Education & Law Journal
October, 2006

Article

***137** Supreme Court of Canada Case Law Regarding Fundamental Rights in Education [FNa1]

The Honourable Justice Louis LeBel

1. INTRODUCTION

During the last 25 years, the Supreme Court of Canada repeatedly had the opportunity to address the application of fundamental rights in the area of education. Today, I intend to review the work done by the Court in that area as well as take advantage of this exercise to identify some orientations that, in my opinion, arise from this case law.

For the purpose of this presentation, I will classify the Court's decisions in six distinct categories. The first two concern the structure of educational institutions. The last four focus on life in the educational community. I will therefore review the following categories: (1) minority language education rights; (2) denominational rights and the effect of the *Canadian Charter of Rights and Freedoms*; [FN1] (3) freedom of religion and reconciling that right with equality rights; (4) freedom of expression of the teaching staff; (5) protection of students against unreasonable searches; and, finally, (6) students' equality rights in respect of educational services. This overview of the case law leads to a well-defined notion of the significance of schools within our society and of the role that the Court, as the final court of appeal, believes it must play in this context.

First, the Court sees the educational community as a learning environment that not only transmits knowledge to students, but also allows to impress on these young citizens the fundamental values shared by our society as a whole. One of these values, which the Court repeatedly mentions, is that of tolerance for others and their differences.

***138** Inspired by the *Canadian Charter*, that vision of school appears to have long been established in our society. To that effect, authors Clarke and Foucher, in their book *École et droits fondamentaux*, quote the words of Kerans J. of the Alberta Court of Appeal, in *Mahe*, explaining that:

> The idea, which originated in the United States of America and spread to Canada in the late nineteenth century, is that a democratic society needs a well-informed electorate and that an egalitarian society needs to teach its children that they can and must subordinate their differences to live together as equals. (Paul T. Clarke and Pierre Foucher, *École et droit Fondamentaux* (2005), p. 62).

Second, the Court recognizes the critical nature of the role played by teachers and various stakeholders from the educational community in forming students for their participation to the Canadian society. Consequently, the Court adopted an approach that I would characterize as deferential to the expertise of members of the educational community. The Court does not claim to have absolute answers to the various problems within the educational

community; it favours, as much as possible, respect of discretionary decisions made by school authorities.

Finally, as corollary to the recognizance of the importance of the role played by schools and their educators, the Court highlights the significant influence that teachers can have on their students. Therefore, the Court has had to remind teachers that the exercise of their profession could limit their freedom of expression much more so than limits justified in other circumstances.

I will now proceed with the analysis of the Court's case law. During that review, I will emphasize the relevant aspects of the judgments that notably highlight the three trends just listed.

2. STRUCTURES OF THE EDUCATION SYSTEM

(a) Minority Language Education Rights

Canada started to recognize the generally precarious situation in which were its language minorities in the Seventies. Faced with these circumstances and the contemporaneous language conflicts in Quebec, it became clear that any renewal of the Canadian Constitution would need to provide for rights to education in Canada's two official languages. Such rights were thus entrenched in the *Charter*. [FN2] These rights, which appear ***139** in section 23 of the *Canadian Charter*, result from a delicate writing and negotiation effort. Section 23 grants Canadian citizens a right to education in a minority language. It is as follows:

> **23.** (1) Citizens of Canada
> [...]
>
> 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. [...]

To the exception of Quebec, that right also extends to citizens “whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside” (paragraph 23(1)(a)). Section 23 thus grants minority language parents the right to have their children receive instruction in homogeneous schools, that is schools where instruction is provided in the minority language, [FN3] save for secondary language classes. Parents can also have all their children receive instruction in a minority language when one of them has received or is receiving, in Canada, instruction in a minority language (para. 23(2)). However, paragraph 23(3) specifies that these rights only apply where a sufficient number of children warrants such application.

Section 23 of the *Charter* has given rise to a significant body of case law. To this day, the Supreme Court has rendered no less than seven judgments interpreting that provision. [FN4] These judgments determine who are the rights holder and what is the content of these rights, particularly where school organization and control is concerned.

***140** In its first important section 23 judgment, *Quebec Assn. of Protestant School Boards v. Quebec (Attorney General) (No. 2)*, [FN5] the Court ruled that some provisions of the *Charter of the French Language*

restricting the right to instruction in English in Quebec were of no force and effect. The Court found that section 73 of the *Charter of the French Language* gave English minority parents more restrictive rights than those granted by section 23 of the *Canadian Charter*. In fact, the *Charter of the French Language* prevented some parents who had received their instruction in English in another Canadian province to have their children receive their instruction in an English minority school, even though section 23 recognized them that right. Moreover, the *Charter of the French Language* only took into account elementary instruction received by the parents to determine the rights to instruction, whereas section 23 of the *Charter* specifically allows for consideration of high school instruction as well.

The Court was later given the opportunity in *Mahe v. Alberta* [FN6] to elaborate important principles for interpreting section 23 of the *Charter*. In *Mahe*, an English Catholic school board had set up a French school following a request made by French-speaking parents in the Edmonton area. The French-speaking parents also sought, under section 23 of the *Charter*, the right to manage and control their school. Specifically, they sought a school managed by an independent French school board.

