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Article

***69** Human Rights and Education: Problems and Prospects

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*In this article the author explores issues relating to equality of educational opportunity. He discusses how employing human rights concepts can help render an education system more inclusive. After explaining briefly how exclusion and discrimination occur in the school system, both directly and systemically, the author uses three case studies to elaborate his general theme. Under discrimination on the basis of disability, the author explains the traditional approach taken by the courts to special education, as expressed in Bales v. Central Okanagan School District 23, and then goes on to analyze the change in judicial direction embodied in Eaton v. Brant (County) Board of Education. In Eaton, the Ontario Court of Appeal reversed the trend of administrative deference and left no doubt that the onus lay on a school board to prove that an exclusionary placement of an exceptional pupil was justifiable under section 1 of the Charter. The second exclusionary context the author discusses is racism. He briefly reviews the American experience, explaining how the "separate but equal" doctrine legitimating racially segregated schooling was eventually successfully challenged and obliterated in the landmark case Brown v. Board of Education. The article also explores systemic discrimination in the form of inequitable funding of school districts which are often ethnically insular. While a constitutional challenge based on such an argument was rejected by the U.S. Supreme Court in San Antonio Independent School District v. Rodriguez, the author believes such arguments are not beyond the hope of success under the Canadian Charter, in light of the wording of sections 15 and 27. He briefly discusses some initiatives undertaken by provincial Ministries of Education to address racial exclusion in the school system. Finally, the author explains how the role of teachers as moral exemplars can affect the inclusiveness of schools. He uses the Malcolm Ross case from New ***70** Brunswick to illustrate that human rights tribunals and courts are more than willing to place constraints on teachers' freedom of speech and expression, even outside of school, to promote an egalitarian school environment. The article concludes with a brief discussion of some administrative initiatives underway in Nova Scotia schools to address concerns about systemic discrimination.*

1. INTRODUCTION

Education and human rights are intertwined in a *symbiotic* relationship. Each is the foundation for the other. Education is one of the important functions of the Human Rights Commission and one in which we are advocates and not "*objective*" decision-makers or investigators. We are "*advocates*" on behalf of those who have been ***71** excluded from society and promoters of inclusion. Bill Pentney, Counsel to the Canadian Human Rights Commission, put the issue very well in a paper prepared for the recent Canadian Association of Statutory Human Rights Agencies ("CASHRA") Conference in Victoria, B.C., in June 1996.

> Belonging. Such an achingly simple word. It conjures up some of our deepest yearnings, and for some of us, perhaps our most painful memories. Equality claims begin and end with a desire of belonging, for community. Ideas of equality lie at the heart of the Canadian promise of community. Yet we know that communities are built in two ways: by welcoming in, and by keeping out.
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> The desire to belong is intense and profound. Each of us have [*sic*] a deeply personal experience of that, which has been built since childhood. True belonging is more than a claim to tolerated. True belonging is acceptance and understanding, and it is founded in recognition of, and respect for, our simple dignity as human beings. It is our birthright, simply as people. Belonging in equality law can mean that, but at the least it means being tolerated if not understood.

Educators should also be advocates for human rights and for "belonging," in Pentney's terms. That is the best way to link education and human rights in a practical and meaningful way.

There are many people who have been excluded from our schools and made to feel that they do not belong to the community. Many of the groups excluded fall within the categories listed in section 5(i) of the *Nova Scotia Human Rights Act*. Some of the bases upon which people are commonly excluded are the following:

1. race/colour and ethnic, national or Aboriginal origin;
2. religion and/or creed;
3. sex (in terms of gender);
4. sexual orientation and/or irrational fear of contracting an illness or disease;
5. physical or mental disability.

There are also many forms of exclusion - some overt and even intentional, and others more subtle and indirect. A few areas in which exclusion may occur in schools include:

1. *curriculum* (by both inaccurate portrayals and complete omission);
***72** 2. *assessment and testing* (failure to recognize cultural biases in tests);
3. *employment* (lack of employment equity and thus lack of role models);
4. *harassment* (on the basis of gender and other grounds).

One of the most hurtful forms of racism in the schools is the exclusion of other perspectives altogether. Many people from non-European racial groups and other excluded groups might well ask, "Where am I in the picture?" The answer would often be: "You are not there at all!" Sexism raises similar kinds of problems

2. THREE CASE STUDIES IN EXCLUSION IN EDUCATION

There are many case studies that could be used, but to illustrate how the school system excludes some people, the following three are particularly apt.

