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The Lighthouse of Equality: A Guide to Inclusive Schooling

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have a right to expect a great deal from schools and the system that supports them. At the very least, they have the right to be educated in an environment free of discrimination on the basis of race, religion, disability, or other listed or analogous grounds. At best, students can aspire to a school system guided by a more expansionist view of equal educational opportunity, including the provision of positive rights to equality. This continuum of expectations begins with access to the school itself, continues through the medium of school programs and activities, and ends with students achieving the results that schooling is meant to bring about.

The *Charter* and the provincial human rights codes, as well as other legislation, provide normative guidelines for this purpose. The Supreme Court, as well as lower courts and quasi-judicial bodies, interpret these norms, thereby providing further guidance. Taken together, these decisions build a framework for equality rights in general and equal educational opportunity rights in particular. Like any useful policy framework, it must breathe life into abstract principles to guide policy and practice in real-life situations, while avoiding narrow constructs that distort rather than inform: 'Rigid formulas cannot capture the interpretive exercise that is at the heart of a determination as to whether equality rights have been violated.'¹³⁵ As foreseen in *Courts in the Classroom*, this framework provides a powerful driving force for the achievement of equality rights for all students.

Among other changes in policy and practice in schools, human rights education as foreseen by the *Convention on the Rights of the Child*,¹³⁶ will be a critical component in achieving equal educational opportunity.¹³⁷ At the end of the day, however, these rights will be achieved not by legislators or judges,¹³⁸ but by school principals, teachers, students and others in thousands of schools across the country. Their efforts will determine whether the United Nations' call for 'education for all'¹³⁹ becomes a reality or remains a slogan.

2 The Lighthouse of Equality: A Guide to 'Inclusive' Schooling*

WAYNE MACKAY

Inclusive schooling is now widely regarded as the most effective way to maximize the potential of all the students served by our schools. It has traditionally been associated with bringing disabled students into the regular classrooms but I use the term in a much broader way to embrace taking account of differences of all kinds – age, disability, race, culture, sex, sexual orientation, national origin, and other defining characteristics. An inclusive approach to schooling is a matter of increasing importance in a Canada that is more diverse and multicultural every day. Most educators now support inclusion as a theory but there are still significant debates about how best to implement the policies of inclusion.

I am thus confident of wide support for the policy of inclusion. I am less confident that either educators or the general public will embrace the law, and in particular the concept of equality found in the *Canadian Charter of Rights and Freedoms*¹ and human rights codes, as the lighthouse that can guide educators down the path to inclusive schools. Lawyers and judges are more often regarded as sources of fog shrouding the educational process than as beacons of light to guide educators through the complex fog of public education. Nonetheless, I will argue that the concept of equality, properly understood and applied with adequate resources, can be the lighthouse that guides us to more inclusive, effective, and even safer public schools.

Broadly Defining Inclusive Education

During 2004–05 I conducted an extensive review of Inclusive Education in New Brunswick, and after thirty-five public hearings involving more than 700 individuals and reading 126 written submissions, I produced

a 350-page report – *Connecting Care and Challenge: Tapping Our Human Potential*.² More recently, in July 2007, I produced a twenty-page booklet on inclusion for the New Brunswick Department of Education.³ Both are available on the New Brunswick Department of Education web page. I was not far into this interesting and challenging review before concluding that inclusion was about much more than just disability access and I state this conclusion at page 2 of the *Inclusion Booklet*: ‘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 overemphasize that effective inclusion is for all students and not just one particular group or category.’⁴

The concept that Canadian schools should be discrimination-free zones and that school boards have a positive duty to promote equality and diversity in schools is not my original idea but comes from a much higher authority – the Supreme Court of Canada. Mr Justice La Forest, speaking for a majority of the Supreme Court of Canada, makes the following statement in *Ross v. New Brunswick Board of Education* [1996]:⁵ ‘The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.’⁶ Impressionable young people bring different life experiences to the classroom, and the diversity of those experiences increases every day. The above quotation from *Ross* and the rejection of Malcolm Ross, and his public expression of anti-Semitic views, as an inappropriate teacher role model, emphasize the need for teachers and all concerned with public education to be tolerant and keep open minds. The decision also serves as a signal from the lighthouse of equality about the importance of accommodating diversity in all its rich layers and complexity. To do otherwise will deny an equal opportunity to all students to achieve their full potential in our schools and the larger society.

One of the early challenges that I faced in my review of education in New Brunswick was defining not only what ‘inclusion’ means but also the purposes of education itself. The latter was the larger task and one that I only partially completed, but that is a subject for another day. In respect to the concept of inclusion it became clear that it must be a manifestation of equality as enshrined in our *Charter* and is far more

than bringing students together in one place. This point is well stated in a 2001 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.’⁷ Sometimes inclusion, mainstreaming, destreaming, integration, and so on are used interchangeably. Sometimes this language is even utilized as political rhetoric because these words conjure up notions of equality. In reality, however, equality is not an easy political slogan. Equality is often messy, requiring difficult balancing acts. More than anything, though, the language of equality is about belonging, about equal concern, respect, and consideration.⁸ Bill Pentney puts it plainly, stating: ‘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.’⁹

The language of equality is also about the equal benefit and protection of the law. When we talk about education, the benefits are enormous. Students who are enabled through a Canadian education receive tremendous benefits in many ways, from life skills, to self-esteem, to employment prospects, and remuneration. There is, however, a stark contrast in the benefits students receive, and there is no question that students whose abilities shine within the existing education structure benefit the most. The language of equality concerns itself with structure as well as outcome. The lighthouse of equality gives us hints and clues in this direction as well.