Chief Justice Dickson wrote the reasons of the Court, and started by describing the general purpose of section 23, in the following manner:

> ... it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada. (p. 362)

Chief Justice Dickson then reminds that section 23 is remedial, as it seeks to remedy historical injustices suffered by minority language groups in various provinces. His opinion confirms that section 23 of the *Canadian Charter* must be interpreted in a broad and liberal manner allowing the implementation of the remedies needed to fully achieve its purpose. [FN7]

Finally, concerning the object of the instant dispute, the Court found that section 23 of the *Charter* effectively granted language minorities the right to manage and control educational facilities and programs in addition to the right to instruction. The Court noted that the participation of minority***141** language parents to management and control of the facilities for their children was vital to the survival of the language and culture. For example, educational decisions made regarding the content of the curriculum, hiring of staff or actual expenses could have a significant influence on whether or not the children's language and culture flourished. [FN8]

According to the Court, section 23 provides for a range of rights comprised of various degrees of management and control. The appropriate degree of control will depend on the number of minority students and on pedagogical and financial considerations. The Court indicated that the highest degree of control is the right for the language minority to have a completely independent school board. In this case, the circumstances required a high degree of control, but not the highest. The Court thus concluded that the language minority was entitled to representation within the local English school boards and that it should be proportional to the number of minority language students. However, minority language representatives had to have exclusive authority to make decisions regarding French language education and facilities. [FN9]

Some aspects of the right of minority language groups to control their educational facilities were clarified in *Reference re s. 79(3), (4) & (7) of the Public Schools Act (Manitoba)*, [FN10] The Court ruled that rights to instruction included the right to distinct space controlled by the minority language group. The Court stressed,

among other things, the importance of a distinct facility for minority communities, so that the schools could play their role "... as cultural centres as well as educational institutions". [FN11] The Court however added that section 23 did not necessarily grant a right to a distinct school in every situation. The number of minority language students will sometimes warrant such a distinct school within the community, whereas the Constitution's requirements will sometimes be met by a shared space system because of a smaller number of minority language children to be served.

In *Arsenault-Cameron v. Prince Edward Island*, the Court once again emphasized the importance of having schools within minority language communities. In this case, the province's Education Minister refused to approve the decision made by the French Language School Board to establish a French school in the Summerside area. The Minister preferred a different solution, one that maintained school transportation services to ***142** a French school in another community. The Court recognized the minority's right to a French language educational facility within its own community each time it was warranted by the number of students. The Court considered *inter alia* the fact that the Minister's decision imposed on minority language children an extremely difficult choice "... between a locally accessible school in the majority language and a less accessible school in the minority language". [FN12] The Court also underlined that, in this case, the Minister had a constitutional obligation to respect the decision of the French language minority school board, given the language minorities' recognized right of management and control. [FN13]

Finally, in 2005, the Court had the opportunity of hearing two cases involving the interpretation and application of section 23 of the *Charter* in Quebec. In *Solski c. Québec (Procureure générale)*, [FN14] the Court had to interpret the words "has received" and "is receiving" in section 23. Let me remind you that this section grants rights to minority language instruction, notably if a parent or one of his or her children has received or is receiving instruction in a minority language. Paragraph 73(2) of the *Charter of the French Language* provided that a child was eligible to English instruction in the Province of Quebec if his or her parents had received the major part of their instruction in English in Canada. The Minister in charge of applying the legislation used a purely mathematical method to determine whether the child had spent more time receiving instruction in one or the other official language. The Court found that para. 23(2) of the *Charter* required a contextual and qualitative assessment of the child's educational experience in order to determine whether the child received a significant part of his or her instruction in the minority language. In light of that finding, the Court read down the "major part" requirement in para. 73(2) of the *Charter of the French Language* to give meaning to the Charter's "significant part" requirement. The Court took advantage of this opportunity to reaffirm that section 23 should be interpreted "in a broad and purposive manner consistent with the preservation and promotion of both official language communities in Canada" and that section 23, given its national character, needs to be interpreted in an uniform manner from province to province, while not completely disregarding the unique historical context of each province. [FN15]

***143** In *Gosselin c. Québec (Procureur général)*, [FN16] rendered at the same time as the *Solski* case, the Court examined the connection between section 23 and equality rights protected by the *Canadian Charter* and the Quebec *Charter*. In this case, parents of the Quebec French language majority wanted their children to receive instruction in English language public institutions. Since section 73 of the *Charter of the French Language* prevented the parents from fulfilling their wish, the parents challenged its validity and claimed that the *Charter of the French Language* violated their equality rights because it discriminated on the basis of language between English-speaking children, who were entitled to English language public instruction, and French-speaking children, who were denied that opportunity. The Court dismissed the claims. The Court confirmed that the right to equality provided for in the *Canadian Charter* could not be set up against section 23 to render it of no force or

effect. The express purpose of section 23 is to grant special rights to selected groups and section 23 is part of the Constitution just like section 15. Since section 73 of the *Charter of the French Language* happens to seek the implementation of the obligations imposed by section 23 of the *Canadian Charter*, the constitutional right to equality could not bar its application either. As the Court explains:

