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The Equality Provisions of the *Charter* and Education: A Structural Analysis

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A legal opinion about how s. 15 of the Canadian *Charter* affects education is developed from texts and existing cases under the *Charter* and from foreign experience that may be parallel. It is argued that non-discrimination will be an almost absolute protection in only some areas (like sex and race) but weaker in others. Equal opportunity will require judicial enforcement and perhaps additional resources from senior levels of government. Equal outcomes will depend upon people being similarly situated, but this is the broadest approach to equality. Speculations on the probable limits of the courts as providers of remedies are balanced against the possible new opportunities for equality implicit in the *Charter*.

Selon l'auteur, la non-discrimination ne constitue une protection quasi-absolue que dans quelques domaines (comme le sexe et la race), alors que c'est un facteur beaucoup moins important dans d'autres. On devra établir des systèmes répressifs et peut-être exiger des ressources supplémentaires des niveaux supérieurs du gouvernement avant de pouvoir assurer une chance égale à tous. On pourra juger du succès de nos entreprises d'après la similitude des situations des gens, mais c'est là une optique des plus généralistes. On met en lumière les limites probables des tribunaux en tant qu'organes répressifs, par rapport aux nouvelles possibilités implicites dans la Charte au niveau de l'égalité des chances.

INTRODUCTION

The equality provisions of the *Charter of Rights* may have more impact on education than all the other provisions of the *Charter* combined. Whether this prediction becomes a reality will depend very heavily upon what the judges do with the open-ended language of s. 15 and the related equality provisions such as s. 27 and 28. If American experience such as *Brown v. Board of Education* (1954) provides any guidance, the legal guarantee of equality provides a window whereby lawyers and judges will enter the world of educational policy making. Prior to the *Charter*, this policy-making arena was the private preserve of the educators.

Educators are understandably reluctant to have lawyers too heavily involved in shaping education in Canada and thus regard the *Charter*

generally, and the equality provisions in particular, with considerable alarm. The judicializing of education is a mixed blessing which will encompass both benefits and burdens for educators. MacKay (1985b) has identified a basic tension between lawyers and educational administrators.

Even a casual perusal of s.15 suggests a host of possible challenges to the existing education system. School boards discriminate on the basis of age at both the lower and upper limits for education. Sex discrimination in respect to school athletics programs is still widely practiced. There are many forms of discrimination in respect to teachers. The purpose of this article will not be to examine these specific school applications of equality but rather to address some of the broader problems implicit in applying *Charter* equality in the educational context.

Among the most basic questions which underlie any discussion of the *Charter* are whether it will enhance or hinder the development of Canadian education and whether we really want more legal involvement in education. These basic questions should be kept in mind as we explore the more specific question of what the equality provisions of the *Charter* may mean for education. Of these more specific questions perhaps the most important one is the definition of equality.

DEFINITIONS OF EQUALITY

The simple reality is that there is not going to be any one theory of equality either among judges or among Canadians generally. That is going to bedevil judges as they try to give meaning to s.15.

It is important to note that the heading for s.15 is "Equality Rights," which is a broader concept than simple non-discrimination. At an earlier state of *Charter* making, the title for this section was "Non-discrimination Rights," but it was dropped in favour of the equality label. According to Justice Estey (1984), speaking for the Supreme Court of Canada in *Law Society of Upper Canada v. Skapinker*, the headings of the various *Charter* provisions should be used in interpreting the sections which come under them. Thus the touchstone is equality and not just non-discrimination.

In broad terms there are three major ways of defining equality in s.15: non-discrimination, equal opportunity, and equal outcomes. Although I do not think that s.15 can be interpreted as just a non-discrimination clause, it is clearly a general prohibition against discrimination which, in particular, bans discriminations on specified grounds.

However, must the prohibited discrimination be intentional or is it enough that the impact or result be *de facto* discrimination? The Supreme Court of Canada departed from the American practice when it recently

decided that proof of intent to discriminate was not vital in respect to provincial human rights codes (*Bhinder and Simpsons Sears*, 1985).

Another perplexing problem is whether there must be an adverse impact to the discrimination or whether different treatment is in and of itself a *prima facie* violation of equality. Lepofsky (1984) speculates about the impact of the equality provisions on the disabled, emphasizing that simple discrimination is not a problem but rather discrimination between individuals or groups who are "similarly situated." If two people are not similarly situated, then differential treatment may be necessary to ensure equality of opportunity. If a student who is blind is treated in exactly the same way as one who can see, the result will be inequality. A school board which offers the exact same services to a disabled child as to the other regular-stream students is in reality discriminating against the child with the disability.

