

# The Legal Context of Canadian Education<sup>1</sup>

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## **Abstract**

With the establishment of the Canadian confederation in 1867, education was made a provincial responsibility. Even today Canada has no federal office of education or a national educational policy. Nevertheless it would be wrong to assume that the federal government does not influence education, e.g., by the power of the purse, or has no role to play in education, e.g. the Young Offenders Act, or the control of the education of First Nation's people. Furthermore, the educational divisions based on linguistic minorities (in fact Catholic and Protestant) were translated into separate school boards; and Quebec was given its linguistic recognition.

The 'repatriation' of the Canadian Constitution, and the entrenchment of the Canadian Charter of Rights and Freedoms in the Constitution, in 1982 ushered in a new era of constitutional rights and freedoms, whereby courts started playing a significant and major role in delineating and demarcating educational rights and obligations, reshaping educational policies and redefining educational practices. The Canadian Charter has introduced a 'rights paradigm' and, while not necessarily resulting in the nullification of the bulk of previous policies and practices, has made the law-makers and policy-makers acutely aware of the existence of their obligation to comply with the Canadian Charter. The cumulative effect is that the law of education remains a fascinating and evolutionary subject which expresses conceptions about social organisation that affect many parents and others as members of a political society.

This article addresses key recent legal developments and some significant future trends in the Canadian law of education.

## **Introduction**

The Canadian law of education has been influenced by many factors. But two are of particular interest: history and a 'rights paradigm',<sup>2</sup> which, with the entrenchment of certain inalienable rights and freedoms in the Canadian Charter of Rights and freedoms in 1982, turned into a proper 'rights discourse'<sup>3</sup>. It is important to note that the patterns of education were primarily set because English-speaking and French-speaking settlers inhabited different parts of Canada<sup>4</sup> and naturally they wanted to preserve their language and culture. In this context, education was rightly considered to be the best means of protecting and perpetuating their respective perceived cultures.

One of the most suitable places to shelter and prolong their English and French cultures was schools. Thus, legal culture<sup>5</sup> developed in close association with educational culture. Therefore, when the Canadian federation was created by the British North America Act by the United Kingdom Parliament in 1867, (now called the Constitution Act 1867), education and language rights of linguistic and religious minorities were preserved. In addition, because it has always endeavoured to regulate the rights and obligations of interested parties equitably - as well as endeavouring to create harmonious relations between and within federal and provincial jurisdictions - Canadian law, including education law, has tried to create the 'rights paradigm'. This has been reinforced by the Canadian Constitution 1982, which, by including in it the Canadian Charter of Rights and Freedoms, has entrenched those rights and freedoms. Furthermore, section 52 of the Constitution Act 1982 lays down the provision that 'the Canadian Constitution is the supreme law of Canada' and any laws which are inconsistent with it are 'of no force or effect'. This has resulted in more and more cases reaching the courts, and particularly the Supreme Court of Canada. The consequence is the opening of the way for politicisation of the judiciary.<sup>6</sup> The result is that more and more educational rights and policies are being defined and framed by higher courts.<sup>7</sup>

Primarily because of the constitutional, statutory and common law developments, the Canadian law of education has not been static; but remains evolutionary, and is constantly developing and expanding. Many of these developments stem from, and are influenced by, Canada's constitutional, legislative and common law rights and obligations.

With the Canadian Bill of Rights 1960, the expected drastic changes in the provision and system of education did not eventuate because the courts treated the Bill like any other statutory provision. However, with the passage and entrenchment of the Canadian Charter of Rights and Freedoms, events started to dramatically change, because the Charter litigation started affecting many aspects of education.<sup>8</sup> During the last two decades, public opinion, and constitutional changes, have brought the area of educational law to prominence, resulting in repetition in the cycles of demand and response.

### **Some Fundamental Characteristics of Canadian Education Law**

Because of the British historical and legal tradition in Canada, there are many major similarities between British (and therefore Australian) and Canadian legal foundations of education. In addition, because of the proximity and influence of the United States of America, many parallels can be drawn between the Canadian and American laws of education. Thus, Canadian education law has been enriched by both the influences. Visitors from Australia, the UK and the USA can feel at home in the Canadian school and higher education systems - the reason why two-way traffic of many expatriates between Canada and the above countries' educational systems remains high.

The major fundamental characteristics of the Canadian education law can be summarised as follows:

### **Federal state**

Unlike Britain and New Zealand, but similar to Australia and the United States, Canada is governed under a federal, rather than a unitary, system of government. While the federal Parliament and government have certain educational powers and discretions - particularly in bilingualism and multiculturalism, Indian Reserves education, international relations, and, of course the purse strings - it is the provincial governments which have the constitutional powers in education<sup>9</sup>, and their educational jurisdiction and discretion are wide, almost all-encompassing. Provincial constitutional powers of education, include the power, for the sake of local control and supervision, of creating local school boards and trustees, which, in addition to playing an important decentralised educational role, provide a unique opportunity in fostering local democratic practice and traditions (Canadians feel proud of the localisation and democratisation of their education). The result is that there are three main statutory levels of educational jurisdictions: federal, provincial, and local. The story does not end there, because superimposed over these levels, are the common law and the fundamental rights enshrined in the Canadian Charter of Rights and Freedoms. Because of the complicated nature of this mish-mash of authority over educational matters, it is not easy to find out who controls the school. According to one commentator, the answer to that question is not easy. 'Any person who seeks to answer that question is likely to be faced with a twisting maze of statutes, regulation, and bureaucratic flowcharts'.<sup>10</sup>

### **Constitutionalisation and legalisation of education**

This has primarily happened because of the passage and entrenchment of the Canadian Charter of Rights and Freedoms, which is part and parcel of the Canadian Constitution Act 1982.<sup>11</sup> This was enacted by the U.K. Parliament at the request of the Canadian Parliament. The results are that Canadians are masters of their own legal system without any need for the United Kingdom courts or Parliament to make laws for Canada. Further the Canadian courts have become important players in interpreting educational laws and declaring whether they contravene the Canadian Charter. Thus judges, especially the Justices of the Supreme Court of Canada, play a role, sometimes as important as legislators, in establishing educational policies and rights. This has a positive effect in establishing a uniform system of federal and provincial laws in the sphere of education.<sup>12</sup>

### **Multiculturalism and multicultural education**

Canadians are very proud of their history of multi-cultural, multi-ethnic and multi-religious traditions and laws (although there have been some blatant and even shameful exceptions). Particularly during the last two decades, the Canadian federal and many provincial governments have been in favour of providing positive multiculturalism policies, especially because the massive intake of ‘non-traditional’ migrants since the end of the Second World War has increased the ethno-cultural background of the Canadian population. However, because this policy was not backed by legal or political weight, according to D.A. Schmeiser, this was not effectively implemented in public education.<sup>13</sup> The Canadian Charter of Rights and Freedoms (s27), provides that the Charter ‘shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada’. While it is only an interpretational rule and part of a defensive mechanism within the Charter, it is ‘dynamic’. It requires those responsible for applying the Charter to contribute to the ‘enhancement’ of Canadian multiculturalism. This requires more positive action than other related ‘constitutional provisions’.<sup>14</sup> In addition, the Canadian Parliament passed the Multiculturalism Act in 1988, which impacts upon the administrative policies of the federal government, and encourages the promotion of the multicultural reality of Canada, although some people maintain that in education it does not go far enough.

### **Official language rights**

The bicultural tradition of Canada has given rise to constitutional protections of language rights for the official English and French populations, thus providing special status for English and French. Similarly, special protection is provided, where numbers warrant, for minority language education rights of the two dominant groups<sup>15</sup>. Furthermore, the Constitution provides (s29), that no provision of the Charter ‘abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools’.

### **Freedom of religion**

While freedom of religion is enshrined in the Canadian Charter, its impact on education has been varied. For example, although regulations mandating school prayers have been declared unconstitutional and therefore of no force and effect, public funding for other than minority Catholic and Protestant schools has not had any success. In this respect the Supreme Court of Canada has shown deference to law-makers (see below).