> If adopted, the practical effect of the appellants' equality argument would be to read out of the Constitution the carefully crafted compromise contained in s. 23 of the *Canadian Charter of Rights and Freedoms*. This is impermissible. (para. 2)

In fact, section 23 was enacted in a context of compromise, first, to protect minority language rights in each of the provinces and, second, to allow Quebec to protect and promote the majority language by ensuring that Francophones would continue to receive instruction in French. The framers of the *Charter* were concerned that if all citizens were allowed to benefit from minority language instruction, majority language students would swamp minority language students. It was feared that minority language schools "... would themselves become centres of assimilation ..." [FN17] The Court thus states that, given the management and control rights conferred by section 23 to language minorities, a provincial government could not offer its citizens equal access to minority language schools.

To summarize, the Court has recognized, in the various cases just examined, the importance of interpreting minority language education ***144** rights in a broad manner. One of the significant rights recognized to language minorities is the power to manage and control their educational facilities on their own. As discussed in *Arsenault-Cameron*, the Court recognized that provincial authorities should respect the discretionary decisions made by representatives of the minority language community unless, of course, these decisions are unlawful.

After this review of minority language situations, I will now briefly discuss the effect of the enactment of the *Canadian Charter* on the collective rights of other minorities, i.e. catholic and protestant denominational minorities.

(b) Denominational Rights in Section 93 of the Constitution and in the *Canadian Charter*

The provinces were granted the exclusive power to make laws in relation to education at the time of Confederation. However, the Lower Canada Protestant minority and the Upper Canada Catholic minority feared that their acquired rights to denominational educational institutions would be compromised once the new provinces were able to legislate the issue. That is why the rights to denominational schools established by provincial legislation at the time of Confederation were protected by section 93 of the 1867 Constitution. Consequently, beyond language distinctions, school organization in several Canadian provinces, including Quebec, has reflected denominational separations between Catholics and Protestants. The new equality rights thus had to take into account the constitutional rights previously established by the Constitution.

Finally, in *Adler v. Ontario*, [FN18] the Court reminded the particular nature and importance of the historical compromise of 1867. As was underlined by the Court in *Reference re Roman Catholic Separate High Schools Funding*, [FN19] some commentators have claimed that the Canadian Confederation would never have emerged absent this historical compromise.

In the *Adler* case, the parents, whose children attended denominational schools not funded by the Ontario government, attempted to be recognized a right to funding by claiming the *Charter*-protected freedom of religion (para. 2(a)) and equality rights (section 15). The Court notes that the Ontario government does not have any

positive constitutional obligation to fund denominational schools, except for its obligation to fund institutions concerned by section 93 of the Constitution. The Court ***145** then adds that the *Canadian Charter* could not serve to defeat another part of the Constitution or, in this case, section 93 of the Constitution. In fact, section 29 of the *Canadian Charter* expressly provides that the *Charter* does not abrogate or derogate "from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

Aside from the issue of denominational rights under *The British North America Act*, religion has long been at the heart of debates concerning the application of the *Canadian Charter* in the educational community. I will now discuss judgments pertaining to that aspect of fundamental rights protection.

3. LIFE IN THE EDUCATIONAL COMMUNITY

(a) Freedom of Religion and Reconciling that Right with Equality Rights

(i) *Respecting the Right to Freedom of Religion in Schools*

I will first deal with a recent judgment of the Court, now well known because of the substantial media coverage it received in Canada as well as the numerous comments made about it: *Singh-Multani c. Marguerite-Bourgeoys (Commission scolaire)*, [FN20] which concerns the right of a Sikh student to wear a kirpan to school.

I will start by a brief account of the facts of this case that arose in the Montreal area. A 12-year-old teenager, Gurbaj Singh Multani, accidentally dropped on school grounds the kirpan he wore under his clothes. Young Multani was an orthodox Sikh. His religious beliefs required him to wear, at all times, a kirpan made of metal. After being informed of the incident, school officials prohibited young Multani from coming to school with his kirpan. After discussions with the Multani family, the school board agreed to let Multani wear his kirpan, provided that the religious object be sewn inside his clothes. Young Multani and his parents agreed to the compromise. The Board of Commissioners however refused to approve the agreement because of safety concerns. In the Board's opinion, wearing the kirpan violated the school's code of conduct, which, among other things, prohibited possession of weapons and other dangerous objects.***146** The Board's decision resulted in litigation that went all the way to the Supreme Court.

The Multani family challenged the Board's decision before the courts, claiming a violation of their rights to equality and freedom of religion under the *Canadian Charter* and the Quebec *Charter*. Justice Grenier of the Superior Court quashed the decision of the Board of Commissioners and affirmed young Multani's right to wear his kirpan to school. Grenier J. did however require the student to respect the following six conditions:

- That the kirpan be worn under his clothes;
- That the sheath in which the kirpan was carried be made of wood, not metal, to remove the sharpness of the kirpan;
- That the kirpan be placed in its sheath, wrapped and safely sewn in sturdy cloth and that everything be sewn to the guthra;

• That school personnel be reasonably allowed to check if the conditions imposed were complied with;

• That the petitioner never remove his kirpan and that the disappearance of the kirpan be immediately reported to school authorities;

• That if the petitioner failed to comply with the present judgment, he would definitely lose his right to wear his kirpan to school.

