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Furthering Substantive Equality Through Administrative Law: Charter Values in Education

Angela Cameron[*] and Paul Daly[**]

I. INTRODUCTION

Recent decisions in the realm of Canadian public law have opened the door to Charter[1] values. Administrative decision-makers must have regard to these values when making decisions. Through the use of a fictional example, outlined below, this paper is intended provide a guide for laypersons, lawyers, judges, administrators, arbitrators and academics on how to further substantive equality through administrative law. Our focus in this paper is on education law, but the framework we propose is capable of application across a wide range of areas.[2]

Two Supreme Court of Canada decisions from 2012 inspire our analytical framework. The first is *Doré v. Barreau du Québec*,[3] in which Abella J. gave the following guidance to administrative decision-makers on how to exercise their powers in conformity with the values of the Charter:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter*

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

2 The principles outlined here extend beyond their application to this particular example. Other factual circumstances might include: immigration and refugee boards, professional bodies, decisions made within the prison system and in the area of human rights law.

3 [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.) [hereinafter "*Doré*"].

> values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives …
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives.[4]

The second is *L. (S.) v. Commission scolaire des Chênes*,[5] where the Court was faced with a challenge to a refusal to exempt schoolchildren from a government-mandated program on religion. This program did not seek to privilege any particular religious world view, but sought rather to privilege neutrality, to which the religiously observant applicant parents objected. The Court held that no interference with the applicants' Charter rights had been established. Moreover, both Deschamps J., for the majority, and LeBel J., in his concurring reasons, took care to recall the important role schools play in Canadian society. As Deschamps J. commented:

> Parents are free to pass their personal beliefs on to their children if they so wish. *However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society*. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores *the Quebec government's obligations with regard to public education*.[6]

Difference and tolerance, then, are facts of Canadian life, to which children in the public school system should be exposed. Justice LeBel's sentiments were similar: "[T]he very nature of a public education system implies the creation of opportunities for students of different origins and religions to learn about the diversity of opinions and cultures existing in our society, even in religious matters."[7]

The obligation to educate children about a "diversity of opinions and cultures" is at the heart of our exploration of administrative decision-making in the education system. We argue, however, that the obligation

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4 *Id*., at paras. 55-56.
5 [2012] S.C.J. No. 7, [2012] 1 S.C.R. 235 [hereinafter "*L. (S.)*"].
6 *Id.*, at para. 40 (emphasis added).
7 *Id.*, at para. 54.

to pay attention to Charter values provides the lifeblood of substantive equality in every administrative law context.

The concept of applying Charter values as a juridical tool in decision-making, while not new,[8] has been given a more dominant role in administrative decision-making by the Supreme Court of Canada in the *Doré* decision. While the exact meanings and practical applications of this concept are as yet unclear, this paper makes a small step towards imagining the contours of Charter values. In particular we attempt to establish, as a first principle, the role of substantive equality as Charter values begin to solidify and take shape in the jurisprudence.

The paper is divided into four parts. In Part II we present our fictional administrative law decision-making scenario located within the public school system. This scenario provides a concrete backdrop against which to imagine the function of substantive equality within Charter values. In Part II we also discuss the public school system in Canada as a key site for the application of Charter values, and a site where these values have been previously contested in law. Finally, in this part we lay out the empirical evidence showing that GLBTQ students, and the children of GLBTQ parents, suffer an equality deficit in Canadian public schools, which we argue can be addressed through the proper application of Charter values by decision-makers within the education system.

Part III outlines our proposed administrative law framework for furthering substantive equality. Specifically, Part III situates substantive equality within the existing framework of administrative law, and provides a blueprint for what substantive claims might look like under our proposed framework. Part IV treats the precise role of substantive equality, outlining a methodology for blending existing equality jurisprudence with the Court's decision in *Doré*, using the fictional scenario as a backdrop.

Finally Part IV demonstrates our proposed framework at work by applying it in the context of our fictional example.

II. SETTING THE SCENE

1. A Fictional Example

We set our fictional administrative decision-making framework in Ontario in 2013. At a public school in urban Ontario, an openly lesbian

[8] See, for instance, *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, at paras. 67, 68 and 85 (S.C.C.) [hereinafter "*TWU*"].

Grade 2 teacher, S, decides to introduce materials into her classroom which discuss and normalize same-sex couples and their children, alongside other family structures. S introduces books, a DVD and exercises which depict same-sex couples and their children. She and her principal believe that these materials comply with the existing Grade 2 social studies curriculum.

S and her same-sex partner of 10 years have a son in the same school district, in Grade 6, who suffered homophobic bullying because he has same-sex parents. In that instance they invoked a 2012 Ontario statute[9] to bring an end to the bullying. The statute aims to prevent homophobic and transphobic bullying through action against individual bullies,[10] and progressive discipline against individuals who persist in homophobic or transphobic bullying.[11] While the 2012 legislation also mandates that gay-straight alliances be permitted in any school[12] where students demand them, it falls short of curriculum reform which would expressly include same-sex couples, gay and lesbian people, or transgendered people. S and her principal believe that one key method to end bullying is through talking about and normalizing same-sex couples, gays and lesbians, and transgendered people.

In 2009 the Ontario Ministry of Education introduced *Realizing the Promise of Diversity: Ontario's Equity and Inclusive Education Strategy*,[13] whose stated goals include eliminating all forms of discrimination in education, including homophobia.[14] Among the action items included in the report, the Ministry commits to supporting schools that conduct a review of classroom strategies in order to "promote school-wide equity and inclusive education policies and practices".[15]

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[9] Bill 13, *An Act to amend the Education Act with respect to bullying and other matters*, 1st Sess., 40th Leg., Ontario, 2011 (assented to June 19, 2012), S.O. 2012, c. 5 [hereinafter "*Accepting Schools Act*"].

[10] *Id.*, at cl. 11.

[11] *Id.*, at cl .14.

[12] *Id.*, at cl .12.

[13] Ontario Ministry of Education, *Realizing the Promise of Diversity: Ontario's Equity and Inclusive Education Strategy* (Toronto: Queen's Printer for Ontario, 2009) [hereinafter "*Realizing the Promise of Diversity*"].

[14] While the 2009 framework does not explicitly address transphobia, the 2012 *Accepting Schools Act* does include a prohibition against transphobic bullying. This paper deals exclusively with the depiction in public schools of same-sex couples with children. We acknowledge that the depiction of individual GLBTQ people or BTQ people and their families may raise different, but equally pressing, substantive equality issues.

[15] *Realizing the Promise of Diversity*, *supra*, note 13, at 22.

S has been an active part of her school's equity review pursuant to this report, and in light of their conclusions, and in conjunction with her supportive principal, S carefully selects classroom materials which she and her principal feel promote school-wide equity and inclusiveness. In order to ensure compliance with the curriculum standards set out by the Minister, they ensure that the books, DVD and posters they select also help to ensure that their students will: "a) demonstrate an understanding that Canada is a country of many cultures; b) use a variety of resources and tools to gather, process, and communicate information about similarities and differences among family traditions and celebrations; c) explain how the various cultures of individuals and groups contribute to the local community"[16] and, in particular: "identify the origins and features of various families (*e.g.*, nationality, culture, size, *structure*)".[17]

Because none of the materials on the Ministry-approved materials list include same-sex families, S and her principal rely on the regulations pursuant to the *Education Act*[18] to supplement the existing list. Section 7 of Regulation 298[19] states:

> (2) Where no textbook[20] for the course of study is included in the list of the textbooks approved by the Minister the principal of a school, in consultation with the teachers concerned, shall, where they consider a textbook to be required, select a suitable textbook and, subject to the approval of the board, such textbook may be introduced for use in the school.

Given that similar materials were being used by other teachers in nearby middle schools, S and her principal did not seek the explicit approval of the School Board before introducing the materials into the classroom. As part of their coursework the Grade 2 students did presentations on their own families, and S presented a photograph and explained the basic structure of her family. Children were encouraged to draw pictures, with some accompanying text, depicting various families they had learned about. Three children depicted same-sex families in

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[16] Ontario Ministry of Education, *The Ontario Curriculum: Social Studies, Grades 1 to 6* (Toronto: Queen's Printer for Ontario, 2004), at 23.

[17] *Id*., at 25 (emphasis added).

[18] R.S.O. 1990, c. E.2 [hereinafter "*Education Act*"].

[19] *Operation of Schools — General*, R.R.O. 1990, Reg. 298 [hereinafter "Regulation 298"].

[20] For the purposes of the regulation, "textbook" is defined as a "comprehensive learning resource that is in print or electronic form, or that consists of any combination of print, electronic, and non-print materials" (Ontario Ministry of Education, *Guidelines for Approval of Textbooks* (Toronto: Queen's Printer for Ontario, 2006), at 6.

their drawings, with captions describing families with "two mommies" or "two daddies". None of the children in the class had parents who comprised a same-sex couple, although there was a significant amount of other diversity, including lone parents, step-parents, and in one case a grandmother who acted as primary caregiver.

