COURT OF APPEAL FOR ONTARIO

CITATION: E.T. v. Hamilton-Wentworth District School Board, 2017 ONCA 893
DATE: 20171122
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Sharpe, Lauwers and Miller JJ.A.

BETWEEN

E.T.

Appellant

and

Hamilton-Wentworth District School Board

Respondent

and

Christian Legal Fellowship, Elementary Teachers' Federation of Ontario and Attorney General of Ontario

Intervenors

Albertos Polizogopoulos, for the appellant

Mark J. Zega and Giovanna Di Sauro, for the respondent

Derek B. M. Ross and Deina Warren, for the intervenor Christian Legal Fellowship

Kate Hughes and Lauren Sheffield, for the intervenor Elementary Teachers' Federation of Ontario

Joshua Hunter and Emily Bala, for the intervenor Attorney General of Ontario

Heard: June 26, 2017

On appeal from the order of Justice Robert B. Reid of the Superior Court of Justice, dated November 23, 2016.

Charter - Freedom of religion - Request for accommodation from school board - Parent's desire to shield children from false teachings.

Sharpe J.A.:

[1] The appellant E.T. is the father of two primary school-aged children who attend a school within the jurisdiction of the respondent Hamilton-Wentworth District School Board (the "Board"). E.T. is a committed Christian and a member of the Greek Orthodox Church.

[2] The appellant advised the Board that his religious beliefs require him to shelter his children from what his religion regards as "false teachings". He provided the Board with a standard form list of topics that included matters such as "moral relativism", "environmental worship", "instruction in sex education", and "discussion or portrayals of homosexual/bisexual conduct and relationships and/or transgenderism as natural, healthy or acceptable". He asked the Board to provide him with advance notice of any classroom instruction or discussion of these issues so that he could decide whether or not to withdraw his children from those classes or activities.

[3] The Board offered to exempt the appellant's children from the "Healthy Living" strand in the elementary program, which is offered as a discrete part of the curriculum and involves education on human development and sexual health. However, the Board explained to the appellant that its Equity Policy aims to

provide an integrated secular and respectful learning environment that does not discriminate against any child. The Board's program aims to promote a positive and inclusive environment that accepts all pupils, including those of any sexual orientation, gender identity and gender expression. The Board advised E.T. that, given the integrated nature of its program and the generality of the items on his list, it was neither practical nor possible to comply with his request for prior notification of any time one of the items on his list would arise for discussion in the classroom. The Board also expressed the concern that if E.T.'s children were required to leave the classroom every time one of these topics came up for discussion, the Board's policy of providing an inclusive and non-discriminatory program would be undermined.

[4] E.T. brought this application seeking declaratory relief, asserting that his parental authority over the education of his children had been denied and that his freedom of religion as guaranteed under s. 2(*a*) of the *Charter of Rights and Freedoms* was violated by the Board's failure to provide him with the accommodation he requested. He also asserted a claim of religious discrimination under the *Human Rights Code*, R.S.O. 1990, c. H.19 and a violation of the *Education Act*, R.S.O. 1990, c. E.2.

[5] E.T.'s application rested on the general assertion that the Board's policies and decisions violated his religious freedom. He provided no evidence of any actual instance where his or his children's religious freedom had been violated.

[6] E.T. appeals the application judge's determination that, while the Board's refusal to provide the accommodation he requested engaged his religious freedom, the Board's refusal to provide accommodation was reasonable.

[7] For the following reasons, I would dismiss the appeal on the ground that E.T. has failed to establish any interference with or violation of his religious freedom.

A. FACTS AND BACKGROUND

(1) The Board's Equity Policy and Accommodation Process

[8] At the time the application was filed, E.T.'s children attended one of the Board's elementary schools. The Board oversees 103 schools of which 88 are elementary schools attended by over 34,000 pupils.

[9] In carrying out its responsibilities, the Board is required to comply with the *Education Act* and regulations authorized thereunder, as well as ministerial directives and policies, and the policies the Board itself promulgates. The central statutory objectives relevant to this appeal are neutrality in matters of religion, inclusion in the school community and student well-being. Section 169.1(1) of the *Education Act* requires schools to promote a climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. Further, the

Ministry of Education has issued several directives to school boards and principals regarding the promotion of diversity, equity and inclusive education: *Realizing the Promise of Diversity: Ontario's Equity and Inclusive Education Strategy, 2009* ("EIES"), the Policy/Program Memorandum No. 119: *Developing and Implementing Equity and Inclusive Education Policies in Ontario Schools*, June 24, 2009, ("PPM No. 119"), and the *Equity and Inclusive Education in Ontario Schools: Guidelines for Policy Development and Implementation, 2009* ("EIEOS"). In response to and in accordance with these directives, the Board developed its own Equity Policy No. 1.01 (the "Policy").

[10] These directives and policies are all designed to combat racism, religious intolerance and homophobia, and to ensure that all students feel welcome and accepted in public schools.

[11] Students are to be provided with learning materials that are bias-free and that reflect the diversity of the school's population, including diversity of sexual orientation and gender identity. A central feature of the Policy is that diversity, anti-discrimination and anti-homophobia are not taught in stand-alone lessons but rather are fully integrated into the curriculum so that acceptance of difference becomes routine. For example, teaching materials for a lesson in mathematics might feature children with two fathers or two mothers. In this way, all courses are infused with equity principles and teachers are directed to ensure that all students—including lesbian, gay, bisexual, transgender, transsexual, two

spirited, intersex, queer and questioning people—will, in the words of the EIES, be “engaged, included, and respected, and … see themselves reflected in their learning environment”.

[12] The religious accommodation guideline included in the Board’s Policy states that the Board will “seek to reasonably accommodate students where there is a demonstrated conflict between a specific class or curriculum and a religious requirement or observance.” Where a parent requests such an accommodation, “the school should have an informed discussion with the student’s parents/guardians to understand the nature and extent of the conflict.” The aim of the Board’s religious accommodation guideline is “to protect students … from harassment and discrimination because of their religion” but the Policy makes it clear that the Board “cannot accommodate religious values and beliefs that clearly conflict with mandated Ministry of Education and Board policies”.