The Quebec Court of Appeal reversed the judgment of Grenier J. In its opinion, the safety concerns of the school board were justified and the conditions imposed by Grenier J. did not prevent every risk created by wearing the kirpan.

The Supreme Court Justices delivered three concurring opinions, disagreeing only over issues concerning the relationship between administrative law and constitutional law and over which approach to applying section 1 of the *Canadian Charter*. They all agreed on the merits: the total prohibition against wearing a kirpan to school, without any reasonable accommodation, violated young Multani's freedom of religion.

According to the established case law, a complainant must show two essential elements to prove a violation of his or her freedom of religion. First, the complainant must demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion. Second, the complainant must demonstrate that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. Once these elements are shown, the opposite party, as provided by section 1 of the Charter, can attempt to demonstrate that, in the context of the case, its ***147** decision is valid by justifying it as a reasonable limit to freedom of religion.

The Court found that the prohibition limited Multani's freedom of religion. Multani had successfully demonstrated his sincere belief that he was required to wear a metal kirpan, and that his refusal to wear a copy made of wood or a symbolic representation of the object in order to comply with his faith was based on a reasonable religious interpretation. Consequently, the choice faced by the student, either refraining from wearing his kirpan to school or staying home, infringed his freedom of religion in a manner that was neither trivial nor insignificant.

In its analysis of the attempt to justify the kirpan prohibition, the Court started with a brief review of the first two steps of the *Oakes* test for the application of section 1 of the *Charter* and ruled that the prohibition had a rational connection with the objective of ensuring a reasonable level of safety. The Court then focused on the minimal impairment test, another step of the *Oakes* test, which proved decisive in this case. At this stage, the Court must make sure that the limit imposed on the *Charter*-protected right minimally impairs the complainant's right, but the limit does not need to be the least intrusive solution. In the context of this case, i.e. a neutral rule valid on its face and adversely affecting an individual, the Court decided to incorporate in the minimal impairment analysis the concept of reasonable accommodation developed by courts in discrimination cases. The individual decision could be justified if the school board demonstrated that it had attempted to find a solution that could reasonably accommodate Multani's right to exercise his freedom of religion. As we all know, this attempt failed. In contrast, the Court was of the view that the solution suggested by the Multani family constituted reasonable accommodation.

As a student, Multani never had any behavioural problems or history of violence. The kirpan had to be kept inside its sheath, itself wrapped and safely sewn in sturdy cloth also sewn to the guthra (shoulder strap). In addi-

tion, the guthra had to be worn under the student's clothing. So, if Multani or another student wanted to use a blunt object to commit violent acts, other objects within the school environment were just as dangerous as a kirpan and even more easily accessible, such as compasses or cafeteria knives. Moreover, the evidence established that not one single case of violence involving a kirpan had ever been reported in Canada.

The Court took this opportunity to emphasize that school institutions have the obligation to foster the acceptance of diversity of values within the contemporary society. The Court mentions that schools will have to ***148** fulfill their educational duty by doing away with cultural prejudice. As to this issue, the majority of the Court writes that:

> Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is, [...], at the very foundation of our democracy. (para. 76)

The Court reiterates the important role that schools must play in the transmission of *Charter* values and underlines that the kirpan prohibition, in that context and with the safety measures recommended by the Superior Court, would stifle the promotion of values such as ... multiculturalism, diversity, and the development of an educational culture respectful of the rights of others . [FN21] Let us also mention that, twelve years earlier, the Court acknowledged the existence of the duty to accommodate religious beliefs in the context of adjustments to a vacation calendar for certain religious holidays celebrated by Jewish teachers. [FN22]

(ii) *Conflicts Between Freedom of Religion and Equality Rights*

In a few cases, the Court was called upon to settle conflicts between the right to freedom of religion and the right to equality within the educational environment. *Trinity Western University v. College of Teachers (British Columbia)*, [FN23] is one such meaningful example.

Trinity Western University was a private Christian university offering a baccalaureate degree in education, the first four years of which were completed at that institution and an additional year was spent at the Simon Fraser University. Trinity Western University now wanted to offer the full five years of training, to ensure that its program reflected more adequately its Christian point of view. It made such an application to the British Columbia College of Teachers (“the College”), which was responsible for teacher training programs within that province.

The College denied the University's application because it considered it contrary to public interest. The College had concerns about a practice of the University that required all students and teachers to sign a document establishing the University's community rules and requiring them to agree ***149** to refrain from any homosexual behaviour. The Supreme Court reversed the decision made by the College.