### **Special needs education**

The Canadian common law did not provide any special educational provisions for people with disabilities. Although anti-discrimination laws against sex and race had been enacted in all the federal and provincial legislatures by 1960 - in common with developments in other countries - disability was not considered so important as to be included in such enactments. ‘It was not until

the early 1970s, however, that anti-discrimination statutes began to address the anachronistic legal treatment of Canadians with disabilities, and it was only in subsequent years that legislative amendments by all the provinces and the federal government afforded protection against discrimination based on disability'.<sup>16</sup> In 1971 Canada became a signatory to the Declaration of the Rights of Mentally Retarded Persons and, in 1975, to the Declaration of the Rights of Disabled Persons. The provinces started making legislative provision for 'handicapped' children. However, according to Sussel:

although most provinces adopted some policies and programs designed to accommodate physically and mentally handicapped children, implementation of such policies and programs was both discretionary and conditional, so that the claim of special need children to an appropriate education was more appropriately described before 1982 as more of a privilege than a right ... In addition to providing minimal entitlements to education for children with disabilities, many provincial education statutes prior to 1982 also contained 'exclusion' clauses that contemplated that not all children with severe disabilities, would be provided access ...<sup>17</sup>

Many provinces, in anticipation of, or after, the equality provisions of the Canadian Charter coming into effect in 1985, passed laws and rules in compliance with their new responsibilities, making it possible for individualised child-centred programs, so that education programs for all children could focus on the unique abilities of the individual learner, and providing for an appeal system. The question of 'inclusiveness' has left some parents dissatisfied with the law. However, the Supreme Court of Canada has shown deference to legislative policy-making in this respect too (see below).

### **Protection of human rights**

In addition to the Canadian Charter, federal and provincial legislatures have enacted various statutes proscribing discrimination and providing for an equitable society. For example, the Alberta Individual Rights Protection Act lays down many equality provisions, e.g. persons resident in Alberta are not to be differentiated or discriminated against on grounds of race, religious beliefs, colour, gender, physical disability, marital status, age, mental disability, ancestry or place of origin. However, it does not protect sexual orientation (see below). One of the recent consequences is that public awareness and expectations of their rights and education authorities' obligations, have increased considerably. In response, some education administrators have expressed the view that their hands are being tied more and more by a more regulated and rights-minded environment. However, as Judge Marvin Zuker so cogently and clearly points out:

the scales of justice have not been tipped against educators ... practices and policies that are arbitrary or unjustifiably violate protected individual rights will not be tolerated by the courts. Educators should sit down and identify and effectively change those policies that may well generate legal interventions. Only with an increased awareness and understanding of basic legal principles can all of us in the educational process develop more respect for the law and those responsibilities that accompany legal rights.<sup>18</sup>

### **The Provincial Educational Role**

The Canadian Constitution<sup>19</sup> provides for a system of government based on division of powers and responsibilities between federal and provincial parliaments and governments (there are ten provinces and two territories). The Constitution delineates exclusive (and concurrent) federal and provincial powers. Section 93 of the Constitution Act 1867 specifically grants authority over education to the provinces. Therefore, the provinces play an overwhelmingly crucial role in primary, secondary and post-secondary education. They determine educational structures, school districts, colleges and universities. Each province provides the legal framework for education within its boundaries by statutes, and subordinate legislation, i.e., by-laws, rules and regulations made under an Act of the Provincial Legislature. All provinces have established education departments. Some have separate departments for advanced or post-secondary education. Unlike some other countries' lack of direct financial control of and micro-management in universities, it is not uncommon for the Minister of Advanced Education to play a major role in the university affairs, because there may not be an intermediary University Grants Committee or a similar body.

### **Local education boards and trustees**

Provincial powers in education include the power to delegate authority. This is done by the establishment of local education boards to administer and supervise schools, which is achieved by legislation. These local education boards play a significant role in the provision of public schooling and related matters. They pass by-laws and issue policy manuals as guidelines. The education boards act as agents of the provincial government - within the ambit of their delegated authority - which can be wide and extensive. The boards are responsible for the administrative, academic and financial functions of their education system - of course subject to and in accordance with the law. Normally there is a chief executive officer of a board, called for example superintendent or director of education, who is appointed by the elected board, and who has the overall administrative responsibilities and powers. He or she plays a significant and pivotal role in supervising the provision of statutory public education within his/her board area. The hierarchical next lower step is the school principal. He or she is responsible to provide and ensure quality education in accordance with the board policies and instructions. He or she is also accountable for the safe school environment including order and discipline.

The local education boards are the local legislatures in educational matters. They are created with the power to act in a legislative and administrative capacity. The education boards, run by locally elected trustees, are a good example of democracy at local level, whereby local people including parents are provided with a mechanism to oversee and control their educational system.

### **The Canadian Charter's Impact on Education**

As must be clear by now, the most significant developments in the law of education in recent years have been in relation to the impact of the Canadian Charter of Rights and Freedoms. In common with the American Bill of Rights, the Canadian Charter of Rights and Freedoms aims to provide fundamental, entrenched and inalienable rights and freedoms. The Charter has impacted on many aspects of Canadian life. Education is no exception. The Charter, being part of the Constitution which is the 'supreme law of Canada'<sup>20</sup>, has resulted in establishing a new branch of educational law through adherence to fundamental principles and human rights. It is therefore important to spend some time and space in this article on some aspects of the Charter and its impact on education.

### **Interpretation of the Charter<sup>21</sup>**

In the interpretation of the Canadian Charter of Rights and Freedoms, in contrast to the Canadian Bill of Rights 1960, the Supreme Court of Canada, from the outset, was bold and inventive, because the Charter was considered as 'a new confirmation of rights and freedoms and of judicial power and responsibility in relation to their protection'.<sup>22</sup> The task which was given to the Supreme Court Justices was enunciated by Justice Estey in *Law Society of Upper Ontario v. Skapinker*<sup>23</sup>:

We are here engaged in the new task, the interpretation and application of the Charter of Rights and Freedoms. This is not a statute or even a statute of the extraordinary nature of the Canadian Bill of Rights 1960 ... It is part of the Constitution of the nation adopted by the constitutional process. The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it is the supreme law of Canada.<sup>24</sup>

The Canadian Supreme Court has established that a liberal, rather than a literal, approach has to be applied in interpreting the constitutionally-entrenched Charter of Rights.<sup>25</sup> However, liberal interpretation cannot be used to develop fanciful or extravagant construction because, extravagant interpretation can only trivialise or diminish respect for the Charter,<sup>26</sup> and a literal approach should be avoided where it defeats the nature and purpose of the section and leads to

absurdity. When such is the case, the literal approach should not prevail unless the language used is ‘absolute intractability’.<sup>27</sup>

Although the courts are now empowered to declare laws unconstitutional and therefore of no force and effect, judges have to tread carefully when declaring statutory provisions null and void, because ‘much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions of fundamental values, not to second guess policy decisions’.<sup>28</sup> According to the Supreme Court Justice Sopinka (in an education case) in 1997 (see below):

In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s.1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity.<sup>29</sup>

However, one should not forget that the Supreme Court of Canada has been stating that the Canadian Charter is a purposive document, which should be construed with purposive interpretation. For example, Chief Justice Dickson elaborated the technique which is necessary in applying the purposive approach, and said that the analysis:

is to be undertaken, and the purpose of the right and freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedoms, to the historic origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

It should be pointed out that the Canadian Charter does not provide for absolute or unfettered rights and freedoms: that would be the antithesis of all rights and would likely serve to nullify them. Instead, section 1 of the Charter lays down the following limits:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>30</sup>

## **Equality rights**

The important provision of the Charter that has the potential to most influence educational decisions is Section 15 which deals with and provides for equality rights. It states:

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

15 (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>31</sup>

As can be appreciated, section 15(1) provides for enumerated grounds on which discrimination is proscribed. It also allows ‘analogous’ grounds, to be developed by the courts. Section 15(2) sanctions affirmative action, but only in limited circumstances.