In giving shape to the equality provisions of the *Charter*, judges will have difficulty deciding which individuals and groups are similarly situated. Are mentally handicapped children in Prince Edward Island similarly situated to mentally handicapped children in British Columbia? If the answer is yes, then both groups of children are arguably entitled to an equal level of educational services. Does the fact that the education budget in Prince Edward Island is smaller than that in British Columbia mean that they are not similarly situated? I do not think it does. However, the ability of an educational agency (such as a school board) to provide the services implicit in the *Charter's* requirement for equality will be a factor in considering what limitations on equality are reasonable within the meaning of s.1 of the *Charter*. Administrative inconvenience or cost do not in themselves amount to a defence of "reasonable limits," but they are factors which the courts will consider (*Singh v. MEI*, 1985). Reasonable limits under the *Charter* will be discussed later. There are complex problems involved in even the simplest non-discrimination approach to defining equality.

In addition to non-discrimination, there is broad support for the view that s.15 guarantees equality of opportunity to all Canadians (Lepofsky, 1984). This view of equality could involve the courts in a positive as well as negative role in upholding the *Charter* – that is, judges could mandate programs in order to produce real equality of opportunity.¹ A more traditional and negative role for courts would prevent various branches of government from infringing upon equal opportunity. Many American cases guarantee equality of laws and not necessarily equality of results; others take note of the "disparate impact" of facially neutral laws. A simple removal of express government barriers to equal opportunity will not allow disadvantaged people to achieve real equality. The fact that the

government does not enact laws which directly hamper a disabled child is of little consequence if that government does not require that school facilities be physically accessible to such a child.

True equality of opportunity cannot be achieved simply because the state does not discriminate. While the *Charter* does act in a negative sense by limiting what the state can do, it may also impose positive duties on the state to promote equal opportunity. At a minimum, the state must avoid enacting laws which are based on stereotypical assumptions. If a new gym were built in a school and no provision made for access by the physically disabled, there are two senses in which such action could be held to violate the equality required under the *Charter*: school authorities assumed that physically disabled students could not use such a facility or they failed to consider this group of people at all. The first is an inaccurate stereotype, and the second demonstrates a lack of consideration for those outside the mainstream. In summary, Lepofsky's *equal opportunity* definition of equality (1984) proposed the following on the part of the state: non-discrimination, avoidance of laws or programs based on stereotypes, and equal consideration when rights are extended by the state.

Finally, the broadest (and I would argue most desirable) interpretation of equality is one which calls for *equal outcomes*. This theory will focus attention on the actual impact and results of legal and governmental policies. Cases arguing from this definition would require empirical data to assess whether particular laws and policies have a disparate impact on particular groups or individuals in society. Judges would be involved in mandating positive programs to promote equal outcomes. This theory would produce the greatest expansion of the policy-making role of judges in Canadian society. It appears to me that this theory would best fulfill the "purposive" interpretation of the *Charter* advocated by Chief Justice Dickson in *Southam v. Hunter* (1984).

This result-oriented definition is the broadest because it requires an assessment of the real problems of inequality and systemic discrimination. It involves an empirical assessment of the actual dimensions of inequality in Canadian society. This was the approach adopted by the *Charter of Rights* Education Fund (1985) in respect to gender discrimination in Ontario.

Discrimination can be subtle; it can be an unconscious or unintended by-product of otherwise beneficial legislation. ... The discrimination may be expressly set out in the wording of the statute; it may be implicit rather than overtly stated. Discrimination may result from the application of seemingly neutral provisions; even failure to legislate in a particular area may have a disparate impact.

It is not enough to parse the language of s.15 of the *Charter* or to

scrutinize the wording of the relevant legislation in the various provinces. This was the rather simplistic approach adopted by the various provincial agencies which conducted a statute audit during the three-year delay period for s.15. Even these reviews which focus on blatant statutory discrimination were performed unevenly in different parts of the country. The results of these audits as they pertain to education have been summarized in Manley-Casimir and Sussel (in press).

Read in an expansive way and in conjunction with related provisions such as the guarantee of multi-culturalism in s.27, equality under the *Charter* may mandate state-funded diversity of education rather than homogeneity. Schmeiser (1985) argues that equality could mean access to education in different languages and in different religious contexts. He also argues that it is a logical result of s.15 and s.27 of the *Charter* that private and religiously based schools should receive public funding. The result would be the provision of diversified educational opportunities at public expense. Judges are likely to be slow to adopt such extravagant definitions of equality.

