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Article

***85** Begging the Questions: The Court of Appeal Decision in the Surrey School Board Book Controversy

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Ultimately this litigation has a certain Alice in Wonderland quality. Like the Cheshire Cat the issues slowly vanish on close examination.

The Honourable Mr. Justice Mackenzie, BC Court of Appeal. September 20, 2000.

1. INTRODUCTION

In this article we critique the British Columbia Court of Appeal decision in *Chamberlain v. Surrey School District No. 36*, a controversial case involving the denial of approval for use in classrooms of three children's books [FN1] that depict families with same-sex parents. The books ***86** were proscribed for use in kindergarten classrooms by the Surrey School Board (SSB) on April 24, 1997 in response to objections by some parents. In an earlier issue of this journal, [FN2] two of us analyzed the significant legal, ethical and educational issues arising from the case. In that article we discussed the lower court decision handed down by Justice Saunders of the Supreme Court of British Columbia, requiring that the Board reconsider its initial resolution to prohibit classroom use of the three books. The present article reviews Justice Mackenzie's opinion written on behalf of a unanimous Court of Appeal panel that overturned the lower court's order to quash the School Board's resolution, thereby reinstating the restrictions on the use of the three books.

It is widely recognized that judicial opinions are intended to serve two purposes: to resolve the specific case at hand and to shed light more generally on matters of law raised by the case. On both of these two grounds, the Court of Appeal decision is a disappointment. The fact that both sides claimed victory immediately after the opinion was handed down is, to our minds, a symptom of the inadequate resolution of the important issues raised in this case. [FN3] A key explanation for the unsatisfactory resolution, we believe, is suggested by Justice Mackenzie's allusion, quoted above, to the issues in the case dissolving, at least in his eyes, just as the *Cheshire Cat* vanishes in *Alice in Wonderland*. We argue that far from vanishing, issues raised by this dispute present educational officials with very real dilemmas that are regularly played out in public schools. The recent Ontario controversy over the popular *Harry Potter* [FN4] children's books is a case in point. Some parents question the appropriateness of *Harry Potter* books for use in the classrooms because they depict wizardry and witchcraft and the books carry “a serious tone of death, hate, lack of respect and sheer evil”. [FN5] J.K. Rowling's response is one of indignation; she observes that banning all books that mention ***87** witches would mean removing much of the body of classical children's stories. Through her characters, Rowling introduces young readers to the endless conflict between doing good and doing evil. As she notes, Harry represents a child with a deep moral conscience

who has a “human underbelly”. [FN6] Moreover, she stresses the difference between taking the *right* way as opposed to the *easy* way out of a difficult moral situation.

The *Harry Potter* books and the three books in the SSB case are simply recent controversies in the long history of disputes about books proposed for use in Canadian public school classrooms that are perceived objectionable by one segment of the population and valued for their merit by another. [FN7] Disputes over classroom or library resources of contested value present dilemmas for educational authorities. One side or the other will be forced to compromise on the values it seeks to protect. Often the “winners” are those parents or interest groups who apply the greater political pressure or whose position is more closely aligned with the personal consciences of the educational officials empowered to authorize the materials. Not unlike the example set by the characters in Rowling's books, we believe educational authorities should strive to resolve these dilemmas in the *right* way and not simply do what is expedient. Regrettably, there are many similarities between the “Off with her head!” stance adopted by the *Queen* in *Alice in Wonderland* and the response of the SSB and other educational authorities who endeavour to deal with a controversy by getting rid of the contested material.

When courts dismiss the competing positions underlying such dilemmas as illusionary, their decisions set back rather than advance the law and, in the process, create confusion. On first reading, the Court of Appeal judgment appears to resolve the legal questions; school boards are authorized to restrict books provided they do so in good conscience. This, we believe, is an inadequate statement of the law. In its blurring of several complicating factors, the court has missed its opportunity to articulate clear standards to guide school officials in developing ethically and legally defensible policies regulating the approval of controversial books. Our article focuses on four questions that the SSB case invited the Court to resolve but which it failed to do satisfactorily:

> ***88** 1. What is the legitimate role of the religious beliefs of parents and school board officials in decisions regarding the approval of educational materials for use in secular schools?
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> 2. Is there a greater onus required for justification when school officials seek to “ban” resources from educational use as opposed to simply “not recommend” them?
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> 3. What are the implications under the *Charter of Rights and Freedoms* [FN8] of school board decisions to ban books because they raise issues of sexual orientation?
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> 4. Do school boards have a positive responsibility to work to reduce discrimination and abusive treatment of beleaguered students and groups of students (including students who are alleged to be homosexual or to be children of homosexual parents)?

We begin by summarizing the facts of the case and Justice Saunders' initial judgment, followed by a review of Justice Mackenzie's opinion on appeal. We then consider the four questions begged by the Appeal Court decision. We conclude by discussing the decision's implications for educational policies and its potential impact on school culture and environment.

2. THE CASE

(a) Background

In the fall of 1996 and early 1997, the Gay and Lesbian Educators Association (GALE), supported by the British Columbia Teachers Association (BCTF), launched a well-publicized campaign to counter homophobia in the public school system. The three books were included in a resource list recommended by GALE. James Chamberlain, a gay teacher in Surrey, applied to his school board for permission to use the books in his kinder-

garten class during discussions of varying family groupings. A Surrey group composed primarily of religious parents strongly voiced its objections that the sensitive nature of the content would morally harm and confuse their children, that the books were age-inappropriate and that the depiction of same-sex parents would teach their children to endorse homosexuality as morally acceptable. This teaching was inconsistent with ***89** the religious and moral values they wanted their children to learn. At the SSB's April 24, 1997 meeting, Mr. Chamberlain and the BC Civil Liberties Association sought to have the books approved. No submissions were made against use of the books. The atmosphere at this meeting was hostile and intimidating. In response to the concerns that parents opposed to the books had expressed earlier, the SSB passed a resolution stating the books were not approved for use in Surrey kindergarten classrooms. The resolutions rejecting the books resulted in hotly debated controversy, followed by litigation.

(b) The B.C. Supreme Court Decision

A law-suit was launched in the British Columbia Supreme Court by James Chamberlain and his colleagues [FN9] on grounds that: (1) the SSB had acted *ultra vires* sections 85 and 76 of the BC *School Act* [FN10]; and, (2) the ban resulted in discrimination under sections 2(b) (freedom of expression) and 15 (equality) of the *Charter*. In response, the SSB and religious parents argued that the books, if introduced, would infringe their section 2(a) *Charter* freedom of religion and conscience. Moreover, they asserted that the trustees have discretion to approve or not approve educational resources by virtue of section 85 of the *School Act*. In her decision handed down in December 1998, Justice Saunders found that although the SSB has autonomy under section 85 to make decisions regarding educational resources, the board's resolution against use of the books was *ultra vires* section 76. She stated the SSB had given too much weight to concerns that the books would conflict with the religious views of parents and other community members. Section 76 (2) directs that the “highest morality must be inculcated' [FN11]' but section 76 (1) requires that “All schools must be conducted on strictly secular and non-sectarian principles.” [FN12] Justice Saunders quashed the SSB resolution that banned the books and referred the decision back to the SSB, asking the trustees to reconsider their decision in light of her judgment. She did not find it necessary to directly address the *Charter* issues. The SSB filed an appeal on the grounds that Justice Saunders had erred in interpreting section 76.

