Teachers are well placed to promote equality and to act as exemplars for young people. This chapter addresses areas in which teachers can educate and exemplify equality. The case law involving various educational issues provides teachers with some clarity, and in some instances, additional fodder for debate. Teachers must lead by both precept and example and teaching the Charter value of equality is an increasingly important role in an ever more diverse and multicultural Canada. The need to be truly inclusive is one of the major challenges facing schools today and into the future.

As discussed in previous chapters, the *Canadian Charter of Rights and Freedoms* (“the Charter”) has had a dramatic impact across the entire spectrum of education. One of its most significant effects has been in the field of special education, particularly with regard to the inclusion of children with special needs into regular classrooms. Parents of disabled children have seen the Charter as their means for achieving suitable educational placements and programming for their children. The Charter contains two provisions that have an impact on special education: sections 7 and 15:

7. Everyone has the right 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.
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.

(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.

Section 7 of the Charter has been designated by many commentators as the heart of a constitutional guarantee to education in Canada. Certainly, it is possible to make a strong argument that, in today’s society, there is no quality of life, liberty, or security of the person unless a person has a basic education. These arguments are more compelling in the context of the Charter because of its express guarantees of the collective right of citizens to education in the context of denominational schools and the right to minority language education in other sections. It seems inconsistent to constitutionally protect specific types of education without protecting the right to education itself. The section 7 argument has not been extensively or successfully litigated. This may be because it is often combined with equality claims under section 15(1), which has received more attention from the courts. Section 7, however, has been used as a constitutional reinforcement of the statutory and common-law guarantees of fair process. Fair process means, at minimum, the right to be heard before an unbiased decision maker.

Many provincial departments of education have now instituted detailed procedural provisions dealing with both classification and placement of children with special needs. These often include comprehensive appeal procedures. In the past, courts have been reluctant to delve into the merits of the program or placement decision or add much to the procedural structure provided by statute. In one early integration case from Ontario, Bales v. Board of School Trustees (Okanagan), the judge emphasized that fair procedure in an educational context need not involve a full-blown court process. This case involved a dispute between a school board that wanted a mentally disabled child placed in a segregated school for special needs and the parents who wanted their child in the special education class offered by the regular neighbourhood school. The parents were unsuccessful because they failed to demonstrate that the school’s placement was unreasonable.

In B. (J.) v. Nova Scotia (Minister of Education), the educational plan for a child with Down’s syndrome was the issue between the child’s mother and the school board. The mother withdrew the child from school for one year,
but registered him the following year because she sought to appeal a placement decision. As a result of the child’s removal from school, there was no current educational plan in place for the child when the mother sought her appeal. Without a current educational plan, the minister of education refused to create an appeal board to hear the mother’s concerns. The Court of Appeal upheld the school board processes with respect to special education appeals, and declined to require the minister of education to put together an appeal board to hear the matter.

In the groundbreaking integration case, *Elwood v. Halifax County Bedford District School Board*, procedural irregularities and a lack of meaningful parental involvement in the classification and placement of their child were essential to the case, which was eventually settled out of court. As one consequence of this case, a process allowing more parental involvement in decisions about a child’s education emerged, which has now been fortified by regulations.

For teachers, the relevant aspect of these procedural guarantees is that parents should always be provided with appropriate information about and notice of the type of classroom setting that they can expect for their child, either in an inclusive or segregated class. In an inclusive setting, the primary responsibility often rests with the classroom teacher in collaboration with special needs experts (such as special education teachers) to determine whether the child can receive an appropriate education in a regular classroom. In recent years, there has been a trend for some parents to request segregated classrooms or funding for private school tuition because they find their child increasingly vulnerable in an inclusive setting. Inclusion is not a panacea for the complex needs of all students, although inclusive schooling has enjoyed substantial success. The failures of inclusive schooling often arise from underfunding and issues of implementation rather than from problems with the concept itself.

Many teachers voice the concern that the ordinary stressors of a classroom of 25 to 30 children do not allow for effective programming for children with special needs. It is up to teachers to properly document the progress of special needs children in their classroom in order to provide the parents and the school board with accurate information on which to base decisions about programming changes. If the matter were to come before the courts, a judge would be very interested in the classroom teacher’s view of the child’s abilities and needs. Courts are still quite deferential to the expertise of the front-line teachers.

The equality rights embodied in section 15 of the Charter have proved the most effective tool for parents challenging school board authority in the area of special needs education. The Supreme Court of Canada has reviewed
this section numerous times, and has provided guidance on its interpretation. In essence, the court has determined that not all forms of discrimination violate section 15. Only discrimination that amounts to prejudice or stereotyping and has an adverse impact on the individual will be subject to Charter scrutiny. An earlier emphasis on human dignity is still relevant but is not as central to equality analysis as before. Therefore, in the context of special education, the matter becomes a “battle of the experts” to determine whether an inclusive or a segregated classroom will have the most beneficial effect on the student. Obviously, both regular classroom and special education teachers have an important role to play in providing evidence of a child’s abilities and suitable programming. Most provinces identify the regular classroom as the best option, where feasible, but also emphasize that one size does not fit all students.

It is important to remember that, in any given case, these issues may ultimately be determined in an adversarial litigation process. A parent whose child has been identified as requiring a special program plan, but who desires more extensive or customized supports, must come to court and establish a breach of her child’s rights. Part of her case must include evidence of adverse impact. Once the parent demonstrates an adverse impact, it will be up to the school board to establish that any limitation placed on the child’s equality rights is reasonable, within the meaning of section 1 of the Charter. To do that, the school board is well advised to have written policies and procedures for dealing with special needs children. Teachers can play a vital role in developing these policies and procedures. Giving some input to parents is also beneficial, and can enhance the fairness of the process.

Human Rights Tribunals as an Alternate Route to Equality: The Landmark Moore Case

In addition to the Charter guarantee of equality in section 15, provincial human rights legislation (which applies to both the public and the private sectors) also prohibits discrimination on a range of grounds, including physical and mental disability. Increasingly, parents are using the human rights commission process to challenge school decisions about their children. This process is more accessible and less expensive because it does not require hiring lawyers. In many provinces, challenges before human rights commissions and the tribunals they appoint are eclipsing court challenges.
The remedies available through the human rights commission process are more limited than Charter remedies, but human rights challenges often provide a context for mediation, restorative approaches, and, ultimately, the settlement of disputes. Increasingly, parents or guardians of children with special needs are seeking redress through provincial human rights processes. One reason for this is likely the prohibitive costs associated with a Charter challenge.

One recent high-profile education law case began in 2005 with a complaint to the BC Human Rights Tribunal. In this case, Frederick Moore filed a complaint on behalf of his son Jeffrey against the BC Ministry of Education (“the province”) and the school district (“the district”), alleging discrimination on the basis that instruction was not available to Jeffrey, who required intensive remediation for dyslexia, in the public school system. The complaint was based on the ground that Jeffrey had been denied a “service customarily available to the public” under the BC Human Rights Code. It is important to note that the district had previously had a Severe Learning Disabilities program that could have addressed Jeffrey’s needs but, on the basis of budgetary concerns, had closed the program prior to Jeffrey’s attendance. When he was in grade 4, Jeffrey’s parents, on the recommendation of a school psychologist, mortgaged their home to pay for tuition at specialized private schools for the remainder of his education.

The tribunal concluded that discrimination had occurred because the public school system had failed to provide Jeffrey with the necessary supports to allow him meaningful access to education as compared to the general student population. The tribunal found the discrimination was both individual, as against Jeffrey, and systemic, as against students with severe learning disabilities. The tribunal ordered that the Moores be reimbursed for costs associated with the private schools Jeffrey attended, as well as $10,000 in damages for pain and suffering. With respect to the finding of systemic discrimination, the tribunal ordered a wide range of remedies against both the district and the province.

Both the district and the province applied for judicial review of the tribunal decision. The trial judge allowed the application, finding that the tribunal should have compared Jeffrey to other students with special needs, and not to the general student population. Having found that the tribunal applied the wrong comparison, the trial judge set aside the tribunal’s decision in its entirety. The Moores appealed the decision to the BC Court of Appeal.

The majority of the Court of Appeal (that is, two of a three-judge panel) dismissed the Moores’ appeal, agreeing with the trial judge that the tribunal had erred in comparing Jeffrey to the general student population and not to other students with special needs. The majority found that the “service”
under consideration was special education, and not the broader access to
education generally. The dissenting judge, Justice Rowles, found that the
tribunal was correct in comparing Jeffrey to the general student population
because, in her view, the special education services Jeffrey required were the
means by which he received meaningful access to education services. The
Moores appealed to the Supreme Court of Canada.