(a) Discrimination on the Basis of Mental Disability

There can be no doubt that, in the past, mentally disabled children and their parents have been denied equality in education. Although legislation has praised the benefits of inclusive education, school boards have continued to impose segregated placements on disabled students. While the discretion granted by education legislation has fostered these placement decisions, the deference of the courts has legitimized them.

(i) *The traditional framework*

Bales v. Central Okanagan School District 23 [FN1] was an important precedent dealing with integration. Aaron Bales suffered brain dysfunction during his infancy. Aaron had been attending a regular school at Kelowna for 3 years, but was then removed by the school board and assigned, against his parents' wishes, to a segregated ***73** school for disabled children. Aaron's parents claimed that the school board had no authority under the existing *Education Act* to operate a segregated school. [FN2]

Justice Taylor, writing for the majority of the British Columbia Supreme Court, rejected the Bales' arguments in favour of an integrated setting for Aaron. Two lessons become clear from an analysis of Justice Taylor's decision. First, in the absence of legislatively mandated integration, the Court was determined to maintain the school board's discretion in forging their own policies with regard to the placement of children with disabilities. Second, in light of the discretion afforded to the school boards, the Court assumed that the onus was on the plaintiffs to demonstrate that harm was being caused by the school board's placement decisions. In an environment of continued debate over the effects of integration, the placement of this onus on the plaintiffs made it extremely difficult to effectively challenge placement decisions made by school boards.

(ii) *The Eaton case: The earth moves*

The decision in *Bales* and subsequent cases effectively rationalized the continued segregation of mentally challenged students in the education system, thus denying those who wished for integrated placements to be accorded their equality rights. [FN3] Recently, however, new hope has been kindled that these important members of our community will at long last be accorded the equality rights to which they are entitled. This hope is rooted in a set of cases which have advanced the proposition that segregated placements for disabled students are discriminatory and, as such, can only be allowed in the strictest of circumstances. These cases, of which the logical culmination is the Ontario Court of Appeal's decision in *Eaton v. Brant (County) Board of Education*, [FN4] allow for continued judicial deference to school board decisions only when school boards - and the legislation that ***74** directs them - ensure that the equality rights of all their students are upheld.

Eaton is the first case in which the effect of section 15 of the *Canadian Charter of Rights and Freedoms* on the rights of disabled children to have access to integrated educational placements has been directly addressed by an appellate level court. [FN5] If it remains in force, this decision will effectively transform the way the laws concerning the placement of students with disabilities will be interpreted in Ontario. Indeed, because of the persuasive weight of the Court of Appeal's decisions, it may have an impact across the country. The *Eaton* decision will also be heard by the Supreme Court of Canada in the Fall of 1996. [FN6] The potential impact of this decision is rooted in the fact that, for the first time, a coherent framework is developed within which the rights of disabled children, as protected under section 15 of the *Charter*, should be applied in the context of education.

Emily Eaton was integrated into a regular class, with the support of a full-time education assistant, until the end of Grade One. At the end of Grade One, the school board requested that Emily be placed in a segregated class for disabled students. This request was granted by the Identification, Placement and Review Committee, despite objections from Emily's parents. This placement decision ***75** was upheld on appeal by the Special Education Appeal Board and the Ontario Special Education Tribunal. The Divisional Court refused to review the Tribunal's decision; however, the Ontario Court of Appeal granted the Eatons leave to appeal.

The arguments made by counsel for the Eatons before the Court of Appeal were similar to some of those advanced by counsel for the Elwoods in *Elwood v. Bedford District - Halifax Country School Board*, almost 8 years earlier. The primary argument was that, by placing Emily in a segregated classroom without her parents'

consent, the school board was discriminating against her. While this type of placement sometimes may be justified, the burden should be on the school board to prove that a segregated placement was more beneficial than an integrated placement. As noted above, courts and tribunals have previously assumed that the onus was on the parents to prove that a segregated placement would be harmful.