(2) E.T.’s request for accommodation

[13] E.T. holds a sincere religious belief that he is obliged to shield his children from what his religion regards as “false teachings”, and to ensure that his children are taught about marriage and human sexuality from a perspective that is consistent with his understanding of biblical and Greek Orthodox teachings. These teachings include the following: sexual relations should only be between a

man and a woman within the sacred institution of marriage; same-sex relations are contrary to God's will; and there are only two genders, male and female.

[14] Using a standard form request provided by Public Education Advocates for Christian Equality ("PEACE"), E.T. asked the Board to provide him with advance notice any time his children would be involved in or exposed to activities or instruction on a list of matters including the following:

- Values neutral education - indoctrination of students in 'moral relativism' and principles of situational ethics. This 'ism' is a central tenet of the religion of secular humanism;
- Occultic principles and practices ...
- Environmental Worship - placing environmental issues/concerns above the value of Judeo-Christian principles and human life;
- Instruction in sex education;
- Discussion or portrayals of sexual conduct that we determine to be unnatural/unhealthy (anal sex, oral sex, masochism, bestiality, fetish, bondage, etc.);
- Discussion or portrayals of homosexual/bisexual conduct and relationships and/or transgenderism as natural, healthy or acceptable.

[15] The Board engaged in a series of discussions with E.T. extending over a two-year period. These included a lengthy meeting between E.T., the school

principal and the Board's Principal of Organizational Leadership-Equity. After considering E.T.'s requests and reviewing the matter with its equity consultant, the Board maintained its refusal of the accommodation E.T. requested. In these discussions with E.T., it became clear that his concerns were focused on issues pertaining to sexual orientation. He indicated that he did not object to his children being taught "facts" about such matters but he did object to his children being exposed to views or "value judgments" that did not match "his worldview".

[16] The Board indicated that it could excuse E.T.'s children from the human development and sexual health segment of the curriculum. However, the Board advised E.T. that, given its commitment to creating schools that are safe, respectful and supportive of all, where diversity is valued and everyone feels accepted, it could not otherwise accommodate his request. As the Board's Equity Principal explained in an affidavit filed on the application:

> The message to classmates if E.T.'s request was accepted, is not tolerance but rather that family structures or discussion of sexual orientation will require the withdrawal of a student from the classroom. This cannot be reconciled with the Board's legal obligations with respect to human rights and tolerance.

[17] As it was unable to provide the accommodation E.T. had requested, the Board suggested that E.T. might consider enrolling his children in a public Catholic school or a private Christian school or homeschooling them.

(3) The ruling of the application judge

[18] The application judge gave detailed and considered reasons for dismissing the application.

[19] He found that a declaration of E.T.'s parental authority over his children's education should not be granted on the ground that a "black-and-white" declaration of parental authority in favour of the appellant would oversimplify a nuanced point in the application of settled common law principles and would not serve any useful purpose.

[20] The application judge found that E.T. had demonstrated a sincerely held religious belief, particularly in relation to marriage and sexuality, which was at odds with the Board's Policy, and that there was an interference with his religious beliefs that was neither trivial nor insubstantial. However, applying the framework established by the Supreme Court of Canada in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] S.C.R. 395 and *Loyola High School v. Québec*, 2015 SCC 12, [2015] 1 S.C.R. 613, the application judge concluded that the Board's refusal to provide E.T. with the accommodation he requested was not unreasonable. The application judge found that Board had taken account of the claim of religious freedom and had reasonably concluded that any constraint of E.T.'s religious freedom was proportionate and no more than necessary given the applicable statutory objectives. The application judge noted that other options,

including independent schools and homeschooling, remain available to the appellant in the event that his concerns about “false teachings” outweigh in his view the advantages of the public school system.

[21] The application judge also dismissed the claim under the Ontario *Human Rights Code*.

B. ISSUES

[22] E.T. does not appeal the refusal of a declaration of parental authority nor does he appeal the dismissal of his claim under the *Human Rights Code* or any of the other grounds raised in his Notice of Application.

[23] E.T.’s central submission on appeal is that his and his children’s freedom of religion as protected by s. 2(*a*) of the *Charter* has been violated. He argues that the application judge erred in finding that the Board reasonably refused his request for advance notification of any classes, lessons or activities involving topics that he has identified as being sensitive, and for permission to withdraw his children from such classes, lessons or activities.

C. ANALYSIS

[24] I begin my analysis by pointing to what I consider to be a central and fatal shortcoming in the case E.T. presented to the application judge and to this court, namely the lack of any concrete evidence of interference with his right to religious freedom.

[25] E.T.'s children have now been pupils at a Board school for several years. E.T. first requested accommodation for his religious beliefs in September 2010. This application was filed in September 2012. When directly asked on cross-examination in November 2012, E.T. was unable to point to any evidence demonstrating that any "false teachings" had in fact been presented to his children. The matter was heard by the application judge in June 2016 and decided in November 2016. Despite the fact that almost six years had passed between the date E.T. first made his request for accommodation and the date the application was heard, E.T. could offer no evidence or any example of a single incident where his or his children's religious freedom was constrained.

[26] I accept that E.T. has a sincere religious belief that he has an obligation to keep his children from being exposed to what he describes as "false teachings". This sincere belief was the basis on which the application judge found that the Board's Policy and its denial of the requested accommodation engaged the *Charter* by limiting its protections under s. 2(*a*) for E.T. and his children. However, a sincere religious belief alone is insufficient to establish interference with E.T.'s freedom of religion. An infringement of the right to religious freedom "cannot be established without objective proof of an interference with the observance of that practice" (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 2). The claimant must also demonstrate that the Board's decision burdened or interfered with his sincerely held beliefs in

more than a trivial or insubstantial way: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 57-59.

[27] E.T.'s claim rests upon his general and pervasive dissatisfaction with the nature of the Board's curriculum with respect to matters of equity, non-discrimination and inclusiveness. However, he has not proved a single instance where his children were coerced to do something that was contrary to his or their religious beliefs or where they were denied the right to manifest or observe their religion as they wished. Nor has he provided any evidence that his right to inculcate his children with his own religious views has been curtailed or infringed.