In a unanimous decision, the Supreme Court of Canada “substantially
allowed” the appeal. The court began its assessment by noting that the
preamble to the School Act in British Columbia (in effect at the time Jeffrey
Moore was in school) stated that “[t]he purpose of the British Columbia
school system is to enable all learners to develop their individual potential
and to acquire the knowledge, skills and attitudes needed to contribute to a
healthy, democratic and pluralistic society and a prosperous and sustainable
economy.” On this basis, the court stated:

This ... is an acknowledgement by the government that the reason all
children are entitled to an education is because a healthy democracy
and economy require their educated contribution. Adequate special
education, therefore, is not a dispensable luxury. For those with severe
learning disabilities, it is the ramp that provides access to the statutory
commitment to education made to all children in British Columbia.

One of the most important issues that the court addressed in this deci-
sion was the identity of the group to whom it was appropriate to compare
the services provided to Jeffrey, in order to determine whether Jeffrey had
been discriminated against. In previous human rights cases, the appropriate
comparator group for a child with special needs was usually other special
needs students with different diagnoses than those of the complainant
child. In this case, however, the court veered off the historical path of com-
paring special needs students with other special needs students. The court
agreed with the tribunal and the dissenting judge of the Court of Appeal that
the appropriate comparator group was general education students, not only
other special education students. The court noted:

[28] [F]or students with learning disabilities like Jeffrey’s, special
education is not the service, it is the means by which those students get
meaningful access to the general education services available to all of
British Columbia’s students ...

[30] To define “special education” as the service at issue also risks
descending into the kind of “separate but equal” approach which was
majestically discarded in Brown v. Board of Education of Topeka ...
Comparing Jeffrey only with other special needs students would mean
that the District could cut all special needs programs and yet be immune from a claim of discrimination. It is not a question of who is or is not experiencing similar barriers.16

The court then went on to consider the next steps in the analysis of discrimination, noting:

[33] [T]o demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code, that they experienced an adverse impact with respect to the service, and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice ... . If it cannot be justified, discrimination will be found to occur.17

The court first noted that it was clear that Jeffrey’s dyslexia was a disability, and that the adverse impact was related to his dyslexia. The next focus for the court was whether Jeffrey was denied access to the same general education available to other students in British Columbia and, if so, whether there was a reasonable basis for that denial.

The court carefully considered the evidence put forth to the tribunal about the special education services provided to Jeffrey, and agreed with the tribunal that the evidence indicated that, simply put, the services were inadequate to support Jeffrey’s meaningful access to education. Of specific concern was the fact that district employees acknowledged that Jeffrey required intensive remediation, which was available initially at the district’s “Diagnostic Centre.” However, after the closure of the Diagnostic Centre, the only option for receipt of these services was to go outside the public school system.18

Of interest to teachers is the fact that the tribunal, and thereafter the Supreme Court of Canada, placed significant emphasis on the views of two educational professionals who had worked directly with Jeffrey in the elementary school setting and who had agreed that the Diagnostic Centre would have been beneficial for Jeffrey. The court noted that in spite of the one-on-one attention provided, and the good qualifications of the teachers involved, the services were not sufficient to meet Jeffrey’s needs.19

The tribunal, and the Supreme Court of Canada, took particular issue with the closure of the Diagnostic Centre in light of evidence that indicated the closure took place without consideration of what would happen to the students who required its services, and without consultation with the educational professionals directly involved in providing services to those students who would be most affected by the closure. The tribunal concluded that the
closure of the Diagnostic Centre was based solely on financial reasoning, and the Supreme Court of Canada agreed.20

Turning to the justification phase of the analysis, the court noted that “it must be shown that alternative approaches were investigated” and that “the prima facie discriminatory conduct must be ‘reasonably necessary’ in order to accomplish a broader goal.”21 The district’s defence focused largely on the budget crisis it was under at the time of the closure. Although accepting that the district was having serious financial issues, the tribunal found that cuts were disproportionate in their effect on special needs programs and, significantly, that the district did not assess other alternatives for students who availed themselves of the services at the Diagnostic Centre. The Supreme Court, in review of the evidence accepted on this point by the tribunal, noted, “In order to decide it had no other choice, it had at least to consider what those other choices were.”22

The Supreme Court overturned the lower courts and upheld the decision of the tribunal with respect to the findings against the district. The court did not, however, accept the findings of the tribunal with respect to the province’s liability. Although the court accepted that the budget crisis faced by the district was partially a result of shortcomings in the funding provided by the province, the court ruled that because the tribunal’s findings supported the conclusion that it was the district’s failure to consider the consequences on students of closing the Diagnostic Centre, there could be no liability assessed to the province.23 The province was not censured for its budget cuts, although the district was held accountable for how it dispensed the reduced funding.

The Supreme Court upheld the remedies awarded by the tribunal to Jeffrey and his parents (tuition, some transportation costs, and $10,000 in damages for injury to “dignity, feelings and self-respect”).24 The tribunal had also ordered a number of sweeping systemic remedies against the district and province. The Supreme Court did not support these, finding that they were too remote from the scope of the Moores’ complaint.25 This is likely to engender considerable political debate between education departments and school boards in the future.

The impact of this recent Supreme Court of Canada decision remains to be seen, but it is safe to say that it will likely be far reaching in the educational context, particularly where the court has charted a new course with respect to comparator groups when assessing whether a student has experienced differential treatment. Moore is a landmark case in equality and education law.
Disability, Special Education, and Inclusion

In an attempt to translate this important legal equality doctrine into the practice of educating special needs children in schools, four important questions emerge:

1. Do all special needs children have access to Canadian schools?
2. What education is appropriate, and who should decide this question?
3. What related services are needed to make access for students with disabilities meaningful?
4. What role do increasingly limited school board resources play in determining a reasonable level of related services? This is perhaps the most critical issue for teachers.

Even the term “special education” is less universally accepted than in the past. A more frequently used term is “inclusive education,” which is the international standard set by the recently ratified Convention on the Rights of Persons with Disabilities in article 24 of that document. These international commitments, although not directly enforceable in Canada’s domestic courts, are increasingly persuasive and used by judges in interpreting the Charter, human rights codes, and regular statutes. This inclusive approach to students with disabilities was also approved by the landmark Supreme Court of Canada decision in Moore.

The use of the term “inclusion” is more than a matter of semantics; the concept embraces all forms of diversity in students, not only disability.

Inclusion is not just about students with disabilities or “exceptionalities.” It is an attitude and an approach that encourages all students to belong. It is an approach that nurtures the self-esteem of all students; it is about taking account of diversity in all its forms, and promoting genuine equality of opportunity for all students in New Brunswick. I cannot over emphasize that effective inclusion is for all students and not just one particular group or category.

With respect to the concept of inclusion, it is clear that inclusion must be a manifestation of equality as enshrined in the Charter and is far more than bringing students together in one place. This point is well stated in a Manitoba education study.

Inclusion is a way of thinking and acting that permits individuals to feel accepted, valued and secure. An inclusive community evolves constantly to respond to the needs of its members. An inclusive community
concerns itself with improving the well-being of each member. Inclusion goes further than the idea of physical location; it is a value system based on beliefs that promote participation, belonging and interaction.29

Sometimes terms such as “inclusion,” “mainstreaming,” “destreaming,” and “integration” are used interchangeably. Sometimes this language is even used as political rhetoric, because these words conjure up notions of equality. But, in reality, equality is not an easy political slogan. Equality is often messy and requires tough balancing acts. More than anything, the language of equality is about belonging, about equal “concern, respect, and consideration.”30 Bill Pentney, in a paper prepared for the Canadian Association of Statutory Human Rights Agencies, states it plainly:

Belonging. Such an achingly simple word. It conjures up some of our deepest yearnings, and for some of us, perhaps our most painful memories. Equality claims begin and end with a desire for belonging, for community. Ideas of equality lie at the heart of the Canadian promise of community.31

Thus, the overriding question concerns how inclusive schools need to be to meet the standards set at the international level, the constitutional level in the form of the Charter, and statutory human rights codes. Whether the challenge to school authorities comes in the form of the Charter or human rights codes, the essence of the debate is about what reasonable limits can be placed on the equality of students or what steps to be inclusive constitute reasonable accommodation of students’ diverse needs.

Accommodation of students is not an absolute right. Equality claims under the Charter are subject to “reasonable limits,” and under human rights codes reasonable accommodation is only up to the point of “undue hardship.” There are many factors relevant to determining the limits of reasonable accommodation, but matters such as cost, safety, practical impact on operations, and context are major considerations.