Even though the *Canadian Charter* and the relevant provisions of the province's *Human Rights Code* did not apply to the College, the Court found that the College had the required jurisdiction to determine public interest in light of the equality rights entrenched in those documents. Since transmitting values to students is part of the school's role, it was appropriate that the College consider the discriminatory practices of educational institutions training teachers. The Court writes:

> Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment

> free of bias, prejudice and intolerance. It would not be correct, in this context, to limit the scope of s. 4 to a determination of skills and knowledge. (para. 13)

However, the Court ruled that the College had erred when it omitted to consider as well the right to freedom of religion. In the instant case, the equality rights guarantee of homosexuals within the British Columbia school system had to be reconciled with the freedom of religion of individuals who wished to attend a religious university. The Court found that those rights could be reconciled by properly defining the scope of each of them. The Court did this successfully by "draw[ing] the line ... between belief and conduct". [FN24] The Court explains that "[t]he freedom to hold beliefs is broader than the freedom to act on them". [FN25] According to the Court, the evidence in this case did not show that the beliefs conveyed by the University could lead its graduates to engage in discriminatory or intolerant conduct against homosexuals. On the contrary, the evidence established that the teachers trained by that institution were competent and had yet to act in a discriminatory manner. Absent evidence of a prejudice to the school system, the Court ruled that the freedom of belief of the members of the Christian University could not be limited. The Court did add that had it been shown that the religious beliefs conveyed by the University could lead future teachers to engage in discriminatory or intolerant conduct against homosexuals, the right to equality would have prevailed over some aspects of the right to freedom of religion. Such was however not the case here.

In 1984, several years before the *Trinity Western University* case, the need to respect religious values of denominational institutions was also ***150** recognized by a decision of the Court, *Caldwell v. Stuart*, [FN26] which was decided based on the British Columbia *Human Rights Code* rather than on the *Canadian Charter*. In that case, a Catholic school refused to rehire a former Catholic teacher, on the basis that the teacher's civil marriage to a divorced man went against the tenets of the Church and the requirements of the school. The teacher claimed that she was discriminated against based on marital status, contrary to the British Columbia *Human Rights Code*.

The Court found that the obligation to respect the tenets of the Catholic Church was a real employment requirement and thus did not constitute discrimination as defined in the *Human Rights Code*. It was the Court's view that since the religious aspect was central to the educational institution, acceptance of and compliance with the rules of the Church were reasonably needed to ensure the achievement of the school's legitimate objectives. The Court underlines, however, that if the teacher had been employed by a secular school, her marriage could not have constituted a real employment requirement and she would have benefited from the full protection of the law against discrimination.

The two previous cases concerned religious values of denominational educational institutions. One can note however that religious values have a different weight within the public secular system, as such was the case in *Chamberlain v. Surrey School District No. 36*. [FN27] In that case, the Court found, given the principle of secularism stated in the British Columbia *School Act*, that the requirements stemming from the religious values of some parents did not allow to impose an educational framework in line with these values to parents and children that did not necessarily share them.

In *Chamberlain*, a kindergarten teacher wanted to use in class three books depicting various types of families, including families with same-sex parents. The school board declined to approve the manuals, its main concern being that depicting families with same-sex parents could go against the religious values of some parents and, thus, would expose children to ideas that would conflict with those taught at home.

Basically, the *Chamberlain* case pitted, once more, equality rights against the right to protection of religious values. However, the discussion did not directly concern the application of legislation protecting rights and

freedoms. In fact, none of the parties had argued the *Canadian Charter* or the provincial human rights legislation. Still, *Canadian Charter* values ***151** greatly inspired the Court's ruling. Chief Justice McLachlin states that the principle of secularism:

> ... reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity. These values are reflected in our Constitution's commitment to equality and minority rights, and are explicitly incorporated into the British Columbia public school system by the preamble to the *School Act* and by the curriculum established by regulation under the Act. (para. 21)

In the end, the Court found that the school board had erred in not considering values of tolerance and respect for diversity. While the parents' religious values should be considered without denying their importance, in order to take into account *inter alia* the values of minority religious groups, the board erred in proceeding solely based on those values, and thus violated the principle of secularism stated in the *School Act*.

(iii) *Freedom of Religion and the State's Supervisory Power over Education*

The Court recognized, in *R. v. Jones* [FN28] that the State has a significant interest in controlling the quality of education. This time, the quality requirements were challenged in the name of freedom of religion. Even the obligation to attend school was questioned.

In *Jones*, the complainant was the pastor of a fundamentalist church and educated his three children along with twenty others in the church basement. The complainant challenged the validity of some provisions of the *School Act* based on sections 2(a) (freedom of religion) and 7 (right to liberty and security) of the *Canadian Charter*. Section 142 of that Act required that children between the ages of 6 and 16 attend public school. The Act provided for some exceptions, including instruction at home and private school. In those two situations, the parent or the private school had to apply to the government for an exemption and approval of the curriculum.

Four of the seven judges of the Court found that there was no violation of section 2(a) of the *Charter* in this case. Justice Wilson, agreeing with the majority in that respect, explained that the *School Act* did not infringe freedom of religion but rather accommodated it. The Act authorized religious instruction at home or in a private school and contained nothing to prevent the complainant from teaching his religious beliefs. In addition, ***152** Wilson J. dismissed the complainant's claim that the obligation itself to seek an exemption from the department infringed his freedom of religion. Justice Wilson explained that this obligation could only have a trivial or insignificant effect on freedom of religion and could not be considered as infringing section 2(a) of the *Charter*. Justices Dickson, La Forest and Lamer were of the opinion that there was a violation of section 2(a), but that the provisions of the Act were justifiable under section 1 of the *Charter*.