[28] E.T.'s complaint is that, given the very nature of the Board's curriculum, his children may be exposed to views with which he, for religious reasons, does not agree. In my view, the jurisprudence from the Supreme Court of Canada makes it clear that exposing students who are attending non-denominational public schools to ideas that may challenge or even contradict their parent's sincerely-held religious beliefs does not amount to an infringement of religious freedom. As the Attorney General puts it in his factum, "requiring students in public school to gain an awareness of Canada's diverse reality is not a substantial infringement of religious freedom."

[29] In *S.L. v. Commission scolaire des Chênes*, parents asked to have their children exempted from Quebec's mandatory Ethics and Religious Culture

("ERC") Program that had replaced Catholic and Protestant programs of religious and moral instruction. The parents objected that the ERC Program would expose their children to "a form of relativism, which would interfere with [their] ability to pass their faith on to their children" (at para. 29) because it presented different beliefs on an equal footing. The Supreme Court accepted the sincerity of the parents' religiously based objection to the nature of the ERC program, but held that sincerity of belief was insufficient to make out a s. 2(*a*) *Charter* claim of infringement of religious freedom. Writing for the seven-judge majority, Deschamps J. accepted, at para. 26, that "[t]he appellants sincerely believe that they have an obligation to pass on the precepts of the Catholic religion to their children" but she then held, at para. 27, that "[t]o discharge their burden at the stage of proving an infringement, the appellants had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children."

[30] Deschamps J. rejected the assertion that exposing children to contrary views, without more, amounts to an infringement of freedom of religion, at para. 40:

> Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the

> multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(*a*) of the *Canadian Charter* and of s. 3 of the *Quebec Charter*.

[31] Deschamps J. drew support for this conclusion from the judgment of McLachlin C.J.C. in *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, where the Supreme Court of Canada considered a challenge to a school board's decision to refuse to approve books suggested by a teacher depicting same-sex parented families for use at the kindergarten-grade one level. The Supreme Court held that, given the Board's statutory mandate of secularism and tolerance, its decision was unreasonable. The Board had failed to proceed on the basis of respect for all types of families and had instead proceeded on an exclusionary philosophy, responding to the concerns of certain parents regarding the morality of same sex relationships. This approach failed to consider the right of children of same-sex parented families to be accorded equal recognition and respect in the public school system.

[32] As McLachlin C.J.C. pointed out, at paras. 64-67, the "cognitive dissonance" that a child might experience from learning about things that do not correspond to the views of the child's own parents is part and parcel of growing up in a diverse society committed to the acceptance of the fact of differences in lifestyles and moral and religious views. "[S]uch dissonance", wrote McLachlin

C.J.C., “is neither avoidable nor noxious” but rather something children encounter every day as members of a diverse student body in a public school system. This kind of cognitive dissonance “is simply a part of living in a diverse society” and “a part of growing up” and “arguably necessary if children are to be taught what tolerance itself involves.” She went on to write:

> [T]he demand for tolerance cannot be interpreted as the demand to approve of another person’s beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people’s entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.

[33] Here, while E.T. has made out a sincere religious belief, his subjective belief that he must shield his children from hypothetical “false teachings” does not gain absolute protection. The onus remains on E.T. to proffer evidence that, from an objective standpoint, the instruction and activities to which his children are in fact exposed interferes with his ability to do so. E.T. has failed to satisfy that onus.

[34] It follows that, while I agree with the result reached by the application judge, I respectfully disagree with his conclusion that E.T. has established an infringement of his s. 2(*a*) right to freedom of religion.

[35] As I have found no interference with the appellant's freedom of religion that would engage the protection of s. 2(*a*), it is unnecessary for me to consider whether, under the *Doré/Loyola* framework, the application judge correctly concluded that the Board's decision refusing E.T.'s request for accommodation was reasonable. However, for the sake of completeness, I add that even if there were an interference with E.T.'s s. 2(*a*) protections, I agree with the application judge that the Board's decision to deny him the accommodation he requested was reasonable and proportionate in light of its statutory mandate to promote equity and inclusive education. The record supports the application judge's finding that the Board properly considered the appellant's request and the conflicting interests involved. The Board's decision to deny the requested form of accommodation constrained the appellant's *Charter* protections no more than was necessary given the statutory objectives the Board is required to pursue.

[36] The protection of religious freedom, like that of other any other *Charter* right, "must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises" (*Amselem*, at para. 62; *S.L.*, at para. 25). The relevant context in this case is that E.T.'s children attend a non-denominational public school with a mandate to provide an open, accepting

and inclusive educational experience for all children. E.T. did not ask to have his children exempted from certain specific and well-defined elements of the curriculum whose subject matter conflicts with his religious views. He declined the Board's proposal that he withdraw his children from the sex education strand of the curriculum. Instead, he seeks to have advance notice and the ability to have his children leave the classroom at any time a "false teaching" will arise, an exercise that would undermine the message of diversity and inclusion which is woven throughout the integrated curriculum.

[37] Exempting some students on a regular basis from classroom discussions touching on diversity, inclusivity and acceptance, within a public school program designed to promote precisely those principles, would run a serious risk of endorsing the non-acceptance of students of other family backgrounds, sexual orientations, gender expressions and gender identities. One of the principles at the heart of Ontario's EIES is ensuring that all students are able to "see themselves reflected in their curriculum, their physical surroundings, and the broader environment, in which diversity is honoured and all individuals are respected". That principle would be contradicted and undermined if, every time certain students' families and/or identities were discussed as being healthy and acceptable, they saw some other members of their class leave so that they would not be exposed to such statements of honour and respect. I do not accept E.T.'s submission that this proposition should be rejected as based upon pure

speculation. The Board does not have to wait for harm to occur before it is permitted to act on its experience and judgment and govern itself accordingly in order to avoid what it perceives, on eminently reasonable grounds, to be a very real risk of harm.

[38] I agree with the Board's submission that E.T.'s list of objectionable topics set out in the standard PEACE form, which includes items such as "moral relativism" and "environmental worship", is so broad and ill-defined that it would be impossible for the Board to determine in advance when a lesson or activity might result in exposure to a "false teaching".

