990.
 cxlii. *Commission scolaire régionale de Chambly v. Bergevin*, above endnote 128.
 cxliii. *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364 (Ont. H.R. Comm.); motion to quash refused (*sub nom. Peel Board of Education v. Ontario Human Rights Commission*) (1990), 72 O.R. (2d) 593 (Ont. H.C.); aff'd (1991), 80 D.L.R. (4th) 475 (Ont. H.C.); leave to appeal to Ont. C.A. refused (1991), 3 O.R. (3d) 531n (Ont. C.A.).
 cxliv. I. Block, "Behind the Hijab Debate", *The Gazette* (1994, December 3) at B1.
- cxlv. For a discussion of this issue see Commission des droits de la personne et des droits de la jeunesse, *Religious Pluralism in Québec: A Social and Ethical Challenge* (Québec: Author, 1995).
 cxlvi. See *Québec (Commission des droits de la personne) and Commission scolaire Saint-Jean-sur-Richelieu*, [1991] R.J.Q. 3003 (Que. Human Rights Trib.); rev'd in part re execution of judgement pending appeal (1992), 94 D.L.R. (4th) 622, 44 Q.A.C. 130 (Que. C.A.); aff'd [1994] R.J.Q. 1227 (Que. C.A.); and *Québec (Commission des droits de la personne) and Commission scolaire régionale Chauveau*, [1993] R.J.Q. 929, 18 C.H.R.R. D/433 (Que. Human Rights Trib.); rev'd [1994] R.J.Q. 1196 (Que. C.A.).
 cxlvii. P. Carignan, "L'égalité dans le droit: Une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne" (1987) 21 R.J.T. 491; D. Proulx, "La norme québécoise d'égalité dérape en Cour suprême: Commentaire des arrêts Forget, Devine et Ford" (1990) 24 R.J.T. 375. See also *Devine v. Québec (A.G.)*, above endnote 91; *Ford v. Québec (A.G.)*, above endnote 90; *Forget v. Québec (A.G.)*, [1988] 2 S.C.R. 90.
 cxlviii. *Doré v. Commission scolaire de Drummondville* (1980), [1981] C.S.160, aff'd (1982), [1983] 4 C.H.R.R. 1377 (Que. C.A.); and see D. Chénard, "Le contrôle judiciaire de l'administration scolaire et l'intégration des élèves intellectuellement handicapés" in P. Chagnon (ed.), *Developpements récents en droits scolaire* (Service de la formation permanent du Barreau du Québec) (Cowansville, Qc: Yvon Blais, 1991).
 cxlix. D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 293-294.
 cl. *Human Rights Codes*, above endnote 86: NB, s. 13; NT, s. 9; NS, s. 25; PE, s. 20.
 cli. *Collège Notre-Dame du Sacré-Coeur v. Commission des droits de la personne du Québec*, [1994] RJQ 1324 (Que. Sup. Ct.).
 clii. *Brossard (Ville) v. Commission des droits de la personne du Québec*, [1988] 2 S.C.R. 279 at 336.
 cliii. *A.D.G.Q. v. Catholic School Commission of Montreal Association* (1979), 112 D.L.R. (3d) 230 (Que. Sup. Ct.).
 cliv. *Brossard (Ville) v. Commission des droits de la personne du Québec*, above endnote 152, at 335.
 clv. *A.D.G.Q. v. Catholic School Commission of Montreal Association*, above endnote 153.
 clvi. K. Swinton, "Application of the Canadian Charter of Rights and Freedoms" in W.S.

- clvii. Tarnopolsky & G.-A. Beaudouin (eds), *Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) 41.
- clviii. S.N. Lederman & A. Ristic, "The Relation between Federal and Provincial Human Rights Legislation and Charter Equality Rights" in L. Smith (ed.), *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) at 95-96.
- clviii. *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728 (Ont. C.A.), rev'g 21 D.L.R. (4th) 599 (Ont. H.C.); original complaint subsequently upheld (1987), 9 C.H.R.R. D/4549.
- clix. Ibid. at 744 (C.A.).
- clx. *Human Rights Codes*, above endnote 86: BC, s. 38; MB, s. 11; NF, s. 19; ON, s. 14; SK, s.47; YK, s. 12.
- clxi. See above endnote 150.