Once a denial of equality and the need to be accommodated is established, there is a high burden on school authorities to justify limiting rights of access. Accommodating students with disabilities has both an individual component and a systemic one. With regard to the former, efforts are made to accommodate the individual within the existing system; in the latter case, efforts need to be directed to changing the system itself to make it more universally inclusive. Both forms of accommodation require a commitment of human and financial resources that move beyond the positive rhetoric about inclusion.
The meaning of these accommodation rights, in practice, is a matter of vigorous debate. This debate occurs in court cases, tribunal hearings, and the judicial reviews of both. Courts, and increasingly tribunals, have focused on two separate and distinct spheres to ensure equality in particular contexts. The first sphere, which has received the most attention, is that of individual accommodation. The second sphere, which is the least developed and least precise in its implications, is systemic or institutional accommodation.32

Access to Schools

All children, except those with the most severe disabilities, now have access to public schools. The general right of access was asserted even before the enactment of the Charter in Carriere v. Lamont Co. School Board.33 The pre-Charter position was that children with disabilities were excluded from school because they were a disruptive influence in the classroom. Even after the enactment of the Charter, the courts have upheld the exclusion of an autistic child from a classroom because the child’s behaviour was too disruptive.34 Severely aggressive behaviour can trigger the removal of a child with special needs from school as well. In Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board,35 the Ontario Court of Appeal upheld a lower court ruling that a principal, and ultimately a school board, can exclude a child with special needs from school for legitimate safety reasons. The court found that, although a principal is required to consider a student’s special needs when deciding whether to remove him from school, the student’s special needs in and of themselves cannot undermine the principal’s statutory duty to maintain safety in the school.36 Interestingly, the court ruled that a school board cannot “administratively transfer” a student from one setting to another pending a decision on appeal from the Identification Placement Review Committee (IPRC). The court ruled that, while an IPRC decision is pending, the most the school can do is offer an alternative placement to the parents. If the parents refuse this placement, the child will remain out of school pending the appeal decision.

School administrators and teachers have expressed concern that, in many cases, it is the parents rather than the child who can pose the greater challenge to an orderly school environment. Parents can become agitated and frustrated by the lack of available resources. Understandably, they are concerned about the welfare of their child and obtaining as many resources as possible to meet their child’s needs. Teachers often bear the brunt of this frustration.37 In these situations, it is important to engage school administration and school board resources to mediate this interaction and set
appropriate boundaries for parents to participate in shaping the education of their child. Parents do not have unlimited and unfettered access to the school and the classroom.

In their article on special needs and school safety, Nolan, Trépanier, and Ellerker suggest that when students are potential safety risks at school, there are two possible options for placement: home instruction, where the school board provides programming, materials, and some instruction; and home schooling, where the parents assume sole responsibility for the provision of education for their child.38 There are many disadvantages to placement at home, not the least of which are isolation of the child and the potential inability of the parents to provide a suitable educational program.

In practical terms, the barriers to access to education for children with special needs have largely been broken down. An exception possibly exists for children with extremely challenging behaviour. Although physically disabled children may still experience barriers because of the costs of making old school buildings accessible, progress is ongoing.

Appropriate and Meaningful Education

Establishing the appropriate education for a child with special needs leads us directly into the controversy over inclusion. One of the earliest relevant cases was Bales,39 where the segregated placement of a child was upheld in British Columbia. The case was decided before section 15 of the Charter came into force. In Hickling v. Lanark-Leeds Roman Catholic School Bd.,40 the right of the parents to have their children integrated into a Catholic school, rather than sent to a special class in the Protestant school, was upheld by an Ontario board of inquiry established under the Human Rights Code. This ruling was overturned in the courts at both the trial and appeal levels because, once again, the judges deferred to the expertise of the educators.41

Perhaps the most groundbreaking case dealing with special education, and specifically the question of inclusion, is Eaton v. Brant County Board of Education.42 In this case, a child with special needs was unable to communicate through speech or alternative forms of communication, was visually impaired, and confined to a wheelchair. In spite of her disabilities, the school board agreed to try the child in a regular classroom in her neighbourhood school with a full-time assistant. After three years, her teachers and assistants were in agreement that the current inclusive setting was not benefiting the child, and might actually be causing harm. The IPRC decided that it would be better to place the child in a special education class. The parents, who wished the child to stay in the inclusive setting, appealed to
the Ontario Special Education Tribunal, which unanimously upheld the
decision of the IPRC.

The parents then sought a review by the courts. The Ontario Court of
Justice—General Division dismissed the application for review. The Eatons
then appealed to the Ontario Court of Appeal, which set aside the order of
the tribunal. The school board appealed to the Supreme Court of Canada,
which reinstated the decision of the tribunal. The Supreme Court consid-
ered section 15 with respect to disability, and ruled that because disability
could mean so many different things, it was possible that segregation could
provide the most appropriate educational setting in certain circumstances.
The court ruled that the presumption that children were entitled to inclusive
education was not constitutionally mandated. Every placement decision
should be based on the personal characteristics of each child, and must
focus on reasonably accommodating those characteristics. Parents, sup-
ported by some academic commentators, have interpreted the Eaton test as
being sufficiently broad to incorporate the “best interests” of the child. This
would be considered a more expansive right than merely the duty of “rea-
sonable accommodation.”

Eaton eliminated what had been a growing view that there was a pre-
sumption in favour of placing all children with special needs in regular
classrooms; the school board was thought to bear the burden of proving that
such a placement was inappropriate. Since Eaton, schools have greater flex-
ibility in showing that a substantially segregated placement is preferable to
an inclusive setting in individual cases. This aspect of the Eaton decision
has led to concerns about its impact on inclusion. Some commentators
support the Ontario Court of Appeal decision;43 however, some parents of
special needs children are relieved to have the option of specialized segre-
gated placements.

Since the decision in Eaton, instead of relying on presumptions, both
parents and school boards must provide information about the most suit-
able accommodation for the child. Note that a court will make its decision
on the basis of what is best for the child, and not simply follow the parents’
preference. This “reasonable accommodation” test (as described above) will
be applied both where parents wish to have their child included in a regular
classroom and where parents seek a segregated and specialized learning
environment for their child.

Another decision of some importance comes from the New Brunswick
Human Rights Commission. In Bonnie Cudmore v. Province of New Bru-
swick Department of Education and School District 2, the mother of a child with
attention deficit hyperactivity disorder (ADHD) filed a complaint that her son
was being discriminated against by the Department of Education and the
school board, on the basis of a mental disability. After seven years of inclusive education with extensive and ongoing accommodations in Moncton, the mother made the choice to send her child to Landmark East, a private non-profit school for children with learning disabilities in Nova Scotia. After her son began at the new school, the mother requested that the Department of Education fund this placement. The department notified her that it was not its policy to provide financial support for alternative placements, citing New Brunswick’s educational philosophy of inclusive education. The department offered its view that the child could succeed in the public school system, and offered to set up a special education plan. The mother visited several alternative learning centres in the district, but because they did not offer one-on-one attention, she felt that they could not provide the same services as Landmark and refused to consider the programs. When the department still refused to fund the placement, she filed a human rights complaint.

The Board of Inquiry found that attention deficit disorder (ADD) and ADHD were disabilities under the New Brunswick Human Rights Code. It determined that school officials tried to accommodate the child, but the mother failed to provide them with pertinent information regarding external factors, such as medication changes, which decreased the school’s efficacy in working with the child. The board also noted that factors outside of school often have an impact on student behaviour, performance, and achievement. It found that the mother had not established that the Department of Education and the school district had denied the child a service available to the public based on his mental disability. Moreover, it found that the department and the district had not discriminated against him with respect to any other services on the basis of his mental disability. The mother’s complaint was dismissed. This case exemplifies the government’s emphasis on accommodation of children within the public school system, rather than on funding private school options. Unlike in Moore, there was evidence in this case suggesting that accommodation within the public school system was possible for this particular student.

This case is important for several other reasons. First, it acknowledges that ADD and ADHD are mental disabilities; therefore, persons with these disabilities will be protected from discrimination under provincial and federal human rights codes. Second, it underlines the reality of the relationship between school and parent. In this case, the child’s teachers, dating back to kindergarten, were called to testify at the hearing. By the time the case was heard, the child was 14 years old. This illustrates the importance of continuous program planning and documentation over several years, various grade levels, and numerous teachers.
### Autism

A firestorm of litigation has surrounded the issue of appropriate education for the growing number of children diagnosed with autism. In the well-publicized *Auton* case, a group of parents of autistic children challenged the government’s refusal to fund a specific type of treatment called applied behaviour analysis (ABA), sometimes known as intensive behavioural intervention (IBI). Although the lower courts of British Columbia found that the government had violated the children’s section 15(1) equality rights, the Supreme Court of Canada ultimately overturned their decisions.

The Supreme Court of Canada found that ABA/IBI was not a “core medical service” under the *Canada Health Act*; it therefore fell within the discretion of the province to choose whether to fund this treatment. Because the government was not obliged to provide the treatment, the complainants were unable to meet the first step of the section 15(1) analysis for discrimination—that is, they were unable to show that the service was “a benefit provided by law.” Although the court could have stopped there, it continued on to evaluate whether the children had been discriminated against, in accordance with step 2 of the test. The first requirement of this step is to establish a comparator group—that is, a group against which the complainants can be compared to see if discrimination existed. The court considerably narrowed the comparator group suggested by the parents. In the end, it found that the province did not discriminate against the complainants by failing to provide a non-core, emerging treatment.