[39] The problem of providing advance notice to the appellant in accordance with his request is further compounded by the integrated nature of the Board's curriculum. Discussion of topics such as, for example, same-sex parenting does not arise in a specific, discrete class or lesson. It is part of the daily lived experience of some schoolchildren and, as such, discussion of it might arise at any point in any class, in ways that could not be predicted in advance. As the application judge found, at para. 96, the list of objectionable subject matter identified by E.T. was extensive and "[i]t would be extremely difficult for teachers to be sufficiently familiar with the variety of concerns raised by parents for individual students so as to advise in advance of their mention in lessons." As pointed out by the intervenor Elementary Teachers' Federation of Ontario, it would be unrealistic to expect teachers to anticipate discussions of all such

subjects in class and to vet all teaching materials in search of any endorsement of family structures, relationships or other matters that are contrary to E.T.'s subjective view of biblical teaching, particularly as E.T.'s list includes such nebulous topics as "moral relativism".

[40] E.T. cannot, by virtue of his religious beliefs, insist that a non-denominational public school board restructure its inclusive and integrated program, designed to meet its statutory objective of ensuring a respectful and accepting climate for all children, so that he can ensure that his own children are not exposed to any views that he does not accept. Nor do I accept E.T.'s suggestion that the Board could or should ensure that discussion of matters such as sexual orientation and gender identity are discussed purely as matters of fact rather than as matters of "value judgment". The Board has a statutory mandate to provide an inclusive and tolerant educational environment, one that respects the principles of equality enshrined in s. 15 of the *Charter*. Equality, inclusivity and acceptance of difference are values, not facts, and it is unrealistic to expect teachers to provide a learning environment that is truly welcoming to all students in a value-free manner.

D. DISPOSITION

[41] For these reasons, I would dismiss the appeal and, in accordance with the parties' agreement, make no order as to costs.

"Robert J. Sharpe J.A."

Lauwers J.A. (Concurring)

A. INTRODUCTION

[42] I have had the benefit of reading the reasons of my colleague, Justice Sharpe. I concur in the result he reaches and would dismiss the appeal for lack of evidence. However, my reasoning to that result differs.

B. OVERVIEW

[43] What is the scope of a school board's duty to accommodate the religion of a parent whose children attend its schools? The appellant raises this issue in the context of provisions of the *Education Act*, policy documents issued by the Ministry of Education, and by the respondent school board, as well as the

decision made by school board officials to reject his request for the accommodation of his religious beliefs.

[44] The underlying issue engaged by this appeal is this: What are the limits imposed by the *Canadian Charter of Rights and Freedoms* on a province's power to use publicly funded education to inculcate, in the language of s. 264 of the *Education Act*, certain beliefs and dispositions educational authorities have determined are desirable or necessary?

[45] It is common ground among the parties and the application judge that the appeal is governed by the *Doré/Loyola* framework. As Abella J. explains in *Loyola,* at para. 39, the *Doré/Loyola* framework has two steps. The first is to determine "whether the decision engages the *Charter* by limiting its protections." If so, the second step is to determine "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play".

[46] My analysis proceeds through the following propositions: First, public education is designed to inculcate children in necessary civic virtues. Section 169.1 of the *Education Act*, the statutory authority underpinning the challenged school board decision, was enacted to further this purpose. Teachers play a critical role in inculcating civic virtues in schoolchildren.

[47] Second, the law recognizes the primacy of parental rights and provides parents with a measure of control over the education of their children. The extent of that measure of control is contested in this appeal.

[48] Third, much is at stake for the appellant as a parent, and he makes a plausible claim that the school board's decision to refuse to provide him with the accommodation he seeks limits his freedom of religion. His claim meets the first half of the first step of the *Doré/Loyola* framework: his religious freedom is implicated.

[49] Fourth, I am unable to find, based on the evidence, that the appellant has proven substantial interference with his freedom of religion, as the balance of the first step of the *Doré/Loyola* framework would require. I would join with my colleague and dismiss the appeal on this basis.

[50] Fifth, although I would dismiss the appeal, I would refrain from applying the proportionality analysis from the *Doré*/*Loyola* framework and I would not approve the school board's decision or the program on which it was based; I have serious concerns about the application of this framework to line decision makers such as teachers, principals and supervisory officers.

C. ANALYSIS

(1) Public Education is Designed to Inculcate Children in Necessary Civic Virtues

[51] I would reject the school board's submission that the program the appellant challenges is morally neutral. Public education has never been morally neutral.

[52] One of the purposes of public education has been to inculcate civic virtues in school children. These civic virtues are those habits, dispositions and behaviours people need to live together peaceably in civil society. This has been a systemic moral commitment for a very long time. Consider s.264(l)(c) of the *Education Act*, which imposes on teachers the duty:

> to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues[1].

The content of the civic virtues is not the unique preserve of any religion or ideology. They are important in any civil society.

[53] Several cases have recognized the inculcation mission of the public system. In *Canadian Civil Liberties Association v. Minister of Education* (1990), 71 O.R. (2d) 341 (C.A.) at p. 380, this court expressed agreement with the

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[1] The first appearance of this language in a statute was in 1896, in *An Act Consolidating and Revising the Public Schools Acts*, (1896), 59 Vict., c. 70, at s. 76(1).

conclusions of the Report of the Mackay Committee regarding both the appropriateness of teaching civic virtues in the classroom and the imperative not to undermine families in the process:

> [T]here are ways of encouraging the development of young people in public school of high standards of character, ethical ideals, and an understanding of moral values, without trespassing on the personal religious beliefs which they have learned at home or in their places of worship.

[54] As distinguished from religious education, this court stated, "the inculcation of proper moral standards in elementary school children" is a legitimate objective of government through education. This conclusion was endorsed by the Supreme Court in *S.L.*, at para. 20. See also *Chamberlain*, at paras. 64-67; see also LeBel J. at paras. 211-212 and Gonthier J. in dissent but not on this point, at para. 184; *S.L.*, per Deschamps J., at para. 40, LeBel J. at para. 54 and see generally *Loyola*.