### **Meaning of ‘discrimination’**

The Supreme Court of Canada in the first case it decided on section 15: *Andrews v. Law Society of British Columbia*<sup>32</sup> defined ‘discrimination’ as follows:

It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concerns, respect and consideration. It has a large remedial component ...

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.<sup>33</sup>

In a more recent case (1995), Madam Justice L’Heureux-Dube’ in *Egan v. Canada*,<sup>34</sup> provides the following definition:

[F]or an individual to make out a violation of their rights under section 15(1) of the Charter, he or she must demonstrate the following three things:

1. that there is a legislative distinction;
2. that this distinction results in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group;
3. that this distinction is 'discriminatory' within the meaning of section 15.

[The third stage of this analysis can be elaborated]: distinction is discriminatory ... where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concerns, respect, and consideration. This examination should be undertaken from a subjective-objective perspective: i.e. from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.<sup>35</sup>

In determining whether discrimination has occurred, Madam Justice L'Heureux-Dube', in a 1996 education case (see below), has further elaborated *Adler v. Ontario*:<sup>36</sup>

It is necessary to reconstruct the context in which the distinction arises. Two categories of factors prove particularly instructive: (1) the nature of the group adversely affected by the distinction, and (2) the nature of the interest adversely affected by the distinction. Where the group identified by the distinction is socially vulnerable and delineated by characteristics which are popularly conceived of as fundamental to personhood, the distinction is more likely to be considered discriminatory.

The process for determining whether there has been discrimination on grounds relating to personal characteristics or the individual or group was laid down by Madam Justice Wilson in *R. v. Turpin*:<sup>37</sup>

... it is important to look not only at the impugned legislation which has created a distinction that violates the right of equality but also the larger social, political and legal context ... it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would [establish] identical treatment which would in the particular context result in inequality or foster disadvantage.

Madam Justice McLachlin, in *Miron v. Trudel*<sup>38</sup> provided the following guidelines:

The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of 'equal protection' or 'equal benefit' of the law, as compared with some

other person. Second, the claimant must show that the denial constitutes discrimination. At this stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as ‘demonstrably justified in a free and democratic society’ under s. 1 of the Charter.

In the most recent Canadian Supreme Court education case in 1997 (see below), Justice Sopinka, *Eaton v. Brent County Board of Education*,<sup>39</sup> elaborated and emphasised that:

the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society ...

In a discrimination case in the school setting, the Ontario Court of Appeal in *Re Blainey and Ontario Hockey Association*<sup>40</sup> decided that section 15 of the Charter constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It requires that those who are similarly situated should be similarly treated. Thus, where a girl was excluded from playing ice-hockey in a boys’ team, it was held to be discrimination.

The Supreme Court of Canada has decided that the Charter does not apply to universities because they are independent of the government; it applies to colleges and hospitals, because they are not at arm’s length from the government; and that mandatory retirement policies in schools, colleges and universities are protected from the application of equality provision of the Charter, because of section 1 of the Charter.<sup>41</sup>

### **Special educational needs**

One area where section 15 of the Charter (equality and non-discrimination) is making fundamental inroads is special educational needs. For example in a recent case, the Ontario Court of Appeal<sup>42</sup> held, over-ruling the Ontario Special Educational Tribunal<sup>43</sup> and the Divisional Court, that the equality provision of the Canadian Charter mandated a presumption in favour of including disabled pupils in regular classrooms and imposed a burden on those who proposed a segregated classroom to establish why the pupil with special needs could be better met in that setting. The Court opined that while it may be true that the Charter does not create a presumption in favour of one pedagogical theory over another, the question should not be that of choosing between

competing pedagogical theories, but, in cases of special educational needs, one of determining the appropriate legal framework within which that choice has to be made. Unlike the lower judicial bodies, the Ontario Court of Appeal decided (for the first time any court of appeal had so concluded) that the Charter's equality section applies to such cases. It is well established that in case of a conflict between the Charter and a statute, the Charter applies because it is the superior, constitutional document. Thus, the Education Act and the Human Rights Legislation have to be construed in the light of the Charter. Madam Justice Arbour of the Ontario Court of Appeal has said:

Segregation of a child with disabilities in a special class for disabled children, against the child's wishes as expressed by the child's legal representatives, is ... discriminatory within the meaning of section 15(1) of the Charter. Under the Education Act, children are permitted to attend a school in their neighborhood in which they will associate freely with their age-appropriate peers. The school board has denied [the plaintiff child] this opportunity on the basis of her disability. This is not a mere innocuous classification. It deprives the child of a benefit or imposes on her a disadvantage or burden ...

The court decided that the segregation of special education needs children for educational purposes may sometimes be necessary but the Education Act went further and authorised the school board to require such a pupil to be educated in a segregated school or classroom, over the parents' objection, without having to show why less exclusionary forms of placement could not reasonably be expected to meet the child's special educational needs. According to the Court of Appeal, that is where the infringement of the Charter comes into play. While a child with special educational needs may not have an absolute right to be educated, with the requisite support, in a regular classroom, there should be a presumption in favour of inclusion, and the burden should be on those who decide otherwise to show that what they advocate is the preferable course of action. Thus, the decision purported to put education authorities on the defensive, and tried to curtail their previously wide discretion.

However, this effort was short-lived, because the Supreme Court of Canada (9 Justices) unanimously allowed the appeal of the education board, set aside the Ontario Court of Appeal's judgment, and restored the Ontario Special Education Tribunal's decision, which had confirmed a Special Education Appeal Board's decision determining that the pupil with exceptional (special) needs be placed in a special education class<sup>44</sup>. The Supreme Court said that the tribunal's decision, which was based upon a thorough and careful consideration of the child's educational interests, taking into account her special needs, could not be considered a burden or disadvantage imposed on the child, because the tribunal, in deciding on the appropriate placement of the child, had considered each of the various categories of needs relevant to her education. It found that it was not possible to meet the pupils's intellectual and academic needs in the regular class without 'isolating her in a dis-serving and potentially insidious way'; it concluded that her

communications needs could be best served in the special class; and it expressed doubt as to whether her emotional and social needs were being met in the regular class. The Supreme Court stated, relying on its previous two cases,<sup>45</sup> that parents' view of their child's best interests is not necessarily dispositive of the question. The decision-making body must ensure that its :

determination of the appropriate accommodation for an exceptional child be from subjective, child-centered perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of the exceptional child. Where this is not possible, that is where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children ... who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

### **Human rights legislation subject to the charter' equality clause**

All federal and provincial human/individual rights enactments, of course, are subject to, and have to comply with, the Charter. One example, in the education setting under the Charter equality provision can be examined here. In a recent case, *Vriend v. Alberta*,<sup>46</sup> an employee at a Christian college was dismissed, because of his confession of homosexuality. The reason given to him was that homosexuality violated certain Christian principles. He complained to the Alberta Human Rights Commission, under the Alberta Individual Rights Protection Act, which prohibits discrimination on various grounds, but 'sexual orientation' is not one of the grounds. The Human Rights Commission dismissed the complaint because of that exclusion of the ground. The employee then appealed to the Alberta Court of Queen's Bench. Madam Justice Russell, holding the dismissal unlawful, declared that the statute was in violation of the equality provision of the Canadian Charter, and that it could not be saved under section 1 of the Charter. Her judgment included the remedy of reading 'sexual orientation' in the Individual Rights Protection Act. However, the Alberta government appealed to the Alberta Court of Appeal, which reversed, by majority, the Queen's Bench's decision. The majority said that they could not:

agree that the *deliberate* legislative omission of the words 'sexual orientation' in the Individual Rights protection Act ... when held up against the Canadian

Charter of Rights and Freedoms, leads inexorably to the constitutional infirmity of such a statute ... the conclusion that the Alberta Legislature's exclusion of 'sexual orientation' from the enumerated discrimination prohibitions of the Individual Rights Protection Act does not leave the Act in so clearly an unconstitutional state that the courts can intervene, through the agency of the Charter, to strike down, let alone rewrite it.