In a more recent case dealing with the right to treatment for autism, *Wynberg v. Ontario*, 35 families with autistic children sued the Ontario government. The families sought a declaration from the court that the government discriminated against their children by failing to provide them with ABA/IBI after age six. This lawsuit differed from *Auton* in that, in *Wynberg*, the Ontario government had already implemented an intensive early intervention program (IEIP), based on ABA principles, for children under age six. Because of long waiting lists, however, many children with autism in this age group did not receive services. In *Wynberg*, the question was not about having a program at all (as in *Auton*), but about gaining access to the program. Justice Kiteley of the Ontario Superior Court found that the children were discriminated against on the basis of age with respect to the IEIP, and on the basis of disability with respect to special education programs and services. The court found that the violation on the basis of age could not be justified under section 1 of the Charter.

The court ruled that the government knew that children were not receiving appropriate special education services in schools, and that it was a duty...
of the minister of education to ensure that all students with special needs were receiving free and appropriate services and programming. This was a blow to the minister, whose counsel had argued that this responsibility rested with the school board. The court awarded the families the declaration they sought, as well as compensation for past and future ABA. The court’s declaration stated that the criteria for the IEIP were discriminatory on the basis of age, and that the minister’s failure to provide and fund ABA based on the needs of individual children, including educational services, was a violation of section 15 on the basis of disability. This failure was also held to be a violation of the Ontario Education Act. Note that the court found that no section 7 rights existed on the facts of this case.

In response to the ruling, the government suspended the age cutoff for receipt of IEIP services. However, long wait lists for services continued to prevent many from receiving treatment.

The Ontario government successfully appealed the decision. The Ontario Court of Appeal unanimously allowed the appeal and held that the IEIP was not discriminatory and did not contravene the Charter. With respect to the age discrimination claim, the court agreed that there had been differential treatment on the basis of age, but that the parties had not proven that the differential treatment constituted discrimination. Specifically, the Court of Appeal found that there was no evidence to support a finding that autistic children age six and over suffered historical disadvantage as compared to younger autistic children. Accordingly, there could be no discrimination on the basis of age.

With respect to the claim of discrimination on the basis of disability, the Court of Appeal compared children with autism to children with other special needs, and found that the claimants had not proven differential treatment on the failure to provide IEIP programming. In the wake of the decision in Moore, this particular ground of appeal might well have been differently decided. The relevant comparator after Moore would be the general student body and not other subgroups with special needs.

As noted above, the lower court had ruled that the government had not proven that the cutoff age was a “reasonable limit prescribed by law” in accordance with section 1 of the Charter. The Court of Appeal disagreed. In spite of their finding that the cutoff age was not discriminatory, the Court of Appeal went on to state that the government had shown that IEIP was enacted by the minister of education in response to pressing and substantial objectives. The court found that the age limit was put in place to ensure that the intensive intervention delivered through the IEIP was available to younger children, because research indicated intervention was most effective when delivered in the early years. The court also found that the age
limit reflected the government’s efforts to balance the needs of younger children for early intervention with the needs of older children, who received school-based programming, and was a reflection of the government’s need to allocate scarce resources where they will be most effective. This position is a clear acknowledgment of the “hands-off” approach that courts have traditionally shown with regard to government policy decisions about allocation of limited funds.

Finally, the Court of Appeal found that the intensive nature of ABA/IBI made it impossible to deliver in a school setting. The families involved sought leave to appeal the decision to the Supreme Court of Canada, but leave to appeal was denied.53

The decision in *Wynberg* affected not only the 35 families involved but numerous other families as well. A number of injunctions had been sought in the years leading up to this decision by other parents who wanted to keep the funding for their children’s ABA/IBI therapy going until the court made a decision in *Wynberg*.54 In *Bettencourt*,55 Justice Ferrier of the Ontario Superior Court ordered the province to partially fund a private IBI program for twins whose parents had tried unsuccessfully to integrate them into the public school system. The parents had to remove the two boys and place them in a private school where IBI was provided. Justice Ferrier found that without IBI, the children were unable to learn, and “at this time, the public and separate school systems are either unable or unwilling to provide the required level of support for children with autism.”56

In April 2005, in the wake of the lower court’s decision in *Wynberg*, a group of parents of children with autism commenced what was intended to be a class action suit against the Ontario government and seven school boards (the case was never certified as a class action). The parents alleged that the funding and services provided by the defendants were insufficient to meet the needs of their children; failed to integrate the only effective teaching method (ABA); and, accordingly, were negligent, in breach of sections 7 and 15 of the Charter, a breach of the defendants’ fiduciary duties, and misfeasance of public office.

In 2007, following the Court of Appeal’s decision in *Wynberg*, the government and school boards brought motions to strike out the plaintiffs’ statement of claim.57 The Superior Court allowed the defendants’ motions in part and struck out all of the plaintiffs’ claims except for those of breach of section 15 of the Charter. The plaintiffs appealed and the Ontario Court of Appeal largely upheld the decision of the lower court,58 noting that many of the issues raised by the plaintiffs had already been addressed in *Wynberg*.

There have also been numerous complaints to the Ontario Human Rights Commission regarding the aforementioned issues. In the time that
Wynberg was before the courts, some 240 human rights complaints had been filed with the Commission. These complaints were held in abeyance while the courts decided Wynberg.59 The government engaged in numerous mediations to resolve a number of the complaints. The government, not the school boards, was involved in these discussions and appeared as a party in some instances. Some complaints were ultimately settled through these processes, while others were simply dismissed.

Ontario is by no means the only province with ongoing litigation over funding and provision of autism treatment. A large number of parents in both Canada and the United States have sought declarations from the courts that school systems and provincial health care systems should provide highly specialized treatments for autism. In D.J.N. v. Alberta (Child Welfare Panel),60 a mother of an autistic child sought funding from child welfare services to augment the special education that her son received in school. The mother requested approximately $15,000 to address her son’s needs for speech and occupational therapies, reading programming, social skills training, and computer training. She was denied the funding by the director of child welfare on the basis that he lacked the jurisdiction to grant her request. Her appeal was rejected by the Child Welfare Appeal Panel, which found that the services she sought were the responsibility of the school board. The panel cited the School Act as justification for its decision that it lacked jurisdiction to order funding. The Alberta Court of Queen’s Bench also denied the mother’s appeal, agreeing with the panel that the requested services fell within the school board’s mandate, and that nothing in the Child Welfare Act required the delivery of these services. Justice Rawlins, however, delivered a rebuke to the government, stating:

It seems to me to be extremely unproductive for two departments of the same government, both of whom may bear some responsibility for the provision of services to handicapped children, to engage in a war as to whose budget should bear the expense. Ideally, the Ministers of both departments should work together to provide a comprehensive approach to the needs of the handicapped children. It ought not to matter what the service is; if it assists the child and there is available funding in one or more government departments, then the public should get the benefit of one-stop shopping instead of the current unpredictable, costly avenues.61

This more holistic approach to meeting students’ needs, sometimes referred to as “wrap-around services,” is growing in popularity. Integrating the services of various government departments and breaking down the traditional silos has been frequently recommended by various studies.62
One theme that has reverberated through many of the autism cases is the cost–benefit analysis. In Wynberg, Justice Kiteley heard evidence as to the long-term benefits of providing intensive and early autism treatment. The plaintiffs produced a cost–benefit analysis that suggested that expanding services to all qualified children ages 2–4 would result in a net savings of $172,549,472 over a 60-year period. Further, the plaintiff’s expert suggested that this was not a one-time savings but that it “attached to the cohort of autistic children currently aged 2, 3 and 4” and that “every 5 years a new cohort of autistic children will be in this age range and will attract a similar cost savings figure.” Unfortunately, funding for these programs is needed now to create savings over the next 50 years; and many current governments are not prepared to invest such huge sums for programming that may not yield immediate and visible results.

It is clear from these cases that section 15(1) is currently the most effective tool for parents to use when arguing special education cases before Canadian courts. However, as we mentioned earlier, discrimination claims before human rights commissions are another route for parents who seek better services for their children.

Related Services

In order for disabled children to benefit from their education, they also need related services that help them to overcome their disabilities. For example, it is essential that transportation and facilities be accessible to children with physical disabilities. Accessibility standards are imposed by human rights codes in most provinces, and resistance to implementation arises only in relation to concerns about costs. Because of the cost factor, these standards are phased in and, as a result, implementation sometimes proceeds very slowly.

One of the major areas of concern in integrating mentally and physically disabled students or providing special education is the administration of drugs or other medical services. Most teachers are not qualified to administer medication or perform medical procedures, and by doing so they expose themselves to considerable legal risk. However, if no qualified staff person is hired to address their medical needs, these students are effectively excluded from school on the basis of their disability. We address the issue of legal liability for teachers and teaching assistants with respect to drug administration and medical procedures in Chapter 6, under the heading “Teachers as Paramedics.”