***90 (c) The B.C. Court of Appeal Decision**

The Court of Appeal decision was delivered on September 20, 2000. [FN13] Justice Mackenzie provided the reasons for judgment, with Justices Esson and Proudfoot concurring. The court found that Justice Saunders erred in her interpretation of the distinction between religion and morality, and incorrectly interpreted what was implied by the requirement in section 76 that schools be conducted according to strictly secular principles. The court held that the religious parent group was entitled, in a free and democratic society, to participate in the decision regarding the books, and that secular schools do not preclude input by people of religious faiths into moral decisions about school matters. What is more, the SSB was thought to have acted in a manner consistent with the highest morality when, out of respect for objections of parents whose conscience may have been informed by religious conviction, it decided not to approve the books. Accordingly, the court reinstated the resolution not to recommend the three books as learning resources in Surrey kindergarten classrooms but allowed the books in school libraries for use by teachers as library resources. Upon release of the judgment, the media reported [FN14] that both parties claimed victory: the SSB and its supporters because the decision not to approve the books as learning resources remained in place; Chamberlain and his supporters were pleased because the de-

cision allowed library resources to be brought into classrooms at the professional discretion of teachers. However, as we explain in our analysis, the issues raised by this case are far from resolved. In rendering the court's opinion, Justice Mackenzie leaves unanswered four crucial questions:

(i) Question 1: What is the legitimate role of the religious beliefs of parents and school board officials in decisions regarding the approval of educational materials for use in secular schools?

As indicated above, the basis for the appeal of the Supreme Court decision was the interpretation given to two clauses in Section 76 of the BC *School Act*: the requirements that schools inculcate the "highest morality" and yet be conducted according to "strictly secular" principles. These requirements raise the more general question of the place of religious beliefs in educational policy decisions in secular schools.

***91** The most obvious of the questions begged in the appeal decision is the interpretation given to the "strictly secular" provision. Justice Mackenzie ends his explication of this key term with a most paradoxical conclusion:

> In my opinion, "strictly secular" in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the positions flow out of a conscience that is religiously informed or not. The meaning of "strictly secular" is thus pluralist or inclusive in its widest sense. [FN15]

In claiming that "strictly secular" must mean "inclusive in the widest sense," Mackenzie J.A. flatly ignores the ordinary language meaning of "strictly secular," which would seem to expressly *exclude* religious principles and, instead, adopts the counterintuitive position of interpreting it to *embrace* religious principles: "No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues in education in public schools." [FN16] Justice Mackenzie asks rhetorically: "Are only those with a non-religiously informed conscience to be permitted to participate in decisions involving moral instruction of children in the public schools? Must those whose moral positions arise from a conscience influenced by religion be required to leave those convictions behind or be otherwise excluded from participation while those emanating from a conscience not informed by religious consideration are free to participate without restriction?" [FN17] He concludes that "[a] religiously informed conscience should not be accorded any privilege, but neither should it be placed under a disability." [FN18] He then poses the question of whether the term "strictly secular" in section 76(1) of the *School Act* can be interpreted as being limited to moral positions that are devoid of religious influence:

> *Moral positions must be accorded equal access to the public square without regard to religious influence. A religiously informed conscience should not be accorded any privilege*, but neither should it be placed under a disability. In a truly free society moral positions advance or retreat in their influence on law and public policy through decisions of public officials who are not required to pass a religious litmus test. [FN19] [emphasis added]

In Justice Mackenzie's view, section 76 is designed to ensure that no one particular religion is emphasized or taught in the public schools. ***92** Nonetheless, he argues, this does not mean those with religious beliefs cannot participate in setting the moral agenda of what their children learn. In light of Justice Mackenzie's decision to reinstate the SSB's resolution, the irrelevance of religious influence as the source of moral conscience presumably means that school board members can decide that their religious beliefs (provided they are non-sectarian) are as morally sound as anyone else's and can therefore follow their conscience in setting school policy. Of course, this

line of reasoning leaves us wondering why the legislators would have directed that schools be run according to secular principles - to say nothing of wondering why they went further to require that the principles be *strictly* secular. What phrase, if not the term “strictly secular”, should legislators have used if they did not want educational authorities to determine school policy by reference to personal religious conviction?

Justice Mackenzie's largely misdirected discussion, predicated on the “inherent dignity and the inviolable rights of the human person”, [FN20] establishes that the words “strictly secular” cannot preclude persons who are religious from participating in public debate about school policy: “Positions on moral issues should not be differentiated on the basis of their source in a religious or non-religious conscience.” [FN21] What he fails to appreciate is that the root or source of a person's conscience - whether it stems from religious or non-religious conviction - is beside the point raised by the requirement that schools be conducted on strictly secular principles. [FN22] The relevant consideration is not the source but the justification***93** for any decisions made. Strictly secular decision-making does not imply, for example, that an avowed Catholic cannot participate in the decision; but it does require that decisions about policy *cannot* be justified by appeal to that person's religious convictions. The reason for this exclusion should be obvious: the fact that the Catholic Church requires a particular behaviour is irrelevant to those who do not share this faith. Thus, justifications must appeal to non-ecclesiastical fiat - to principles that do not depend on a religious conviction, but are principles that all persons within the society could and should accept. Ironically, this is the very point that Justice Mackenzie should have appreciated when he agreed with Justice Saunders that the Supreme Court of Canada's decision in *Big M Drug Mart* “must be the point of departure” for the analysis of issues in the SSB case. In deciding whether or not the *Lord's Day Act* violated *Charter* freedom of religion provisions, in Justice Mackenzie's own words, the Supreme Court considered whether the Act “could be supported on non-religious grounds as mandating a day of rest. Such a *rationale* was consistent with American authorities ... [but] that *justification* for a secular purpose was not possible. The legislation inescapably enacted long-held Christian doctrine.” [FN23] (emphasis added).

Significantly, in her decision, Justice Saunders looks to the reasons for supporting the SSB decision. She quotes from sixteen affidavits supplied by SSB supporters that expressly refer to parents' and other persons' religious objections to the books. In light of these and other comments by school board members, she decided that “some of the trustees who voted in favour of the resolution were motivated to a significant degree by concern that parents and others in the School District would consider the books incompatible or inconsistent with their religious views ...”. [FN24] Justice Saunders concludes: “by giving significant weight to personal or parental concern that the books would conflict with religious views, the Board made a decision significantly influenced by personal religious considerations.” [FN25] In explaining her reasoning she notes that the expectation that schools will promote the highest morality, yet be on based on strictly secular principles, has the effect of “distinguishing religious influence from issues of morality.” [FN26] And, as many people have observed, ***94** constitutional documents provide a fundamental set of moral principles that are “secular” principles; principles that do not presuppose a religious orientation for them to have moral force. In this vein, Justice Saunders refers to the values embodied in the *Charter* as providing some of the substance of the “moral standard that schools must apply.” [FN27] Similarly, Justice Mackenzie refers to provisions of the *Criminal Code* as evidence of generally recognized moral principles. [FN28] Thus, our hypothetical Catholic school board member who may be motivated to oppose the three books on religious grounds cannot, if he is to comply with the *School Act*, simply assert his religious convictions. Rather the *Act* requires that his justification for policy decisions be grounded on broader principles, for example, on the educational value of the books, their quality, respect for fundamental rights and so on. It is legally irrelevant that a position may have its origins in and be motivated by religious conviction; what matters is whether or not it can be justified by appeal to extra-religious considerations. In a society

that values freedom of religion, the only way to prevent one group from imposing their religious beliefs on others is to prohibit the resort to religious convictions as the justification for public policy.