[55] Dr. Bernard Shapiro asserted in the *Report of the Commission on Private Schools in Ontario* (October 1985), (Toronto: The Commission on Private Schools in Ontario, 1985) at p. 39, that public schools are necessary in order to “ensure that, in a pluralistic and multi-cultural society, schools can contribute to the strengthening of the social fabric by providing a common acculturation experience for children”. He added at p. 50 that:

> [I]t would also be difficult to underestimate the importance of a common, non-commercial acculturation experience in the socialization of the young. Indeed, the more fragmented the society and diverse the groups striving for their "place", the greater the need for schools to seek a common unifying core.

[56] This development of a common culture, which includes civic virtues, is the dominant argument for specifically *public* schools, as the cases set out.

(2) Section 169.1 of the *Education Act* is an Iteration in Inculcation

[57] Section 169.1 of the *Education Act*, first enacted in 2012, is part of the inculcation effort. It now provides:

> **169.1** (1) Every board shall,
>
> (a) promote student achievement and well-being;
>
> (a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;
>
> (a.2) promote the prevention of bullying;

[58] In the context, I see the use of the word "promote" in s. 169.1 to denote something close to "inculcate". The prescribed methods are aimed at securing acceptance by the pupils of the morality of the Ministry's concept of inclusion, and their disapproval of the listed types of discrimination.

[59] My colleague identifies the ministerial directives and policy documents by which the implementation of s. 169.1 is to be effected, at paras. 10-11. I repeat for convenience his general characterization of their purposes:

> These directives and policies are all designed to combat racism, religious intolerance and homophobia, and to ensure that all students feel welcome and accepted in public schools.
>
> Students are to be provided with learning materials that are bias-free and that reflect the diversity of the school's population, including diversity of sexual orientation and gender identity. A central feature of the Policy is that diversity, anti-discrimination and anti-homophobia are not taught in stand-alone lessons but rather are fully integrated into the curriculum so that acceptance of difference becomes routine. For example, teaching materials for a lesson in mathematics might feature children with two fathers or two mothers. In this way, all courses are infused with equity principles and teachers are directed to ensure that all students—including lesbian, gay, bisexual, transgender, transsexual, two spirited, intersex, queer and questioning people—will, in the words of the EIES, be "engaged, included, and respected, and … see themselves reflected in their learning environment".

[60] This is a fair description of some of the attitudes the schools and teachers are expected to inculcate in pupils, and the methods by which they are expected to do so. For convenience I will call this effort "the s. 169.1 program".

(3) Teachers Play a Critical Role in Inculcating Civic Virtues

[61] The Supreme Court has also addressed the important role of the teacher in inculcating civic virtues in school children: "By their conduct, teachers as

"medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system": *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, per La Forest J. at para. 44. In that case the court upheld the dismissal of a teacher who publicly made discriminatory statements in his off-duty time. See also *Toronto* (City) *Board of Education v. O.S.S.T.F.*, [1997] 1 S.C.R. 487, 144 D.L.R. (4th) 385, per Cory J. at para. 55, *R. v. Audet*, [1996] 2 S.C.R. 171, per La Forest J. at p. 196.

[62] As Dr. Glenn Watson observed in his *Report of the Ministerial Inquiry on Religious Education in Ontario Public Elementary Schools* (January, 1990) at p. 57:

> An educational system cannot be neutral. If there is no religious education or any form of religion in the schools, then secular humanism, by default, becomes the basic belief system. Secular humanism does not represent a neutral position.

[63] He noted at p. 50:

> In every relationship, and especially in that between a teacher and a student, there is something that can be referred to as religious education. It is the transmission of ideas, or answers to significant life-related questions, or it is the exemplification of values by 'precept and example.' There is no way to avoid such an interaction and the learning experience associated with that relationship over a period of time.

[64] The appellant's intuition that teachers play a critical role in inculcating beliefs in school children is amply supported.

(4) Parental Rights in Education

[65] Education of the young is bound to be formative; if the state educates the young, it also forms them, at least in part, and perhaps the major part. However, the right of parents to care for their children and make decisions for their well-being, including decisions about education, is primary, and the state's authority is secondary to that parental right. This has been recognized in many different cases, statutes, and international instruments.

[66] The *Charter* protection of parental rights under s. 2(a) is more broadly based than freedom of religion under s. 2(a) of the *Charter*. Although the rights of parents to make choices for the education of their children may be supported by religious beliefs and practices, they are not conditional on religious belief. They are equally protected under s. 2(a) as a matter of conscience.

[67] The law is clear that the authority of the state to educate children is a delegated authority: "Parents delegate their parental authority to teachers and entrust them with the responsibility of instilling in their children a large part of the store of learning they will acquire during their development." *R. v. Audet*, at para. 41.

[68] The law recognizes the central role of parents in education, and their concomitant rights. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 223, the Supreme Court noted that the

"constitutional freedom [of religion] includes the right to educate and rear their child in tenets of their faith." The court added: "until the child reaches an age where she can make an independent decision regarding her own religious beliefs, her parents may decide on her religion for her and raise her in accordance with that religion."

[69] In a case involving homeschooling, *R. v. Jones* [1986] 2 S.C.R. 284, La Forest J. specified that some governmental restraint is warranted, noting at para. 63: "Those who administer the Province's educational requirements may not do so in a manner that unreasonably infringes on the right of the parents to teach their children in accordance with their religious convictions." He echoed s. 1 of the *Charter* in saying: "The interference must be demonstrably justified."

[70] This judicial understanding is consistent with recognized international documents. Article 26(3) of the Universal Declaration of Human Rights (1948) provides: "Parents have a prior right to choose the kind of education that shall be given to their children."

[71] The *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 19, UN Doc A/4354 (1959), 19 at Principle 7, para. 2 provides that: "The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."

[72] Finally, Article 18(4) of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 acknowledges “the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

[73] Everywhere and at all times parents have desired to pass their religious and cultural identities on to their children, as well as their understanding of what it means to be a good and successful human being. As Abella J. noted in *Loyola v. Quebec (A.G.)* [2015] 1 S.C.R. 613 at paras. 64-65: “[A]n essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions.”