Defining equality will be a major challenge for judges. In some cases, the concepts of equality and non-discrimination may even be in conflict. This is in part recognized by the approval of affirmative action programs in s.15(2). Equality may mean different rather than similar treatment in many situations. Simplistic notions about equality, such as gender neutrality, will not meet the spirit of s.15 of the *Charter*. Furthermore, acceptable definitions of equality will change over time. There are difficult but challenging days ahead for judges and educators in giving content to the concept of equality.

THE EQUALITY PROVISION: S.15

Equality Rights

- 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.

There are four phrases in s.15 that all add slightly different elements to the equality concept. In fact, anybody outside Canada would think that Canadian draughtsmen stutter because we have equality before the law, under the law, equal protection of the law, and equal benefit of the law.

Most Americans would ask "Why did you say the same things four times?" They are all rather different, and the difference may go to an affirmative role for courts. *Equality before the law* is simply the 1960 *Bill of Rights* language which, in the rather narrow rulings of the *Lavell v. Attorney General of Canada* (1974) and *Bliss v. Attorney General of Canada* (1979) cases in the Supreme Court, gives us equal administration of the law before the ordinary courts. I think the predominant interpretation after Lavell and Bliss is that equality did not guarantee equal content of the law but, whatever the law's content, equal application before all Canadian courts.

The Lavell case raises the issue of sex discrimination under the Indian Act. A provision of the Act penalizes an Indian woman who marries a non-Indian by removing her status as a Canadian Indian. This loss of status is also applied to her children. One result of this loss of status is that the family may be forced to leave the Indian reserve. No similar penalty is applied to male Indians who marry non-Indian women. These men retain their status and the whole family can live on the reserve. To the surprise of many and the frustration of Indian women, the Supreme Court of Canada concluded that this situation under the Indian Act did not constitute sex discrimination. In reaching this conclusion, the court adopted a narrow definition of equality under the law.

In the later Bliss case, the Supreme Court of Canada again raised the ire of Canadian women. Bliss made a claim for unemployment insurance benefits but was ruled ineligible because the rules for pregnant women were stricter than those for the rest of the public. She argued her case all the way to the highest court of the land, claiming hers to be a classic case of sex discrimination. In rejecting her claim, the Supreme Court made two important findings. Any discrimination was on the basis of pregnancy, not sex, and thus not prohibited, and the *Bill of Rights* only mandated equality in respect to penalties, not benefits. What was at stake in the Bliss case was benefits.

The various groups who designed s.15 tried to word it to avoid the narrow interpretations typically found under the *Bill of Rights*. S.15 was not developed by legislators from some Tibetan mountain meditating on the words of the *Charter*. The *Charter* was politically negotiated in the sense that most of the rights listed in s.15 are there because well-organized and articulate groups convinced the Joint House and Senate Committee on the Constitution that their group should be added to the protected list – whether it be the mentally disabled or women. S.15 rights were essentially lobbied into the *Charter* (Romanow, 1982).

Equality under the law, which was negotiated into s.15 by a very effective and articulate women's lobby, was intended to permit challenges not just to the application of the law but to the content of the law as well. In other

words, equality "under the law" had the effect of repealing the Lavell decision. Now the judges have a mandate to talk about not only equal application of the law but also whether the content of the law itself is equal. It is very clear from the transcripts of the Joint House and Senate Committee on the Constitution that you can question the actions of legislators and not just those of bureaucrats and administrators. This extension in itself projects judges into a more active role with respect to the legislatures.

The third version of equality speaks of *equal protection of the law*. It is obviously significant that this is exactly the wording used in the American 14th Amendment, and judges will use this phrase to bring in some American case law on equality. This American case law is much more extensive and more affirmative than is the Canadian *Bill of Rights* jurisprudence. While judges will continue to draw upon the wealth of the American experience, they also will be mindful of the unique Canadian situation. For example, in the United States, the 14th Amendment has been used primarily in relation to racial discrimination, but it is likely that discrimination based on sex, disability, or language will have a higher profile in Canada.

The final formulation of equality in s.15 may be the broadest of the four. *Equal benefit of the law* had the effect of repealing the Bliss decision which had denied unemployment insurance benefits to women when that decision was made on the grounds of pregnancy and not of sex. Bliss was a different case from *R. v. Drybones* (1970) because the latter concerned penalties. In *Drybones*, the court held that equality before the law means that nobody is to be unequally penalized under the law, while in Bliss it held that it is acceptable to distribute benefits under the law unequally. This distinction made it possible under the *Bill of Rights* to distinguish penalties from benefits and to forbid discrimination only in the case of penalties. S.15 forbids discrimination in either case. This extension to benefits can have important consequences for educators. Not only must male and female students be disciplined in an equal fashion but they must share equally in the distribution of benefits. An argument could be made that schools must spend as much on women's athletic programs as they do on those for men.