In its analysis of the claim under section 7 of the Charter, the majority assumed, without deciding the issue, that the right to liberty in section 7 included the right of parents to educate their children as they wished. The majority also found that the process imposed by the Act to seek an exemption did not violate fundamental principles of justice guaranteed by section 7. In fact, given the government's “compelling interest in the quality of education”, [FN29] the establishment by the Act of a system allowing the government to check the quality of education was perfectly reasonable.

(b) Freedom of Expression of the Teaching Staff

I will now examine the case *Ross v. New Brunswick District No. 15 Board of Education*, [FN30] which deals with the teachers' freedom of religion and, more importantly, their freedom of expression. That Supreme Court judgment is now indispensable to any discussion about the freedom of expression of teachers.

Ross does in fact recognize the legitimacy of some limitations to the freedom of expression of teachers. In this case, Mr. Ross, a public school teacher, had disseminated various racist and discriminatory statements regarding Jews in newspapers, books and on television. Mr. Ross had however made these statements during his off-duty time. A Jewish parent filed a complaint with the New-Brunswick Human Rights Board. The complaint claimed that the school board acted in a discriminatory manner by allowing the teacher to keep his job. The Board of Inquiry allowed the complaint. The Supreme Court ultimately dismissed an application for judicial review of that decision.

The Supreme Court found that the school board discriminated against its Jewish students by continuing the employment of Mr. Ross and, consequently,***153** violated the New-Brunswick *Human Rights Act*. The Court ruled that the School Board's passivity signalled a silent condonation of the teacher's views.

The Court started by stressing the importance of the role played by schools and, therefore, of the role played by teachers in communicating the values of our society. Writing for the Court, Forest J. stated that:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.
>
> Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole. (para. 42-43)

The Court however underlined that, despite the importance of the role played by teachers, courts should not interfere in the teachers' lives to subject their conduct as a whole to more onerous moral standards of behaviour. Nonetheless, some ideas expressed by a teacher can have an adverse effect on some forms of exercise of his or her freedoms of expression and religion. In this case, the evidence established that Mr. Ross, by his conduct, had poisoned the school environment. The evidence notably revealed that some Jewish students had been harassed or intimidated by other students. These actions could be reasonably linked to the ideas expressed by Mr. Ross.

The Board of Inquiry had *inter alia* ordered the School Board to place Mr. Ross on a leave of absence for a period of 18 months, to appoint him to a non-teaching position at the end of the leave and to terminate his employment if he produced any other anti-Semitic material. After recognizing that the order of the Board of Inquiry limited Mr. Ross' rights to freedom of expression (para. 2(b)) and religion (para. 2(a)) guaranteed by the *Charter* , the Court found that the limit was justified in a democratic society under section 1 of the *Charter*. One element of that order was however invalidated. While the Court did rule that the publication ban was justifiable for a certain period of time, it also found that the permanent ban imposed to Mr. Ross could not be justified.

***154** Other aspects of fundamental rights affect school life as well. I will start by examining the problem of searches within the educational environment, a problem that courts mostly encounter in criminal law.

(c) Protection of Students Against Unreasonable Searches

In *R. v. M. (M.R.)*, [FN31] the Court examined the scope of the power of school authorities to search elementary or high school students. In that case, a high school vice-principal had reasonable grounds to believe that a student was in possession of marijuana. The vice-principal asked the student to come to his office, where he asked him to empty his pockets and pull up his pant legs. Having noticed a bulge in one of the student's socks, the vice-principal removed the object that turned out to be a plastic bag containing marijuana. Another student and an RCMP officer witnessed the search but did not take part in it. The Court confirmed the legality of the search.

Without deciding the issue, the Court initially considers that the *Canadian Charter* applies to the actions of school personnel because schools are part of the government within the meaning of section 32 of the *Canadian Charter*. Therefore, section 8 of the *Charter* providing that everyone has the right to be secure against unreasonable search or seizure is found to apply to the search done by the vice-principal.

Supreme Court judgments have established that, in order to benefit from the protection in section 8, a person must have a reasonable expectation of privacy. If such is the case, the person will then be protected against unreasonable searches. A search conducted by a State representative, such as a police officer, is usually considered reasonable if authorized by a warrant issued by a neutral adjudicator who, more often than not, is a judge.

In this case, however, the Court took into account the distinctiveness of the educational context and favoured the adoption of a more flexible standard. Speaking for the majority, Cory J. starts by stressing the importance of the role played by school personnel:

> Teachers and principals are placed in a position of trust that carries with it onerous responsibilities. When children attend school or school functions, it is they who must care for the children's safety and well-being. It is they who must carry out the fundamentally important task of teaching children so that they can function in our society and fulfil their potential. In order to teach, school officials must provide an atmosphere that encourages learning. During the school day they ***155** must protect and teach our children. In no small way, teachers and principals are responsible for the future of the country. (para. 35)

School personnel must be allowed to settle disciplinary problems at school, including serious problems involving drugs or possession of weapons, and requiring prior judicial authorization to do a search would not be a practical solution. Moreover, the Court stresses that students must be aware that they have the obligation to comply with school regulations and should thus expect to undergo a reasonable search to ensure their application. This means that students' expectation of privacy will be lesser in school than in the general community.