[74] For many parents, that store of cultural knowledge includes convictions about ultimates such as their place in the universe and their relationship with God. I need not rehearse the cases on freedom of religion. Few have matched the eloquence of South African Constitutional Court Justice Albie Sachs, who observed: “For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe”: *Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (10) B. Const. L.R. 1051 (S. Afr. Const. Ct.), at para. 36.

[75] Chief Justice Dickson expressed a similar understanding: “The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being:” *R. v Edwards Books* [1986] 2 S.C.R. 713, at para. 97.

[76] Chief Justice Dickson had earlier noted: “[w]ith the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise” in *R. v. Big M Drug Mart Ltd*., [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 135.

[77] These words about freedom of religion apply with necessary modifications in the context of the parental right to a measure of control over the moral and religious education of their children. There is really no dispute about the existence of this parental right. The issue is about its reach.

(5) What is at Stake for the Parent?

[78] Parents know that the world in general and education in particular can defeat them in transmitting their religious faith to their children, so the stakes are high. It is therefore especially important for the court to attend to the appellant’s reasons for believing that his right to freedom of religion has been infringed. In

particular, the court must attend to the nature of the interest he is trying to protect and advance – the formation of the character and religious faith of his children.

[79] The court's responsibility in addressing a religious freedom claim is to engage deeply and sympathetically in the "agonistic" analysis needed to fully understand the religious claim in the claimant's own terms, as Professor Benjamin Berger asserts in *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), at p.111, 188.

[80] We would not be paying due respect to the appellant's faith commitment by merely accepting, as the application judge and my colleague do, that the appellant holds a sincere religious belief guided by Biblical and Greek Orthodox teachings. We must go further and ask whether the school board's refusal to provide the accommodation the appellant sought unduly impedes the appellant in fulfilling his duties as a parent.

[81] This was the question facing the principals when they considered the applicant's accommodation demand letter dated September 20, 2010. This was the PEACE standard form that included the list of ten sensitive topics described by my colleague.

[82] I do not criticize the manner in which the school board principals approached the delicate task of discerning just what was truly important to the appellant from the amorphous list my colleague accurately described as "so

broad and ill-defined that it would be impossible for the Board to determine in advance when a lesson or activity might result in exposure to a “false teaching”.” Nor do I underestimate the difficulty faced by teachers and principals. They must navigate humanely, sensitively and fairly between the appellant, his children and their classmates who are living in the same-sex circumstances that the appellant considers to be morally unacceptable. This is a frontier on which deep and wounding emotions can be engaged, and where reconciling and balancing is both difficult and necessary.

[83] The PEACE letter, entitled “Our Family’s Traditional Values,” sets out the basic request that the parent be given notice “whenever concepts or values are presented that may conflict with the values of the home”. It requests that the parent be given an opportunity to “not have my/our child participate” and to be put in a position to know that “a family discussion about what was learned” was needed. The letter noted that the parents’ concern was to ensure that the school do nothing to “undermine the values taught at home” which are “important for achieving eternal life”.

[84] The appellant’s request morphed somewhat as the case progressed over the years. It was narrowed in the appellant’s discussions with the principals and in the appellant’s affidavit, but expanded again to the original list in his cross-examination.

[85] As is evident from the transcript of the November 18, 2010 meeting with the principals, the appellant was especially concerned about issues of human sexuality. This would include the use of school books that depicted “two mommies in a book”. The appellant wanted his children to be excused from class when such discussions arose.

[86] The school board representatives were resolute in stating that they would not permit the appellant’s children, then four years old and six years old, to be excused. They stated that doing so would discriminate against classmates who might happen to be living in the same-sex circumstances the appellant found to be unacceptable. In the course of the meeting, an interesting exchange occurred:

> The appellant: If my son sees a picture of two mommies in a book and he says “Excuse me, I don’t think God wants two women to be married.” Will my son be disciplined for that?
>
> [School Board's Equity Principal]: No, absolutely not.
>
> [Elementary School Principal]: No, but I think the teacher would probably say something like “You know [son’s name], that’s something you want to go home and speak to you…talk to your parents about.” And completely taken out of the classroom… it’s a parent issue to discuss that…”

[87] The appellant received a letter dated February 3, 2011 from the Superintendent of Student Achievement, who refused his accommodation request. The letter explained that students were all expected to participate, “in learning activities that reflect the diversity of our community.” The reason given

for refusing the accommodation was that allowing his children to be absent from activities where "various dimensions of diversity are addressed" would have a "negative impact […] on other students and the learning environment, as it fosters a climate of exclusion."

[88] The appellant repeated his request for "religious accommodations" more than a year later. The school board again refused the request by letter dated August 30, 2012. The application to the Superior Court was issued a week later.

[89] In my view, the school board's factum fairly summarized the appellant's cross-examination evidence:

> The Appellant conceded on cross-examination that he is not opposed to the teaching of the topics listed on the Form as facts; rather, the Appellant is concerned with a teacher stating that something is "ok" or "alright".
>
> In addition, the Appellant clarified in his cross-examination that he does not seek advance notification of his children's participation, or removal of his children from class, even if what is discussed conflicts with his religious, moral and beliefs if:
>
> (i)It arises from student generated discussions;
>
> (ii)The teacher participates because of student generated discussions;
>
> (iii)The teacher provides factual information and not value judgments;
>
> (iv)The discussion is limited to facts related to the proscribed topics identified on the Form he submitted as long as the discussion does not involve value judgments.

[90] To summarize the evidence, it appears that the appellant agrees to his children being told about the fact of same-sex families or to his children being told that they must accept the equality of children in same-sex households. He agrees this is necessary in a society where all need to get along. While the appellant accepts the equal dignity of each person, he does not want his children to be inculcated in the view that acceptance of other persons requires full endorsement of all of their choices, such as same-sex marriage, which the appellant does not endorse.

[91] What I glean from this evidence is that the appellant fears that his children will be persuaded to abandon the insights of their religion if the moral positions taken in the policy materials receive the active endorsement of their teachers, which the appellant characterized as a “value judgment” on the sensitive topic.