- clxii. See Bosset & Caron, above endnote 131; J.K. Samson, "Le droit à l'égalité et la Charte québécoise des droits et libertés de la personne" in G.-A. Beaudoin (ed.), *Vues canadiennes et européennes des droits et libertés* (Cowansville QC: Yvon Blais, 1988) 133.
- clxiii. *Regulation Respecting Affirmative Action Programs*, R.R.Q., c. C-12, r. 0.1.
- clxiv. *Québec (Commission des droits de la personne) and Commission scolaire régionale Chauveau*, above endnote 146.
- clxv. R. Jurianisz, "Section 15 and the Human Rights Codes" in G.-A. Beaudouin (ed) *Your Client and the Charter: Liberty and Equality* (Cowansville, Qc: Yvon Blais, 1988) 321.
- clxvi. *Shewchuk v. Ricard*, [1986] 4 W.W.R. 289 (B.C.C.A.) at 295 (leave to appeal to S.C.C. refused, [1987] 2 W.W.R. lxx (note) (S.C.C.)).
- clxvii. *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3rd) 387 (Ont. C.A.), rev'g (*sub nom Roberts and Ontario (Ministry of Health), Re*) (18 December 1990), Toronto 467/89 (Ont. H.C.), aff'g (14 April 1989), (Ont. H.R. Bd. of Inquiry) [Unreported].
- clxviii. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
- clxix. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, above endnote 128.
- clxx. *Action travail des femmes. v. C.N.R.*, [1987] 1 S.C.R. 1114.
- clxxi. *Ontario Human Rights Commission and Simpsons-Sears Ltd., Re*, above endnote 89.
- clxxii. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, above endnote 128.
- clxxiii. *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.
- clxxiv. Ibid. at 982, 984.
- clxxv. *Commission scolaire régionale de Chambly v. Bergevin*, above endnote 128.
- clxxvi. *Caldwell v. Stuart*, [1984] 2 S.C.R. 603.
- clxxvii. Ibid. at 618.
- clxxviii. *Gore v. Ottawa Separate School Board* [unreported] as summarized in W.S. Tarnopolsky & W. Pentney, *Discrimination and the Law, Including Equality Rights under the Charter* (including cumulative supplements until July 1998) (Toronto: Carswell, 1998) at 6/37.
- clxxix. Ibid. at 6/39. Ans see *Ontario English Catholic Teachers Assn. v. Dufferin-Peel Roman Catholic Separate School Board*, (1995) 128 D.L.R. (4th) 179 (Ont. Ct. Gen Div.).
- clxxx. *Re Essex County Roman Catholic Separate School Board and Porter* (1978), 78 D.L.R. (3d) 417 (Ont. Div. Ct.); *Re Essex County Roman Catholic Separate School Board and Tremblay Webster* (1984), 45 O.R. (2d) 83 (C.A.); *Daly v. Ontario (A.G.)*, (1997) 145 D.L.R. (4th) 464 (Ont. Ct. Gen. Div.); *Stack v. Roman Catholic School Board for St. John's* (1979), 99 D.L.R. (3d) 278 (Nfld S.C.); *Newfoundland Teachers' Association v. Newfoundland (Treasury Board)* (1988), 53 D.L.R. (3d) 161 (Nfld C.A.).
- clxxxi. *Garrod v. Rhema Christian School* (1991), 15 C.H.R.R. D/477.
- clxxxii. *Parks v. Christian Horizons* (1991), 16 C.H.R.R. D/40.
- clxxxiii. *Kearly v. Pentecostal Assemblies Board of Education* (1993), 19 C.H.R.R. D/473.
- clxxxiv. Tarnopolsky & Pentney, above endnote 178, at 6-61.
- clxxxv. *Human Rights Codes*, above endnote 86: AB, s. 7; BC, s. 13; MB, s. 11; NB, s. 3; NF, s. 9; NT, s. 2; NS, s. 6; ON, s. 11; PE, s. 6; SK, s. 16; YK, s. 9.
- clxxxvi. *Chabot v. School Commissioners of Lamorandiere*, [1957] Que. Q.B. 707 (C.A.) at 722.
- clxxxvii. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 42 (1976).
- clxxxviii. *Tinker v. Des Moines*, 393 U.S. 503 (1969).