When the drawings went home with the students, the parents of two of the children who had depicted same-sex families in their pictures were upset. They informed other parents, via the school e-mail directory, and four parents (out of a class of 18 students) made a complaint about the introduction of these materials, first to the principal of the school, who defended their introduction, and then to the Minister of Education. Some cited a conflict with their religious beliefs on marriage, and some thought it was "too early" to introduce Grade 2 students to same-sex families.

Since being notified of the complaints by the Ministry of Education, the School Board[21] in S's area has told her to remove the materials from her classroom until they have approved her selections.[22]

Our fictional scenario illuminates the role that Charter values might play in administrative decision-making in the wake of the Supreme Court of Canada's decision in *Doré v. Barreau du Québec*.[23] All the way down the decision-making chain, from the Minister to teachers in the classroom, actors in provincial public education must act with Charter values as their lodestar. In particular, section 15, with its underlying guarantee of substantive equality, and section 7, underpinned by a concern for

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[21] According to the *Education Act*, school boards must:

169.1(1)(a) promote student achievement and well-being;

(a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;

(a.2) promote the prevention of bullying …

[22] While the Minister has the power to approve materials under s. 8(1) of the *Education Act*, this power has been delegated exclusively to school boards under s. 7 of Regulation 298 (emphasis added):

> (1) The principal of a school, in consultation with the teachers concerned, shall select from the list of the textbooks approved by the Minister the textbooks for the use of pupils of the school, and the selection shall be *subject to the approval of the board*.
>
> (2) Where no textbook for the course of study is included in the list of the textbooks approved by the Minister the principal of a school, in consultation with the teachers concerned, shall, where they consider a textbook to be required, select a suitable textbook and, *subject to the approval of the board*, such textbook may be introduced for use in the school.

[23] *Doré*, *supra*, note 3.

safeguarding physical and psychological integrity, are touchstones to guide the exercise of administrative powers.

Situating Charter values as a factor in decision-making, of course, prompts a series of difficult questions. Many of these questions we touch upon below, and some will be addressed by courts as specific circumstances arise over time. While the application of Charter values to administrative decision-makers in and of itself sounds promising, existing Charter jurisprudence is, of course, complex and nuanced. For instance, what is the scope of Charter values (as opposed to Charter rights), how do we balance competing Charter values (or corresponding rights), and how does the balancing act required by section 1 of the Charter find its way into a decision-making framework?

2. The Importance of Schools

Within our fictional scenario the focus is on public schools, and with good reason. The Supreme Court of Canada has on several occasions emphasized the importance of schools, echoing Aristotle's view that it is obvious that there must also be training for the activities of virtue:[24] "Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance."[25] Take the words of Major J. in *Ross v. New Brunswick, School District No. 15*:[26]

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. 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.[27]

The Court has also made clear that the place of the communication centre can only be understood by reference to the broader values of Canadian society. In *Chamberlain v. Surrey School District, No. 36*,[28] the Court was addressing the appropriateness of a decision by a local school board to refuse to approve books depicting same-sex families for use in the classroom. Although the case turned on the interpretation of a

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[24] Aristotle, *Politics* (Oxford: Clarendon Aristotle Series, 1997).

[25] *TWU*, *supra*, note 8, at para. 13, Iacobucci and Bastarache JJ.

[26] [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.) [hereinafter "*Ross*"].

[27] *Id.*, at para. 42.

[28] [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.) [hereinafter "*Chamberlain*"].

provincial statute, McLachlin C.J.C.'s statement of principle rings loud and beyond the borders of the province:

> 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.[29]

Moreover, given their role in shaping the minds of the young, educators "are responsible for the future of the country".[30] Accordingly, they have "onerous responsibilities":[31]

> … The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others.[32]

Indeed, each school board must be "ever vigilant of anything" that might interfere with its "duty to maintain a positive school environment for all persons served by it".[33] They must "act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves".[34] If this causes them to run into objections from parents, so be it: "Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference."[35]

The public school is an apt legal space to investigate Charter values in administrative decision-making. There are many decision-makers from principals to school boards whose choices may be subject to legal scrutiny, and there are many competing values and rights to be balanced. The public school is also a place where Canadian values, as enshrined in our Constitution, are to be modelled as well as taught.

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[29] *Id.*, at para. 21.

[30] *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393, at para. 35 (S.C.C.), Cory J.

[31] *Id*.

[32] *Ross*, *supra*, note 26, at para. 82.

[33] *Id.*, at para. 50, approving the reasoning of a Board of Inquiry constituted under the *Human Rights Act*, R.S.N.B. 1973, c. H-11 (since repealed, now R.S.N.B. 2011, c. 171) .

[34] *Chamberlain*, *supra*, note 28, at para. 25.

[35] *Id.*, at para. 33.

Our fictional example deals with that difficult balancing act between competing values and rights; in this case the equality rights of GLBTQ people, and the right to religious expression. The following section presents empirical research demonstrating that GLBTQ students, and students with GLBTQ parents, face discrimination in public schools, and that this kind of inequity has serious consequences for these students. We argue that an appropriate application of Charter values in this case would result in a public school system free of discrimination for all students regardless of their (or their parents') sexual or gender identity.

3. The Empirical Evidence

There are documented impacts of school-based homophobic discrimination on gay and lesbian youth, and the children of gay and lesbian parents. This empirical evidence speaks to the important role of the school curriculum in combating negative impacts.

The day-to-day experience of queer students in Canadian public schools is extremely difficult.[36] Canadian research in the area has revealed that the majority of queer youth experience homophobic harassment, and even assault, on a regular basis in their school environments.[37] Research also reveals that LGBT students who suffer from homophobic bullying show increased rates of headaches, sleep disturbances and absences from school.[38] More seriously, queer youth have a lowered sense of self-esteem,[39] attempt suicide at alarming

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[36] Three-quarters of LGBTQ students feel unsafe in at least one place at school, such as change rooms, washrooms and hallways. Half of straight students agree that at least one part of their school is unsafe for LGBTQ students. Transgender students are especially likely to see at least one of these places as unsafe (87 per cent). Catherine Taylor *et al*., *Youth Speak Up about Homophobia and Transphobia: The First National Climate Survey on Homophobia in Canadian Schools* (Toronto: Egale Canada Human Rights Trust, 2008), at 3 [hereinafter "Taylor"].

[37] Six out of 10 LGBTQ students in British Columbia report being verbally harassed about their sexual orientation. Nine out of 10 transgender students, six out of 10 LGB students and three out of 10 straight students were verbally harassed because of their expression of gender. One in four LGB students had been physically harassed about their sexual orientation. Almost two in five transgender students, and one in five LGB students, reported being physically harassed due to their expression of gender. See *id.*, at 4. See also Elizabeth Saewyc *et al*., *Not Yet Equal: The Health of Lesbian, Gay, & Bisexual Youth in B.C.* (Vancouver: The McCreary Centre Society, 2007), at 14-16 [hereinafter "Saewyc"].

[38] Stephen Russell *et al*., "Adolescent Perceptions of School Safety for Students with Lesbian, Gay, Bisexual and Transgender Parents" (2008) 5:4 Journal of LGBT Youth 11, at 14 [hereinafter "Russell, 'Adolescent Perceptions'"].

[39] Saewyc, *supra*, note 37, at 29.

rates,[40] and have high rates of drug and alcohol abuse.[41] Queer youth are often forced to hide their sexual orientation from their peers and mentors, and many have poor relationships with unsupportive families.[42]

Extensive research in Canada, the United States and the United Kingdom has consistently identified adverse effects of homophobic bullying on the physical and mental health of gay, lesbian and transgendered youth.[43] Negative health effects include increased suicidal ideation and

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[40] *Id.*, at 30-32. In *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513, at 601 (S.C.C.), the Supreme Court of Canada noted that "a study by the Quebec Human Rights Commission has indicated that the isolation, harassment and violence imposed by the public and the rejection by their families has caused young homosexuals to have a higher rate of attempted and successful suicide than heterosexual youths". Justice L'Heureux-Dubé, dissenting in *TWU v. British Columbia College of Teachers*, noted:

> Canada has one of the highest youth suicide rates in the world ... Of all teens who commit suicide, about one third appear to be homosexual in orientation. Many such youth become depressed in the ongoing struggle with social fear and rejection ... Cognitive, emotional and social isolation, ongoing external and internalized homophobia and lack of support may lead homosexually oriented adolescents to perceive suicide as their only means of escape ... "Closeted" adolescents who are aware of their same-sex attraction but who have not yet established a positive homosexual identity, are at particular risk for suicide.