The justification for a policy decision is a crucial factor in determining its legality because the proffered reasons establish the policy's intended purpose. And, as the Supreme Court has confirmed in *Big M Drug Mart*, "either an unconstitutional purpose or unconstitutional effect can invalidate legislation." [FN29] Thus, on our reading, the "strictly secular" requirement is intended to safeguard religious freedom by prohibiting policies that have a detectable religious purpose. As explained in *Big M Drug Mart*, "[t]he guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts for others." [FN30] Hence, the religious significance that an action has for one group cannot be used to justify general school policy; only if a legitimate secular justification can be established will the "strictly secular" condition required by the BC *School Act* be satisfied. Certainly, the *Charter* prohibits school boards from forcing students to read books that contradict their religious convictions or those of their parents. Yet, to our mind, the *School Act* - and likely the *Charter* - bar school boards ***95** from denying access to books simply because the books are inconsistent with the religious views of some. The battle for resource approval must be fought exclusively on extra-religious grounds.

(ii) Question 2: Is there a greater onus required for justification when school officials seek to "ban" resources from educational use as opposed to simply "not recommend" them?

At trial, the issue appeared to be the SSB's intention to ban the use of the three books in school district classrooms. On appeal, however, it was concluded that the issue before the court was whether the three books would be approved as "recommended learning resources"; there was no apparent intention on the SSB's part to prevent the introduction of the books as library resources. According to Justice Mackenzie, library resources are merely "appropriate for the curriculum" [FN31] whereas recommended learning resources are "relevant to the learning outcomes and content of the course or courses" for which they are recommended. He concludes the only "sensible distinction" [FN32] between a library resource and a recommended learning resource is that the latter is "recommended for instructional purposes generally in classes throughout the district whereas a library resource is made available for use as appropriate in the discretion of the particular teacher." [FN33] Thus, the SSB's decision *not* to recommend the three books was seen as a decision not to support their general use by teachers. Because there was no SSB resolution to prevent the books becoming library resources, Justice Mackenzie concludes that the Board accepted the books as library resources. [FN34] Consequently, in Justice Mackenzie's eyes, the classroom use of the three books became "primarily a matter for the professional judgment of the teacher rather than one of general policy for the Board,' [FN35]' although he noted that "a prudent teacher should consult with colleagues, parents and the principal before using sensitive materials." [FN36]

Justice Mackenzie's inference about the SSB's implied acceptance of the three books as library resources means that the Board concedes that, among other criteria, the books satisfies the following conditions:

> ***96** 1. The library resource shall support and be consistent with the general educational goals of the province, district, and the aims and objectives of individual schools and specific courses.
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> ...
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> 3. The library resource shall be appropriate for the curriculum and for the age, emotional development, ability level, learning style, and social development of students from whom the materials are selec-

ted.

4. The library resource shall have aesthetic, literary, historical, and/or social value.

...

7. The library resource shall be chosen to help students gain an awareness of our pluralistic society as well as an understanding of the many important contributions made to our civilization.

8. The library resource shall be chosen to motivate students and staff to examine their own attitudes and behaviours, and to comprehend their own duties, responsibilities, rights and privileges as participating citizens in our society.

9. The library resource is fair, objective, free from gratuitous violence, propaganda and discrimination, except where a teaching/learning situation requires illustrative material to develop critical thinking about such issues. [FN37]

It is difficult to reconcile the SSB's implied acceptance of the three books' satisfying these criteria with the extensive arguments advanced at trial by SSB lawyers and witnesses challenging the educational merits and age-appropriateness of the resources. The unaddressed question - and we think the transparent intention of the SSB - was the banning of the books from any classroom use. It is not coincidental that the SSB lawyer argued on appeal that approval as library resources meant only that the books could be used in the library, and not in the classroom. To his credit, Justice Mackenzie dismissed as absurd the SSB's suggestion that teachers could not take library books into their classrooms to read to their students. Nevertheless, according to Justice Mackenzie's reading of the evidence, the SSB did not seek to ban the books, it simply declined, as was the school board's right, to recommend their general instructional use in classrooms.

We concur that a school board may legitimately not *recommend* for general use books that it knows to be controversial. The important question begged by Justice Mackenzie's reading of the issues is the school board's entitlement to attempt to *prohibit* or *restrict* their use. If resources are judged sound by educational experts, can school boards legitimately proscribe their use simply because they offend some parents' sensibilities ***97** or create controversy? To take parallel but pointed examples, could a school board ban or restrict books that portrayed women in leadership positions or ethnic groups in a favourable light because some members of the approval committee objected to these kinds of positive depictions? We think not; laws against discrimination would forbid such conduct. And we wonder about the discriminatory nature of singling out books solely because they show same-sex families in a positive light.

The contentious feature of the books is that they depict “same-sex” families. Mackenzie J.A. incorrectly concludes that “each of these three books depicts a family model distinguishable from other alternative family models only by reason of the sexual orientation of the parents.” [FN38] Although there is no reference to homosexual couples or homosexuality, Justice Mackenzie notes that other families where the “parents” were of the same sex but obviously heterosexual - say a grandmother taking on a surrogate mother role - could have been chosen. He observes that perhaps over half the children in Surrey live in “non-traditional” or alternative family models and he defines traditional families as being heterosexual families where the mother does not work outside the home. Justice Mackenzie concludes that Chamberlain's intention was to promote acceptance of homosexual “same-sex” families. He claims that “[t]he three books in issue were selected for their sexual orientation dimension” [FN39] and he chides Chamberlain for pursuing an “agenda that was bound to be confrontational.” [FN40] As *obiter dicta*, Justice Mackenzie notes that James Chamberlain must have known when he applied to have the books approved that they would offend some parents because they are about sexual orientation. Justice Mackenzie implies that if Chamberlain's objective was, as Chamberlain claims, to convey the value of loving and caring

family relationships whatever their form, he should have proposed books about alternative families that would not be seen by adults to raise the red flag of endorsing homosexual relationships. That Chamberlain petitioned the Board over the three books that he did was seen to be a deliberate act of confrontation.