A rather perverse benefits argument might be that students in the regular-stream classes have a right to as large a claim on the state's education resources as those students suffering from a physical or mental disability. The problem is that it usually costs more to educate a disabled student than one in the regular stream. Is this a case of *Charter* inequality? On the surface, financial benefits are being unequally distributed, but that is not the end of the matter. In my opinion, this is not a true situation

of inequality because the two groups are not “similarly situated.” On either an equal opportunity or a results definition of equality, there is no violation of s.15.

S.15 fits the rest of the *Charter* because it is a classic Canadian compromise with a little bit of British, a little American, and some domestic ideas combined for equality rights. The Supreme Court has made it clear in its first few cases under the *Charter* that there will be a new departure. It has rejected the narrow approach of the *Bill of Rights* as a guide to the constitutional *Charter of Rights*. At least at the highest judicial levels, we have escaped the past.

LISTED AND UNLISTED GROUNDS OF DISCRIMINATION

In addition to the various formulations of equality in s.15 of the *Charter*, there is also a general prohibition against discrimination. The general rule is that there shall be no discrimination, but the drafters then listed particular kinds of discrimination which are offensive: race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Many people assume that this is a complete list of offensive grounds for discrimination. This is not correct. The section states that there shall be no discrimination and “in particular” no discrimination based on the listed grounds. By the use of the phrase “in particular,” the drafters indicate that there must be other unlisted grounds.

If the *Charter* is designed to promote respect for minority views and to improve the lot of those who are disadvantaged in Canadian society, it is easy to think of kinds of disadvantage that could lead to discriminations in addition to those that are expressly listed in s.15, although Samek (1982) and MacDonald (1982) caution against such lofty interpretations of the wording. The following list gives some examples of possible unlisted grounds for claiming discrimination: marital status, sexual preference, region, culture, language – other than official language, which is covered in s.23 (*Mahe v. the Queen*, 1985), economics, and province.

This list is by no means complete and can be expanded as social conditions change. What amounts to a condition of disadvantage changes over time. Even the grounds suggested above illustrate the broad sweep of s.15 in the educational sphere and elsewhere. Discriminations on the basis of marital status or sexual preference can arise with respect to either students or teachers. It is normal to provide different levels of service from province to province or region to region. Failure to provide educational services or to publicly fund private school services (in particular, for heritage languages or a particular cultural group) may also be seen as discrimination. The potential discriminations on the basis of

economics are too numerous to mention but placement of low-income students in vocational classes could be one example. S.15 will touch most levels of educational decision-making.

REASONABLE LIMITS AND LEVELS OF SCRUTINY

In the United States, some forms of discrimination have been regarded with greater suspicion than others. The degree of scrutiny to which a law or program is subjected by the courts depends upon the ground of discrimination. Race is an automatically suspect ground of discrimination, and any law or policy that discriminates on the basis of race will be subjected to the strictest scrutiny by the courts. In theory, the legislators can save their law by showing a compelling state interest necessitating the discrimination, but in all but the most extreme cases – such as the detention and expulsion of Japanese Americans during World War II (*Korematsu v. United States*, 1944) – strict scrutiny results in the law being invalidated as unconstitutional.

For discriminations which fall into an intermediate category, the courts engage in medium scrutiny of the offending law or policy. To defend a law against this level of scrutiny, the state must show a *substantial* state interest, a requirement more easily met than that of showing a *compelling* state interest. In the American setting, sex discrimination has been regarded as falling within this intermediate category. It is thus easier to defend American laws which discriminate on the basis of sex than on the basis of race. This may prove to be in contrast to the Canadian position.

Finally, certain grounds of discrimination attract only minimal scrutiny from the courts. Economic discriminations would fall within this lowest category in the United States. In this situation, the burden of proof shifts to the person alleging the violation of equality to show that *no valid purpose* is achieved by the discrimination. This is a very difficult burden to discharge, and most laws survive the minimal scrutiny test. Tarnopolsky (1982) discusses this hierarchy of discriminations in the United States. Lepofsky (1984) doubts there is such a hierarchy in Canada and claims all challenges are equally worthy. However, if we accept the Tarnopolsky claim, whether a Canadian law or policy survives a *Charter* challenge may depend upon the kind of discrimination involved. Differential treatment based upon age or disability may be easier to defend than that based on race or sex.