Madam Justice Arbour agreed with the plaintiffs' arguments in her decision. She noted at the outset that there has not yet been a resolution of the "pedagogical controversy" over integration of disabled students. The existence of this debate, however, was of little consequence in the eyes of the Court of Appeal since it merely shows that "*solely from the pedagogical point of view*, integration has not yet been proven superior" [FN7] [emphasis added].

More important than the existence of this pedagogical debate is the existence of the equality rights of the children whose school placements are in question.

> With the greatest respect for the Divisional Court, in my view, it mischaracterized the issue. The question is not one of choosing between competing pedagogical theories, but one of determining the appropriate legal framework within which that choice will be made. [FN8]

While judges in previous decisions had perceived the lack of consensus on the comparative merits of integration and segregation as a reason for deferring to the decisions made by "educational experts," Justice Arbour clearly established that, notwithstanding the ongoing pedagogical debate, the merits of decisions made by "educational experts" must be considered within an established legal framework. ***76** That legal framework must include a consideration of the equality rights associated with section 15 of the *Charter*. More specifically, in light of section 15 of the *Charter*, the legal framework to be applied must consider whether or not the decisions taken are in any way discriminatory.

Madam Justice Arbour followed the approach to section 15 analysis established in *Andrews v. Law Society (British Columbia)*. [FN9] In *Andrews* it was established that section 15 was infringed when a distinction is made by a state actor on the basis of a prohibited ground which imposed a burden on the complainant, or deprived the complainant of a benefit, opportunity or advantage. Decisions to place children with disabilities in segregated classes or segregated schools are made on the basis of the child's disability. Not only is disability a prohibited ground of discrimination under section 15, but there exists an historical pattern of discrimination against disabled persons that can best be described as a "history of exclusion." Disabled persons thus fit the *Andrews* requirement that they be a "discrete and insular minority." Finally, segregated placements deny disabled children the benefits linked with learning and associating with "regular" children. Thus, according to Madam Justice Arbour, segregated placements are prima facie discriminatory:

> [I]t seems to me that when analyzed in its social, historical and political context, the decision to educate Emily Eaton in a special classroom for disabled students is a burden or disadvantage for her and therefore discriminatory within the meaning of s. 15 of the *Charter*. [FN10]

Madam Justice Arbour identified the Ontario *Education Act*, [FN11] and, more specifically, the discretion afforded by the Act, as a source of the discrimination in this case. Although Justice Arbour's decision does not directly attack the existence of discretion in the Ontario *Education Act*, it does require that that discretion be confined to the parameters established by section 15 of the *Charter*, that is to say, the discretion can be exercised to require a segregated placement only if all other options have been explored.

***77** In short, the *Charter* requires that, regardless of its perceived pedagogical merit, a non-

> consensual exclusionary placement be recognized as discriminatory and not be resorted to unless alternatives are proven inadequate. [FN12]

If segregated placements are prima facie discriminatory, the justification for these programs can only be made under section 1, where the onus of proof is shifted to the party attempting to restrict a right guaranteed by the *Charter*. Thus, within the legal framework established by Madam Justice Arbour, the onus shifts to the defendant school boards to demonstrate that segregated placements are justifiable. It was clear to Justice Arbour that the earlier decisions in this case had not recognized this shift in burden and thus had not applied the proper legal framework.

> More to the point, in proceeding as it did, the Tribunal saw no need to examine the desirability of providing Emily with a modified integrated setting, such as assigning her to a regular class but with a different teacher, more experienced in integrating disabled students, or withdrawing her periodically from the classroom for individual instruction. I do not wish to suggest that any of these measures would have been perceived by the Tribunal as likely to succeed where the integration in place, in its opinion, was failing. I simply remark that the Tribunal did not consider measures short of segregation, nor did it consider directly whether and how segregation offered better promise than the integrated model in place. [FN13]

This reasoning, adopted by the Tribunal and criticized by Justice Arbour, is precisely the reasoning that has, until now, characterized judicial consideration of placement decisions taken by school boards. The Ontario Court of Appeal's decision in *Eaton* demonstrates the constitutional weakness of such an approach and establishes a logical legal framework that should be applied in such cases in the future.

(b) Racial Discrimination in Education

(i) *The context for racial discrimination*

The education system is an important socializing tool. The biases inherent in the education system are all too often mirrored by its students and thus perpetuated in society. It is also possible, ***78** however, as Varpalotai argues, that the education system can be used to “repair” biases.