(*TWU*, *supra*, note 25, at para. 85.) Justice L'Heureux-Dubé also quoted a study that concluded 46 per cent of gay and lesbian youth had attempted suicide at least once. Their average age at the first suicide attempt was 13 years. See *Being Out: Lesbian, Gay, Bisexual & Transgender Youth in B.C.: An Adolescent Health Survey* (Burnaby: The McCreary Centre Society, 1999).

[41] Saewyc, *supra*, note 37, at 25-28.

[42] Many LGBTQ students would not be comfortable talking to their teachers (four in 10), their principal (six in 10), or their coach (seven in 10) about LGBTQ issues. Only one in five LGBTQ students could talk to a parent comfortably about LGBTQ issues. Three-quarters could talk to a close friend about these issues. See Taylor, *supra*, note 36, at 5. The unwillingness of some families to accept their children as queer is evidenced in the high rates of homelessness among LGBT youth. See *No Place to Call Home: A Profile of Street Youth in British Columbia* (Vancouver: The McCreary Centre Society, 2007).

[43] See Dorothy L. Espelage *et al*., "Homophobic Teasing, Psychological Outcomes, and Sexual Orientation Among High School Students: What Influences do Parents and Schools Have?" (2008) 37:2 School Psychology Rev. 202; Yue Zhao *et al*., "Suicidal Ideation and Attempt Among Adolescents Reporting 'Unsure' Sexual Identity or Heterosexual Identity Plus Same-Sex Attraction or Behavior: Forgotten Groups?" (2010) 49:2 J. American Academy of Child & Adolescent Psychiatry 104 [hereinafter "Zhao"]; E. Hetrick & A. Martin, "Developmental Issues and Their Resolution for Gay and Lesbian Adolescents" (1987) 14:1-2 J. Homosexuality 25, at 35-36; Ilan H. Meyer, "Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence" (2003) 129:5 Psych. Bull. 674, at 682; Elizabeth Saewyc, "Contested Conclusions: Claims That Can (and Cannot) Be Made from the Current Research on Gay, Lesbian and Bisexual Teen Suicide Attempts" (2007) 3:1 J. LGBT Health Research 79; Joanna Almeida *et al*., "Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation" (2009) 38 J. Youth Adolescence 1001; Robert Valois *et al*., "Peer Victimisation and Perceived Life Satisfaction among Early Adolescents in the United States" (2012) 43 Am. J. of Health Education 258; Eliza Dragowski, "Sexual Ordination Victimization and Posttraumatic Stress Symptoms Among Lesbian, Gay and Bisexual Youth" (2012) 23 Journal of Gay and Lesbian Social Services 226.

suicide attempts,[44] increased maladaptive coping mechanisms such as drug and alcohol use,[45] and increased rates of depression and anxiety.[46]

Less research has been conducted to gauge the effects of a negative school environment on the children of gay, lesbian, bisexual and trans-gendered parents, but preliminary results indicate that "children of LGBT parents face LGBT bias-motivated victimization or harassment".[47]

Several longitudinal studies have shown that the overall outcomes around emotional and cognitive function, and other indicators, are equal as between children raised by heterosexual parents and those raised by

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[44] See Zhao, *id*., at 104 (citations omitted):

> GLB adolescents report higher rates of risk factors for suicide behavior, including depression, anxiety, alcohol and substance abuse, eating disorders, early sexual activity and more sexual partners, being victims of violence, family history of criminal offending, and family disruptions. Even after controlling for traditional risk factors, GLB sexual status is independently associated with suicidal ideation and attempt.

Karine J. Igartua, Kathryn Gill & Richard Montoro, "Internalized Homophobia: A Factor in Depression, Anxiety, and Suicide in the Gay and Lesbian Population" (2003) 22:2 Can. J. Community Mental Health 15, at 17 (citations omitted):

> A handful of doctoral dissertations have demonstrated an inverse correlation between internalized homophobia and self-esteem in both gay men and lesbians. Other unpublished studies have shown a correlation between internalized homophobia and depressive symptomatology in gay men and lesbians. Still other dissertations have found associations between internalized homophobia and alcohol abuse in gay men and lesbians.

Stephen T. Russell *et al*., "Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment" (2011) 81:5 J. School Health 223, at 223-24 (citations omitted):

> Prior research has identified strong associations between secondary school victimization (where motivated by LGBT-related bias or not) and compromised health and adjustment during adolescences. School victimization has been linked to compromised academic achievement and school absenteeism, aggressive behavior, compromised emotional health and suicidal ideation. In addition, physical victimization is linked to substance use, delinquency, and aggression, particularly for boys.

[45] See Russell, *id.*; Zhao, *id.*; Margaret S. Schneider, "Educators' Beliefs about Raising Lesbian, Gay, Bisexual, and Transgender Issues in the Schools: The Experience in Ontario, Canada" (2008) 5:4 J. LGBT Youth 49, at 51 (citations omitted): "The impact of harassment on youth includes mental health consequences such as depression, developmental delay, lower grades, absenteeism and higher drop-out rates, substance abuse, and a greater likelihood of carrying a weapon to school."

[46] See Ian Rivers, "Recollections of Bullying at School and Their Long-Term Implications for Lesbians, Gay Men, and Bisexuals" (2004) 25:4 The Journal of Crisis Intervention and Suicide Prevention 169. See also Michelle Birkett *et al*., "LGB and Questioning Students in Schools: The Moderating Effects of Homophobic Bullying and School Climate on Negative Outcomes" (2009) 38 Journal of Youth Adolescence 989, at 991.

[47] Russell, "Adolescent Perceptions", *supra*, note 38, at 12. See also: *Hatred in the Hallways: Violence and Discrimination against Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools* (New York: Human Rights Watch, 2001), online: Human Rights Watch <http://www.hrw.org>.

gay or lesbian parents.[48] The research also shows, however, that one main difference is that "the children of gays/lesbians were more concerned about stigmatisation and fear of being teased".[49] A 2008 American study measuring students' perceptions of school safety for those with gay or lesbian parents drew on data from 2,559 middle- and high-school students in California. The authors concluded that "youth believe that children of LGBT parents may experience an unsafe (school) environment".[50] The study found that students in schools with a Gay Straight Alliance club[51] reported higher levels of perceived safety, as did those who knew where to get information on LGBTQ issues, and those whose teachers actively intervened to stop homophobic behaviours in schools.[52] Education on LGBTQ issues also increased the safety of students with LGBTQ parents.[53]

Across three major studies, less than 50 per cent of queer students in Canada, the United States and the United Kingdom reported incidents to their schools.[54] Of those who did report incidents, approximately 30 per cent reported that their schools/teachers did nothing. "Only seven per cent of teachers [in the United Kingdom] are reported to respond every time they hear homophobic language."[55] In one study, some respondents actually indicated that staff told the queer student to ignore the problem (2.2 per cent).[56] One of the open-ended questions in the same study asked what the staff person did when notified about the homophobic incident.

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[48] N. Anderssen, C. Amlie & E.A. Ytteroy, "Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000" (2002) 43:4 Scandinavian Journal of Psychology 335. See also 2012 National Longitudinal Lesbian Family Study, online: National Longitudinal Lesbian Family Study <http://www.nllfs.org>; Timothy J Biblarz & Judith Stacey, "How Does the Gender of Parents Matter?" (2010) 72:1 Journal of Marriage and Family 3.

[49] Russell, "Adolescent Perceptions", *supra*, note 38, at 14.

[50] *Id.*, at 25.

[51] See generally Gay-Straight Alliance Network, online: GSA Network <http://www.gsanetwork.org>.

[52] Russell, *supra*, note 38, at 22.

[53] *Id*.

[54] See Ruth Hunt & Johan Jensen, *The School Report: The Experiences of Young Gay People in Britain's Schools* (London: Stonewall, 2007), at 8 [hereinafter "Hunt & Jensen"]; J.G. Kosciw, E.A. Greytak & E.M. Diaz, "Who, What, Where, When and Why: Demographic and Ecological Factors Contributing to Hostile School Climate for Lesbian, Gay, Bisexual and Transgender Youth" (2009) 38:7 Journal of Youth Adolescence 976 [hereinafter "Kosciw, Greytak & Diaz"]; Catherine Taylor & Tracey Peter, *Every Class in Every School: Final Report on the First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools* (Toronto: Egale Canada Human Rights Trust, 2011), at 119 [hereinafter "Taylor & Peter"].

[55] Hunt & Jensen, *supra*, note 54, at 8.

[56] Kosciw, Greytak & Diaz, *supra*, note 54.

In response to that question, an American 11th Grade boy said: "Nothing actually. Rocks were thrown at me and nothing was done about it."[57] This captures the general feeling held by queer students that teachers and school staff are ineffective at responding to homophobic harassment.