This judgment has widely been criticised,<sup>47</sup> and has been appealed to the Supreme Court of Canada.

### **Right to life and liberty**

In addition to the Equality Rights, many other provisions of The Canadian Charter also impact upon education. Here we look at section 7, which extends to 'everyone' the rights 'to life, liberty and security of the person' and the right 'not to be deprived thereof except in accordance with the principles of fundamental justice'. One aspect of education law reached the Supreme Court of Canada, where it was contended by a parent that the truancy provision contravened section 7 of the Canadian Charter. However, the Supreme Court was not persuaded that parents' freedom to educate their children as they wished was infringed by the law against truancy.<sup>48</sup>

### **Freedom of religion**

Another example is Section 2(a) which lays down that 'Everyone has the fundamental freedom of religion and conscience'. Paradoxically, the Charter also lays down that 'Canada is founded upon principles that recognise the supremacy of God'. While this phrase sometimes is taken into account in interpreting the Charter, this does not mean to say that Canada is in any danger of becoming a theocracy! The subject of religion and education has ended up in many courts as the connection between religion and education is strong and strongly-felt. Litigation has taken many forms. For example, litigation in the following matters has resulted under this provision: (1) parents claim that they have the exclusive right to educate their children in accordance with their religious beliefs, (2) the state's role of providing religious instruction in public school, and (3) some parents' claim that by not providing funding to religious private schools, except public schools and minority Catholic schools, section 2(a) is violated.

### **Parents' exclusive right to educate their children**

In *R v. Jones*<sup>49</sup> the appellant, a pastor, operated a fundamentalist church. He maintained that a parent's duty to educate his children comes from God and not the secular State. The majority of Supreme Court of Canada decided that the appellant had not been able to show any substantial interference with his belief that God, and not the State, was the source of his authority to educate

his children. Thus it is now clear that a parent who wants his/her child(ren) to be educated at an unauthorised religious school or at home, without any approval or certification from the education authorities, is not free to do so. The parent's argument was that the Charter freedoms of religion and equality mean that private education, and parents who educate their children privately, are free from state constraints or inspection. However, the Supreme Court decided that the guarantee of religious freedom does not shield a parent from sending his/her child to school, or to obtain a certificate of efficient instruction at home in order to fulfill that requirement. Madam Justice Wilson said:

In my view, the School Act does not offend religious freedom; it accommodates it. It envisages the education of pupils at public schools, private schools, at home or elsewhere. The legislation permits the existence of schools such as the appellant's which have a religious orientation. It is a flexible piece of legislation which seeks to ensure one thing - that all children receive an adequate education ... There is no conflict between what the legislation requires and what the appellant feels it is his duty to provide. True, he wishes to provide more, specifically religious guidance, but the legislation does not prohibit it.

The majority of the Supreme Court decided that, while parents are free to educate their children according to their religious beliefs, it is not a violation of religious freedom to require someone to apply to a provincial (Alberta in this case) Department of Education to set up a private school or a home-teaching programme for religious instruction. It is now clear that the provinces have the right to regulate alternative education, including private denominational schools, in order to ensure that a core curriculum and adequate standards and facilities of teaching are maintained.

### **Religious education in public schools<sup>50</sup>**

How far can the State promote religious 'indoctrination' in the public school system? The Ontario Court of Appeal has answered two aspects of this question in two cases.<sup>51</sup> In the first case, the issue was that of religious instruction in the public school system. The Court decided that the regulations requiring public schools to open with the Lord's prayer or other suitable prayer and passages from the Bible or other suitable readings with exemptions for children of non-Christian faiths were unconstitutional. The Court said that the requirement of religious education:

imposes on religious minorities a compulsion to conform to the religious practices of the majority ... The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. The peer pressure and the classroom norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority values ... We

consider [the regulations under the Education Act] also infringe freedom of conscience and religion in a broader sense. The requirement that pupils attend religious exercises, unless exempt, compels students and parents to make a religious statement. ... the effect of the exemption provision is to discriminate against religious minorities ... the exemption provision imposes a penalty on pupils from religious minorities who utilize it - by stigmatising them as non-conformists and setting them apart from their fellow students who are members of a dominant religion.<sup>52</sup>

In the second case, the issue was the requirement of two periods of religious instruction each week in public schools. In these regulations too, exemptions were provided for the children of parents who objected to the practices or instruction, thus allowing them to be excused from participation. The court rejected the argument about the benefits of religious instruction to teach children about morality, adding that there were other effective methods to teach children about morality without imposing Christian practices on them. However, the court was of the opinion that there was no prohibition on the teaching about religions, provided that the line between indoctrination and education was observed.<sup>53</sup>

The Ontario Court of Appeal more recently had to deal with a multifaith group's argument that the prohibition of voluntary religious instruction in public schools is unconstitutional because it infringes section 2(a) of the Charter. However, the three-judge court, while sympathising with Sikh, Hindu, Muslim and Christian parents who argued that the survival of their cultures and religions is endangered by having to send their children to secular public schools, said 'this case primarily involves funding'. The court added: 'No freedoms have been violated. The problem for these parents and others is that the province has decided not to fund religious schools.'<sup>54</sup>

In a multi-cultural and multi-religions country like Canada, courts recognise the principle that some accommodation has to be made to take into account non-Christian believer's faith, e.g. wearing of hijab by a Muslim pupil, or wearing of a kirpan by a Sikh pupil, or dietary restrictions of various faiths. However, the task of legislators and courts is not easy, because, while accommodation in small matters may not be difficult, in significant issues - like banning of certain books or changing the school year or redesigning the curriculum - can face formidable challenges, particularly when legislators and judges in the overwhelming majority belong to the dominant culture.<sup>55</sup>

### **Public funding of private schools**

Section 93(1) of the Constitution Act 1867 provides that no law may prejudicially affect any right or privilege with respect to denominational schools which any class of persons had at the time of the Confederation.<sup>56</sup> Without this political compromise, there would have been no Confederation. Thus, this constitutionally entrenches a special status for such class of persons (religious

minorities: only Catholics and Protestants), which are denied to others.<sup>57</sup> The Supreme Court in 1987, in *Reference re Bill 30, an Act to Amend the Education Act*,<sup>58</sup> decided that to fund a Roman Catholic School, under section 93 of the Constitution Act of 1867 does not infringe section 2(a) of the Charter. Madam Justice Wilson acknowledged that this special status may 'sit uncomfortably with the concept of equality in the Charter', but it must be given proper respect and recognition. The Supreme Court upheld the Ontario Education Act which extended full public funding to the province's Roman Catholic separate schools, because section 2(a) or section 15(1) of the Charter of 1982 have to be subject to section 93(1) of the Constitution Act 1867. The Court concluded that there was no infringement of 'freedom of religion' (s. 2(a) of the Charter) of non-Catholic schools, when full public funding was provided only to Catholic schools, because one part of the Constitution cannot be used to interfere with rights protected by a different part of the same document.

In a 1995 case, the Supreme Court of Canada has re-stated that parents have the fundamental right to educate their children in the religion of their choice.<sup>59</sup> However, Hindus, Jews, Muslims, Sikhs and other such people say that this right is a hollow one, if, while Catholic and Protestant minority schools are provided public funding, other private religious schools are not entitled to state funding. But, this argument has not been accepted by the higher courts. For example, in *Adler v. Ontario*<sup>60</sup>, parents - who sent their children for reasons of religious or conscientious belief to independent, private, and fee-paying schools because the province would not fund such schools - claimed that their freedom of religion was violated, because the state made schooling compulsory but did not fund private religious schools. The Ontario Court of Appeal did not agree.<sup>61</sup> It said that the Education Act mandated compulsory education, not compulsory schooling, because a child is excused from attendance at school if the child is receiving satisfactory education at home or elsewhere. Thus, the court found that the Education Act accommodates religious freedoms instead of interfering with it. Dubin CJO said that there was no statutory compulsion on the appellants to send their children to private, fee-paying religious-based schools, because they were free to send their children to secular fee-free public schools, which were maintained at public expense. The parents' decision not to do so was solely a response to their religious beliefs and not a consequence of any government action. He said that the Education Act has created an education system which, owing to its secular nature, accommodates all parents of all religious beliefs.<sup>62</sup> In his opinion, the parents' decision to have their children educated at private religious schools flowed from their religious beliefs, not state action. Freedom of religion and conscience guarantees the freedoms:

to pursue one's religion or beliefs without government interference, and the entitlement to live one's life free of state-imposed religions or beliefs. It does not provide an entitlement to state support for the exercise of one's religion. Thus, in order to found a breach, there must be some state coercion that denies the exercise of one's religion.