[92] This is a legitimate fear, as Dr. Watson made clear in his *Report of the Ministerial Inquiry on Religious Education in Ontario Public Elementary Schools* quoted earlier. The mores contained in the s.169.1 program can conflict with parental religious views, particularly if it is premised on the proposition that true acceptance of another person can only be achieved by embracing all of their self-understandings.

[93] The appellant has demonstrated that the school board’s decision to refuse the accommodation he sought could act to limit his freedom of religion. His claim

meets the first half of the first step of the *Doré/Loyola* framework: his religious freedom is implicated.

(6) Has the Appellant Proven Substantial Interference with his Freedom of Religion?

[94] It is not necessarily contrary to a parent's freedom of religion for children to be exposed to ideas that contradict those of the parents. Some kinds of "cognitive dissonance" can be acceptable, as McLachlin C.J. explained in *Chamberlain* at paras. 64-67. See also LeBel J at paras. 211-12 and Gonthier J. in dissent but not on this point, at para. 184, *S.L.*, Deschamps J. at para. 40, LeBel J. at para. 54, and see generally, *Loyola*. However, acceptability depends on the purpose and effect of the challenged educational program, and also the age of the children involved.

[95] If the purpose of the challenged educational program is to undermine the religious beliefs of school children, then the program, and any decisions made to instantiate it, would limit the freedom of religion of the parents unacceptably and beyond the capacity to justify under s. 1 of the *Charter*: *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295 at para. 88. Sometimes, as the Supreme Court found in *Loyola*, the infringing purpose is easily found on the face of the policy. That is not this case. The appellant has put forward no expert evidence that the s.169.1 program set by the Ministry of Education and implemented by the school board has such a purpose.

[96] However, if the effect of the s.169.1 program were to undermine the efforts of parents to transmit the tenets of religious faith to their children, that would also limit the religious freedom rights of parents and engage their s. 2(a) *Charter* right to freedom of religion, subject to justification under s. 1 of the *Charter*. The parents bear the burden proving this limiting effect objectively on the balance of probabilities: *S.L.* at paras. 2, 23-24. The burden of justifying the limit is on the state actor.

[97] In this case, the appellant has not put forward any objective evidence that the school board's decision to refuse accommodation is functioning to undermine his ability to transmit the precepts of his religion, including teachings about human sexuality, to his children. There is no evidence that his children have experienced negative teacher "value judgments" of the sort he fears, over the many years this case has been pending. Nor has he put forward expert evidence detailing the way in which the s.169.1 program actually operates that would have this negative effect on his ability to transmit his religious faith to his children in the absence of the accommodation he seeks. The lack of such evidence is fatal to the appellant's appeal, which must be dismissed on that basis.

[98] Dismissing this appeal does not, however, give the s.169.1 program a clean constitutional bill of health. Were there evidence that the s.169.1 program undermined a parent's ability to transmit religious faith, together with a refusal to provide accommodation, the result might well be different.

[99] To return to the question posed at the outset of these reasons, in my view there are limits imposed by the *Charter* on a province's power to use publicly funded education to inculcate children in beliefs that educational authorities have determined are necessary; these limits cannot be specified in advance except very generally, as I have done. To repeat the words of La Forest J. in *Jones*, at para. 63: "Those who administer the Province's educational requirements may not do so in a manner that unreasonably infringes on the right of the parents to teach their children in accordance with their religious convictions." See also *Christian Education South Africa,* Sachs J., at para. 35.

[100] In these circumstances, I would take LeBel J.'s approach in *S.L*. at para. 58, and decline to rule definitively on the constitutionality of the s. 169.1 program. It would not be hard to imagine that a tweak to the program would pose a problem, or to imagine a teacher actively using both the force of personality and approved curriculum materials to undermine the faith commitments of students, which could make the provision of accommodation necessary. But that is not the case here.

[101] In light of these considerations, the court does not reach the second stage of the *Doré* analysis, which would address whether the limits on the appellant's freedom of religion are demonstrably justified under s. 1 of the *Charter*.

[102] Accordingly, there is no need to determine that "inclusion" is a "*Charter* value", and the application judge erred in doing so. The application judge's use of the concept instantiates the concerns this court expressed in *Gehl v Canada* (A.G.) 2017 ONCA 319.

[103] The application judge's decision brings into sharp relief the subjective nature of decisions invoking *Charter* values and the lack of transparency in the reasoning process leading to their identification. Invariably, the concept is used to identify a particular moral commitment that the sponsor asserts is not only desirable but should be given additional or decisive weight in legal reasoning, on the basis that it is entailed or implied by the *Charter*.

[104] Labelling a moral commitment as a "*Charter* value" is, in practice, a rhetorical move - a result-selective conclusion - and not the outcome of a transparent analytical process. In doing so the sponsor seeks to justify setting apart the desirable moral commitment as decisive or worthy of a preference in legal analysis. But whether it is worthy of weight in the proportionality calculus should not depend on rhetoric; the parties' respective interests must be analyzed directly. What interests are the competing moral commitments striving to advance, protect or instantiate? Are any of the competing moral commitments *Charter* rights? If they are, how should we sort out the contest under the proportionality test in s. 1 of the *Charter*?

[105] The school board takes the position that there is no need for this court to decide that “inclusion” is a *Charter* value. I would agree. This is not a surprising position for the board, since the issue of inclusion remains alive in special education, twenty years after *Eaton v. Brant (County) Board of Education* [1997] 1 S.C.R. 241. This is a delicate and sensitive area into which it would be imprudent to effectively invoke closure by utilizing *Charter* values, newly minted or otherwise. The impact would be completely unpredictable, which is another reason to avoid the instantiation of *Charter* values.

[106] My colleague Miller J.A. and I referred to some of these issues in *Gehl*, but neither that case nor this case is the one in which to resolve them.

[107] I now turn to make some observations about problems in the application of the *Doré/Loyola* framework to the discretionary decisions of line decision makers who do not have an adjudicative function.