The benefits of attending a school with queer-supportive policies and curricula are also well documented. Each of the national school climate surveys from Canada, the United States and the United Kingdom present important statistics on the remedial effects of a queer-friendly school environment. In the United Kingdom school climate study, they found that "lesbian and gay pupils who go to schools that state homophobic bullying is wrong are nearly 70 per cent more likely to feel safe at school".[58] Similarly, in Canada, "LGBTQ students who come from schools with anti-homophobia policies were significantly less likely to report feeling unsafe in general at school (61.4% compared to 75.8% of LGBTQ students at schools without anti-homophobia policies) or feeling unsafe due to their sexual orientation (41.4% compared to 56.6%)."[59] In the United States, students also felt *less unsafe* in schools with inclusive curricula than those without (42.1 per cent versus 63.6 per cent).[60] With respect to homophobic remarks in Canada:

> Students from schools with anti-homophobia policies or procedures reported hearing expressions like "that's so gay" less often than participants from schools without such policies (65.4% versus 80.6% reported hearing such comments every day). […] the same relationship holds for homophobic comments such as "faggot," "queer," "lezbo," or "dyke" (47.9% compared to 62.6% reported hearing such comments every day).[61]

III. ADMINISTRATIVE LAW AS A FRAMEWORK FOR FURTHERING SUBSTANTIVE EQUALITY

This section of the paper introduces our proposed administrative law framework for furthering substantive equality. We first situate substantive equality within the existing framework of administrative law, and then provide a blueprint for what administrative law claims might look

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57 *Id*.
58 Hunt & Jensen, *supra*, note 54, at 2.
59 Taylor & Peter, *supra*, note 54, at 119.
60 Kosciw, Greytak & Diaz, *supra*, note 54, at 66.
61 Taylor & Peter, *supra*, note 54, at 116.

like under our proposed framework. This section provides a structure within which to discuss the decision to be made by our fictional school board regarding the introduction of material that normalizes same-sex parents and their children, against the wishes of some parents.

1. Judicial Review and Administrative Decision-Making

We traverse two linked avenues of inquiry in this paper. One allows us to explore the possibility of using judicial review doctrine to further substantive equality. The other permits an exploration of how substantive equality can be achieved through the workings of the administrative decision-making process. Our focus throughout is on the principal actors in the area of education: provincial ministers and their civil servants, school boards, principals and teachers.

Administrative lawyers have a tendency to focus on the first avenue of inquiry: the doctrines of judicial review are the focus of most teaching and scholarship on administrative law. In its preoccupation with legality, rationality and fairness,[62] judicial review is undoubtedly important. A British government handbook for civil servants is entitled *The Judge Over Your Shoulder*.[63] The title captures an important idea. When administrative decision-makers formulate policies and make decisions, theirs is not the only presence in the room. A ghostly shadow is cast on their deliberations by the spectre of subsequent review in the courts. With the *ex post* check of judicial oversight ever possible, administrative decision-making must conform to legal norms. Many individual decisions will be taken with these norms in mind.[64] Over time, assuming appropriate oversight mechanisms, institutional culture must move towards conformity with legal norms. Conformity cannot be taken for granted, however. It may be slow in coming and there may be areas of decision-making which are never exposed to the judicial microscope. Nevertheless, in the absence of compelling evidence to the contrary, logic and data suggest that judicial oversight must have some

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[62] *Canada (Attorney General) v. TeleZone Inc*, [2010] S.C.J. No. 62, [2010] 3 S.C.R. 585, at para. 24 (S.C.C.).

[63] *The Judge Over Your Shoulder*, 4th ed. (London: Treasury Solicitor's Department, 2006).

[64] Given the diffuse nature of administrative decision-making and its oversight, it would be too strong to state that *all* decisions will be taken with these norms in mind. See, *e.g.*, Laura Pottie & Lorne Sossin, "Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare" (2005) 38 U.B.C. L. Rev. 147.

effect on administrative decision-making.[65] If nothing else, the norms embodied in judicial review doctrine provide benchmarks against which administrative actors can measure their performance. They have a reflexive quality.

Judicial review has a function, too, beyond the regulation of interactions between individuals and administrative decision-makers. Judges are public officials and the norms they develop and apply have a public quality. Judicially imposed norms must closely track social values. This is not to say that judges must respond slavishly to every twist and turn in public opinion. Rather, the past and present of social values, read large, provide a framework in which legal norms can be articulated.[66] For these reasons, judicial review is rightly a focus of attention.

It ought not, however, to be the *sole* focus of attention. Decisions and the decision-making processes that produce them will always be individuals' first points of contact with administrative law. Often, they will be the last. Lack of resources may preclude an individual from seeking judicial review, and judicial doctrines of justiciability may preclude judges from entertaining the merits of individual cases.[67] Placing too much emphasis on judicial review in the education context blithely presupposes that courts can consistently conduct necessary oversight. Yet it is more likely that judicial control will be exercised in fits and starts, if at all in the case of lower-level decision-makers.

Moreover, when judicial review does take place, it does so at one remove from the decision-making process. The intimacy of the relationship between individual and administrative decision-maker has no equivalent in the judicial forum, a point of evident importance in the context of the relationship between vulnerable children and adolescents and those in positions of authority.[68] Where relationships are informed by power imbalances, the consequences of failing to respect the dignity interests of one of the parties can be devastating. Extra burdens are placed

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[65] Lorne Sossin, "The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada" in Marc Hertogh & Simon Halliday, eds., *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 129, at 158. Sossin cautions, however, that judicial review's effect may be felt in different ways in different settings.

[66] Jack Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011).

[67] See, *e.g.*, Robert Summers, "Justiciability" (1963) 26:5 Mod. L. Rev. 530.

[68] See generally Geneviève Cartier, "Administrative Discretion and the Spirit of Legality: From Theory to Practice" (2009) 24 C.J.L.S. 313. But see Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011).

on decision-makers, moral burdens which weigh whether or not there is judicial or administrative oversight of their actions.

In addition, administrative policies may shape the exercise of discretion and the development of the individual/decision-maker relationship. This is hardly problematic: administrative policies serve important functions of efficiency and certainty.[69] But when "soft law" is framed and applied,[70] other considerations should be borne in mind. If exercises of discretion and decision-making procedures are shaped by soft law, it will affect individuals and ought to be designed, then, in the knowledge that soft law serves individuals and values other than simply efficiency and certainty. A focus on soft law is especially appropriate in the education context, where instruments other than binding legal rules significantly shape the decision-making environment: curricula, policy directives and school board policies, to name but a few, are of critical importance.

Finally, articulation of the values of administrative actors is of great importance.[71] Concerns of an institutional and human nature attend exercises of discretionary authority. Decision-makers do not act in an institutional or moral vacuum; they live and act by reference to "civil servants' values".[72] As creatures of their environments, they can be expected to uphold institutional norms. Administrative actors exercising discretionary authority "build up sets of principles to guide them in the exercise of what is on paper an entirely unfettered discretion".[73] In a similar vein, Dickson J. (as he then was) noted that knowledge, fairness and integrity are important characteristics of those charged with administering and implementing policy.[74] As humans, they can also be expected to uphold moral norms. As living, breathing creatures capable of reflection, we should also expect administrative actors to act compassionately,

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[69] *Nabors Canada Ltd. v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, [2010] A.J. No. 1097, 324 D.L.R. (4th) 747, at para. 18 (Alta. C.A.).

[70] Lorne Sossin has provided a helpful definition of "soft law" as encompassing "non-legislative instruments such as policy guidelines, technical manuals, rules, codes, operational memoranda, training materials, interpretive bulletins, or, more informally, through oral directive or simply as a matter of ingrained administrative culture" ("Discretion Unbound: Reconciling the *Charter* and Soft Law" (2002) 45 Can. Pub. Admin. 465, at 466-67).

[71] See generally D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).

[72] John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18:4 U.T.L.J. 351.

[73] John Willis, "Foreword" in John Willis, ed., *Canadian Boards at Work* (Toronto: MacMillan, 1941), at 71.

[74] *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] S.C.J. No. 71, [1985] 2 S.C.R. 455, at 470 (S.C.C.).

in a way responsive to the individuals they serve.[75] Fairness in judicial review and policy guidelines is important, but fairness at the heart of administration is vital.

Values, too, influence the exercise of discretion. Sometimes those values are immanent in the statute; they can form part of the "perspective within which a statute is intended to operate".[76] An example is *Baker v. Canada (Minister for Citizenship and Immigration)*.[77] Here, an immigration officer's decision denying an application for an exemption on humanitarian and compassionate grounds was quashed, for the reasons he presented indicated that his decision was "inconsistent with the values underlying the grant of discretion".[78] As he was bound to "act in a humanitarian and compassionate manner",[79] his failure to do so vitiated the decision.

Charter values also permeate perspective. Indeed, administrative actors must act *consistently* with those values.[80] Such is the importance of this edict that even where legislation precludes consideration of Charter guarantees *per se*, administrative actors must still take Charter values into account.[81] And what are these values, to which all administrative actors — including ministers, civil servants, school boards, principals and teachers — must have reference? Referring to section 1 of the Charter, Dickson C.J.C. gave a helpful précis:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[82]

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[75] See, *e.g.*, Lorne Sossin, "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66 Sask. L. Rev. 129.