Another area of concern is the limited supply of expert human resources. Speech therapists, audiologists, school psychologists, and resource teachers
with specialized training for certain disabilities are in short supply in many districts. This creates longer than necessary waiting times for assessment and treatment.\textsuperscript{65}

On a philosophical level, special education, like minority language education and denominational school rights, is perhaps more of an institutional problem than one directly involving teachers. On a practical level, however, it continues to be a major concern for all teachers, not just special education and resource teachers. It is rare today for a classroom teacher not to be faced with the demands of including multiple children with special needs in her classroom. Good school board policies on inclusion and special education necessarily involve frank discussion with teachers in an effort to determine the appropriate level of services for children in inclusive classrooms. Class composition is a vital issue for teachers and one that focuses on a lack of adequate resources. Courts can provide a framework but cannot ultimately answer the service delivery and resource questions.

Balancing Limited Resources: The Limits of Reasonable Accommodation

School boards have scarce resources to meet the many demands placed on the educational system, yet the costs of accommodating the diverse range of students within society are growing, creating a tough balancing act for school administrators and policy makers. Although courts are aware of these challenges, they nevertheless have an obligation to ensure that educational services are provided on the basis of equality in accordance with the requirements of section 15 of the Charter and provincial human rights codes. Courts may consider scarce public resources as a factor in determining whether a limit placed on an equality right in the educational sphere is reasonable within the meaning of section 1 of the Charter; however, this is not always a reliable “reasonable limits” argument. Cost is not a total answer to a Charter equality claim, but may be one component of determining what is reasonable in a free and democratic society. This point was emphasized in a 2004 Supreme Court of Canada decision denying pay equity to women in Newfoundland and Labrador as a result of the financial crisis facing the government of the day.\textsuperscript{66} The landmark Moore case from the Supreme Court of Canada in 2012 is less sympathetic to budget cuts as an effective response to limits on students’ equality rights.\textsuperscript{67} The allocation of resources within school systems continues to be a systemic issue that is beyond the scope of this book, but one that affects teachers every day.
Other Equality Issues

Special education focuses attention on physical or mental needs, and is the basis for findings of discrimination against young people in the schools. However, other prohibited modes of discrimination listed in section 15 of the Charter and human rights codes might also give rise to equality challenges. These have been somewhat lost in the shadow of special education. The Supreme Court of Canada has made it clear that the types of discrimination prohibited by section 15 are not exhaustive and may be expanded to include other analogous categories. Types of discrimination not specifically listed in section 15 have been claimed to protect the equality rights of other groups who have formerly faced exclusion and discrimination. Gay, lesbian, bisexual, and transgendered students provide recent, and high-profile, examples of this extension of section 15.

Sex

The prohibition in section 15 against discrimination on the basis of a person’s sex opens up the question of whether school policy can validly distinguish between male and female students in the school. This would include matters such as courses offered only to women or sports teams delineated by the players’ sex.

Outside the school context, the Ontario Court of Appeal has upheld the right of a teenage girl to play hockey on a boys’ all-star team based on section 15 of the Charter.68 The trial judge accepted the discrimination as justified under section 1 because of the benefits of separating girls and boys in athletic activities. However, the Court of Appeal disagreed with this reasoning, stating that section 19(2) of the Ontario Human Rights Code (now repealed), which allowed this type of discrimination in athletic activities, failed to prescribe any limits or guidelines for the distinction. The court held that participation in athletics is important for the development of “health, character and discipline,” and is therefore worthy of protection.

By the time this case was decided, the young woman in question had moved beyond that level of hockey, but this case has paved the way for other women who wish to play male-dominated sports. The Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS) notes that the issue of women or girls wishing to play for men’s or boys’ sports teams tends to arise where there is no local female team, or when playing on a male team would create better access to tournaments, resources, and facilities. CAAWS suggests that “the legal opinion has largely
been that females have the right to compete for a position on a male team on the same basis as males, as long as they demonstrate sufficient skills and ability to meet the requirements of the team.”

In 2010, the Ontario Federation of School Athletic Associations changed its gender equity policy, thus allowing female athletes to play on boys’ sports teams. The change resulted from a human rights complaint filed by a female soccer player, Courtney Greer, who wished to play on her school’s male soccer team. Previously, the policy had been that girls could only play on boys’ teams where the sports activity was not otherwise available to them—that is, where there was no corresponding girls’ team.

Similar human rights complaints were raised in 2006 in Manitoba, by twin sisters Amy and Jesse Pasternak, who wished to try out for the High School Men’s Hockey League, and who were prevented from doing so by the Manitoba High School Athletic Association, in spite of having the support of their school administrator and the school division superintendent. A Manitoba Human Rights Board found that the two young women had been discriminated against and made a number of orders, including the order that the association remove the requirement that, if a female team existed, female students would not be permitted on male teams.

In Casselman v. Ontario Soccer Association, also in Ontario, two teenage girls were denied the right to play on an under-16 boys’ team for the league championships because the organizing association did not approve of mixed-sex teams for players past the age of puberty. The prohibition occurred despite the fact that the girls had played with the team for the entire regular season. The board of inquiry allowed the girls’ complaint, ruling that the girls were discriminated against on the basis of their sex. The board also noted, as an additional reason for its finding, that there were no girls’ teams in the area.

In Nova Scotia schools, sports teams are labelled “boys’,” “girls’,” and “open.” Sports such as basketball are classified as “boys’” and “girls’,” and students must play on teams according to their sex; hockey is classified as “girls’” and “open,” and football is classified as “open.” Girls with the requisite skills, can therefore play hockey on either the girls’ or the open team and can play football, but they cannot play on the boys’ basketball team because the teams are divided on the basis of the sex of the players. The Nova Scotia Schools Athletic Federation (NSSAF) instituted this policy so that schools would be required to provide both boys’ and girls’ teams for the more popular sports, and not simply create one team from the strongest players in the school regardless of their sex.

Over the past several decades, there have been significant changes to the curriculum and pedagogy in public schools. More attention is paid to the
learning styles of both female and male students, and significant efforts have been made to engage female students in the traditionally male-dominated fields of math and science. Gone are the days when girls were directed toward typing and home economics and boys toward woodworking and drafting. The field of computer science is one area where boys still appear to have an advantage over girls—they appear to learn how to operate computers more quickly and demonstrate better manual dexterity. Overall, however, more young girls than boys are excelling academically and going on to post-secondary education.

Some educators believe that so much focus has been placed on girls that boys are beginning to feel the lack of attention, and problems in school are resulting. However, most research does not support this conclusion. Nevertheless, teachers should be conscious of the manner in which they divide their attention and should attempt to have the same expectations for male and female students. Research suggests that boys and girls do learn in different ways, and equality demands recognition of these differences.

Age

The primary issue in the field of age discrimination is whether age limits for starting and finishing public education are reasonable. In general, schools can set age limits for schooling, but should be prepared to defend them. For young children, problems are most likely to arise in cases where parents feel that their child is particularly gifted and the “appropriate” education should consequently begin at an early age. In *Winnipeg School Division No. 1 v. McCarthur*, parents tried to force a school to admit their child, who was one month short of the required five years of age at the cutoff date. This case came to court before the Charter’s enactment, and the parents sought to apply the Manitoba *Human Rights Code*. The court held that human rights legislation did not apply to schools. This is no longer the case. More important, however, it held that the age restrictions in Manitoba’s *Education Act* were specific and had been enacted later than the human rights statute; hence, the age limitation prevailed. This illustrates that courts may rely on the “reasonable limits” exclusion in section 1 of the Charter to restrict claims of age discrimination in relation to early school admission.

A school board in Quebec ran into the problem of trying to assess each child individually to determine the appropriate entry age for primary education. The school board developed a policy in which parents could attend meetings of a committee set up by the board to assess a child’s abilities and whether it would be appropriate for that child to start school earlier than the prescribed cutoff date. The process involved gathering and bringing evidence
before the school board concerning the child's ability, which was a costly exercise. The board soon discovered that because of the associated costs only parents of higher economic means were applying. The board was then faced with a difficult dilemma; its new program, meant to be universal, was effectively excluding lower-income children. It may be that schools should not try to enter into this type of inquiry but should instead rely on the traditional method of setting an arbitrary cutoff date. The courts are likely to defer to a school board's cutoff date, provided that the board can show some reasonable basis for limiting the access of young children.

The more contentious issue with respect to age discrimination in schools is the extension of educational services to adults. Each provincial education statute contains provisions that govern the cutoff age for publicly funded education. Many of these statutes also include special provisions for adults in the education system, including night classes and classes held in local community centres. Concerns also focus on special needs students who require services past the age of 21.

A variation on age discrimination occurs in the North, where Aboriginals often decide to return to school later in life. Given their unique cultural values, a strong argument can be made that an arbitrary “cutoff” age should not apply to Aboriginals, whose special status is reflected in the education acts of the North. As yet, these cases have not made their way to the courts. The argument on behalf of Aboriginals becomes stronger when coupled with the further argument under section 15 that restricting access to schools is a matter of racial discrimination. Aboriginal rights are also guaranteed in section 35 of the Constitution Act, 1982. In the face of the information above, an argument can be made that age limits are a good example of structural or systemic race discrimination that is not obvious at first glance. Racial discrimination is most often a problem of latent structural inequality.