The Supreme Court of Canada in 1996, by a majority, confirmed the Court of Appeal's decision.<sup>63</sup> The majority reiterated that freedom of religion under section 2(a) of the Charter is not infringed, where a province or a school board refuses to fund publicly a private/independent religious school, while funding secular public schools. While parents are free to educate their children in private religious schools, they have to pay for that choice. The cost of sending their children to private religious schools is a natural cost of the parents' religion, and the disadvantage they suffer does not flow from state-funded public schools. Furthermore, failure to act in order to facilitate the practice of religion cannot be considered state interference with freedom of religion.

### **Freedom of expression**

The Charter's provision of 'freedom of thought, belief and expression, including freedom of the press and other media communication' in section 2(b) has also become relevant in education, particularly in relation to hate speech, especially when teachers are involved.<sup>64</sup> As Irwin Cotler has pointed out, recent years:

have witnessed an almost unprecedented explosion of racial and religious incitement against vulnerable minorities in democratic societies in Europe, Canada, the United States, Latin America and Asia. The legal remedies invoked to combat such incitement have been the object of constitutional challenges in regions around the world, triggering a series of *causes-celebres* in the 1990's, including the *Le Pen case* in France, the *Radio Islam case* in Sweden, the *Smirnov-Ostashvili case* in the former Soviet Union, the *David Irving case* in England, and the 'Minnesota and Cross Burning' in the United States, to name but a few.<sup>65</sup>

Two teachers' cases<sup>66</sup> in Canada have highlighted the dilemma of the contrasting laws: teachers' freedom of speech and the community's concern against hate propaganda. In the first one, a teacher was convicted under the Canadian Criminal Code's provision against hate propaganda, for willfully promoting hatred against an identified group by communicating false statements. The Supreme Court of Canada, confirming the conviction stated, by majority, that the Criminal Code provision is a reasonable and demonstrably justifiable limitation on freedom of speech. Chief Justice Dickson said:

... hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.

In the second case (1996), unlike the first one, a teacher expressed racist views outside the classroom, and was recommended by a Board of Enquiry, set up under the provincial Human

Rights Act, to be removed or relocated. The New Brunswick Court of Appeal by majority revoked the order because, the court said, it infringed the teacher's freedom of expression outside the classroom. This decision was over-turned by the Supreme Court of Canada, because the evidence disclosed that the teacher's vitriolic views were known to his pupils and had created a poisoned educational environment in which Jewish children perceived the potential for misconduct and were likely to feel isolated and suffer a loss of self-esteem on the basis of their Judaism. The Supreme Court said that the educational context means that a teacher's freedom to make discriminatory statements outside the school has to be considered when balancing the rights of children in the school board to be educated in a school system that is free from bias, prejudice and intolerance. In a school setting vulnerability of young children to messages conveyed by their teachers is an extremely important factor to take into account. Justice La Forest, who wrote for the unanimous court, stated:

By their conduct, teachers as 'medium' must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to 'choose which hat they will wear on what occasion' ... teachers do not necessarily check their teaching hats at the school-yard gate and may be perceived to be wearing their teaching hats even off duty.

It is submitted that the Supreme Court of Canada has removed many doubts and fears by the unanimous judgment, which sends a strong message to the community that hate-propaganda is outlawed from schools and teachers' utterances, because it constitutes an assault on the lofty values and interests sought to be protected by freedom of expression - which allows considerable latitude in a market place of ideas but not does not give unlimited freedom to vilify other religions or beliefs. Freedom of expression, does not mean freedom to tell lies and spread racial or religious hatred.

The in-class, out-class distinction created by the Court of Appeal was untenable. The present writer agrees with the following statement of the British Columbia Court of Appeal in *Abbotsford School District No. 34 Board of School Trustees v. Shewan*:<sup>67</sup>

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.

### **Freedom of association**

Section 2(d) of the Charter guarantees 'freedom of association'. This section was used by a teacher to try not to belong or pay subscription to a teachers' trade union - where a union security clause was present in the collective agreement applicable to him<sup>68</sup>. The Canadian Federal and Provincial labour relations legislation recognises that once a union has been certified as a bargaining agent, it may bargain for its own financial security. Under this scheme, the employer agrees to take positive action to strengthen the position of the union, in accordance with an agreed formula contained in the collective agreement. Each employee either agrees to belong to the relevant union or to pay contributions equal to the membership fee to the union or a charity (there are various arrangements, e.g., 'closed shop', 'union shop' or 'agency shop'). For example, the Labour Relations Code of Alberta provides that:

Nothing in this Act prevents a trade union from continuing an existing collective agreement or entering into a new collective agreement with an employer or employers' organisation whereby all or any of the employees of the employer or one or more employers represented by the employers' organisation are required to be members of a trade union.

The Supreme Court of Canada in the teacher's case decided that where a union security clause is included in the collective agreement, compulsory payment to a union of an amount equal to union dues by a non-member does not infringe the freedom 'not to associate'.<sup>69</sup> The argument in favour of union security arrangements is that they contribute to some extent to the good health of the collective bargaining and industrial relations system, especially in public service employment, by increasing the strength of the union movement, both numerically and economically, so that unions can bargain from strength and not from division and weakness.

### **Some Significant Future Trends**

Some in Canada would maintain that education is turning out to be an effective agent of social change and that it will continue to do so. The Canadian socio-economic, and political-cultural context is such that change and evolution are inevitable. Canada, being one of the richest countries in the world (and a member of the G-7), concentrates its policies and energies on creation of individual and collective wealth, which creates its own problems, particularly the endemic problem of a pool of significant number of people who are left behind in the education race, or remain at the bottom of the prosperity heap. Despite Canada having a particularly good record of welfare and social programmes, and access to numerous social benefits - including education

whereby, at least in principle, equal educational opportunities are provided to every one irrespective of their social or financial standing - problems remain. For example, in functional illiteracy; cycle of poverty - unemployment - inadequate educational facilities - poverty. Nevertheless, efforts are being made at least to highlight these problems so that the public's and politicians' consciences can be stirred, to make improvements. However, one problem will continue to haunt the law-makers: the endemic below-poverty line existence of hundreds of thousands of children. In a July 1997 Report <sup>70</sup>, Statistics Canada confirms how badly Canada fares in relation to lack of social and educational facilities for the poor of Canada<sup>71</sup>. The other side of the coin is that, with the winds of change blowing from Europe and the USA, more and more privatisation, and less and less egalitarianism, is creeping into the educational system. For example, increasing numbers of independent schools are mushrooming, more and more provinces are considering funding such private schools with public money. In Alberta a Task Force has been established to examine the issue of public funding to private schools, and a lively debate is taking place at the time of the writing of this article. Opinions will continue to be polarised, and an acceptable solution will continue to evade law-makers, because either way a big majority will remain dissatisfied.

Canada has been, and will continue to be, a major attraction for migrants. Canadian immigration policies have resulted in a diverse and multi-cultural society, and it will continue to do so. The school population of pupils whose first language is non English or French has been increasing. This has benefits and disadvantages. One of the advantages is cultural pluralism and an ethnic-mosaic. Thus, the cultural diversity that has started in schools will continue to increase, and the nearly-complete domination of the English and French 'founding people' will be on the wane.