(7) Reflections on the Application of *Doré*/*Loyola* to Line Decision Makers

[108] The doctrinal methodology for determining whether a limit placed on a *Charter* right is justified shifts from context to context. In the context of *Charter* rights challenges to statutes, the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 gives *prima facie* priority to the *Charter* right claim, placing the burden on the state actor to establish, among other things, that the reasons for enacting the impugned statutory provision are sufficiently compelling to justify the limit placed

on the right. *Charter* rights thus have a defeasible priority over statutory objectives. This priority is also reflected in the minimal impairment requirement, as Dickson C.J. noted: “The limiting measures … must impair the right as little as possible” *Edwards Books*, at p. 768.

[109] In *Doré,* Abella J. was reflecting on the proper approach to “an adjudicated administrative decision” at para. 4. But in *Loyola* the analysis is made to apply to a discretionary decision that is not adjudicated. The shift in doctrine from *Doré* to *Loyola* is not a small one.

[110] The *Doré/Loyola* framework is intended to adapt the s. 1 justificatory methodology to the assessment of potential *Charter* infringement by decisions of administrative decision makers. I have concerns that this project miscarries in para. 4 of *Loyola*, which both the application judge and my colleague invoke.

[111] Abella J. states in para. 4 of *Loyola* that, under *Doré*, “the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.” The language used by Abella J. seems to suggest that the statutory objectives have indefeasible priority over *Charter* rights, contrary to the *Oakes* methodology. Perhaps the logic of para. 4 is that if a statutory objective is pressing and substantial (understood in the *Oakes* sense), that would be sufficient to justify the limit of the *Charter* right,

irrespective of any countervailing considerations. See *Doré*, para.6. I am uncertain.

Other Difficulties with the *Doré/Loyola* Framework

[112] The context of the underlying decision under appeal raises some methodological problems. The *Doré/Loyola* framework cannot easily be applied to a line decision made by several educators who were not operating in a context that would yield “an adjudicated administrative decision”, as *Doré* contemplated at para. 4.

[113] Where what is at issue is the discretionary decision of a line official, as in this case, and not, as in *Doré*, “an adjudicated administrative decision,” the rights claimant caught by the *Doré/Loyola* framework faces several serious difficulties.

[114] Consider the context of this case as an example. In Ontario, school boards are corporations and have a board of trustees (sometimes confusingly referred to as the school board), composed of democratically elected citizens. Boards of trustees are occasionally required to exercise statutory powers in a natural justice hearing under the aegis of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22. However, most school board decisions are made by its employees, such as teachers, principals, and supervisory officers, as in this case. Sometimes they proceed in a manner consistent with policy direction from the *Education Act*, the Ministry of Education, or the board of trustees, and

sometimes they are left to respond to the exigencies of the circumstances without much policy guidance apart from common sense, and their training and experience. These individuals typically lack *Charter* expertise.

[115] At first sight, it seems to be eminently reasonable to invoke "reasonableness" as the applicable standard of review of discretionary decisions, as the application judge and my colleague do.

[116] But some questions emerge. I reflect on several difficulties with the application of the *Doré/Loyola* approach to a line decision maker.

[117] First, in the necessary constitutional analysis, who has decided that the underpinning statutory objectives are pressing and substantial? Is the line decision maker competent and qualified to make that constitutional assessment? As I see it, applying the *Doré/Loyola* approach to a line decision maker effectively imports a presumption that the statutory objective on which the decision rests is always "pressing and substantial". But this is a contestable proposition. Not every legislative or policy objective implemented by a challenged line decision would have this character. But a presumption would effectively reverse the s. 1 *Charter* onus to the rights claimant's disadvantage.

[118] Second, does such a presumption put the rights claimant in the position of having to challenge the legislative objective in order to defeat the presumption, when all she wants to do is challenge a specific decision?

[119] Third, who is called upon to exercise the “justificatory muscles” to which Abella J. refers in paragraph 5 of *Doré*, when there is no adjudication at the moment of the challenged decision?

[120] Fourth, what sort of justification must the line decision maker offer for the challenged decision? Is it to be provided at the moment of decision, or is it in the hands of creative lawyers when the decision is challenged judicially? In my view, in order to justify a *Charter* limit, the record of evidence considered by the line decision maker should demonstrate the elements of accountability, intelligibility, adequacy and transparency courts expect from administrative tribunals.

[121] Finally, what is the applicable standard of review? Is it to be “reasonableness” as the “deferential standard,” derived from *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 1 at para. 47? This is implied in *Doré* at para. 47, but that was in relation to a regulator functioning in an adjudicative setting, not to a line decision maker.

[122] Can these decision makers be considered expert in the manner generally understood by administrative law to justify a deferential standard of review? Within a narrow professional compass, individual school board employees can have a measure of expertise in the education profession, acquired by qualifications and training, and by experience, but these vary among individuals. When they are confronted with the claim that their decision is not sufficiently

respectful of *Charter* rights, will they understand how to reason from constitutional principles?

[123] Further, can we be sure that these line decision makers will inevitably be impartial and fair, even when their own decisions are challenged? Can we be sure that their supervisors, also being human, will be impartial and fair, and not defensive of the conduct of their subordinates? The administration of justice has developed numerous mechanisms to ensure impartiality and fairness on the part of decision makers, but none of them apply to discretionary line decision makers.

[124] Where a person challenges the decision of a line official on the basis that it violates a *Charter* right, there is every prospect that the first impartial decision maker in the sequence will be a court or other adjudicative tribunal.

[125] I would be reluctant to apply a robust concept of “reasonableness” burdened by a standing obligation of judicial deference to a line decision maker’s discretionary decision. There is a real risk that a claimant’s *Charter* rights will not be understood and will not be given effect by the line decision maker. I would prefer a more sensitive application of the nostrum that “reasonableness takes its colour from the context,” and "must be assessed in the context of the particular type of decision-making involved and all relevant factors," as Stratas J.A. observed in *Re: Sound v. Canadian Association of Broadcasters* 2017 FCA 138 at para. 34, 148 C.P.R. (4th) 91, citing several Supreme Court decisions. It is one

thing to defer to an educator on educational matters, but something else to defer to an educator on constitutional matters.

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“P. Lauwers J.A.”
“I agree B.W. Miller J.A.”