Race and Multiculturalism

The systemic nature of racial discrimination makes it difficult to address on a case-by-case basis in the courts. There have been some human rights challenges, but most school-based cases involving racial discrimination do not even proceed to a board of inquiry, let alone the courts. The primary reason that cases are settled out of court is the desire on the part of school boards to avoid the adverse publicity that accompanies a racial complaint. Although race and ethnic origin are explicitly included as prohibited grounds of discrimination under section 15 of the Charter, no student appears yet to have launched a racial challenge using the Charter that has
proceeded to trial. However, school board employees, including teachers, have used section 15 challenges in a number of labour cases.74

Complaints of racism can be coupled with an argument under section 27 of the Charter, which protects the multicultural heritage of Canadians as follows:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Because section 27 is an interpretive section, it lacks the substantive force of some of the other provisions of the Charter, such as section 15. Most provinces, however, have multicultural policies with respect to education, and they could use the interpretive principles in section 27 to strengthen the application of these provincial policies.

Because of its widespread nature, discrimination may be a problem beyond the power of any one teacher to correct. However, as educational state agents, it is important for all teachers to be aware of potential discrimination in their schools—in particular, latent or systemic discrimination. As Canada’s population becomes increasingly multicultural, discrimination will have a growing legal importance. The growing diversity of student populations in Toronto, Vancouver, and other large urban centres emphasizes the importance of an open and inclusive school climate.

On a practical level, teachers should take a close look at the teaching materials they use on an everyday basis to ensure that they are appropriate for the cultural makeup of their particular classroom. Teachers should also be sensitive to their own biases. A lack of cultural diversity within the classroom is problematic for more than philosophical reasons. Research indicates that

exclusion of the experiences, values, and viewpoints of Aboriginal and racial and ethnocultural minority groups constitutes a systemic barrier to success for students from those groups and often produces inequitable outcomes for them. Such inequities have been linked to students’ low self-esteem, placement in inappropriate academic programs, low career expectations, and a high dropout rate.75

Teachers must also be aware of the criminal component of racial violence, which places students’ safety at risk. One need look only to the terrible murder of Reena Virk76 to see what can happen when young people react violently to someone who is “different.” Although Virk’s death was not attributed solely to racism, it is clear that she did not “fit in” and was murdered
by a group of her peers because of it. It is plausible that one of the reasons
she did not fit in was her race.

Another major concern is the impact of school discipline policies on
racial minorities. In 2007, the Ontario Human Rights Commission reached
a settlement with the Ministry of Education with respect to the “safe schools”
provisions of the Education Act and their resultant policies on student dis-
cipline, generally known collectively as “zero tolerance.” The settlement
was effected two years after the commission brought forward a complaint
on behalf of students, in which the commission alleged that the policy had
a disproportionately negative effect on racial minority students and students
with disabilities.

The settlement required the Ministry to agree that schools must consider
mitigating factors before expelling or suspending a student and to remove
all references in the Education Act, regulations, or policies to the concept of
“zero tolerance.” The commission proposed, and the Ministry accepted, a
number of mitigating factors to consider, including (but not limited to):

- whether racial or other harassment was a factor in the misbehavior;
- the impact of a suspension or expulsion on the student’s continuing
  education;
- in the case of a student with a disability, whether the disability was a
  factor in the behaviour and whether appropriate accommodation had
  been provided; and
- the safety of other students.

The Ministry subsequently released a policy memorandum enunciating
the expectations for school boards for provision of services to students who
have been expelled, in order to allow them continued access to education.
It is clear that race has historically been a factor in many decisions made by
administrators and teachers. It is important for teachers to become
increasingly sensitive to race, culture, and ethnicity as Canadian schools
become more diverse each year.

Religion as Proxy for Culture: New Challenges of
Diversity and Multiculturalism

Although in some respects religion is of little significance in Canadian
schools (except denominational schools), in others it has become more
important as a proxy for race and culture. This is particularly true in relation
to Muslim students in places such as Toronto and also to Sikh students on
the West Coast of Canada. The exclusion of students from traditional reli-
gious practices such as the Lord’s prayer has been explored in Chapter 3.82 Here, we will briefly explore newer claims to religious equality in the diverse and multicultural Canada where white Protestants are no longer the majority in many schools, especially in large centers like Toronto.

As discussed at length in Chapter 3, the issue of religious dress in schools continues to create a challenge for school districts, teachers, and the courts.83 Accommodation of the growing diversity of the Canadian student body is an important challenge facing Canadian schools and teachers on the front lines. This is a new and increasingly important aspect of inclusive education that has many parallels to the inclusion of students with disabilities. In parts of Western Canada, the accommodation of First Nations students in the general public schools and the creation and proper funding of First Nations schools is also a major challenge. It is a vital part of establishing a new relationship between the First Nations and the rest of Canada.84 This is more a matter of culture than religion, but there still needs to be a celebration and accommodation of differences.

As was dramatically played out in the province of Quebec and discussed in the report of the Bouchard-Taylor Commission,85 accommodating new cultures and religious traditions into the more traditional bilingual Canada is a significant challenge. As with other human rights issues, the central question is: what amounts to reasonable accommodation? To be consistent with Canada’s claims to be a mosaic, we should be accepting but not to the point where core Canadian values such as gender equality are compromised. The need to be appropriately accommodating of new immigrants to Canada and its First Nations is accentuated by current Canadian demographics. Immigrants and indigenous populations are growing, while the traditional English and French populations are in decline. The face of Canada is changing and this must be properly reflected in our schools.

Sexual Orientation

In recent years, the issue of sexual orientation has become a hot-button issue in schools. Teachers often ask us whether they should address this issue in their classrooms, and, if so, how they might go about it. The issue of discrimination on the basis of sexual orientation has come before the courts in several high-profile cases.

In *Jubran v. North Vancouver School District No. 44,*86 a high school student filed a complaint with the BC Human Rights Commission, alleging that he had been discriminated against on the basis of perceived sexual orientation. The student had been harassed by his peers for several years. His classmates used physical violence and homophobic slurs to taunt him despite the fact
that he was not gay. The student and his parents sought support from the school. The human rights tribunal found that although the school had taken action against individual offenders, it had failed to address the harassment and bullying in a systematic fashion and had never taken any proactive steps to address the student’s concerns. The tribunal awarded the student $4,500 in damages. The BC Supreme Court overturned the ruling, but the Court of Appeal reversed the lower court’s decision, reinstating the tribunal’s decision and award. The BC Court of Appeal confirmed that schools can no longer sit back and wait for bullying to occur before they take steps to prevent it. This decision appears to require school boards to address the issue of homophobia in schools and to educate their students about the unacceptability of homophobic behaviour. The Supreme Court declined to hear an appeal of the BC Court of Appeal ruling.87 Note that gay and lesbian students are among the most frequent targets of bullying and are more susceptible to suicide than other young people.88

In Ontario in 2002, another case made headlines when a student named Marc Hall sought an injunction from the courts to allow him to bring his same-sex partner to his Catholic school’s senior prom.89 The court granted the injunction, holding that to exclude the student from his prom would be to restrict his access to a “fundamental social institution.” The judge noted the long social history of discrimination against gays and lesbians that did not accord with Charter values of respect for the dignity and worth of all persons. It is clear that the rights of gay and lesbian students to attend school and school functions free of discrimination have been upheld by the courts and human rights commissions.

There appear, however, to be limits on how far the judiciary will go in allowing teachers to disclose their homosexuality in the classroom. In 1998, a Manitoba arbitration board declined to hear and determine a grievance from a teacher who argued that her school district had behaved improperly in denying her the right to disclose her sexual orientation to her students.90 The teacher felt that if she were able to disclose her lesbianism to her students at a “teachable moment,” she would be able to present herself as a positive model for tolerance and show her students that stereotyping of gay and lesbian students is inappropriate. When she requested the permission of her school district to disclose this information, the district informed her that it was inappropriate for any teacher, whether homosexual or heterosexual, to declare her sexual orientation. The teacher filed grievances, arguing that her academic freedom as well as her human rights had been violated. The division rejected her grievances. At the arbitration hearing, the division argued that disclosure of the teacher’s sexuality would result in a backlash from parents’ groups and a loss of the teacher’s effectiveness in
the classroom. They also argued that it would be impossible for the teacher to advise 13- and 14-year-old students of her lesbianism and then simply move on to another topic. The arbitration board ruled that because a teacher informing students of her sexuality would be significant in terms of lessons and curriculum, the division had the right to determine whether such a disclosure should be made to students. The teacher’s grievances were dismissed because the arbitration board found it had no jurisdiction to rule on this matter.

Bullying, School Violence, and Vulnerable Students

Although the victims of bullying are not exclusively drawn from traditionally protected categories under human rights codes, sex, race, sexual orientation, and disability are often factors. One of the defining features of a bullying relationship is a power imbalance, and the victims in this relationship are often drawn from the ranks of the vulnerable. Human rights codes draw parallels between bullying and harassment, and addressing matters of bullying by referring them to human rights commissions is one of the important recommendations of the Nova Scotia Task Force on Bullying and Cyberbullying. Australia has had considerable success by using the human rights structure to address some forms of bullying and cyberbullying.