As has been observed by Ratna Gosh:

Canada has an official policy of multiculturalism within a bilingual framework. The multicultural reality is significant for schools because educational institutions are responsible for preparing students to participate fully in a multicultural society. Notwithstanding the fact that Canada is an immigrant country and has become increasingly heterogeneous, the provincial governments of education have historically had a policy of assimilation.<sup>72</sup>

Demands by religious parents will continue to be made that religious instruction be included in the school-day, and that public funding be provided to private religious schools.<sup>73</sup> However, views are also expressed that:

The ideal of public school system is to provide universal access to a secular education, with one of the important goals the teaching of tolerance and respect for different views. Some of the religious groups who will seek funding have a very different objective that rejects free debate on many issues and refuses to

accord respect to different views and values. Indeed their reason for wanting to control educational content is to teach certain accepted truths and moral practices. Some of those values may be inconsistent with other values accepted in Canadian society, such as gender equality and absence of discrimination on the basis of marital status or the importance of vigorous debate to the pursuit of truth.<sup>74</sup>

The Canadian Charter of Rights and Freedoms had an impact, and will continue to impact, upon educational policies and practices. The Charter is increasingly used to question and challenge educational laws and subordinate legislation. However, during the last few years, the Supreme Court of Canada has somewhat retreated from too much activism and has started to follow the policy of deference to the law-makers. This is likely to continue during the tenure of the present Justices. However, in many instances, a unanimous decision was not achieved. Therefore, on those matters, there is potential for revisiting the issues. One prediction can easily be made. The Charter will increasingly be used to keep the legislatures, policy-maker in the sphere of education, on their toes. They may have been given plenty of leeway, but they will always be looking over their shoulder. This is not a retrograde development, because it means policies, directives and rules will only be made or changed after a thorough examination of all the legal pros and cons. However, as MacKay has observed, this 'rights paradigm' will only be as good as the vision of the people who apply the paradigm.<sup>75</sup>

## **Conclusions**

History has played an important part, probably more than in some other countries, in shaping and reshaping laws governing education in Canada. As Wayne MacKay points out:

In the spirit of Canadian history, educational history has drawn principles from an evolutionary construct and has relied on external influences - British and French culturally, the United States sociopolitically and technologically ...<sup>76</sup>

However, despite many compromises, Quebec is still not satisfied with the present legal regime. One expects continued pressure from Quebec for more money and more changes.

It is sometimes maintained that the mechanisms for making, enforcing and interpreting the law are good indicators to point out how complicated and complex a society is. By that standard, Canadian education law makes Canada quite complicated! The American influence has been eroding the British heritage. The new and written Constitution including a bill of rights, modelled on the U.S. Constitution, during the last fifteen years has made significant inroads into the legal context of education. The Canadian federal system, again akin to the US system, has had a considerable impact on the legal framework of education. These developments make the Canadian educational set-up quite different from the one operated in Britain, or even in Australia. The big difference with Australia is that Canada now can be analogised with the US because of

the Canadian Charter. Although the Australian High Court has started limited acceptance of 'implied rights',<sup>77</sup> the Court does not have the same constitutional power and authority to declare laws and regulations null and void.

Although many British legal precedents are liberally quoted in Canadian education court-cases, especially in view of the British membership of the European Union and its status of a signatory to many international and European Treaties and Conventions, which become relevant in the interpretation of the Canadian Charter, Australian precedents are seldom cited. However, one big difference between the British and Canadian education law is the Education Board and Education Trustees in Canada, which are created by Provincial legislatures. The Constitution Act 1867, in enumerating the federal and provincial powers clearly states that the provincial legislatures have the power to 'exclusively make laws in relation to education'. This power although 'exclusive' is not 'absolute'.

In most provinces separate schools are created - Roman Catholic, Protestant, and the public school system. Trustees of these schools are elected, under the Municipal Elections Act, while the qualifications and eligibility for candidates are determined under the Education or Schools Act. School trustees are under a public duty to act as reasonable business people because they are entrusted with public money, and can incur personal liability except when acting in good faith.

School Boards act in a legislative or administrative capacity. They sometimes act in quasi-judicial manner. The provincial Education Act normally defines the Board's duties, responsibilities and powers. Boards play a significant and coherent role in school education. They could be analogised with the British local education authorities, but are independent of the local authorities as their composition is elected directly; and each province has different statutory rules regarding School Boards and Trustees.

Some provinces in Canada, with conservative governments and Thatcherite philosophies, are trying to emulate some of the British Conservative policies in education. For example, in Alberta efforts are being made to start the processes of competition between schools, schools to make and operate their own budgets, forcing schools to move to more standardised testing, making results available to parents, establishing charter schools, and a significant increase in public funding for private education. Professor Stephen Ball, of King's College London, has warned Albertans not to follow the British model. He said that schools in Britain are already operating like business:

because the Thatcher government decided to dole out funding based on the number of students in school, instead of on the programs offered. This has dramatically increased competition between schools ... The British system is storing up enormous problems for the future. [The British] are going to have a divided school population coming out of the school system in another five to ten years. Some will have had a very privileged education, some a very poor

education ... Although parents still think they have a choice of which taxpayer-funded school their child will attend, it has become a charade.<sup>78</sup>

Whether this advice is accepted or not, it is certain that changes will continue to evolve not only the legal foundations of education but in education itself, because education, in the postmodern and poststructural Canada, will continue to be a major instrument of accelerated social change. As R. Gosh points out:

Social change, whether gradual or evolutionary, is inevitable and brings with it new patterns of social interaction. The place of education in this process is both complex and critical. In today's postmodern, postindustrial society, the Canadian social profile is changing radically and rapidly. Education has a significant role to play in this change, especially because of the pressing changes in the nature of the family and work, and the needs of a technological society in an information age. While education alone cannot achieve all the desired changes, it would be a great mistake to ignore its potential for affecting change (see M. Conroy, *Education change: Past and present*, in M. Carnoy (ed.) *Schooling in a corporate society* (1975)) and to minimise the *school's responsibility for influencing* the needed outcomes. Not only can education be a significant force for change, it is essential for producing critical citizens and for maintaining a critical democracy.<sup>79</sup>

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## Endnotes

<sup>1</sup> A few parts of this article appeared in (1997) 2 *Education, Public Law and the Individual* 84-87.

<sup>2</sup> According to Wayne MacKay:

Canadians might be forgiven for concluding that the concept of rights burst upon the scene in 1982 with the arrival of the Canadian Charter of Rights and Freedoms. This is, of course, not true. Legal rights in the form of statutory guarantees and judge-made common law rules are part of the British heritage that Canada carried into Confederation in 1867. Even constitutional rights were around before 1982, including guarantees of collective rights to denominational schools and Canada's two official language groups in the Constitution Act 1867. We also have human rights codes since the late 1940s and a statutory guarantee of individual rights in the Canadian Bill of Rights (1960). However, it was not until the Charter's arrival in the 1980s that rights discourse became a regular part of Canadian life.

(A. Wayne Mackay, *The Rights Paradigm in the Age of the Charter*, in R. Gosh & D. Ray, *Social Change and Education in Canada* (1995) p. 224.)

<sup>3</sup> According to Ronald Dworkin, two views of the rule of law are prevalent among lawyers,

(1) a 'rule-book conception' and (2) a 'rights conception'. The first one 'insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all. [This is too narrow a concept since] it does not stipulate anything about the content of the rules that may be put in the rule book. [This conception] insists only that whatever rules are put in the book must be followed'. [On the other hand, the rights conception] assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole ... it insists that these moral and political rights be recognised in positive law, so that they may be enforced *upon the demand of individual citizens* through courts so far as this is practicable': R. Dworkin, *A Matter of Principle* (1985).