Yet, the books make no mention of sexual orientation and are not inconsistent with the "same-sex" parents in the stories being heterosexual. In a parallel situation, during a CBC interview, J.K. Rowling responded to the accusation that her books promote devil worship. She strenuously denied the accusation but, by Justice Mackenzie's logic, the ***98** fact that some would interpret her books in this way, even though they are not expressly directed toward such an end, would be sufficient grounds to ban the books. The effect of this logic is to reduce the selection of books to those that no one alleges to be offensive. Surely the presumption in favour of freedom of expression ought to require that those objecting have tangible and rational grounds for claiming that the materials contain the messages the parties claim to be offensive. During cross-examination at trial, the Surrey school district Superintendent confirmed that the books were innocuous, a statement supported by school trustee Mary Polak. The trustees were more concerned with how the parents *perceived* the books. [FN41]

Justice Mackenzie insinuates that if Chamberlain truly sought to convey the value of loving and caring family relationships, he should have proposed books portraying less controversial forms of alternative families. This, of course, begs the question of the need to seek approval for these more acceptable types of books. Do existing resources approved for use in the school district adequately depict children who are raised by maiden aunts or by a grandmother/mother couple? More importantly, are the children of these "accepted" same-sex families recipients of the same hostile behaviour and derisive remarks as those of homosexual same-sex couples? The innocuous type of books that Justice Mackenzie mentions would not have met the purpose that Chamberlain's selection of books meant to serve, namely, to help students recognize that couples who could not otherwise be linked because of blood or marriage are part of the pool of alternative "loving and caring" families. Yet there is nothing inconsistent in making this claim and accepting Chamberlain's contention that he was not promoting same-sex sexual orientation.

Justice Mackenzie's dismissive remark that "the parties appear to agree that issues of sexual orientation do not belong in the K-1 class-rooms" [FN42] fails to distinguish between explicitly discussing sexual orientation and addressing issues that are connected to sexual orientation. The former would be widely seen as inappropriate with six- and seven-year-old children. However, teachers need not discuss "sexual orientation" with students in order to help them accept that biologically unrelated couples of men or women can live together, love each other and raise their children. It is analogous to the difference between describing sexual intercourse to a young child and explaining that children come from their mother and fathers. The three books encourage children to appreciate that these types of alternative families can be loving families; they do not ***99** require that sexual orientation be explained to young children. Besides, the children from the alternate family groupings Justice Mackenzie refers to are free to discuss their families in the classroom at any time. There is no restriction on discussing grandmothers, step-parents or aunts and uncles in kindergarten classrooms or on using books that depict these alternate family structures. The three books ought to be handled no differently than those that depict these other "alternate" structures. To do otherwise is to discriminate on the basis of sexual orientation.

Significantly, Justice Mackenzie acknowledges that "the principle of non-discrimination is sufficiently compelling as a public value in a truly free society that it must be included within any definition of the highest morality ..." [FN43] He notes that sexual orientation as a prohibited form of discrimination was affirmed by the Supreme Court as an analogous ground under section 15 through the landmark decisions of *Vriend v. Alberta* [FN44] and *Egan v. Canada*. [FN45] We can infer, therefore, that Justice Mackenzie recognizes that discrimina-

tion on the basis of sexual orientation would not be consistent with the "highest morality." In fact, immediately following this discussion, Justice Mackenzie quotes from an SSB directive issued two weeks after the initial ban on the books, expressly forbidding intolerance or discrimination on matters of sexual orientation and committing to providing an environment free of discrimination on the basis of sexual orientation. He interprets this directive as offering a "clear, emphatic and unambiguous statement of District policy." [FN46] The obvious question that Justice Mackenzie begs is whether or not the SSB decision is consistent with its avowed non-discriminatory policy. If convictions about the immorality of homosexuality were key factors in the SSB's decision, is this not a case of denying equal benefit by virtue of one's sexual orientation? Clearly, the SSB's resolution creates an undue burden on same-sex parents and deprives them and their children of a right afforded other families. [FN47] The fact that the decision may have been motivated by conscientious religious belief does not, on its own, mean that the decision is lawful. As Justice Mackenzie himself notes when quoting Justice Cory in *Vriend v. Alberta*, "Religious belief and the form of worship are personal characteristics ... so long as the form of ***100** worship is not unlawful, it must be not only tolerated but also protected by the *Charter*." [FN48]

In a curious concluding statement, anticipating the sort of challenge we have just raised, Justice Mackenzie dismisses any suggestion that the SSB acted in a discriminatory way by announcing that he sees "no reason not to take this directive [the board's anti-discrimination directive] at its word or to conclude that the Board did not stand behind its admonition [proscribing discriminatory actions]." [FN49] The members of the SSB may have believed that they were not discriminating against homosexuals, yet this is beside the point. The effect of their decision, if not their intent, may well be discriminatory. Surely, we are entitled to have the court, not the officials under scrutiny, determine whether or not restricting the use of books portraying same-sex families in a positive light amounts to legal discrimination based on sexual orientation. Once again, the *Alice in Wonderland* treatment of this case is in evidence as the Court obscures, amid vaporous reasoning, the significant legal issues staring it in the face.

(iii) Question 3: What are the Charter implications of school board decisions to ban books because they raise issues of sexual orientation?

The *Charter* places reasonable limits on laws or policies that infringe fundamental *Charter* guarantees. The prior question highlights a crucial issue the courts in this case declined to confront: justification for the discrimination that results from the SSB resolution. The arguments in the petition filed by Chamberlain and his colleagues at trial included *Charter* challenges on grounds of infringement of freedom of expression rights under section 2(b) of the *Charter*, [FN50] and infringement of equality rights under section 15 (equality). Justice Saunders, although referring to the *Charter* obligations in passing, did not find it necessary to address the specific challenges raised because, in her opinion, the book ban was clearly *ultra vires* section 76 of the *School Act*. [FN51] The *Charter* challenges were not included in the grounds for appeal; therefore, the Court of Appeal was not required to address them. Nonetheless, the restatement of the SSB initial resolution should not be interpreted to mean this decision ***101** would withstand *Charter* scrutiny. We contend the SSB policy would not survive this challenge.

In our earlier analysis of the issues [FN52] it became evident that the board's decision resulted in significant impairment of the rights and interests of specific stakeholders. We arrived at these conclusions by looking at earlier court cases on freedom of expression, equality, and parental prerogative for input into their children's education. We also studied the legal options available to parents if they wished to have their children removed from the classroom when sensitive content was being discussed. We assessed the effects of the restrictions on

the fundamental rights and interests of parents, children and teachers under sections 2 (a) and (b) of the *Charter* (freedom of religion and conscience and freedom of expression) and under section 15 of the *Charter*. Here, we will briefly consider the type of claims made by those who allege that restricting the three books infringes their *Charter* rights and then the claims by those who contend that failing to restrict their use would infringe their *Charter* rights.

We believe that restricting the use of educational resources and practices promoting acceptance of same-sex families infringes the equality rights and freedom of expression of homosexual parents. The nature and scope of infringement experienced by these families are contained in numerous affidavits filed at trial. The test used by the courts [FN53] to determine infringement of equality rights generally involves deciding whether an undue burden or hardship is imposed on one party that is not imposed on others. [FN54] Consider the affidavit of Kim Forster, the biological mother of two boys who were conceived through artificial insemination. She describes her family as having “strong values of honesty, integrity, respect, compassion, tolerance and love”. [FN55] She states her family's “greatest challenges have been presented by the school system and a few people in their community who hold fast to traditional paradigms.” [FN56] Forster deposes that despite the fact that she and her partner have identified themselves to the school as a same-sex family through student information sheets and have informed their sons' teachers about their family structure, the school continues to ignore or undermine her family situation. For example, when her son (who was identified as gifted) demonstrated disruptive behaviour typical to gifted children, the school counsellor vigorously***102** explored the “potential influence” of their gay family as a cause for his misbehaviour. She observes that their family situation was further ignored when the children were asked to prepare a family tree:

> In the curriculum for K-1, the prescribed learning outcomes for the Family Life Education section of the IRP for personal planning includes the ability to identify: a variety of family models; the roles and responsibilities of different family members and the characteristics that make the family safe and nurturing. In no way were my sons encouraged by either of their teachers to openly discuss their family reality nor foster a sense of pride, security and nurturing in their family. On the contrary when they did an exercise to diagram their family tree they were both given a sheet with a preprinted “tree” with lines identifying “mother”, “father”, “sister”, “brother” and then the lines for the extended family tree. My sons came home confused, enquiring how they should fill out the tree. This was the beginning of the message that the school has consistently given them that negates their reality. [FN57]

Furthermore, she discovered that one of the teachers for grade 3 took it upon herself to teach her son to read the bible. She supported the teacher's efforts until she realized that her son was the only student singled out to read these scriptures. Forster says that although she had never broached the subject before, she finally raised her concerns to the principal about the lack of validation in pictures, books and discussion of her family situation. Although sympathetic, the principal was hesitant to introduce the books into the classroom or order them for the library. The principal informed Foster that she was under the impression the books were not allowed in Surrey classrooms and that the district administrators had not given any clear direction on the district policy regarding the books. [FN58] Other affidavits filed by parents from this category argue, in a similar vein, that the SSB decision denies their parental prerogative to have input in what their children learn at school. These parents maintain that the books are necessary to educate their own children and, more importantly, the children of others that same-sex families are as nurturing, loving and caring as heterosexual families, and to validate their own children's family situation. In addition, they contend such information is necessary in public schools to protect their children from being stigmatized and discriminated against, and to combat homophobia in the public school system.

Creating an accepting climate for same-sex families is especially important since there are few schooling options available to them, particularly when their children are victims of harassment in public schools. Most private schools are denominational and, judging from the response ***103** from the religious groups, less tolerant of homosexuality. Many "Charter" schools also take a more traditional approach, and the chances of gaining acceptance in those schools are also minimal. Furthermore, these parents may not be able to afford private school fees. Home schooling is an enormous undertaking and may not be an option if both parents work. Consequently, parents who personally endorse homosexuality are disadvantaged and their parental prerogative impaired by the SSB decision. Moreover, their children are stigmatized in the classroom because their families are not validated and, in terms of freedom of expression, they cannot freely discuss their family configurations in the same way that the majority of children can. Furthermore, they are often harassed and bullied on the playground because few adults are willing to discuss the topic. This exposes them to a "chilled environment" both in the classroom, where teachers are afraid to discuss the topic, and on the playground because children are not properly taught attitudes of respect and caring. The SSB's resolution imposed a burden on this group of parents and their children not imposed on others, resulting in undue hardship. They were denied a right freely granted to most parents and children. Same-sex parents and their children are isolated by the SSB's restrictions on the three books.

A second group claiming infringement of their freedoms of expression and conscience by the SSB are "tolerant" heterosexual parents, children and teachers. This group does not endorse homosexuality as a positive value in their own lives but, nevertheless, believes in tolerance for difference and freedom of expression. Affidavits filed by some of these heterosexual parents and teachers indicate they value open discussion of issues of morality, particularly since the books are not obscene and, in fact, are rather innocuous. [FN59] These parents argue the books will not harm even very young children if handled in a sensitive manner by teachers. Such parents view discussions of morality (even if they involve values that differ from their own) as part of their children's learning to become well-rounded individuals. In terms of educational value, this group claims a right to have their children learn positive values.

Those who support the SSB decision to restrict use of the books claim that a failure to do so would infringe their freedom of religion and conscience. Justice Mackenzie's reasons for judgment might appear to support this contention. In supporting their right to have input into educational decisions (but avoiding directly the question of whether this right justifies discrimination against other stakeholders), Justice Mackenzie apparently ***104** concurs with the religious parents regarding their parental prerogative to direct what *all* children learn. As mentioned earlier, numerous affidavits were filed at trial by this group, stating that homosexuality contravened their religious beliefs, that they did not want to discuss the issues with their children at home until they felt they were old enough and that, according to their religions, homosexuality is a sin. [FN60] Furthermore, they argue that if the books are allowed into classrooms, they do not want to opt their children out of class (although they have the right to do so) because their children would be isolated and stigmatized. Another concern expressed by these parents is that they may not receive adequate notice to opt their children out prior to use of the books. As well, they stressed that they do not send their children to school to have them sit out of certain classes. Our review of cases that deal with parental prerogative and freedom of religion (*Zylberberg* [FN61], *CCLA* [FN62], *Adler* [FN63], *Bal* [FN64] and *Islamic Federation* [FN65]) confirmed that if parents do not wish their children to participate in certain classroom activities, they have the choice of opting them out, given adequate notice to do so. The Court of Appeal in *Zylberberg* noted that children who opted out during daily religious exercises were stigmatized. In the Surrey case, however, children who were opted out would not necessarily experience any stigma if the situation were handled thoughtfully. Moreover, the books would not be introduced on a daily basis but on a single occasion for an hour at most. Any feeling of isolation or stigma could be avoided by providing parents

with adequate notice prior to discussion of the books so that alternative activities, which their children enjoyed, could be organized for them during the opting out period.

***105** The court cases also indicate that a conflict in morals and values does not give parents free rein to decide what will be taught in public schools. Moreover, courts have stated that if parents are not happy with values taught in public schools, they are free to leave the system altogether. Although this places a considerable hardship on these parents, it may well be less severe than the parallel hardship presented to homosexual parents who may have greater difficulty finding alternative schools that would be sympathetic to their position.

To conclude this very brief review of *Charter* implications, we believe there is abundant case law suggesting that parental prerogative cannot be used to single-handedly promote the values of one group of parents (religious, homosexual or otherwise) over those of others in the public school system. In a pluralistic society, public schools must consider and protect the interests of all groups. We submit this requires erring on the side of those who are tolerant of differences in areas protected by *Charter* equality provisions, especially when the effects of not doing so clearly have negative consequences for the human dignity, self-esteem and personal health of individuals who may be singled out. [FN66] At some point in the life of this case, the Courts must directly address the issue of *Charter* infringements to clarify for all the limits of a school board's authority to restrict educational resources by reason of sexual orientation.

(iv) Question 4: Do school boards have a positive responsibility to work to reduce discrimination and abusive treatment of beleaguered students and groups of students?

In applauding the SSB for what he describes as an “emphatic and unambiguous statement” of tolerance for sexual orientation, Justice Mackenzie cites the SSB's *Multicultural, Anti-Racist and Human Rights Regulations* that affirm a commitment “to providing a working and learning environment that is safe, supportive, and free of discrimination based on a person's sexual orientation. The *promotion* of intolerance is unacceptable” [FN67] (emphasis added). This reference to the SSB's commitment not to promote intolerance leaves open the question of a school board's ***106** responsibility to combat intolerance. Yet, Justice Mackenzie later notes that “all those involved in teaching and administration must be vigilant in *prevention* of all forms of discrimination and abuse” [FN68] (emphasis added). He asserts that the principle of non-discrimination is significantly compelling as a public value in a free and democratic society and must be included in any interpretation of the “highest morality” in the sense of Section 76 (2) of the *School Act*. Earlier he states that “public schools must *positively* espouse” non-discrimination on grounds of sexual orientation [FN69] (emphasis added). We interpret these remarks to imply that the *School Act* stipulation that schools inculcate the “highest morality” requires a more active responsibility than merely refraining from promoting intolerance.