- clxxxix. See e.g., *R. v. J.M.G.* (1986), 56 O.R. (2d) 705 (C.A.); *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364 (Ont. H.R. Comm.); motion to quash refused (*sub nom. Peel Board of Education v. Ontario Human Rights Commission*) (1990), 72 O.R. (2d) 593 (Ont. H.C.); aff'd (1991), 80 D.L.R. (4th) 475 (Ont. H.C.); leave to appeal to Ont. C.A. refused (1991), 3 O.R. (3d) 531n (Ont. C.A.); *R. v.*

- J.J.W. and A.D.B.* (1990), 83 Nfld & P.E.I. R. 13 (Nfld S.C.).
- cxc. *Quebec Civil Code*, art. 14.
- cxci. See e.g., *Infants Act*, R.S.B.C. 1979, c. 156, s. 16; *Medical Consent of Minors Act*, S.N.B. 1976, c. M-6.1, s. 2.
- cxcii. See e.g., *Re W (a minor)*, [1992] 4 All E.R. 627 (C.A.); *Walker (litigation guardian of) v. Region 2 Hospital Corp.* (1994), 116 D.L.R. (4th) 477 (N.B.C.A.); *C.(J.S.) v. Wren* (1986), 35 D.L.R. (4th) 419 (Alta C.A.).
- cxci. *Hewer v. Bryant*, [1970] 1 Q.B. 357.
- cxci. *B.(R.) v. Childrens Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 434-435 per Iacobucci & Major JJ. And see *C.(J.S.) v. Wren*, (1986), 35 D.L.R. (4th) 419 (Alta. C.A.).
- cxcv. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) at 242, 244-245.
- cxcvi. B. Dickens, "The Modern Function and Limits of Parental Rights" (1981), 97 *Law Quarterly Review* 462 at 485.
- cxcvii. *Eaton v. Brant (County) Board of Education* (1995), 22 O.R. (3d) 1 (C.A.) at 12, rev'd [1997] 1 S.C.R. 241.
- cxviii. *Ibid.* (SCC) at 278.
- cxix. W.J. Smith, *Themes and Traditions in Québec Education*, above endnote 13, at 88.
- cc. W.F. Foster & W.J. Smith, *Educational Governance in Canada: Restructuring for Quality and Accountability* (Montreal: Office of Research on Educational Policy, forthcoming).
- cci. The principal education statutes of each jurisdiction are listed below. For purposes of discussion, the generic term *Education Act* will be used for every province.
- AB - *School Act*, S.A. 1988, c. S-3.1 ("AB Education Act").
- BC - *School Act*, S.B.C. 1996, c. 412 ("BC Education Act").
- MB - *Public Schools Act*, R.S.M. 1987, c. P-250 ("MB Education Act").
- NB - *Education Act*, S.N.B. 1997, c. E-1.12 ("NB Education Act").
- NF - *Schools Act*, R.S.N. 1997, c. S-12.2 ("NF Education Act").
- NT - *Education Act*, R.S.N.W.T. 1995, c. 28 ("NT Education Act").
- NS - *Education Act*, S.N.S. 1995-96, c. 1 ("NS Education Act").
- ON - *Education Act*, R.S.O., 1990, c. E.2 ("ON Education Act").
- PE - *School Act*, P.E.I. 1993, c. 35 ("PE Education Act").
- QC - *Education Act*, R.S.Q., c. I-13.3 ("QC Education Act").
- SK - *Education Act*, 1995, S.S. 1996, c. E-0.2 ("SK Education Act").
- YT - *Education Act*, S.Y. 1989-90, c. 25 ("YT Education Act").
- ccii. W.J. Smith & A. Lombard, "Educational Governance in Québec: a Balance of Rights?" in W.F. Foster (ed.), *Rights, Responsibilities and Reasonableness: Striking the Balance in Education* (Proceedings of the Conference of the Canadian Association for the Practical Study of Law and Education, Saskatoon, May 1994) (Châteauguay, QC: Lisbro, 1995) 153; W.J. Smith, J.E. Paquette & T. Bordonaro, *Educational Governance in Canada: A Model for Comparative Analysis* (Montréal: McGill University, Office of Research on Educational Policy, 1995).
- cciii. *Northwest Territories Act*, R.S.C. c. N-22, s. 16; *Yukon Act*, R.S.C. c. Y-2, s. 17.