Two questions arise from the idea of a hierarchy of discriminations: What will be the ranking of discrimination grounds under the Canadian *Charter*, and how will the American levels of scrutiny be fitted into the different structure of the Canadian *Charter*?

I would predict that sex discrimination will be the top category – producing the highest level of judicial scrutiny – mainly because one of the listed grounds in s.15 is sex discrimination but in addition because s.28 says that all persons will have equal application of the *Charter of Rights* regardless of whether they are male or female.

The special protection against sex discrimination is also a good illustration of the *Charter* as a political document. S.28 was drafted in response to an effective women's lobby without any real consideration of its impact on the rest of the sections in the *Charter*. The original accord (November 1981) did not include rights for women or native rights. Both of these were added in that short period after the original accord and before the Joint House and Senate resolution was sent to London. Thus, the drafting had to be conducted rather quickly. One result of the last minute lobbying was s.28 which is an additional protection against sex discrimination and one that is beyond the legislative override of s.33 (by which either the provinces or the federal government can, by a clear legislative enactment, pass legislation notwithstanding the protections of the *Charter*). S.15 is one section that could be thus escaped, but it is clear that s.28 cannot similarly be set aside, so this is another sense in which sex discrimination falls within a unique category. Indeed, the term “notwithstanding” at the beginning of s.28 may even set aside s.1, making the prohibition against sex discrimination absolute.

There will also be a hierarchy within the other listed grounds, and I suspect that race would be next to sex as a protected category. Age discrimination will probably be the easiest listed right to justify. Age discriminations can be justified for driving a car, going into a tavern, or perhaps beginning school. Although rules which set a maximum school age may also be challenged, the courts are likely to accept some cut-off point. All of these examples can be justified, whereas race and sex discrimination cannot. Indeed, Lepofsky (1984) argues that you would not even have to go to a s.1 justification to defend the above mentioned laws because there is no discrimination between similarly situated groups.

It is important to note the possible ranking of discriminations based upon mental or physical disability. These grounds have broad implications for educators as they will affect both access to special education services and possibly the means by which such services are provided. Whether there is a right to education generally and special education in particular is a question that I have explored elsewhere (MacKay, 1984a; 1984b; 1985a). At least one early case has accepted a right to education as part of s.7 of the *Charter* (*R. v. Kind*, 1984). Assuming for a moment that there is a right to education, s.15 makes it clear that it must be provided without discriminations based upon either physical or mental disabilities.

Is this a case where it is easy to think of reasonable discriminations? Hogg (1982) asserts that, unlike the other listed grounds, neither age nor disability are inherently suspect grounds of discrimination. It is interesting to note that both age and physical or mental disability were added as a result of submissions made to the Joint House and Senate Committee on the Constitution and were not a part of the list included in the original draft. Lepofsky (1984) argues that justifications for unequal treatment of the disabled are often based upon inaccurate stereotypes and underestimations of what disabled people can do, and that all listed grounds should receive similar levels of scrutiny.

The final category in the grounds for discrimination will be the unlisted grounds referred to earlier. Laws or policies which discriminate on one of these unlisted grounds will likely be subjected to minimal scrutiny and in most cases they will pass the challenge of the *Charter*. Thus, education laws or policies that involve sex discrimination will be much more difficult to justify than ones that discriminate on the bases of province, region, or economic differences. While educators will need to be prepared to defend any discrimination, some such actions may require compelling evidence that the discrimination is essential while others may only require evidence that some useful purpose is served.

One interesting challenge on the basis of unequal distribution of educational funds in the United States was *San Antonio Independent School District v. Rodriguez* (1973) in which a group of parents challenged the school finance system on the basis that children in poor districts were not given the same opportunity as those in wealthier ones. The parents lost; the system of school financing survived the constitutional challenge. This was in part due to the only minimal judicial scrutiny of economic discriminations in the United States. If Canada adopts a similar approach, then attacks upon how a school board allocates its funds will be difficult to sustain. However, if the funds are distributed so as to violate one of the listed grounds, the school authority may be in greater difficulty. For example, unequal distribution of funds for special education services between regions of a province may also be a violation on the basis of disability and thus harder to defend.

Turning to the second question that arises from reference to the American experience, where should the different levels of scrutiny be considered in the Canadian *Charter*? Unlike the American Constitution, the Canadian *Charter* contains an express justification clause which reads as follows:

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

As a matter of judicial practice in the United States, limitations have been imposed on the individual rights guaranteed under her Constitution, but there is no express limitation clause. American judges have engaged in balancing of individual rights against larger societal interests such as the need for law and order. The levels of scrutiny discussed earlier are merely a refined form of this interest balancing.