[76] *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121, at 140 (S.C.C.). See, *e.g.*, *Chamberlain*, *supra*, note 28, at para. 71.

[77] [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter "*Baker*"].

[78] *Id.*, at para. 65, *per* L'Heureux-Dubé J.

[79] *Id.*, at para. 66, *per* L'Heureux-Dubé J.

[80] *Doré*, *supra*, note 3, at para. 24, *per* Abella J.

[81] *United Food and Commercial Workers, Local 401 v. Alberta (Attorney General)*, [2012] A.J. No. 427, 522 A.R. 197, at para. 42 (Alta. C.A.).

[82] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 64 (S.C.C.) [hereinafter "*Oakes*"].

To invite reliance on Charter values is not to invite opacity. Still less is it an invitation to palm tree justice. Reasoned decision-making need not be sacrificed on the altar of Charter values. Decision-makers should be guided by fairness, as we argue, but also by the edict that reasons for decisions should "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes".[83] The Federal Court of Appeal has recently put the point very well, addressing a related concern about an administrative tribunal's inability to precisely quantify factors it was required to take into account in reaching a decision:

> When precise quantification is not reasonably possible for a given element, a rough estimate is to be preferred to a subjective judgment call. When neither a precise quantification nor a rough estimate is reasonably possible for a given element, then of course there will be a certain degree of discretion in attributing weight to any remaining qualitative [elements], but this discretion must be curtailed and limited by the principles of reasonableness. In other words, any weight given to the remaining unquantifiable qualitative effects must be reasonable, *i.e.*, it must be supported by the evidence, and the reasoning behind the Tribunal's weighting must be clearly articulated or otherwise discernable.[84]

Charter values are very important, but their importance does not legitimate departures from appropriately rigorous decision-making.

2. Substantive Claims within the Legal Framework

What spaces exist for the furthering of substantive equality within the existing administrative law framework? Five can be identified.

First, consider the apparent importance accorded to general norms. Questions of general law that are both of central importance to the legal system as a whole and outside a decision-maker's specialized area of expertise fall in the judicial domain.[85] Should a decision-maker make a misstep in answering such a question, the courts stand ready to

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[83] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708, at para. 16 (S.C.C.).

[84] *Tervita Corp. v. Commissioner of Competition*, [2013] F.C.J. No. 557, 446 N.R. 261, at para. 148 (F.C.A.).

[85] *Smith v. Alliance Pipeline*, [2011] S.C.J. No. 7, [2011] 1 S.C.R. 160, at para. 26 (S.C.C.), *per* Fish J.

intervene.[86] Enforcement of these general norms, then, is within the judicial bailiwick. Ensuring that certain important factors are taken into account in decision-making processes might amount to the sort of general norm that deserves Canada-wide enforcement. If there are important characteristics of vulnerable individuals which are common to multiple regulatory regimes, reviewing courts could ensure that administrative actors give the characteristics due consideration. Failure to do so would result in decisions being quashed and remitted for reconsideration of the previously overlooked characteristics. For example, prior to the reorientation of judicial review doctrine in *Dunsmuir v. New Brunswick*,[87] the Court applied a standard of review of correctness in *TWU*,[88] a case in which the respondent had refused to accredit the teacher training program of a private university. The refusal was based on the homophobic internal policy of the school, *Responsibilities of a Membership in the Community of Trinity Western University*, to which students and faculty were to adhere. Justices Iacobucci and Bastarache noted that "[t]he existence of discriminatory practices is based on the interpretation of the TWU documents and human rights values and principles. This is a question of law that is concerned with human rights and not essentially educational matters."[89] *TWU* provides some support for the existence of a general norm of non-discrimination, which reviewing courts can stand ready to enforce. It may be that the *TWU* foundation has been washed away by the recent waves of reform.[90] However, regardless of its precise place as a matter of judicial review doctrine, non-discrimination is doubtless a key benchmark against which ministers, civil servants, school boards, principals and teachers should judge themselves.

Second, the Canadian definition of unreasonableness has ample scope for the furthering of substantive equality claims. Failing to pay heed to the need to accord substantively equal treatment to vulnerable individuals or failing to take into account evidence which is relevant because of the need to accord substantively equal treatment could

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[86] *Law Society of New Brunswick v. Ryan*, [2003] S.C.J. No. 17, [2003] 1 S.C.R. 247, at para. 268 (S.C.C.), *per* Iacobucci J.

[87] [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter "*Dunsmuir*"].

[88] *TWU*, *supra*, note 8.

[89] *Id.*, at para. 18.

[90] See, e.g., *Syndicat du personnel technique et professionnel de la Société des alcools du Québec (SPTP) c. Société des alcools du Québec*, [2011] J.Q. no 12598, [2011] R.J.D.T. 993, at para. 71 (Que. C.A.).

cause a decision-making process to lack the necessary "justification, transparency and intelligibility" or a decision to fall outside the range of acceptable and rational solutions.[91] This may be a more appropriate means of furthering substantive equality claims in Canadian administrative law. Elevating considerations to mandatory status as general norms could reduce the degree of deference accorded to administrative actors, whereas conceiving of failures to take important characteristics into account as tending to lead to unreasonableness strikes a balance between administrative autonomy and the aim of furthering substantive equality.

Third, administrative actors must take Charter values into account in exercising their discretion. Values must be distinguished from guarantees: even in cases where an individual cannot surmount the formal thresholds of specific Charter rights, "the values they reflect" can still be a relevant consideration for administrative actors.[92] In furthering substantive equality, this distinction is critical. Although many vulnerable individuals would not be able to surmount the high thresholds of, say, section 7 of the Charter, they can invoke the values underpinning them. An individual's life, liberty and security of the person may not be threatened to such an extent that section 7 is itself engaged, but where administrative decisions touch upon these aspects of vulnerable people's lives, discretion should be exercised in an appropriately sensitive manner. More broadly still, the notions of compassion and fairness, in a broader setting of constitutionalism, democracy and the rule of law, animate the provisions of the Charter. For the vulnerable individual, these notions are full of vitality. Section 15's guarantee of substantive equality looms especially large in this decision-making picture, whether or not the formal threshold of section 15 is surpassed.

Fourth, when it comes to statutory values, a broad view should be taken of statutory purposes. As public documents, statutes should be construed by reference to institutional and social values. Imbuing statutory provisions with values such as knowledge, fairness, integrity and compassion will give further guidance to administrative actors as to how they should exercise their authority, to institutions formulating guidelines, and courts in their reviewing roles. For example, the overarching principle of tolerance in British Columbia's *School Act*[93] has been held to have the

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91 *Dunsmuir*, *supra*, note 87, at para. 47.

92 *Doré*, *supra*, note 3, at para. 3, *per* Abella J.

93 R.S.B.C. 1996, c. 412 [hereinafter "*School Act*"].

effect that while a school board is "indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community".[94]

Fifth, "soft law" can be adapted to the requirements of substantive equality. Statutes provide baselines and, by and large, high ceilings. Institutions and those arguing within them can exploit this space to improve the lot of vulnerable individuals. At base, though, the exercise of discretion is a human endeavour and should be treated as such. Training administrative actors what to look for and how to react to it remains paramount. Adapting law and discretion is important, but we should not lose sight of the human element at the heart of government.

IV. SUBSTANTIVE EQUALITY[95]

1. Blending the Court's Substantive Equality Jurisprudence into *Doré*

While we do not know yet the precise parameters of "Charter values" as defined in *Doré*, we argue that no definition could rightly exclude substantive equality. In attempting to sketch out what the Charter value of substantive equality might look like, we draw upon the work of Patricia Hughes, who has argued that substantive equality should be considered "a foundational constitutional principle"[96] alongside judicial independence, federalism, political speech and democracy. Hughes argues, and we agree, that substantive equality must permeate our constitutional framework and the attendant jurisprudence, beyond its explicit guarantee under section 15.[97] We argue that substantive equality infuses each of the five areas of administrative law outlined in the section above:[98] it is a general norm, a relevant consideration, a Charter value, a

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[94] *Chamberlain*, *supra*, note 28, at para. 19.

[95] A special thanks to Professor Rosemary Cairns-Way, who shared her substantive equality "favourites" with us.

[96] "Recognising Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dal. L.J. 5 [hereinafter "Hughes"]. In this article, Professor Hughes argues that substantive equality must be added alongside the unwritten constitutional principles outlined by the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) as a basic lens through which to interpret the Canadian Constitution.

[97] Hughes, *id.*, at 28.

[98] Pearl Eliadis argues that substantive equality should also be a fundamental principle governing policy-making in Canada in "Inscribing Charter Values in Policy Processes" in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of*

statutory value and a lodestar which administrative decision-makers should follow. Moreover, in each of these areas, it is supplemented by the values underpinning section 7's protection of life, liberty and security of the person.