- cciv. See above endnotes 22 and 23; see also G. Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council" (1962) 63 *Canadian Bar Review* 461.
- ccv. *Reference Re Bill 30*, above endnote 82. "Full funding" refers to the provision of government grants to the end of secondary schooling (grade 13), whereas separate school funding had been hitherto limited to the end of grade 10. For a discussion of this important case, see G. Bale, "Reference re Funding for Roman Catholic High Schools - Tiny Convincingly Overruled but Equality Rights Needlessly Compromised" (1989) 11 *Supreme Court Law Review* 399; P. Carignan, *Les garanties confessionnelles à la lumière du renvoi relatif aux écoles séparées de l'Ontario: Un cas de primauté d'un droit collectif sur le droit individuel à l'égalité* (Montréal: Thémis, 1992).
- ccvi. *School Boards Association of Alberta v. The Queen; Public School Boards Association of Alberta v. Attorney General of Alberta*, unreported, Nov. 28, 1995, Q.B. Action No. 9401-12053 and 9403-12272 (AB. Q.B.), appeal heard Nov. 1996, January 1997 and April 1997.
- ccvii. See above endnotes 44, 45, 46, 43.
- ccviii. W.J. Smith, "Linguistic School Boards in Québec: A Reform Whose Time has Come" (1994) 39 *McGill Law Journal* 200.
- ccix. F. Chevrete, H. Marx, & A. Tremblay, *Les problèmes constitutionnels posés par la restructuration scolaire de l'île de Montréal* (Québec: Ministère de l'Éducation, 1972) at 46.
- ccx. *Mahé v. Alberta*, [1990] 1 S.C.R. 342, rev'g (1987), 42 D.L.R. (4th) 514 (Alta. C.A.), aff'g

- (1985) 22 D.L.R. (4th) 24 (Alta. Q.B.), at 382 (S.C.R.).
- ccxi. *Constitution Amendment Proclamation, 1987 (Newfoundland Act)*, *Canada Gazette*, Pt. II, vol. 122, no. 2 (January 20, 1987).
- ccxii. See *Constitutional Amendment Act, 1997 (Newfoundland Act)*, *Canada Gazette* Pt. II, vol. 131, no. 10 (May 2, 1997); see J. Staple, "The Newfoundland Education Referendum" (1995) 5:3 *Capsle Comments* 4.
- ccxiii. *Hogan v. Newfoundland School Boards*, [1997] N.J. No. 154 (S.C.); *Constitution Amendment Act, 1998 (Newfoundland Act)*, *Canada Gazette*, Extra No. 1, vol. 132 (January 14, 1998).
- ccxiv. *Hogan v. Newfoundland School Boards*, [1998] N.J. No. 7 (S.C.); *Constitution Amendment Act, 1998 (Newfoundland Act)*, above endnote 213.
- ccxv. ON Code, above endnote 86, s. 19.
- ccxvi. SK Code, above endnote 86, ss. 13, 16.
- ccxvii. See generally W.J. Smith & W.F. Foster, *The Right to Minority Language Education in Canada: A Research Report* (Montreal: McGill University Office for Research on Education Policy, 1997).
- ccxviii. AB *Education Act*, above endnote 201, s. 24.4(c).
- ccxix. *Education Acts*, above endnote 201: AB, s. 17(1); BC, ss. 7(1)(c), 8; NB, ss. 32(1)-33(2); NS, ss. 20-23; PE, s. 66 YT, s. 116(1)(p).
- ccxx. *Education Acts*, above endnote 201: BC, s. 76; NB, s. 2(2); PE, s. 142.
- ccxxi. AB *Education Act*, above endnote 201, s. 24.3(4) & (5).
- ccxxii. Hogg, above endnote 83, at 775-76.
- ccxxiii. J. Murphy, *Restructuring Schools: Capturing and Assessing the Phenomena* (New York: Teachers College Press, 1991) at 41.
- ccxxiv. *Education Acts*, above endnote 201: AB, s. 43; NT, s. 98(5); ON, ss. 87, 158(3); SK, s. 53(1); YT, s.116.
- ccxxv. BC *Education Act*, above endnote 201, s. 76.
- ccxxvi. *Education Acts*, above endnote 201: NB, s. 2(2); PE, s. 142.