Adjudication under the Canadian *Charter* can best be understood as a two-step process. First, is there a violation of equality in s.15 of the *Charter*? If the answer is yes and there appears to be some violation of equality or of a specific discrimination, then the second question arises. Is the limitation on equality one that can meet the test of reasonableness set out in s.1 of the *Charter*? It is the challenger of the law or program who must show that there is a violation of s.15 at the first stage, but this is often easy to do. At the second stage of justification, which is frequently more difficult, the burden of proof shifts to the state to "demonstrably justify" what appears to be discrimination (Dickson in *Southam v. Hunter*, 1984).

As to what limits are reasonable in a free and democratic society, judges take different approaches (e.g., *Quebec Protestant School Boards v. A. G. Quebec*, 1982). Furthermore, the phrase "prescribed by law" may mean that the limitation on rights must be in written form and accessible in some way (*Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, 1983). One aspect of s.1 which is quite clear is that the burden of justifying a *Charter* violation rests with the agents of the state. In the field of education, that means the departments of education, school boards, administrators, and teachers.

This two-stage analysis of the *Charter* will require the state to demonstrate "compelling state interests" and the various other standards in relation to s.1. Furthermore, it is going to make a difference where the right is in the hierarchy of s.15 rights: in sex discrimination cases, it will be difficult to use s.1; in non-enumerated discrimination cases, s.1 defences can be used more easily. In a strictly practical sense, that is the way I would see Canada using the American experience.

What kind of limitations on equality will be held reasonable by the courts? To put the matter another way, what kinds of laws are likely to withstand an equality challenge? It is far too early even to attempt to answer these questions, but adding to the educational budget or avoidance of administrative inconvenience are not per se excuses for limiting equality. If there are valid educational or financial reasons for discriminating, the educators will have to be ready to articulate them clearly for the judges.

Is it going to be a defence to say that we can not afford equality? Can the school boards plead financial limits as reasonable limits? What if the

school board, to use an earlier example, agrees in principle to have special education classes but cannot afford to hire special education teachers? There are a number of options open. One is to say that judges cannot force you to spend money that you do not have, but does the board spend a large sum on sports programs? There is nothing in the Constitution that protects sports programs, but there is a ban against discrimination against the disabled. Perhaps the board will have to cut sports programs to provide special education classes because the Constitution tells you that equality is a superior value to whatever is not in the Constitution. That is just one example of the extent to which courts can become educational policy-makers.

Another option left open to the legislatures (which also may act for their delegated agents such as boards) is the s.33 opt-out provision of the *Charter*. If the special education case goes all the way to the Supreme Court and sports are ruled out to ensure special education, then that particular province can still amend the Education Act, stipulating that notwithstanding the *Charter of Rights* educational policy in this province for five years at least will not provide special education classes in the relevant school district. One would hope that such an opt-out would be politically unpopular, but in real political terms there may be more parents who want sports programs than parents who want special education classes.

APPLICATION OF THE CHARTER: PUBLIC AND PRIVATE ACTION

One should emphasize that the general sections of the *Charter* all apply to s.15 as they do to the other sections. The above example indicated the possible application of the s.33 opt-out. Another interesting example is the application section (s.32). Does the *Charter* apply to the private as well as the public sphere? If not, how do you distinguish public and private action?

How extensive the impact of s.15 will be depends in part on whether the *Charter* and s.15 apply only to state actions or also to private actions. Swinton (1982) and Hogg (1982) reflect most of the early academic commentators and judges in suggesting that s.15 is likely to be applied only to state action for a host of reasons, one being that drafters and creators of the *Charter* clearly had government actions in mind. Second, the most literal interpretation of s.32 is that it applies to the legislatures and the governments of both the federal and provincial levels but, by implication, not to the private sector.

However, Gibson (1982; 1983), supported by *R. v. G. B.* (1983) and *R. v. Lerke* (1984), argues that the *Charter* applies to private action. Gibson

advocates a broad application on the basis that it is not possible to divide the public and private spheres any more and there is no point trying to do so. Another compelling argument in relation to s.15 is that, if equality in s.15 means not only that judges can tell people what they cannot do but also that they can mandate people to do things, then it makes little sense to stop at the public sector. For example, judges could require provincial legislatures to add to the various human rights codes grounds of discrimination equivalent to those found in s.15 of the *Charter* if the duty under s.15 is a positive one. For example, some provinces do not have protection for discrimination based on mental disability; since mental disability now is in s.15, a case could be brought on behalf of someone excluded because of mental disability that the judge's duty under s.15 is to require the legislature to add a ground to the *Human Rights Code* to cover this person's situation. That is a potential interpretation, given a positive approach to equality.