So, when I talk about an inclusive school system, or inclusion, I am not referring to a specific program, service, or methodology. I am referring to a school system that in both its design and effect continually strives to ensure that each student can participate in the school community, be part of the community in positive and reinforcing ways, and have his or her identity reflected in the operations of the school community. Another fundamental reason for each student to receive an appropriate education is to allow each student to fulfill his or her potential; potential being something that cannot be fully gauged until after the fact. We should therefore be wary of initial assumptions about any particular student’s potential and ensure that all potentials are valued and respected.

These are exciting times for those concerned with the promotion of inclusive schooling. Exceptionality, in the form of autism, has even become the topic of a best-selling novel, Mark Haddon's *The Curious Incident of the Dog in the Night-Time*, published in 2004.¹⁰ In this clever book, the author attempts to view the world through the eyes of an autistic child and ponders the limits of definitions and labels in the following insightful passage:

All the other children at my school are stupid. Except I'm not meant to call them stupid, even though this is what they are. I'm meant to say that they have learning difficulties or that they have special needs. But this is stupid because everyone has learning difficulties because learning to speak French or understanding relativity is difficult and also everyone has special needs, like Father, who has to carry a little packet of artificial sweetening tablets around with him to put in his coffee to stop him from getting fat, or Mrs Peters who wears a beige-coloured hearing aid, or Siobhan, who has glasses so thick that they give you a headache if you borrow them, and none of these people are special needs, even if they have special needs.¹¹

This passage is loaded with many weighty questions. How broadly should we define exceptionality or special needs? Do people always pay a price when they are labeled, even if the label is a benign one that is intended to assist the recipients of the label? What is the price of not treating students in an inclusive way, as compared with the price of doing so? What are the comparative roles of parents, school authorities, judicial bodies, and society at large in responding to the diverse needs of the children in our school system today? I do not propose to answer these complex questions here, but rather to explore the legal framework within which some of the answers can be sought. To do this I shall briefly explore three areas – disability access in schools, the balancing of gay rights and freedom of religion, and finally the positive link between inclusive and safe schools.

Disability as an Inclusion Case Study

One of the important areas for considering the inclusiveness of our schools is with respect to the access of physically and mentally disabled students. Both human rights codes and s.15 of the *Charter* prohibit discrimination on the basis of disability and encourage equity programs to promote greater access in a proactive way. Such equity programs are

seen as advancing equality and not as reverse discrimination, as has been argued in the United States. It was not that long ago that disabled students did not have access to our schools, but that has changed, and now the challenge for educators is to design programs that accommodate the range of diverse abilities and allow students to reach their varied potentials. There is also the challenge of doing this in a way that does not disrupt the educational experiences for other students. Inclusion is about meeting the needs of all students.

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, but only up to the point of 'undue hardship.' The factors that are relevant to setting the limits of reasonable accommodation are set out in my *Inclusion Booklet*.

- The cost of the accommodation – serious thought about the feasibility of a given accommodation or alternatives must be demonstrated
- The health of any members of the school community or larger community
- The safety of any member of the school community or larger community – both the magnitude of the risk and the identity of those who would bear it are relevant
- Interchangeability of work force and facilities
- The size of the operation (in this case the school district), which may influence the assessment of whether a given financial cost is undue
- The ease with which the workforce or facilities can be adapted to the circumstances
- Significant disruption to a collective agreement
- The reasonable conduct of other parties such as the union and the person seeking accommodation
- The practicality and reasonableness of other less exclusionary options.¹²

Once a denial of equality and the need to be accommodated has been established, there is a high burden on the school authorities to justify limiting the rights of access. Accommodating students with disabilities has both an individual component and a systemic one. In the former, efforts are made to accommodate the individual within the existing system; in the latter, efforts must 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 mere 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 set out two separate and distinct factors to examine in giving effect to equality in particular contexts. The first, which has received the most attention, is that of individual accommodation. The second factor, which is the least developed and least precise in its implications, is systemic or institutional accommodation.

Individual Accommodation: The Guiding Light

Judicial interpretation, in particular at the level of the Supreme Court of Canada, focuses on the need to view the actual characteristics of the individual in the context of the particular claim when addressing issues of disability. This is so much so that the Supreme Court of Canada in *Eaton* declined to set a legal presumption in favour of 'integration'¹³ (where special needs services take place in a 'regular' classroom). Instead, the Court set out a 'best interests of the child test' in which:

the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from the subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view ... For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children, and those like Emily, who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision maker must make this determination on the basis of other evidence before it.¹⁴

In *Eaton* the Supreme Court of Canada clearly articulated the importance of the best interests of the child test in a way that is reminiscent of family law custody issues. No one can really dispute the need to focus on the best interests of the child, but the real challenges include questions such as how do you measure these best interests and who should be the final judge? What are the comparative roles of parents, education officials, and the courts in defining what is ultimately in the best interests of the child? Compared to the Ontario Court of Appeal decision of Justice Arbour in *Eaton*, the Supreme Court shows greater deference to the expertise of the educational officials and places a higher burden on parents to demonstrate that the educators have got it wrong.¹⁵

The Court did give legal recognition to the benefits of social inclusion, setting 'integration' as the normal point of departure, as well as setting out the requirement that services for students with disabilities be provided through public funds. It is also clear from *Eaton* that merely plunking a round peg into a square hole will not meet the requirements of equality. With this decision the Court gave a significant burst of light indicating that individual children cannot be sacrificed to the gods of educational efficiency. If the social institutions are not ready for full inclusion, other interim options must be explored. The quality of the inclusion counts.