> [I]nside and outside of education, many groups have organized themselves and raised questions about the nature and structure of a society that permits ongoing systemic inequalities. Much of the questioning has focused on the role of schooling as the major social institution of the young. It is argued that equality of opportunity and a change in attitude must begin with the education of our youth. [FN14]

The ethnic make-up of Canada has changed dramatically, making the understanding and acceptance of others more pressing, if not more important, than ever. McAndrew reports that, according to Statistics Canada,

> The proportion of non-Native, non-French and non-English groups ... in the overall population of Canada grew from less than 8 percent in 1871 to almost 42 percent in 1991. [FN15]

Discrimination in educational settings often takes different forms. It is more than just biased treatment of one person by another (e.g., a student by a teacher). Discrimination can also be manifested in bias in the curriculum, low teacher expectations, and inequitable distribution of funding. Each of these forms of discrimination must be addressed in order to combat racism in education.

(ii) *The American experience*

Most of the popular conceptions of racism in education come from our exposure to American law and, in particular, to the case of *Brown v. Board of Education of Topeka*. [FN16] In *Brown*, the plaintiffs argued that laws permitting or forcing (depending on the state) schools to be segregated according to race, denied the racial minority (African-Americans) equal protection of the laws under the 14th Amendment to the American Constitution. Segregated schools had been allowed to exist as a result of the "separate but equal" doctrine ***79** that emerged out of *Plessy v. Ferguson*. [FN17] The doctrine provided that so long as the state provided comparable separate facilities (in *Plessy* it was a railway coach) for non-whites, there was no violation of constitutional rights.

In reaching his opinion in *Brown*, Chief Justice Warren noted the importance of education in American life:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.
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> Today, education is perhaps the most important function of state and local governments .... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. [FN18]

Chief Justice Warren ruled that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." [FN19]

Although *Brown* mandated desegregation of the schools, a de facto segregated system continued to exist for several reasons. As a result of a long history of formalized segregation and economic disadvantage, most African-Americans lived together in insular neighbourhoods - often ghettos. Naturally, African-American children went to schools in their neighbourhoods. Schools in economically depressed neighbourhoods received less funding than schools in wealthier neighbourhoods. This is a result of the system by which funding for schools is collected and distributed in the United States, which involves a combination of locally determined property and sales taxes. Thus, after *Brown*, governments started to mandate busing programs to ensure that schools were desegregated and that African-American students had access to better schools. These busing programs have been the focus of a great deal of litigation in the United States.

State legislatures have also responded by instituting and funding "magnet schools" - schools located in depressed neighbourhoods which specialize in particular programs and, as such, attract white middle-class students, without resorting to busing. Recent U.S. ***80** Supreme Court decisions have overturned earlier decisions that forced the states to pay for these magnet schools - thus putting the programs in jeopardy. [FN20]

Some cases have been launched to try to ensure fair funding for schools in poor neighbourhoods.

> A problem which many courts have been asked to address stems from the fact that virtually every state has a wide range of per pupil expenditures among its local schools districts. This is due to state school financing statutes which provide for financing local schools through a variable property tax. This revenue may vary to a large extent within a state, as property tax based on assessed value of real property within the district may vary significantly. These disparities may remain substantial despite state legislation designed to equalize such expenditures. [FN21]

San Antonio Independent School District v. Rodriguez [FN22] is the case where this issue came to a head. In this 1973 case, the U.S. Supreme Court ruled that the Texas statutory scheme which allowed for substantial dis-

parities in intrastate public educational expenditures did not contravene the equality guarantees of the 14th Amendment.

> If education is a fundamental right, then the statutory inequities would impermissibly infringe on the students' right to education in a poorly funded school district. In *Rodriguez*, the Court declared, and the State of Texas conceded that if education was a fundamental right under the equal protection clause of the Federal Constitution, the local funding system in Texas would be struck down under the strict scrutiny test. [FN23]

Since, however, education was not held to be either an explicit or implied right under the U.S. Constitution, the funding scheme was not subject to the strictest level of constitutional scrutiny. The Texas funding scheme was thus constitutionally scrutinized by the Supreme Court according simply to whether it "rationally further[ed] a legitimate state purpose or interest" or was "so irrational as to be invidiously discriminatory." The Supreme Court held that it was not so irrational as to warrant it to substitute its wisdom for what educators "for half a century have thought was an enlightened approach***81** to a problem for which there is no perfect solution." Despite the *Rodriguez* ruling, funding challenges, based on racial discrimination grounds, have continued, with some succeeding on the basis of a violation of state constitutions, rather than the U.S. Constitution.