The responsibility of school boards and administrators to work against discrimination and abuse of children who are alleged to be homosexual or who have same-sex parents (homosexual or heterosexual) requires, in our view, more than merely issuing statements and declarations. Bullying of students thought to be gay or lesbian continues in school playgrounds across the country and many school districts are reviewing their anti-violence policies and searching for ways of overcoming these problems. [FN70] The importance of a proactive stance against homophobia is highlighted by the recent suicide of Hamed Nastoh, a fourteen-year-old Surrey student. Although his family insists he was not homosexual, he was incessantly teased as being gay. Sadly, even after enormous amounts of public funds were spent on litigation relating to the book ban, and significant concern about the anti-bullying policies in the district were raised by the media over Hamed's subsequent death, the

chairperson of the SSB appears unconcerned about actively addressing school conditions confronting students who are alleged by other students to be homosexual. Consider the following comments attributed to Chairperson Stilwell, reported in the *Vancouver Sun*:

> Defending the lack of specific references to homosexuality in Surrey's anti-bullying program, Stilwell said there is also no 'specific programs for discriminating***107** against kids who are Muslim, or Christian, *or because they have fat butts or zits or whatever*.' [emphasis added].
>
> She was also skeptical that so-called ‘gay-straight clubs' being promoted by some teachers as a way of encouraging tolerance of homosexual student would improve school safety-or would have prevented Nastoh's death.
>
> Emotionally troubled teens 'need therapy not group support' she said.
>
> ... 'The school staff had no idea at all that this was a kid at risk' she said. 'And this is a very caring school community'. [FN71]

The chairperson seemingly places the blame for this tragedy exclusively on Hamed's emotional fragility rather than considering whether or not the school could have done more to confront the bullying that may have contributed to the student's distress.

In the face of the hardships faced by these beleaguered students, we find it difficult to accept that educational authorities are not legally obligated to make resources available that promote tolerance and combat abusive treatment. What is worse, the banning of books dealing with same-sex relations may be seen to officially sanction intolerance for such a sexual orientation. We believe that public schools should actively teach students that the rights of individuals with different physical attributes, skin colour or sexual orientations must be respected. In this regard the three books embody the most fundamental social principles, including those entrenched in the *Charter*, such as respect for individual differences and equality. These are the very elements that give the three books their *moral* value and, in turn, their grounds for acceptance into a public educational system committed to inculcating the highest morality.

3. THE DILEMMA FOR EDUCATIONAL ADMINISTRATORS

Many scholars [FN72] would agree with our conclusion that the responsibility of the educational administrators in Surrey extended beyond the curbing of intolerance to the promotion of an equitable, respectful, inclusive***108** environment, based on the argument that educational administration is inherently a moral activity. Furthermore, the argument continues, moral principles should inform not only purpose, but also the manner of carrying out that purpose. Thus the case of the three books confronts educational administrators with a difficult dilemma in at least two ways. The first has to do with Justice Mackenzie's decision; the second with the more general problem of addressing moral disagreements in a democracy.

We have already alluded to the difficulty that Justice Mackenzie's decision causes administrators. Its ambiguity has enabled both sides in the dispute to claim victory. There are already indications that the two groups will have different expectations about the use of the three books (and other similar resources) in the classroom, and will use the decision to try to enforce practice consistent with their expectations. The administrators clearly will be caught in the middle, regardless of their personal convictions, with no firm basis for their decisions. The inadequacy of the decision in terms of the *Charter*, which we established earlier, exacerbates the difficulty for educational administrators. The principles embodied in the *Charter* - for example, equality, fairness, respect - are similar to the professional norms of educational administrators. [FN73] Implementing a decision reflective

of the *Charter*, then, would support practice consistent with educational administrators' professional norms, whatever the personal convictions of individual administrators. In the Chamberlain case, for example, if the books were permitted, notice could be sent home to the parents who opposed the books informing them in advance, so that they could opt their children out of the classroom when the books were discussed. If the opting-out were handled by the teacher in a sensitive manner, then the children who were opted out would not be stigmatized and arrangements could be made for them to engage in enjoyable and educative activities while absent from class. Such a practice would be defensible according to professional norms. But that is not the current situation. Now that the books have been approved as library resources, Surrey trustees have stated that permission from parents will be required before the books are brought into the classroom. [FN74] Educational administrators will now find themselves in uncertain territory given the contested legal status of the SSB decision and the resulting lack of clarity in the law ***109** from the Mackenzie ruling. We think educational officials, however, should look beyond the legality of their actions and confront the broader ethical and moral challenges posed.

Even if Justice Saunders' decision had been upheld, educational administrators would still be faced with a dilemma: how to make all participants in the system - parents, teachers and other staff, students, other community members - feel included in and respected by the system, regardless of their position on the issue. This is a specific instance of the general problem of how to deal with moral disagreement in a democracy. [FN75] Most commonly we turn to the ethic of justice, with its emphasis on individual rights and impartiality of treatment of the individual by societal institutions, [FN76] to resolve such conflicts. The opting out solution we just presented derives from this approach, but it is not an entirely adequate response. The ethic of justice is important to the practice of educational administration, and we would not wish to see it diminished in any way. It does, however, have limitations, most notably the creation of “winners” and “losers”, with the latter generally dissatisfied with the decision and determined to continue pursuing their rights as they understand them. Thus, educational administrators trying to comply with the decision are likely to meet with varying degrees of resistance. Two related approaches offer some possibility for ameliorating this state of affairs.

One is the notion of deliberative democracy, [FN77] which demands an open, continuing and intensive exploration of the moral principles underlying various positions on policy issues. Its goal is a genuine, morally justified consensus where possible; and, where not possible, respect for the legitimacy and seriousness of the moral arguments of opponents, even though disagreement exists over the conclusions. The emphasis is on deliberation (as opposed to, for example, bargaining and negotiation), that is, consideration of the merits of moral claims (independent of the status of those making the claims), with attention paid both to the conditions of deliberation and the content of deliberation. The other is the ethic of care, [FN78] which focuses on the primacy of relationships (as opposed to the rights orientation of justice) and requires “fidelity to persons, a willingness to acknowledge their right to be who they are, an openness to ***110** encountering them in their authentic individuality, a loyalty to the relationship.” [FN79] In a policy context, the ethic of care considers the merit of a decision in terms of its impact on, and the quality of experience for, [FN80] different groups and individuals within the community, as well as for the community as a whole. The emphasis is on acting with, rather than on behalf of or for, others. [FN81]

Both deliberative democracy and the ethic of care advocate public forums other than - or at least in addition to - the courts for consideration of moral arguments pertaining to policy. Both invite widespread participation in the dialogue (multiplicity of voices), and deliberately seek to include those who are rarely heard from. Both acknowledge, even embrace, diversity of perspectives, and prefer respectful disagreement to artificial consensus. [FN82] Both are concerned with inquiry and understanding, and the development of an informed and politically active citizenry. Both attend to the relationships among members of the community. It is these features which al-

low educational administrators to face moral disagreement in the community in ways more fully consistent with their professional norms.