4 According to Ratna Gosh, British and French settlers set the patterns of education by the mid-nineteenth century and formalised them in the British North American Act of 1867, which made education a provincial responsibility. This was reiterated in the Constitution Act 1982. In R. Gosh and D. Ray, *Social Change and Education in Canada*, (1995) p 8.  
5 One author describes 'legal culture' as a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organisation and operation of a legal system and about the way law is or should be made, applied, studied, perfected and taught: J.H. Merryman, *The Civil Law Tradition* (1969). See H.W. Ehrmann, *Comparative Legal Cultures* (1976); L.M. Friedman, *Legal Culture and Social Development*, (1969) *Law and Society Rev.* 29; L.M. Friedman, *Total Justice* (1985).

6 In conferring important new political powers on judges, [the Canadian Charter] has made the courtroom a more pervasive and visible arena of politics and imposed the form of legal disputation on more of our public life. By the same token it has placed attention on the judges themselves as political actors.

(R. Knopff & F.L. Morton, *Charter Politics* (1992)). See also, R.I. Cheffin and P.A. Johnson, *The Revised Constitution: Politics as Law* (1986); R. I. Cheffin & R.N. Tucker, *The Constitutional Process in Canada* (1976); G.L. Gall, *The Canadian Legal System* (1995); P. Hogg, *Constitutional Law of Canada* (1996).

7 With the entrenchment of the Canadian Charter of Rights and Freedoms, Canada has moved from the British parliamentary supremacy principles to the American individual-rights model. The predictions of many writers that legal work in education will increase are becoming true: See for example, D. Cruickshank, Charter equality rights: The challenge to education law and policy. In M.E. Manley-Casimir & T.A. Sussell (eds) , *The Courts in the Classroom: The Charter and educational Change* (1986); J. Anderson, Will Charter usher in a 'new school law'? (1985) 25 *Ontarion Lawyers' Weekly* 25; W. Mackay, The Judicial role in educational policy-making: Promise or Threat, (1988) 1 *Education and Law Journal* 127.

8 Another development has been that Canada, by signing many international treaties, has accepted certain obligations which has obliged law-makers and the judiciary to mould the Canadian education law in accordance with these Treaties - for example the Declaration of the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights. The signatories of the latter have accepted the following provisions:

1. [They] recognise the right of everyone to education. They agree that education

shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society.

2. [The] recognise that, with a view to achieving the full realisation of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education ... shall be made generally available and accessible to all by every appropriate means.

For a full account of anti-discrimination provisions in their historical perspective, see W.S. Tarnopolsy & W.F. Pentney, *Discrimination and the Law in Canada* (1982).

<sup>9</sup> Section 93 of the Constitution Act 1867.

<sup>10</sup> Mackay, A.M. *Education Law in Canada* at p. 11.

The original name was the British North American Act 1867 - passed by the UK Parliament.

<sup>11</sup> Although passed as an Act of Parliament, it cannot be amended like any other Act.

<sup>12</sup> Rights and policies are not completely separate, but rather are different species within a single genus. Indeed, policies can be the source of rights - albeit ones that are lower in the legal hierarchy. This hierarchical ordering of rights is a vital aspect of the rights paradigm ... Thus the card that trumps all others in the rights game is the constitutional one. (A.W. MacKay, *The Rights Paradigm in the age of the Charter*, in R. Gosh & D. Ray, *Social Change and Education in Canada* (1995).

<sup>13</sup> See D.A. Schmeiser, *Multiculturalism in Canadian education*, in Canadian Human Rights foundation (Ed.), *Multiculturalism and the Charter: A legal perspective* (1987).

<sup>14</sup> J.E. Magnet, *Multiculturalism in the Canadian Charter of Rights and Freedoms*, in G.A. Beaydoin & E. Mendes, *The Canadian Charter of Rights and Freedoms* (1996).

<sup>15</sup> See A.N. Khan, (1994) *Minority Education Language Rights in Canada*, *Journal of Law and Education* 23, 399.

<sup>16</sup> T.A. Sussel, *Canada's Legal Revolution: Public Education, the Charter and Human Rights* (1995) at p.48.

<sup>17</sup> *Ibid*, at p. 49. See A.W. Mackay, 'The Charter of Rights and Special Education : Blessing or Curse?' (1987) 3 *Canadian Journal for Exceptional Children* 118.

<sup>18</sup> Zuker, M.A., *The Legal Context of Education* (1988) p. 164.

<sup>19</sup> The British North America Act 1867 (Now renamed as the Constitution Act 1867), and reinforced by the Constitution Act 1982.

<sup>20</sup> Section 52 of the Constitution.

<sup>21</sup> The Charter does not apply to individual dealings. Section 32 of the Constitution Act 1982 states:

The Charter applies a) to the Parliament and government of Canada ...; and b) the legislature and government of each province of all matters within the authority of the legislature of each province.

A detailed jurisprudence now exists on the meanings of this section.

<sup>22</sup> Justice Le Dain in *R. V. Therens* [1985] 1 SCR 613.

23 [1984] 1 SCR 357.  
24 See A.N. Khan, The Interpretation of the Canadian Charter of Rights and Freedoms.  
(1995) *Punjab University Law Journal*.  
25 [1984] 1 SCR 357.  
26 Zuber JA in *R. V. Altseimer* (1982) 38 Ont. Rep. (2d) 783.  
27 Justice Lamer (now Chief Justice of Canada) in *Dubois v. R.* [1985] 2 SCR 350  
28 Per Justice La Forest in his minority judgment in *Miron v. Trudel* [1985] SCR 418. See  
*Thibauden v. Canada* [1995] 2 SCR 627.  
29 *Eaton b. Bruntwood County Board of Education*, (1997) 142 DLR (4th) 385.  
30 The courts have developed a detailed jurisprudence in this regard. See E.P. Mendes, The  
Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of  
Section 1, In G.A. Beaudoin & E.P. Mendes, *The Canadian Charter of Rights and  
Freedoms* (1996) ch. 3.  
31 Section 15 came into force three years later than the other provisions of the Canadian  
Charter. The Supreme Court of Canada has been criticised for not being as bold and  
inventive in the Charter's equality provisions as in others, e.g. expression and religion.  
Between 1985-95, the Supreme Court only upheld two equality claims.  
32 [1989] 1 SCR 143.  
33 Per McIntyre J.  
34 [1995] 2 SCR 513.  
35 In the same case, Justices Cory and Iacobucci explained discrimination in the following  
way:

The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics. Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available.

36 [1997] SCR 609.  
37 [1989] 1 SCR 1296  
38 [1995] 2 SCR 418.

39 (1997) 142 DLR (4<sup>th</sup>) 385.  
40 [1976] 58 O.R. (2D) 274. Leave to Appeal to the Supreme Court was denied.  
41 See A.N. Khan, (1992) 4(1) *Education and the Law* 7.  
42 [1996] 27 C.R.R. (2d) 53. For an opposing view see *Quebec v. St. Jean-sur Richelieu*  
[1994] 64 Q.A.C. 1.399.  
43 The Tribunal, after considering and balancing various educational interests of the pupil,  
confirmed a Special Education Needs Board's decision made over the objections of the  
parents, that the pupil's best placement was in a special class, where she should be  
educated, rather than in an integrated class. But the placement proposed was in a class  
located in a regular school where 'the special class is integrated with the regular classes  
through morning circle and a buddy system which may include hand-over-hand art  
activities, music, reading, outings such as walks and recess, special activities like  
assemblies, mini olympics, interactive games, including rolling balls and playing catch'.  
In addition, the Tribunal added:  
  