(iii) *The Canadian experience*

In general, the discussion of racism in education has not been as high-profile or dramatic in Canada as in the United States. However, it would be a mistake to take this lack of exposure as an indication that there is no racial discrimination in Canadian education. A discussion of the concept of racial discrimination in Canada must be informed by the existence of section 27 of the *Charter*, which states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." The impact of this section has been unclear and it would appear that it can be argued only in conjunction with some other provision of the *Charter*. [FN24] There are also problems with the ambiguity of the term "multiculturalism."

> In the education field, federal multiculturalism policy has influenced a variety of provincial "multicultural education policies." The ambiguity of the ideology of multiculturalism is reflected in the divergent stresses that each province places upon integration, maintenance or intercultural measures in its definition of multicultural education and also in the extent to which cultural pluralism is considered as a priority over provincial cohesiveness. [FN25]

In many respects, especially in educational policy, Canada suffers from a constitutional identity crisis, unable to make up its mind between the "old" constitutional dualistic privileges under the *British North America Act, 1867* and the "new" constitutional values of cultural pluralism reflected in sections 15 and 27 of the *Charter* and enacted in 1988 in the form of the *Multiculturalism Act*. [FN26]

***82** A. Individual discrimination. Individual discrimination in an educational setting can occur in every relationship. This form of discrimination often involves direct and intentional actions based on bias and stereotyping. It can arise in the following interactions: teacher-student (student-teacher); teacher-teacher; student-student; or administrator-teacher or student (student or teacher-administrator). There is, however, very little Canadian case law dealing with cases of individual discrimination in the school context. This is an emerging area of the law.

B.Systemic discrimination. Systemic, or indirect, discrimination occurs when a rule or policy which is ap-

parently neutral on its face has a disparate negative effect on a person or group protected under a human rights code or the *Charter*, for example, a racial or ethnic group, women or the disabled. Systemic discrimination in education can take many forms. One interesting case is *Bhadauria v. Toronto (City) Board of Education*. [FN27] Bhadauria, a teacher, complained that the school effectively discriminated against people of South Asian origin through excessive reliance on interviews in their promotional policy, which handicapped those, such as himself, who come from deferential cultures and who feel uncomfortable having to "sell" themselves. The complaint, however, was dismissed.

In the past several years, school boards and Ministries of Education have been willing to recognize what minority groups have been claiming for decades - that the education system in Canada does not reflect the contributions of minority groups to Canada and does not meet their needs. For example, the Ontario Ministry of Education makes the following observations in its guidelines on racism and ethnocultural equity in education:

> In recent years, there has been a substantial increase in Ontario's racial and cultural diversity. In important respects, however, Ontario's school system has been and continues to be mainly European in perspective. The prevalence of one cultural tradition limits students' opportunities to benefit from the contributions of people from a variety of backgrounds. Moreover, exclusion of the experiences, values, and viewpoints of Aboriginal and racial and ethnocultural minority groups constitutes a systemic barrier to success for students from those groups and often produces inequitable outcomes for them. ***83** Such inequities have been linked to students' low self-esteem, placement in inappropriate academic programs, low career expectations, and a high dropout rate. [FN28]

In an attempt to remove the sort of systemic racism described by the Ontario Ministry of Education, the Nova Scotia government recently announced it will spend $1 million in 1996 to develop a new curriculum which will include courses on black history, culture, and traditions. The government will also fund scholarships for black students who want to become teachers or study sciences at university. [FN29]

These kinds of initiatives are welcome but long overdue and there is still a long way to go before the school system will adequately reflect the diversity of the Canadian population. The forms of systemic discrimination in education are numerous and subtle; only a few of them were outlined above. At least there are some signs of hope for change.