- ccxxvii. W.J. Smith & W.F. Foster, "Equal Educational Opportunity for Students with Disabilities in Canada: A Platform of Rights to Build On" (1993) 5 *E.L.J.* 193; W.J. Smith & W.F. Foster, "Equal Educational Opportunity for Students with Disabilities in Canada: Beyond the School House Door" (1993) 5 *E.L.J.* 305; W.J. Smith & W.F. Foster, "Equal Educational Opportunity for Students with Disabilities in Canada: How Far Have We Progressed" (1997) 8 *E.L.J.* 183.
- ccxxviii. See *Bal*, above endnote 123. And see *Re Board of Education for North York and the Minister of Education* (1978), 19 O.R. (2d) 547 (H.C.).
- ccxxix. AB *Education Act*, above endnote 201, ss. 16, 33.
- ccxxx. *Ibid.*, s. 33.
- ccxxxi. *Ibid.*, ss. 16, 33.
- ccxxxii. BC *Education Act*, above endnote 201, s. 76(2).
- ccxxxiii. MB *Education Act*, above endnote 201, ss. 80, 81.
- ccxxxiv. *Ibid.*, s. 84(1),(8).
- ccxxxv. *School Administration Regulation - Education Act*, NB Regulation 97-150, s. 25.
- ccxxxvi. NF *Education Act*, above endnote 201, s. 75(1)(m).
- ccxxxvii. *Ibid.*, s. 10.
- ccxxxviii. NT *Education Act*, above endnote 201, s. 77(2).
- ccxxxix. *Ibid.*, s. 77(3).
- ccxl. *Ibid.*, s. 77(2).
- ccxli. NS *Education Act*, above endnote 201, s. 64(3).
- ccxlii. ON *Education Act*, above endnote 201, s. 51 and Regulation 298, above endnote 138, s. 28.
- ccxliii. ON *Education Act*, above endnote 201, s. 51 and Regulation 298, above endnote 138, s. 29.
- ccxliv. ON *Education Act*, above endnote 201, s. 52.
- ccxlv. ON *Education Act*, above endnote 201, s. 51 and Regulation 298, above endnote 138, s. 4.
- ccxlvi. ON *Education Act*, above endnote 201, s. 51 and Regulation 298, above endnote 138, s. 29.
- ccxlvii. SK *Education Act*, above endnote 201, ss. 182, 183.
- ccxlviii. *Ibid.*, ss. 182(3), 183(3).
- ccxlix. *Education Acts*, above endnote 201: AB, s. 8(3); MB, s. 262; NB, s. 16(1); Nfld, s. 27(4); NWT, s. 27(4); ON, s. 21(2); PE, s. 70(a); SK, s. 157(1)(j); YK, s. 22(2).
- ccl. AB *Education Act*, above endnote 201, s. 16.
- ccli. *Ibid.*, s. 33(2).
- cclii. *Ibid.*
- ccliii. MB *Education Act*, above endnote 201, s. 82.
- ccliv. *Ibid.*, s. 84(4).
- cclv. *School Administration Regulation - Education Act*, above endnote 235, s. 25(5).
- cclvi. NF *Education Act*, above endnote 201, s. 10(1).
- cclvii. *Ibid.*, s. 10(1).
- cclviii. ON *Education Act*, above endnote 201, s. 51 and Regulation 298, above endnote 138, s. 29.
- cclix. ON Regulation 298, above endnote 138, ss. 4, 29(3)(c).
- cclx. *Ibid.*, s. 182(5).
- cclxi. SK *Education Act*, above endnote 201, ss.182(4), 183(4).
- cclxii. C. Richter, "Separation and Equality: An Argument for Religious Schools Within the

- Public System" (1996-97) 28 *University of Ottawa Law Review* 1 at 25.
- cclxiii. C.A. Stephenson, "Religious Exercises and Instruction in Ontario Public Schools" (1991) 49 *University of Toronto Law Faculty Review* 82 at 95.
- cclxiv. *Education Acts*, above endnote 201: AB, s. 1(1)(h); MB, ss. 82, 84(4); ON, s. 1(2).
- cclxv. SK *Education Act*, above endnote 201, s. 182(5).
- cclxvi. ON *Education Act*, above endnote 201, s. 264(1).
- cclxvii. NS *Education Act*, above endnote 201, s. 25(1)(m).