Specific services and aids for students with disabilities are, generally speaking, individual accommodations to enable the individuals to benefit from education. This area, as educators and government providers are well aware, can be characterized by a seemingly limitless demand for services and the money that goes with them. Rights, though, are not absolute. Rights guaranteed under s.15(1) are subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'¹⁶

Human rights under human rights acts are similarly circumscribed by the limits set out in the act and by the judicial interpretation of 'accommodation to the point of undue hardship,' a test set out in the landmark cases of *Meiorin*¹⁷ and *Grismer*.¹⁸ This test poses the question whether 'the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost.'¹⁹ In setting out this test, the Supreme Court of Canada highlighted earlier jurisprudence supporting the assertion that 'undue hardship means that more than mere negligible effort is required to accommodate.'²⁰ The large expenditures required by some successful claims are not irrelevant, particularly if a government's fiscal situation can be characterized as an emergency.²¹ In this area the duty to accommodate plays much the same role as the reasonable limits justification under the *Charter*.

While individual accommodation is an important part of equality law in Canada, it is only one facet. It cannot on its own accomplish all of the goals of equality. Take for example Emily Eaton's case, where the Court found that she was in fact more isolated in the 'regular' classroom than in a segregated placement. While Emily was placed in a regular classroom, two components of equality were missing: benefit from the education and belonging within the community, even though she was physically located in the school community. Being physically

present in the classroom was a competing value with the benefit of education to Emily: these competing values needed balancing. The Court gave hints and clues as to the direction needed to bring those two competing values together, so that they might be mutually reinforcing.

The Court in Emily Eaton's case chose to emphasize that discrimination on the basis of disability results from 'the failure to make reasonable accommodation to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation.'²² Even though it rejected a legal presumption of inclusion, the Court did suggest a path to equality. The light in this case shone brightly on the need for individual accommodation with some reflection on the issues of systemic barriers to equality.

Systemic Design: Newer Reflections of Light

Through all of the cases dealing with discrimination on the basis of disability, courts have been forced to face the inescapable conclusion that the very construction of societal institutions creates many barriers and gives rise to the need for individual accommodation. The recognition of this monumental problem has been part of a separate line of reasoning running through many recent equality cases.

The Supreme Court of Canada began to address systemic barriers to equality very early on in a case concerning employment standards, requirements, and promotion procedures that had the impact of keeping women out of certain jobs within the Canadian National Railway.²³ Citing the Report of the Royal Commission on Equality and Employment, which came to be known as the Abella Report²⁴ (for its author Justice Abella – now a Justice of the Supreme Court of Canada), the Supreme Court of Canada affirmed that discrimination often 'results from the simple operation of established procedures,' reinforcing the view that exclusion is the result of 'natural forces.'²⁵

The Supreme Court of Canada picked up this line of reasoning in the subsequent case of *Eldridge v. British Columbia (Attorney General)*,²⁶ where the Court found that in order for all patients to truly benefit from health services, effective communication was essential to the delivery of core medical services in hospitals and emergency rooms. The declaration that the government must provide sign language interpretation in the medical context extended not only to the individual claimants in the case, but generally to all persons who required sign language

interpretation for effective communication in the delivery of these medical services. *Eldridge* also affirmed that equality can be violated by omissions as well as actions.

This line of reasoning came to fruition in the later cases of *Meiorin* and *Grismer*, where the Court recognized that its past approach to equality claims was itself a barrier to addressing systemic design issues. In *Meiorin*, the unanimous Supreme Court of Canada abandoned its own traditional approach to equality claims under human rights acts, in favour of an approach that allowed courts and respondents to simultaneously address individual accommodation as well as systemic discrimination, without having one emphasized at the expense of the other. Quoting from equality analysts Shelagh Day and Gwen Brodsky, the Court highlights that:

Accommodation seems to mean that we do not change procedures or services, we simply 'accommodate' those who do not quite fit. We make some concessions to those who are 'different,' rather than abandoning the idea of 'normal' and working for genuine inclusiveness. In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made ... Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make 'different' people fit into existing systems.²⁷

This significant shift in reasoning creates a dual responsibility on the part of institutional officials. As part of this responsibility, institutional officials must address both individual accommodation needs (particularly in the short term), as well as engage in a process of institutional analysis to uncover the often hidden barriers and make changes to reduce the negative impact of the system or institution. This will have positive impacts in the long term.

As a result, the test outlined to gauge the adequacy of accommodation efforts involves not only an examination of 'to the point of undue hardship' (as outlined above), but also an inquiry into:

- 1 Whether or not the standard [or procedure] is adopted for a purpose rationally connected to the performance of the function being performed

- 2 Whether or not the particular standard is adopted in the good faith belief that it is necessary to the fulfillment of the legitimate purpose or goal
- 3 Whether or not the standard is reasonably necessary to accomplish the legitimate purpose or goal, because the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost.²⁸

Courts are unable to make specific pronouncements on precise systemic changes for many reasons. They are limited by the framing of the issues by the applicants, and by the divergent functions of courts and legislatures with respect to equality claims. The courts' purpose is to determine when legislative or governmental actions or inactions run afoul of the *Constitution* and human rights acts. Courts are much better at pronouncing upon how governments get it wrong, than upon how governments can get it right. Nonetheless, courts have given clues and hints as to what direction the inquiry needs to follow in order to meet the burden of addressing systemic discrimination.