This section outlines the approach we would take to blending substantive equality with the Court's direction to proportionally balance Charter values in *Doré*, and shows what this would look like as applied to our fictional administrative decision-making scenario.

According to Hughes, substantive equality can be defined as

> a form of equality which is satisfied only if policy or law is made meaningful for all members of society, including those who have been racialised or systemically defined by gender, sexuality, or disability or similar kinds of characteristics, as well as intersecting identities; in contrast, formal equality is satisfied if everyone is treated as subject to the law or is subject to it in the same way.[99]

The Court in *Doré*[100] notes that administrative decision-makers are in the best position to balance competing Charter guarantees against the objectives of their home statutes, by asking "how the *Charter* value at issue will best be protected in light of the statutory objectives".[101] The Court states that this "requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives".[102] The Court goes on to describe this "balancing" of Charter values and statutory objectives as similar to the proportionality analysis under *Oakes*: "In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives."[103]

This balancing is where substantive equality should be taken into account. When assessing the impact of their decisions on historically disadvantaged groups, decision-makers must strive to identify an interpretation of their home statute that renders it meaningful to these

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Rights and Freedoms (Markham, ON: LexisNexis Canada, 2006) [hereinafter "*Diminishing Returns*"], at 229.

[99] Hughes, *supra*, note 96, at 7. In *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 164 (S.C.C.) [hereinafter "*Andrews*"], the Supreme Court notes, in relation to substantive equality that "identical treatment may frequently produce serious inequality".

[100] *Doré*, *supra*, note 3.

[101] *Id.*, at para. 56.

[102] *Id*.

[103] *Id.*, at para. 7.

groups. According to Hughes, this would mean applying laws in ways that can "recognize the multivariate nature of the communities subject to the same law".[104] We argue that in the administrative law context this means applying home statutes in ways that take into account the *difference* between Canadians, within the parameters of their legislative mandate. In other words, administrative decision-makers must consider how equality-seeking groups may be subject to their home statute in different ways, depending on their social location.

While the Court in *Doré* does not specifically address the appropriate methodology when decision-makers are tasked with balancing competing Charter guarantees, the Court does note that decision-makers must show "a proportionate balancing of the Charter protections at play".[105] Competing Charter interests are, of course, central to our fictional example. In our situation the school board will be asked to balance the section 15 equality interests of the children of gay and lesbian parents,[106] and the freedom of religion interests of those parents objecting to the materials on religious grounds.[107] More subtle, but no less important, is the obligation to respect an important value underpinning section 7: freedom from harm. Introducing classroom materials that aim to demonstrate the reality and normality of same-sex relationships assists in reducing prejudice and, accordingly, psychological and physical harm. Given that it is acceptable for school boards to take the religious views[108] of their constituents into account in decision-making, *alongside* secular concerns for tolerance and diversity, what is required is a proportional balance of these Charter interests alongside the statutory objectives as outlined in the Ontario *Education Act*.

The Court in *Doré* required the administrative decision-maker in that case to balance freedom of speech against a statutory requirement to protect the public from unprofessional conduct by lawyers, whose profession must be conducted in the public interest. In our fictional scenario the Charter values in question do not run counter to the achievement of statutory objectives. Rather, both freedom of religion and

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[104] Hughes, *supra*, note 96, at 33.

[105] *Doré*, *supra*, note 3, at para. 57.

[106] It is also possible that with older children and youth, this scenario would also require a balancing of the equality interests of gay and lesbian students themselves.

[107] It is also possible that with older children and youth, this scenario would also require a balancing of the religious rights of observant students themselves.

[108] "Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the (school) boardroom door": *Chamberlain*, *supra*, note 28, at para. 19.

substantive equality are Charter values which form the perspective within which statutory powers granted by the *Education Act* must be exercised.[109] If anything, it is Charter values themselves, or at least their expression by teachers, principals and parents, which are possibly in conflict. But as we seek to explain, in the public school system in Ontario, freedom of religion is not quite as vital a concern as the promotion of substantive equality.

In attempting to operationalize administrative decision-making within a context of Charter values, we do not strictly limit our understanding of substantive equality to section 15 jurisprudence,[110] although as Hughes notes this jurisprudence "will be both a reference for judges and a foil against which to develop a more expansive meaning of substantive equality as a foundational principle".[111] The understanding and deployment of substantive equality will be altered and shaped by the context in which it is used. In developing our framework we draw on the extant jurisprudence under section 15, and the notion of balancing or proportionality drawn from the Court's direction in *Doré*. From the section 15 jurisprudence we argue that effects and context are two key factors to consider. In order to ensure that substantive equality is met, a proportional balancing of competing interests in the administrative context must take into account the social and legal context of the respective claimants, and the actual effects of the decision on those who will be impacted.[112] Although the precise methodology for applying context and

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[109] While s. 51(2) of Ontario's *Education Act* prohibits mandatory religious practice or observance within the public school system, it does not refer specifically to secularism as a tenet of its public school system. In contrast, see s. 76(1) of British Columbia's *School Act*, *supra*, note 93, which reads: "All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles." The Ontario Act also explicitly prohibits bullying based on sexual orientation, as noted above.

[110] See, *e.g.*, *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.) [hereinafter "*Withler*"]; *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "*Kapp*"]; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.); *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222 (S.C.C.); *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.); *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.); *Andrews*, *supra*, note 99.

[111] Hughes, *supra*, note 96, at 40.

[112] We are alive to the critique of eliding s. 15 and s. 1 analyses in equality jurisprudence. See, *e.g.*, Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in *Diminishing Returns*, *supra*, note 98, at 95; Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011-2012) 16 Rev. Const. Stud. 31, at 59 [hereinafter "Koshan & Watson Hamilton"]. In this circumstance, however, the Court in *Doré* at times seems to suggest the implication of an *Oakes*-like proportionality into the legal analysis (see paras. 66, 71). In this case, the unfortunate result may be a hybridization of the two concepts, which ought to remain distinct in s. 15 jurisprudence. This is a question that will have to be worked out in future cases.

effects has differed over the course of equality jurisprudence[113] the two have remained consistent throughout, and provide the backdrop against which the Court has (re)theorized substantive equality.[114]

Leaving aside the merits of the Supreme Court of Canada's *application* of these principles of substantive equality within the section 15 jurisprudence,[115] we wish to emphasize the Court's consistent use of legal and social context, and of the actual effects of discriminatory decision-making on vulnerable groups. In their analysis of the *Withler* case, Koshan and Watson Hamilton[116] note that the Court maintains its historical focus on a contextual approach to equality jurisprudence. "The Court also reaffirmed a contextual approach to section 15(1), one that should focus on 'the actual situation of the group and the potential of the impugned law to worsen their situation'."[117] They and others[118] note that ignoring social context, such as the role of gender or class, in decision-making can lead to discriminatory treatment.[119]

> The Court's s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider *all context* relevant to the claim at hand. The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. … a valid s. 15(1) analysis must consider *the full context of the claimant group's situation* and the *actual impact of the law* on that situation.[120]

Koshan and Watson Hamilton, in their analysis of *Withler*, also comment on the Court's emphasis on the actual impact of the impugned law on the claimants. They note that the Court reiterates this as a long-standing principle of substantive equality.[121] Hughes too, in outlining the "characteristics" of substantive equality, notes that "substantive equality

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[113] See Koshan & Watson Hamilton, *id.*, at 46-47 to witness the Supreme Court's shifts on how to apply the contextual factors from *Law*.

[114] The Court in *Withler*, *supra*, note 110, for instance, mentions the importance of both social/legal context and effect at paras. 2, 37, 39, 40, 43 and 64. See also *Kapp*, *supra*, note 110, at para. 23.

[115] See *Diminishing Returns, supra*, note 98.

[116] Koshan & Watson Hamilton, *supra*, note 112.

[117] *Id.*, at 44.

[118] See, *e.g.*, Denise Réaume, "*Law v. Canada (Minister of Employment and Immigration)*" (2006) 18 C.J.W.L. 147.

[119] Koshan & Watson Hamilton, *supra*, note 112, at 56.

[120] *Withler*, *supra*, note 110, at para. 43 (emphasis added).

[121] Koshan & Watson Hamilton, *supra*, note 112, at 45.

requires consideration of the *impact* of government policy and decision on the various communities subject to them"[122] and that substantive equality must be grounded in the actual experience of the oppressed.[123]

Reference to section 7, which protects "life, liberty and security of the person", buttresses substantive equality in the current context.[124] It is true that the section 7 threshold is a high one. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,[125] Lamer C.J.C. held that for a breach of the security of the person to be established by reason of emotional harm, it would be necessary to demonstrate "a serious and profound effect on a person's psychological integrity".[126] It is clear, however, that the right to security of the person protects the individual's physical and psychological integrity.[127] Moreover, as Wilson J. noted in *Singh v. Canada (Minister of Employment and Immigration)*,[128] security of the person "must encompass freedom from the *threat* of physical punishment or suffering as well as freedom from such punishment itself".[129] If the rights protected by section 7 themselves protect the individual both from harm and the threat of harm, the values underpinning section 7 must be still more protective. Accordingly, exercising discretionary powers in accordance with Charter values in the education field requires sensitivity to the risk that children will be exposed to physical and psychological harm by their peers and others. In view of the empirical evidence, introducing and carefully explaining material that normalizes same-sex relationships gives effect to the values underpinning section 7 of the Charter.