In Ontario, the link between bullying and human rights is even more explicit. The Accepting Schools Act, 2012 enunciates the following definition of bullying:

“bullying” means aggressive and typically repeated behaviour by a pupil where,

(a) the behaviour is intended by the pupil to have the effect of, or the pupil ought to know that the behaviour would be likely to have the effect of,

(i) causing harm, fear or distress to another individual, including physical, psychological, social or academic harm, harm to the individual’s reputation or harm to the individual’s property, or
(ii) creating a negative environment at a school for another individual, and

(b) the behaviour occurs in a context where there is a real or perceived power imbalance between the pupil and the individual based on factors such as size, strength, age, intelligence, peer group power, economic status, social status, religion, ethnic origin, sexual orientation, family circumstances, gender, gender identity, gender expression, race, disability or the receipt of special education; (“intimidation”).
The above section discusses the various categories of people protected under human rights codes; however, these codes include other categories as well. In the big picture, a wide range of students are vulnerable to bullying and cyberbullying and there is no closed list of categories to determine who will be bullied. Being subjected to bullying is a serious problem that detracts from the quality of the school experience and, at its core, displays a lack of respect for the dignity of the victimized student. It is therefore an issue of concern to educators.

As discussed in Chapter 2, Application of Negligence Principles in the School, under Bullying, a group of Canadian scholars has suggested that bullying will be reduced only when lawsuits against schools increase in an attempt to hold them responsible for bullying. Questions as to the legal responsibility of schools remain—for example, to what standard of care would a court hold a school when dealing with bullies? Most important, teachers and administrators want to provide a safe environment for students to learn and grow. This concern increases each time we hear of another student who has taken his own life in an effort to escape from bullying or who has been murdered by her schoolmates. What actions must a school take?

First, it is important to define “bullying,” as did Ontario’s Bill 13, Accepting Schools Act, 2012, above. In its discussion of bullying, the Nova Scotia Task Force on Bullying and Cyberbullying notes:

Bullying is typically a repeated behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person’s body, feelings, self-esteem, reputation or property.

Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression.

This definition goes on to define “cyberbullying” as a form of bullying and holds accountable not only the bullies but also the bystanders who encourage or assist the bullying.

Cyberbullying (also referred to as electronic bullying) is a form of bullying, and occurs through the use of technology. This can include the use of a computer or other electronic devices, using social networks, text messaging, instant messaging, websites, e-mail or other electronic means.

A person participates in bullying if he or she directly carries out the behaviour or assists or encourages the behaviour in any way.

Debra Pepler and Wendy Craig define bullying as “a form of aggression in which there is an imbalance of power between the bully and the victim.”
They note four key factors: a power imbalance, repeated incidents, intent to harm the victim, and the victim's distress.

Pepler and Craig found that the effects on both the victim and the bully are significant and long lasting. Eric Roher reports that people who are bullied are often blamed and ostracized by other children for what happened to them and tend over time to have academic and emotional difficulties, including depression, anxiousness, and insecurity. These characteristics, as we have seen numerous times, can lead to tragic results. The high profile suicide of BC teen Amanda Todd in the fall of 2012 captivated the nation and emphasized the seriousness of the problem.

Bullies also suffer long-term effects from their own behaviour. Pepler and Craig’s study shows that a child bully can grow into an adult bully who needs more government services than the average citizen because of criminal convictions, alcoholism, and family breakdowns. The tragic consequences of bullying and cyberbullying are also highlighted in the report of the Nova Scotia Task Force on Bullying and Cyberbullying.

Under the common law, school boards, schools, and teachers have a responsibility to protect students from harm that is reasonably foreseeable. Thus, if a negligence claim were brought against the school and its personnel, the court would evaluate whether a reasonable person in the place of the teacher or school administrator, knowing what they knew about the situation, would have foreseen the harm to the student. If the answer is “yes,” then the court may find that the teacher or administrator owed a duty of care to the student. A plaintiff would also have to show that there was a connection between the student’s injury and school’s actions or inactions.

The common law is not the only source for a duty of care. Provincial legislation creates statutory duties for most school boards, administrators, and teachers. As we saw at the beginning of Chapter 3, teachers in Ontario have a statutory duty, created by the *Education Act*, “to maintain, under the direction of the principal, proper order and discipline in the teacher’s classroom and while on duty in the school and on the school ground.” Under the regulations attached to the *Education Act*, principals are required to maintain proper order and discipline in the schools and to inform parents when their child has committed an infraction of school rules.

When a bullying case is proven in court, it is likely the school board (rather than the teacher) that will have to pay any compensation the court awards, pursuant to the doctrine of vicarious liability, which we discussed in Chapter 2. It is clear that schools can be held liable for injuries that a student suffers as a result of bullying, as was seen in *Jubran*, where the school board was held accountable through the human rights process, rather than the common-law principles of negligence. Although the amount
of money awarded to the student was not substantial, it illustrates the court’s position that schools can be held accountable for failing to protect students from their peers.

Roher argues that the courts have, in effect, established a test for deciding whether a school “created a situation of increased violence or vulnerability.” He suggests that the plaintiff must prove four components in order to successfully bring a claim:

1. The alleged misconduct placed the student “at substantial risk of serious, immediate and proximate harm.”
2. The defendant (usually a teacher or principal) knew of the risk, or the risk was obvious.
3. The defendants acted recklessly in consciously disregarding the known risk.
4. The defendant’s actions or inactions “shock the conscience.”

According to Roher, the courts apply this test “stringently,” so that the acts of violence on which the claim is based must approach the standard of “inhumane.” This stringent test has not stopped parents from filing civil lawsuits against school boards, alleging negligence in failure to protect their children from bullying. Many such claims are settled before they proceed to trial.

In May 2004, an Alberta family filed a claim against Calgary school officials, claiming that the school was aware that their son had been repeatedly victimized by a bully, and did nothing to ensure his safety. The bullying culminated in an attack that resulted in serious injuries to the student.

In another case, a family in Kilbride, Ontario, wanted more than just money in reparation for the bullying their son suffered. They sued the Halton District School Board seeking $500,000 in damages, a public apology, and a commitment from the board to develop a systemic plan to combat bullying. The bullying against their son began in grade 4; it included stealing his belongings, throwing ice at him, and shooting him in the leg with a pellet gun. Through to high school, the physical violence continued, but the verbal and psychological violence expanded by means of the Internet, when several of his tormentors from school began posting hateful messages about him.

Some Canadian schools have turned to the criminal law to address the more heinous examples of bullying. Criminal liability may apply to cases involving assault (the application, or threat of application, of force), threats of death or bodily harm, and stalking (or criminal harassment). Roher notes that the criminal courts have indicated concerns about the perceived increase in bullying in schools. One of the issues that courts have struggled
with is the question of where schoolyard taunting crosses the line to become the criminal offence of harassment.

In *R. v. D.W.*, the BC Youth Court struggled with this very question. After a 14-year-old student committed suicide, a classmate was charged with three counts of threatening death or bodily harm and one count of criminal harassment. Two other classmates were also charged with uttering threats of death or bodily harm to the deceased student. In finding the first defendant guilty, the court noted that the charge of uttering threats of death or bodily harm does not require intent to carry out the threat, as long as there was an intention to intimidate. The defendant was sentenced to 18 months’ probation, including 20 hours of community service. Roher postulates that this decision is an important one because it involved no physical violence, as do the vast majority of criminal convictions for bullying. The court in *R. v. D.W.* ruled that the threat to beat someone up might be sufficient to constitute a threat to commit bodily harm.

From the decisions discussed above, in particular *Jubran*, it appears that school boards and school administrators must implement programs to reduce and prevent bullying in schools. Indeed, many provincial governments have made public commitments to address the issue.

The Nova Scotia Task Force on Bullying recommended a four-pronged approach to the problems of bullying and cyberbulling:

1. anchoring change in law and policy;
2. implementing preventive interventions;
3. educating diverse audiences about the nature and the scope of the problem; and
4. establishing clear accountability lines.

Changes have been made to the legislative and policy framework in Nova Scotia, as has been the case in many provinces. These include holding accountable encouraging bystanders as well as the bullies themselves. Ontario has recognized that jurisdiction over cyberbullying extends beyond the school grounds and after school hours.