Courts are wary of their role in these matters and leave scope for legislators to fulfill their function, particularly where remedies will require significant governmental expenditures. The 2004 Supreme Court of Canada decision in *Auton v. British Columbia (Attorney General)*²⁹ is a case in point. Some were surprised to learn that the Supreme Court of Canada allowed the appeal and declined to order the Medical Services Commission to fund the treatment of Applied Behavioral Analysis/Intensive Behavioral Intervention (ABA/IBI) for autistic children. Nor did the Court approve compensation to the claimants for funds expended for the treatment. The Court held, first, that the benefit sought was not a benefit 'provided by law,' in the sense that under the legislative scheme of the *Canada Health Act*, these treatments were not 'core services,' such as the services in *Eldridge*, which the government was required to provide for all people in British Columbia. The relevant autism treatments were non-core services subject to permissive language under the statutory scheme. Second, the Court held that practitioners of this treatment had not yet been designated as Health Care Practitioners under the provincial statute; therefore the Medical Services Commission did not have the authority to fund this treatment under their authorizing statute.

In *Auton* the Court held that, rather than the appropriate comparator group being non-disabled or otherwise disabled people receiving non-core

services, the appropriate comparator group was: 'a non-disabled person or a person suffering a disability other than a mental disability ... seeking or receiving funding for a non-core therapy which is emergent and only recently becoming recognized as medically required ... People receiving well-established non-core therapies are not in the same position as people claiming relatively new non-core benefits ... There was no evidence of how the Province had responded to requests for new therapies or treatments by non-disabled or otherwise disabled people.'³⁰

The Court certainly sympathized with the petitioners in this case, holding that: 'The government's failing was to delay putting in place what was emerging in the late 1990's as the most, indeed the only known, effective therapy for autism while continuing to fund increasingly discredited treatments ... The issue however, is not whether the government met the gold standard of scientific methodology but whether it denied autistic people benefit it accorded to others in the same situation.'³¹

Three critical questions arise from this case with regard to special needs programming in schools. First, how do schools and ministries of education deal with and implement new research, methodology, and technology both with regard to individual accommodation and systemic barriers? Second, how does this compare with the implementation of new research, methodologies, and technologies in other areas? Finally, who should bear the costs of certain programs to advance inclusion of disabled children?

In coming to its decision in *Auton*, the Supreme Court of Canada specifically supported the findings in *Eldridge* and *Meiorin*, and their focus on systemic issues, by requiring an analysis of existing practices and operations resulting in the exclusion of certain groups. Indeed, systemic elements of discrimination are often lost from sight when parents and advocates focus on specific services to benefit an individual, even making claims to have governments pay large amounts for private delivery of services, in order to give effect to equality.³² This is understandable, because parents and advocates simply want the best that is available for their child, and governments should be striving to provide the best services that they can afford. The response of education officials to these high-cost claims, by and large, has been to deny them and to argue that courts and tribunals have no role in dictating budgetary or programming priorities for education. The setting of these priorities has traditionally been left to the elected legislative branch and its executive agents. Courts and tribunals have shown a willingness to

wade into detailed evidence, while still showing some deference to the elected branches of government.³³

The first Ontario trial decision in respect to a series of injunctions in relation to ABA/IBI therapy was released on 30 March 2005. In *Wynberg v. Ontario*,³⁴ the Ontario Superior Court of Justice held that once the government had undertaken to provide the service of ABA/IBI to pre-school children, cutting off the service at the arbitrary age of six, it discriminated on the basis of age. Aiding the Court in coming to this conclusion was the fact that the government was aware that autistic children entering school were not having their needs met by the education system.³⁵ The Court distinguished this case from *Auton* by finding that once a government decides to provide ABA/IBI service, it cannot then claim that it is a new or emerging therapy. With regard to the responsibility of the minister of education, Justice Kiteley found that the minister had not considered ABA/IBI as a service delivery option. Justice Kiteley found that a myth had been created that ABA/IBI was a therapy or treatment and that the Minister had not considered it as a teaching strategy or educational approach.³⁶ Based on this assessment, Justice Kiteley found that the government had discriminated on the basis of disability in the provision of special education programs and services. This case was reversed on appeal, and the courts reverted to a more deferential approach to the allocation of scarce educational funds more in line with the judicial approach to health funds in *Auton*.³⁷

Courts do recognize the delicacy of allocating finite resources and the comparable expertise of governments in performing this function. Courts prefer to provide guidance as to the nature of the duties to accommodate (both individual and systemic).³⁸ It is sometimes difficult to keep a clear focus on the comparative roles of courts and legislatures and their respective roles in promoting equality.

The light from the lighthouse is more difficult to make out, especially when the glare of individual accommodation is so bright, once claims to individual accommodation become more numerous and extensive. The importance of addressing systemic discrimination is to reduce the need, cost, and inconvenience of individual accommodation claims. In other words, the promise of an inclusive system is a reduction in the burdens of separate schemes and structures for individual accommodations. Canadian courts are more cautious about directing systemic changes to the education system than requiring individual accommodations. This case by case approach fits more comfortably within the traditional judicial role. It may not be the most cost effective.

That being said, it is not reasonable to anticipate immediately a system that is inclusive of all children. This leaves education officials and teachers with the tough balancing acts required by equality and the difficult decisions about where to concentrate limited resources. Suffice it to say that the dual responsibility to work towards equality in terms of both individual accommodations and systemic changes will require a dual focus. It should also be remembered that in equality, as in many other aspects of life, one size rarely fits all. Not surprisingly, this was also a major conclusion of my report on inclusive schooling in New Brunswick.³⁹

Balancing Gay Rights and Freedom of Religion

In the previous case study on including the disabled, the arguments to the contrary are based upon cost and educational effectiveness but not normally on a basis of conflicting rights. It is true that some argue that the focus on students with disabilities comes at the expense of the non-disabled students in the class but that is really more a question of resources and methods than a true conflict of rights. Inclusion properly understood and resourced, is about promoting the rights and interests of all students.