2. Legal and Social Context

An administrative decision which implicates the equality interests of historically disadvantaged groups, we argue, must utilize substantive

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[122] *Id.*, at 49 (emphasis added).

[123] *Id.*, at 46.

[124] See also *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 118 (S.C.C.), *per* L'Heureux-Dubé J., dissenting.

[125] *Id*.

[126] *Id.*, at para. 60.

[127] See, *e.g.*, *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.); *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

[128] [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.).

[129] *Id.*, at para. 47 (emphasis added).

equality, underpinned by the right to be free from physical and psychological harm, as an interpretive tool in order to comply with Charter values. While not strictly a section 15 claim, a substantive equality analysis points to a purposive approach to proportional balancing under *Doré*. One purpose of the balancing act required of decision-makers in our scenario is to give effect, in the exercise of their statutory powers, to the interests of gay and lesbian parents and their children who attend public school, within the context of competing public attitudes about gay men and lesbians. In this context decision-makers must take into account the need to protect the children of families from sexual minorities from discrimination by the majority — whether this discrimination is rooted in secular homophobia or religious belief.

In the larger constitutional context, religiously observant Canadians have already been granted a partial constitutional exemption to actions within public schools which run counter to their religious beliefs: their children have the right to attend a school where their religious rights, including some forms of discrimination against gays and lesbians, take precedence over many other constitutional guarantees.[130] Private and publicly funded religious schools exist to support this legitimate Charter interest, which is protected in section 2(a). On the other hand, gays and lesbians do not have the option to send their children to a school that explicitly places their constitutional guarantee of equality above most other constitutional interests. They must rely on public and secular private school systems to balance the constitutional interests of all students. In this context, it becomes imperative that administrative decision-makers within this system work within their statutory mandates in order to protect children from discrimination.

The need for curriculum reform must also be placed in the context of historical and contemporary homophobia, and its impact on gay and lesbian adults and youth. For decades, homosexuality in Canada was a criminal offence, and gays and lesbians lost jobs, family and housing if their sexuality was discovered.[131] Even post-criminalization in Canada, gays and lesbians faced overt discrimination in many aspects of their lives including housing and employment.[132] Homosexuality was treated

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[130] See *Hall (Litigation guardian of) v. Powers*, [2002] O.J. No. 1803, 59 O.R. (3d) 423 (Ont. S.C.J.); *TWU*, *supra*, note 8.

[131] See Gary Kinsman & Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press, 2010); Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002) [hereinafter "Warner"].

[132] *Id*.

as a psychiatric disorder, and a threat to national security.[133] Canadian scholars have documented a well-established pattern of historic[134] and contemporary[135] violence against the gay and lesbian community. Until recently, gays and lesbians were denied the right to marry, to share benefits or to adopt children.[136] Homophobia and the vilification of gays and lesbians continue in Canadian society today.

In the larger social and legal context, any failure to directly combat homophobic discrimination in a publicly funded space is anomalous and out of step with the legal and social gains that gays and lesbians and similar groups have made in Canadian society in the past decade.[137] Recent decisions by the Supreme Court and law reform initiatives mean that gays and lesbians are able to marry,[138] to live in common law relationships,[139] to adopt[140] and to procreate using artificial reproductive technologies.[141] The number of queer families, and therefore children with same-sex parents, is growing.[142] Ontario has recently passed a provincial law to protect children and youth who identify as belonging to a sexual or gender minority from bullying and discrimination.[143] It is unlawful to discriminate in housing, employment and other publicly offered services based on sexual orientation.[144] Gays and lesbians (and their children) have a legally protected place in Canadian society, and access to public schools that are safe for their children must be part of that citizenship.[145]

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[133] Warner, *supra*, note 131, at 17.

[134] See, *e.g.*, Bruce MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000), at 150.

[135] See Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005).

[136] See *id.*; Warner, *supra*, note 131.

[137] *Id*.

[138] See *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 (S.C.C.); Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, 1st Sess., 38th Parl., 2005 (assented to July 20, 2005).

[139] *Id*.

[140] Fiona Kelly, *Transforming Law's Family* (Vancouver: UBC Press, 2011).

[141] Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" 26:1 (2010) Can. J. Fam. L. 95.

[142] *Id*.

[143] *Safe Schools Act, 2000*, S.O. 2000, c. 12.

[144] *Human Rights Code*, R.S.O. 1990, c. H.19, ss. 1, 2(1), 5(1).

[145] For more on this argument, see generally Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012).

3. Impacts of Educational Administrative Decision-Making on Charter Interests

Any infringement of religious freedom is offset first, by the choice available to observant parents to have their child attend a private religious school of their choosing where their religious views will remain largely unchallenged and second, within the public school context, by parental ability to counter equality education with religious education at home.[146] While it is true that cognitive dissonance will be one effect on the children of religious parents,[147] the Supreme Court of Canada in *Chamberlain* has noted that a certain amount of cognitive dissonance is actually positive, and promotes tolerance, a key value in Canadian society:

> 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 parents' 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.
>
> Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. As my colleague points out, the demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights,

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[146] Same-sex parents engage in such counter-education constantly with their children to counteract homophobic messages in school and society generally. See generally Rachel Epstein, ed., *Who's Your Daddy and Other Writings in Queer Parenting* (Toronto: Sumach Press, 2009), c. 4-5*ff*.

[147] "The argument based on cognitive dissonance essentially asserts that children should not be exposed to information and ideas with which their parents disagree" (*Chamberlain*, *supra*, note 28, at para. 64).

> values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.[148]

As has been amply demonstrated,[149] the children of gay and lesbian parents who experience homophobia at school, on the other hand, suffer increased rates of depression, anxiety and higher rates of suicidal ideation and suicide.

A post-*Doré* analysis must engage in a proportional weighing of the competing values, within the legal and social context of Canadian society. Taking seriously the value of substantive equality analysis calls for administrative decision-making that gives meaning to a law or policy for marginalized groups. Education actors should lean in favour of protecting the vulnerable from the measurably more serious impact upon them.

V. EXERCISING ADMINISTRATIVE POWERS IN THE EDUCATION CONTEXT

It flows from our argument up to this point that in exercising their powers — from policy initiatives at the ministerial level, to the refining and implementation of those initiatives and other measures of control at the school board level, to their ultimate implementation by principals and teachers — administrative actors in education must use Charter values as their touchstones.[150] Where they fail to do so, substantive equality claims

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[148] *Id.*, at paras. 65-66.

[149] See Part II.3, above, for more on this topic.

[150] Evidently, Charter values will have to be applied in different contexts, giving rise to the possibility of disagreement. An interesting question may occasionally arise: how to regulate situations in which decision-makers disagree with each other about the application of Charter values. Here, we refer to the developing jurisprudence on standards of review *within* administrative decision-making structures. Attention to the text, purposes and context of the relevant legislation will be necessary to identify the appropriate relationship between decision-makers. For example, it will not necessarily always be the case that a decision-maker higher up the chain will be able to make a *de novo* decision which takes no account of decisions taken by front-line decision-makers. See, *e.g.*, *Newton v. Criminal Trial Lawyers' Assn.*, [2010] A.J. No. 1463, 38 Alta. L.R. (5th) 63, at para. 43 (Alta. C.A.).

can be advanced by way of judicial review in the five ways identified in Part III. Our focus in what follows is on the regime created by Ontario's *Education Act*, but it can equally be applied to the decision-making structures in the other provinces and the territories. Our more particular focus — compelled by our discussion of the empirical evidence — is on powers in relation to curriculum setting and control of bullying.

1. Role of the Minister, School Boards, Principals and Teachers

At the head of Ontario's education superstructure is the Minister of Education. As one would expect, the *Education Act* vests broad policy-making authority in the Minister. Section 8.3 provides, in respect of curriculum, for example, that the Minister may "issue curriculum guidelines and require that courses of study be developed therefrom" and "prescribe areas of study". In addition, section 8.6 allows the Minister to "select and approve for use in schools textbooks, library books, reference books and other learning materials".[151] In respect of bullying, section 301(1) permits the Minister to "establish a code of conduct governing the behaviour of all persons in schools"; one of the purposes of such a code of conduct is, pursuant to section 301(2)7, "[t]o prevent bullying in schools".