- cclxviii. *Religious Exercises in Schools Regulation*, MB Regulation 544/88.
- cclxix. *School Administration Regulation - Education Act*, above endnote 235, s. 25(4).
- cclxx. *Ibid.*, s. 25(3).
- cclxxi. NT *Education Act*, above endnote 201, s. 77(1).
- cclxxii. See B.J. Shapiro, "The Public Funding of Private Schools in Ontario" (1986) 11(3) *Canadian Journal of Education* 264.
- cclxxiii. *Education Acts*, above endnote 201: BC, s. 3(3)(a) (and BC *Independent School Act*, S.B.C. 1989, c. 51, s. 11); MB, ss. 60(5), 262(a).
- cclxxiv. *Education Acts*, above endnote 201: AB, ss. 8(3)(e), 24.1; NB, s. 57(3)(a); NF, s. 70 (see also NF *School Attendance Act*, R.S.N. 1990, c. S-9, s. 8(d)); NT, s. 11; NS, ss. 113(b), 130 (see also NS *General Regulations*, citation, s. 63(f)); ON, s. 21(2)(a); PE, s. 69(4)(b); SK, s. 157(a.1) (certain "historical high schools" do receive grants; see also SK *Independent Schools Regulations*, R.R.S. c. E-0.1 Regulation 11, ss. 2(y), 26); YT, ss. 19, 22(e).
- cclxxv. *Education Acts*, above endnote 201: AB, s. 23; BC, ss. 1, 3(3)(b), 12-13; SK, s. 157(a); YT, ss. 19, 22(e), 31; see also AB *Home Education Program Regulation*, Alta Regulation 37/89, ss. 3-5; BC *School Regulation*, B.C. Regulation 265/89, s. 3; BC *Investigation by Superintendent Order*, Ministerial Order 151/89, s. 2; *Independent School Act*, S.B.C. 1989, c. 51, s. 9; *Independent School Regulation*, B.C. Regulation 262/89, s. 6; SK *Home-Based Education Program Regulations*, R.R.S. c. E-0.1, Regulation 15, ss. 2(m), 2(n), 3-5, 24-27.
- cclxxvi. *Education Acts*, above endnote 201: MB, s. 262(b); NB, s. 57(3)(a); NT, ss. 11, 20; NS, ss. 3(1), 113(a), 128-129 (see also NS *General Regulations*, above endnote 274, s. 63(f)); ON, s. 21(2)(a); PE, ss. 69(4)(c), 139-140. See also NF *School Attendance Act*, above endnote 274, s. 8(d). For AB, BC, SK & YT, see above endnote 275.
- cclxxvii. Commission for the Estates General on Education, *Renewing Our Education System: Ten Priority Actions*, Final report of the Commission (Québec: Ministère de l'Éducation du Québec, 1996) at 49 (emphasis in original).
- cclxxviii. Ministère de l'Éducation du Québec, *A New Direction for Success: Ministerial Plan of Action for the Reform of the Education System* (Québec: Author, 1997); see also W.F. Foster & W.J. Smith, *School Governance in Québec: Delegation of Authority or Responsibility?*, paper presented at the annual meeting of the Canadian Association for the Practical Study of Law and Education (CAPSLE), Kananaskis, AB (Montreal: McGill University, Office of Research on Educational Policy, 1998).
- cclxxix. See Foucher, above endnote 9; W.J. Smith, above endnote 9.
- cclxxx. See Smith, above endnote 208.
- cclxxxi. *Constitution Amendment Act, 1997 (Quebec)*, *Canada Gazette*, Pt. II Extra, vol. 131, no. 8 (December 22, 1997).
- cclxxxii. *Act Respecting the Constitution Act, 1982*, S.Q. 1982, c. 21.
- cclxxxiii. Hogg, see endnote 83, at 36.8.
- cclxxxiv. *Human Rights Codes*, above endnote 86: NF, s. 4(2); ON, s. 19(1).
- cclxxxv. ON *Code*, above endnote 86, s. 19(2).
- cclxxxvi. ON *Education Act*, above endnote 201, s. 264(1).
- cclxxxvii. *Act Respecting the Ministère de l'Éducation*, above endnote 30, s. 8.
- cclxxxviii. See Gallagher, above endnote 32 at 37.
- cclxxxix. See generally *Act Respecting the Conseil supérieur de l'éducation*, above endnote 31.