The inclusion of gays and lesbians within the school system and the recognition of their values have produced a more classical example of conflicting rights that need to be balanced. Some parents of particular religious faiths find homosexuality objectionable and argue that the tolerance of homosexuality and related values is an affront to their freedom of religion. How this apparent conflict of rights should be reconciled and whether courts or legislators should perform the delicate balancing act arose to national prominence in the high profile Alberta case of *Vriend v. Alberta*.⁴⁰

In *Vriend*, a laboratory worker was dismissed from his position at King's College in Edmonton, when his employer became aware that he was gay. The college thought it was entitled to dismiss him because the Alberta human rights legislation, the *Individual's Rights Protection Act*,⁴¹ did not include sexual orientation as a prohibited ground of discrimination. There had been numerous attempts to include sexual orientation as a ground, but the government had deliberately chosen to omit it from the *IRPA*. Mr Vriend argued that the college had violated his s.15(1) *Charter* right to equality. The Supreme Court of Canada considered whether the Alberta legislature had the right to omit sexual

orientation as a prohibited ground of discrimination, and determined that it did not. The Court then deemed that from that time forward, the *IRPA* should be read to include sexual orientation as a prohibited ground of discrimination. Discrimination on the basis of sexual orientation is now a prohibited ground of discrimination in all provinces, based on both human rights codes and the *Charter*.

The conflict between claims of religious freedom and equality claims for gays and lesbians within schools became even more explicit in *Trinity Western University v. British Columbia College of Teachers*.⁴² In this case the issue was the certification of teachers with declared anti-homosexual views to teach in the public schools of the province. Trinity Western University (TWU) is a private institution in British Columbia, associated with the Evangelical Free Church of Canada. TWU established a teacher training program offering baccalaureate degrees in education upon completion of a five-year course, four years of which were spent at TWU, the fifth year being under the aegis of Simon Fraser University (SFU). TWU applied to the B.C. College of Teachers (BCCT) for permission to assume full responsibility for the teacher education program. One of the reasons for assuming complete responsibility for the program was TWU's desire to have the full program reflect its Christian world-view.

The BCCT refused to approve the application on the ground that it was contrary to the public interest for the BCCT to approve a teacher education program offered by a private institution that appeared to follow discriminatory practices. The BCCT was concerned that the TWU Community Standards, applicable to all students, faculty, and staff, embodied discrimination against homosexuals. Specifically, the concern stemmed from the list of 'practices that are biblically condemned,' which encompassed 'sexual sins including ... homosexual behaviour.' TWU community members, including the teachers in issue, were asked to sign a document in which they agreed to refrain from such activities.

On application for judicial review, the British Columbia Supreme Court⁴³ found that it was not within the BCCT's jurisdiction to consider whether the program follows discriminatory practices under the public interest component of the *Teaching Profession Act*⁴⁴ and that there was no reasonable foundation to support the BCCT's decision with regard to discrimination. The British Columbia Court of Appeal⁴⁵ found that the BCCT had acted within its statutory jurisdiction, but affirmed the trial judge's decision on the basis that there was no reasonable foundation for the BCCT's finding of discrimination.

The majority of the Supreme Court of Canada, like the lower British Columbia courts, reversed the ruling of the BCCT and directed that the Trinity Western University education program be certified, allowing their students to teach in the public schools. The Court drew a clear line between belief and conduct, and ruled that the graduates of the Trinity Western University program were entitled to hold their anti-homosexual beliefs as a matter of freedom of religion so long as they did not act on those beliefs in a way that would be discriminatory against gay or lesbian students. The Court also concluded that the BCCT concerns about such discrimination were only speculative and not based on hard evidence.

As the lone dissenter in this case, Madame Justice L'Heureux Dube would have upheld the decision of the BCCT and not allowed these graduates of Trinity Western University into the public schools. She based her decision on the comparative expertise of the teacher certification board and the desirability of the courts deferring to that expertise. She also argued that the majority decision was inconsistent with the earlier Supreme Court ruling in *Ross*, that a teacher must be an appropriate, non-discriminatory role model.

In *Chamberlain v. Surrey School District No. 36*⁴⁶ the clash between religious views and gay rights arose in a different context. This case concerned the refusal of an elected school board to approve books about same sex family units as part of the supplementary reading material for the Kindergarten to Grade 1 (K-1) student level. The elected school board has the authority under British Columbia's *School Act*⁴⁷ to make such a decision but the question was whether it exercised its discretion in accordance with the principles of its governing statute and in a non-discriminatory fashion.

The school board defended its actions in banning the books on two major bases. First, it argued that including the books, and thereby presenting homosexual family units in a positive light, would offend the religious view of a majority of the parents within the constituency that it was elected to represent. Second, it argued that the books were inappropriate for impressionable young students at the Kindergarten and Grade 1 levels and exposing them to these alternate versions of the family unit would cause cognitive dissonance with family units as they experienced them. The board seemed to ignore the fact that there may have been a number of different family units within its own school district.