With respect to preventive interventions, the Nova Scotia Task Force sets out criteria for selecting effective and evidence-based interventions to reduce bullying and recommends that an anti-bullying coordinator be hired to oversee the responses to the problem. This coordinator has now been hired. The Nova Scotia Task Force also strongly endorses restorative approaches, especially ones that involve young people themselves. Peer responses—for example, the pink shirt initiative in Nova Scotia—have been most effective. The importance of youth engagement in responding to bullying is a major theme of the Nova Scotia Task Force.
Finally, it is vital to educate the diverse audience of students, parents, teachers, and the general public about both the scope and consequences of bullying and cyberbullying. The Nova Scotia Task Force recommends courses in digital citizenship, Internet safety, and related matters for students. There is also a need to educate parents about both technology and the world of social media. The Standing Senate Committee on Human Rights produced both an excellent report on cyberbullying and a practical guide for both students and parents on this topic.114

Eric Roher notes that although there is no single prescribed form for anti-bullying programs, the programs that appear to be most successful are those that apply a “whole school” approach, addressing bullying at the school, classroom, and individual levels.115 Roher suggests a number of steps to minimize the legal liability of schools when dealing with bullying and create a positive learning environment for children.116 First and foremost, he finds it essential that schools develop programs and policies that are both preventive and responsive. In other words, schools must be prepared to teach children about why bullying is wrong before the bullying occurs and must also be ready to address the behaviour after it happens, as it inevitably will. He suggests that early intervention strategies, such as conflict resolution programs, peer mediation, and restorative justice programs, are good examples of the proactive end of the spectrum.117 Responsively, schools should have plans for specific consequences and clear courses of action for teachers and administrators to follow. Peer involvement in responding to bullying, as stated above, is very important.

There have not yet been many successful negligence cases brought against teachers and school boards over bullying incidents. However, in the face of ever-rising public awareness, the courts are more likely to find a duty on the part of school administrators and staff to intervene in incidents of bullying. Bullying is a reasonably foreseeable occurrence in today’s school culture.118 The growth of cyberbullying poses new challenges for schools and the courts, particularly with respect to the limits of a school’s jurisdiction in addressing behaviour that occurs outside the school setting. It is also a problem with significant human rights dimensions.

Concluding Thoughts on Schools as Guardians of Equality

Equality is one of the defining principles of inclusive schools. Although truly inclusive schools are difficult to achieve, much progress has been made in Canada over the last few decades. In charting the course toward schools that
embrace and celebrate diversity, the principles of equality enshrined in the Charter and human rights codes serve as a lighthouse to guide school authorities. Educators and lawyers need to work together to produce better environments in which students can learn that are safe and, as much as possible, free from discrimination.119

NOTES


2 A.W. MacKay, Education Law in Canada (Toronto: Emond Montgomery, 1984), at 37-41.

3 See, for example, Ministerial Education Act Regulations, N.S. Reg. 80/97, as amended by N.S. Reg. 157/2005, ss. 53-61.


7 See Bonnie Cudmore v. Province of New Brunswick Department of Education and School District 2, Human Rights Board of Inquiry, file no. HR-003-01 (2004); affirmed 2005 NBQB 90.


10 British Columbia (Ministry of Education) v. Moore, 2008 BCSC 264.


12 Ibid., at para. 171.

13 Ibid., at para. 131.


15 Ibid., at para. 5 (emphasis in original).

16 Ibid., at paras. 28 and 30.

17 Ibid., at para. 33.

18 Ibid., at paras. 41-42.

19 Ibid., at para. 42.

20 Ibid., at paras. 43-44.

21 Ibid., at para. 49.

22 Ibid., at para. 52 (emphasis in original).

23 Ibid., at para. 54.

24 Ibid., at para. 56.

25 Ibid., at para. 57.


36 For further discussion on this topic, see E.M. Roher and A.F. Brown, “Special Education and Student Discipline” (2002), vol. 14, no. 1 Education & Law Journal 51.

37 See Angle v. LaPierre, 2008 ABCA 120, 2008 CarswellAlta 393 (Alta. C.A.), dismissing an appeal of the lower court’s finding of defamation against a number of parents for their publications, which the court found constituted personal attacks against a school principal and teachers. R. Keel and N. Tymochenko, in An Educator’s Guide to Parental Harassment (Aurora, ON: Canada Law Book, 2004), explore the line between legitimate child advocacy and harassment.


39 Bales, supra note 4.


41 Lanark, Leeds Roman Catholic School Bd. v. Ontario Human Rights Comm. (1989), 57 D.L.R. (4th) 479 (Ont. CA). See also Robb v. St. Margaret’s School, 2003 BCHRT 4, 2003 CarswellBC 3500 (BCHRT), in which the tribunal found the school had discriminated against the child when they withheld re-enrollment forms between grades 3 and 4, because of her severe learning disability.
46 Supra notes 9 to 14.
52 Supra note 14.
55 Bettencourt, ibid.
56 Ibid., at 16. See also McNabb (Litigation Guardian of) v. Ontario, 2005 CarswellOnt 99 (S.C.J.), which was decided at the same time as Bettencourt, in which an injunction ordering the reinstatement of IBI treatment pending trial was ordered.
58 Sagharian (Guardian ad litem of) v. Ontario (Minister of Education), [2008] ONCA 411, 2008 CarswellOnt 2888 (C.A.), leave to appeal refused by the Supreme Court of Canada 256 O.A.C. 398 (note)
61 Ibid., at para. 59.
63 Wynberg v. Ontario, supra note 49 at 665.
64 In Ontario, the Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11, received royal assent on July 14, 2005. The new Act requires that the government work with the disabled community and the public and private sectors to establish standards for accessibility, and requires the development of committees to create these accessibility standards. However, the new Act does not require the implementation of these new standards until 2025.
65 See McKay, supra note 62.

Moore, supra note 14.


Fourteen-year-old Reena Virk was savagely beaten by a group of teenagers and drowned by two of her original attackers in November 1997 in Vancouver, British Columbia. Six teenage girls were convicted of assault causing bodily harm for their roles in the initial attack. Two other teenagers, Warren Paul Glowatski and Kelly Ellard, were convicted of second degree murder for their roles in Virk’s death.


Ibid.

Ibid.


See also B. Sokhansanj, “Our Father Who Art in the Classroom: Exploring a Charter Challenge to Prayer in Public Schools” (1992), 56 Saskatchewan Law Review 47.

See the Supreme Court of Canada’s decision regarding the right of a Sikh student to wear a ceremonial dagger (the kirpan) to school: Multani v.Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256. See also W.H. Harris and A. Ackah, “Freedom of Religion and Accommodating Religious Dress in Schools” (2011), 20 Education & Law Journal 211.

Nurturing the Learning Spirit of First Nations Students: The Report of the National Panel on First Nation Elementary and Secondary Education for Students on Reserve (February 2012). This panel was created by the federal government of Canada and chaired by Scott Haldane, CEO of the Y.M.C.A. in Canada. The importance of education to an improved relationship with First Nations is also emphasized in the earlier Royal Commission Report on Aboriginal Peoples. Further information about the report of
this commission can be viewed online, http://www.aadnc-aandc.gc.ca/eng/1307458586
498/1307458751962.

85 The Report of the Bouchard-Taylor Commission of Reasonable Accommodation of
Minorities can be viewed online, http://accommodements-quebec.ca/documentation/

affirmed 2005 BCCA 201.

87 Board of School Trustees of School District No. 44 (North Vancouver) v. Jubran, 2005
CarswellBC 2475.

88 S. MacDonald, “Acknowledging the Rainbow: The Need for the Legitimization of
Lesbian, Gay, Bisexual, and Transgender Youth in Canadian Schools,” (2006) 16
Education & Law Journal 183.


91 A.W. MacKay, Q.C., Chair, Respectful and Responsible Relationships: There’s No App for
That, The Report of the Nova Scotia Task Force on Bullying and Cyberbullying,
February 29, 2012, Recommendation 23, at 47.


93 J. McKinlay, R.J. Konopasky, A. Konopasky, A.W. MacKay, and T. Barrett, “Bullying
Finding Schools Liable Changes Everything,” in R. Flynn, ed., Rights and Reason:
Shifting Tides in Education (Proceedings of the 22nd Annual Conference of CAPSLE,
St. Johns’ Newfoundland) (Toronto: CAPSLE, 2012), at 129. This article also suggests
that “bullying” may be too soft a term for what is really a much harsher phenomenon
involving assaults, threats, intimidation, and harassment.

94 Supra note 91 at 42-43.

95 Ibid. at 43.

96 D. Pepler and W. Craig, “What Should We Do About Bullying: Research into Practice”
(1999), Peacebuilder 2, 9-10.

97 Ibid.

98 E. Roher, “When Push Comes to Shove: Bullying and Legal Liability in Schools”
(2002-3), vol. 12, no 1 Education & Law Journal 319, at 325. See also E. Roher, An

99 Supra note 96.

100 As Jubran, supra note 86, indicates, issues of bullying may also be pursued from a
human rights perspective.

101 Education Act, R.S.O. 1990, c. E.2, s. 264(1)(e).

102 Supra note 86.


104 Ibid.

105 Calgary Sun, May 14, 2004, as cited in Roher, “When Push Comes to Shove,” supra note
98, at 323.

106 Ottawa Citizen, March 21, 2005, as cited in Roher, “When Push Comes to Shove,”
supra note 98, at 321.


110 Supra note 86.
111 Supra note 91, chapters 4-7.
116 Ibid., at 344.
118 S. Findlay, “Bullying Victims Are Taking Schools to Court,” MacLeans Magazine, September 14, 2011.