(c) Teachers as Egalitarian Role Models: The Malcolm Ross Case

There would be few people in Atlantic Canada who have not heard of the *Malcolm Ross* case. Indeed, this case involving the Moncton teacher who made public statements and published books, which were anti-Semitic in nature, has received national notoriety. All of these activities took place outside the classroom but were widely publicized in the Moncton area and beyond. Since the statements were made outside the classroom, the case raises more complex issues than those involved in the case of *R. v. Keegstra*. [FN30] The issue is one of balancing a teacher's rights to privacy and freedom of expression against the equality rights of children to be taught in an environment free of bigotry.

On April 3, 1996, the Supreme Court of Canada rendered its judgment in this case, which is reported as *Attis v. New Brunswick* ****84*** *District No. 15 Board of Education*. [FN31] The Court came down clearly on the side of equality and found that it was reasonable to limit Mr. Ross's speech in this context. Mr. Justice La Forest, writing for a unanimous Court, largely restored the remedy granted by the original Tribunal set up under the New Brunswick *Human Rights Act*. Under the remedy, Mr. Ross had to curtail his anti-Semitic writings and com-

ments or face dismissal. He was also removed from the classroom.

The flavour of the judgment is apparent in the following passages from this important decision. In agreeing with the following statement made in the original Human Rights Tribunal, the Court emphasized the special nature of the school environment.

> In the case of the teacher who has proclaimed the discriminatory views publicly the effect may adversely impact on the school community. It may raise fears and concerns of potential misconduct by the teacher in the classroom and, more importantly, it may be seen as a signal that others view these prejudicial views as acceptable. It may lead to a loss of dignity and self-esteem by those in the school community belonging to the minority group against whom the teacher is prejudiced.
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> The Act does not prohibit a person from thinking or holding prejudicial views. The Act, however, may affect the right of that person to be a teacher when those views are publicly expressed in a manner that impacts on the school community or if those views influence the treatment of students in the classroom by the teacher. [FN32]

In a later passage, Mr. Justice La Forest emphasized the special obligation on school officials to maintain an environment that is appropriate for the education of young children.

> A school is a communication centre for a wide 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. [FN33]

La Forest J. also identified the teacher as the heart of the unofficial curriculum. He does this by citing one of the author's former education law students, Allison Reyes, who wrote:

> ***85** Teachers are a significant part of the unofficial curriculum because of their status as “medium.” In a very significant way the transmission of prescribed “messages” (values, beliefs, knowledge) depends on the fitness of the “medium” (the teacher). [FN34]

The Court buttressed this point further by referring to an earlier decision by the British Columbia Court of Appeal involving the privacy and free speech rights of teachers - *Abbotsford School District 34 v. Shewan*. [FN35] This was a colourful case involving two teachers who had sent nude photos of one of them to *Gallery Magazine*. They were suspended for “conduct unbecoming a teacher.” As with the *Malcolm Ross* case, their conduct occurred outside the classroom but was still subject to sanction. In *Shewan*, the Court of Appeal had stated:

> The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system. [FN36]

Justice La Forest also suggested that school boards have an active role to play in promoting the proper educational environment. Referring to the original tribunal decision, he stated:

> In effect, its passivity signalled a silent condonation of, and support for the respondents' views. The Board found an obligation within the school community “to work towards the creation of an environment

in which students of all backgrounds will feel welcomed and equal" (p. 83). It stated (at p. 80):

> In such situations it is not sufficient for a school board to take a passive role. A school board has a duty to maintain a positive school environment for all persons served by it and must be ever vigilant of anything that might interfere with this duty. [FN37]

When it came to assessing the proper limits on Mr. Ross's freedom of speech under the *Canadian Charter of Rights and Freedoms*, La Forest J. again emphasized the unique nature of the school environment.

> ***86** There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. While the importance of education of all ages is acknowledged, of principal importance is the education of the young. As stated in *Brown, supra*, education awakens children to the values a society hopes to foster and to nurture. Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher. The importance of ensuring an equal and discrimination-free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others. [FN38]

Mr. Ross also argued that his freedom of religion and conscience under section 2(a) of the *Charter* was violated by the ban on the expression of his views. While the Court was willing to accept that there was a violation, it was easily able to justify limiting these rights under the reasonable limits clause of the *Charter*.

> In relation to freedom of religion, any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a) - a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience. The respondent's religious views serve to deny Jews respect for dignity and equality said to be among the fundamental guiding values of a court undertaking a s. 1 analysis. Where the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate. [FN39]

The Supreme Court of Canada sent a clear message in the *Malcolm Ross* case that limits can be placed on the freedom of teachers in order to promote an egalitarian teaching environment. Indeed, it is an important step along the arduous path to schools that are free from all forms of discrimination. It is important to have support for this cause from the highest court in the land.