Chief Justice McLachlin, speaking for the Supreme Court, rejected the school board's reasons for banning the books and concluded that its

exercise of discretion was both discriminatory and not in accordance with the principles articulated in its governing *School Act*. In particular, she ruled that the board was acting on behalf of a particular religious parents' group and not respecting the insistence of the *School Act* on secularism, non-discrimination, and the promotion of diversity. The Chief Justice stated:

The *School Act's* emphasis on secularism reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity. These values are reflected in our Constitution's commitment to equality and minority rights, and are explicitly incorporated into the British Columbia public school system by the preamble to the *School Act* and by the curriculum established by regulation under the Act ...

The message of the preamble is clear. The British Columbia public school system is open to all children of all cultures and family backgrounds. All are to be valued and respected. The British Columbia public school system therefore reflects the vision of a public school articulated by La Forest J. in *Ross, supra*, at para. 42: ...⁴⁸

Chief Justice McLachlin is equally firm in rejecting the arguments about cognitive dissonance and the impact of exposing young children to alternate family units.

The number of different family models in the community means that some children will inevitably come from families of which certain parents disapprove. Giving these children an opportunity to discuss their family models may expose other children to some cognitive dissonance. But such dissonance is neither avoidable nor noxious. Children encounter it every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parent's religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.⁴⁹

She goes on to assert that a certain degree of cognitive dissonance is a necessary part of learning about tolerance. This does not negate freedom of religion, as those opposed to homosexual family units do not have to change their views or adopt the views of gays and lesbians. Tolerance and diversity involve respecting the views of others not embracing them as correct for all people or adopting them as our own views.⁵⁰ On the question of whether the children were too young to be exposed to books about same sex families the Court concludes '[t]olerance is always age-appropriate.'⁵¹

In this case study, the lighthouse of equality shines on the importance of tolerance and diversity in our schools and the value of exposing students to differing views of life – even if such exposure causes some cognitive dissonance. It reinforces the earlier view that schools should be discrimination-free zones but takes it to the next level, by demonstrating the value of inclusion and the educational growth that comes with exposure to differences. Even when rights and values come into conflict they can be balanced in a respectful way. Promoting this kind of equality causes the fog of intolerance to dissipate.

Inclusive Schools Are Safer

The growing diversity in Canadian schools is often identified as one of the sources of disruption and violence in schools. This is a message that comes from many quarters including the media. It is also frequently suggested that the inclusion of students with a wide array of disabilities and challenges has led to significant class disruptions and in more extreme situations, violence directed at both students and teachers. It would appear that this is a perception that is based on feelings and impressions rather than concrete evidence.

Based upon my review of inclusion in New Brunswick, disabled students were neither the primary targets nor the primary victims of school violence and bullying. The only real exception to this was the fact that students with invisible disabilities were sometimes targeted for bullying and exclusion. Contrary to popular belief, it did not appear that disabled students were major instigators of class disruptions. While the problem of disruptions is a real one, the perpetrators are spread across the spectrum of abilities, economic backgrounds, cultures, and geographic regions. Boys more frequently create problems than girls but there are some signs that girls are catching up.

I did not do any scientific or empirical study of the origins of violence and bullying as part of my review but what I did observe challenges the view that diversity and conflicting values are at the heart of the problem. It would, however, be fair to say that the failure to properly accommodate diversity, in its many manifestations, is a significant cause of student frustration, alienation, and withdrawal. This, in turn, can lead to inappropriately acting out in ways that are disruptive and lead to discipline problems. The failure of most school systems to properly include Aboriginal students and accommodate their perspectives goes a long distance in explaining the high levels of discipline problems and dropouts among this student population. Diversity in itself does not pose a threat to school safety but not responding properly to this diversity can lead to disruption and, at the extremes, violence.

The apparent conflict between the values of diversity and inclusion on the one hand, and school safety on the other, played out in the high profile case of *Multani v. Commission Scolaire Marguerite-Bourgeoys*.⁵² Twelve-year old Gurbaj Singh Multani had no idea that when he accidentally dropped his ceremonial dagger in his schoolyard in 2001 that the incident would touch off a dispute that would eventually wind up in the Supreme Court of Canada. The dagger was a kirpan and Gurbaj was wearing one because he is a baptized orthodox Sikh. Orthodox Sikhs say the kirpan is not a weapon but a religious symbol that must be worn at all times. But others said, symbol or not, any kind of knife has no place in a school environment. When the school board's governing body ruled that a kirpan violated its ban on students bringing 'dangerous and forbidden objects' onto school property, the dispute headed to the courts ... and ultimately to the country's top Court.

The first-level school board sent Gurbaj's parents a letter in which, as a reasonable accommodation, it authorized their son to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. Gurbaj and his parents agreed to this arrangement. The governing board of the school refused, however, to ratify the agreement on the basis that wearing a kirpan at the school violated art. 5 of the school's *code de vie* (code of conduct), which prohibited the carrying of weapons. The school board's council of commissioners upheld that decision and notified Gurbaj and his parents that a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless, would be acceptable in the place of a real kirpan. Gurbaj's father then filed a motion in the Superior Court for a declaratory judgment to the effect that the council of commissioners'

decision was of no force or effect. The Superior Court granted the motion, declared the decision to be null, and authorized Gurbaj to wear his kirpan under certain conditions.⁵³ The Court of Appeal set aside the Superior Court's judgment.⁵⁴ After deciding that the applicable standard of review was reasonableness, the Court of Appeal restored the council of commissioners' decision. It concluded that the decision in question infringed Gurbaj's freedom of religion under s.2(a) of the *Charter* and s.3 of *Quebec's Charter of Human Rights and Freedoms*⁵⁵ ('Quebec Charter'), but that the infringement was justified for the purposes of s.1 of the *Charter* and s.9.1 of the *Quebec Charter*.