Therefore, school authorities will not need to obtain a warrant before conducting a search. Nevertheless, a search will only be legal if school authorities have reasonable grounds to believe that a regulation or school discipline has been breached and that a search would allow demonstrating that breach. To that effect, the Court mentions that “... [s]chool authorities will be in the best position to assess information given to them and relate it to the situation existing in their school. Courts should recognize the preferred position of school authorities to determine if reasonable grounds existed for the search”. [FN32]

In addition, the search itself must be conducted reasonably. The line between a reasonable search and an illegal search is not always easily drawn. The Court listed in this case some factors that could be used a guide to decide whether a search is valid or not. The Courts mentions *inter alia* that the students' safety must be considered. Thus, a thorough search would be justifiable in an emergency, such as where a teacher believes a stu-

dent to be in possession of a weapon. The age and the sex of the student are also factors to consider. For example, the Court seems to set as principle that the search of a student's person by a teacher of the opposite sex would generally be considered inappropriate and unreasonable. Of course, there can be exceptions to that rule in extreme situations. The Court also mentions that the nature of the breached regulation will be relevant. That is why the Court implies, by quoting an obvious example, that a search of a student's person is likely to be improper if done to determine whether the student is in possession of chewing gum.

***156 (d) The Right to Equality in Access to Educational Services**

I must finally mention the importance of integration problems faced by disabled children in the implementation of their fundamental rights. I will thus start by taking a brief look at *Eaton v. Brant (County) Board of Education,* [FN33] which specifically concerns equality rights of disabled children within the educational environment.

The *Eaton* case concerned a 12-year-old girl, Emily Eaton, who suffered from cerebral palsy and who was placed, in her neighbourhood, in a regular classroom with children without disabilities. After three years, the teachers and educators concluded that it would be in young Eaton's best interest to be placed in a special classroom for exceptional pupils. The Supreme Court ruled that this decision did not violate section 15 of the *Charter*. To establish discrimination under section 15, the complainant must show that he or she was deprived of a benefit or imposed a disadvantage. The evidence established that the decision to transfer young Eaton in a special education classroom was in her best interest. The decision took into account her disability but not in a prejudicial manner. It was, in fact, in the best interest of the child. The Court explained that integration of exceptional children in regular classrooms should be recognized as the norm because of the benefits it generally provides to those children. Establishing a presumption in favour of that option would however not be in the best interest of exceptional children. The interest of a child must be individually determined based on the particular circumstances of the case. By rejecting the idea of a presumption, the Court is actually recognizing that the various stakeholders from the educational environment have the main responsibility of assessing what is in the best interest of the child.

4. CONCLUSION

Supreme Court judgments confirm that the Court is fully aware of the critical role schools play in our society. First, the Court mentions in minority language education rights cases, that school is a decisive tool allowing the transmission to children of minority language and culture. In addition, in *Multani, Chamberlain, Trinity Western University* and *Ross*, the Court explicitly recognizes that school is an important vector for fostering in students the fundamental values of our society, including ***157** those guaranteed by the *Canadian Charter*. Consequently, decisions made at all levels of the school system should take into account the values entrenched in the *Canadian Charter* as well as in the various provincial human rights legislation. School authorities should also give great significance to the value of tolerance for others.

The judgments examined also show that the Court grants critical importance to the particular role and expertise of school teachers and directors. In that respect, *R. v. M. (M.R.)*, concerning searches in the educational environment, is particularly instructive. The Court mentions, in this respect, that courts should show deference to school authorities in deciding whether reasonable grounds justified a search. However, I wish to mention that, despite that deference, school teachers and directors will need to ensure that the relevant criteria determined by

the Court is properly applied in assessing whether the grounds for the search and its method of execution are reasonable. In case of failure to do so, courts will have no choice but to interfere if the conflict is brought before them.

The importance of school in our society and the essential role played by teachers inevitably give rise to additional responsibilities for teachers as well as school administrations. *Ross* is a clear example. That role is central to the efforts made by the Canadian society in welcoming various or new groups of persons while maintaining and transmitting, at the same time, a core of common values that serve as basis for the concept itself of a democratic society.

[FNa1]. CAPSLE--ACEPSLE Conference, Montreal, April 30 to May 1, 2006. Notes for address by the Honourable Louis LeBel, Supreme Court of Canada, with the collaboration of Me Sébastien Beauregard, law clerk to the Supreme Court of Canada.

[FN1]. Hereinafter "*Canadian Charter*" or "*Charter*".

[FN2]. Mark Power and P. Foucher, "Les droits linguistiques en matière scolaire", in Michel Bastarache (Dir.), Les droits linguistiques au Canada (2nd ed. 2004), p. 300, at pp. 412-413.