If judges take that broad an approach, then I think they indirectly invade the private sector. By mandating the public sector and adding grounds to the *Human Rights Code*, one would be affecting the private sector too. There are many other possible examples, such as a judge ordering a school board in a particular region of the province to create a special education class so that disabled students in that area would have equal benefit of the law. Then a private school might be required to offer the same special education services. If the courts take an expansive and positive approach to the promotion of equality, the impact on the private as well as the public sector will be greater.

There are also significant problems in deciding how far down the chain of command the *Charter* applies. Certainly the Cabinet, ministers of education, school boards, administrators, and teachers in a public school system are acting as agents of the state. Thus they are bound by the *Charter* in the conduct of their affairs. While there may be some rare occasions during which school authorities act in a private capacity under the doctrine of *in loco parentis*, they generally derive their authority from statute and act as agents of the state. Parents who act as private individuals are likely to escape the restrictions of the *Charter*.

Universities and private schools pose more difficult questions about the application of the *Charter*. In defining state action, Swinton (1982) notes that we are likely to borrow from the American experience which suggests two major tests: what the links are between the agency and the state and whether the agency is performing a public or governmental function.

On the first test, the courts look at such things as whether the agency is created by statute, exercises statutory powers, or is publicly funded. The degree of funding and the actual amount of state control are often crucial

considerations. On this analysis, some universities and private schools might be considered as falling within the *Charter's* jurisdiction. Whether a particular agency is an emanation of the state is a factual determination made on a case by case basis.

The second test has even broader implications because essentially private bodies may be involved in performing a public function. Indeed, the provision of education (whether in a public or a private school) might well be seen as an important state function. If one adds to this some degree of state financing, the case for the application of the *Charter* is even stronger. The precise nature of each institution must be examined, and the factual details will determine the outcome.

In the United States, courts have not been inclined to extend the Constitution to private schools, but they have often applied it to the universities (Millington, 1979). The United States Supreme Court (*Rendall-Baker v. Kohn*, 1982) held that a privately owned and operated school for hard-to-educate youngsters was outside the doctrine of state action. Thus the *Bill of Rights* did not apply. Similarly, a private nursing home was not held to be an emanation of the state (*Blum v. Yaretsky*, 1982).

If the *Charter* is held to apply only to the state and not private actions, which is the likely conclusion, there are still problems in defining the state. The American experience suggests that universities are more likely to be caught by the *Charter* than are private schools. It will, however, be a factual determination in each particular case.

REMEDIES FOR INEQUALITY

There are two remedial provisions related to *Charter* violations. The first relates not just to the *Charter* but to all parts of the Canadian constitution and is contained in s.52 of the Constitution Act, 1982.

- 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This provision allows challenges to statutes, regulations, and possibly even policy statements as being in whole or in part contrary to the *Charter*.

A second remedial provision is found in s.24 of the *Charter* and relates specifically to violations of rights.

- 24.(1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstance.

Remedies under s.24 are quite open-ended. Even s.52 of the Constitution Act, 1982 can be sweeping. So long as the challenged law is in conflict with the Constitution, then the law is struck down and is of no force or effect. The combined effect of these remedial provisions is to give judges a potentially expansive role in shaping Canadian society.

An interesting example is special education. One could argue under the equality section of the *Charter* that special education classes have to be equally available throughout the province and that this is not the case. Could you then argue that this violates s.15, which forbids discrimination based on handicap? If the court were to conclude that offering different levels of services depending on residence in, say, Halifax or Mount Thom is a violation, then I think it would be open to the court under s.24 to go to the offending school boards and require them to provide special education classes.

Other examples of bold judicial approaches could be the ordering of equal funding to schools of different religious denominations and the mandating of affirmative action for women in school administration. Systemic discrimination will continue in spite of laws or policies which are neutral on their face. In order to deal with pervasive institutional discrimination, the focus must be on outcomes rather than motives. Laws often have a disparate impact on groups even without overt intention of discrimination.

It is unlikely that judges will be so adventurous and ready to invade actual school administration. The Canadian tradition is one not of judicial activism but rather of deference to the administrators. This point can best be highlighted by quoting two passages from *Mahe v. The Queen* (1985).

Compliance with the *Charter* cannot be achieved instantaneously and as long as reasonable progress is being made, the court should not interfere. ... The courts should not become involved with preparing or drafting methods of achieving the required objective. The courts have attempted to provide guidance by interpreting the *Charter*, but must not interfere by decreeing methods or becoming involved in ongoing supervision or administration. It should restrict its function to recognizing and declaring a denial of rights created or recognized by the *Charter*.