*87 3. ADMINISTRATIVE AND STRUCTURAL INITIATIVES IN NOVA SCOTIA: SYSTEMIC SOLUTIONS FOR SYSTEMIC PROBLEMS

There is now a clear legal framework for equality in our schools. At the international level, Canada is a signatory to various protocols under the *Universal Declaration of Human Rights*. At the national level, Canada now has a *Charter of Rights* that promotes equality as a positive right and accepts the value of equality as a limitation on other guaranteed rights, such as freedom of expression. There are also human rights codes which have administrative structures designed to not only sanction discrimination but also promote equality in a proactive way.

Thus the legal framework is in place.

There have also been some important initiatives by school boards and school administrators in recent years to promote more inclusive schools. One example of such an initiative is the anti-racist program developed by the British Columbia Teachers' Federation. Other provinces have similar programs, although they are all chronically underfunded. Increasingly, school boards have adopted anti-racism policies; the one adopted by the Halifax District School Board is an excellent example. [FN40] There are concerns, however, that some of these policies and related initiatives have been lost in the process of school board amalgamation.

The Department of Education in Nova Scotia has also moved to promote a more diverse educational setting, as discussed earlier. There has also been a reactivation of the Joint Human Rights and Education Committee chaired jointly by the Executive Director of the Human Rights Commission and the Deputy Minister of Education. This type of cooperation can provide an important forum for policy about human rights issues in the schools at a high level. It can also assist in coordinating such projects as the program dealing with sexual harassment in schools, spearheaded by the Nova Scotia Human Rights Commission.

The Coalition Against Sexual Harassment (“CASH”) in Schools project is an encouraging sign of activity on the human rights ***88** front in Nova Scotia schools. As the name suggests, this is a coalition of a number of different groups and agencies attempting to combat the significant problem of sexual harassment in our schools. The idea is to create a pilot for school programs at the junior high level. The target date for this pilot is September 1997, but phase one began during the summer of 1996.

There have also been some significant curriculum changes in Nova Scotian schools which make course offerings more inclusive than they used to be. Some progress has also been made with respect to equity in staffing, but there is still a very significant problem of under-representation of African-Canadians, Aboriginals and people with disabilities within the ranks of the teaching profession. There is also still an under-representation of women at administrative ranks within the school system.

Thus, while there are some positive signs, there are also many hurdles to overcome. In times of economic restraint there is a real danger that some of the recent advances will be lost. We also live in a climate where there is a significant backlash against the cause of equity. Finding systemic solutions to the problems of discrimination in our schools, therefore, will require creativity and resourcefulness. We should begin with an honest recognition of the problems that exist, and work together to foster a school community that allows all students to belong. This is an ideal worth pursuing.

[FNa1]. Professor of Law, Dalhousie Law School, and Executive Director, Nova Scotia Human Rights Commission. The author gave a version of the article as an address to the Annual General Meeting of the Multicultural Education Council of Nova Scotia in Halifax, Nova Scotia, on June 13, 1996.

[FN1]. (1984), 54 B.C.L.R. 203 (S.C.).

[FN2]. *School Act*, R.S.B.C. 1979, c. 374.

[FN3]. See also *Yarmoloy v. Banff School District No. 102* (1985), 16 Admin. L.R. 147 (Alta. Q.B.); *Robichaud c. Nouveau-Brunswick Commission scolaire no. 39* (1989), 99 N.B.R. (2d) 341 (C.A.).

[FN4]. (1995), 22 O.R. (3d) 1 (C.A.)