... our decision in favour of a special class placement does not relieve the  
school board and the parents of the obligation to collaborate creatively  
in a continuing effort to meet her present and future needs. Emily's is so  
unusual a case that unusual responses may well be necessary for her.  
Such achievements can only be realised through cooperation, and most  
important, compromise.  
44 *Eaton v. Brent County Board of Education* {1997} 142 DLR (4th) 385.  
45 *E v. Eve* [1986] 2 SCR 288; *Children's Aid Society of Metropolitan Toronto* [1985] 1  
SCR 315.  
46 [1996] ALR.  
47 For example, see F.C. De Costa, (1996) Case Comment: *Vriend v. Alberta*: Sexual  
orientation and liberal polity: 34(4) *Alberta Law Review* 950.  
48 See Khan, A.N., *Liberty and Education in Canada*, [1993], 5 *Education. & the Law* 95.  
For the British truancy law, see Khan, A.N., *Compulsory School Attendance in Britain*  
[1995], 24 *Journal of Law & Education* 91.  
49 [1986] 1 S.C.R. 1469.  
50 See the Supreme Court of Canada's following cases on section 2(a): *R. v. Big M Drug*  
*Mart* [1985] SCR 295; *Edwards Books & Arts Ltd v. R.* [1986] 2 SCR 713.  
51 *Zylberberg v. Sudbury (Board of Education)*, [1988] 52 D.L.R. (4th) 577; *Canadian Civil*  
*Liberties Association v. Ontario (Ministry of Education)* [1990] 65 D.L.R. (4th) 1.  
52 In *Bal v. Ontario* (A-G) (1994) 21 OR (3d) 681, the court said that recent changes in law  
'signify the end of an era of majoritarian Christian influence, and mark the beginning of  
a period of secularism in education based on an awareness of a changing societal fabric  
and Charter protection for minority rights to freedom of religion'.  
53 For a critique of such pronouncements, see F. Peters, (1996) *The Changing Face of*  
*Denomination Education in Canada*, 7 *Education Law Journal* 229.  
54 *The Edmonton Journal*, 4 July 1997.  
55 While Canada now provides laws against racial discrimination and has become a 'mosaic'  
of different ethnics and religions, its history is not a proud one, as it enacted abominable

laws sanctioning racial discrimination and encouraging racial prejudice. For an example, see the Chinese Immigration Act. See Cohen, T., 'Race Relations and the Law', (1988) Toronto, Canadian Jewish Congress.

<sup>56</sup> The Supreme Court cited Sir Charles Tupper (one of the founding fathers of the Confederation) when he said that the Confederation would not have come into existence in 1867 without the guarantee of educational rights of the religious minorities of Catholics and Protestants: *Reference re Bill 30, An Act to amend the Education Act* [1987] 1 SCR 1148. In another case the Supreme Court stated that the compromise 'served to moderate religious conflicts which threatened the birth of the Union': *Reference re Education Act (Quebec)* [1993] 2 SCR 511 at 529.

<sup>57</sup> See *Tiny Roman Catholic Separate School Board v. R.* [1928] AC 363 (Privy Council). See also B. Shapiro, The Public Funding of Private Schools in Ontario: The Setting. Some Arguments, and Some Matters of Belief, (1986) 11 Canadian Journal of Education 264. [1987] 1 S.C.R. 1148. See also *Adler v. Ontario* 116 D.L.R. (4th) 1.

<sup>59</sup> *B (R) v. Children's Aid Society of Metropolitan Toronto* [1985] 1 SCR 315. Justice La Forest, writing for the majority, said:

It seems to me that the right of parents to rear their children according to their religious beliefs, including that of choosing medical or other treatments, is an equally fundamental aspect of freedom of religion.

<sup>60</sup> 94 DLR (4th) 417.

<sup>61</sup> 116 DLR (4th) 1. See D.K. MacLellan, The Legal Question of Extending Public Funds to Private Schools in Ontario: *Adler v. Ontario* (1995) 7(1) Education Law Journal 61.

<sup>62</sup> On the duty to accommodate, see *Renaud v. Central Okanagan School District No. 23* [1992] SCR 970, where a school did not object to Jewish teachers taking a day off to observe Yom Kippur, but it was to be without pay. The Supreme Court of Canada (nine Justices) confirmed the arbitration board's finding that the teachers were the subject of adverse effect discrimination and that the school board failed in their duty to accommodate. See M. LeFrancois, The Scope of the Duty to Accommodate in the Large Employment Setting, (1996) 5 *Canadian Labour and Employment Law Journal* 1.

<sup>63</sup> *Adler v. Ontario* [1997] 140 DLR. (4th) 385.

<sup>64</sup> The Supreme Court of Canada has put a great value on freedom of expression. For example, freedom of expression is 'one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of the western society ... it is an essential feature of Canadian parliamentary democracy': *Retail, Wholesale and Department Store Union Local 580 et al. v. Dolphin Delivery Ltd.* [1986] 2 SCR 573; 'it is the means by which the individual expresses *his or her* personal identity and sense of individuality': *Ford v. Quebec* [1988] 2 SCR 712; 'a democracy cannot exist without it ... it is an important way of seeking and attaining truth: *Edmonton Journal v Alberta (A-G)* 45 CRR 1.

<sup>65</sup> Irwin Cotler 'Hate Speech, Equality and Harm Under the Charter, Towards a Jurisprudence of Human Dignity for a Free and Democratic Country' in Beoudoin, G-A. & Mendes, E. (1996) *The Canadian Charter of Rights and Freedoms*.

<sup>66</sup> *R. v. Keegstra* [1990] 3 SCR 697, (2) *Attis v. Moncton Board of School Trustees, Dist. No*

15 [1993] 110 D.L.R. (4th) 241 (Court of Appeal), [1996] 35 CRR (2d) 1 (SCC). See also  
67 *R. v. Zundel* [1992] 2 SCR 731.  
(1987) 21 BCLR (2d) 93. See Allison Reyes, Freedom of expression and public school  
68 teachers, (1995) 4 *Dalhousie Journal of Legal Studies* 35.  
However, the right to collective bargaining, according to the Supreme Court of Canada,  
is not covered by section 2(d): See *Board of Education Toronto v. Ontario SST*  
*Federation* [1997] 144 DLR (4th) 385; *Professional Institute of Public Service Employees*  
*v. Northern Territories* [1990] 2 SCR 367.  
69 *Lavigne v. Ontario Public Service Employee's Union*, [1991] 2 SCR 211. See A.N. Khan,  
'Union Security in Canadian Academia', [1993] 5 *Education & the Law* 211. See *Ahrens*  
*v. Alberta Teachers Association* [1994] 147 A. R. 383.  
70 *The Low-income Line* (July 1997).  
71 Hundred of thousands of children, according to the Report, live below the poverty line.  
The proportion of such children rises considerably higher for children under the age of  
six: *The Edmonton Journal*, July 8, 1997.  
72 In R. Gosh & D. Ray, *Social Change and Education in Canada*, p. 8.  
73 The existing separate (i.e., public and religious) schools create their own problems, e.g.,  
unnecessary multiplicity of schools and school boards resulting in financial strain on  
limited resources. The province of Newfoundland found the requirement of establishing  
separate schools too cumbersome and expensive. It held a referendum to change its  
constitution. The majority of the electorate voted in favour of the proposal. However, the  
government's plan of bringing in the changes has been declared, at first instance, to be  
unconstitutional (*The Edmonton Journal*, 9 July 1997). The saga goes on!  
74 K. Swinton, Freedom of Religion, in G-A Beaudoin and E. Mendes, *The Canadian*  
*Charter of Rights and Freedoms* (1996) ch. 4. For an opposite view, see F. Peters, The  
Changing Face of Denominational Education in Canada, (1996) 7 *Education and Law*  
*Journal* 229; and M. Minow, Putting Up and Putting Down: Tolerance Reconsidered  
(1990) 28 *Osgoode Hall Law Journal* 409.  
75 A.W. MacKay, The Rights Paradigm in the Age of the Charter, In R. Gosh & D. Ray,  
*Social Change and Education in Canada* (1995) p.224.  
76 R.F. Lawson, Context, Policies, and Rights in Canadian Education, in R. Gosh & D. Ray,  
*Social Change and Education in Canada* (1995), p358.  
77 See A.N. Khan & N. Wallace-Bruce, Implied Constitutional Rights and the Closed Shop,  
(1996) *Australian Journal of Contemporary Issues in Business and Government*, 1(3).  
78 *Edmonton Journal*, May 25, 1996.  
79 *opp. cit.* Note 63, p. 6.