At the Supreme Court of Canada level in *Multani* the justices were unanimous in the view that the values of diversity and inclusion clearly trumped the minimal threat to school safety posed by a properly sealed kirpan. While in theory a kirpan (essentially a dagger) could be used as a weapon, so could scissors or pencils or many other items commonly found in schools. In spite of the school board's arguments about school safety it produced no real evidence that the existence of kirpans in schools had in fact led to violence. Indeed the existing evidence was to the contrary. Furthermore, all parties agreed that Gurbaj himself was not a discipline problem and posed no threat to safety. Thus, once the Court concluded that the absolute ban on the kirpan violated his freedom of religion, it rejected the board's justification on this limitation as being a reasonable limit in pursuit of school safety.

The essence of the Supreme Court of Canada's ruling in *Multani* is well articulated in the following passage from the case:

Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students this value that is, as I will explain in the next section, at the very foundation of our democracy ...

Since we have found that the council of commissioner's decision is not a reasonable limit on religious freedom, it is not strictly necessary to weigh the deleterious effects of this measure against its salutary effects. I do not believe, however, like the intervener Canadian Civil Liberties Association, that it is important to consider some effects that could result from an absolute prohibition. An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity and the development of an educational culture respectful of the rights of others. This Court has on

numerous occasions reiterated the importance of these values ...

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.⁵⁶

As discussed earlier the inclusion of Sikhs within the school system and the promotion of respect for diversity and minority rights is not a real threat to school safety. The failure to accommodate this kind of diversity and the frustration and alienation which might result, could pose a threat to a safe school environment. Thus the representation by the board in *Multani* that diversity and school safety are opposing forces can now be stood on its head. Diversity properly accommodated in the schools produces a sense of inclusion and belonging that is conducive to a safe and welcoming environment. This is a further reason to support inclusion.

In *Jubran v. North Vancouver School District No. 44*,⁵⁷ Azmi Jubran claimed discrimination on the basis of sexual orientation because he suffered from homophobic harassment from other students. It was found that the school board had discriminated against him even though it had taken several preventive measures, because it had failed to implement what were shown through evidence to be more effective ways of responding. The fact that the school had documented each incident of harassment and followed up with an investigation and punishment where a perpetrator could be found, was weighed in the school board's favour on the issue of damages. In the end Azmi Jubran did win an award for the resulting damage to his dignity and self-worth. The Tribunal's decision was also vindicated in the British Columbia Court of Appeal.

The interesting part of this case is that Azmi Jubran claimed that he was not homosexual, but that students harassed and bullied him on the basis of perceived sexual orientation because the harassers called him names like 'faggot' and 'queer.' In fact, this is the very reason the British Columbia Supreme Court quashed the decision of the Tribunal. In a very short decision, it held that people must declare themselves to be gay or lesbian in order to claim discrimination on the basis of sexual

orientation. The trial court also questioned whether the other students really perceived Jubran as gay.

Ultimately, however, the reasoning behind the Human Rights Tribunal's decision was reinforced when the case reached the B.C. Court of Appeal. Levine JA, speaking for the majority of the court, stated the following when discussing the issue of the harassers' perception of Jubran's sexuality: 'The effect of (the harassers') conduct was the same whether or not they perceived Mr Jubran as homosexual. The homophobic taunts directed against Mr Jubran attributed to him the negative perceptions, myths and stereotypes attributed to homosexuals. His harassers created an environment in which his dignity and full participation in school life was denied because the negative characteristics his harassers associated with homosexuality were attributed to him.'⁵⁸

Disconcertingly, the British Columbia Supreme Court had ignored the fact found by the Tribunal that Azmi Jubran was identified as having Attention Deficit Disorder / Attention Deficit Hyperactivity Disorder (ADD/ADHD). With ADD/ADHD having been affirmed as a disability recognized under the *New Brunswick Human Rights Act*, this could have had some impact on the case. The recognition of the fact that disability or differences in ability forms the basis for much harassment is a necessary first step. Unfortunately, the Tribunal's finding of fact was also not a factor considered by the British Columbia Court of Appeal, which chose instead to focus on the harassment and taunts that centered on Azmi Jubran's perceived sexuality. Consideration of his disability at the appellate level would have afforded more credence to the important ruling at the Tribunal level.

Discriminatory harassment on the basis of prohibited human rights grounds such as sexual orientation, disability, gender, or race (to name but a few examples) is a major form of bullying and violence in schools. Once again, a school system that is more inclusive and accommodating and comes closer to achieving the ideal of schools as discrimination free zones, as articulated in *Ross*, would not only be a better learning environment but also a safer place. A truly inclusive school setting would be one that encourages positive interactions between students rather than violent and discriminatory conduct.

The paragraph that immediately follows the one quoted in the introduction from Mark Haddon's best-selling novel narrated by an autistic child reads: 'But Siobhan said we have to use those words because people used to call children like the children at school *spaz* and *crip* and

mong, which were nasty words. But that is stupid too because sometimes the children from the school down the road see us in the street when we're getting off the bus and they shout, 'Special Needs! Special Needs! But I don't take any notice because I don't listen to what other people say and only sticks and stones can break my bones and I have my Swiss Army knife if they hit me and if I kill them it will be self-defence and I won't go to prison.'⁵⁹

We should not underestimate the importance of promoting a culture of tolerance and respect among our students. We should also recognize the relationship between promoting substantive equality and reducing violence and harassment. Truly inclusive schools should also be safer schools. This is an important flash of insight from the lighthouse of equality and one that provides a further incentive to make our schools more inclusive places, where students can participate and contribute in constructive ways. As tragedies such as Columbine, Virginia Tech, and, closer to home, Taber, Alberta indicate, the price of alienation and exclusion can be very high indeed. There are costs to producing truly inclusive schools but the costs of not doing so are greater. It is better to pay now than pay later.