We do not offer the ethic of care and deliberative democracy as a panacea for the creation of harmony in educational governance. There will continue to be serious moral disagreement. How moral disagreement is resolved and how people holding different positions regard one another ***111** may very well change, though. Noddings tells the story of an organization which admits members two at a time - one on each side of the abortion issue. The purpose of the organization is to encourage pro-life and pro-choice advocates to work together towards solution of social problems of mutual concern, other than abortion. None of the women has changed her stance on abortion, but engagement in political activity has changed greatly. Opponents are seen as individuals deserving of respect. It is now unthinkable to insult them or throw things at them, or to injure them in any way. This seems a worthwhile accomplishment, and it is in that spirit that we raise these possibilities for educational administrative practice.

4. CONCLUSION

Cases involving controversial educational materials pose a legal and ethical dilemma for public school officials where the *prima facie* rights of various parties conflict and are inevitably compromised, whichever decision is reached. As we explained in Question 3, it is important that any course of action be minimally intrusive on the rights and interests of those stakeholders who are compromised. Not only is this requirement legally advisable, given the court's interpretation of the reasonable limits provisions of section 1, it is also prudent insofar as it will help to lessen the opposition and annoyance of the parties whose side was not upheld by the decision reached by a board. Given the courts' responsibility to enforce the moral principles found in the *Charter*, we think doing the ethically proper thing in respectfully managing the competing interests put in conflict in these dilemmas will not only be prudent and educationally sound, but will not be far from what the courts will eventually require when they resolve the as yet unanswered legal questions raised by this case. Finally, we urge that consideration of these issues in the policy arena be embedded in notions of deliberative democracy, dialogue and the ethic of care.

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[FN1]. *Asha's Mums* by Rosamund Elwin and Michele Paulse is about a little girl named Asha who runs into problems when she needs a permission form signed by both parents allowing her to go on a field trip. The teacher refuses to let her go on the field trip unless her father signs the form as well. Finally her two mothers visit the school and explain to the teacher that they live together and therefore Asha has two mothers. The most frequently objected to statement in the book is one that says it is acceptable to have two Mums as long as they love you. Those who object to the book interpret this as an attempt to inculcate or indoctrinate acceptance of homosexual values. There is, however, no mention of sex or sexuality. The book emphasizes that Asha is well looked after and loved by her two Mums.

Belinda's Bouquet by Leslea Newman stresses acceptance of people who look different or are different for

whatever reason. Belinda is labeled “fat” by a bus-driver. She regains her self-esteem after a conversation with one of her friend's two Mums. The message about same-sex parents is so subtle and innocuous it may even be missed by children who hear the story. The emphasis is on loving and caring family and friends.

One Dad, Two Dads, Brown Dads, Blue Dads by Johnny Valentine is a Dr. Seuss-style book promoting acceptance of diversity. For example, in the book, a white girl asks a black boy a flood of questions about his blue skinned Dads. Questions include whether the Dads work, whether they cough, whether if you rub their skin too hard the color comes off. The book's message is tolerance for diversity. There is no mention of sex or sexuality.

The books are hereafter referred to as “the three books”.

[FN2]. S. Shariff, R. Case and M. Manley-Casimir, “Balancing Competing Rights in Education: The Surrey School Board's Book Ban” (2000) 10 ELJ 47.

[FN3]. K. Bolan and B. Morton, “Both sides claim victory in same-sex book case” *The Vancouver Sun* (21 September 2000) A1, A4.

[FN4]. M. Wyman, “Rowling Thunder” *The Vancouver Sun* (21 October 2000) B1, B5.

[FN5]. *Ibid.*

[FN6]. M. Wyman, “You can lead a fool to a book but you can't make them think” *The Vancouver Sun* (26 October 2000) A1, A4.

[FN7]. S. Shariff and M. Manley-Casimir, “Censorship in Schools: Orthodoxy, Diversity & Cultural Coherence.” In A. Hutchinson, and K. Petersen (Eds.), *Interpreting Censorship in Canada* (Toronto, Ont.: University of Toronto Press, 1999).

[FN8]. *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the “*Charter*”).

[FN9]. *Chamberlain v. Surrey School District No. 36* (1998), 168 D.L.R. (4th) 222, 60 B.C.L.R. (3d) 311 (B.C. S.C.), reversed 191 D.L.R. (4th) 128 (B.C. C.A.) (the “Surrey Case”).

[FN10]. British Columbia *School Act*, R.S.B.C. 1996, c. 412 (the “*School Act*”).

[FN11]. *Ibid.*

[FN12]. *Ibid.*

[FN13]. *Chamberlain v. Surrey School District No. 36* [2000] BCCA 519, 191 D.L.R. (4th) 128 (B.C. C.A.).

[FN14]. Above, note 3.

[FN15]. Above, note 13 at para. 33.

[FN16]. *Ibid.* at para. 34.

[FN17]. *Ibid.*

[FN18]. *Ibid.* at para. 28.

[FN19]. *Ibid.*

[FN20]. *Ibid.* at para. 12.

[FN21]. *Ibid.* at para. 40.

[FN22]. Justice Mackenzie's misreading of this term stems from ambiguity in the term “religious influence.” He notes that “the moral position of some on all sides will be *influenced* [emphasis added] by their religion, others not. There is no bright line between a religious and a non-religious conscience. Law may be concerned with morality *but the sources of morality in conscience* [emphasis added] are outside the law's range and should be acknowledged from a respectful distance” [above, note 13 at para. 21]. Influence may refer either (1) to the original motivation or source of a position-how an individual first came to hold a view - or (2) to its justification-the reasons for accepting the view as sound. Justice Mackenzie's analysis of “strictly secular” focuses on the first sense. He is right in seeing that just because a position happens to arise from an individual's religious conviction, it does not, *ipso facto*, violate the *School Act* requirement. Unfortunately, he leaves his analysis at this point and reaches his counterintuitive conclusion that “secular” implies that religious justifications of school policy are as good as any other type of justification. We argue that the term as used in the *School Act* prohibits public school officials from justifying decisions by appeal to religious fiat, even if their position is rooted in religious conviction. In her opinion, Justice Saunders uses the term “influence” in the sense we adopt, although she does not expressly distinguish between the justification and source of beliefs. She notes that “the words ‘conducted on strictly secular ... principles' precludes [*sic*] a decision significantly influenced by religious considerations' [above, note 9 at para. 78] and later refers to a “decision based in a significant way on religious considerations” [above, note 9 at para. 83].

[FN23]. Above, note 13 at para. 10.

[FN24]. Above, note 9 at para. 93.

[FN25]. *Ibid.* at para. 94.

[FN26]. *Ibid.* at para. 80.

[FN27]. *Ibid.* at para. 81.

[FN28]. *Above, note 13 at para. 20*.

[FN29]. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.) at 350.

[FN30]. *Ibid.* at 364.

[FN31]. *Above, note 13 at para. 52*.

[FN32]. *Ibid.* at para. 53.

[FN33]. *Ibid.*

[FN34]. *Ibid.* at para. 51

[FN35]. *Ibid.* at para. 53.

[FN36]. *Ibid.*

[FN37]. *Ibid.* at para. 50.

[FN38]. *Ibid.* at para. 56.

[FN39]. *Ibid.* at para. 59.

[FN40]. *Ibid.*

[FN41]. *Above, note 9, at para. 98*.