- ccxc. See above endnotes 31 and 53.
- ccxci. See Foster & Smith, above endnote 278, for details of this reform.
- ccxcii. QC *Education Act*, above endnote 201, s. 218.
- ccxciii. *Ibid.*, s. 457.
- ccxciv. *Regulation Respecting Consultation of Parents Concerning an Application for Recognition or Withdrawal of Recognition of a School as Catholic or Protestant*, R.R.Q. c. I-13.3, r. 0.004.
- ccxcv. QC *Education Act*, above endnote 201, s. 218.
- ccxcvi. *Ibid.*, s. 520.
- ccxcvii. *Regulation Respecting the Recognition of Elementary and Secondary Schools of the Public School System as Catholic and their Confessional Character*, R.R.Q. c. C-60, r. 7.1.
- ccxcviii. QC *Education Act*, above endnote 201, s. 37.
- ccxcix. *Regulation of the Protestant Committee of the Conseil supérieur de l'éducation Regarding Protestant Moral and Religious Instruction as well as the Recognition of Educational Institutions as Protestant*, R.R.Q., c. C-60, r. 2.1.

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- ccc. QC *Education Act*, above endnote 201, ss. 36 ff.
- ccci. Ibid., ss. 239-240.
- ccci. Ibid., s. 275.
- ccci. Ibid., ss. 96.24, 96.25, 276.
- ccciv. *Act Respecting the Conseil supérieur de l'éducation*, above endnote 31, Preamble.
- cccv. QC *Education Act*, above endnote 201, s. 4.
- cccv. Stephenson, above endnote 263, at 95.
- cccvii. *Quebec Civil Code*, art. 14.
- cccviii. See *Agreement Binding The Employer Bargaining Committee for Protestant School Boards (CPNCP) and The Fédération des Professionnelles et Professionnels de l'Éducation du Québec (CEQ)* (1989-91); Ministère de l'Éducation & Quebec Association for Protestant School Boards, *Classification Plan: Professional Personnel - School Boards and Regional Boards for Protestants* (June 25, 1987).
- cccix. QC *Education Act*, above endnote 201, s. 96.21; *Regulation Respecting Consultation of Parents Concerning an Application for Recognition or Withdrawal of Recognition of a School as Catholic or Protestant*, above endnote 294; *Regulation Respecting the Recognition of Elementary and Secondary Schools of the Public School System as Catholic and their Confessional Character*, above endnote 297; *Regulation of the Protestant Committee of the Conseil supérieur de l'éducation Regarding Protestant Moral and Religious Instruction as well as the Recognition of Educational Institutions as Protestant*, above endnote 299.
- ccc. QC *Education Act*, above endnote 201, ss. 20, 21.
- cccxi. *Act Respecting the Conseil supérieur de l'éducation*, above endnote 31, Preamble.
- cccxi. QC *Education Act*, above endnote 201, s. 15.
- cccxi. *Act Respecting Private Education*, R.S.Q. c. E-9.1; *Regulation Respecting Private Educational Institutions at the Preschool, Elementary and Secondary School Levels*, R.R.Q., c. E-9.1, r. 2; *Regulation Respecting the Application of the Act Respecting Private Education*, R.R.Q. c. E-9.1, r. 1.
- ccciv. QC *Education Act*, above endnote 201, s. 15(4).
- ccc. *Regulation Respecting the Recognition of Private Educational Institutions as Catholic and their Confessional Character*, R.R.Q. c. C-60, r. 73.
- cccvi. *Mahé v. Alberta*, above endnote 210, at 383-384.
- ccc. J.S. Coleman, "The Concept of Equality of Educational Opportunity" (1968) 38 *Harvard Educational Review* 7.
- ccc. Québec Human Rights Commission, above endnote 145, at 19.
- ccc. QC *Education Act*, above endnote 201, s. 36.
- ccc. Smith & Foster, above endnote 10, at 6.
- ccc. M. Wiener, "Keep Holy War out of Schools," *The Gazette* (1998, May 17) at A.12.
- ccc. Foucher, above endnote 9, at 16.
- ccc. M.E. Manley-Casimir & P. Pitsula, "The Charter, Culture and the Public Curriculum: Emerging Perspectives and Guidelines" (1988) 1 *E.L.J.* 37 at 40.