School boards are to "promote student achievement and well-being", "promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability" and "promote the prevention of bullying".[152] They are required, moreover, to "establish and provide annual professional development programs to educate teachers and other staff of the board about bullying prevention and strategies for promoting positive school climates"[153] and to "provide programs, interventions or other supports for pupils who have been bullied, pupils who have witnessed incidents of bullying and pupils who have engaged in bullying".[154]

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151 Although this power is delegated to individual School Boards. See note 21, *supra*.
152 *Education Act*, *supra*, note 18, s. 169.1(1)(a).
153 *Id.*, s 170(1)7.1.
154 *Id.*, s. 170(1)7.2.

Principals have the responsibility "to maintain proper order and discipline in the school".[155] In cases of bullying, they are required to consider suspending the offending pupil,[156] and, in cases where harassment was based on the other pupil's sexual orientation, this must be taken into consideration.[157] They must also "give assiduous attention to the health and comfort of the pupils".[158] In addition they may be required, by a School Board or (indirectly) by the Minister, to establish a "local code of conduct" in respect of bullying which is consistent with any provincial code of conduct in place.[159]

For their part, teachers must "maintain, under the direction of the principal, proper order and discipline in the teacher's classroom and while on duty in the school and on the school ground".[160] They must also "encourage the pupils in the pursuit of learning"[161] and "inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues".[162] This is language "of another era", which should not be taken in modern times as privileging one world view, but which emphasizes the "idealistically high" expectations of today's teachers.[163]

Taking a step back and looking at the forest rather than the individual trees, it is clear that the Minister (acting for the most part through or with the help of civil servants) and school boards have a crucial role in the development of curricula and bullying policies. Principals and teachers play a subordinate — though no less important — role in implementing ministerial and school-board policies and in discharging the state's duty to educate. Powers in relation to the curriculum can evidently be used to shape young minds. So too can powers in relation to discipline, which permit educators not only to demonstrate to malefactors the error of their ways but also to point towards better paths.

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[155] *Id.*, s. 265(1)(a). See generally *G. (F.) v. Scarborough (City) Board of Education*, [1994] O.J. No. 240, 68 O.A.C. 308 (Ont. Div. Ct.).

[156] *Education Act*, *supra*, note 18, s. 306(1).

[157] O. Reg. 427/07.

[158] *Education Act*, *supra*, note 18, s. 265(1)(j).

[159] *Id.*, ss. 301(2), 303(1).

[160] *Id.*, s. 264(1)(e).

[161] *Id.*, s. 264(1)(b).

[162] *Id.*, s. 264(1)(c).

[163] *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] S.C.J. No. 27, [1997] 1 S.C.R. 487, at para. 52 (S.C.C.).

As we have explained, the powers granted for the furtherance of the functions we have outlined should be exercised in conformity with the values underpinning sections 7 and 15 of the Charter, especially in deciding what to put on the curriculum, how to teach it, what materials to employ, and how to prevent and respond to bullying, as a general phenomenon and in its individual manifestations. In particular, attention should be paid to the need to protect children from harm and to expose them to the realities of life and diverse family arrangements in modern Canada. Indeed, a proper appreciation of the Charter values which form the backdrop to the exercise of powers in the field of education reveals the importance of normalizing relationships that do not resemble the traditional nuclear family and protecting those who suffer prejudice due to perceived deviation from dominant norms. Exposure to difference and the nurturing of equality allow educators to play their part in shaping a society in which children are not singled out on the basis of their characteristics or those of their family members. The overwhelming evidence of the physical and psychological harm that result from homophobic and other forms of bullying should be an important consideration for educators from the classroom up to the Ministry of Education.

Failure to take these considerations and evidence into account should be considered an error on the part of the Minister, school boards, principals and teachers. But it also opens up the possibility of judicial review, to advance claims for substantive equality in the five areas identified in Part III. Within the administrative process itself, when arguing or advocating before the Minister, a school board, a principal or a teacher, the importance of Charter values should be emphasized by those who find themselves on the front line of administrative decision-making. As we noted above, administration, in the education field as in any other, is at heart a human endeavour that requires appeal to decision-makers' moral cores. Infused with the values underpinning sections 7 and 15 of the Charter, those appeals should move decision-makers' minds.

2. Charter Values and Education in Ontario: A Return to Our Fictional Example

To return to our fictional example, the School Board should allow S to introduce these materials into her classroom. In balancing the effects of the decision on the children of GLBTQ parents against the effects on other

children in the classroom, we argue that combatting the devastating effects of homophobia must take precedence in the public school setting. A substantive equality approach would take into account the ameliorative effect of the curriculum in protecting against discrimination, as well as its role in educating all Canadian children about the (legally protected) diversity of families in their communities. The decision must also be taken against the contextual backdrop of Canadian society, where GLBTQ parents and youth have full legal rights, yet are still the subject of homophobic violence and discrimination. To exclude GLBTQ families and individuals from the public school curriculum, while simultaneously emphasizing other kinds of diversity (cultural diversity, for example), sends a not-so-subtle message to children and youth about whose families are valued, and whose families are to be ignored. Rendering these families and individuals invisible in official discourse risks normalizing homophobic and transphobic reactions to encountering this kind of difference.

That is not to say that the children of religiously observant parents should be sidelined. The Ontario curriculum clearly makes a place within public schools to celebrate diverse families' cultural and religious traditions. In circumstances where religious and cultural views diverge between families on important topics, teachers frequently find creative and harmonious ways to acknowledge both without denigrating either. A good example is the celebration in public schools of various religious and/or cultural festivals, even where the basic tenets or morals of these religions/cultures may diverge in important ways. A similar approach can be taken in this instance, acknowledging and celebrating children from diverse families, while simultaneously creating teaching moments about differences in opinion, and equality in difference. As McLachlin C.J.C. pointed out in *Chamberlain*, cognitive dissonance, learning about difference from our peers, and managing conflict are important skills to teach all young Canadians.

Beyond our fictional example, leaving the decision to include or exclude GLBTQ families and individuals to individual teachers, principals or school boards is not, we argue, sufficient to meet basic standards of substantive equality in the education system. The *Accepting Schools Act, 2012*[164] was a huge step in the right direction for protecting youth who are experiencing homophobic and transphobic bullying. This Act allows educational decision-makers to deal with persistent,

[164] S.O. 2012, c. 5.

individual bullies with progressive discipline on a case-by-case basis. Like the piecemeal curriculum introduction from our fictional example, this is an important but inadequate approach to systemic homophobia and transphobia. Significantly, the Act also mandates gay-straight alliances in any public school where students want them. Empirical evidence suggests that the presence of these student-led initiatives greatly improves the school environment for GLBTQ youth. Both anti-bullying legislation and gay-straight alliances are clearly steps that take substantive equality for GLBTQ students, or students with GLBTQ family members, into account.

We suggest three additional steps. First, the empirical evidence suggests that introducing a normalizing and GLBTQ-positive curriculum has the potential to profoundly change school environments in positive ways, reducing the need for individual disciplinary measures. Ontario's public school curriculum already includes mandated coverage of cultural difference, and the policy framework for adding further curriculum diversity is in place. Since 2009, in *Realizing the Promise of Diversity: Ontario's Equity and Inclusive Education Strategy*,[165] the Ontario Minister of Education has sought to actively address substantive equality in our public education system, including equality for GLBTQ stakeholders in the education system. We recommend that, alongside cultural diversity, the Ontario curriculum include sexual and gender minorities in existing curriculum. For example, in Grade 2, where students are taught about diverse family traditions, celebrations and structures, the curriculum should further specify that this should include, for example, depictions of same-sex families or families with a transgendered parent. As with cultural and structural diversity (lone parents, step-parents, *etc.*), the aim is not to valorize one family model over another, but to introduce the existence of diverse families, and the important notion that they all deserve respect and protection from discrimination. In exercising his powers over the curriculum, the Minister should give due weight to the values underpinning sections 7 and 15 of the Charter.

Second, the current *Education Act* contains little guidance on how decision-makers should balance competing constitutional rights. Introducing specific language that speaks to Charter values, substantive equality, or even more specifically the equality rights of GLBTQ students, or students with GLBTQ family members, alongside other

[165] *Supra*, note 13.

rights holders would give administrative decision-makers guidance as to the kinds of factors that must be weighed in making decisions on a day-to-day basis. Currently the *Education Act*, unlike British Columbia's education legislation, for example,[166] does not include any guidance on how to balance equality and religious rights in the public school context.

Third, there is of course a limit to what can be done through legislation and administrative decision-making. What is necessary is sensitivity on the part of civil servants, school boards, principals and teachers to difference and the need for equality. Adopting a province-wide program to nourish education actors' appreciation of substantive equality and the right to be free from harm would help to bring administrative decision-making into line with the Court's edicts in *Doré*. After all, civil servants, school boards, principals and teachers are often the first and last lines of defence of Charter values.

[166] *School Act*, *supra*, note 93.