Another example of Canadian judicial caution is provided by the British Columbia Supreme Court in *Weinstein v. Minister of Education for B.C.* (1985). When a school board approved a budget in excess of the provincial limit, the members of the board were removed from office by an order-in-council. Five of the former trustees challenged the order as a violation of their equality rights and those of the citizens of Vancouver. In response to the claim by the trustees, the court ruled that remedies were

not available to a statutory body or its members but only to persons or individuals. The trustees had no standing to raise an equality claim. While it was not an equality claim, a broader approach was followed in the case of *Operation Dismantle Inc. v. R.* (1985). The claim on behalf of the citizens of Vancouver also failed because the court ruled that they were not similarly situated to the citizens served by other school boards. From this it concluded that there was no violation of equality. Thus courts can limit the impact of equality by defining the rights narrowly or by limiting who can claim them.

It is safe to predict that judges will not revolutionize the education system. While the potential for innovative remedies is broad, the reality likely will be more conservative. Even if particular judges provide a bold ruling, it can be either appealed or over-ridden by the use of the s.33 opt-out provision of the *Charter*. This effectively gives the final word to the legislators, a situation which Weiler (1984) considers to be desirable. The judicial role has expanded but there will be no revolution.

CONCLUSION: PARTNERSHIP NOT CONFLICT

Given the breadth of the remedial provisions, judges will be called upon to exercise prudent discretion in their fashioning of remedies. They should be creative and not feel bound by pre-*Charter* practices but they should also avoid going too far. Gibson (1985) argues that the courts are critical actors in the new *Charter* drama. Nonetheless, we should not too quickly assume that Canada will abandon her traditional doctrines about the supremacy of parliament, the general *bona fides* of administrators, and the need for courts to be deferential. In Gibson's words:

... judges must be more than spectators at the Charter Rights Opera. Their active participation is essential to a successful performance. Usually they will sing in the chorus, or in duets with politicians. Occasionally they will have mere walk-on parts, carrying spears. From time to time, however, they must be prepared to sing solo.

The equality provisions signal an extension of the role that judges have already been performing under the other provisions of the *Charter* (Morton & Leslie, 1985). Moreover, the role of judges as policy makers predates the *Charter*: Chief Justice Dickson (1982) claimed that Canadian judges have always been "law developers" if not judicial legislators. It is the open-ended nature of s.15 which intrigues academics and intimidates most educators and some judges.

Lederman (1982) and Brun (1985) emphasize the need for all branches of government to enforce the equality mandated by the *Charter of Rights*.

The courts should not be seen as the enemy but rather as a new partner in the educational enterprise. If there is a danger of introducing too much legalism into education, the best way to avoid it is for educators to attempt to put their own houses in order. If school boards, school administrators, and teachers evolve a plan for implementing equality in the schools, the courts are less likely to interfere. The first step is for educators to become educated about the equality provisions of the *Charter* and their implications for school policy. It will be a long but interesting journey.

NOTE

- ¹ See T. A. Sussel and H. Manley-Casimir, "The Supreme Court of Canada as a 'National School Board': The *Charter* and Educational Change," in this volume.

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Der Autor glaubt, die Nichtdiskriminierungs-Vorschrift gewähre nur in manchen Bereichen (z.B. auf Grund des Geschlechts oder der Rasse) einen fast vollständigen Schutz, in anderen Bereichen sei sie jedoch weniger wirkungsvoll. Die chancengleichheit erfordert gerichtliche Durchsetzung und vielleicht auch zusätzliche Maßnahmen von seiten höherer Regierungsebenen. Gleiche Resultate lassen sich nur erzielen, wenn sich die Betroffenen in ähnlichen Situationen befinden, aber das ist eine Auffassung von der gleichheit im weitesten Sinne. Einer Spekulation über die den Gerichten womögliche gesetzten Grenzen muß man gegenübersetzen, daß die Charta neue Möglichkeiten der Gleichheit beinhaltet.

Según el autor solamente algunas áreas (tales como sexo y raza) estarán protegidas en forma absoluta contra la discriminación, mientras que otras lo serán menos. La igualdad de oportunidad deberá ser impuesta judicialmente, y tal vez también requerirá recursos adicionales de parte de los niveles superiores del gobierno. Resultados iguales dependerán de la igual situación de las gentes, pero esta idea constituye el punto de vista más amplio de la igualdad. Se pone de relieve las limitantes de las Cortes como órganos que aseguran la igualdad, en relación con las posibles nuevas oportunidades de igualdad implícitas en la Carta.

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