[FN5]. Interestingly, out-of-court settlements were reached in each of the major cases in which s. 15 arguments have been advanced prior to *Eaton*. See, for example, *Elwood v. Halifax County - Bedford District School Board* (1987) in "The Elwood Case - Vindicating the Educational Rights of the Disabled" in M. Csapo & L. Goguen, eds., *Special Education Across Canada: Issues and concerns for the '90's* (Vancouver: Centre for Human Development) at 19. Despite the fact that the case was settled before trial, it became one of the best known cases dealing with the education rights of children with disabilities. The case was popularized by Jack Batten in his book, *On Trial* (Toronto: MacMillan, 1988). The Elwood agreement has been used as a blueprint in several settlements between school boards and parents and the arguments advanced by counsel for the Elwoods have been adopted in other cases, such as *Eaton*. The text of this agreement is printed in G.M. Dickinson & A.W. MacKay, eds., *Rights, Freedoms and the Education System in Canada: Cases and Materials* (Toronto: Emond Montgomery, 1989) at 278. See also *Hysert v. Carleton Board of Education*. The full details of this settlement are not available due to an agreement between the parties; however, a discussion of the case can be found in *The Globe and Mail* (25 April 1991) A6.

[FN6]. Editor's Note: On October 9, 1996, the Supreme Court of Canada reversed the Court of Appeal's decision: Doc. No. 24668.

[FN7]. *Eaton*, above, note 4 at 8.

[FN8]. Ibid. at 10.

[FN9]. [1985] 1 S.C.R. 143.

[FN10]. *Eaton*, above, note 4 at 15-16.

[FN11]. R.S.O. 1990, c. E-2.

[FN12]. *Eaton*, above, note 4 at 22.

[FN13]. Ibid. at 22-23.

[FN14]. A. Varpalotai, "Affirmative Action for a Just and Equitable Society" in R. Ghosh & D. Ray, eds., *Social Change and Education in Canada*, 3d ed. (Toronto: Harcourt Brace, 1995) 240 at 242.

[FN15]. M. McAndrew, "Ethnicity, Multiculturalism, and Multicultural Education in Canada" in Ghosh & Ray, eds., above, note 14, 165 at 167.

[FN16]. 347 U.S. 483, 74 S.Ct. 686 (1954).

[FN17]. 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 265 (1896).

[FN18]. Above, note 15 at 691 (S.Ct.).

[FN19]. Ibid. at 692.

[FN20]. "U.S. Court Deals Blow to Schools" *The [Toronto] Globe and Mail* (5 July 1995).

[FN21]. T.L. Sobel, “Strategies for School Finance Reform Litigation in the Post-Rodriguez Era” 21 New England L. Rev. 817 at 819.

[FN22]. 41 U.S. 1 (1973).

[FN23]. D. McKeige, “Inequality in Louisiana Public School Finance: Should Educational Quality Depend on a Student's School District Residency?” (1986) 60 Tulane L. Rev. 1268 at 1283.

[FN24]. A.W. MacKay, “Protecting Ethnic Rights under the Canadian Charter of Rights and Freedoms” (1983) 6 Multiculturalism 23.

[FN25]. Above, note 15 at 174.

[FN26]. A full discussion of multiculturalism and its impact on education is beyond the scope of this article. However, readers should see McAndrew, ibid., and G. Dickinson & W.R. Dolmage, “Education Law and Multiculturalism: A Trio Becomes a Quintet” in W. Foster, ed., *Education in Transition: Legal Issues in a Changing School Setting* (Châteauguay: LISBRO, 1996) 79.

[FN27]. (1990), 12 C.H.R.R. D/105 (Ont. Bd. of Inquiry), aff'd (1992), 89 D.L.R. 126 (Ont. Div. Ct.).

[FN28]. (Ontario) Ministry of Education and Training, *Antiracism and Ethnocultural Equity in School Boards: Guidelines for Policy Development and Implementation* (1993) at 5.

[FN29]. “Schools More Attuned to Race” *The [Toronto] Globe and Mail* (10 July 1995).

[FN30]. [1990] 3 S.C.R. 697.

[FN31]. [1996] 1 S.C.R. 825.

[FN32]. Ibid. at 25.

[FN33]. Ibid. at 27.

[FN34]. Ibid. at 28, citing A. Reyes, “Freedom of Expression and Public School Teachers” (1995) 4 Dal. J. Legal Stud. 35 at 42.

[FN35]. (1987), 21 B.C.L.R. (2d) 93 (C.A.).

[FN36]. Ibid. at 97.

[FN37]. Above, note 28 at 32.

[FN38]. Ibid. at 47-48.

[FN39]. Ibid. at 53.

[FN40]. *Anti-Racism Policy as Regards Aboriginal, Black and Visible Ethnocultural Persons*, Halifax District School Board, approved December 19, 1995.

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