Concluding Thoughts on the Equality Lighthouse

While special needs programming has come through a marathon of court cases and tribunal hearings as well as a barrage of new language and commitments to equality, the path for governments is still mired in uncertainty and what some might call a hazy fog. The same can be said in respect to the inclusion of other forms of diversity. The case study on sexual orientation demonstrates the challenges facing both school officials and tribunals and courts in balancing the conflicting claims to freedom of religion and the inclusion of gay perspectives as a matter of equality. Our courts and tribunals aid in giving effect to our constitutionally protected rights to equality, although they are not always able to do so as specifically as we might like. Indeed, many educators might suggest that the courts and tribunals have been major contributors to the fog, rather than a lighthouse providing guidance.

The judicial role is a difficult one limited by the framing of issues by individual claimants and by the courts and tribunals' deference to the roles of the school boards and legislatures. Primarily these adjudicative bodies function to tell governments when they get things legally wrong, rather than to demonstrate how to get things right. There is usually

more than one way to accomplish a goal. The law can help provide the framework and indicate a general path. As such, court and tribunal decisions and the development of the language of equality are like a lighthouse aiding the navigation through these unknown waters.

Light emanating from the lighthouse has taken two distinct forms: the glare and the reflection. The glare is the call for individual accommodations to ameliorate the situation of people with disabilities and other manifestations of diversity in societal institutions that are not designed to include them. Many equality advocates have attempted to push the boundaries of this glare as far as it can reach. But the reflection, which is the call for an analysis of the barriers inherent in the operations of societal institutions, is not so easy to see. This systemic reflection has too frequently escaped notice in its implications as well as in its promises for reducing the efforts needed to accommodate individually. If the rules are changed to be more inclusive, then there is less need to accommodate to the rules.

One of the major challenges facing governments is how to implement new research, methodology, and technology in a timely manner as it becomes available, thereby benefiting more students. A second challenge is how to work more cooperatively with various government departments and other interested parties in fulfilling the whole government's responsibility to promote and ensure equality. How should governments apportion finite resources in the context of judicial messages from the lighthouse of equality? This is a tough question to answer and one that requires participation from all parties. This collaborative approach could bring us closer to a truly inclusive education system. An approach that puts into effect both the glare and the reflection, that is, both individual accommodation and systemic or institutional equality, is necessary to discharge fully the government's responsibilities in promoting equality.

Some may consider cases such as *Auton* and *Cudmore* to be a retreat from equality, but they are a reminder that simply focusing on the brightness of individual accommodation is not enough to reach the ultimate goals of equality. Both claimants and institutional officials alike still need to notice the reflection of the light onto societal institutions and pursue the analysis at this systemic level. Furthermore, the ultimate answers have to come from those on the front lines. The courts and tribunals can only provide a framework.

Support from federal officials might be sought in the form of resources to put into effect Canada's international commitments under the

United Nations *Convention on the Rights of the Child*.⁶⁰ Although there are constitutional limitations to assigning a strict legal responsibility to the federal government in arenas of provincial control (education being an important one), educators may find some support for initiatives that further Canada's international commitment to implement the substance of the *Convention on the Rights of the Child*. I believe governments want to do the right thing. Cooperation and setting goals and targets to promote inclusive schooling as a part of the substantive implementation of equality is a definite step in the right direction.

The needs to increase genuine access to community, a sense of belonging, and a sense of confidence and self-worth for students with disabilities and other manifestations of diversity are areas that have received inadequate attention. The positive self-esteem that can come from confidence and a sense of belonging may have a tremendous impact on the level of benefit that students can derive from their education. The stress caused by perceived inferiority following a diagnosis of a disability or from cultural or economic exclusion and their impact on student performance should not be underestimated.

Beyond this sense of belonging to the school community is the quality of the relationships and attitudes among students. As was recently publicized in New Brunswick,⁶¹ the harassment of people with disabilities by students and others in the community is not as rare as one would like to believe. It would also appear that students with invisible disabilities, such as learning problems or Attention Deficit Disorder (ADD), are more likely to be the targets of bullying than students with clearly visible disabilities. The harassment of students on the basis of sexual orientation has already been discussed. Attitudes are an important part of the school community, and the social climate is legitimately the concern of education officials.⁶² More efforts are needed to proactively ensure a positive connection among diversity, community, curriculum, pedagogy, and the general operations of the school system, in order to inspire a sense of belonging and self-worth among all members of the school community.

The serious consequences of not addressing systemic barriers to equality and particularly the emotional responses to such barriers for students with disabilities and other manifestations of difference, and the negative impact of this neglect on student to student relationships, are critical. It is vital to recognize the connection between violence and harassment and some of the systemic barriers to equality in our schools. The recognition of the seriousness of these issues for students should

also underscore the need to move towards inclusive schooling with greater haste. Inclusive schools offer the best hope for delivering on the promises of equality and producing the safe and non-discriminatory schools that the Supreme Court of Canada calls for in *Ross*.⁶³ The lessons learned in the efforts to include disabled students can be helpful in making schools more inclusive of the many forms of diversity. It is this broader sense of inclusion that must be the ultimate goal, and the lighthouse of equality can help us get there.