[FN42]. *Above, note 13, at para. 63*.

[FN43]. *Ibid.* at para. 37.

[FN44]. *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.).

[FN45]. *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.).

[FN46]. Above, note 13 at para. 38.

[FN47]. Just to be clear, it is not unlawful to hold prejudicial beliefs about homosexuals (among other things the *Charter* does not apply to private individuals); these beliefs enter the public sphere when these opinions motivate decisions by public officials.

[FN48]. Above, note 13 at para. 36.

[FN49]. *Ibid.* at para. 39.

[FN50]. Above, note 8.

[FN51]. Above, note 10.

[FN52]. Above, note 2.

[FN53]. *R. v. Oakes*, [1986] 1 S.C.R 103 (S.C.C.).

[FN54]. R. Case, *Understanding Judicial Reasoning: Controversies, Concepts and Cases* (Toronto, Ont.:Thompson Educational Publishing, Inc., 1997) at 35-38.

[FN55]. Affidavit of K. Forster, 1998, as filed in the Surrey Case above, note 9.

[FN56]. *Ibid.* at 1.

[FN57]. *Ibid.* at 2

[FN58]. *Ibid.* at 3.

[FN59]. Affidavit of T. Beer, 1998, as filed in the Surrey Case above, note 9.

[FN60]. Affidavit of C. Anderson, as filed in the Surrey Case, para. 13 at 5-6; para. 14 at 6. Affidavit of L. Burden, 1998, as filed in the Surrey Case, para. 7 at 3. Affidavit of A. Buksh, 1998, as filed in the Surrey Case, para. 9 and 11 at 3. Affidavit of C. Hilton, 1998, as filed in the Surrey Case, para. 5 at 2.

[FN61]. *Zylberberg v. Sudbury (Board) of Education* (1988), 65 O.R (2d) 641 (Ont. C.A.), reversing (1986), 55 O.R. (2d) 149 (Ont. Gen. Div.).

[FN62]. *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (Ont. C.A.) ("CCLA").

[FN63]. *Adler v. Ontario* (1992), 9 O.R. (3d) 676 (Ont. Gen. Div.) (1994), 19 O.R. (3d) 1 (Ont. C.A.), leave to appeal allowed (1995), 119 D.L.R. (4th) vi (note) (S.C.C.), affirmed [1996] 3 S.C.R. 609 (S.C.C.).

[FN64]. *Bal v. Ontario Attorney General* (1994), 121 D.L.R. (4th) 96 (Ont. Gen. Div.), affirmed (1997), 151 D.L.R. (4th) 761 (Ont. C.A.), leave to appeal refused (1998), 49 C.R.R. (2d) 188 (note) (S.C.C.).

[FN65]. *Islamic Schools Federation of Ontario v. Ottawa Board of Education* (1997), 145 D.L.R. (4th) 659 (Ont. Div. Ct.), leave to appeal denied [1997] O.J. No. 3165, 1997 CarswellOnt 3052, (July 29, 1997) Doc. CA M20514 (Ont. C.A.).

[FN66]. See, for example, *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 (S.C.C.) and *Granovsky v. Canada (Minister of Employment & Immigration)* (2000), 186 D.L.R. (4th) 1 (S.C.C.), wherein the Supreme Court of Canada emphasized the negative impact discrimination has on the human dignity and sense of worth of individual members of insular, minority groups.

[FN67]. Above, note 13 at para. 38.

[FN68]. *Ibid.* at para. 39.

[FN69]. *Ibid.* at para. 40.

[FN70]. L. LaRocque and S. Shariff are currently conducting research on a provincially-funded research project to examine how school administrators across British Columbia are conceptualizing violence through their policies and programs. A report on the kinds of initiatives that are in place or underway will be available in February, 2001. In a similar project, S. Shariff conducted research on 22 intervention programs in schools and the community nationally for the Youth Justice Education Partnerships (YJEP), funded by Justice Canada. A report will be available in Spring, 2001.

[FN71]. C. Skelton, "Surrey takes stock after student's suicide" *The Vancouver Sun* (17 March 2000) A9.

[FN72]. See, for example: W. D. Greenfield, "Articulating Values and Ethics in Administrator Preparation." In C. Capper (Ed.), *Educational Administration in a Pluralistic Society* (Albany, N.Y.: SUNY Press, 1993); C. Hodgkinson, *Educational Leadership: The Moral Art* (Albany, N.Y.: SUNY Press, 1991); C. Marshall, (Ed.) *Feminist Critical Policy Analysis* (Vol. 1) (London: Falmer Press, 1997); T. J. Sergiovanni, *Moral Leadership* (San Francisco, Calif.: Jossey-Bass, 1991).

[FN73]. J. Blase and G. Anderson, *The Micropolitics of Educational Leadership* (New York, N.Y.:Teacher's College Press, 1995). See especially the discussion of normative-instrumental leadership for a discussion of ad-

ministrator norms.

[FN74]. P. Brook, “Here's who really won the books battle” *The Vancouver Sun* (22 September 2000) B3.

[FN75]. A. Gutmann and D. Thompson, *Democracy and Disagreement* (Cambridge, Mass.:The Belknap Press of Harvard University, 1996).

[FN76]. N. Noddings, “Care, Justice, and Equity.” In M. S. Katz, N. Noddings, and K. A. Strike (Eds.), *Justice and Caring: The Search for Common Ground in Education* (New York, N.Y.:Teacher's College Press, 1999).

[FN77]. Above, note 75.

[FN78]. Above, note 76.

[FN79]. R. Starratt, *Building an Ethical School* (London: Falmer Press, 1994).

[FN80]. Above, note 76.

[FN81]. The ethic of care is often set in opposition to the ethic of justice, but might more properly be seen as complementary to and inextricably bound with it (Chamberlain and Houston, below; Noddings, below). For example, Streitmatter (below) argues that justice untempered by care emphasizes an equality that neither questions nor addresses institutionalized power differentials related to social diversity. On the other hand, Van Galen (below) argues that care untempered by justice emphasizes the unfortunate circumstances of the lives of members of minority groups separate from the economic/social/political/gendered dimensions of those lives. Thus the practice of educational administration must be informed at least by the ethic of justice and the ethic of care, although some (e.g. Starratt below, and Strike below) argue for multiplicity of guiding ethics.

E. Chamberlain and B. Houston. “School Sexual Harassment: The Need for Both Justice and Care” in Katz et al. above, note 76; K. A. Strike, “Justice, Caring and Universality: In Defence of Moral Pluralism” *ibid.*: N. Noddings, “Care, Justice, and Equity” *ibid.*; J. Streitmatter, “Pedagogical Implications for Gender Equity.” In D. Eaker-Rich and J. Van Galen (Eds.), *Caring in an Unjust World-Negotiating Borders and Barriers in Schools* (Albany, N.Y.: SUNY Press; J. A. Van Galen, “Caring in Community: The Limitations of Compassion in Facilitating Diversity,” *ibid.*

[FN82]. Two recent books differentiate between typical public discourse and the kind of dialogue that is being advocated here: W. Isaacs, *Dialogue and the Art of Thinking Together* (New York, N.Y.: Currency Press, 1999); D. Tannen, *The Argument Culture: Moving from Debate to Dialogue* (New York, N.Y.: Random House, 1998).
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