[FN3]. *Ibid.*, p. 407.

[FN4]. *Quebec Assn. of Protestant School Boards v. Quebec (Attorney General) (No. 2)*, [1984] 2 S.C.R. 66, 1984 CarswellQue 100, 1984 CarswellQue 100F (S.C.C.); *Mahe v. Alberta*, [1990] 1 S.C.R. 342, 1990 CarswellAlta 26, 1990 CarswellAlta 649 (S.C.C.); *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 CarswellPEI 4, 2000 CarswellPEI 5 (S.C.C.); *Reference re s. 79(3), (4) & (7) of the Public Schools Act (Manitoba)*, [1993] 1 S.C.R. 839, 1993 CarswellMan 97, 1993 CarswellMan 344 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 CarswellNS 375, 2003 CarswellNS 376 (S.C.C.); *Solski c. Québec (Procureure générale)*, [2005] 1 S.C.R. 201, 2005 CarswellQue 761, 2005 CarswellQue 762 (S.C.C.); *Gosselin c. Québec (Procureur général)*, [2005] 1 S.C.R. 238, 2005 CarswellQue 763, 2005 CarswellQue 764 (S.C.C.).

[FN5]. [1984] 2 S.C.R. 66, 1984 CarswellQue 100, 1984 CarswellQue 100F (S.C.C.).

[FN6]. [1990] 1 S.C.R. 342, 1990 CarswellAlta 26, 1990 CarswellAlta 649 (S.C.C.).

[FN7]. *Mahe v. Alberta*, above note 4, p. 365.

[FN8]. *Ibid.*, p. 367,

[FN9]. *Ibid*. p. 394-395.

[FN10]. [1993] 1 S.C.R. 839, 1993 CarswellMan 97, 1993 CarswellMan 344 (S.C.C.).

[FN11]. *Reference re s. 79(3), (4) & (7) of the Public Schools Act (Manitoba)*, above note 4, para. 25.

[FN12]. *Arsenault-Cameron v. Prince Edward Island*, above note 4, para. 50.

[FN13]. *Ibid.*, para.. 55.

[FN14]. 2005 SCC 14, [2005] 1 S.C.R. 201, 2005 CarswellQue 761, 2005 CarswellQue 762 (S.C.C.).

[FN15]. *Solski c. Québec (Procureure générale)*, above footnote 4, paras. 20-21.

[FN16]. 2005 SCC 15, [2005] 1 S.C.R. 238, 2005 CarswellQue 763, 2005 CarswellQue 764 (S.C.C.).

[FN17]. *Gosselin c. Québec (Procureur général)*, above footnote 4, para. 31.

[FN18]. [1996] 3 S.C.R. 609, 1996 CarswellOnt 3989, 1996 CarswellOnt 3990 (S.C.C.).

[FN19]. [1987] 1 S.C.R. 1148, 1987 CarswellOnt 1049, 1987 CarswellOnt 1049F (S.C.C.).

[FN20]. 2006 SCC 6, 2006 CarswellQue 1368, 2006 CarswellQue 1369 (S.C.C.).

[FN21]. *Singh-Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, 2006 CarswellQue 1368, 2006 CarswellQue 1369 (S.C.C.), para.. 78.

[FN22]. *Chambly (Commission scolaire régionale) c. Bergevin*, [1994] 2 S.C.R. 525, 1994 CarswellQue 78, 1994 CarswellQue 114 (S.C.C.).

[FN23]. [2001] 1 S.C.R. 772, 2001 CarswellBC 1016, 2001 CarswellBC 1017 (S.C.C.).

[FN24]. *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772, 2001 CarswellBC 1016, 2001 CarswellBC 1017 (S.C.C.), para.. 36.

[FN25]. *Ibid*.

[FN26]. [1984] 2 S.C.R. 603, 1984 CarswellBC 825, 1984 CarswellBC 477 (S.C.C.).

[FN27]. [2002] 4 S.C.R. 710, 2002 CarswellBC 3021, 2002 CarswellBC 3022 (S.C.C.).

[FN28]. [1986] 2 S.C.R. 284, 1986 CarswellAlta 181, 1986 CarswellAlta 716 (S.C.C.).

[FN29]. *R. v. Jones*, [1986] 2 S.C.R. 284, 1986 CarswellAlta 181, 1986 CarswellAlta 716 (S.C.C.), para.. 40.

[FN30]. (*Ross v. New Brunswick School District No. 15*) [1996] 1 S.C.R. 825, 1996 CarswellNB 125, 1996 CarswellNB 125F (S.C.C.).

[FN31]. [1998] 3 S.C.R. 393, 1998 CarswellNS 346, 1998 CarswellNS 347 (S.C.C.).

[FN32]. *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, 1998 CarswellNS 346, 1998 CarswellNS 347 (S.C.C.), para. 50.

[FN33]. (1996), [1997] 1 S.C.R. 241, 1996 CarswellOnt 5035, 1996 CarswellOnt 5036 (S.C.C.).
16 Educ. & L.J. 137

END OF DOCUMENT